IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 121 OF 2013 (AJEF)

IN THE MATTER OF THE ARBITRATION LAW, 2012

AND IN THE MATTER OF AN ARBITRATION BETWEEN APPALACHIAN REINSURANCE (BERMUDA) LTD. AND GREENLIGHT REINSURANCE, LTD

BETWEEN:	APPALACHIAN REINSURANCE (BERMUDA) LTD.	Plaintiff
AND:	ROBERT M. MANGINO	1st Defendant
AND:	ROBERT M. HALL	2nd Defendant
AND:	THOMAS M. TOBIN	3rd Defendant
AND:	GREENLIGHT REINSURANCE, LTD.	4th Defendant

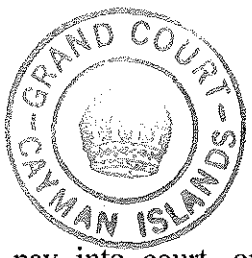
GRAND COURT - CAYMAN ISLANDS

Coram:	Mr. Justice Angus Foster
Dates:	25 & 27th November 2013
Appearances:	Applicant/4th Defendant: - Ms. Colette Wilkins & Mr. Nicholas Dunne of Walkers
	Respondent/Plaintiff: - Mr. Anthony Akiwumi of Stuarts

Reasons for Order made on 27th November 2013

Introduction

1. By these proceedings the plaintiff has applied for an arbitral award made against it to be set aside by the court. The arbitral award required the plaintiff to pay the sum of slightly less than USD25m. to the fourth defendant. By paragraph 2 a. of an order made on 27th November 2013 on the application of the fourth defendant I ordered that, pending the



determination of the plaintiff's application, the plaintiff should pay into court, or otherwise secure to the satisfaction of the fourth defendant, the amount of the arbitral award. It is against that part of the order that the plaintiff has appealed. The plaintiff was given leave to appeal out of time and apparently complied, albeit late, with subsection (2) of section 19 of the Court of Appeal Law (2011 Revision) on 16th January 2014. Accordingly, pursuant to subsection (4) of the said section 19, this is a statement of my reasons for making the order of 27th November 2013.

Background

2. The plaintiff ("App Re") is a company incorporated in Bermuda. The fourth defendant ("Greenlight") is a company incorporated in the Cayman Islands. Both companies are in the business of reinsurance.

3. By its originating summons dated 6th September 2013 App Re applied to this court to set aside an arbitral award made on 15th August 2013 ("the Award") by the arbitral tribunal ("the Tribunal") in the arbitration concerned, which was governed by Cayman Islands law. The arbitration was initiated by App Re pursuant to the relevant arbitration clause in two retrocession agreements between App Re and Greenlight in furtherance of certain reinsurance agreements. Various unsuccessful negotiations had taken place between the parties concerning the amount of collateral payable to Greenlight by App Re pursuant to the two retrocession agreements. This finally culminated, in October 2012, in a formal demand to App Re by Greenlight for payment of a sum slightly in excess of USD27m. Shortly after that, on 2nd November 2012, App Re served notice of arbitration pursuant to the retrocession agreements.

4. The factual history of the arbitration is set out in detail in the first affidavit of Ms. Laura Acurso, in-house counsel and secretary of Greenlight, sworn on 31st October 2013, and the exhibits thereto, all of which I reviewed fully. I accepted and relied upon this account of the factual history, which I do not think it necessary to repeat in detail in these reasons as it can readily be found in Ms Acurso's affidavit, although I will refer to

some of it later. However, overall the factual history of the arbitration satisfied me that App Re conducted itself in relation to the arbitration in an extremely dilatory and inappropriate manner, giving rise to a clear inference that it was pursuing a deliberate strategy of delay and prevarication. In very brief summary, App Re delayed in appointing an arbitrator within the stipulated time and ultimately failed to appoint one at all; it refused to join in indemnifying the arbitrators for their fees and costs as required; it attempted to impose an unreasonably lengthy timetable for the conduct of the arbitration; it failed to comply with timetables set by the Tribunal and it failed throughout to set out its substantive case in relation to the amount of collateral payable to Greenlight, which was the very issue in the arbitration which it had initiated.

