CIVIL JURISDICTION

2007: No. 41

BETWEEN:

ACE BERMUDA INSURANCE LTD **Plaintiff**
(formerly A.C.E. Insurance Company, Ltd)

-and-

(1) CONTINTENTAL CASUALTY COMPANY **Defendants**
(2) CONTINENTAL INSURANCE COMPANY

RULING

Date of Hearing: 18 May 2007 - Chambers
Date of Ruling: 1 June 2007

Mr. Narinder Hargun, Conyers Dill & Pearman for the Plaintiff
Mr. David Kessaram, Cox Hallett Wilkinson for the Defendants

Introduction

1. This ruling arises from the defendants' application to set aside the orders made by the Hon. Chief Justice on 15 February 2007, the reasons for which were set out in his ruling dated 19 February 2007. By his orders, the Chief Justice restrained the defendants (to whom I will refer in this ruling simply as "Continental") from commencing, continuing, proceeding with, or taking any other action in relation to litigation instituted by Continental in the District Court for the Fourth Judicial District of the State of Minnesota ("the Minnesota Proceedings") relating to an excess liability insurance policy, designated MMM-371/4 issued by the plaintiff ("ACE") to Minnesota Mining and Manufacturing Company ("3M"), and gave leave to ACE to issue a writ for service out of the jurisdiction on Continental.

The Minnesota Proceedings

2. By its action in Minnesota, Continental seeks a determination of the scope of its obligations under certain excess liability insurance policies issued to 3M at various times between 31 December 1969 and 1 January 1986. What is perhaps unusual about the Minnesota Proceedings is that there are more than 60 insurers (together the "Defendant Insurers"), including ACE, joined in the proceedings on the basis that 3M purchased potentially applicable insurance from such Defendant Insurers. Continental states in the suit that it brings the action against the Defendant Insurers for the purpose of binding those Defendant Insurers to the relief sought in those proceedings, and for the purpose of achieving a comprehensive resolution of the issues underlying the complaint. Continental indicates that it would dismiss the action as to any Defendant Insurer shown not to have issued any policy potentially covering 3M's underlying liability, but as Mr. Hargun pointed out in argument, Continental does not say whether "shown" involves a determination by the Minnesota court or a decision made by Continental. The issue is not an academic one for ACE, since it contends that the policy which ACE issued to 3M was issued subsequent to the period referred to above, but that is not an issue for this application.

3. The policies which Continental issued to 3M pertain to liability in respect of claims arising from exposure to toxic substances caused by 3M products. In the nature of such claims, complex questions arise as to when liability under particular insurance policies was triggered and as to the appropriate allocation between the various different policies. Continental pleads that coverage is not triggered on the polices which it issued to 3M until 3M can affirmatively prove exhaustion of all the insurance policies written by the Defendant Insurers underlying Continental's own policies issued to 3M. Continental seeks declarations in relation to the issues of triggering and allocation in relation to the various underlying insurance policies issued by the Defendant Insurers, as well as a declaration that Continental's policies have not been triggered by the exhaustion of the underlying insurance. This, submitted Mr. Hargun, will necessarily require the Minnesota court to determine, so far as ACE is concerned, the contractual rights and obligations between ACE and 3M with regard to the terms of their contract and the extent of coverage thereunder. Mr. Hargun further submitted that this contention has been accepted by Continental in its skeleton argument, which acknowledged that the potential liability of the Defendant Insurers (including ACE) to 3M, subject to the terms and conditions of their respective policies, would be determined if the Minnesota court applied the doctrine of "continuous trigger" for which Continental contends in the Minnesota Proceedings.

