In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2021: No. 59

BETWEEN:

ALLIED WORLD ASSURANCE COMPANY LTD.

Plaintiff

- and -

BLOOMIN' BRANDS, INC.
(a Delaware corporation)

Defendant

RULING

Ex Parte Summons - Insurance Company – Insurance Policy - Bermuda Arbitration and Choice of Law - Nevada Proceedings – Anti-Suit Injunction - Preventing Anti-suit and/or Anti-anti-suit Injunction – Leave to Serve out of the Jurisdiction

Date of Hearing: **24 February 2021**
Date of Ruling: **3 March 2021**

__Appearances__: **Lewis Preston, Kennedys Chudleigh Ltd., for the Plaintiff *ex parte***

RULING of Mussenden J

Introduction

1. This matter came before me on the Plaintiff's ("Allied World") *ex parte* application (a) for an interlocutory injunction to restrain the Defendant from proceeding with an action in Nevada, USA ("the Nevada Proceeding") and (b) related relief for leave to issue and serve these proceedings including Allied World's Originating Summons out of the jurisdiction. The basis of the application is that the Nevada Proceeding is in breach of the arbitration clause in an insurance policy between them. The applications are supported by the First Affidavit of Scott Coppinger sworn on 23 February 2021 together with its Exhibit SC-1. After hearing full argument from Mr. Preston for the Plaintiff, I granted the applications and promised reasons which I now give.

2. The Plaintiff is an exempted company incorporated in Bermuda and registered in Bermuda as a "Class 4" insurer with its registered office in Hamilton, Bermuda.

3. The Defendant is a Delaware company with its headquarters in Tampa, Florida, which according to the Complaint in the Nevada Proceeding, owns and/or operates more than 1,450 restaurants worldwide and has approximately 93,000 employees.

4. In the course of the Plaintiff's business, in an insurance policy effective for the period 31 December 2019 to 31 December 2020, it insured the Defendant for various risks in exchange for the Defendant's obligation to pay a premium ("the Allied World Policy"). That policy was specifically endorsed on 30 December 2019 to include the Bermuda Arbitration Agreement, by virtue of Endorsement 20.

5. The material parts of the Bermuda Arbitration Agreement set out as follows: *"(1) Bermuda Arbitration - Any and all disputes arising under or relating to this Policy, including but not limited to, its formation and validity, shall be finally and fully determined in Hamilton, Bermuda under the provisions of the Bermuda International Conciliation and Arbitration Act 1993 (exclusive of the Conciliation Part of such Act), as may be amended and*

supplemented, by a Board composed of three arbitrators…" and *"(2) Choice of Law - This Policy shall be construed in accordance with the laws of England and Wales (with the exception of the procedural law required by paragraph 1. of this Endorsement which shall be construed in accordance with the laws of Bermuda) …"*

The Nevada Proceeding

6. On 12 February 2021 the Defendant commenced the Nevada Proceeding by filing a Complaint and Jury Demand in the District Court of Clark County, in Nevada, USA against various insurers including the Plaintiff. The Complaint has not yet been served on the Plaintiff but the Defendant may take steps to effect service by way of service on the Nevada Commissioner of Insurance.[1] The Complaint concerns the Defendant's claims against its insurers in respect of business interruption losses that it alleges it incurred at its restaurants as a result of the Covid-19 pandemic. It seeks declaratory relief and damages based on various causes of action including breach of contract, breach of an alleged covenant of good faith and fair dealing and violations of the Nevada Unfair Claims Practices Act. The relief sought includes, among other relief, declaratory relief, damages, punitive damages, exemplary damages and treble damages with the matter being heard before a jury.

