27/1/12

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 96 OF 2011
(ORIGINALLY CAUSE NO: 39 OF 2008)

The Hon. Sir Peter Cresswell

BETWEEN:	**CIGNA WORLDWIDE INSURANCE COMPANY (BY AND THROUGH ITS COURT APPOINTED RECEIVER, JOSIE SENESIE, AND IN RESPECT OF THE ASSETS, UNDER TAKINGS AND AFFAIRS OF ITS LICENSED LIBERIAN BRANCH AND BUSINESS)**	**PLAINTIFF**
AND:	**ACE LIMITED**	**DEFENDANT**

Hearing dates: 16 and 17 January 2012

Judgment 27 January 2012

APPEARANCES: Mr. Nicholas Dunne of Walkers on behalf of the Plaintiff.

Lord Goldsmith PC, QC instructed by and with Mr. Colin McKie of Maples and Calder on behalf of the Defendant.

JUDGMENT

There are two Summonses issued by the Defendant dated 5 December 2011 before the Court.

The Defendant applies for an Order

(1) that the Plaintiff/the Receiver provide security for the Defendant's costs;

and

(2) that this action be stayed pending the final determination of the proceedings, and any appeals therefrom, before the Court of Chancery of the State of

Delaware, U.S.A. entitled CIGNA Worldwide Ins Co. et al v Josie Senesie, Civil Action No. 4171-VCL.

The Defendant has also issued two strike out summonses dated 30 September 2008 and 5 December 2011 ("the Defendant's two strike out summonses").The application for security is up until the end of what is anticipated to be a 5 day hearing of these summonses.

I will refer to "the Plaintiff" in this judgment to refer to the formulation of the identity of the plaintiff set out above in the heading of this action with Mr Josie Senesie (or Mr Foday Sesay) named as Receiver, without prejudice to any of the issues identified below under 1.LEAVE TO AMEND, as to who is the appropriate plaintiff, with right and title to sue etc.

The following dramatis personae, description of the Cayman Islands proceedings, procedural history and status of proceedings is drawn from the case memorandum prepared by the parties pursuant to GCR Order 72 Rule 4(3) and the Order dated 2 December 2011.

The Plaintiff is represented by Walkers in this matter. The Defendant is represented by Maples and Calder.

The Defendant disputes Mr Sesay's assertion that he is acting on behalf of CIGNA WW in this litigation. The Plaintiff says that the Plaintiff alone is entitled to act on behalf of the Liberian branch or estate of CIGNA WW by virtue of the Liberian Court order to that effect.

Dramatis Personae

The companies and individuals below are material to the proceedings before the Grand Court:

CIGNA Worldwide Insurance Company ("CIGNA WW" or "CWW") – an insurance company incorporated in Delaware, U.S.A. In April 2007, the Liberian Court appointed Mr Senesie as Receiver over CIGNA WW's Liberian branch and business (CIGNA WW having been registered to do business in Liberia). The parties disagree on the nature and scope of CIGNA WW's operations in Liberia

and in particular on whether CIGNA WW had a Liberian "branch. CIGNA WW is not subject to any insolvency, or similar, proceeding in any other jurisdiction.

Josie Senesie – former Commissioner of Insurance for Liberia, appointed by the Liberian Court as receiver over CIGNA WW's Liberian branch and business. Retired October 2009, succeeded as Commissioner of Insurance for Liberia by Foday Sesay.

Foday Sesay - Present incumbent in the offices of Commissioner of Insurance for the Republic of Liberia and of Receiver over CIGNA WW's Liberian branch and business.

Samuel M. Lohman – born in the United States, licensed to practice law in the State of Oregon, registered with the Geneva Bar Association as a foreign lawyer since 1991, practising in Switzerland for over 20 years. Represented G-22 and AJA prior to 24 April 2007, on which date he began representing Mr Senesie. Together with Mr. Senesie and others, respondent to the contempt proceedings brought by CIGNA WW in the Eastern District of Pennsylvania for alleged violation of an anti-suit injunction by representing the Plaintiff in the Cayman Islands proceedings to enforce the Liberian judgment in favour of AJA (by seeking indemnification from the Defendant for, *inter alia*, said judgment, as discussed in more detail below).

Abi Jaoudi & Azar Trading Co Ltd. ("AJA") – Plaintiff in *The Abi Jaoudi And Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, Civil Action No. 91-6785 in U.S. District Court, Eastern District of Pennsylvania ("EDPA"), wherein (i) the jury returned a verdict in favour of the Plaintiff on CIGNA WW's defence relating to a war exclusion clause and was unable to reach a verdict on certain other of CIGNA WW's defences and (ii) judgment, notwithstanding the jury verdict ,was entered in 1995 granting CIGNA WW's war risk exclusion defence and denying AJA's claim. Judgment creditor of CIGNA WW pursuant to a contrary judgment by Liberian Court in 2000. Enjoined from seeking to enforce an October 2000 Liberian money judgment by U.S. Federal Court order in 2001, enforcement of which order was subsequently prohibited by a contrary Liberian Court order in 2002.

G-22 ("G-22") – A consolidated group of 22 judgment creditors of CIGNA WW pursuant to a judgment awarded by the Liberian Court in 2005. Defendants in U.S. District Court, Delaware action, which issued a declaratory judgment in default of appearance or defence in 2002 that G-22 had no valid policy claims against

CIGNA WW. (Jurisdiction was not taken in personam over the G-22 by the Delaware Court. It was based on the theory that the situs of the G-22's right to sue CWW was in Delaware and that therefore the Court had quasi-in rem jurisdiction over the subject matter of the dispute (namely the insurance policies issued by CWW). The Plaintiff says that there was no basis for the District of Delaware to take quasi-in rem jurisdiction over their contractual choses-in-action against CWW.)

ACE Limited ("ACE") – Defendant. A Swiss incorporated insurance company, originally a Cayman Islands company, which subsequently redomiciled to Switzerland soon after these proceedings were instituted in July 2008. Acquired certain assets and assumed certain liabilities of CIGNA WW's international property and casualty business, including the liabilities pertaining to the Liberian branch and business, by agreements dated 11 January1999 and 2 July 1999.

Description of the Cayman Islands proceedings

In July 2008 Mr. Senesie, then Commissioner for Insurance of Liberia and the predecessor to Mr. Sesay instituted these proceedings against ACE, for indemnification of the estate of the Liberian branch and business of the Debtor against the two judgments issued by the Liberian Court against CWW in October 2000 and August 2005 (the "Liberian Debts"). The Liberian Debts were originally comprised of (i) a judgment in favour of AJA in the aggregate amount of US$66,572,000 (the "AJA Liberian Judgment") and a judgment in favour of the G-22 in the aggregate amount of US$32,317,106.00 (the "G-22 Judgment").These proceedings seek recognition of the appointment of the Commissioner of Insurance of Liberia as Receiver of the Liberian branch of CIGNA WW by order of the Liberian Court dated April 24 2007 ("the Order of Appointment").

The Defendant claims that the Cayman Islands proceedings are directly related to the judgments of the EDPA and the District of Delaware in which it was declared that CIGNA WW was not liable to AJA or G-22 in respect of their claims under certain policies of insurance. The Plaintiff says that the case before the EDPA is no longer relevant as the Liberian Judgment relating to AJA is no longer within the scope of the Cayman Islands action, and that the declaration in the Delaware action is incapable of statutory or common law recognition in the Cayman Islands.

Procedural History

ACE Limited and CIGNA Worldwide Insurance Company

The Defendant is an insurance holding company that was incorporated in the Cayman Islands in 1985. In July 2008, upon the application by the Defendant, the Cayman Islands Court approved the de-registration of the Defendant as a Cayman Islands company pursuant to section 226 of the Companies Law (2007 Revision) on the undertaking, inter alia, that ACE's Swiss incorporated successor would "*submit to the jurisdiction of the Grand Court such that the Swiss Successor will become the defendant herein.*" The Defendant has now re-domiciled to Switzerland.

The Defendant says that in the mid-1980s CIGNA WW began writing property and casualty insurance in Liberia through two managing general agents. [The Plaintiff says that CIGNA WW] was registered to do business in Liberia as a foreign corporation and licensed to operate as an alien insurer within the jurisdiction subject to the requirements of, inter alia, the Insurance Law of Liberia. The Defendant says that the insurance was issued by, and underwritten from, a subsidiary of CIGNA WW based in Greece. In or around June 1990, following the outbreak of the first Liberian Civil War, CIGNA WW stopped writing insurance through its agents in Liberia with immediate effect.

