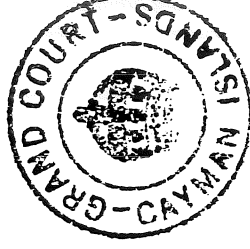


IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No. 356 of 1992
No. 205 of 1992



6-08-93

INSURCO INTERNATIONAL LTD.
V.
GOWAN COMPANY
Cause No. 356/92

ACHRICHEM LIMITEE
(FORMERLY AGRICHEM INSURANCE COMPANY LTD.)
AND
INSURCO INTERNATIONAL LTD.

V.
MUTUAL SERVICE INSURANCE COMPANY
AND
FRIT INDUSTRIES INC.
Cause No. 205/92

Mr. Henriques QC with Mr. Barrie for plaintiffs
Mr. Lamontagne QC with Mrs. Maierhofer for
Mutual Service Insurance Co.
Mr. Hill QC with Mr. Parkinson for Frit Industries Inc.
Mr. Foster for Gowan Company

Schofield J.

These applications have been consolidated because they arise out of very similar circumstances involving as they do a mutual plaintiff, and because they involve identical principles and issues of law, although there may be a slight difference of emphasis in the application of those principles as between one defendant and another.

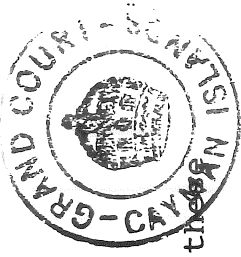
Agrichem Ltd. (hereinafter referred to as "Agrichem") was formerly called Agrichem Insurance Co. Ltd. Insurco International Ltd. ("Insurco") was incorporated on 13th May, 1985, and on the 1st June of that year acquired the business of Agrichem. These companies are exempt companies incorporated under the Companies Law (Cap 22) and were or are involved in what is known as the captive insurance business.

Frit Industries Inc. ("Frit") and Gowan Company ("Gowan") are United States Corporations whose business it is to manufacture and/or distribute agricultural chemicals. Frit is incorporated in the State of Alabama and Gowan in the State of Arizona.

Agrichem, succeeded by Insurco, provided to each of the Corporations product liability, completed operations and contractual liability insurance coverage.

Between 16th October, 1990, and 19th December, 1990, three suits were filed against Frit in the General Court of Justice, Superior Court Division, North Carolina, alleging injuries to two deceased persons and one surviving plaintiff from contaminated fertilizer supplied by Frit. Frit maintains that Insurco is obliged to provide cover for its defence of those proceedings and to indemnify it in respect of any judgment given in the proceedings. Mutual Service Insurance Co. ("Mutual") is an Minnesota Corporation which also provided insurance cover to Frit, and which Frit similarly maintains is obliged to provide defence in the underlying actions and to indemnify it in respect of any damages which may be awarded against it. Mutual has brought an action against, inter alia, Frit, Agrichem and Insurco in the United States District Court for the Middle District of Alabama, Southern Division, claiming that it is not liable to indemnify Frit against the claims brought in the North Carolina Proceedings and that Frit, Agrichem and Insurco are liable to defend these claims and Agrichem and Insurco are liable to provide indemnity to Frit. Frit has filed an answer, counterclaim and as against Agrichem and Insurco a cross-claim in that action. Agrichem and Insurco have filed an answer to Mutual's claim and an answer to Frit's cross-claim.

Four actions are currently pending against Gowan in the Superior Court of the State of California, U.S.A. These are actions are brought by four municipalities in California alleging that Gowan manufactured, formulated and distributed a chemical which contaminated their water supplies. Gowan maintains that Insurco and certain other insurance companies are under a duty to defend these actions on behalf of Gowan and to indemnify it in respect of any damages which may be awarded therein. Gowan has filed an action in the Superior Court of the State of California,



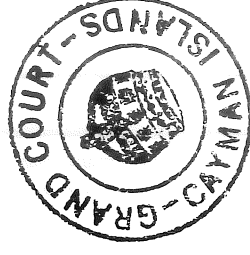
in and for the County of Fresno, in respect of that claim and its similar claims against the other insurance companies.