5. Eventually, after almost a year of delay, procrastination and stalling by App Re, since there was no dispute as to the relevant terms of the retrocession agreements, Greenlight invited the Tribunal to consider determining the amount of collateral payable by App Re on an application it proposed to make for summary judgment. App Re objected to such a procedure being adopted by the Tribunal. The Tribunal, having considered the parties' oral (by telephone) and written submissions on its entitlement to hear and decide such an application for summary judgment, concluded that it was entitled to do so and re-affirmed a timetable which it had proposed for Greenlight's submission of its summary judgment application, for App Re's response and for Greenlight's reply. In response to this decision by the Tribunal App Re threatened the Tribunal with proceedings in this court, including for an injunction, although it did not in fact issue any such proceedings. Instead, notwithstanding that the Tribunal had already decided that it could and would hear Greenlight's summary judgment application, App Re's response to Greenlight's summary judgment application was to file three consecutive written submissions, not on the merits of Greenlight's application but re-iterating and expanding upon its arguments that the Tribunal was not entitled to entertain an application for summary judgment or to determine the issue before it on that basis. App Re also contended that there should be an oral hearing by the Tribunal on Greenlight's summary judgment application.

6. In accordance with the timetable established by the Tribunal, Greenlight then filed a reply to App Re's submissions. Thereafter, on 15th August 2013, the Tribunal issued the Award and ruled (1) that it had authority to decide the merits of the proceeding upon written submissions without an oral hearing, (2) that such an oral hearing was not necessary because App Re had not presented any evidence of any contested fact as to Greenlight's entitlement to the relief it sought and (3) that it would grant Greenlight's summary judgment application. The Tribunal awarded Greenlight a total sum of just under USD25m. in respect of collateral and associated expenses pursuant to the retrocession agreements, to be paid by App Re in cash or by way of letter of credit.

7. On 7th October 2013, the Tribunal awarded Greenlight its costs of the arbitration in the sum of USD210,150.16 ("the Costs Award"). There is no challenge by App Re to the Costs Award.

8. App Re commenced the present proceedings on 6th September 2013 seeking to set aside the Award. In its originating summons it named as defendants, not only Greenlight, but also the three individual members of the Tribunal. However, App Re did not file an application for leave to serve the members of the Tribunal out of the jurisdiction for some two months. As a result of subsequent developments in these proceedings, which are not relevant to these reasons, that application has not yet been heard. App Re also failed to serve its evidence in support of its originating summons timeously in accordance with the relevant rules.

9. Thereafter, by summons dated 6th November 2013, Greenlight applied for orders that App Re pay into court within 7 days:

    a) a sum of USD69,000 by way of security for Greenlight's costs of these proceedings;
    b) the sum of USD24,916,567, being the amount of the Award;
    c) the sum of USD210,150.16, being the amount of the Costs Award.

10. On 27th November 2013, following a hearing on Greenlight's summons on 25th November 2013, I made the order in issue ("the 27th November Order"). The 27th November Order is twofold. Firstly, at the start of the hearing App Re had intimated that it consented to an order that it should pay into court the sum of USD69,000 as security for Greenlight's costs of the proceedings within 7 days. Accordingly, the first part of the 27th November Order is a consent order to that effect.

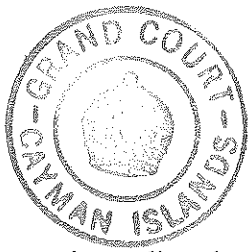
11. The second part of the 27th November Order requires App Re to secure to the reasonable satisfaction of Greenlight by no later than 3:00pm on 16th December 2013 (ie 19 days after the date of the order), failing which to pay into court, firstly, the amount of the Award, being the sum of USD24,916,567 (para 2 a.of the 27th November Order), and, secondly, the amount of the Costs Award, being the sum of USD210,150.16, (para 2 b. of the 27th November Order), all as applied for by Greenlight. It is against para 2 a. of the order that App Re seeks to appeal. As I have mentioned, there is no appeal against para 2 b. of the 27th November Order relating to the Costs Award.

The law

12. App Re's originating summons states that it is brought pursuant to section 75 of the Arbitration Law 2012 ("the Law") as an application to the court to set aside the Award. Greenlight's summons was brought pursuant to section 77 subsections (6) (security for costs) and (8) (security for the Award) of the Law. The latter subsection provides, in relation to any application or appeal to the court pursuant to section 75 (or section 76, which was not relevant to the application before me), as follows:

"(8) *The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with*"

This provides the court with a discretionary power to order that the amount of an arbitral award (including, as in the present case, the amount of any costs ordered to be paid by the



arbitral tribunal), are to be paid into court or otherwise secured, pending determination of the application made to the court pursuant to section 75 of the Law to set aside the arbitral award. The 27th November Order is such an order.