The Chief Justice's Ex Parte Order

4. The basis upon which the Chief Justice made his orders on 15 February 2007 was that the policy issued by ACE to 3M contains an arbitration clause requiring any dispute arising out of the policy to be settled by arbitration in Bermuda under the Bermuda Arbitration Act 1986. The policy itself is expressed to be governed by the law of the State of New York, with the exception of the arbitration clause which is expressly governed by the law of Bermuda. ACE contended before the Chief Justice that the Minnesota Proceedings will effectively decide the issues between ACE and 3M arising from their policy of insurance in a final and binding manner, and that this infringes the arbitration clause. The Chief Justice was satisfied that there was a serious issue to be tried in this regard, and a good arguable case that the action was within the terms of Order 11 rule 1 (1) (d) (iii) of the Rules of the Supreme Court 1985 as amended. Finally, the Chief Justice accepted the argument by ACE that it was bringing these proceedings to enforce the arbitration clause which is expressly governed by the law of Bermuda. He concluded that it mattered not that Continental were not themselves parties to the contract as a whole or the arbitration clause, and that this was plainly a proper case for service out under Order 11 rule 4 (2).

5. In relation to the grant of an anti-suit injunction, the Chief Justice took the view that ACE had made out a strong prima facie case that it would be unconscionable and unjust for it to be subjected to the Minnesota Proceedings, and that by seeking to bring ACE into the Minnesota action simply for the purpose of binding it, Continental was officiously interfering with ACE's contractual relations with 3M such that ACE was entitled to be protected by the grant of an injunction.

The Basis for Challenge

6. The basis on which Continental seeks to set aside the Chief Justice's ex parte order granting leave is essentially its contention that ACE's cause of action does not fall within the terms of Order 11 rule 1 (1) (d) (iii), which is the particular sub-rule relied upon by ACE when seeking leave to serve out. That rule provides (leaving out the irrelevant provisions) 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, rescind, dissolve, annul or otherwise affect a contract…..which….is by its terms, or by implication, governed by the law of Bermuda.

7. In his written submissions on behalf of Continental, Mr. Kessaram submitted that ACE's cause of action did not come within the sub-rule because

   (i) there is no contract or sufficient contractual nexus between ACE and Continental, and alternatively
   (ii) even if ACE could rely upon the terms of its policy issued to 3M to provide the requisite contractual nexus, the relevant obligation under the contract which ACE is seeking to enforce is not governed by Bermuda law.

   In the event, this alternative argument was abandoned by Mr. Kessaram when it was pointed out that the terms of the arbitration clause between ACE and 3M were identical to those in the case which Mr. Kessaram had sought to distinguish, *ACE Bermuda Insurance Ltd –v- Pedersen et al* (Civil Jurisdiction number 89 of 2005, Decision dated 12 September 2005).

8. Mr. Kessaram further contended that ACE did not have a good cause of action against Continental in Bermuda as required by Order 11 rule 4, on the basis that there was no contractual nexus between ACE and Continental and that consequently there was no obligation upon Continental to arbitrate any issue with ACE. Finally, Continental contended that even if (which was denied) the Minnesota Proceedings were unconscionable, that could not be a stand-alone basis for an anti-suit injunction, since Continental maintained that the Bermuda Court did not possess jurisdiction over it.

9. So Continental's position was that the existence of a contract as between ACE and 3M did not afford a sufficient contractual nexus as between ACE and Continental to justify service out under Order 11. Mr. Kessaram first asserted that Continental's claims in the Minnesota Proceedings did not affect the contract as between ACE and 3M, although he did concede that ACE's liability to 3M "impinged upon" the obligation owed by Continental to 3M, and then did accept that in the Minnesota Proceedings, the Minnesota court would be asked to determine ACE's liability to 3M. But Mr. Kessaram submitted that where there was no direct contract between a plaintiff and a defendant, there had to be a contractual nexus of the sort afforded by an assignment, or such as that existing where the contracting party's insurer pursued its insured's contractual claim through subrogation.

10. Particularly, Mr. Kessaram suggested that the requisite test as formulated by ACE in its skeleton argument was put incorrectly. ACE had said that there were only two relevant questions which had to be answered in the affirmative to justify service out; the first was "Is there a contract?", and the second was "Is the

plaintiff seeking to enforce or otherwise affect that contract against the defendant?". Mr. Kessaram submitted that the formulation should start with the question whether there was a contract between the plaintiff and the defendant, and said that there was no case in which a stranger to a contract had obtained leave pursuant to the provisions of Order 11. And that, in a nutshell, is the issue between the parties to be determined on this application.