It is Mr Sesay's case that CIGNA WW operated a registered "branch" insurance business in Liberia. This is a claim that is denied by the Defendant on the grounds that CIGNA WW's relevant operations were run through managing general agents and the insurance was issued and underwritten by Greek subsidiaries. It is also Mr Sesay's case that the Liberian Court has found that (a) no adequate reserves (including 10% of CWW's gross premium revenue realised in Liberia) were maintained inside Liberia for the payment of its liabilities as required by the Liberian Insurance Law and (b) the manner of its immediate cessation of business was a breach of a number of provisions of Liberian Insurance Law and Associations Law (under which CIGNA WW is said by the Plaintiff to have operated), including, *inter alia*, the maintenance of adequate reserves with which to meet claims. The Plaintiff also says that the Defendant breached

the Insurance Law of Liberia in failing to obtain the consent of the Liberian Commissioner of Insurance to the sale of CIGNA WW's Liberian branch to ACE. Again, these points are denied by the Defendant.

In January 1999, the Defendant and CIGNA's parent corporations, CIGNA Corporation and CIGNA Holdings Inc., entered into an Acquisition Agreement pursuant to which the Defendant acquired certain assets and assumed certain liabilities of CIGNA WW, including the "*assets, liabilities and obligations pertaining to [CIGNA WW's] run-off business in Liberia.*"

History of underlying Liberian claims in this action

Section 5.12.2 of the Liberian Insurance Law provides that a "policyholder shall be entitled to enforce his rights against any authorised insurer in a court of competent jurisdiction in Liberia, notwithstanding any provision in the policy or agreement concerning the policy to the contrary."

AJA

In 1991, at the height of the First Liberian Civil War (1989-1996), the Liberian Courts were closed. AJA brought a lawsuit against CIGNA WW in the EDPA. AJA alleged that CIGNA WW had breached certain property and casualty insurance policies with AJA by denying coverage for damage to property in Liberia sustained during that war. (It is the Plaintiff's case that the damage in question was sustained during, but was not directly attributable to, the war). CIGNA WW defended the EDPA Action on the ground that AJA's coverage claims were barred by the *"war risk exclusion"* in AJA's insurance policies. After a jury trial on the war risk exclusion and other defences, in which the jury found in AJA's favour as to the war risk exclusion and was unable to reach a verdict as to CIGNA WW's defence alleging fraud on the part of the AJA, the EDPA ruled that: "*...the insurrection that existed in Liberia in 1990 was the efficient cause of the losses [AJA] sustained,*" and accordingly, "*defendant [CWW] is entitled to judgment n.o.v. under the war risk exclusion clauses contained in the policies.*"

AJA appealed the EDPA's judgment to the Court of Appeals for the Third Circuit, which affirmed the ruling. The United States Supreme Court denied AJA 's petition for *certiorari* in 1997. (519 U.S. 1077 (1997)). Thus, the EDPA judgment in CWW's favour became final. The parties disagree as to the relevance and enforceability of that judgment outside of the United States.

In 1998, AJA, brought a new lawsuit in a Liberian court alleging the same claims that had been decided against AJA in the EDPA. CIGNA WW sought dismissal of the Liberian action on (among others) the ground that AJA's action was barred by *res judicata* on the basis of the EDPA judgment in favour of CIGNA WW. The Liberian court overruled CIGNA's *res judicata* defence, stating that a judgment notwithstanding a jury verdict was a concept not recognised in Liberian law, and therefore that the EDPA judgment was not recognised in Liberia. The Defendant says that on the first day of trial, CIGNA WW's counsel stated that he had been instructed not to participate in the trial of the merits of the case out of concerns for the safety of its lawyers and witnesses in light of the ongoing civil unrest in Liberia. It is the Plaintiff's case that this is a misleading simplification by the Defendant of the sequence of events and conduct of CIGNA WW. In 2000, the Liberian court entered judgment for AJA in excess of US$65 million. The cumulative limits of all of the policies at issue totalled US$6.92 million plus L$10.12 million (approximately US$253,000 at 2000 interest rates). The Plaintiff maintains that the AJA Liberian Judgment no longer has bearing on the issues now before the Court.

In April 2001, following a motion filed by CIGNA WW, the EDPA entered an anti-suit injunction prohibiting AJA from "*...taking any action to enforce in any jurisdiction the Liberian Judgment*" or otherwise taking any actions that "*conflict with, constitute an attack upon, or seek to nullify*" the EDPA's prior judgment. No appeal was made from the EDPA's anti-suit injunction order.

In 2002, following a Bill of Information filed by AJA, the Liberian Court stating that a j.n.o.v. is not a concept recognised in Liberian law issued an anti-anti-enforcement injunction declaring the AJA Liberian Judgment to be enforceable and declaring that any action to deter or prohibit its enforcement would be a contempt of the Liberian Court. It

is the Plaintiff's position that Defendant, by one or more of its actions described herein, is in breach of the Liberian anti-anti-enforcement injunction.

In 2003, AJA hired Martin Kenney of Martin Kenney & Co., Solicitors, a British Virgin Islands firm, and Samuel M. Lohman of Law Firm Lohman, a law firm located in Switzerland, to attempt to collect on the AJA Liberian Judgment.

G-22

In November 1999, the G-22 filed proceedings in Liberia against CIGNA WW, seeking insurance payments based on their alleged losses during the period of the First Liberian Civil War.

In June 2001, CIGNA WW filed suit in the District Court for the District of Delaware, requesting a declaratory judgment that it was not liable to the G-22 based upon the policies' war risk exclusions. The G-22 refused to participate in the Delaware action asserting that the Court did not have *in personam* jurisdiction over them. The District of Delaware entered judgment in default of appearance in favour of CWW on June 25 2002, reasoning that the claimants' losses "*resulted from or are related to events attendant to the forced change in Liberia's political leadership,*" which "*clearly meet[s] any reasonable definition*" of the terms "*insurrection*" and "*civil war.*" The Plaintiff maintains the June 2001 action has no bearing on the issues now before the Court.

The G-22's Liberian lawsuits were consolidated in 2002 and tried in the summer of 2005. The Defendant says that on 29 July 2005, the case was ordered for trial on 1 August. It is the Defendant's case that CIGNA WW unsuccessfully requested a continuance to afford additional time for CIGNA WW's attorneys and witnesses to travel to Liberia to prepare and participate in trial. After this request was denied, CIGNA WW's counsel withdrew from participation in the trial of the merits of the case. It is the Plaintiff's case that this is a misleading simplification by the Defendant of the sequence of events and conduct of CIGNA WW. In August 2005, the Liberian Court entered a judgment in excess of US$28 million against CIGNA WW. The sum of the policy limits of all of the G-22 policies at issue was less than L$18 million, or US$300,000 at 2005 exchange rates. The

Plaintiff's case is that the damages were correctly calculated as a matter of Liberian law.

It is the Defendant's case that the Liberian judgments in respect of the G-22 and the AJA were obtained by fraud and are prima facie irrational.

Appointment of receiver to enforce Liberian judgments

In April 2006, CIGNA WW and the Defendant received a letter from Mr. Lohman demanding payment of the AJA and G-22 Judgments. Mr. Lohman contended that ACE's indemnification obligation to CIGNA WW's parent companies, as provided in the 1999 Acquisition Agreement, made it liable to his clients for their claims against CIGNA WW. Mr. Lohman identified himself as counsel to both AJA and two Nevis companies, CC International Ltd. ("CCI") and St. Cleer LLC, and claimed that in 2005, title to the right to receive proceeds under the AJA and G-22 judgments had been assigned to these two companies.

In April 2007 the Liberian Civil Court appointed Mr Senesie as Receiver over the assets, undertakings and liabilities of CIGNA WW's Liberian branch and business. The Plaintiff says that Mr Lohman was retained as counsel to the Receiver on the same date.

The Defendant's case is that the Receivership is invalid, and avers that the Receiver was appointed (and acts) at the behest of private individuals who had purchased the AJA and G-22 claims. (The Plaintiff has reserved its right to object to certain portions of the affidavit evidence tendered by the Defendant on the basis, *inter alia*, that it contains conclusory statements; personal opinion and introduces material protected by legal professional privilege not waived by its disclosure under compulsion of law in another proceeding. I have considered this material *de bene esse*).

In August 2007, on Mr Senesie's motion, the Liberian Court recognised the AJA and G-22 judgments as the sole obligations of CIGNA WW's "*Liberian branch*".

In October 2009, Mr. Senesie retired as Commissioner of Insurance and was succeeded by Mr. Foday Sesay. In February 2010, the Liberian court entered an order clarifying that upon such succession Mr. Sesay had automatically replaced Mr. Senesie as receiver of CWW's "*Liberian branch.*" In August 2011, the Delaware Court allowed Mr. Sesay to be substituted for Mr. Senesie as the defendant in the Delaware Action.

It is common ground that Mr Senesie, and now Mr Sesay, has no ability to satisfy an award for costs in the Cayman Islands proceedings. Mr Senesie has represented to both the Liberian Court and the Delware Chancery Court that the estate which he administers has no assets other than the alleged right to seek indemnity against the Defendant in respect of the Liberian Debts as court-appointed Liberian receiver of the Liberian branch of CIGNA WW.