13. In view of the relatively recent enactment of the Law, there is apparently as yet no Cayman Islands authority on the exercise of the court's power under section 77 (8) of the Law (or, for that matter any other provision of the Law). However, section 70 (7) of the English Arbitration Act 1996 ("the English Act") is identical to section 77 (8) of the Law and I was referred to two English cases relating to applications under that section. The cases concerned were both at first instance and so, of course, not binding on this court. However, I found them to be of assistance.

14. In *Peterson Farms v C & M Farming Limited & Another [2003] EWHC 2298 (QB)* Tomlinson J (as he then was) considered an application under section 70 (7) of the English Act. That was a case in which the party against whom the arbitral tribunal had awarded damages against Peterson which contended that the arbitral tribunal had had no jurisdiction to award against it damages which had been suffered by companies in a group other than the claimant company, C & M Farming Limited (C & M), which had been the named party to the arbitration agreement. Peterson had issued an application pursuant to section 67 of the English Act seeking to set aside that part of the award as having been made by the arbitral tribunal without jurisdiction. Section 67 provides that a party may apply to the court to have an arbitral award set aside on the ground that the arbitral tribunal did not have substantive jurisdiction. The arbitrators had concluded that they did have substantive jurisdiction to award against Peterson damages claimed by the other companies associated with or affiliated to C & M.

15. I should note at this stage that section 67 of the English Act is to be distinguished from section 68 of that Act. Section 68 of the English Act provides that a party may apply to the court to have an arbitral award set aside on the ground of serious irregularity affecting the arbitral tribunal or the arbitration proceedings or the arbitral award in various respects including, under section 68 (2) (b), that the arbitral tribunal exceeded its

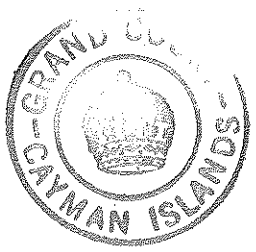
powers (other than by exceeding its jurisdiction). As will be seen, this distinction has been considered relevant by the English court in an application under section 70 (7) of the English Act and, by analogy, it was argued, an application under section 77 (8) of the Law.

16. In the *Peterson Farms* case the judge said:

"*26. Furthermore, Mr Foxton* [for Peterson] *points out that there is of course a conceptual difference between a challenge under section 67 and a challenge under sections 68 and 69. An award which is challenged either under section 68 as having been made in the wake of a serious irregularity, or an award which is alleged to be wrong in law under section 69, has a presumptive validity, unless and until set aside. The same is not true of an award challenged under section 67, as to which it is only possible to say of it either that it was made with jurisdiction or that it was not.*

27. One can well understand why it is that it might be thought appropriate to require the posting of security in circumstances where a section 68 challenge is made, because if the parties have chosen to arbitrate their dispute it may be said that they have elected a procedure which will not necessarily contain all of the same formalities and safeguards which might be thought to attend proceedings in court. Something of that notion is apparent from the observations of Robert Goff J., as he then was, in Mondial Trading Company v Gill & Duffus [1980] 2LLR 376 at 380 ……
……

in the context of his consideration of circumstances in which the giving of security might be appropriate, Robert Goff J referred to the fact that the parties have chosen the arbitrators as their tribunal, by which of course he meant to refer to the fact that, having chosen arbitration as their method of dispute resolution, it would be inappropriate, without more, for one of the parties to then seek to suggest that the matter had not been dealt with in precisely the manner in which it might have been dealt with in legal proceedings



28. That consideration does not of course arise here, [being an application under section 67] *because the question at issue is whether in relation to the recoverability of losses sustained by the associated or affiliated companies the parties have chosen this arbitration tribunal as their selected tribunal to determine the dispute, the whole question being whether the arbitration agreement is, on its true construction or in the circumstances, apt to embrace those claims."*

The judge then went on to give guidance "*as to the circumstances in which the court will be likely to exercise its power under section 70(7) where an application is made under section 67.*" And in that context he said:

"*30. Having said that, it is quite clear to me that one circumstance which is likely always to weigh very heavily with the court in determining whether it is appropriate to exercise a power under section 70(7) will be the question whether the challenge appears to have any substance. Here Mr Godwin* [for C & M] *submitted that the challenge was without substance, or was, as he put it, flimsy. It is obviously undesirable that I should say too much about the nature of the challenge, since I have concluded that it is not flimsy and since it will fall to the judge hearing the full application in due course to reach his own conclusions.*"

The judge then explained why he did not consider that the challenge under section 67 was insubstantial or flimsy and continued:

"34. For all these reasons, therefore……

……

I am certainly in no position whatsoever to conclude that the challenge which is mounted by Peterson Farms is flimsy. It seems to me that it is far from flimsy, although that itself is far from saying that it will necessarily succeed at the end of the day.

35 It seems to me that, in most cases, it is likely that demonstration by the party against whom the jurisdictional challenge is made that the challenge is flimsy or otherwise lacks

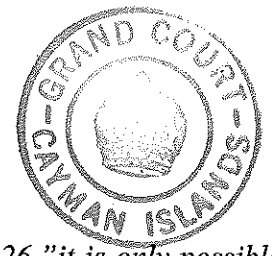
substance is likely to be regarded as a threshold requirement for the court's consideration whether in all the circumstances it is appropriate to require, as a condition of proceeding under section 67, that money payable under the award shall be brought into court or otherwise secured pending the determination of the application. That being the case, the threshold is not, in this case, crossed by C & M, and I would, for that reason, alone, decline to grant the relief sought."

And the judge then explained why, in the circumstances which he had outlined, he would not consider it as an appropriate exercise of his discretion to make the order for posting of security for the award.

17. The other English case to which I was referred in this context was the more recent one of *A v B (Arbitration Security) [2010] EWHC 3302,* a judgment of Flaux J. That also arose out of an application under section 67 of the English Act to set aside two awards on grounds of the arbitral tribunal's alleged lack of jurisdiction (there was also a challenge to the awards on a question of law under section 69, which was not relevant to the case before me). The successful party in the arbitrations/defendant to the section 67 application applied to the court both for security for costs and for security for the sums awarded by the arbitral tribunal, the latter under section 70(7) of the English Act.

18. In his judgment Flaux J considered the *Peterson Farms* case and, after considering an issue discussed in that case arising out of another aspect of the English Act which was not relevant to the terms of the Law which I had to apply, he said:

"*16. The second significant matter to which Tomlinson J drew attention in that case is that there is a difference between an application section 67 and applications under sections 68 or 69 in that, in the case of an award which is challenged under section 68 on the basis of serious irregularity or which is said to be wrong in law under section 69, the award has a presumptive validity unless and until set aside. By contract, an award which is said to have been made without jurisdiction and challenged under section 67 does not*



have a presumptive validity; as the judge said at para 26,"it is only possible to say of it either that it was made with jurisdiction or that it was not".

The judge then reviewed certain other subsequent cases relating to applications under section 70(7) of the English Act made in the context of applications to the court pursuant to section 67 and concluded:

"*32 Because of the problems with Morison J's approach to section 70(7) which I have identified, I consider that the view of Tomlinson J is much to be preferred. This is the view that, in most cases there will be a threshold requirement that the party making the section 70(7) application demonstrates that the challenge to the jurisdiction is flimsy or otherwise lacks substance.*

19. The Law is structured somewhat differently from the English Act in some respects and the grounds on which an arbitral award may be set aside by this court, which may be considered somewhat more restrictive, are consolidated in section 75 of the Law rather than set out in separate sections (sections 67, 68 and 69) as in the English Act. Section 75 of the Law is in the following terms:

"*75 (1) An award may be set aside by the court -*

(a) If the party who applies to the court to set aside the award proves to the satisfaction of the court that –

(i) a party to the arbitration agreement was under an incapacity or placed under duress to enter into an arbitration agreement;

(ii) the *arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the laws of the Islands;*

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;*

(v) *the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties, unless such agreement is contrary to any provisions of this Law from which the parties cannot derogate, or, in the absence of such agreement, is contrary to the provisions of this Law;*

(vi) *the making of the award was induced or affected by fraud, corruption or misconduct on the part of an arbitrator; or*