7. The Plaintiff submits that by commencing the Nevada Proceeding against Allied World and indicating the intention to effect service, the Defendant has acted, and continues to act, in breach of the Allied World Policy and the Bermuda Arbitration Agreement on various grounds: (a) The Bermuda Arbitration Agreement constitutes a clear, binding and valid arbitration agreement between Allied World and the defendant; (b) The Defendant has not explained in their Complaint in the Nevada proceeding why they might be entitled to ignore the Bermuda Arbitration Agreement whether as a matter of Bermuda law, English law or any other law which they might suggest applies; (c) The Defendant has not sought to challenge the validity of the Allied World Policy, or any of its endorsements. On the contrary, the Defendant is purporting to enforce the Allied World Policy in the Nevada

[1] The Plaintiff submits that such service is not in conformance with the requirements of the Hague Convention, which applies to Allied World as an entity domiciled in Bermuda.

Proceeding; (d) Any disputes which have arisen between the Defendant and Allied World plainly fall within the scope of the Bermuda Arbitration Agreement in the Allied World Policy; (e) The Defendant has sought to avoid serving the Plaintiff out of the jurisdiction in Bermuda pursuant to the Hague Convention; and (f) The commencement and pursuit of the Nevada Proceeding by the Defendant is in breach of the Bermuda Arbitration Agreement. The Plaintiff submits that there is a good arguable case to this effect.

8. The Plaintiff also submits that the Defendant's commencement of the Nevada Proceeding is unconscionable, oppressive and/or vexatious because of the breach of the Bermuda Arbitration Agreement and because the Defendant appears to be engaged in forum-shopping as the Defendant is headquartered in Florida and incorporated in Delaware with no particular substantial link to Nevada[2]. The Plaintiff submits that as US Courts and English Courts are grappling with the issue of whether Covid-19 constitutes an insurable risk under various business insurance policies, it may be inferred that the Defendant considers the emerging case law of the Nevadan Courts to be favourable to it.

The Legal Principles for an Anti-Suit Injunction

9. The Court has jurisdiction to grant an anti-suit injunction pursuant to its inherent jurisdiction, and/or section 19(c) of the Supreme Court Act 1905, and/or section 35(5)(e) of the Bermuda Conciliation and Arbitration Act 1993, and/or RSC Order 29.

10. The general powers of the Court to grant an interlocutory injunction are stated in section 19(c) of the Supreme Court Act 1905.

> "*…an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to* ***be just or convenient that*** *such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just…*"

[2] Although the Plaintiff did note that the Defendant asserts in its Complaint that it has substantial insured properties and business interests in Nevada, this appears to be the case across the USA

11. Counsel for the Plaintiff cited a list of cases in how the legal principles applicable to anti-suit injunctions had become settled in Bermuda. The cited cases included *International Risk Management Group Limited v Elmwood Insurance Limited and others* [1993] Civil Jurisdiction Nos 103 and 245; *Skandia International Insurance Company and others v Al Amana Insurance and Reinsurance Company Limited* [1993] Civil Jurisdiction No 381; *ACE Bermuda Insurance Ltd. v Continental Casualty Co* [2007] Bda LR 12; *ACE Bermuda Insurance Ltd. V Continental Casualty Co* [2007] Bda LR 38; *Starr Excess Liability Insurance Company v General Reinsurance Corp* [2007] Bda LR 34; *IPOC International Growth Fund Ltd v OAO "CT-Mobile"* [2007] Bda LR 43; and *Carnival Corporation v Estibeiro* [2013] Bda LR 20.

12. In *Apex Fund Services Ltd and Peter Hughes v Matthew Clingerman (as Receiver) and Silk Road Funds Limited* [2019] SC (Bda) 74 Com Subair Williams J relied on extensive passages from some of those cases in setting out the legal principles in respect of applications for anti-suit injunctions. Subair Williams J stated:

> *"115. Applying the approach of Millett, LJ in The Angelic Grace [1995] 1 Lloyd's Rep 87 at 96, as approved by Stuart-Smith JA of the Bermuda Court of Appeal* in *IPOC*[3] *: If the Plaintiffs could establish a contractual right under the Administration Agreement to an anti-suit injunction, then there would be no good reason for diffidence in granting an injunction to restrain the New York proceedings."*

