In The Supreme Court of Bermuda

CIVIL JURISDICTION

(COMMERCIAL COURT)

2016: No. 394

BETWEEN:

(1) IRONSHORE INSURANCE LTD.
(2) STARR INSURANCE AND REINSURANCE LIMITED
(3) IRON-STARR EXCESS AGENCY, LTD.

Plaintiffs

-and-

(1) MF GLOBAL ASSIGNED ASSETS LLP
(2) MF GLOBAL HOLDINGS LTD

Defendants

2016: No.393

ALLIED WORLD ASSURANCE COMPANY LTD

Plaintiff

-and-

(1) MF GLOBAL ASSIGNED ASSETS LLP
(2) MF GLOBAL HOLDINGS LTD

Defendant

REASONS FOR DECISION

(in Camera)

Enforcement of arbitration agreement governed by Bermudian procedural law-anti-suit injunction-mandatory interim anti-suit injunction-restraint of Adversary Proceeding before US Bankruptcy Court

Date of Ruling: December 22, 2016
Date of Reasons: December 23, 2016

Mr. Alex Potts, Sedgwick Chudleigh Ltd, for the Plaintiffs
Mr. Henry Tucker, Harneys (Bermuda) Limited, for the Respondent.

Introductory

1. The present proceedings, Civil Jurisdiction 2016 No. 393 ("AWAC") and 394 ("Ironside") are separate actions which for administrative convenience have been heard together without being consolidated. Each case was formally commenced by an Originating Summons issued on November 14, 2016. Each case sought permanent injunctions against both the First Defendant ("MFGAA") and the Second Defendant ("MGFGH") restraining them from, *inter alia*, commencing or prosecuting proceedings in the United States in breach of a valid and binding arbitration agreement under reinsurance policies to which the respective Plaintiffs and Defendants were party "the Policies"). Specific mention was made in each case of proceedings commenced by the Defendants (as Debtors) in the United States Bankruptcy Court, Southern District of New York, Case No.11-15059 (MG), Adv. Proc. No: 1601251(MG) (the "Adversary Proceedings"). In short, the Plaintiffs seek permanent 'anti-suit' injunctions to enforce their right to have disputes in relation to the Policies referred to arbitration.

2. Prior to the issuing of the Originating Summonses, on November 7, 2016 the Plaintiffs issued Ex Parte Summonses seeking interim anti-suit relief which I granted on November 8, 2016 (the "Interim Anti-Suit Injunctions"). On the same date I granted leave to serve the Defendants out of the jurisdiction. Bermuda is a leading reinsurance domicile. Reinsurance contracts almost invariably contain arbitration agreements. Bermuda's statutory law as applied in case law over many years places a high public policy premium on protecting the contractual right to arbitrate, regardless of the place of arbitration. Ex parte interlocutory anti-suit injunctions are regularly granted by this Court and in the overwhelming majority of cases such injunctions are not even challenged.

3. The Complaint in the Adversary Proceedings was placed before me at the November 8, 2016 ex parte hearing. On its face, the Complaint appeared to assert claims which were clearly subject to the arbitration agreements which are governed by Bermudian law. It even mentioned the arbitration agreements without proffering any reasons as to why they were no longer binding. It is of course not uncommon for parties to arbitration agreements to commence litigation in court, forcing the counterparties to elect to either enforce or waive their contractual arbitration rights. From a Bermudian law perspective it was impossible to identify any potentially viable basis for contending that the Bermudian Plaintiffs' contractual rights had been nullified. The fact that the Adversary Proceedings were brought in the US Bankruptcy Court on behalf of US Debtors did not cloud this picture and did not raise complications which this Court had not previously addressed.

