In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 272

BETWEEN:

ATHENE HOLDING LTD.

Plaintiff

-and-

CENTRAL LABORERS' PENSION FUND

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Kevin Taylor and Mr Benjamin McCosker, Walkers (Bermuda) Limited, for the Plaintiff**

Date of Hearing: **5 July 2019**

Date of Ruling: **5 July 2019**

RULING
(Extempore)

Introduction

1. This is the ex parte hearing of two applications by Athene Holding Ltd. ("the Company" or "Athene"), in proceedings where the Defendant is a shareholder of Athene, the Central Laborers' Pension Fund ("CLPF").

2. The two applications are: first, an interim anti-suit injunction restraining the Defendant from taking any further steps to advance or otherwise positively

participate in the proceedings it has commenced derivatively on behalf of Athene in the Supreme Court of the State of New York, County of New York, save that the Defendant be required to take steps as soon as reasonably possible to obtain a stay of those proceedings, pending the hearing of Athene's application before this Court for a permanent injunction.

3. The second application is that Athene be given leave to serve a Concurrent Originating Summons in these proceedings on the Defendant out of the jurisdiction pursuant to Order 11, Rules 1(1)(d) and (ff) of the Rules of the Supreme Court 1985.

The Background

4. The background facts are that the Bye-Laws of the Company contain an exclusive jurisdiction clause in relation to certain disputes, and that particular provision is Bye-Law 84, which provides that:

> "In the event that any dispute arises concerning the Act, (the Companies Act 1981), or out of or in connection with these Bye-Laws, including any questions regarding the existence and scope of any Bye-Law, and whether there has been any breach of the Act of these Bye-Laws by an officer or director, whether or not such a claim is brought in the name of a shareholder, or in the name of a Company, any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda."

5. Clearly, Bye-Law 84 contains an exclusive jurisdiction clause in relation to the subject matter, which is set out therein, and it binds the parties who are bound by the Bye-Laws generally. As was submitted, correctly in my view, Bye-Laws, under the Bermuda Companies Act 1981, constitute a multilateral contract between on the one hand, the company and shareholders, and secondly, as a contract between the shareholders inter se.
6. The contractual position is set out in Section 16 of the Bermuda Companies Act 1981, which reflects the earlier English statutory provisions. It appeared in the

English Companies Act 1948 in identical terms. Section 16 provides that subject to this Act, the memorandum of association, when registered, and the Bye-Laws, when approved, shall bind the company and the members thereof to the same extent as if they respectively have been signed and sealed by each member and contain a covenant on the part of each member to observe all the provision of the memorandum and the Bye-Laws.

7. The effect of this multilateral contract is confirmed by the English authority of *Hickman v Kent or Romney Sheep-Breeders' Association* [1915] 1 Ch 881. Despite the existence of the exclusive jurisdiction clause in Bye-Law 84, one of the shareholders, CLPF, has commenced proceedings by filing a complaint in the Supreme Court of the State of New York against two US corporations alleging certain breaches of duties (the "Complaint"). The action is on a derivative basis and it is said that the Company is added as a party in a nominal capacity. It is assumed that it is added as a nominal defendant so that any benefit of the judgement can be given to the Company and that the Company is bound by any findings made in that litigation. It also means that the Company may be bound to provide discovery or disclosure in relation to the derivative proceedings.

8. The Complaint is exhibited to the affidavit of Mr Beilinson. The defendants in the New York action are Athene Asset Management, ("AAM") and Apollo Global Management LLC ("Apollo"); one of them is party to the Investment Management Agreement ("IMA"), and the other one is a major shareholder. A striking feature of the New York proceedings is that despite the fact that serious allegations are made in the Complaint against the directors of Athene (the "Directors"), the Directors are not added as defendants in the New York proceedings.

9. The underlying allegation which is made in the Complaint is set out in paragraph 3, where it is said that the defendants, at the instigation of Apollo, which has de facto voting control of Athene, and Belardi, who make Athene's investment decisions, and with acquiescence of the breaches of fiduciary duties by Athene's board, Athene entered into extravagantly expensive IMAs, pursuant to

which AAM provides Athene with asset and management services. It is also alleged that Athene has entered into an extravagantly expensive Master Sub Adviser Agreement with Apollo ("MSAA"), pursuant to which Apollo provided certain investment and management services.

10. The Complaint confirms under the section headed "Parties" that the plaintiff, CLPF, is a shareholder, as is said to be Apollo. It is said that Apollo, with its affiliate companies, constitutes 45 per cent of Athene's shareholding voting power. The Complaint also has a section dealing with Non-Party Directors of Athene, where it appears that all the Directors are cited; their position is noted; their appointments are set out; the extent of their shareholding is set-out; and their present addresses are set out. It is specifically pointed out that these are non-party Athene Directors.