The Relevant Law

11. Although Mr. Kessaram did not rely upon it, it is no doubt relevant to observe that the notes in the 1999 White Book, when dealing with the applicability of Order 11 rule 1 (1) (d) make the following statement:

> "In order to bring a claim within the scope of O.11, r.1 (1) (d) or (e) the plaintiff must show that there is a contract between himself and the defendant, and that there is a good arguable case that the claim affects such contract. It is insufficient for the plaintiff to rely upon a contract made between himself and a third party."

12. That passage carries on to say:

> "Accordingly where a plaintiff denies the existence of any contract between himself and the defendant, and seeks a declaration to that effect, his claim does not fall within O.11 r. 1 (1) (d) or (e)",

citing the case of *Finnish Marine Insurance Co Ltd –v- Protective National Insurance Co* [1989] 2 All ER 929.

13. So the first question to be answered is whether the *Finnish Marine* case is indeed authority for the statements made in the White Book notes. Clearly, the case is authority for the proposition that where a plaintiff denies the existence of any contract between himself and the defendant, and seeks a declaration to that effect, his claim does not fall within the relevant provision of Order 11 rule 1 (1) (d). It is the word "Accordingly" and the prior passage which are less clearly justified by the case, and the conclusion which I have reached, for the reasons set out hereafter, is that the case is not authority for the wider proposition set out in the White Book notes, which proposition represents the gravamen of Mr. Kessaram's submissions.

14. The starting point is the language of the rule itself. It is a statement of the obvious that the rule does not require in terms that there be a contract as between plaintiff and defendant. The rule simply requires that the proceedings brought in this jurisdiction are, referring only to those provisions relied upon by Mr. Hargun, brought to enforce or otherwise affect a contract which by its terms is governed by the law of Bermuda.

The Authorities

15. It is, therefore, necessary to understand the scope of the decision made in *Finnish Marine* by Mr. Adrian Hamilton Q.C. sitting as a Deputy Judge of the High Court. The question that the learned judge asked himself was not whether there must be a contract between the plaintiff and the defendant for the relevant provisions of Order 11 to apply, or whether the existence of a contract between the plaintiff and a third party would suffice, although it is true that he commented on these issues. The question the learned judge asked (page 933) was "Does the rule allow a plaintiff to get leave while denying that a contract ever existed between the plaintiff and the defendant?". The learned judge immediately pointed out that this was both a difficult and an important point and that, surprisingly, there appeared to be no direct authority. He referred to the slightly different question raised in the case of *BP Exploration Co (Libya) Ltd –v- Hunt* [1976] 3 All ER 879, where Kerr J. had said at page 885 that:

> "The words "or otherwise affect" are very wide; indeed, almost as wide as they can be. A claim for a declaration that a contract has become discharged, whether as a result of frustration, repudiation, or otherwise, is in my view a claim which affects the contract in question. The contrary construction would have serious and highly inconvenient consequences."

16. The learned judge rejected the argument that the same considerations applied if the claim was that there had never been a contract at all. He maintained that there was a clearly recognised distinction between the case where there has been a contract which has later been discharged by an accepted repudiation, frustration or rescission, and a contract which has not been entered into at all. Since the plaintiffs in the case before him contended that there was never a contract at all, the learned judge concluded that this was not a case falling within the rule.

17. Although the argument in the *Finnish Marine* case was put for the plaintiff on the basis that it was sufficient to bring the claim within the scope of the relevant rule to show that the claim affected a contract between the plaintiff and a third

party, that argument has to be looked at in the context of the facts of the case. In *Finnish Marine*, there was an issue as to whether the plaintiff's agent had written a reinsurance contract without authority. If that were to have been the case, there would clearly have been no contract as between plaintiff and defendant. Counsel for the plaintiff argued that it was sufficient for him to show that the claim affected the plaintiff's contract with its agent. But the declaration sought by the plaintiff was not in relation to the contract between the plaintiff and the third party agent; the declaration sought was as to the existence of a contract between plaintiff and defendant. So although the learned judge made the statement that the grounds of the sub-rule could only relate to a contract between plaintiff and defendant, he was doing so in context of that factual background. It is no doubt for this reason that subsequent cases have been careful to put the decision in *Finnish Marine* in the context of its own facts. In *DR Insurance Co –v- Central National Insurance Co* [1996] 1 Lloyd's Law Reports 74, Mr. Martin Moore-Bick Q.C. sitting as a Deputy Judge of the High Court said, speaking of Mr. Hamilton Q.C.'s decision in *Finnish Marine* (page 78):

