# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**
**2009: No. 96**

**BETWEEN:**

**VALIDUS HOLDINGS, LTD.**

**Plaintiff**

**- and -**

**(1) IPC HOLDINGS, LTD.**
**(2) IPC LIMITED**
**(3) MAX CAPITAL GROUP LTD.**

**Defendants**

Date of Hearing: Monday 11 and Tuesday 12 May 2009
Date of Judgment: Wednesday 13 May 2009

Richard Snowden, Q.C. and John Riihiluoma for the Plaintiff;
Robert Hildyard, Q.C. and Allan W. Dunch for the 1st and 2nd Defendants; and
David Chivers, Q.C. and Christian Luthi for the 3rd Defendant.

## JUDGMENT

1. By way of background, the Plaintiff, Validus, is a Bermuda exempted company whose common shares are listed on the New York Stock Exchange. Validus is a provider of reinsurance and insurance, conducting its operations worldwide through two wholly-owned subsidiaries, one of which is Validus Reinsurance, Ltd. Validus Re is a Bermuda-based reinsurer focused on short-tail lines of reinsurance. Validus is the registered holder of 100 shares in the capital of IPC Holdings, the First Defendant, which shares it acquired on the 8th April 2009.

2. IPC Holdings is a Bermuda exempted company whose common shares are listed on the NASDAQ Global Select Market. IPC Holdings provides property catastrophe and other reinsurance on a worldwide basis through its subsidiaries. The Second Defendant, IPC Limited, is a Bermuda exempted company and is a wholly-owned subsidiary of IPC Holdings. The Third Defendant, Max Capital Group Ltd. ('Max') is a Bermuda exempted company whose common shares are listed on the NASDAQ Global Select Market. Max provides specialty insurance and reinsurance products for the property and casualty markets.

3. On the 2nd of March 2009, IPC Holdings announced that it had entered into an agreement with Max providing for the amalgamation of Max with IPC Limited, pursuant to section 106 of the Companies Act 1981. Pursuant to the terms of the Max Amalgamation Agreement, holders of Max common stock will receive 0.6429 shares in IPC for each Max share held by them. Completion of the Max Amalgamation Agreement will require, amongst other things, the approval of various resolutions at a general meeting of IPC Holdings, including, but not limited to, resolutions to change the bye-laws of IPC Holdings and to approve the issue of shares in IPC pursuant to the terms of the Max Amalgamation Agreement.

4. While the IPC/Max transaction is structured as an amalgamation, the proposed structure provides for the amalgamation of IPC Limited and Max, not IPC Holdings and Max. Accordingly, at the anticipated general meeting, the shareholders of IPC Holdings will be asked to vote on certain bye-law amendments and other matters relevant to the amalgamation. Whilst the amalgamation will require the approval of those resolutions, the statutory dissenter rights provided for under Bermuda law will not be available for shareholders of IPC Holdings. The General Meeting of IPC Holdings has now been fixed for 12th June 2009.

5. Validus says it is concerned that the basis upon which all the shareholders will be asked to vote at the meetings will be flawed, since the Board of Directors is presenting the proposal to shareholders, in compliance with obligations entered into pursuant to the

terms of the Max Amalgamation Agreement, which agreement Validus alleges contains certain provisions which are contrary to Bermuda law and which Validus says have been entered into by the Board of Directors in breach of their duties to IPC Holdings. Validus therefore argues that it is essential that the validity or otherwise of the provisions of the Max Amalgamation Agreement and any consequential relief be determined before any vote takes place, so that the shareholders have full knowledge and understanding of the effect of the Max Proposal. Validus, therefore, invites this Court to expedite the trial of this action so as to allow a decision as to such validity, and any consequential relief, to be determined by the Court, on an expedited basis and, in any event, before the general meeting of IPC Holdings takes place on 12th June.

6. The questioned provisions are:

(i) a termination fee of US$50 Million, which is payable by IPC Holdings to Max in certain circumstances, including if the necessary approvals to effect the Max Proposal are not passed by the shareholders of IPC Holdings and another competing bid is approved by the shareholders within 12 months of termination of the Max Amalgamation Agreement; and

(ii) a "no-solicitation"/"no-talk" provision, which effectively prevents the directors from soliciting competing bids from other parties, and also from seeking any information from a party who submits an unsolicited bid or entering into a dialogue with that party to enable a better proposal to be made to the shareholders.