The Republic of Liberia does not view itself as the real party in interest in the proceedings. In March 2011 the Government of Liberia, by its Liberian Embassy in Washington, D.C., submitted a diplomatic Note Verbale to the U.S. State Department, saying that: "[T]he Republic of Liberia confirms that it is not the real party in interest in the [EDPA] Proceedings. Rather, one of its former State officials and his current successor in that office (and one of their agents) have been sued personally and in respect of activities undertaken by them in furtherance of their Liberian statutory and Court-mandated duties [as receiver]." Mr Sesay was exonerated from personal liability by the Liberian Court (the order of the Liberian court appointing Mr. Senesie as receiver provides that the only security for any obligations incurred by him as receiver is a charge against the assets of the "Liberian branch" of CIGNA WW (see the order of Liberian court dated 24 April 2007, paragraph 17)). (The Plaintiff says that such provision is standard in orders appointing receivers, liquidators and other insolvency office holders, but such provision does not exonerate Mr. Sesay for wilful misconduct).

It is the Defendant's case that the legal costs and other expenses incurred by Messrs. Senesie and Sesay in the Cayman Islands proceedings are being paid by as-yet-unidentified investors. Based upon Mr. Lohman's representation that CCI was "*formed for the specific purpose of holding the right to receive any proceeds arising*

under the . . . claims against CWW," (see Samuel M. Lohman's Brief in Opposition to CWW's Cross-Motion to Compel Discovery, dated 28 June 2011), and that no assets have yet been recovered, it is the Defendant's case that CCI is a shell company without substantial assets, formed for the purpose of receiving and distributing any recovery on various Liberian judgments against CIGNA to shareholders who, in return, have agreed to advance litigation expenses.

Recent proceedings in the United States

The current phase of the EDPA action was commenced in November 2008 when CIGNA WW filed a motion to hold AJA, Mr Lohman, Mr Senesie and others in contempt of court for aiding and abetting AJA's violation of the EDPA's anti-suit injunction from 2001, by bringing the proceedings in the Cayman Islands.

Mr Lohman and Mr Senesie ("Respondents") opposed CIGNA WW's contempt motion on the basis that the EDPA lacked personal jurisdiction over them and that as government officials and, in the case of Mr Lohman, as counsel to such officials, they were entitled to foreign sovereign immunity under the FSIA.

In a Decision and Order of 12 January 2009, the EDPA held that there was sufficient evidence that the Respondents were aiding and abetting AJA's violation of the anti-suit injunction to provide a basis for personal jurisdiction. The EDPA also held that the Respondents were not entitled to sovereign immunity under the FSIA. The Respondents appealed these decisions to the Court of Appeals for the Third Circuit.

Meanwhile, in November 2008, CIGNA WW commenced an action in the Delaware Chancery Court, where CIGNA WW is incorporated, against Mr. Senesie for a declaratory judgment that Mr. Senesie, as a foreign receiver of a Delaware corporation, had no authority to pursue claims on behalf of CIGNA WW outside of Liberia. At the same time as it filed its complaint, CIGNA WW moved for summary judgment on its claims.

In December 2008, Mr Senesie moved to dismiss CIGNA WW's Delaware proceeding on grounds of lack of personal jurisdiction and foreign sovereign immunity under the FSIA.
In February 2009, prior to determination of Mr. Senesie's and CIGNA WW's motions, consent orders were entered by the Grand Court, the EDPA and the Delaware Chancery Court, staying all proceedings in all three jurisdictions, pending the final determination of Messrs. Senesie's and Lohman's appeals to the Third Circuit of the 12 January 2009 EDPA decision. Accordingly, at that time the Delaware Chancery Court did not decide the pending motions.

The Respondents' appeals before the Third Circuit regarding the EDPA action were heard in March 2009. In August 2010, the Court of Appeals held that the Respondents could not be entitled to immunity under the FSIA. The Court of Appeals remanded to the EDPA to consider the issue of whether the Respondents might be entitled to immunity under common law and noted that remand "*will permit the parties to make the related arguments and engage in discovery, if necessary*," on that issue.

The Court of Appeals declined to exercise jurisdiction over the EDPA's finding of personal jurisdiction over the Respondents at an interlocutory stage of the case. Neither party petitioned the Supreme Court for a writ of certiorari, and the Court of Appeals' decision became final in November 2010.

On 25 October 2010, CIGNA WW served discovery requests on the Respondents. On 17 November 2010 the EDPA extended the Respondents' deadline for responding to CIGNA WW's discovery requests to allow time for the State Department of the United States of America to provide a response to the Respondents' application for common law immunity. On 21 January 2011 the State Department issued a notice stating that threshold questions need to be resolved, specifically "the capacity in which the Respondents are being sued and, in particular, whether Liberia is the real party in interest."

Following the State Department's 21 January 2011 notice, the Respondents provided objections and responses to CIGNA WW's discovery requests on 24 January 2011. The Respondents objected on several grounds, including the claim that the discovery sought

information unrelated to the limited issues to be resolved by the EDPA as defined by the Third Circuit and the State Department and was intended to be used in this litigation, which, according to Respondents, constitutes an abuse of discovery process in United States courts. In addition, the Respondents objected to the discovery on the grounds that the EDPA lacked jurisdiction over them and the discovery requests would require Mr. Lohman to violate ethical duties in Switzerland and Nevis.

Current status of U.S. litigation

On 20 May 2011, Messrs. Senesie, Sesay and Lohman informed the EDPA that they agreed to "abandon the indemnity enforcement action against ACE Limited in the Grand Court of the Cayman Islands related to the [AJA] Liberian [J]udgment." In a subsequent communication, Mr. Sesay informed the EDPA that he had instructed his Cayman counsel to "ensure that such amendment to the pleading is permanent – or with prejudice."

The Defendant says that the proceedings currently before the EDPA relate to Messrs. Senesie, Sesay and Lohman's non-compliance with certain discovery requests served on them in relation to, *inter alia*, the identification of the persons funding and directing the Respondents' litigation in the Cayman Islands and the United States. On 10 May and 31 May 2011, after considering the objections of Messrs. Senesie, Sesay and Lohman, the EDPA ordered them to provide full and complete responses to the discovery requests. On 6 June 2011, Mr Senesie and Mr Sesay withdrew from the proceedings, maintaining that discovery is inappropriate by reason of, *inter alia*, sovereign immunity and attorney/client privilege. Also on 6 June 2011, Mr. Lohman provided a partial response to the discovery requests. The Plaintiff says that Mr. Lohman maintains that discovery is inappropriate for the same reasons and also that foreign law of Switzerland and Nevis prohibits his participating in such discovery proceedings.

Meanwhile, on 5 December 2011, the United States Department of Justice filed a Statement of Interest in the EDPA on behalf of the United States Department of State which states: "*Respondents Senesie*

and Sesay, the past and current Insurance Commissioners for the Republic of Liberia are immune from suit to the extent the Court finds that, under Liberian law, they acted in their official capacities when they took the acts that are the basis for Defendant's contempt motion against them. Conversely, Senesie and Sesay are not entitled to immunity to the extent the Court finds that, under Liberian law, these acts were taken solely in their capacities as representatives of the estate and thus outside of their official capacities." The Statement of Interest states that "*courts today must continue to defer to Executive determinations of foreign official immunity, just as they deferred to determinations of foreign state immunity before the enactment of the FSIA.*"

As to Mr. Lohman, the Statement of Interest states that, "*to the extent the claims against Lohman arise from his conduct on behalf of Senesie, any immunity to which Lohman is entitled derives from and cannot exceed the immunity to which Senesie is entitled for such acts as were taken in his official capacity,*" and "*Lohman is not entitled to immunity for actions he took while representing AJA.*"

In September 2011, the Delaware Chancery Court conducted a scheduling conference. During the conference, Vice Chancellor Laster stayed the case until 45 days after resolution of the assertion of foreign sovereign immunity in the EDPA, in order to avoid duplicative and potentially conflicting rulings on that issue. He stated that, after resolution of the sovereign immunity issues by the EDPA, he would (if there was no immunity) take up Mr. Sesay's personal jurisdiction defence and the issue of whether a Delaware Chancery Court would view Mr. Sesay as having authority to pursue assets outside the jurisdiction of his appointment.

Events in the Cayman Islands

On 9 July 2008, a Writ of Summons was filed in these proceedings by Mr Senesie, which was amended and re-filed on 10 July 2009. A Statement of Claim was filed on 20 August 2008.

Prior to the filing of a Defence, by the consent order dated 6 February 2009, the Cayman Islands proceedings were stayed pending final

determination of the interlocutory appeal to the Court of Appeal for the Third Circuit in relation to sovereign immunity and personal jurisdiction. The position remains that no Defence has been filed.