> "I would respectfully agree with his conclusion on the facts of that case. But in my view it is far removed from the present case in which DR seeks a declaration which directly relates to the rights and liabilities between itself and the defendants." and
>
> "The expression "contract" in sub-par. (d) is in my view quite wide enough to cover contractual rights and liabilities which have become vested in one or other party in this way."

18. And in the case of *DVA –v- Voest Alpine* [1997] 2 Lloyd's Law Reports 279, Hobhouse L.J., having quoted from Mr. Hamilton Q.C's judgment in *Finnish Marine*, said (page 287):

> "It is important to put that statement in its context. The plaintiff in that action was vexed by a foreign company which said it had a contract with the plaintiff company. The foreign company was saying that an underwriting agency had entered into a contract with it as the agent of and with the authority of the plaintiff company. The plaintiff company commenced proceedings in this country for a declaration that it had no contract with the foreign company. The defendants in the action were the foreign company. The plaintiffs needed to obtain leave to serve the writ out of the jurisdiction under O.11, r. 1. The writ said that there was no contract and so did the affidavit. It is therefore difficult to see how the plaintiffs could have thought that were entitled to

> rely upon sub-par. (d). Under O.11 it is necessary in order to found the application for leave to bring oneself within one of the relevant sub- paragraphs….For the purposes of sub-pars. (d) and (e) it is necessary to assert that there is a contract. Further, it must be the contract upon which the cause of action is based because otherwise any contract would do, for example an insurance contract by which an insurance company was insuring one of the two commercial parties involved in the dispute.
>
> "Confined to its context, what Mr. Hamilton said was clearly right. But it is not right then to extrapolate so as to say that an assignee who is asserting a right under a contract is not to be treated for the purposes of these sub-paragraphs as a party to that contract or, to be more precise, so as to conclude that the plaintiff applying for leave to serve out of the jurisdiction cannot found jurisdiction upon that contract. The assignee suing in respect of an assigned right can obtain leave relying on the sub-paragraphs to serve the debtor out of the jurisdiction; so also can the debtor obtain leave to serve the assignee in relation to that contract. There are only two relevant questions: Is there a contract? Is the plaintiff seeking to enforce that contract against the defendant?"

19. Hobhouse L.J. carried on to agree with the evaluation of *Finnish Marine* by Mr. Moore-Bick Q.C. referred to above.

20. I respectfully agree that there is no basis to take the comments of Mr. Hamilton Q.C. in *Finnish Marine* beyond the context of the facts of the case, and one therefore needs to look at the terms of the sub-rule (which as I have said contains no requirement for the contract to be between the plaintiff and the defendant) and see whether there are any other authorities which support such a contention.

21. I have already referred to the words of Kerr J. in *BP Exploration*, commenting that the words "or otherwise affect" in the sub-rule are very wide. But Mr. Hargun does not simply rely upon those words. His main contention is that the Bermuda proceedings seek to enforce the terms of the contract between ACE and 3M, that is to say to ensure by the Bermuda proceedings that the matters in dispute between those two contracting parties are resolved by means of arbitration in Bermuda, as their contract provides.

22. Although I was referred to a number of further authorities, I will restrict my references to those cases which I have found helpful with regard to the scope of Order 11, and in this regard, the only one of the further cases upon which Mr.

Kessaram relied to which I need refer is that of *Youell –v- Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Law Reports 102. But the passage which I found helpful in terms of the Order 11 point does not support Mr. Kessaram's submission. In that case Aikens J. referred to the passage which I have quoted above from the judgment of Hobhouse L.J. in *DVA –v- Voest Alpine.* Having referred to the "only two relevant questions", Aikens J. then said (page 117):

> "In the present case, in relation to the direct action claim I think that the two relevant questions can be expanded to: "does the claimant in the English proceedings rely on a contract on which the proposed defendant asserts claims in the foreign proceedings; if so is it seeking to enforce that contract against the defendant?". The answer to both questions is "yes"."