13. In the recent case of *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm), Cockerill J stated:

> *"38. As to the general principles governing anti-suit relief, the following statements were essentially common ground:*

[3] IPOC International Growth Fund Ltd v OAO "CT-Mobile" [2007] Bda LR 43

i) The Court has the power to grant an interim injunction "in all cases in which it appears to the court to be just and convenient to do so": section37 (1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).

ii) The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.

iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).

iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871, 892E per Lord Goff.

v) As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: "The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection."

vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39]. [emphasis added] *The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003] 1 Lloyd's Rep 267 and has been recently affirmed on the*

high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.

vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.

viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham."

14. In respect of the Court exercising its discretion to secure compliance with the contractual bargain, in *Donohue v Armco* [2002] 1 All ER 749 Lord Bingham stated:

> *"24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."*

15. Also, in respect of the Court protecting the integrity of a contractual bargain reached between the parties, in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm), Jacobs J stated:

> *"36. … the starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties. This is, in my view, one reason why "strong reasons" are and should be required once the court is satisfied, to a high degree of probability, that there is a valid English jurisdiction clause to which the parties have agreed."*

16. In respect of determining what is a 'strong reason' Lord Bingham endorsed the list of matters to be considered given by Brandon J's judgment in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242:

> *"The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion, the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4) the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether plaintiffs would be prejudiced by having to sue in the foreign Court because they would, (i)*

> *be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."*

17. In *ACE Bermuda Insurance Ltd. v Continental Casualty Company and Continental Insurance Company* [2007] SC (Bda) 12 Com, Ground CJ stated:

> *"8. As to the claim for an injunction, when it comes to enforcing an arbitration clause by anti-suit injunction the courts will act robustly: See The Angelic Grace [1995] 1 Lloyds Rep.*
>
> *9. In order to justify an anti-suit injunction at this stage the test is higher than the balance of convenience. The plaintiff has to show "a prima facie case that it would indeed be unconscionable and unjust" if it were subjected to this action: …"*

18. In *Carnival Corporation and others v Alexio Estibeiro* [2013] Bda LR 20 Kawaley CJ stated:

> *"17. Finally I should explain briefly why I decided to grant the injunction sought. It is really trite law that where a party has contracted to have their disputes resolved in a particular forum or by a particular means such as arbitration, it is regarded as unconscionable for a party to seek relief which falls within the arbitration clause or exclusive jurisdiction clause otherwise than from the contractually agreed tribunal."*

19. In respect of granting an injunction restraining a Defendant from pursuing proceedings in a foreign court, in the case *The Angelic Grace* [1995] 1 Lloyds's Rep 87 Millett LJ stated:

> *"96L. 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…*

96R. We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the Defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the Plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can safely be left to the Italian Court to grant the Plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign court may wrongly assume jurisdiction despite the Plaintiffs, but on the surer ground that the Defendant promised not to put the Plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the Plaintiff of its contractual rights altogether.

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as ... The justification for the grant of the injunction in either case is that without it the Plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

20. In respect of damages being an inadequate remedy, in *Continental Bank v Aekos* [1994] 1 WLR 588 at 598, Steyn LJ stated at 598:

> *"In our view the decisive matter is that the bank applied for the injunction to restrain the defendant's clear breach of contract. In the circumstances, a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the appellants' breach of contract. If the injunction is set aside, the appellants will persist in their breach of contract, and the bank's legal rights as enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case for the grant of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the defendants. The judge exercised his discretion properly."*

Analysis – Applicability of the legal principles

21. The Plaintiff submits that the applications for anti-suit relief is self-explanatory and straightforward. Further, the claim against it in the Nevada Proceedings is subject to the Bermuda Arbitration Agreement in the Allied World Policy and there can be no dispute that the Bermuda Arbitration Agreement forms part of the Allied World Policy and is prima facie valid and binding as the Defendant itself has exhibited the Allied World Policy including the Bermuda Arbitration Agreement to its Complaint. Therefore, the Court ought to exercise its discretion to grant an anti-suit injunction unless the Defendant can show strong reasons for proceeding in Nevada.