In May 2011, Mr Sesay notified the Defendant that the Cayman Islands stay had been lifted following the Third Circuit's ruling on sovereign immunity. On 26 May 2011, Mr Sesay filed a purported Re-Amended Writ of Summons and Amended Statement of Claim, without leave. The amendments included the reduction of the indemnity sought by the amount of the liability evidenced by the AJA Liberian Judgment and replacement of Mr Senesie by Mr Sesay as the named receiver. The claim before the Grand Court is said to be an indemnity enforcement action in respect of the liability evidenced by the amended Liberian Order Fixing Liabilities of CIGNA WW's Liberian branch, and the underlying judgment in favour of the G-22, which is for US$40,073,311.95 plus interest. The Defendant says that the purported amended Statement of Claim is not consistent with Mr. Sesay's commitment to the EDPA that he would "abandon" the claim based upon the AJA Liberian Judgment against the Defendant "with prejudice."

Status of Proceedings

By way of summary, at present the status of proceedings is as follows:

(i) Delaware Chancery Court- stayed pending outcome of EDPA on sovereign immunity issue;

(ii) EDPA – Active- currently pending before the EDPA are issues relating to (i) respondents' assertion of sovereign immunity, and (ii) respondents' non-compliance with the EDPA's discovery orders; (The Plaintiff has filed a Motion before the Liberian Court seeking its determination on issues of Liberian law as to the correct legal status of the Receiver in the EDPA proceedings for the purposes of analysing whether the Receiver is "*immune from suit to the extent the Court finds that, under Liberian law, they acted in their official capacities when they took the acts that are the basis for Defendant's contempt motion against them.*" This motion was due to be heard on January 10, 2012, however it is not possible to say when the Liberian Court

will issue its determination. The Plaintiff expects that the EDPA will await this determination prior to issuing its own, although nothing requires the EDPA to do so.)

(iii) Cayman Islands – Active- due to consider (i) application from Defendant for stay pending outcome of Delaware (and thus Pennsylvania) proceedings and (ii) application from Defendant for security for costs.

I turn to consider the issues that need to be determined in the following order.

1. Leave to Amend
2. Abandonment of the AJA Claim
3. Security for costs
4. The application for a stay
5. An order that the Plaintiff identify the persons who are funding these proceedings?
6. Future Case Management

1. LEAVE TO AMEND

On 26 May 2011 there was a purported re-amendment of the Writ and amendment to the Statement of Claim. GCR Order 20 contains rules as to when amendments can be made with and without leave. Mr. Dunne accepted (in my view correctly) that leave was necessary to re-amend the Writ and that leave had not been obtained.

As to the amendment to the Statement of Claim, Order 20 Rule 3 does not enable a plaintiff who has served a separate Statement of Claim to add new parties without leave. (The Supreme Court Practice 1995 20/3-4/3). In my opinion the same reasoning applies to an "omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues....."

An application must be made for leave to re-amend the Writ and amend the Statement of Claim. In formulating draft amendments the Plaintiff should give consideration to the following points:-

(i) who is the appropriate plaintiff and how the plaintiff should be identified, described and pleaded (and what is the standing of Mr. Sesay to bring proceedings in the name of CIGNA WW)?

(ii) if reliance is placed on "automatically taking over the office of Receiver" the relevant provision of law relied on.

(iii) if and to the extent that there has been some form of assignment whether the assignee(s) is the appropriate plaintiff or needs to be joined (see further below).

(iv) the basis on which it is alleged there is "entitlement to the benefit of and to claim under the provisions of the Acquisition Agreement and the Assignment and Assumption Agreement" and who is making that claim and in what capacity?

(Compare 5.13 (2) (b) of the Liberian Insurance Law ("If it applies to the Liberian branch of an alien insurer .... the assets of the business of such Liberian branch shall be the **only** assets included therein.")).

Is it the Plaintiff's case that any alleged entitlement to claim as above is in respect of an asset within the jurisdiction – (see the decision in Canadian Arab Financial Corporation v Player below)?

(v) whether the Receiver of a "branch" of a foreign insurer will be recognised in the Cayman and to what extent?

(vi) whether a Receivership based on a judgment in Liberia will be recognised in the Cayman Islands, when there is a conflicting judgment of the courts of the United States?

(vii) whether the Liberian judgment in favour of the G-22 will be recognised in the Cayman Islands, when there is a conflicting judgment of the courts of the United States.

(viii) what is the nature of the alleged receivership – for example is it by way of equitable execution (or is it some other form of receivership, and if so what form)?

(ix) the relevance and application of the principles set out in the judgment of Jones J in Masri and Manning v Consolidated Contractors International Company SAL [2010 (1) CILR 265] (see further below).

(x) what was the reason for the appointment of the receiver and whether the appointment was at the instance of AJA and the G-22 judgment creditors of CIGNA WW or some other person or persons?

[To the extent that it is alleged that any issues raised in the pleadings are governed by foreign law, the relevant provisions of the foreign law must be pleaded].

For completeness I draw attention to the CILRC Issues Paper "The Enforcement of Foreign Judgment and Interim Orders" 17-1-12.

2. ABANDONMENT OF THE AJA CLAIM

By a motion in the EDPA dated 20 May 2011 Mr. Foday Sesay, Mr. Josie Senesie and Mr. Samuel Lohman requested the EDPA to find CWW's various discovery requests, its notices of deposition, and its Motion to Compel moot. The motion stated:-

> "Non-Party Respondents, Foday Sesay ("Sesay"), Josie Senesie ("Senesie") (Messrs. Sesay and Senesie are collectively referred to as the "Receiver"), and Samuel M.Lohman, Esquire ("Lohman") (collectively, "Respondents"), by and through their counsel, request that this Court declare all outstanding discovery requests, including notices of deposition, and Movant CIGNA Worldwide Insurance Company's Motion to Compel moot because Respondents hereby stipulate and agree to abandon the indemnity enforcement action against ACE Limited in the Grand Court of the Cayman Islands related to the underlying Liberian judgment or claim of The Abi Jaoudi and Azar Trading Corporation (the "AJA Claim"). (The action in the Grand Court of the Cayman Islands includes twenty-two (22) other claims unrelated to the Anti-Suit Injunction. Respondent Sesay, as Receiver of CWW's Liberian Branch, hereby reserves his right to pursue these other claims against ACE Limited.) Furthermore, Respondents agree to not pursue or enforce, or in the case of Mr. Lohman, not to represent any other person or entity seeking to pursue or enforce, the AJA Claim. Because Respondents

have abandoned the AJA Claim, which was the sole basis for the coercive sanctions sought by CWW, this Court should declare all discovery moot and withdraw its May 10, 2011 Order setting deadlines related to discovery.....the sole basis for coercive sanctions related to civil contempt has been Respondents' alleged aiding and abetting the violation of the April 10, 2011 Order. Respondents now stipulate and agree that the Receiver shall withdraw the AJA Claim from the claims made by the Receiver in the action which the Receiver has commenced against ACE Limited in the Cayman Islands. In addition, Respondents agree to not pursue or enforce the AJA Claim, either individually or on behalf of any other person or entity, in any other proceedings or court. In light of these actions, Respondents are no longer in violation of the April 10, 2011 Order and there is no basis for CWW to continue pursuit of coercive sanctions in civil contempt."

Before this Court the initial position adopted by the Plaintiff was to submit that by the purported re-amendments to the Writ and amendments to the Statement of Claim the Plaintiff had done all that was necessary to comply with its stipulation and agreement to the EDPA. The Defendant submitted (in my view correctly) that it had not.

In the event Mr. Dunne on behalf of the Plaintiff said that he would seek further instructions. Later, having done so, he said that the Plaintiff would agree to an order in the following terms:

"WHEREAS on 20 May 2011 Messrs Foday Sesay, Josie Senesie and Samuel M Lohman stipulated and agreed to the EDPA in Civil Action no 91-6785 to abandon the indemnity enforcement action against ACE Limited in these proceedings relating to the judgment of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, Republic of Liberia between Abi Jaoudi & Azar Trading Corporation v CIGNA Worldwide Insurance Company dated 4 October 2000 (the "AJA Claim")

IT IS HEREBY ORDERED by consent that:

1. The Plaintiff's claim herein arising out of or in connection with the AJA Claim (the "Plaintiff's AJA Claims") are hereby dismissed with prejudice."

Lord Goldsmith QC on behalf of the Respondent submitted that Mr. Sesay, Mr. Senesie and Mr. Lohman should (as part of a consent order) "undertake on their own behalves, their agents, successors and assigns that they shall not proceed with or institute any action, proceeding, claim, or assert [the same] by way of set off or counterclaim, or in any other way whatsoever, in reliance on the AJA Claim."

Mr. Dunne said that he had no instructions to give any undertakings.