7. These provisions are of concern not just to Validus as the holder of its 100 shares in IPC Holdings; they are also of concern to Validus because, on 31st March 2009, Validus made an alternative approach to IPC Holdings. The Validus Proposal, which was set out in an amalgamation agreement signed by Validus and which would have been binding upon its countersignature by IPC, provided for an amalgamation between Validus and IPC Holdings, pursuant to section 106 of the Act. The Validus Proposal provided for shareholders in IPC Holdings to receive 1.2037 Validus common shares for each IPC share held by them. The Validus Board of Directors was and is of the opinion that it's 31st March 2009 proposal was a superior offer to the Max Proposal for IPC and its

shareholders, and hence constituted a "Superior Proposal", as defined in Section 5.5(f) of the Max Amalgamation Agreement, but that view is not shared by the Directors of IPC Holdings.

8. During the course of the hearing, Validus commenced an exchange offer for all of the outstanding common shares of IPC Holdings. Under the terms of that exchange offer, IPC shareholders would receive, again, 1.2037 Validus common shares for each IPC common share held by them. That offer was announced on 12th May, which I say was during the hearing, and will expire at 5 p.m. New York time on Friday, 26th June 2009, unless extended.

9. Against that background, in this action, the Plaintiff claims declarations in the following terms:

> (a) that the Termination Fee constitutes an unlawful and unenforceable penalty;
> (b) that, in entering into the Max Amalgamation Agreement containing the Termination Fee and the No-Talk Provision, the Directors of IPC acted in breach of duty and otherwise than in accordance with the constitution of IPC; and
> (c) that, in continuing to act in accordance with the Termination Fee and No-Talk provisions of the Max Amalgamation Agreement, the Directors of IPC continue to act in breach of duty and otherwise than in accordance with the constitution of IPC.

And each reference to "IPC" there is a reference to IPC Holdings.

10. By the action, Validus also seeks an injunction restraining the First or Second Defendants – that is the IPC entities – from making any direct or indirect payment to Max pursuant to the Termination Fee provision, and/or from taking any steps, whether by itself or by its directors, servants, agents or otherwise to give effect to the No-Talk Provision and/or Termination Fee provisions of the Max Amalgamation Agreement. But they have not pursued any injunctive relief on this application.

11. What the Plaintiff seeks on this Application is that there be an expedited trial of the Plaintiff's action herein and that, to that end, it be ordered that –

(a) the Defendants to file their Defence within ten days of the order;

(b) the Plaintiff be at liberty to serve its reply, if so advised, within five days of service of the Defendants' Defence;

(c) the parties shall provide discovery by exchange of list of documents within 10 days of service of the Defendants' Defence;

(d) there be inspection of documents within three days of delivery of the parties' lists of documents;

(e) there be an exchange of witness statements and any expert reports within seven days of the service of the lists of documents;

(f) this matter be listed for trial with an estimated length of hearing of three to five days commencing on the 17th day of June 2009; and

(g) the parties do exchange their skeleton arguments at least two days before the commencement of the trial.

12. The Summons also seeks that that schedule be subject to adjustment in the event that the First Defendant calls a general meeting before 17th June 2009. IPC Holdings has now done just that, announcing on 7th May that it currently proposes to hold that general meeting on 12th June. Validus complains that this is notwithstanding that the Max Amalgamation Agreement contains a long-stop completion date of November 2009. Validus also complains that this was after Validus requested that this matter be expedited to enable a decision to be made before any meeting; after Validus had proposed a timetable with a hearing on 17th June 2009; and after this hearing to determine a timetable for an expedited hearing had been fixed. It asserts that this is an attempt to present the Court with a *fait accompli*.

13. In view of the announcement of the 12th June date, Validus has now proposed a revised timetable that would bring the matter to trial on Monday 8th June 2009, presumably still with an estimate of three to five days, and that timetable would require a Defence by Monday 18th May 2009.

14. In response to all of this, the Defendants point out that the proceedings were first threatened on 8th April 2009, which was the same day that Validus bought its 100 shares in IPC Holdings. The Defendants therefore allege that Validus acquired its IPC shares simply so that it could bring these proceedings and assert that Validus is bringing the proceedings not to vindicate any right that it has as a shareholder but because it wishes to derail the proposed Max/IPC amalgamation. The Defendants say that Validus has done this because it is a disappointed suitor for the hand of IPC, who hopes that by the acquisition of its 100 shares, and by the commencement of these legal proceedings, it can advance its position as a bidder for IPC.

15. While Validus sues in its capacity as a shareholder, the Defendants point out that, as a shareholder, Validus has no real economic interest in the outcome of this litigation, its 100 shares being acquired for less than $3,000. In fact, they assert that the IPC shares were acquired for $2,300; that even if exchanged for Validus shares under the terms of the offer, they are worth less than $3,000; and that, as at close of business on the 7th May 2009, IPC shares were worth approximately $25.43 each, so that Validus's holding was worth only $2,543 as of that date. The Defendants therefore say that these proceedings are an abuse of process.