4. In *ACE Bermuda Insurance Ltd.-v-Peers Pedersen as Plan Trustee for the Estates of Boston Chicken Inc.* [2005] Bda LR 44, similar ex parte anti-suit injunctions were granted by way of enforcing agreements to arbitrate insurance coverage disputes. My dismissal of applications to challenge the jurisdiction of this Court and to set aside the anti-suit injunctions was not appealed. I outlined the broad parameters of the jurisdictional landscape as follows:

> "*It is difficult to imagine any jurisdiction in the world which, statutory incorporation apart, would apply a foreign procedural law instead of its own domestic law to an action properly commenced under local law within the jurisdiction. When Bermudian estate representatives seek the cooperation of the United States bankruptcy courts, they invariably do so under the umbrella of the provisions of section 304 of the US Bankruptcy Code, if not chapter 11. They do not apply to set aside actions commenced in the US against Bermudian companies in liquidation on the grounds that leave of the Bermuda Court should have been obtained by virtue of Bermuda domestic law. Unfortunately, Bermuda statute law presently has no counterpart provision to section 304, which may well explain the quandary faced by the Plan Trustee in seeking to determine how to obtain Bermuda law recognition for the primacy the Arizona Court arguably enjoys under US bankruptcy law in relation to all litigation involving estate assets.*
>
> *But even if this Court had the power to stay proceedings brought in Bermuda in deference to a foreign bankruptcy proceeding, it seems improbable that such jurisdiction would enable this Court to grant the relief the Applicants presently seek. Because the only application presently before the Court is based on the premise that an extra-territorial doctrine of US bankruptcy law arguably supersedes Bermuda statute law, namely order 11 rule 1(1) (f) of the 1985 Supreme Court Rules, and that this US law deprives this Court of the jurisdiction expressly conferred upon it to grant leave to serve abroad*

proceedings brought here to enforce a contract governed by Bermuda law.

It is also settled that this Court cannot properly stay proceedings on forum non conveniens grounds where the parties have agreed to arbitrate here, which is no doubt why this doctrine (in its traditional sense) has not, in any coherent way at least, been invoked by the Applicants. Yet the doctrine is relied upon in support of the proposition that the Arizona court is the more appropriate forum for determining whether or not the arbitration clause should be respected. Not because of traditional jurisdictional connecting factors, but because the monies due under the Policy are an estate asset over which the Arizona Court has primary natural competence. This admittedly ingenious reformulation of the forum non conveniens principle invited the Court, without any supportive authority, to step outside the bounds of established legal theory and practice."

5. In the same case, I adopted the following observations of an English court on the nature of anti-suit injunctive relief:

> "*The grant of an anti-suit injunction involves by definition a degree of interference with foreign Court procedures, because that is its object. But if the English Court is satisfied that litigation in another country would be a breach of contract to arbitrate the dispute in London, the grant, of an injunction involves no disrespect or unfriendliness towards the foreign Court, but merely an insistence on parties respecting their own contractual obligations. Moreover, the argument that the Delaware Court would provide an apt forum for the determination of the validity, of the arbitration clause appears to me to be wrong, and I hasten to add that I say that without disrespect to the Delaware Court.*"

6. It is against the background of these clearly settled legal principles that the commencement of the present proceedings and the somewhat unusual subsequent developments must be viewed. The present Judgment, however, merely provides reasons for one aspect of the Orders I made on December 22, 2016. By this date the Defendants had neither applied to set aside the Interim Anti-Suit Injunctions nor to challenge the jurisdiction of this Court to grant such anti-suit relief. More importantly still, the Defendants had failed to identify any arguable grounds for opposing the present applications for permanent anti-suit injunctive relief on either jurisdictional or substantive grounds. Accordingly, I granted the following additional ex parte injunctive Order, the Defendants' counsel declining to accept short service of the Plaintiffs' application for:

> "*An interim injunction mandating the Defendants, acting by themselves and/or acting through their employees, servants, agents, representatives,*

and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (.i.e within the next 28 days) to dismiss (without prejudice) the adversary proceedings commenced by the Defendants against the Plaintiffs in United States Bankruptcy Court, Southern District of New York, Case No.11-15059 (MG), Adv. Proc. No: 16-01251 (MG)"

The Interim Anti-Suit Injunctions

7. The Ironside ex parte application was supported by evidence which described the dispute between those Plaintiffs and the Defendants as a coverage dispute under the relevant Policy and asserted that the Adversary Proceedings were a clear breach of the governing arbitration agreement. The AWAC ex parte application was supported by similar evidence but also explained that the Plaintiff would suffer irreparable harm if forced to engage in jurisdictional battles in the New York Court, prejudice which the arbitration agreement in the applicable Policy was designed to prevent. The evidence also demonstrated that the Plaintiff had referred the coverage dispute to arbitration on February 11, 2016. Both parties had appointed their arbitrators, subject (in the case of the Defendants) to a reservation of rights in relation to "*the arbitrability of any coverage dispute…under these facts and the bankruptcy-related circumstances*". This reservation of rights from a Bermudian law perspective was meaningless and the commencement of the Adversary Proceedings on October 27, 2016 was, in relation to AWAC in particular, a flagrant breach of the arbitration agreement.