22. I recognize that this is an interlocutory application and that I have only heard one side. However, in light of the circumstances, the Allied World Policy and the Endorsement of the Bermuda Arbitration Agreement I am of the view that it is appropriate to grant the application for an anti-suit injunction for several reasons.

23. First, the initial important question is whether the Plaintiff has established, to a high degree of probability, that there is an arbitration agreement which governs the dispute in question. Upon a review of the Allied World Policy and the Bermuda Arbitration Agreement, per the standard of proof required in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* I am satisfied that there is a high degree of probability that there is such an arbitration agreement which governs the dispute in question. Also, it appears to me that as set out in *Donohue v Armco* applying the general rule, the Plaintiff and Defendant have indeed bound themselves by an exclusive jurisdiction clause, namely the Bermuda Arbitration Agreement. I am fortified in this view in that the Defendant in the Nevada Proceeding has exhibited the Allied World Policy including the Bermuda Arbitration Agreement to its Complaint. On that basis I am inclined to agree that the Bermuda Arbitration Agreement is prima facie valid and binding.

24. Second, the commencement and pursuit of the Nevada Proceeding is contrary to the Defendant's promise under the Allied World Policy to resolve disputes only by way of arbitration governed by English law. In following *The Angelic Grace* per Millett LJ at 96R, permitting the Defendant to pursue the Nevada Proceeding will deprive the Plaintiff of its contractual rights in a situation in which damages are manifestly an inadequate remedy. Further, following Steyn LJ in *Continental Bank v Aekos*, a claim for damages for breach of contract would be a relatively ineffective remedy. If the injunction is not granted, then the Defendant is likely to pursue the Nevada Proceeding continuing their breach of contract and the Plaintiff's rights as set out in the Bermuda Arbitration Agreement will prove to be valueless. Similar to Steyn LJ in *Continental Bank v Aekos* I am of the view that the pursuit of the Nevada Proceeding will amount to vexatious and oppressive conduct.

25. Third, I am bound to consider whether there are any strong reasons why the Defendant should be permitted to pursue the Nevada Proceeding. In assessing the criteria set out by Brandon J in *The Eleftheria*, again I recognize that I have only heard one from one side. However, the Plaintiff submits that there are no reasons let alone strong reasons. In their duty of full and frank disclosure, the Plaintiff submits that the Defendant may argue that the Bermuda Arbitration Agreement is invalid as a matter of Nevada law but counters that

argument by submitting that provisions of Nevada law are irrelevant given the parties' express choice as to the governing law of the Bermuda Arbitration Agreement. In light of the evidence before me, at this stage of my assessment, I am not able to identify any strong reasons why the Defendant should be permitted to pursue the Nevada Proceeding.

26. Fourth, the Defendant has not yet served the Plaintiff with the Complaint although it has considered effecting service by way of service on the Nevada Commissioner of Insurance. In following *The Angelic Grace* per Millett LJ at 96R, it is clear that the Plaintiffs have acted promptly and the Nevada Proceeding is not at an advanced stage.

27. Fifth, in respect of any contention that the Plaintiff should have to appear in and litigate matters in the Nevada Proceeding, similar to the view of Millett LJ in *The Angelic Grace*, I also find that proposition to be unattractive on the surer ground that the Defendant, by way of the endorsement of the Bermuda Arbitration Agreement, promised not to put the Plaintiff to the expense and trouble of applying to that Court at all. On that basis, the grant of an anti-suit injunction would support the Plaintiff in not having to engage in the time, resource and expense of litigating in the Nevada Proceeding.