16. The Defendants also strongly contest the Plaintiff's position on the Termination Fee and the No-Talk provisions on its merits, and they argue that the 100 shares held by Validus do not confer upon them the standing to bring an action of this nature, particularly as Validus are strangers to the contract between IPC Holdings and Max. And, in any event, the Defendants say that it is not necessary for these points to be decided before the meeting, because they have given full disclosure to their shareholders, not only of the existence and import of the challenged provisions, but also of Validus's challenge to them, and they point to their SEC filings in that respect.

17. Against that background, the issue on the summons before me is whether I should order an expedited trial of the Plaintiff's action. In addressing that issue, I accept Mr.

Chivers' submission, which was not contested, that I am exercising, at least in part, the power under RSC Ord. 3, r. 5(1), because I will be shortening the Defendants' time for filing a Defence and the time for the other normal steps in the proceedings. In that respect I have noted the principles set out in the note at 3/5/5 in the Supreme Court Practice, 1999 Edition, and in particular that "where necessary to avoid an injustice time will be abridged; but such orders are rare, except by consent..." I have, therefore, approached the Plaintiff's application by asking whether an expedited trial is necessary to avoid injustice, and that seems to me to import a balancing of the rights and interests of the parties.

18. Although I have been shown some of the law on the main issues that would arise on trial, I am not in a position to express a concluded view on any of them, nor should I attempt to do so on this interlocutory application. I think it fair to say, however, that they are complex, both factually and legally, and there are arguments either way. I think that the correct approach in such a situation is to adopt a modified version of the American Cyanamid approach, used for interlocutory injunctions, and ask myself first if there is a serious question to be tried. If there is, then I go on to consider where the balance of convenience -- which I take to mean the balance of fairness, and ultimately of justice -- lies on the question of an early trial.

19. At this point, I do think that the Plaintiff's statement of claim raises serious questions to be tried, and that includes the question of their standing, to which I will return shortly.

20. In considering the balance of convenience I have balanced the undesirability of undue haste against the realities of the Plaintiff's position. It seems to me that the trial of this matter will be a substantial undertaking, although not necessarily as substantial as Mr. Hildyard contends. That gives rise to a variety of factors for consideration. First, there is simply the difficulty of the task, and the increased expense if it is rushed. This is not an injunction application, and there is no way of extracting an undertaking in damages for the expense and inconvenience the Defendants will be put to in having to prepare for trial in a rush. I simply note, en passant, that the absence of the need for such an undertaking may well have factored into the decision as to the form of this application.

Second, there is the risk that a precipitate trial might be unfair, or slapdash, so that the outcome is unsatisfactory. In that regard I bear in mind the comments of Millett J, as he then was, in MacMillan v Bishopsgate Investment Trust plc & Ors. (No. 3) [1995] 3 All ER 747 at 783. And third, there is the fact that the Defendants are likely to have to carry much of the evidential burden at trial. The factual issues will require little from the Plaintiff, but a great deal from the Defendants, who will be required to devote a considerable amount of corporate effort to the trial at a crucial time for their proposed amalgamation. The Plaintiffs will not be encumbered in the same way and, in any event, have been able to steal a march on the Defendants, not least during the three weeks which intervened between the acquisition of their shares on 8th April and the service of these proceedings on 29th April.

21. I have also taken into account that some, at least, of the need for abridgement is caused by the Defendants' own actions and their own timetable, and in particular the setting of the date of 12th June for the meeting, which may be tactical, and it may be earlier than is really necessary. On the other hand I do take on board the commercial need for certainty, and the points made in respect of the imminence of the hurricane season and the imminence of the reinsurance renewal season. Nor do I think that a short extension of the meeting timetable would do anything to remove or substantially ameliorate the undue compression of the trial timetable. This is particularly so because any extension of the meeting timetable would have to allow not only for the trial itself, but also for sufficient time for the Judge to consider and frame his judgment on what are said to be important and precedent-setting points of law. Nor is that the end of it, for there also has to be sufficient time for the shareholders to be informed of the outcome, to consider their position in the light of it, and deliver their proxies as they think appropriate.

22. As to the issues for trial, at the outset an important one will be the question of the Plaintiff's standing in this personal action to challenge the actions of the Board in its management of the Company's affairs. That raises genuinely difficult issues of Company Law. I neither can nor should attempt to reach a view on those issues at this

stage, but the Defendants make the point that the standing issue is one which would normally be resolved as a preliminary issue, before the parties undertook the expense and trouble of preparing for a real trial, and that is another adjunct of normal process of which they will be deprived by an expedited trial. I can see the force in that argument. The Plaintiff's standing is not so clear that I can simply take it for granted. I think that the Defendants may well be entitled to have that question resolved before rushing to a full trial, and that is incompatible with the sort of expedited timetable sought by the Plaintiff.