Lord Goldsmith referred to a letter from Walkers to Maples and Calder dated 26 May 2011 which said

> "Pursuant to a Motion filed in the United States District Court for the Eastern District of Pennsylvania on 20 May 2011, the non-party Respondents in that case, Foday Sesay and Josie Senesie have now agreed to abandon the indemnity enforcement action against ACE Limited insofar as it relates to the Abi Jaoudi and Azar Trading Company in the Grand Court and have instructed their attorney, Mr. Lohman, to that effect. Accordingly, please find enclosed a copy of our Re-Amended Writ and Statement of Claim which reflects both this change of circumstances and the fact that Mr. Sesay took over from Mr. Senesie as Commissioner of Insurance of Liberia and Receiver upon Mr. Senesie's retirement in October 2009. We will provide a filed copy of the Re-Amended Writ as soon as possible. We also propose to provide undertakings to the Court in respect of the finality of this abandonment." (emphasis added)

Despite the final sentence of the paragraph quoted above the Plaintiff was not prepared to provide any undertakings to this Court in respect of the finality of the abandonment.

In the circumstances I will make a consent order in the terms set out above. I am minded to make it a condition of any leave to re-amend/amend the Writ and Statement of Claim that appropriate undertakings are provided to the Court to reflect the words "Respondents agree to not pursue or enforce..... the AJA Claim" and what was said in the final sentence of the paragraph quoted above from the letter of 26 May.

It is common ground that the Plaintiff must pay the Defendant's costs in connection with and arising out of the Plaintiff's AJA Claims. The Defendant says the appropriate order is

> "The Plaintiff do pay the Defendant's costs arising out of the Plaintiff's AJA Claims on the standard basis to 20 May 2011 and on the indemnity basis thereafter, such costs to be taxed if not agreed and paid forthwith"

The Plaintiff says that the costs should be on the standard basis throughout.

The order will be in the form sought by the Defendant for the following reasons. I do not consider that the Plaintiff has taken the steps it should have taken to comply with what was in effect a promise to the EDPA, in the circumstances set out above, which promise was made against the background of the litigation in the United States described in detail above.

I will order an expedited taxation. The costs when taxed will be paid out of the sum provided by way of security for costs (see below).

3. SECURITY FOR COSTS

By its summons dated 5 December 2011, the Defendant seeks an order that the Plaintiff provide security for ACE's costs up to and including disposal of ACE's summonses dated 30 September 2008 and 5 December 2011. ACE further seeks an order that Mr. Sesay identify the persons who are funding him in these proceedings (including details of their residence or place of incorporation, as may be), so that any unsatisfied order for costs made against Mr. Sesay may be enforced against them.

The affidavits dealing with this issue are the following:

> The Second Affidavit of Mr. Donald Hawthorne dated 22 November 2011; The Third Affidavit of Mr. Hawthorne dated 22 November 2011; The First Affidavit of Mr. Nicholas Dunne dated 28 December 2011; The First Affidavit of Mr. Stephen Alexander dated 6 January 2012; and the Fourth Affidavit of Mr. Hawthorne dated 6 January 2012.

ACE's submissions as to security

Lord Goldsmith submitted as follows.

There was a previous offer of limited security in Walkers' letter to Maples and Calder of 15 December 2008.

ACE relies on GCR O.23, r.1 (1)(a) and (2) (the plaintiff is ordinarily resident out of the jurisdiction) and/or O.23 r.1(1)(b) (the plaintiff is a nominal plaintiff who is suing for the benefit of some other person).

GCR O.23, r.1(1)(a)

Mr. Sesay is a Liberian citizen who is ordinarily resident outside of the jurisdiction. The Liberian Court appointed Mr. Senesie, now Mr. Sesay, as receiver over, what Mr. Sesay claims is the Liberian "branch and business" of CWW a solvent company incorporated in Delaware U.S.A. (ACE contends that CWW wrote property and casualty insurance in Liberia through two managing general agents. The insurance was issued by, and underwritten from, a subsidiary of CWW based in Greece. There was no Liberian "branch" of CWW).

The principal purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is *"to ensure that a successful defendant will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs."* (Cybervest Fund [2006] CILR 80 at 87 approving Porzelack KG v Porzelack (UK) Ltd [1987] 1 WLR 420). There is no such fund. Mr. Sesay has no funds in the Cayman Islands or overseas to satisfy an order for costs. Mr. Sesay's predecessor, Mr. Senesie has represented to the Liberian court that the so-called "Liberian branch" of CWW is effectively insolvent and has no assets of any kind in Liberia.

The Republic of Liberia would not satisfy an order for the costs made against Mr. Sesay. The order of the Liberian court appointing Mr. Senesie as receiver provides, inter alia, that:

(a) The only security for any obligations incurred by him as receiver is a charge against the non-existent assets of the "Liberian branch" of CWW;
(b) Suits against the receiver without his consent or leave of the Liberian court are prohibited;

(c) The receiver has no liability or obligation as a result of his appointment except on the basis of *"gross negligence or wilful misconduct."*

Further, both Mr. Sesay and the Liberian Government have repeatedly submitted to the U.S. courts that Liberia is not the real party in interest in suits involving Mr. Senesie or Mr. Sesay in their representative capacity as purported receiver for CWW's "Liberian branch".

GCR O.23, r.1(1)(b)

In the alternative, ACE seeks security for costs under GCR O.23, r.1(1)(b). The test under O.23, r.1(1)(b) was described in *Cowell v Taylor* (1885) 31 Ch. D 34 at 38.

Mr. Sesay, an individual representing an insolvent estate with no realisable assets, has brought these proceedings for the benefit of unidentified third parties who are funding the litigation. Insolvent plaintiffs bringing the proceedings *"for the benefit of somebody else"* are nominal plaintiffs and are obliged to provide security for costs under O.23, r.1(1)(b). (See for example, *Semler v Murphy* [1968] Ch 183 and *Lloyd v Hathern Station Brick Co. Ltd* (1901) 85 L.T. 158).

Mr. Sesay suggests that the impecuniosity arises from the actions of ACE. This assertion is wholly unparticularised.

Lord Goldsmith referred to a number of documents in support of the application under GCR O.23, r.1(1)(b) (and the application for an order that Mr. Sesay identify the persons who are funding him in these proceedings).

In a letter dated 18 April 2006 from Law Firm Lohman to CIGNA WW and to the Defendant ACE Ltd, Mr. Lohman wrote:-

> "This firm acts on behalf of CC International Limited ("CCI"), St. Cleer LLC (the "Trustee"), and Abi Jaoudi & Azar Trading Corporation of Monrovia, Liberia ("Abi Jaoudi"). Pursuant to certain agreements executed on 21 day of January, 2005 and 28 day of January, 2005 (collectively, the "Assignment Agreements"), the twenty-three individuals and entities of Monrovia, Liberia listed at Schedule "A" to this letter (collectively, the "Liberian Claim Holders") assigned and conveyed good

and clear title to the entirety of their rights to receive any and all proceeds realisable from various claims or judgments against CIGNA WW and CIGNA WW's successor, namely ACE Limited, unto the Trustee for CCI.....

Notice and Caution

It has recently come to our attention that certain members of the G-22, under the leadership of one Charles Ananaba of Delta Insurance Loss Adjusters, Inc. of Randall Street, Monrovia, Liberia may be seeking to breach the terms of the 21st January, 2005 Assignment Agreement and negotiate a settlement or compromise with you directly.

The purpose of this letter is, in part, to put you on formal notice that, as a result of the terms of the Assignment Agreement dated 21st January, 2005, neither Mr. Ananaba nor any of the parties listed at Schedule "A" hereto have the legal capacity to provide you with a valid receipt for any sums paid in satisfaction or comprise of either (a) the Judgments specified herein or (b) the payment out against any of the Insurance claims which formed the underlying basis of such Judgments. Our clients have instituted international arbitration proceedings in Geneva, Switzerland to, in part, obtain certain relief to protect their rights in respect of such Judgments.

Any settlement with the Liberian Claimholders, or any of them, would have no effect in terms of satisfying either of these Judgments in light of the assignment Agreements in favour of CCI.

We should be grateful if you would ensure that the appropriate manager within your respective organizations with responsibility for Liberian run-off claims is notified of the position. This will prevent you incurring further unnecessary liability."