(vii) *a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or*

(b) If the court finds that –

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under this Law; or*

(ii) *the award is contrary to public policy.*

20. App Re's originating summons does not identify which particular sub-section or sub-sections of section 75 of the Law it is relying on in its application to set aside the Award. The relief which it seeks is:

"1. a Declaration that the 1st, 2nd and 3rd Defendants [the individual arbitrators] do not possess the authority to hear an application for Summary Judgment;

2. an Order that Order No.3 [the Award] *made by the 1st, 2nd and 3rd Defendants, in their capacity as Arbitrators presiding over the Arbitration, be set aside;*

3. an Order that the 1st, 2nd and 3rd Defendants dismiss the 4th Defendant's application for Summary Judgment;

4. an Order that the Plaintiff is at liberty to file affidavit evidence in respect of factual matters concerning the substantive merits of the Arbitration; and

5. such other Orders and Directions as this Honourable Court deems fit."

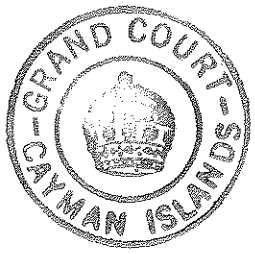
In "*Particulars*" forming part of its originating summons App Re avers that, as a result of the Tribunal's finding that it had "*the authority*" to hear and decide Greenlight's application for summary judgment, the Award "*was induced and/or affected by misconduct on the part of the* [Tribunal]". It was also averred that for the Tribunal to proceed to hear the summary judgment application "*without the benefit of an oral hearing was a breach of the rules of natural justice with the consequence that the rights of* [App Re] *were prejudiced.*"

The parties' submissions and comment thereon

21. The principles which have been adopted by the English courts in the cases to which I was referred have clearly distinguished between applications changeling the jurisdiction of the arbitral tribunal under section 67 of the English Act on the one hand and applications changeling the conducted or procedure adopted by the arbitral tribunal under section 68 on the other hand when considering whether security for the arbitral award concerned should be required of the party seeking to set aside the arbitral award pursuant to one or other of those sections. This distinction gives rise to a different approach on such an application. Where the set aside application is a challenge to the jurisdiction of the arbitral tribunal there is no presumption that the critical award is valid. Consequently in such a case it is appropriate to require the party making the application for security for the award to demonstrate to the court first, as a threshold test, that the challenge to the jurisdiction of the tribunal is flimsy or otherwise lacking in substance. It is only if that can be done that the court will then go on to consider other factors in exercising its discretion on the application. On the other hand, in relation to an application to set aside the award on grounds of irregularity, other than a lack of jurisdiction, affecting the arbitral tribunal or the arbitral proceedings or the award there is, unless and until the award is set aside, a presumption that the award is valid. In such a case there is therefore no need for the applicant for security for the award to demonstrate, whether as a threshold test or otherwise, that the challenge to the award is flimsy or lacking in substance; the award is presumed at that stage to be valid.

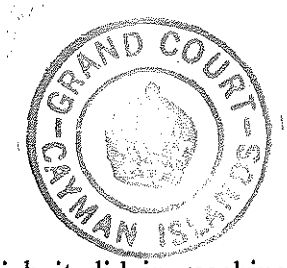
22. In its previous submissions to the Tribunal, in its originating summons and in both the written and oral submissions of its counsel at the hearing before me, App Re referred to its complaint against the Tribunal as being to its "jurisdiction" to hear and determine the issue in dispute on an application for summary judgment. At the hearing, counsel for App Re contended that its challenge to the Award was not based simply on the procedure adopted by the Tribunal but was a question of the Tribunal's purported exercise of summary "jurisdiction". Although on other occasions counsel referred to his submission as being that the Tribunal had no "power" or "authority" to hear or determine Greenlight's application for summary judgment, overall his argument was that App Re's application to set aside the Award was a jurisdictional one, namely that the Tribunal had no jurisdiction to hear and determine the issue in the arbitration on a summary basis. Accordingly, he submitted, the grounds on which App Re had applied for the Award to be set aside were akin to those under section 67 of the English Act. That being so, he contended that applying the English principles, the present case was therefore one in which the threshold test should be applied. It was, therefore incumbent on Greenlight to demonstrate to the court that App Re's application to set aside the Award was flimsy or otherwise lacking in substance, which, he contended, it was unable to do.