Agricham and Insurco claim that they are not liable to defend or indemnify Frit, Gowan or Mutual in the actions commenced in the United States of America. They base their claims on the terms of the policies and, in the case of Frit, on a further assertion that they have already paid out the policy limit for the year in respect of which the claims are made. In the two suits in which these applications are made declarations are sought to that effect. As against Gowan there is a further declaration sought that the policies are void because of a material non-disclosure. Leave was granted for the plaintiffs to serve all the defendants out of the jurisdiction. All defendants seek an order that such leave be discharged. Frit and Gowan also seek orders that the writ of summons and service of notice of writ be set aside and that the action be dismissed. Mutual seeks an order that the proceedings be stayed. All the defendants urge me that in applying the doctrine of forum non conveniens I should hold that the Cayman Islands is not the most appropriate forum to try the action. Gowan also urges me to find that the claim should be struck out as an abuse of the process of the Court.

I shall deal with the question of forum non conveniens first. The basic test on an application such as this was laid down by Lord Goff in Spiliada Maritime Corp. v Cansulex Ltd., The Spiliada [1986] 3 ALL E R 843 at 854:

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

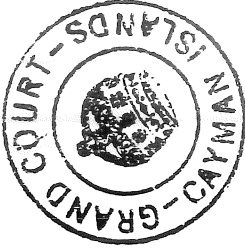
Where leave of the Court to serve out of the jurisdiction is



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necessary the burden of proof lies on the plaintiff and he has to persuade the Court not merely that Cayman is the appropriate forum for the trial of the action but that it is clearly so (see The Spiliada at p. 858).

The Court will endeavour to ascertain with which Court the action has the most real and substantial connection. As Lord Goff said in The Spiladia, at p. 856:



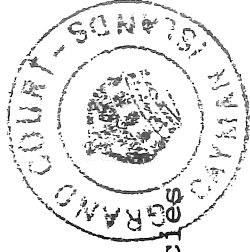
"So it is for connecting factors in this sense that the Court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Credit Chimique v. James Scott Engineering Group Ltd. 1982 SLT 131), and the places where the parties respectively reside or carry on business."

One factor heavily relied upon by the plaintiffs is their contention that Cayman law is the proper law of these insurance policies. Counsel for Gowan and Frit both agree that this is a factor which must weigh with the Court, but argue that Cayman law is not the proper law of the policies. Counsel for Mutual maintains that in the case of his client this factor should be of minimal influence.

I must make a provisional decision on what is the proper law of the insurance policies, although of course the issue may be raised at the trial. As Diplock J. (as he then was) said in Pick v. Manufacturer's Life Insurance Company [1958] 2 Lloyd's Rep 93, 97:

"It is now well established that under English rules of private international law, which differ in this respect from the rules of many continental countries, the proper law of the contract depends upon the intention of the parties, to be ascertained in the same way as any other contractual term is to be ascertained."

In considering this question I must take into account the terms of the contract and, furthermore, the surrounding

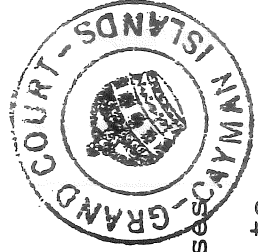


circumstances in which they were made. The insurance policies themselves are silent on what is the proper law.

The plaintiffs were providing insurance services for United States Corporations engaged in the agricultural chemical industry. This was a captive insurance scheme whereby the insurers sought to benefit from the tax advantages of this jurisdiction. All policyholders had to become shareholders in the insurance company and, of course, took the benefit of any profits made by the company. Both sides to these disputes point to the fact that the shareholder's agreement states that the law of the Cayman Islands governs the agreement. Should it not then follow, say the plaintiffs, that policies issued by the company are governed by Cayman law? No, say the defendants, otherwise the policies would have expressly stated so, as did the shareholder's agreement. I must say that the defendants argument appears to me to have more force. If it was the intention of the parties that each insurance policy should be governed by the law of these Islands it would have been easy to include a clause to that effect in that policy.

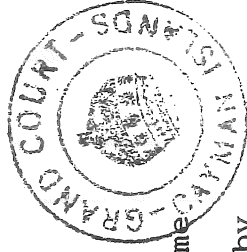
There is evidence that the policies are standardised United States insurance forms and follow the wording of forms issued out of the Insurance Service Office Inc. in Chicago, which is a trade association to which many United States insurance companies belong. The policies are printed in the United States of America. These policies were clearly designed to cover United States Corporations against risks incurred in North America. The terms of these or similarly worded policies have been the subject of much interpretative litigation in the United States.