In Civil Action No 91-6785 in the EDPA on 6 June 2011 in Non-Party Samuel M. Lohman's Objections and Responses to Defendant's Interrogatories, in answer to an interrogatory - (Indentify all persons, natural or otherwise, who have, claim or assert any interest, legal or equitable, in; or who have, claim or assert a right to any part of recovery from, any claims of The Abi Jaoudi and Azar Trading Corp. ("AJA") against CWW.) Mr. Lohman said:-

> "Without waiving the foregoing general and specific objections, Lohman states that the Respondent Receiver and acting Commissioner of Insurance of Liberia, Foday Sesay, has the right to pursue the indemnity enforcement action against ACE Limited,..... while CC International, Limited ("CCI"), a Nevis company,..... has the sole right to receive a dividend or distribution of the net proceeds of recovery (e.g. net of any outstanding legal or other costs), realized from the said indemnity enforcement action. In Liberia, an insolvency stay order is in place prohibiting any Liberia creditor of CWW form seeking to pursue any assets or litigation associated with CWW's Liberian branch and business. Only the Receiver is now authorised by Liberian law to pursue the Liberian related assets of CWW for recovery on the AJA or G-22 judgments or claims. However, the Receiver has abandoned pursuit, with prejudice, of the AJA claim in the only action capable of seeking an effective award thereupon – the Cayman Islands indemnity enforcement action against ACE Limited. In addition, Martin Kenney & Co., Solicitors, a BVI law firm,..... and Law Firm Lohman a *société simple* with an address [in] Geneva, have each represented the Receiver as legal counsel in connection with the pending action in Cayman Islands against ACE Limited, and have a conditional contractual right to a legal fee represented by, in part, a portion of any recovery from such action as a part of the compensation due to each respective law firm for such services (the quantum of which being subject to all applicable rules governing the payment of such conditional fee)."

In the same action Mr. Lohman's Brief dated 28 June 2011 in opposition to CWW's cross-motion to compel discovery stated:-

> "CC International Limited "(CCI") is a Nevis company, which was formed for the specific purpose of holding the right to receive any proceeds arising under the G-22 and AJA claims against CWW..... all documents relating to the formation and operation of CCI (and its relationships with AJA, the G-22, and the Receiver) were prepared in anticipation of insolvency enforcement litigation against CWW in Liberia and the indemnity enforcement litigation against ACE in the Cayman Islands".

Lord Goldsmith also referred to redacted Law Firm Lohman legal bills including in particular those dated 1 May 2003 and 1 March 2007 and to paragraphs 15 to 28 of Mr. Hawthorne's third affidavit.

The Plaintiff's submissions as to security

A skeleton argument was provided on behalf of the Plaintiff in which it was submitted:-

(i) In this case the Rules are clear and while security for costs may be ordered against CIGNA WW, it cannot be ordered against the Receiver who acts as representative of the Plaintiff in respect of its Liberian branch. There is no jurisdiction under the Rules to order security for costs against either a plaintiff suing in a representative capacity or the representative of a plaintiff. The Receiver is in effect a non-party and this application is an attempt to make him liable personally for costs.

(ii) If is held that the Court has jurisdiction to order security for costs, security for costs ought not to be granted in the circumstance of the present case. The application should be viewed in its legal context, namely an application by the Receiver for relief in aid of a foreign insurance liquidation of a delinquent alien insurer operating within the jurisdiction of his appointment. To award security for costs in the present case would risk denying the Receiver access to justice on behalf of the creditors of the Liberian branch of CIGNA WW.

(iii) There are special circumstances in this case that justify the refusal of the application. They include:

(a) the delay in bringing the application;

(b) that the result of the application is to infringe and to continue to infringe the Plaintiff's right to a fair hearing within a reasonable time under Article 6 of the European Convention on Human Rights;

(c) the fact that the manner in which the business of CIGNA WW was operated in Liberia, entailing as it did numerous breaches of the Insurance Law, was and is clearly a matter of considerable public importance, leading to the unprecedented step of the Attorney General commencing an investigation and ultimately applying, at the request of the Insurance Commissioner of Liberia, to the Liberian Courts for relief in the

form of an order appointing a receiver over the Liberian branch of CIGNA WW;

(d) the *sui generis* nature of the proceeding;

(e) the fact that an order for security for costs would have the effect of stifling the proceedings; and

(f) the application seeks an order for security for costs against a non-party, the Receiver.

In oral argument, Mr. Dunne for the Plaintiff conceded that in the light of Dolphin Quays Developments Ltd v Mills [2008] 1 WLR 1829 at 1842 para 52, Lawrence Collins LJ this Court has jurisdiction in the present case to order security, but submitted that for the reasons set out above security, should not be granted.

Analysis and Conclusions

Order 23.r.1 of the Grand Court Rules provides so far as is relevant-

Security for costs action, etc. (O.23,r.1)

1. (1) Where, on the application of a defendant to an action or other proceedings it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction; or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;..... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

(2) For the purposes of this rule a person is deemed to be ordinarily resident out of the jurisdiction if he does not have the right either to reside permanently in the Islands or have the right to work in the Islands.

GCR O.23,r.1(1)(a)

A liquidator or receiver bringing proceedings in the name of an insolvent company is not under any duty to ensure that the company has sufficient funds to pay any costs awarded to the defendant. The defendant's primary method of protection here is an application for security for costs against the company. A defendant who fails to make such an application will not normally be entitled to an order for costs payable by the liquidator or receiver personally.

In Dolphin Quays [supra] Lawrence Collins LJ said at paragraph 52:-

> "Where the action is brought in the name of the company by a receiver, the defendant can normally obtain security for costs. The availability of security for costs has been considered in a number of decisions involving the personal liability of those causing an insolvent company to bring proceedings, some of which I have already mentioned."

In the present case the claim is said to be brought by a Liberian Receiver of the assets of what is said to be the (insolvent) Liberian branch of a company incorporated in Delaware.

In my opinion having regard to the principles set out above there is jurisdiction to grant security for costs under O.23, r.1(1)(a) (and Mr. Dunne was right to concede this).

GCR O.23, r.1(1)(b)

A nominal plaintiff is a plaintiff in name, but who in fact sues for the benefit of another – for example where the plaintiff has assigned or charged the whole fruits of the action to another (Semler v Murphy [1968] 1 Ch 183).

If, contrary to the above, there was not jurisdiction under GCR O.23, r.1(1)(a) to order security, there is material before the Court (referred to above) which would justify the conclusion that the Plaintiff is a nominal plaintiff.

Discretion

A plaintiff who alleges that an order for security will stifle the claim must adduce satisfactory evidence that the plaintiff does not have the means to provide security and that the plaintiff cannot obtain appropriate assistance to do so from any third party, who might reasonably be expected to provide such assistance if they could *(Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688).

The evidence in opposition to the application for security is sworn by Mr. Nicholas Dunne. In my opinion this evidence is not satisfactory.

GCR O.41, r.5 provides:-

"Contents of affidavit (O.41, r.5)

5. (1) Subject to Order 14, rules 22(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

(3) An affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorneys has direct personal knowledge of the facts and matters to which he deposes and does not appear as advocate in the cause or matter."

The evidence in paragraphs 13, 14 and 15 of Mr. Dunne's first affidavit relates to the allegation that an order for security will stifle the claim. But the sources and grounds of the statement of information or belief are not identified (see The Supreme Court Practice 1995 41/5/3) and the affidavit contravenes O.41 r.5(3).

In all the circumstances of the case set out above (and having carefully considered all the points raised by the Plaintiff in relation to the discretionary power to order security for costs) I consider that the Defendant is entitled to security.

Amount of Security

The amount of security awarded is in the discretion of the Court. The Court will fix such sums as it thinks just, having regard to all the circumstances of the case. The amount of security may relate to the total costs likely to be incurred in opposing the claim, but it is not always the practice to order security on a full indemnity basis. The Court will fix the amount having regard to the costs already incurred and the costs likely to be incurred in the future. One of the factors for the Court to consider is the possibility that the proceedings may settle. Each case has to be decided on its own circumstances, and it may not always be appropriate to make a discount for the possibility of settlement.

In determining the amount of security, the court must take into account the amount which the respondent is likely to be able to raise. The court should not normally make continuation of the claim dependent upon a condition which it is impossible for the respondent to fulfil. On the other hand, where a respondent opposes the making of an order for security or seeks to limit the amount of security by reason of impecuniosity, the onus is upon the respondent to put proper and sufficient evidence before the Court, and in doing so, the respondent should make full and frank disclosure *(M.V. Yorke Motors (a firm) v Edwards* [1982] 1 W.L.R. 444 HL). If the respondent gives an incomplete or misleading account of its resources, the court may, in exercising its discretion, set an amount which represents the Court's best estimate of what the respondent can afford *(Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123; and see *Kuenyehia v International Hospitals Group Ltd* [2007] EWCA Civ 274). The requirement to have regard to all the circumstances of the case will often prevent the applicant obtaining complete security.

In the present case having regard to the history of this matter set out above I make no allowance for the possibility of settlement. Further I do not consider that the Plaintiff has made full and frank disclosure. Nor do I consider that the Plaintiff has given anything approaching a complete account to the Court.

The evidence as to the amount of security sought is found in Mr. Hawthorne's third affidavit and in Mr. Alexander's first affidavit. It became clear in the course of the hearing that there were errors in the projections of future costs. By letter dated 18

January 2012 Maples and Calder made changes to the amount claimed. I will require an undertaking from the Defendant to procure the swearing of a further affidavit deposing to the changed figures.

I have seen and carefully considered the Plaintiff's Supplemental Submissions on Security dated 20 January 2012.