11. From paragraph 86 onwards of the Complaint, there are specific allegations made against the Directors. It is said at paragraph 86:

> *"Each of the Athene Directors has a fiduciary relationship with Athene and as a result, owes the company the highest duty of good faith, honesty, fair dealing, reasonable skill and care and loyalty."*
>
> *"87. The Athene Directors breached their fiduciary duties and failed to safeguard the best interests of Athene, first as set forth above, the asset management fees and sub-advisory fees that Athene pays AAM and Apollo, under the respective IMAs and MSAA, were multiples over what would be charged by entities unaffiliated by Apollo, Belardi or Rowan for similar services, and therefore unreasonable and unfair to Athene. The Athene Directors breached their fiduciary duties in approving the IMAs and MSAA."*

So, it will be seen that in paragraph 87 there are allegations of positive wrongdoing on the part of the Directors.

12. In paragraph 88 of the Complaint it is said:

> *"Second, as set forth above, the Athene Directors approved amendments to the Bye-Laws that made it a practical impossibility for Athene to terminate the IMAs while granting AAM an unfettered right to terminate."*

Again, positive actions of wrong-doing are alleged on the part of the Directors in paragraph 88.

13. Paragraph 89 of the Complaint alleges:

> "*Third, as set forth above, the Athene Directors never exercised their right to attempt to force AAM or Apollo to lower their asset management and sub-advisory fees so as to terminate the IMAs and MSAA. By failing to avail themselves of the IMA termination notice process or to terminate the IMAs or MSAA, the Athene Directors breached their fiduciary duties."*

14. So, it can be seen that paragraphs 86 to 89 set out, in a detailed way, what it is said that the Directors have done wrong. Paragraph 90 makes it clear that this is a derivative action. As for the causes of action: Count 1 pleads dishonest assistance in breach of fiduciary duties at paragraphs 97 to 108. The point to note is that the dishonest assistance is in relation to the principal cause of action of breach of fiduciary duty. The principal cause of action, the underlying cause of action, is the breach of fiduciary duty by the Directors owed to the Company, and what is being said is that as far as Apollo and AAM are concerned, they are legally responsible, because they have assisted in the breach of that fiduciary duty committed by the Directors of Athene.

15. Count 2 deals with knowing receipt of sums paid as a result of the Directors' breach of fiduciary duty. Again, the principal underlying cause of action is the breach of fiduciary duty by the Directors and the liability against Apollo and AAM is said to be affixed to them on the basis that they have knowingly received sums paid as a result of that breach.

16. Count 3 deals with a conspiracy to injure by unlawful means. Paragraph 121 of the Complaint says that:

> *"Notice is given, under the procedural rules of New York Court, that the plaintiff hereby gives notice of its intent to raise issues under Bermuda Law, including but not limited to laws governing the fiduciary duties owed by Athene Directors to Athene and their breach of such duties; defendants' knowing and dishonest assistance in those breaches of fiduciary duties; defendants' knowing receipt of sums paid by Athene as a result of Athene's Directors' breach of fiduciary duties; and the defendants' combination and conspiracy to injure Athene by unlawful means."*

Paragraph 121 shows that to a large extent, the focus of the proceedings is the breach of the fiduciary duties committed by the Directors and secondly, that breach is to be determined by reference to Bermuda Law. Then, under "Relief", paragraph A, seeks a declaration that the Athene Directors breached their fiduciary duties owed to the Company. So, the end result is that in the New York proceedings, the plaintiff is seeking a declaration from the New York Court that the Directors have breached their fiduciary duties owed to Athene, but somewhat unusually, the Directors are not parties to the New York proceedings.

Service Out

17. With this background, I turn to the two applications: in relation to the application to serve out, I accept the general submission that the Court has to be satisfied that there is a serious issue which is reasonable to be tried on the merits, i.e., a substantial question of fact or law or both; secondly, that there is a good arguable case that the Plaintiff's claim, made in the originating summons, falls within one of the jurisdictional gateways; thirdly, that in all the circumstances, Bermuda is clearly and distinctly the appropriate forum for the trial of the dispute.

18. The first requirement is whether there is a serious issue to be tried on the merits, and what one has to show is that there is a realistic, as opposed to a fanciful prospect of success. A realistic claim is one that carries some degree of conviction. Accordingly, the issue is what are the prospects of obtaining an injunction in these proceedings; and in relation to that, one of the first issues would be whether CLPF is bound by Bye-Law 84, which contains the exclusive jurisdiction clause.