23. Quite separate from the issue of standing is whether these proceedings are an abuse of process, being brought for an ulterior or collateral purpose beyond the proper scope of the proceedings. I was referred to the relevant principles as set out in Broxton v McLelland [1995] EMLR 485 at 497 - 498, as modified in Wallis v Valentine [2002] EWCA Civ 1034. Again, I cannot decide that on this application, not least because there is no application asking me to do so. Any decision on the point is going to involve a consideration of what constitutes an improper purpose, and the Plaintiff relies on the statement in Broxton v McLelland that "Motive and intention as such are irrelevant."

24. While I do not have to decide the point now, I do think that motive and intention are factors that I can look at when considering where the balance of convenience lies, and what the interests of justice require in respect of a speedy trial. For this purpose, I think that sufficient can be inferred from the fact that the Plaintiff acquired its shares after the announcement of the proposed amalgamation, and in the full knowledge of its terms. That, coupled with the small size of the holding, tells me that they have no real interest in these issues as personal shareholders, and every interest in them as rival bidders. I do not see why I should bounce the Defendants into an early trial in defence of that interest, not least because the small size of their shareholding means that any loss the Plaintiff may suffer as shareholders is readily compensatable in damages.

25. Against that, the Plaintiff urges me to step in in the interests of all the shareholders. But Validus's claim is not framed as a representative action, and probably never could be, because Validus's interests are different from the interests of the other shareholders. The

mere possession of 100 shares does not divest Validus of its true character as a bidder for IPC Holdings, and the interests of a proposed purchaser are essentially different from the interests of a potential seller: see, for example, In re Hellenic Trust Ltd [1976] 1 WLR 123 at 126, per Templeman J, as he then was. And, as Mr. Hildyard puts it, Validus is a bidder in shareholder's clothing, but it always remains a bidder. It may be that in some cases, in certain factual situations, the interests of a bidder and the shareholders may *de facto* overlap or coincide, but I most certainly cannot say that that is the case here.

26. It is in that context that I attach little or no weight to Validus's submissions when they concern the rights and interests of the other shareholders. The other shareholders will have to consult their own rights and interests when deciding how to proceed in respect of the proposed Max acquisition and Validus's counter-proposals. Validus cannot do that for them, and nor can the court, particularly not on Validus's application. Thus the fact that the way the Max transaction is structured may mean that the shareholders of IPC Holdings do not get the appraisal and buy-out rights conferred by section 106(6) of the Act is only relevant to the extent that it may affect Validus's personal position, and then it is, in financial terms, negligible. Nor do those rights feature at all in the way that Validus's legal action is framed, and I am just asked to throw them in the scales when deciding where the interests of justice lie on this application. For the reason just given, they carry little weight in those scales.

27. It is also said, because such transactions are not regulated in Bermuda, that the courts should be ready to step in and fulfill a regulatory function in cases such as this. But courts are not regulators. In some cases a particular statute may confer a quasi regulatory function upon them, such as when considering a scheme of arrangement or overseeing a liquidation. But that is not this case, and in a writ action, as this is, the function of the court is to decide the rights of the parties before it, and the court should be astute not to go beyond that, and in that regard I have very much in mind Millett J's postscript to his judgment in Re Piccadilly Radio plc [1989] BCLC 683 at 688, where he said:

> "There is a regrettable tendency for the contestants in modern take-over battles to try to enlist the aid of the court. It is gratifying that on this occasion at least the

decision was made by the shareholders and was not affected by the court's decision."

28. Finally, I do accept and understand that if there is not a trial of these issues before the meeting now proposed for 12th June, that they may become moot, depending on the outcome of the meeting. On the other hand, I accept the Defendants' argument that true certainty is not attainable in anything like that timetable, given the possibility of an appeal, should the trial go against the Defendants. I put it that way because the Plaintiff disavows any intention to appeal. But more importantly, Validus, as shareholder, has little need to have these questions answered before the meeting. It knows how it is going to vote, and any loss it may sustain as shareholder is readily compensatable in damages. It is Validus, as bidder, who wants these questions answered.

29. Balancing all of that, I consider that it would be neither reasonable nor fair to force these Defendants to an early trial on the application of this particular Plaintiff. I therefore dismiss the Plaintiff's application for an order that there be an expedited trial of its action.

Dated the 13th day of May 2009

Richard Ground
Chief Justice