This is a complex matter which raises difficult and to some extent novel issues in the circumstances and for the reasons set out above. The instruction by the Defendant of eminent leading counsel from London is in my opinion plainly justified. Again in my opinion the percentage of costs recoverable on taxation is likely to be at the higher end of the percentages of costs ordinarily recoverable.

In all the circumstances on the case set out above and having carefully considered the relevant legal principles and all the points raised by the Plaintiff in relation to the discretionary power to order security for costs and the amount of security, I consider that the Defendant is entitled to security up to the end of the fifth day of the hearing of the Defendant's two strike out summonses in the amount of $850,000.00.

4. THE APPLICATION FOR A STAY

The Defendant ACE applies for an order that this action be stayed pending the final determination of the proceedings, and any appeals therefrom, before the Court of Chancery of the State of Delaware, USA entitled *CIGNA Worldwide Ins. Co. et al v Josie Senesie, Civil Action No. 4171-4 VCL.*

ACE's submissions as to a stay

Lord Goldsmith on behalf of ACE submitted as follows.

Although commenced in 2008 these proceedings were stayed by consent pending final determination of an appeal to the Court of Appeal for the Third Circuit in relation to sovereign immunity and personal jurisdiction. Although the appeal itself has been determined and therefore the stay granted in February 2009 has automatically lifted, the issue which it was intended should be resolved by those

US Proceedings has not in fact finally been determined. The stay now sought therefore relates to the US proceedings.

The reasons for the Stay Application are described in Mr. Hawthorne's second affidavit. A central issue in question is whether the appointment of Mr. Senesie as a local, Liberian receiver for a Delaware insurance company authorises him to bring suit outside Liberia in the name of CWW. This is the question before the Delaware Court (see Memorandum of Law in support of CWW motion for summary judgment, dated November 20' 2008, at 21 and 24-28) and is a key issue to be determined on the summons which ACE has issued for determination of a preliminary issue whether Mr. Senesie lacks the authority to bring suit in the name of CWW in his alleged representative capacity as receiver.

It is desirable that this Court should not proceed further until the position in the multiplicity of actions in other places, namely Delaware, EDPA and Liberia, has been resolved. This Court can, if it considers fit, keep the position following a stay under review, for example, by making an appropriate order as to reports to the Court.

As to the law, the Court has a power to grant a stay pending determination of an issue in another court even where the proceedings are otherwise properly brought in Cayman. This is a case management power to stay rather than a jurisdictional stay. Such a stay is appropriate in circumstances where:

(i) the foreign proceedings would dispose of significant issues in the Cayman proceedings;

(ii) simultaneous actions would increase costs; and

(iii) the Plaintiff would not be irreparably prejudiced by a further delay in the prosecution of proceedings here (see *Reichhold Norway A.S.A. v Goldman Sachs International [2000] 1 WLR 173* especially at 184 g-h, 185 d-h, 186 c-f; *Spiliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460* at 482-484; *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] *CILR 18; AHAB v Saad Investments Company Limited & Others,* unreported 25 June 2010 (Smellie CJ) and 1 December 2010 (Court of Appeal).

This matter already raises questions about a conflict between judgments in two countries, namely, the United States of America and Liberia. It is highly

undesirable to risk multiplying the problem of conflicting judgments by proceeding simultaneously in Cayman and in Delaware. It would also be very costly to do so. This course would also meet the requirements of judicial comity particularly as the Delaware Judge (Vice Chancellor Laster) expressed the hope that this Court would take the same view as his, and await the decision from Delaware.

The Plaintiff's submissions

Mr. Dunne on behalf of the Plaintiff submitted as follows.
The likelihood of the Delaware Court being in a position to decide the issue of whether Mr. Sesay has authority to pursue claims on behalf of CIGNA WW outside of Liberia any time in the near future is fanciful. The Defendants are in effect asking this Court to stay the proceedings herein indefinitely.

The Court has been asked to recognise the Receiver in this jurisdiction for the purpose of effecting his mandate under the order of appointment. Mr. Sesay will have to seek the "recognition of (his) appointment as receiver in this jurisdiction, thus affording him *locus standi* to sue and recover judgment against ACE in this jurisdiction".

The issue in the Delaware proceedings is whether Mr. Sesay, as a foreign receiver of a Delaware corporation, has authority to pursue claims on behalf of CIGNA WW outside of Liberia. However Mr. Sesay does not purport to be a receiver of a Delaware Corporation, but rather a receiver over the Liberian branch of an alien insurer (CIGNA WW), authorised and registered to do business in Liberia as such.

The issue in the Delaware and Cayman proceedings are entirely discrete, and do not have any bearing upon each other. The determination of the Delaware Court as to what, if any extent, it will recognise the authority of Mr. Sesay to sue in the name of CIGNA WW is of no relevance to the determination of the Grand Court as to whether it will afford recognition in the Cayman Islands to Mr. Sesay as Receiver over the Liberian branch of CIGNA WW.

The Delaware Court by any decision it might make on the issue with which it is concerned cannot determine:

(a) whether the Receiver is entitled to recognition in Cayman; and

(b) whether the indemnity is enforceable at the behest of the Receiver in favour of the Liberian estate of CIGNA WW.

The Grand Court has jurisdiction to grant recognition in the Cayman Islands to a Receiver appointed by a foreign court if satisfied that there is a sufficient connection between the company in question and the jurisdiction in which the Receiver was appointed, to justify recognition of the foreign court's order.

The determination of the Delaware Court on whether or to what extent it would recognise the Receiver's authority to act in the name of the CIGNA WW is not only not necessary, but in fact immaterial, to the determination of the issues with which this Court is concerned.

The Defendant is in effect asking the Grand Court to abdicate jurisdiction over the issue whether the Receiver appointed over the Liberian estate of CIGNA WW should be recognised in Cayman, in favour of the Delaware Court.

This approach is misconceived. However, there are in any event a number of factors which are relevant in assessing whether to stay these proceedings pending a determination of the Delaware Court on the limited issue stated.

(a) These proceedings were commenced as of right in the Cayman Islands;

(b) These proceedings were commenced prior to the Delaware proceedings (and indeed those before the District Court) and are further advanced;

(c) The relief sought in these proceedings can only be granted by the Grand Court;

(d) There is no issue as to personal jurisdiction in the Cayman Islands proceedings, whereas the Delaware Court does not have personal jurisdiction over the Receiver; and

(e) There is no *forum non conveniens* application pending in this Court with respect to the proceedings.

Analysis and conclusions

The circumstances in which the Court will recognise the power of a receiver appointed by a foreign court.

The Grand Court has an inherent power to recognise foreign appointed receivers and managers over assets within the jurisdiction based on well recognised conflict of laws principles - *Canadian Arab Financial Corporation and Kilderkin Investments Limited v Player* [1984-85 CILR 63] at page 103, Zacca P.

Dicey, Morris and Collins on 'The Conflict of Laws' 14th Edition at 30-127 considers the circumstances in which the Court will recognise the powers of a receiver appointed by a foreign court:-

> "Receiver appointed by court..... The circumstances in which the courts will recognise the powers of a receiver appointed by a foreign court..... seem to obtain where the foreign court had jurisdiction over the defendant whose property is made subject to the receivership. Such jurisdiction has been said to exist if there is a "sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order". When a sufficient connection will exist cannot be definitively stated. However, first, it seems that an appointment by a court in the country where the company is incorporated will be recognised. Secondly, it is also likely that the appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English court would recognise the order of the foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by a court in a country where the central management and control of the company is exercised, particularly, perhaps, if there is no likelihood of intervention from the courts of its place of incorporation. Similarly, the relevant connection may be found to exist if the appointment is made by the court of the country where the company carries on business, particularly if that is the only country where business is carried on."

This passage was considered by Jones J in *Masri and Manning v Consolidated Contractors International Company SAL* [2010(1) CILR 265] where a distinction was drawn (at paragraph 8) between the concept of recognition and enforcement.

Stay on the grounds of forum non conveniens, the case management power to impose a temporary stay on proceedings commenced as of right in the Cayman Islands and general management powers.

It is necessary to distinguish between:-

(1) Stay on the grounds of forum non conveniens. Where a plaintiff sues a defendant as of right in the Grand Court and the defendant applies to stay the proceedings on grounds of forum non conveniens, the principles to be applied by the Grand Court in deciding that application are those set out in the speech of Lord Bingham in *Lubbe and others v Cape Plc* [2000] 4 ALL ER 268 at 274.

(2) Case management powers to impose a temporary stay on proceedings commenced as of right in the Cayman Islands, in order to force the plaintiff to commence parallel proceedings in a foreign jurisdiction in which he would not otherwise choose to litigate. I refer to the decision of the Court of Appeal in *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Ltd and others* 1 December 2010 ("AHAB") where the Court considered the judgment of the English Court of Appeal in *Reichhold v Goldman Sachs* supra.