The plaintiffs emphasize that their place of business is Cayman. Premiums are paid to the Cayman Islands, the policies are issued from these Islands and claims are made to and paid from Cayman by an agent/manager who is domiciled here. In short it seems that the paper work and accounting is carried out in



these Islands. The plaintiffs' secretary, John Law, deposes that adjustments, settlements or denials of claims are made to the agent/manager outside the United States of America. His affidavit avoids indicating that the processing of claims is carried out in the Cayman Islands. We do know that Mr. Law is the President of Cayman National Trust Co. Ltd. The name plate of both plaintiff companies is proximate to the office of Cayman National Trust Co. Ltd. on the second floor of the West Wind Building, George Town, but neither plaintiff appears to maintain an office in Cayman. The plaintiffs use the post office box number of a company called Beauman International Ltd. Two gentlemen by the name of Alfred and Christopher Beauman are directors of that company. Alfred Beauman lives in Florida, U.S.A. and Christopher Beauman lives in the Isle of Man. Christopher Beauman is the managing director of both Agrichem and Insurco. Alfred Beauman is a director of Agrichem. One Don Beauman is a director of Insurco. All three Beaumans are directors of a company called Beauman and Beauman Inc. which is incorporated in Florida and whose address is in Satellite Beach, Florida. There is evidence that Beauman and Beauman Inc. involved itself in soliciting business for Agrichem and Insurco, but there is dispute over what exactly that involvement was. Whatever one makes of the evidence in that regard it would be fanciful to deny the connection of the officers of Agrichem and Insurco with the United States of America. On the other hand none of the defendants have any connection whatsoever with the Cayman Islands.

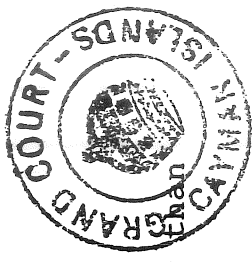
The plaintiffs are exempt companies. Insurco has been issued with an unrestricted class "B" insurance licence by the Government of the Cayman Islands and can accept insurance business other than domestic business. Agrichem and Insurco do not therefore provide insurance to any person or entity within the Cayman Islands; they provide cover for American Corporations engaged in the agricultural chemical industry in the United



States of America. American policyholders chose to become members of these Cayman Islands companies which were governed by Cayman Islands law. There is no doubt that they do so to secure taxation advantages for themselves.

The insurance policies are meant to cover risks which emanate from North America. The individual insurance policies written are standard American policies carrying reference to the United States of America. This appears to give a clear indication that the parties intended the proper law of the policies to be the United States of America and not Cayman. It is evident that the plaintiffs do business in the United States of America. Even if I am wrong in my conclusion as to the inference to be drawn regarding the intention of the parties the evidence points to a conclusion that the policies have their closest and most real connection with the United States of America (see Rossano v. Manufacturers Life Insurance Co. Ltd. [1962] 2 All E R 214). I have considered that each State has its own system of law and it is pertinent to ask whether the law of one State or another is the proper law of these policies. I do not consider that the answer to the question can involve shying away from the United States of America and returning to the Cayman Islands simply because America is a Federation of States. The answer must be to deal with each policy separately and determine with which State it has the closest and most real connection. For the purposes of these proceedings I need merely give my provisional view that the law of the Cayman Islands is not the proper law of these insurance policies.

My finding in this regard substantially determines the question of what is the forum conveniens for these actions, for, as I understood it, the plaintiff's contention that the proper law of the policies is the law of these Islands is the main head of their arguments. In any case I have considered most of the relevant connecting factors when determining the proper law of the policies. But in the case of each defendant the factors



pointing to the United States jurisdictions go much further than the matters I have already referred to.

Gowan is facing four suits in regard to alleged contaminated water supplies filed by four City Authorities in the San Francisco County Superior Court, California. In these underlying actions it is contended that property damage occurred during periods of time when Gowan claims it was covered by insurance policies issued by Insurco and certain other insurance companies, including a company called Inter-Industry, a wholly-owned subsidiary of Insurco registered in the Isle of Man. Initially all of Gowan's insurance carriers refused or failed to defend Gowan in the underlying actions. As a result Gowan has filed suit in the Superior Court of the State of California in and for the County of Fresno for breach of contract, breach of implied covenant of good faith and declaratory relief as against all these insurance companies, including Insurco and Inter-Industry. Various issues therefore fall to be canvassed before the Courts of California as to whether various insurance policies issued by different insurance companies cover the damage which it is alleged was caused in the underlying actions. There is evidence before me that some at least of these insurance policies are in the same form or substantially the same form. The Insurco and Inter-Industry policies fall to be construed in the California actions, which actions cover all the issues relating to all the insurance policies. It is important that all the policies are interpreted in the same way and it would be undesirable for this Court and the California Court to come to different and irreconcilable conclusions on interpretation of the policies. I am given to understand that an application was made by Insurco to stay the California proceedings on the ground of forum non conveniens but that such application was unsuccessful. That the decision is under appeal.