28. Sixth – Full and Frank Disclosure - The legal principles of full and frank disclosure were set out in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* where Jacobs J stated:

> *"78. The duty of full and frank disclosure that without notice applications imply was summarized by Lawrence Collins J. in Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, at [180] as follows:*
>
> > *"On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: Brink's Mat Ltd v*

Elcombe [1988] 1 WLR 1350 ,1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

79. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it: see Toulson J in MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm), at [25].

80. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable. Thus, in OJSC ANK Yugraneft v Sibir Energy [2008] EWHC 2614 (Ch), Christopher Clarke J. said at [106]:

"As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose.""

29. The Plaintiff made submissions in respect of their duty of full and frank disclosure including: (a) it is difficult to conceive of any argument as to why the anti-suit injunction should not be granted given the terms of the Bermuda Arbitration Agreement; (b) as stated above, the Bermuda Arbitration Agreement may be invalid as a matter of Nevada law; (c) the ex parte application may not be appropriate but countered that with the submission that in light of all the circumstances the risks justify such an approach. The Plaintiff submitted that it was difficult to see what prejudice would be suffered by the Defendant if an injunction was granted to a return date compared to that which would befall Allied World

if the Defendant obtained an anti-anti-suit Temporary Restraining Order (TRO) from the Nevada Court; and (d) it may be necessary based on some circumstances for Allied World to seek to remove the Nevada Proceeding to the United States Federal Court.

30. I have considered the submissions made in full and frank disclosure. As stated previously, I have only heard one side. At this point of my assessment, the full and frank disclosure has not undermined my views in respect of granting the application for an anti-suit injunction in respect of the Nevada Proceeding.

Summary – Anti-Suit Injunction

31. In summary, in light of all the circumstances set out above in consideration of what protection this Court is being asked to give, I am guided by the case of *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* where the starting point is to act to protect the integrity of a contractual bargain reached between the parties. Also, in following *ACE Bermuda Insurance Ltd. v Continental Casualty Company and Continental Insurance Company* where it cited *The Angelic Grace* about acting robustly, I am satisfied that this Court should act robustly in granting the application for an anti-suit injunction.

32. I find that the Plaintiff has made out a strong prima facie case that it would be unconscionable and unjust for it to be subjected to the Nevada Proceeding and also that it is no doubt contrary to public policy. This is on the basis that the Plaintiff and Defendant have expressly agreed that in the event of a dispute, such dispute should be determined by a Bermuda arbitration, and where there is no question that if the Defendant were not to be restrained, the dispute between them would be determined by the Nevada Court in the Nevada Proceeding.

Leave to serve out of the Jurisdiction

33. The Plaintiff has applied for leave to serve the Defendant out of the jurisdiction.

34. Rules of the Supreme Court (RSC) Order 11, rule 1(1)(d) provides that service out of the jurisdiction is permissible with the leave of the Court if, in the action:

> *"the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—*
>
> *(i) was made within the jurisdiction, or*
>
> *(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or*
>
> *(iii) is by its terms, or by implication, governed by the law of Bermuda, or*
>
> *(iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract;*

35. RSC Order 73, rule 7 provides

> *(1) Subject to paragraph (1A), service out of the jurisdiction of—*
>
> *(a) any originating summons or notice of originating motion under the Arbitration Act 1986 or the Bermuda International Conciliation and Arbitration Act 1993, or*
>
> *(b) any order made on such a summons or motion as aforesaid,*
>
> *is permissible with the leave of the Court provided that the arbitration to which the summons, motion or order relates is governed by the law of Bermuda or has been, is being, or is to be held within the jurisdiction.*

(1A) Service out of the jurisdiction of an originating summons for leave to enforce an award is permissible with the leave of the Court whether or not the arbitration is governed by the law of Bermuda.