The Court should only in the most compelling circumstances (if at all) exercise its case management powers to impose a temporary stay on proceedings commenced as of right in the Cayman Islands, in order to force the plaintiff to commence parallel proceedings in a foreign jurisdiction in which he would not otherwise choose to litigate (AHAB para 88, Chadwick P).

A central question to be considered in such a case is whether the benefits which are likely to result from imposing a temporary stay so clearly outweigh any disadvantage to the plaintiff, that the case is one in which "rare and compelling circumstances" provide "very strong reasons" that justify doing so (AHAB at para 94).

In considering this central question it is material to consider (a) whether some existing process (short of lis alibi pendens) could be expected to resolve issues between the parties which would otherwise have to be decided in proceedings before the Grand Court; (b) whether proceedings commenced in a foreign court will lead to a decision determinative of the claims in this jurisdiction within a relatively short time; (c) whether proceedings commenced in a foreign court will necessarily lead to a resolution of issues which would otherwise have to be tried in this jurisdiction; and (d) whether the outcome of proceedings commenced in a foreign jurisdiction would be accepted as binding here (AHAB at paras 95-6)

(3) General case management powers.

The Preamble to the Grand Court Rules 1995 (Revised Edition) is as follows:

"PREAMBLE

1. The Overriding objective

1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.

1.2 Dealing with a cause or matter justly includes, as far as is practical-

(a) ensuring that the substantial law is rendered effective and that it is carried out;

(b) ensuring that the normal advancement of the proceeding is facilitated rather than delay;

(c) saving expenses;

(d) dealing with the cause or matter in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case; and

(iii) to the complexity of the issues;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.

2. Application by the Court of the overriding objective

2.1 The Court must seek to give effect to the overriding objective when it-

(a) applies, or exercises any discretion given to it by these Rules; or

(b) interprets the meaning of any Rule.

2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

3. Duty of the parties

The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

4. Court's duty to manage proceedings

4.1 The Court must further the overriding objective by actively managing proceedings.

4.2 This may include-

(a) identifying the issues at an early stage;

(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(c) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(d) helping the parties to settle the whole or part of the proceeding;

(e) deciding the order in which issues are to be resolved;

(f) fixing timetables or otherwise controlling the progress of the proceeding;

(g) considering whether the likely benefits of taking a particular step will justify the cost of taking it;

(h) dealing with as many aspects of the proceeding as is practicable on the same occasion;

(i) dealing with the proceeding without the parties needing to attend at court;

(j) conducting procedural hearings by means of telephone conference calls;

(k) making appropriate use of technology; and

(l) giving directions to ensure that the trial proceeds quickly and efficiently.

4.3 Whenever a proceeding comes before the Court, whether a summons for directions or otherwise, the Court will consider making orders on its own for the purpose of giving effect to the overriding objectives of the rules."

I also refer to the FSD Guide First Edition Section A 14 Case Management and Summonses for Directions.

The Court has a duty to further the overriding objective by actively managing proceedings. In fixing timetables or otherwise controlling the process of

proceedings the Court may have regard to the existence of litigation in other jurisdictions, to the extent appropriate in that particular circumstances.

In the present case the Defendant, ACE, does not seek a stay on the grounds of forum non conveniens.

According to Mr. Hawthorne's second affidavit

> "On September 20, 2011, the Delaware Court conducted a scheduling conference ..... During the conference, Vice Chancellor Laster stayed the case until 45 days after resolution of Mr. Sesay's assertion of foreign sovereign immunity in the EDPA..... in order to avoid duplicative and potentially conflicting rulings on that issue. He stated that, after resolution of the sovereign immunity issues, he would (if there was no immunity) take up the issue of whether a Delaware Court would view Mr. Sesay as having authority to pursue assets outside the jurisdiction of his appointment.....
>
> Counsel for CWW raised the concerned that, if the Grand Court were to move forward with this action, the Delaware Court's stay might have the effect of denying this Court the benefit of a ruling of a Delaware state court on the meaning of Delaware law. Vice Chancellor Laster responded:
>
> > *"I think what I want you to do is talk to my judicial colleague in the Caymans first. If he or she believes that there is a need to press forward quickly with this case on a schedule that would be inconsistent with the type of sequence that I've set up, certainly you can come back and make an application to me. You know, my speculation is that given the relatively slow-moving pace of this train, that the Caymans judge would look at this the same way I do, which is let's do this in a reasonable sequence. It's going to be helpful to the Cayman Islands judge to get an answer from this judge. It's going to [be] helpful to this judge to get an answer from the federal judge. So we'll go, you know, Tinker to Evers to Chance, and we'll ultimately end up with everybody having the precursor information that they need"*

According to footnote 8 of Mr. Hawthorne's affidavit:

> "Joe Tinker, Johnny Evers and Frank Chance were infielders for the Chicago Cubs in the early 1900s. Their efficiency in turning a double play – which involved Tinker fielding the ball, then throwing to Evers, who got the first out at second and in turn threw to Chance at first, who got the second out and completed the double play – was the bane of the then-New York Giants, who lost repeatedly to the Cubs in those years. Their three-way play-making was immortalized in the poem, "Baseballs' Sad Lexicon." Franklin P. Adams..... The phrase is "*still used on occasion today, to characterize any process that happens with smoothness and precision, as a near-synonym to expressions such as "like clockwork" or "a well-oiled machine.*""

It is to be remembered that there was a Consent Order staying these proceedings dated 6 February 2009 to which I refer for its terms and effect.

My response to the Defendant's summons for a stay is as follows:-

1. There will be an expedited taxation of the order for costs following the abandonment of the AJA Claim (see 2 above).

2. Save for the expedited taxation referred to in 1 above (and consequential applications or orders) there will be a stay until the Plaintiff complies with the order for security for costs (see 3 above).

3. The Plaintiff must thereafter apply for leave to re-amend the Writ and amend the Statement of Claim.

4. I will consider any application for leave at a Case Management Conference in April 2012 provided the order for security for costs is complied with.

5. At the Case Management Conference in April 2012 I will give directions as to the future timetable of these proceedings and in doing so I will have regard to any developments and anticipated developments in Liberia and the United States.

6. I am grateful to my judicial colleague in Delaware for his very clear and practical observations. Collaboration between judges in different

jurisdictions is highly desirable. I respond by saying that it would be helpful if any decision in Delaware were available as soon as practicable, albeit not perhaps at quite the speed of Tinker to Evers to Chance. I am confident that the Vice Chancellor will agree that the sooner this multi-jurisdictional litigation is brought to an end the better. The possible relevance of the Delaware proceedings to this action is in particular (but without limitation) identified above in the passage from Dicey, Morris and Collins at 30-127, third proposition.

5. AN ORDER THAT THE PLAINTIFF IDENTIFY THE PERSONS WHO ARE FUNDING THESE PROCEEDINGS?

ACE seeks an order that Mr. Sesay identify the persons who are funding him in these proceedings (including details of their residence or place of incorporation, as may be), so that any unsatisfied order for costs made against Mr. Sesay may be enforced against them. Lord Goldsmith submits that this is an opportunistic claim brought for the benefit of shadowy people.

There is no formal application for such as an order before the Court. I make the following observations.

It is the duty of parties to help the Court to further the overriding objective. This duty includes Mr. Sesay and his legal advisers. A serious issue is raised by the Defendant as to the nature, extent and legal effect of any assignment. I refer to the various statements on this subject quoted above.

In the course of the hearing Mr. Dunne made oral submissions on what were said to be instructions, but in the end he recognised that what the Court requires is full and accurate assistance as to the true position.

I refer (by way of illustration) to the principles set out in Chapter 3 of Snell's Equity 31st Edition as to Assignment of Choses in Action. Careful attention should be paid to the relevant principles when any draft amendment is formulated.

The subject of Third Party Funding was considered in Chapter II of Sir Rupert Jackson's Report on Costs where paragraphs 39 to 45 of the judgment of Lord Phillips in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 are set out. I also refer to *Abraham and another v Thompson and others* [1997] 4 ALL ER 362, CA and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2004] 1 WLR

2807 (PC). It is far from clear on the material before the Court what the nature, extent and legal effect of any assignment in the present case is, and whether the related arrangements conform to third party-funding as referred to above, or take some different form.

I indicate that it would further the overriding objective if Walkers would take careful instructions when preparing the application for leave to re-amend/amend and write to Maples and Calder clarifying the position as to any assignment, and enclosing copies of all material documents (to the extent that the Defendant is entitled to see the same.)

My purpose in giving this indication is to identify and narrow the issues and save time and cost.

If the Defendant wishes (despite the order for security) to pursue an application as above, a formal application should be issued.

6. FUTURE CASE MANAGEMENT

I reserve for consideration at a Case Management Conference in April the question of what future directions are appropriate (having regard to the overriding objective) in relation to the Defendant's two strike out summonses.

DATED this 27 day of January 2012

Cresswell J

The Hon. Sir Peter Cresswell
Judge of the Grand Court