23. I did not agree with these submissions by counsel for App Re. Section 67 of the English Act refers to the "substantive jurisdiction" of the arbitral tribunal, which, in the overall context, seemed to me to mean the substantive authorisation and sanction of the arbitral tribunal to determine the issue in dispute between the parties which has been submitted to arbitration pursuant to the applicable arbitration agreement. It seemed to me important to have regard to the substantive nature of the challenge to the award and not simply to the terminology used by the applicant seeking to have the award set aside. The use of the word "jurisdiction" in relation to the entitlement of the Tribunal to adopt a particular procedure, namely a summary judgment application to reach its decision, was, in my view, misleading in this context.



24. As I have already pointed out, the structure and terminology of section 75 of the Law in relation to the grounds on which this court may be satisfied that it may set aside an arbitral award are not precisely the same as the structure and terminology of the English Act. In this particular respect, the Law, I believe, more closely follows the format and provisions of the UNCITRAL model law than the English Act. Nonetheless, it did seem to me that subsection (1) (a) (iv) of section 75 of the Law amounts in effect to a provision empowering this court to set aside an award on grounds amounting to a similar lack of jurisdiction basis as that on which an award may be set aside under section 67 of the English Act. I have set out above the terms of subsection (1) (a) (iv) of section 75 of the Law but in summary it provides that an award may be set aside if the court is satisfied that it deals with a dispute not falling within the terms of the arbitration agreement. This seems to me to be effectively the same as saying that the tribunal did not have substantive jurisdiction to determine the issue in dispute as section 67 of the English Act provides, although the language of the two provisions is, of course, not identical. In the *Peterson* case, in describing the section 67 application, Tomlinson J referred to "*the whole question being whether the arbitration agreement is apt to embrace those claims.*" That was, in my view much the same as the basis for challenge of an award which is set out in subsection (1) (a) (1v) of section 75 of the Law. It was, in my opinion, clearly not the true basis on which App Re was in reality seeking to have the Award set aside.

25. I therefore considered that App Re's challenge to the Award was not a jurisdictional one. There was no submission, and I did not understand there to be any suggestion, that the Award dealt in any way with a dispute not contemplated by or not falling within the terms of the arbitration clause in the retrocession agreements or the submission to arbitration or that the Award contains decisions on any substantive matter beyond the scope of the arbitration clause or the submission to arbitration. The Award determined, and only determined, the very issue submitted to arbitration pursuant to the relevant arbitration clause, namely the amount of collateral payable by App Re to Greenlight pursuant to the retrocession agreements. The issue raised by App Re in its application was not whether the Tribunal had jurisdiction to make the Award but whether the

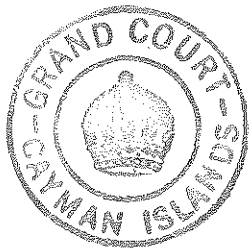


Tribunal was entitled to adopt the means or procedure which it did in reaching its decision on what, if anything, to award. I was of the opinion that on a correct analysis the criticism of the Award by App Re is of the procedure adopted by the Tribunal as provided for in section 75 (1) (a) (v) of the Law, similar to a challenge on grounds of irregularity under section 68 of the English Act.

26. In light of my conclusions above, I considered that I should proceed on the basis that there was no need, in fact that it would be inappropriate, in this case, for Greenlight to have to satisfy me that App Re's application to set aside the Award was flimsy or otherwise lacking in substance as for these purposes I should proceed on the basis that the award was valid. I therefore rejected the argument of counsel for App Re that Greenlight should be required, in the circumstances of this case, to meet such a threshold test before considering further its application for security for the Award.

27. I also considered App Re's contention, already mentioned, which is averred at paragraph 8 of the Particulars attached to its originating summons, that the Tribunal's finding that it "*possessed the jurisdiction to hear and determine* [Greenlight's] *application without the benefit of an oral hearing was a breach of the rules of natural justice with the consequence that the rights of* [App Re] *were prejudiced.*" In fact the Tribunal did not refer in its finding to its "jurisdiction" to hear or determine the summary judgment application. However, notwithstanding this, App Re's averment was presumably based on the provisions of subsection (1) (a) (vii) of section 75 of the Law, which I have also set out above. My view was that this ground for seeking to set aside the Award clearly also related to the procedure adopted by the Tribunal and was not a jurisdictional challenge. It seemed to me to be similarly a challenge of the kind in respect of which the award concerned retains a presumptive validity unless and until set aside. This too was accordingly not the type of challenge in respect of which the threshold test was necessary or required of Greenlight.

