IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION 2007 NO. 41

BETWEEN:

ACE BERMUDA INSURANCE LTD.
(formerly A.C.E. INSURANCE COMPANY, LTD.)

Plaintiff

- and -

(1) CONTINENTAL CASUALTY COMPANY
(2) CONTINENTAL INSURANCE COMPANY

Defendants

N. Hargun for the plaintiff *ex parte*

RULING

1. This matter came before me on the plaintiff's *ex parte* application for leave to serve the writ out of the jurisdiction, and for an interlocutory injunction to restrain the defendants from proceeding with an action in the United States. The basis of the application is that the US action is in breach of an arbitration clause. The matter is complicated by the fact that the defendants are not parties to the arbitration agreement. Nevertheless, after hearing full argument from Mr. Hargun for the plaintiff, I made the injunction and promised short reasons which I now give.

2. The plaintiff is a reinsurance company incorporated and doing business in Bermuda. In the course of that business it issued excess liability insurance policy MMM – 371/4 to a company now known as 3M (formerly Minnesota Mining and Manufacturing Co.). That policy contained an arbitration clause requiring the arbitration of all disputes in Bermuda under the Bermuda Arbitration Act 1986. The agreement itself is expressed to be

governed by the law of the state of New York, save that the arbitration clause is governed by the law of Bermuda.

3. The defendants are themselves insurers incorporated in Illinois and Pennsylvania respectively, and both doing business in Illinois. They too (along with a predecessor in interest) issued excess liability insurance policies to 3M. They have now brought an action in the District Court for the Fourth Judicial District of the State of Minnesota, where they allege that 3M has its principal place of business, seeking declarations of non-liability under those excess policies. That would be unexceptionable. However, they have also sought to join into those proceedings a large number of other insurers who had issued policies to 3M "for the purpose of binding those Defendant Insurers to the relief sought herein". The plaintiff is one of those so joined.

4. The plaintiff argues that several of the grounds of alleged non-liability are potentially common to its policies with 3M, and that, if it is a party to this litigation, those issues will effectively be decided between it and 3M in a final and binding manner. It says that this infringes the arbitration clause. I think that it has a strongly arguable case that that is so. In saying that, I recognize that this is an interlocutory application, that I have only heard one side, and that that view of the merits is therefore, of necessity, provisional. There is, however, plainly a serious issue to be tried.

5. The plaintiff seeks leave to serve out under Ord. 11, r. 1(1)(d)(iii) of the Rules of the Supreme Court 1985, as amended. That sub-rule provides that service of a writ out of the jurisdiction is permissible with the leave of the Court if, in the action begun by the writ:

> "the claim is brought to enforce . . . a contract . . . which –
>
> . . .
>
> (iii) is by its terms, or by implication, governed by the law of Bermuda,"

6. The plaintiff argues that it is bringing this action to enforce the arbitration clause, which is expressly governed by the law of Bermuda. I accept that and think, therefore, that there is a good arguable case that this action is within the rule. It matters not that the

defendants are not parties to the contract as a whole or to the arbitration clause: see DVA v Voest Alpine [1997] 2 Lloyd's Rep. 279 at 287:

> "There are only two relevant questions: Is there a contract? Is the plaintiff seeking to enforce that contract against the defendant?"

And see also Through Transport Mutual v New India Assurance co. Ltd. [2005] 1 Lloyd's Rep. 69.

7. I think that it is also plain that this is a proper case for service out, under Ord. 11, r. 4(2), Bermuda being the appropriate jurisdiction to decide such questions in respect of an arbitration clause governed by Bermuda law, and there being strong policy reasons for ensuring that Bermuda arbitration clauses are respected. I therefore gave leave to serve out.

8. As to the claim for an injunction, when it comes to enforcing an arbitration clause by anti-suit injunction the courts will act robustly: see The Angelic Grace, [1995] 1 Lloyd's Rep. 86 at 96 per Millett LJ. However, I also recognize that those expressions of principle were in the context of an action between the original contracting parties, and do not therefore apply with full force to proceedings such as these, where the defendant is not a party to the clause itself, a distinction which was made in Through Transport Mutual (*supra*) at 89.

9. In order to justify an anti-suit injunction at this stage the test is higher than the balance of convenience. The plaintiff has to show "a *prima facie* case that it would indeed be unconscionable and unjust" if it were subjected to this action: Bryanston Finance Ltd. v deVries (No. 2) [1976] Ch. 63, as approved in Midland Bank v Laker Airways [1986] 1 QB 689 at 707, per Dillon LJ, as applied in International Risk Management Group Limited and International Risk Management (Bermuda) Limited v Elwood Insurance Limited and Hoechst Celanese Corp. [1993] Bda LR 48

10. Against that background, I consider that the plaintiff has made out a strong *prima facie* case that it would it would indeed be unconscionable and unjust for it to be subjected to the Minnesota action. It is entitled to the benefit of the arbitration clause in its agreement, and the defendants are not entitled to compel it to litigate the agreement outside of the arbitration clause. Moreover, by seeking to bring the plaintiff into the Minnesota action simply in order to bind it, the defendants are officiously interfering with its contractual relations with 3M. I consider that the plaintiff is entitled to be protected from that by injunction.

11. The injunction was made until trial or further order. I did not fix a return date for an *inter partes* hearing, the defendants not yet having appeared in this jurisdiction. However, an *ex parte* order can be set aside on a proper application: see RSC Ord. 32, r. 6. Moreover, the Order itself contains an express liberty to apply on 48 hours written notice.

Dated this 19th day of February 2007

Richard Ground
Chief Justice