8. The applications for anti-suit relief were granted in this case, and are typically granted, on an ex parte basis without notice for fear that the parties sought to be restrained will seek competing orders from the foreign court if afforded notice of the application. In deciding that it is appropriate to grant ex parte relief, I implicitly made the interlocutory finding that the Bermudian Plaintiffs' case on the merits was so strong that there is little room for doubt that the pursuit by the Defendants of the foreign proceedings is in violation of their contractual obligations. Since the arbitration clause provided for arbitration to take place in Bermuda under the curial supervision of this Court, that was a finding which it was easy to reach.

9. From a Bermuda law perspective the commencement of arbitration proceedings by a creditor of a company in liquidation would require an application to this Court to lift the statutory stay of proceedings against the insolvent company and call for an assessment of whether the creditor should be permitted to compel the insolvent company to litigate or whether the creditor should be required to submit to the proof of debt process. Contractual claims against debtors arising under contracts containing arbitration clauses do not raise any opportunity for contending that the governing arbitration agreement is any way affected by the fact that the counterparty seeking to establish a contractual liability is itself in liquidation. If the insolvent company

succeeded in making a recovery from the contractual debtor, the sums recovered would of course be administered and distributed by the insolvency court.

10. While viewing the applications through Bermudian lens, I was well aware that the US Bankruptcy Court approach to claims against debtors of insolvent estates is different to the Bermudian/English approach. Such claims are ordinarily, rather than exceptionally, pursued in the bankruptcy proceedings against debtors within the jurisdiction of the US Court. Counsel for the Plaintiff Mr Potts fully and frankly disclosed that there was a potential argument that the Defendants might raise that the New York Court had jurisdiction both to decide the dispute and/or whether it was arbitrable. However, in his Skeleton Argument he also submitted that:

> "*26. Moreover, the New York Court has recently enforced (in the context of bankruptcy proceedings in respect of Residential Cpiatl LLC) London and Bermuda arbitration clauses in policies issued by various Bermuda domiciled insurers: Drennen et al v Certain underwriters at Lloyd's of London et al., Case No. 12-12020 (MG) (Opinion dated 21 October 2016).*"

11. At the November 8, 2016 ex parte hearing, the Plaintiffs' counsel also referred the Court to a judicial statement which is now famous in the British-influenced legal world which was made over 20 years ago by Millett LJ (as he then was) in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 at 96:

> "*In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.*"

The Defendants' response to the Interim Anti-Suit Injunctions

12. As every commercial lawyer knows, the best means of challenging an improperly granted interim order made by a local or foreign court is to apply to set it aside, typically on jurisdictional grounds. Where there is no rush to file and pursue such an application in the case of an order made by a foreign court, there is a strong suspicion that the parties adversely affected by the decision realise that there are no good grounds for challenging the assumption of jurisdiction by the foreign court.

13. Another standard consideration is this. Where the defendant has already commenced proceedings in another court, they will usually be required to either ignore the foreign proceedings altogether or to seek leave from the foreign court to take necessary steps (for instance to preserve the status quo) in the 'home' court to avoid any suggestion that they are in breach of the foreign interim anti-suit injunction. The Defendants in the present case have forsaken both of these well-trodden paths. Perhaps their freedom of action is constrained to some extent by their status as Debtors in a Bankruptcy Court proceeding. Be that as it may, the broad strategy they appear to have adopted amounts to this. They are reluctant to move from the safety of home base and run the gauntlet of the various bases and are hoping to hit a home run.