36. In *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 Lord Mance stated:

"50.. In circumstances where an arbitration claim includes under CPR62.2(d) "any other application affecting (i) arbitration proceedings (whether started or not); or (ii) an arbitration agreement", the requirement in CPR62.5(c)(ii) that "the seat of the arbitration is or will be within the jurisdiction" must be read as satisfied if the seat of any arbitration, if any were to be commenced or proposed under the arbitration agreement, would be within the jurisdiction"…

"51. I add only that in the present case, although leave was in fact obtained under CPR PD 6B, paragraph 3.1(2) and CPR62.5(1)(b) and (c), the court would appear also to have had jurisdiction to give leave for service out of the jurisdiction under CPR PD 6B(6)(c), on the ground that, treating the arbitration agreement as the "contract", the claim was "made in respect of a contract where the contract …. (c) is governed by English law"."

37. In *ACE Bermuda Insurance Ltd. and Continental Casualty Company* [2007] SC Bda LR 12 Ground CJ stated:

"6. The plaintiff argues that it is bringing this action to enforce the arbitration clause, which is expressly governed by the law of Bermuda. I accept that and think, therefore, that there is a good arguable case that this action is within the rule. It matters not that the defendants are not parties to the contract as a whole or to the arbitration clause: see DVA v Voest Alpine [1997] 2 Lloyd's Rep. 279 at 287:

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

38. In *ACE Bermuda Insurance Ltd. and Continental Casualty Company* [2007] Bda LR 38 in respect of an application to set aside the order of the Chief Justice in the case in the previous paragraph, Bell J stated:

> *"27. 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."*

39. The Plaintiff submitted that leave to serve out should be granted under the various rules since (a) The Originating Summons is brought pursuant to the Bermuda International Conciliation and Arbitration Act 1993 and the arbitration if held would per the terms of the Bermuda Arbitration Agreement be held in Bermuda and its procedure would be governed by Bermuda law; and (b) the Bermuda Arbitration Agreement constitutes an arbitration agreement which was made within the jurisdiction of Bermuda.

40. On the evidence there is the Allied World Policy and the Bermuda Arbitration Agreement between the parties, pursuant to which, if the arbitration were to take place, it would take place in Bermuda, and the procedure of which arbitration would be governed by Bermuda law. Therefore I find that these proceedings brought by the Plaintiff against the Defendant, for the reasons submitted by the Plaintiff, are within the ambit of the sub-rule insofar as

they are proceedings which seek to enforce the contract between the parties. I find that the Plaintiff has demonstrated that it has a good arguable case that this application is within Order 11, rule 1(1)(d) for service out of the jurisdiction and that there is a serious issue to be tried arising out of the underlying claims.

<u>Conclusion</u>

41. For the reasons above, I granted the applications and signed the Order that:

    a. The Plaintiff has leave to issue an Originating Summons for service out of the jurisdiction on the Defendant;
    b. The Plaintiff has leave to serve and/or give notice of the Originating Summons, evidence and Orders made in the proceedings on the Defendant at its address in Tampa, Florida, USA and/or by email to the Defendant's US attorneys;
    c. The Defendant have 21 days after service of the Originating Summons to enter an appearance in response to the Originating Summons;
    d. An interim injunction restraining the Defendant from:
        i. Prosecuting and pursuing the Nevada Proceeding against the Plaintiff;
        ii. Seeking and obtaining an anti-suit or anti-anti-suit injunction restraining or preventing the Plaintiff from pursuing and or otherwise enforcing the Bermuda Arbitration Agreement; and
        iii. Prosecuting, pursuing and/or otherwise continuing or proceeding against the Plaintiff in respect of any dispute arising under the Allied World Policy other than pursuant to the Bermuda Arbitration Agreement; and
    e. Leave for anyone served with or notified of the Order to apply to the Court for an inter partes hearing to vary or discharge the Order with terms for notice and filing evidence;

f. Costs to be reserved to the return date, if any, with liberty to apply in respect of costs in the event that no return date is sought within 28 days of service or notice to the Defendant.

Dated 3 March 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT