CIVIL JURISDICTION
2007: No. 76

BETWEEN:

(1) STARR EXCESS LIABILITY INSURANCE COMPANY, LTD

(2) STARR EXCESS LIABILITY INSURANCE INTERNATIONAL, LTD Plaintiffs

-and-

GENERAL REINSURANCE CORPORATION Defendant

RULING

Date of Hearing: 26 and 27 April 2007 - Chambers

Date of Ruling: 3 May 2007

Mr. Rod Attride-Stirling, Attride-Stirling & Woloniecki for the Plaintiffs

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates for the Defendant

Introduction

1. This ruling arises from the hearing of an inter partes summons on 26 and 27 April 2007, when the defendant ("Gen Re") made application to set aside an ex parte order which I had made on 16 March 2007. That order granted the plaintiffs an anti-suit injunction against Gen Re, restraining it from taking any further steps in proceedings which Gen Re had issued in the Supreme Court of the State of New York or bringing other similar proceedings. The New York proceedings concerned an arbitration agreement between the parties, on which I will set out the necessary detail shortly. I will refer to the first plaintiff as "Starr Excess (Delaware)", the second plaintiff as "Starr International" and the two together, where necessary, as "Starr" or "both Starr companies". I recognise that there is an issue between the parties as to the extent to which the contractual arrangements between the parties are between Starr and Gen Re, as contended for by Starr, or between Starr Excess (Delaware) and Gen Re, as contended for by Gen Re.

2. Starr Excess (Delaware) is a licensed insurance company which is registered in Delaware. Starr International is similarly a licensed insurance company registered in

Dublin, Ireland. Of the two, only Starr International is licensed to operate and conduct insurance and reinsurance business in Bermuda. In his affidavit sworn on 15 March 2007 in support of Starr's application for an ex parte injunction, William Goldsmith averred that Starr's principal place of business was in Bermuda, albeit that its registered offices were in Delaware and Dublin, Ireland respectively. He indicated that Starr's principal place of business is Bermuda, its business and underwriting operations are carried out in Bermuda, and Bermuda is the principal location of the majority of its employees. There was no countervailing evidence in regard to this aspect of matters.

3. For Gen Re, an affidavit dated 23 April 2007 was sworn by Peter Clauson. Mr. Clauson averred that Gen Re is a Delaware incorporated business with offices in Stamford Connecticut and New York, and maintains no office or personnel in Bermuda. He set out the background to the negotiations of the reinsurance contract governing the underlying arbitration, where the loss arose by reason of Starr having agreed to provide excess liability cover to a company named Warner Lambert Company ("Warner Lambert") a manufacturer of pharmaceutical products. One of these products led to wide claims, which were settled between Warner Lambert on the one hand and Starr and other insurers on the other. Starr's share of the settlement amounted to $75 million, in respect of which Starr claims a 16.66 % portion from Gen Re, amounting to $12,495,000.

4. One of the issues between the parties relates to the particular Starr company on risk in relation to the arbitration. Although the treaty containing the arbitration clause is between both Starr companies and Gen Re, Gen Re contends that only Starr Excess (Delaware) is on risk in the arbitration, that Mr. Goldsmith's affidavit failed to mention that fact, and that this constituted a material omission.

The Arbitration Agreement

5. The arbitration agreement is contained in Article 25 of a Casualty Quota Share Reinsurance Contract between Starr and Gen Re ("the 1999 Contract"). Clause A of Article 25 deals with the appointment of arbitrators and an umpire, and contains a mechanism for the appointment of such arbitrator or umpire by a Justice of the Supreme Court of the State of New York in the event of default of either the parties or the arbitrators. Gen Re relies upon that provision. Clause B provides at the outset that

> "The arbitration proceeding shall take place in Hamilton, Bermuda"

and the clause then carries on to deal with procedural matters. Article 27 provides that the contract shall be governed by and construed in accordance with the laws of New York. Mr. Clauson in his affidavit referred to a number of other clauses to show connections between the contract and the jurisdiction of New York. Included in these references was a reference to Article 24, a service of suit clause, which does not appear to

be applicable to Gen Re, insofar as it applies only to reinsurers domiciled outside the United States, into which category Gen Re does not fit. Mr. Harshaw conceded as much during argument.

The New York Proceedings

6. Let me next turn to the events which led to the ex parte application and to the grant of an anti-suit injunction. On 1 February 2007, Starr's Bermuda attorneys served notice of arbitration on Gen Re. There followed correspondence in relation to the appointment of arbitrators, and there quickly became an issue between the parties as to the scope of the arbitration clause. The notice of arbitration referred in terms to an arbitration under the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), and Gen Re immediately took the position that the 1993 Act did not govern the dispute between the parties and reserved the right to challenge its application. Although both parties did appoint their arbitrator, there next arose an issue as to the appropriate level of communication between the parties and their appointed arbitrator in relation, in the first instance, to the appointment of the umpire, although no doubt that dispute would have covered a wider range of communications subsequently.

7. On 9 March 2007, Gen Re commenced proceedings in the Supreme Court of the State of New York. In his affidavit, Mr. Goldsmith characterised the proceedings as seeking an order to compel arbitration under New York law and pursuant to New York procedural rules and practice. There is of course no issue as to the law governing the substantive dispute between the parties; that is the law of New York. The dispute is in regard to the procedural law governing the arbitration. Mr. Goldsmith referred to the issue of the New York proceedings as an attempt to pre-empt the Supreme Court of Bermuda from exercising supervisory jurisdiction over the arbitration which it has by virtue of the 1993 Act, and the consequent application of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). Gen Re says that all it has done is to ask the New York court (which it identifies as the only court expressly referenced in the arbitration clause) to interpret the 1999 Contract under New York law, which Gen Re describes as the only body of law expressly adopted by the parties in the 1999 Contract.

8. However, it is somewhat disingenuous of Gen Re to say, as Mr. Clauson did in his affidavit, that all that it has done in New York is to ask the New York court to interpret the 1999 Contract. Indeed, Mr. Harshaw went further in his submissions, and said that all that Gen Re was doing was asking the New York court to determine the appropriate procedural law, as if to suggest that Gen Re merely wanted to clarify whether the procedural law of New York or the procedural law of Bermuda applies. In fact, the petition filed on behalf of Gen Re in New York makes it clear, as foreshadowed in the correspondence between the attorneys for the parties, that the underlying issue is access by the parties to their appointed arbitrator, since the petition asks the New York court to

enter an order "directing the parties to proceed to arbitration under New York law in accordance with the arbitration clause contained in their Reinsurance Contract, which allows each party to appoint (and interact with) its own arbitrator - as is the established practice in the reinsurance industry."

9. As I understood it, it was common ground that the level of communication (or interaction) which might properly take place between a party and its appointed arbitrator following United States law and procedure is significantly greater than that which would be permissible in an arbitration in Bermuda under the auspices of the Model Law.

The Ex Parte Application

10. There are two other matters which I should mention in relation to the ex parte application. The first is that Mr. Harshaw was present for Gen Re, having been given notice, albeit short notice, of the application, on which he had not then had an opportunity to take full instructions. I queried at the outset whether the application was to be regarded as ex parte or inter partes, to which Mr. Harshaw's response was that it should be treated as ex parte on notice, and should remain ex parte on the basis that he did not propose to address the Court on the merits of the application, and thereby run the risk of forfeiting his right to make the application now made. My understanding at the time was that the hearing on 16 March 2007 remained an ex parte hearing despite Mr. Harshaw's presence, and my note reflects that position. I mention that at this stage because Mr. Attride-Stirling for Starr subsequently contended that Gen Re was precluded from making its present application by virtue of Mr. Harshaw having been present at the ex parte hearing, even without addressing the Court as to the merits. In this regard, it was not suggested at the time of the ex parte hearing that Mr. Harshaw's presence alone would make the hearing inter partes, and in my view it would be unjust so to rule at this stage. If that was the position that Mr. Attride-Stirling for Starr planned to take, in my view it was incumbent upon him to make that clear when the question of the nature of the application was being canvassed.