23. When one asks those two questions in relation to the facts underlying these proceedings, it seems to me that the answer to the two relevant questions is similarly "yes". ACE as claimant in the Bermuda proceedings relies on its contract with 3M, and there is no question but that Continental asserts claims in respect of that contract in the Minnesota Proceedings. It maintains that its liability to 3M does not arise because the protection afforded to 3M by its policy with ACE (and many others) has not been exhausted. In relation to the second question, ACE is indeed seeking to enforce that contract against Continental, insofar as it seeks to enforce that contract (its contract with 3M) in relation to its arbitration provisions.

24. I now turn to the cases upon which Mr. Hargun for ACE relied, starting with *The "Ines"* [1993] 2 Lloyd's Law Report 492. There is no need to go into the facts, but the issue in that case before Saville, J. was whether it was the owners or the time charterers who were liable to the plaintiffs. If it was the one, there would clearly be no contract with the other. Saville, J. reached his decision on the "necessary or proper party" provisions of Order 11, but since the provisions of Order 11 rule 1 (1) (d) had been argued at length before him, he stated his view in regard to that aspect of matters in the following terms (page 495):

> "As I have indicated, it is common ground that there is a bill of lading contract which contains an English law and jurisdiction clause in terms that bring it within the language of sub-rule (d) (iii) and (iv) of this rule. On the face of it, therefore, the plaintiffs bring themselves within the wording of the rule, for the relevant claim is one to recover damages for breach of that contract. The time charterers submit that although the rule does not say so in terms, it must be an implied requirement of this rule that the contract in question is one to which the party sought to be served is a party. I

> disagree. To my mind it is obvious that one of the main purposes of this particular rule is to give the English Court jurisdiction, other things being equal, to deal with English law contracts or cases where the contract contains a choice of this jurisdiction. Of course, as I have already said, under O.11, r.4 (2) the Court will not be disposed to require a foreigner to come here unless persuaded that there are issues which fall for a trial for their proper determination and that England is the proper forum. Thus where there is a dispute as to whether or not the proposed defendant is party to such a contract and in breach of it, the case will not be considered a proper one for service out of the jurisdiction unless the Court is of the view that the questions of the identity of the contracting parties and the alleged breach raise issues which it is fair to all concerned should properly be tried out in the English Court. It follows to my mind that there is no need to imply into this part of the rule additional requirements over and above those expressly stated, since the point is already covered by the requirement in O.11, r. 4 (2) that the case must be a proper one for service out of the jurisdiction."

Mr. Hargun relied upon that passage, and while it is of course obiter, Saville, J., now Lord Saville of Newdigate, is very clear in his rejection of the argument that it is an implied requirement of the rule that the contract relied upon by the plaintiff must be a contract between the plaintiff and the defendant. And on the facts of that case, if there were no contact, neither would there be any "contractual nexus". None is needed. The protection for the foreign defendant is afforded in terms of the requirements of Order 11 rule 4 (2).

25. In *Gulf Bank –v- Mitsubishi* [1994] 1 Lloyd's Law Reports 323, Hobhouse, J. similarly emphasised the need to have regard to the words of the rule. He also commented on the meaning of the word "enforce" in the sub-rule. This was in the context of a claim by the plaintiff for a declaration that a counter indemnity was valid. Hobhouse J. said (page 327):

> "the defendants submitted that a claim for a declaration such as that which is made by the plaintiffs in these proceedings does not fall within the terms of R.S.C., O.11, r.1 (1) (d) because such a claim is not a claim -
> …brought to enforce, rescind, dissolve, annul or otherwise affect a contract.
>
> It is because of this submission that I have decided to give the reasons for my decision in open Court. Counsel have not been