19. Whilst there are interesting cases as to in what circumstances directors can be bound by Bye-Law provisions, the position in relation to shareholders is reasonably straightforward. It is not doubted that the shareholders are bound by the bye-laws which is the direct effect of Section 16 of the Companies Act 1981. Accordingly it must necessarily follow that the CLPF, as indeed any other shareholder, is bound by the exclusive jurisdiction clause contained in Bye-Law 84.

20. The real issue in this case is not likely to be whether CLPF is bound by Bye-Law 84, but rather what is the scope of Bye-Law 84 and in particular, whether the proceedings which are being pursued in New York are in breach of the exclusive jurisdiction clause in Bye-Law 84. On the face of it, it is my view at this stage and subject to any further argument on an inter-partes hearing, that the subject matter of the New York proceedings does indeed fall foul of the exclusive jurisdiction clause in Bye-Law 84.

21. The proceedings in New York start at their foundation with the claim that the Directors of the Company have committed breaches of fiduciary duties which are owed to the Company. That, in my view, is clearly the subject matter of Bye-Law 84. Bye-Law 84 specifically says that any claims relating to breaches of fiduciary duties of the Directors must be pursued in the exclusive jurisdiction of the Supreme Court of Bermuda.

22. As noted above, the plaintiff in the New York proceedings actually seeks a declaration that the Directors of Athene have breached their fiduciary duties to the

Company. In those circumstances, at this stage, I am satisfied that the essential subject matter of the New York proceedings is something which needs to be pursued in Bermuda in accordance with the mandatory conditions of the exclusive jurisdiction clause.

23. The fact that the Directors have not been made party to the proceedings in New York, in my judgement, at this stage at any rate, is not determinative. What one needs to look at is the essential subject matter of the New York proceedings and if one looks at the essential subject matter of the proceedings, they are derivative proceedings brought against two New York entities, where the Company is added as a nominal defendant. But the central allegation, the basis of the New York proceedings, is that the Directors have committed breaches of their fiduciary duty owed to the Company. If that essential element is taken out, there is no case to proceed in New York. So it seems to me, that the exclusive jurisdiction clause which binds CLPF, required CLPF to bring the proceedings in the Supreme Court of Bermuda.

24. The second requirement is the jurisdictional gateway. I am satisfied that this case falls within the jurisdictional gateway allowed under Order 11. Specifically, in my judgement, the present proceedings commenced by the originating summons, come within Order 11, Rule 1(1)(d)(iii), which provides that:

> *"The claim is brought to enforce, rescind, dissolve, annul or otherwise effect a contract or to recover damages to obtain other relief. In respect of the breach of contract being in either case a contract which is, by its terms or by implication, governed by the law of Bermuda."*

25. The Bye-Laws of a Bermuda company, which are specifically governed by the Companies Act 1981 must, by necessity, be governed by the laws of Bermuda. I accept that in exceptional circumstances, Bye-Laws may, by express terms, provide that they are governed by a different law. But in the absence of an express governing law to the contrary it must be the case that the implied choice of law in relation to Bye-Laws must be the laws of Bermuda.

26. Secondly, the action comes within Order 11, Rule 1(1)(d)(iv), that the contract contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract. That applies here because that is the effect of the express terms contained in Bye-Law 84.

27. Thirdly, I also take the view that this case comes within Order 11, Rule 1(1)(ff), that is:

> *"The claim is brought against a person who is a director, officer, or member of a company registered within the jurisdiction."*

CLPF is a member of a company which is registered within the jurisdiction.

28. The third requirement is that Bermuda is the appropriate forum for the trial of the dispute. In my view, if one takes the position, as I do at this stage, without having the benefit of inter-partes argument, that Bye-Law 84 containing the exclusive jurisdiction clause is operative, then in those circumstances Bermuda is clearly the appropriate forum for the trial of the dispute.

29. The fourth requirement is the evidentiary requirement, namely that has the Plaintiff in the Bermuda proceedings confirmed that this is an appropriate case, a good case, where the court should give leave to serve out. I see that Mr Beilinson, in paragraph 20 of his affidavit, has confirmed that. So, in those circumstances, my ruling is that I do give leave to the Plaintiff to serve the originating summons upon CLPF as sought in the ex parte summons.

Interim Anti-Suit Injunction

30. I now turn to the second application, which is the application for an interim anti-suit injunction. I accept that in relation to this area of the law, one needs to have in mind the different principles which apply in relation to an injunction in aid of contractual provisions and other situations where a party is seeking an anti-suit injunction based upon equitable considerations, i.e. where the party is alleging that the conduct of the other party is vexatious or unconscionable.