11. So it was against the background of Gen Re's issue of the New York proceedings which led to Starr's application for ex parte relief, and the grant of the order which I made on 16 March 2007. There was a question raised during submissions as to whether the form of that order might have been too widely drawn, if and insofar as it could be interpreted as restricting either party from applying to a Justice of the Supreme Court of the State of New York for the appointment of an umpire pursuant to the provisions of Article 25 of the 1999 Contract.

The Application to Set Aside

12. In his written submissions, Mr. Harshaw gave what he described as an overview of the application. He described the anti-suit injunction as a non-contractual injunction on the basis that Starr Excess (Delaware) had no legal right under the 1999 Contract to restrain Gen Re from proceeding in the New York court. He then submitted that the Bermuda Court had no in personam jurisdiction over Gen Re, and that even if it did so have, this Court's interest would be insufficient to justify what he described as the anti-suit injunction's interference with the New York court action. I pause to point out that anti-suit injunctions are of course addressed not to the foreign court but to the party enjoined. Mr. Harshaw nevertheless maintained that the anti-suit injunction violated established notions of international comity. Lastly, in terms of the overview, Mr. Harshaw indicated that Starr had made material mis-statements in making its ex parte application, such that the injunction should be set aside.

13. Mr. Harshaw then divided his submissions into the law on anti-suit injunctions, the need for in personam jurisdiction, comity, and the question of the natural forum of the underlying dispute. He then dealt separately with the alleged material misrepresentations.

14. What Mr. Harshaw did not do was to identify what Gen Re believed to be the effect of the clear wording in the 1999 Contract to the effect that the arbitration proceeding was to take place in Bermuda. Mr. Clauson dealt with this by saying that in agreeing to Bermuda as the place of arbitration, Gen Re was only agreeing to travel to that physical locale, in order to attend the hearing. Mr. Clauson carried on to say that Gen Re had never agreed that Bermuda would be the legal "seat" of the arbitration, had never agreed to give itself "or the arbitration process" over to the supervision of the Bermuda Court, and had never agreed that Bermuda procedural or substantive law applied to the 1999 Contract or arbitrations conducted thereunder. These expressions on Mr. Clauson's part are no doubt in the same category as his averments as to Gen Re's intention when agreeing the terms of the 1999 Contract. As I indicated during the course of argument, Gen Re's subjective statements of its intention are of course irrelevant when it comes to construing the meaning and legal effect of the arbitration agreement, since the task of ascertaining the intention of the parties must be approached objectively. And since the effect of the provision that the arbitration proceeding should take place in Bermuda impacts both on whether the anti-suit injunction is indeed non-contractual, and whether the court has in personam jurisdiction over Gen Re, it seems to me that the starting point is to consider the meaning and effect of the provision in the 1999 Contract that the arbitration proceedings should take place in Bermuda.

The Effect of Arbitration in Bermuda

15. The issue between the parties in regard to the effect of this provision is whether, as Starr contends, the wording of the first sentence of Clause B of Article 25 means that Bermuda law is the procedural law of the arbitration, or whether, as Gen Re contends, New York law is the procedural law of the arbitration. Indeed, it is not clear to me whether Gen Re concedes that there are any consequences of the arbitration taking place in Bermuda. There was some debate between counsel as to the nature of Mr. Harshaw's concession in this regard, which Mr. Harshaw said was simply a concession that the Bermuda Court would retain jurisdiction over the arbitration once it had started in Bermuda. But that concession did not identify what such jurisdiction would cover, or Gen Re's position in the event of a conflict between the procedural law of New York and the law of Bermuda. This highlights a difficulty for Gen Re identified by Mr. Attride-Stirling, who wanted to know from Gen Re whether it accepted that once the arbitration started in Bermuda, the Model Law would apply, on the basis that the 1993 Act provides that the Model Law has the force of law in Bermuda, and the Model Law is applicable to international commercial arbitration, which it is not disputed is the nature of the arbitration between these two parties. Gen Re declined to be drawn on the effect of the Model Law or the potential for conflict between New York as the procedural law and Bermuda law as the law of the place where the parties had unquestionably chosen to conduct their arbitration. That scenario takes one to a position very similar to that existing in the case of *Union of India –v- McDonnell Douglas* [1993] 2 Ll. Rep 48, a case on which both counsel relied, where the issue was between the procedural law which the parties had expressly chosen, and the procedural law of the seat of the arbitration proceedings.