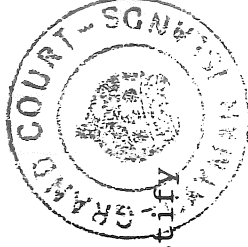
Finally, so far as Gowan is concerned, Insurco has failed to identify one witness to the California actions who is from these

Islands. Its own directors who may be called upon to testify reside either in Florida or the Isle of Man.

Mutual is brought into these proceedings because it chose to file a complaint against, inter alia, Frit, Insurco and Agrichem for a declaratory judgment that it, Mutual, is under no duty to defend Frit in underlying actions being pursued in North Carolina or to pay on any judgment entered therein, and that Insurco and Agrichem are under such duties. In that action filed in the United States District Court for the Middle District of Alabama, Southern Division, Frit has counterclaimed against Mutual and cross-claimed against Insurco and Agrichem. Thus the only connection which Mutual has with this jurisdiction is that it sued a Caymanian Company in its, Mutual's, own jurisdiction. All of Mutual's witnesses are in the United States of America. There is possibly one witness for the plaintiffs from these Islands.

Furthermore the Alabama proceedings are far advanced and the Court there has already determined part of the claim. It has determined that Insurco and Agrichem are under a duty to defend Frit in the underlying suits. It has also determined that Mutual is under a duty to defend Frit in two of the underlying suits. These are matters which should not be relitigated in this Court.

Prayer (4) in the statement of claim in CC 205 of 1992 seeks a declaration against Mutual and Frit that on the terms and conditions of the policies of insurance issued by Mutual to Frit, Mutual is liable to defend and indemnify Frit for claims made against Frit in the underlying actions. This is an issue purely between Mutual and Frit and is not one which can be brought into this Court by these plaintiffs. If this Court made a declaration in the terms prayed how would the order be enforceable? In any case the matter has already been partly decided by the Alabama Court.



The upshot of all this is that I find overwhelmingly that the connecting factors in these two suits point away from the Cayman Islands and to the Courts of the United States of America.

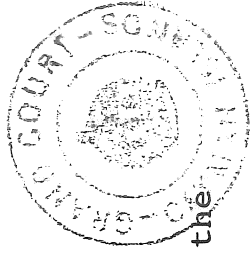
Counsel for Gowan went further than to argue that the action against his client be stayed on the ground of forum non conveniens. He argued that prayers (1) and (2) in the notice of writ be struck out as an abuse of the process of the Court. Counsel for Mutual and Frit both adopted his submissions, although Mutual's summons seeks only a stay of proceedings.

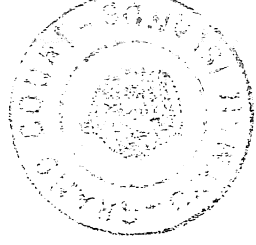
Prayers (1) and (2) of the notice of writ against Gowan claim declarations that Insurco is not liable on two policies of insurance, referred to as a master policy and an umbrella policy, to indemnify Gowan in the underlying actions in California in respect of the claims made therein and also that Insurco is not liable under those policies to defend the actions. The third prayer for a declaration that the certificates issued under those policies are void ab initio because of a material non-disclosure of fact, does not fall under this argument. The notice of writ against Mutual and Frit seeks three declarations of non-liability similar to those attacked by Gowan under this head of argument save that one such prayer seeks a declaration on the ground that the plaintiffs have already paid out the policy limits for the year in respect of which the claim is made.

In The Volvox Hollandia [1988] 2 Lloyd's Rep 361 at p 371 Kerr L.J. had this to say:

"Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflict of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping."

Kerr L.J. had further cause to consider the question of negative declarations in First National Bank of Boston v. Union Bank of Switzerland and others [1990] 1 Lloyd's Rep. 32. He had





this to say at p. 36:

"I then come to the considerations which, quite apart from these matters, are generally relevant to the approach of our Courts to claims for negative declarations, in particular declarations of non-liability. There is clear authority that these will be viewed with great caution, particularly where they arise in the contact of an international dispute involving conflicting jurisdictions.