31. In relation to contractual provisions, such as arbitration agreements, whereby the parties agree that the disputes are to be resolved by way of arbitration or exclusive jurisdiction clauses, where the parties agree that in relation to any future dispute, the dispute would be resolved in a particular jurisdiction, the practice of the Court is that the Court, in the ordinary course, seeks to give effect to the contractual agreement of the parties. The fact that one of the parties has breached that agreement is itself unconscionable, and in the ordinary case, the Court will enjoin that party from breaching the contractual bargain. There are a number of cases in this jurisdiction dealing with arbitration agreements where the Court, as a matter of course, has granted an injunction, restraining the other party, from commencing court proceedings, either in this jurisdiction or in a foreign jurisdiction, in breach of its contractual obligation contained in the arbitration agreement. The same analysis applies in relation to exclusive jurisdiction clauses.

32. The technical requirements of an injunction have to be complied with. I accept that in order to grant such an injunction, the defendant must be subject to the jurisdiction of the Bermuda Court and, as I said in argument, this requirement can be misunderstood. It does not require that the defendant must be present within the jurisdiction; it is simply a requirement that service can be effected on that particular defendant. In this case, the defendant is subject to the exclusive jurisdiction clause contractual obligation and I have already given leave to serve outside the jurisdiction. So in those circumstances, I accept that this particular requirement has been satisfied.

33. The second requirement is that Bermuda is the natural forum for the determination of the matters in issue. Given that there is an exclusive jurisdiction

clause, which is binding on CLPF and covers the particular proceedings which are pending in New York, I do take that view, subject to hearing contrary argument at any inter-partes hearing, that Bermuda is clearly the natural forum.

34. The third issue is that the conduct of the defendant, which is sought to be restrained, must be unconscionable, vexatious or oppressive. A number of authorities decided in the Bermuda Court have held that a breach of an arbitration agreement by a party is indeed unconscionable conduct warranting the grant of an anti-suit injunction. I have in mind the judgement of Bell J in *Bermuda Insurance v Peers Pederson as Plan Trustees for the Estates of Boston Chicken Inc* [2005] Bda LR 44, and a number of other cases. In the context of breach of a contractual obligation, either an arbitration agreement or an exclusive jurisdiction clause, the fact of breach itself is sufficient and in those circumstances, I am satisfied that this is an appropriate case.

35. The second requirement is forum conveniens. Again, in the context of an exclusive jurisdiction clause, it can only lead to one answer.

36. There remains the final point as to how one should exercise the residual discretion. Even when the Court is satisfied that all the essential criteria have been satisfied, there is still residual discretion on the part of the court not to grant the relief in exceptional circumstances.

37. This has been recognised by the Bermuda Court of Appeal in *IPOC International Growth Fund Ltd v LV Finance Group* [2007] Bda LR 43, the judgement given by Sir Murray Stuart-Smith, and the Supreme Court decision in *Donohue v Armco Inc* [2002] CLC 440, and they stand for the proposition that if there is a likelihood that the foreign proceedings may continue, despite the grant of the injunction in Bermuda, and that there is a realistic risk that two courts might be asked to make findings in relation to similar issues and may result in inconsistent rulings in relation to those issues, then the court has to seriously consider whether the grant of the injunction is appropriate in those circumstances.

38. In this context, I was concerned to see whether it was possible to constitute the New York proceedings, presently pending New York proceedings, in Bermuda. In other words, whether it was possible to get to a situation where all the parties, who are parties to the New York proceedings, could appropriately be parties in any similar proceedings in Bermuda and that specifically applies to AAM and Apollo, which are not Bermuda Companies and are not subject to process in Bermuda.

39. On reflection and again, subject to of course any further argument on an inter-partes hearing, I believe that can be achieved. One route, which again was discussed in argument, would be to serve the Directors of Athene with derivative proceedings. Certainly in Bermuda, if serious allegations were made against the Directors and it was alleged that the Directors had breached their fiduciary duty to the Company and the plaintiff was seeking a declaration to that effect, it would be a requirement that the Directors be added as parties. Assuming that the Directors are added to the Bermuda proceedings, the Directors can of course be served on the basis that they are Directors, under Order 11, Rule 1(1)(ff).

40. The fact that they are served outside the jurisdiction is not an impediment for the operation of the further sub-rule, that is the Order 11, Rule 1(1)(c) under which once the Directors have been served, or it is confirmed that they will be served in due course, then Apollo and AAM could be served out on the basis that they are necessary or proper parties to the proceedings. In the circumstances, I am satisfied that there is no special reason why I should not exercise my discretion to grant the anti-suit injunction in support of the exclusive jurisdiction clause set out in Bye-Law 84.

41. In conclusion, I grant the relief which is set out in paragraph 1 of the written submissions, relating to the interim anti-suit injunction and in relation to the service of the concurrent originating summons outside the jurisdiction, and I do so in terms of the ex parte summons.

Dated 5 July 2019

NARINDER K HARGUN

CHIEF JUSTICE