16. The first point to be made in relation to this issue is that it is common in international commercial arbitration for the procedural law to be different than the law governing the substantive dispute between the parties. Redfern and Hunter on the Law and Practice of International Commercial Arbitration states (second edition, page 77) :-

> "It is a feature of international commercial arbitration that it usually takes place in a country which is "neutral" in the sense that it is not the place of business or residence of the parties to the dispute. This means that, in practice, the law which governs the arbitration is likely to be different from the law which governs the substantive matters in dispute or the "proper law" in Dicey's celebrated phrase."

17. And in relation to the "seat" or place of arbitration, Russell on Arbitration (22nd Edition, paragraph 2-099) states :-

> "Like other jurisdictions, England regards it as essential for an arbitration to have a "seat", a geographical location to which the arbitration is ultimately tied and which in the absence of agreement otherwise prescribes the procedural law of the arbitration."

Russell indicates that it may be theoretically possible for the parties to choose to hold an arbitration in one country but make it subject to the procedural laws of another, but concludes that in practice this could give rise to great difficulty, and states that it is not possible under English law to exclude all jurisdiction of the English Court in respect of arbitrations taking place in England, citing the *Union of India* case.

18. Finally, on this aspect of matters, let me refer to the judgment of Saville J. in that case, and quote the following passages from his judgment, which seem to me to bear upon the issues in the case before me:-

> "If the parties do not make an express choice of procedural law to govern their arbitration, then the Court will consider whether they have made an implicit choice. In this circumstance the fact that the parties have agreed to a place for the arbitration is a very strong pointer that implicitly they must have chosen the laws of that place to govern the procedures of the arbitration. The reason for this is essentially one of common sense. By choosing a country in which to arbitrate the parties have, ex hypothesi, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they attached some importance to the relevant laws of that country, i.e. those laws which would be relevant to an arbitration conducted in that country." (page 50)

And

> "….it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such is sanctioned by those Acts themselves." (page 51)

19. Applying the law to the facts of the case before me, and given that the parties reached an express agreement that the arbitration proceeding should take place in Bermuda, and there being no express choice of procedural law, the next question is whether are any other pointers to offset the "very strong pointer" that by agreeing to arbitrate in Bermuda

the parties have implicitly chosen the law of Bermuda to be the procedural law of the arbitration.

20. This is the question which I put to Mr. Harshaw during the course of argument, and although he at one stage referred to Article 24 of the 1999 Contract, he conceded that this article had no application since it applied only to reinsurers domiciled outside the United States. The only provision to which Mr. Harshaw could point was the fact that the default mechanism for the appointment of an arbitrator or umpire in clause A of Article 25 provided for a Justice of the Supreme Court of the State of New York to be the appointing authority. Mr. Harshaw referred also to the fact that Article 27 provided that the contract should be governed and construed in accordance with the laws of New York, but that is of no great weight given the frequency with which in international commercial arbitration the procedural law differs from the proper law of the underlying dispute.