14. By letter dated November 21, 2016, the Defendants' attorneys in the New York Proceedings, Jones Day, wrote a letter which their Bermuda counsel Mr Tucker described yesterday as a necessary report to the New York Court. Mr Potts countered that the letter did not give a fair presentation of the circumstances in which the Interim Anti-Suit Injunctions had been obtained. Both these assertions had some force. It was clearly necessary and appropriate for the Defendants' counsel to apprise Judge Glenn, the presiding Judge, of the Bermudian developments. Such a report did not amount to a breach of the Injunctions. But the communication was artfully crafted in such a way as to inflame the nationalist passions of the most internationalist judge. In particular, Judge Glenn was told:

    - the Bermuda proceedings were in breach of the New York Court's August 10, 2016 "9019 Order". This argument had not seemingly been raised with the Bermuda Plaintiffs before the present proceedings were commenced;

    - "*The Bermuda Insurers' commencement of Bermuda proceedings seems aimed at preventing this Court from determining issues over which this Court has retained exclusive jurisdiction*";

    - the Barton doctrine prohibited foreign insurers from enforcing arbitration agreements against bankruptcy trustees without obtaining the leave of the Bankruptcy Court.

15. Judge Glenn issued an Order to show cause against the Defendants the very next day, on November 22, 2016 requiring them to explain why they should not be held in contempt. On November 28, 2016, for reasons which are somewhat unclear and which to my mind muddied the jurisdictional waters further, the Bermuda Plaintiffs filed a Motion to Compel Arbitration in the Adversary Proceedings.

16. The first return date of the Originating Summonses in the present actions was December 8, 2016. On December 6, 2016 the Defendants attorneys wrote the Plaintiffs seeking confirmation that the Interim Anti-Suit Injunctions would be discharged or suspended pending the determination by the New York Court of the Motion to compel arbitration. That invitation was not accepted. The Defendants lead New York counsel Bruce Bennett swore an Affidavit dated December 7, 2016` with the express aim of:

    (a) informing this Court of material developments since November 8, 2016; and

    (b) inviting this Court of its own motion to discharge the Interim Anti-Suit Injunctions because of non-disclosure at the ex-parte hearing of the fact that the August 10, 2016 9091 Order restrained the Plaintiffs from commencing the present proceedings.

17. The Defendants' Bermuda counsel Mr Tucker swore an Affidavit on the same date additionally advising the Court that the Defendants intended to apply for leave to enter conditional appearances and to discharge the interim Anti-Suit Injunctions. Despite the able efforts of Mr Frith who appeared for the Defendants at the December 8, 2016 hearing, I was unpersuaded that the material non-disclosure complained of was sufficiently clear to justify the Court discharging the ex parte Orders without an application even being filed. On the contrary, it was difficult to see how the 9091 Order could be construed as having the intent and/or effect contended for by the Defendants. Nor did either Affidavit disclose any clearly arguable grounds for challenging the jurisdiction of this Court or the merits of the applications.

18. Be that as it may the matters were adjourned for further directions to December 22, 2016, in part to take into account further developments in the New York Proceedings in relation to Judge Glenn's Show Cause Order, which was due to be heard on December 14, 2016.

19. The transcript of that hearing indicates that Judge Glenn was understandably unhappy about deciding the issue of whether or not his August 10 2016 Order had been breached without hearing from both sides. The Bermuda Defendants did not address the Court because they were concerned about breaching the Bermuda Injunctions and the Bermuda Plaintiffs did not volunteer to agree to seek a variation of the Orders so as to permit opposing counsel to address the Court. Again it is difficult to avoid the strong suspicion that the Defendants' counsel were again, artfully, stirring the jurisdictional pot. It was always open to them to have applied on December 8, 2016 when the parties were before me for permission (or clarification that permission was not required) to address Judge Glenn on the limited issue of contempt of the 9091 Order, or to have come back for such relief at any point before the December 14, 2016 Order. It is difficult to imagine that I would have refused such an application. Instead, the Defendants seemingly cast themselves at the December 14, 2016 hearing before Judge Glenn as a classical mediaeval 'damsel in distress' who had been silenced and held captive by the 'Big Bad Wolf' Bermudian Court.