The passage most frequently cited in this connection is from the judgment of Lord Justice Pickford in Guaranty Trust Company of New York v. Hannay & Co. [1915] 2 K.B. 536, at pp. 564-565, which the learned Judge cited at p. 6 of his judgment. Lord Justice Pickford (later Lord Sterndale) said:

I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it is brought...but taking the larger view that I do of the effect of Order XXV Rule 5 [-which deals with the grant of declarations-] I am not prepared to say it is beyond the power of the Court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the Court does not approve does not take away the power to make it, but only gives reason to refuse it.

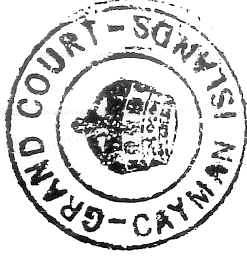
The reference to the purpose of which the Court did not approve involved concurrent proceedings in the United States in which the roles of the parties were again reversed, as here which the plaintiffs hoped to influence by bringing the English action.

In Camilla Cotton Oil Co. v. Granadex S.A. [1976 2 Lloyd's Rep. 10 Lord Wilberforce referred to the Hannay case as well-known but confused. In saying that it was confusing he was referring to the fact that the issue in Hannay turned mainly on the question of the Court's jurisdiction to grant a declaration of non-liability at all. That question was answered in the affirmative by the majority. But they left open and remitted, the issue whether such a declaration should in fact be granted in circumstances where the plaintiff claiming it was the defendant in foreign

proceedings in which a positive claim arising out of the same dispute was made against him. The tenor of the judgments of Lords Justices Pickford and Bankes in Hannay was clearly against the view that a claim for such a declaration should be used as an indirect means of avoiding or influencing the foreign proceedings. But this issue was left open because the material to decide it was considered not to be before the Court and because there was also a claim for an injunction against the defendants in the English proceedings to restrain them from continuing with the American proceedings, which had to go to trial in any event."

The jurisdiction of the Grand Court to grant declarations is, it seems, as wide as that of the English Courts. But it is clear that we must exercise great caution before granting negative declarations of the kind sought by the plaintiffs in this case. I have already rehearsed many of the factors which would operate against granting orders which are meant to interfere with the proceedings pending in California and Alabama. Although the proceedings by Gowan were filed in California in the month following the filing of the suit in this jurisdiction, Gowan had given earlier warning to Insurco that it intended to have recourse to legal proceedings in the United States if its claims were not satisfied. Mutual filed its claim in the Alabama Court three or so months before the plaintiffs filed suit in this Court against Mutual and Frit.

If this Court were to make the negative declarations sought there is nothing I have seen which could satisfy me that the Courts of the United States of America would be bound by them. Rather it seems that the declarations would or at least could present embarrassment to those Courts. As I have already said, there being other insurance companies involved in both the proceedings in California and in Alabama, there would be a risk of conflicting decisions between the Grand Court and those Courts on the interpretation of the same or similar insurance policies. Gowan in particular has a claim in the California proceedings for breach of good faith which is not known to our law and which will be proceeded with no matter what the outcome of the proceedings

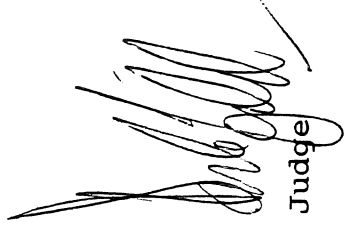


in this Court. So the plaintiffs cannot hope to resolve all issues before the California and Alabama Courts in this jurisdiction. They merely seek to have some of those issues litigated in this jurisdiction. They appear to be forum shopping.

For all these reasons I accept the contention of the defendants that the prayers for negative declarations are an abuse of the process of the Court.

One final matter ought to be dealt with. Gowan and Frit entered conditional appearances and thus did not submit themselves to this Court's jurisdiction. Mutual entered a general appearance and has thus submitted to the jurisdiction. It is argued by the plaintiffs that Mutual may only be granted a stay and is not entitled to an order setting aside leave to serve out of the jurisdiction. As pointed out by counsel for Mutual the question of forum non conveniens is not a question of jurisdiction (see Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd. [1990] 3 All E R 404, 416). Mutual did not claim in its summons that there was anything wrong with the writ; it attacked the proceeding. Mutual does not seek to have the writ set aside and the action dismissed. But it is proper for Mutual to apply not only for a stay of these proceedings but also for an order setting aside the leave to serve out of the jurisdiction, these being applications going to matters of proceeding (see for example, Re Harrods (Buenos Aires) Ltd. (No 2) [1991] 4 All E R 348, 351).

The defendants in both suits, Gowan, Mutual and Frit, will have the orders they seek and also their costs.



Judge