21. I do not regard the default provision for appointing an arbitrator or umpire as being a matter which should be taken beyond its relatively narrow confines; it is, as Mr. Attride-Stirling submitted, a purely administrative provision, applicable only to the appointment of an arbitrator or umpire. In my view, it cannot justify an inference that it represents some wider choice of procedural law. As Mr. Attride-Stirling pointed out, in the *Union of India* case, there was a provision for the president of the ICC to make a default appointment. The ICC is of course head-quartered in Paris, but there was no suggestion in that case that French law had any procedural relevance.

22. In the circumstances, there is no part of the arbitration agreement which operates to counter the "very strong pointer" that the parties' agreement on Bermuda as the place of the arbitration implicitly indicates their agreement that the procedural law of Bermuda should apply to the arbitration. I am therefore satisfied that by their agreement to arbitrate their dispute in Bermuda the parties did implicitly agree that Bermuda procedural law (and only Bermuda procedural law) should apply to the arbitration, and I so find.

Jurisdiction

23. This was a matter which was the subject of detailed and careful submission by Mr. Attride-Stirling at the time of his application for the ex parte injunction. He relied upon the judgment of Rix L.J. in the case of *Glencore International –v- Exter Shipping* [2002] CLC 1090 (paragraph 42). Mr. Attride-Stirling identified from that case three essential criteria as representing the requirements for the grant of an anti-suit injunction, as follows:-

    (i) the defendant must be subject to the jurisdiction of the Bermuda Courts;

(ii) the natural forum for the determination of matters in issue must be Bermuda; and

(iii) the conduct of the defendant which the claimant seeks to restrain must be unconscionable, vexatious or oppressive.

24. In one sense the first and second of these can be run together. Gen Re agreed in terms that the arbitration of its dispute would take place in Bermuda, and, as I have found, the consequence of that agreement is that Bermuda procedural law governs the arbitration, and the Bermuda Court is the court exercising supervisory jurisdiction in relation to the arbitration. By its agreement to arbitrate in Bermuda, Gen Re has made itself amenable to the jurisdiction of the Bermuda Court and thus afforded in personam jurisdiction. There are other criteria to be considered before an anti-suit injunction can properly be granted, but the issue of jurisdiction follows from the agreement to arbitrate in Bermuda.

Forum

25. In his submissions, Mr. Harshaw sought at length to identify those aspects of the 1999 Contract which suggested an association with New York. If one were concerned with an exercise to determine the proper law of the contract, those matters which he identified would no doubt be highly relevant. But here there is no issue on the governing law of the contract; it is expressly the law of New York. What one is concerned with in relation to the forum issue is the position in relation to the agreement to arbitrate, and the various factors which Mr. Harshaw relied upon, identified by Mr. Clauson in his affidavit, are all matters affecting the parties' underlying dispute rather than their agreement to arbitrate. In relation to that issue, it must follow that the natural forum for the determination of the procedural issues between the parties can only be Bermuda, and the Bermuda Court.

Gen Re's Conduct

26. As Rix L.J. stated in *Glencore International*, what is unconscionable cannot and should not be defined exhaustively, but includes conduct which is oppressive or vexatious or which interferes with the due process of the court.

27. In his submissions, Mr. Harshaw sought to classify the ex parte anti-suit injunction as a non-contractual injunction. I reject that characterisation. As Stuart-Smith J.A. said in his judgment in *IPOC International Growth Fund Ltd –v- OAO "CT-Mobile" LV Finance Group* (Civil Appeal number 22 and 23 of 2006, judgment dated 23 March 2007) :-

> "It is common ground that there are two categories of anti-suit injunction. The first is where the claimant has no contractual right to have the defendant restrained from pursuing foreign proceedings. This is referred to as the non-contractual type. The

> second type is where the claimant has a contractual right, founded on an agreement between the parties, that the defendant will not litigate in any state or forum save that agreed. These are commonly exclusive jurisdiction or arbitration agreements, and are referred to as the contractual cases."

This case is concerned with an arbitration agreement, and is clearly contractual.