> able to refer me to any reported decision which specifically decides whether a claim for a declaration that a contract is subsisting and binding upon the defendant is a claim to "enforce" or "otherwise affect" a contract; it is desirable that there should be an authority which states what the law is on this question and reflects the many unrecorded decisions which have been given authorizing service out of the jurisdiction of proceedings claiming declaratory relief.
>
> In my judgment the words in sub-par. (d) are clearly intended, together with the references to breaches of contract, to make a comprehensive reference to contractual claims. The language discloses no intention to exclude any category of contractual claim nor does the policy of O. 11, itself. The restrictive part of sub-par. (d) is that which follows and lays down criteria which the relevant contract must satisfy. Provided that the relevant contract satisfies one or more of those criteria then there is no reason in policy why any legal claim in respect of that contract should not fall within the ambit of O.11, r. 1.
>
> The claim made in the present proceedings is a claim which is properly characterized as a claim to enforce a contract. To obtain a declaration of a Court that a contract is enforceable is one of the steps in enforcing that contract."

26. Mr. Hargun also referred to the passages from *DR Insurance* and *DVA –v- Voest Alpine* to which I have already referred, and the fact that in the former case, Mr. Moore-Bick Q.C. referred to the fact that the conclusion in the passage which I have set out above was supported both by the judgment of Saville, J. in *The "Ines"* and that of Hobhouse, J. in *Gulf Bank –v- Mitsubishi.*

Finding in Relation to Order 11 Rule 1 (1) (d)

27. Having considered the authorities, I am satisfied, and find, that there is no justification for the proposition that in order to obtain leave to serve out of the jurisdiction under Order 11 rule 1 (1) (d) there must either be a contract or a contractual nexus between the plaintiff and the defendant. In my view there is no justification for going beyond the words of the sub-rule, and on the basis of the words themselves I am satisfied, and find, that these proceedings brought by ACE against Continental are indeed within the ambit of the sub-rule, insofar as they are proceedings which seek to enforce or otherwise affect the contract (which ACE has with 3M) against Continental. I find that ACE has demonstrated that it has a

good arguable case that its claim falls within the relevant head of Order 11, and that there is a serious issue to be tried arising out of the underlying claim. I further find that the case is a proper one for service out of the jurisdiction pursuant to Order 11 rule 4 (2), since I am satisfied that the issues for trial in these proceedings properly fall to be determined in the Bermuda Court, on the basis of the provisions of the arbitration clause.

The Anti-Suit Injunction

28. In relation to this, Mr. Kessaram essentially relied upon his argument that the grant of leave under Order 11 should be set aside, and submitted that if that were to be done, it would follow that there was no jurisdiction for the anti-suit injunction, and that that too should be set aside. He was not prepared to concede that if leave was properly granted under Order 11, then the joinder of ACE to the Minnesota Proceedings by Continental was unconscionable. I have no hesitation in finding that Continental's pursuit of the Minnesota Proceedings against ACE is indeed unconscionable, and no doubt also contrary to public policy, when ACE and 3M have expressly agreed that in the event of a dispute as to their contractual rights and liabilities, such dispute should be determined by a Bermuda arbitration, and where there is no question but that if Continental were not to be restrained, the issues as between ACE and 3M which would otherwise fall to be decided in Bermuda arbitration proceedings would be determined by the Minnesota court in the Minnesota Proceedings.

29. In relation to the question of jurisdiction and Mr. Kessaram's submission that the Bermuda Court has no jurisdiction over Continental, the Court has granted anti-suit injunctions to restrain a party from pursuing foreign court proceedings in breach of an arbitration agreement for many years. In my judgment, the Court has such jurisdiction whether or not the party pursuing the foreign court proceedings is itself a party to the arbitration agreement. It is the breach of the arbitration clause calling for arbitration in Bermuda that the Court has jurisdiction to restrain. Continental's suit in Minnesota is calculated to breach such an arbitration clause, and the Bermuda Court thus exercises jurisdiction,

Summary

30. It follows that Continental's application to set aside the orders made by the Chief Justice on 15 February 2007 should stand dismissed, and I so order.

Costs

31. I will hear counsel as to costs.

Dated the 1 of June 2007.

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Hon. Geoffrey R. Bell
Puisne Judge