20. On December 21, 2016 Judge Glenn issued his Memorandum Opinion and Temporary Restraining Order which very proportionately:

(a) temporarily restrained the Bermuda Plaintiffs from taking any steps to "*enforce the Injunctive Orders against the Plaintiffs and their counsel*" but clarifying that "*at this stage of the case, the Court is not enjoining the Bermuda Insurers from prosecuting the case they filed in the Bermuda Court*";

(b) declining to hold the Bermuda Plaintiffs in contempt;

(c) ruling that further enquiry was necessary to decide whether or not the 'Bar Order' prohibited the filing of the Bermuda Proceedings: "*a hearing at which all parties are able to appear and argue*".

21. In light of the latter observations in Judge Glenn's Opinion, and without any application by the Bermuda Defendants, I yesterday ruled that in my judgment the Interim Anti-Suit Injunctions did not prohibit the Defendants from addressing Judge Glenn on the narrow issue of the scope of the 9091 or Bar Order and whether or not it prohibited the Plaintiffs from commencing the present proceedings under US law.

The status of the Defendants' Jurisdictional Challenge

22. On December 7, 2016, the Defendants entered a 'Conditional Memorandum of Appearance' pursuant to Order 12 rule 7 of the Rules of the Supreme Court. This rule states as follows:

> "***12/7 Conditional appearance***
> *7 (1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.*
>
> *(2)A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 8 and the Court makes an order thereunder.*"

23. No application for leave to enter an appearance has yet been made. The time for applying for leave to set aside service of a writ on jurisdictional grounds where a conditional appearance has been entered is 14 days after the conditional appearance has been entered (Order 12 rule 8(1)). That period expired on December 21, 2016. Rather than applying for leave to enter a conditional appearance, the Defendants applied for an extension of time to do so by way of a Summons filed on December 21, 2016. I declined Mr Potts' application for me to dismiss that Summons because the merits of the position seemed somewhat unclear, no evidence having been filed to explain why an extension was being sought. However the position as of yesterday (December 22, 2016) was that as a matter of law the Defendants had submitted to the jurisdiction of this Court. This is because of the related provisions of Order 12 rule 7 rule:

"(1) *A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 8 and the Court makes an order thereunder*." [Emphasis added]

24. The starting assumption nevertheless was that an extension of time would not lightly be granted for challenging the jurisdiction. The commentary on the English rule from which our own Rules are derived (Supreme Court Practice 1999 paragraph 12/8/4 states that the defendant (having entered a conditional appearance) "*must apply to the court 'within the time limited…' and he is well advised to serve it within that time*".

25. In summary, the Defendants appeared firmly set on a course of all but ignoring the Bermuda proceedings, hinting at contesting the proceedings but hesitating to do so. In the oft- quoted words of Alexander Pope, the Defendants appeared quintessentially to be "*willing to wound, and yet afraid to strike, Just hint a fault, and hesitate dislike.*"

Summary: Reasons for Granting the ex parte Interim Mandatory Anti-Suit Injunction

26. It is against the above background that I came to make the further Order designed to signify that as matter of Bermuda law the Plaintiffs appear to have an unassailable case for permanent injunctive relief in circumstances where the Defendants had not even hinted at grounds for contesting the present proceedings on their merits and had apparently lost their right to raise any jurisdictional challenge based on US Bankruptcy law considerations which have no obvious application under Bermudian law. After all, the arbitration agreements the Plaintiffs are enforcing provide for arbitration in Bermuda under Bermudian arbitration law. Mr Potts properly referred me to the following passage in Raphael's '*The Anti-Suit Injunction*" (Oxford University Press: Oxford, 2008) at paragraph 13.39:

"*Interim mandatory anti-suit injunctions have been described as involving a 'direct interference with the procedure of the foreign court, and they usually will be irrevocable. The principles of comity therefore require greater caution to be exercised than in the case of a corresponding prohibitory injunction.*"

27. The form of interim mandatory injunction which was sought, quite elegantly, is expressly designed not to have irrevocable effect. It merely requires the Defendants to discontinue the Adversary Proceedings "*without prejudice*" so that should they succeed in preventing the Plaintiffs from obtaining permanent injunctive relief herein, they will be at liberty to restore such proceedings. But in the interim, they will not be permitted as a matter of Bermuda law from prosecuting that proceeding, actively or passively) in breach of the Interim Anti-Suit Injunctions which they have yet to apply to set aside.

Dated this 23rd day of December, 2016 _____
IAN RC KAWALEY CJ