28. And Stuart-Smith J.A. in *IPOC* rejected the argument that the principles applicable to the grant of non-contractual anti-suit inunctions also applied in contractual cases, relying upon the judgment of Millett, L.J. in *The Angelic Grace* [1995] 1 Lloyd's Law Reports 87 at 96, in the followings terms:-

> "I agree and wish only to add a few observations of my own on the approach which the Court should adopt when asked to exercise its undoubted jurisdiction to restrain a party from taking or continuing proceedings in a foreign court in breach of an agreement to refer the dispute to arbitration.
>
> 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 given 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."

29. The Chief Justice recently relied upon the judgment quoted above in granting an ex parte interlocutory injunction to restrain defendants from proceeding with an action in the United States in breach of an arbitration clause, saying:-

> "As to the claim for an injunction, when it comes to enforcing an arbitration clause by anti-suit injunction the courts will act robustly." (ACE Bermuda Insurance Ltd –v- Continental Casualty Company, Civil Jurisdiction number 41 of 2007, Ruling dated 19 February 2007).

30. Mr. Harshaw's submission that the New York proceedings are not vexatious, oppressive or unconscionable is founded on the premise which I have rejected, namely that the procedural law of the arbitration is New York law. Once one has reached a position where one is dealing with an arbitration which
    (i) the parties have agreed will take place in Bermuda,
    (ii) the procedural law of which (as I have found) is the law of Bermuda, and
    (iii) hence the parties have submitted themselves to the supervisory jurisdiction of the Bermuda Court,

    then it is clearly unconscionable for a defendant to take proceedings in a foreign court which are in breach of the arbitration clause.

Misrepresentation

31. Mr. Harshaw's written submissions specified four premises which he referred to as being "unsustainable", by which I understood him to mean that they constituted material misrepresentations at the time that the ex parte injunction application was made. Two of these four effectively depend upon the view that this Court takes as to the legal issues, namely whether or not the Court has in personam jurisdiction over Gen Re, and what Mr. Harshaw referred to as to the total disregard for principles of international comity. There is no question of there having been any misrepresentation in regard to these aspects of matters.

32. Neither is there any question of misrepresentation in relation to the third matter upon which Gen Re relies, which it contends is a suggestion made on behalf of Starr that Starr Excess (Delaware) is a Bermuda company with a Bermuda insurance license, when this is not the case. In fact, Mr. Goldsmith's affidavit set out carefully the different position in relation to Starr Excess (Delaware) and Starr International, as I have set it out in paragraph 2 above. The statements made by Mr. Goldsmith referred to Starr International and then said that "It" was licensed in Bermuda and regulated by the Bermuda insurance regulator. Hence the references are clearly references to Starr International only, this being the company which had just been identified by Mr. Goldsmith as being a subsidiary of Starr Excess (Delaware).

33. That leaves only a complaint as to the lack of clarity regarding the real party at interest, which Gen Re contends is Starr Excess (Delaware). There is no question but that the

1999 Contract is a contract made between both Starr companies and Gen Re, and, importantly, the notice of arbitration lists both Starr companies as claimants. It may or may not be that the Warner Lambert claim arises from business written only by Starr Excess (Delaware), but if that indeed be the case (and while Mr. Attride-Stirling refused to accept that it was, there was no evidence filed on behalf of Starr in relation to this aspect of matters), it is hard to see what turns on the point. The Bermuda arbitration would remain international, according to the definition contained in the Model Law, and I cannot see any other factor which would be relevant. Hence my view is that if and insofar as that aspect of matters may have constituted an omission on the part of Starr, it was not a material omission.

34. Although Mr. Harshaw's written submissions referred to four premises under the heading of "The False Premises", they then carried on to refer to three other matters, described as "demonstrably false premises". The first of these was that Starr had said in its evidence that the terms and wording of the 1999 Contract were pursuant to the Bermuda Form. Mr. Clauson's affidavit contended that the 1999 Contract was not based on the Bermuda Form. But as I understood it, the point which Starr was making in making reference to the Bermuda Form was that this form of arbitration clause typically provides for arbitration of a dispute which is subject to the substantive law of New York, but the procedural law of either Bermuda or England. The point made for Starr was that there was absolutely nothing unusual in this formula contained in the 1999 Contract, and that it accords with the practice in the Bermuda market. I do not see any misrepresentation in this regard. The second of the alleged false premises is in relation to the connecting factors with New York, and is again essentially a legal argument which I have rejected. The last is what Gen Re describes as the "irresponsible representation" made to this Court that there was a need for urgent relief because a hearing was due to take place in New York on 28 March 2007. Gen Re submitted that the New York court had not set any time for the hearing of Gen Re's petition, and that in fact no New York judge had even been assigned to the matter. Mr. Harshaw's submissions went so far as to say that Starr Excess (Delaware) "knew" this to be the case, but during argument Mr. Harshaw confirmed that they should have read "ought to have known".

35. The New York proceedings were issued by Gen Re without any warning in the form of a letter before action, and the relevant notice refers to the fact that an application would be made at 9:30 a.m. on 28 March 2007. It may be (and again the evidence was not clear in this regard) that the matter would not have proceeded on that date, but the notice did on its face require service of an answer and supporting documents "at least seven days before the aforesaid date of the hearing". In these circumstances, I am unable to conclude that the urgency of the application was overstated, and even if it were, I would not regard the misrepresentation as being sufficiently material to cause me to set aside the ex parte injunction. The reality is that Gen Re issued its proceedings in New York in breach of the terms of the arbitration agreement with Starr, and sought to obtain

procedural rulings from the New York court which are properly the province of the Bermuda Court.

Conditional Appearance

36. Mr. Attride-Stirling also argued that it was not open to Gen Re to seek to set aside the anti-suit injunction since they had appeared in the matter unconditionally. Mr. Attride-Stirling submitted that what Gen Re should have done was to seek leave to file a conditional appearance, which course he said would have enabled Gen Re to make this application. In fact, no appearance has been entered by Gen Re. Given the view which I have taken as to the merits of the application, I would not propose to deal in this ruling with the question whether Gen Re's application to dismiss the ex parte order itself constituted a submission to the jurisdiction such as to preclude the present application. The point was not fully argued, and was made not as a preliminary point, but after Mr. Harshaw had completed his submissions. For the purpose of this application, the point is of academic interest only, and I would not therefore rule on it.

Terms of the Ex Parte Order

37. As indicated in paragraph 11 above, there was a suggestion at the inter partes hearing that the effect of my order of 16 March 2007 would be to preclude either party relying upon the default appointment provisions of Clause A of Article 25. Mr. Harshaw indicated that he was not making an application to vary the order at this stage, and Mr. Attride-Stirling's position was that the order in its present form does not preclude an application for the appointment of an umpire (the parties having appointed their arbitrators), but said that he was happy for there to be a variation in this regard, if the Court viewed it as appropriate.

38. The order of 16 March 2007 restrains Gen Re from bringing any other court proceedings against Starr "in respect of the procedural governance of the arbitration clause contained in Article 25" of the 1999 Contract. As I have indicated, it does not seem to me that a default appointing authority is a matter of procedural governance, so that I do not regard any variation as necessary. For the avoidance of doubt, my order of 16 March 2007 was not intended to affect Gen Re's right to make application for the appointment of an umpire, should the other provisions of Article 25 so permit.

Summary

39. It follows from all that is set out above that in my view the ex parte injunction was properly granted, and should not be set aside. I so find, and I therefore dismiss Gen Re's summons dated 24 March 2007.

Costs

40. I indicated that I would deal with the matter of costs in my ruling on a nisi basis. I see no reason why costs should not follow the event in the normal way, and I therefore make an order nisi that the costs of the application should be Starr's in any event. That order nisi will become absolute within seven days in the absence of an application to be heard on the issue of costs.

Dated the 3rd day of May 2007.

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Hon. Geoffrey R. Bell
Puisne Judge