28. However, it may assist if I record that, even if I was wrong my opinion above based on my analysis of the grounds of App Re's application to set aside the Award and that it



was indeed incumbent on Greenlight to satisfy me as a threshold test that App Re's application to set aside the Award was flimsy or otherwise lacking in substance, I had nonetheless concluded anyway that in this case the threshold test would indeed have been met. Of course I accepted what Tomlinson J said in the *Peterson Farms* case in relation to the jurisdictional challenge in that case that it would be undesirable for me to say too much about the merits of App Re's application when there will presumably be a hearing of the application itself in due course and it will be for the judge hearing the application to determine the merits of it (see also per Flaux J in the *A v B* case at para 36). Nonetheless, in order for me to decide whether the threshold test had been met in this case it would clearly be necessary to consider the various points made in the application to set aside the Award and I therefore did so.

29. On this hypothesis App Re's case was that the Tribunal did not have jurisdiction to hear and determine the application by Greenlight for summary judgment. I was of the view that this was a flimsy and insubstantial argument. It seemed to me that App Re, or rather its counsel, had approached (and continued to approach) the arbitration as if it was an action in court and his submissions appeared to be made in that light. As the judge said in the *Peterson* case in the passage cited at para 27 above, parties chose to resolve their disputes by arbitration for the very reason that they do not wish to have to observe or be bound by the formalities of court procedure. When parties have chosen arbitration as their method of dispute resolution, it is inappropriate, without more, for one of the parties to suggest that the matter was not dealt with by the arbitral tribunal in the manner in which it might have been dealt with in legal proceedings. Yet, it seemed to me that this was precisely what counsel for App Re was in effect doing. For example, he referred to and apparently relied upon the Grand Court Rules in his submissions to the Tribunal and in criticizing its approach to Greenlight's summary judgment application as if the application should have complied with and the Tribunal should have observed those rules or otherwise applied the practice and procedure of this court in litigation before it. My view was that this reflected a fundamental misunderstanding of the point and nature of arbitration. Of course the arbitral tribunal acting in an arbitration

governed by Cayman Islands law is bound by the provisions of the Law but the Law itself, by section 3, provides:

> *"(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;*
>
> *(b)the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and*
>
> *(c) In matters governed by this Law the court should not intervene except as provided in this Law."*

30. In the present case the parties expressly agreed in the arbitration clause that the arbitrators were "*not obliged to follow judicial formalities or the rules of evidence except to the extent required by governing law*" (which, of course, was Cayman Islands law). They also expressly agreed that the arbitrators should "*make their decisions according to the practice of the reinsurance business*" and that "*The decision rendered by a majority of the arbitrators shall be final and binding on both parties."* According to the evidence before me, the three arbitrators comprising the Tribunal were, as also required by the express agreement of the parties, all "*active or retired officers of insurance or reinsurance companies or Lloyds London Underwriters*". They were all experienced arbitrators in relation to insurance and reinsurance matters and familiar with the practice of the reinsurance business.

31. In my view there was nothing in the Law which precluded the Tribunal, in the absence of agreement otherwise by the parties, from hearing and determining the issue before it on a summary judgment application if it considered it appropriate and fair to do so in the particular circumstances. In this case it did not seem to me to have been in any way contrary to the public interest for the Tribunal to do so. App Re was given every opportunity by the Tribunal to state its case on the merits of the issue which was the subject of the arbitration and to present any evidence of fact which it contended was relevant but it chose not to do so. It was my conclusion that the Tribunal's approach and procedure had been fair and appropriate in the particular circumstances and was consistent with the object of arbitration as set out in the Law. I could not see that there

had been any misconduct by the Tribunal or breach of the rules of natural justice in connection with the making of the Award and none by which the rights of App Re had been prejudiced. In my view it was unlikely that any material misconduct would be established to the satisfaction of the court such as to justify the court setting aside the Award. While it was not, of course, for me to conclude that App Re's application to set aside would fail in the end of the day, it did seem to me to be based on flimsy and insubstantial grounds. Accordingly, my reasons based on my analysis of the true nature of App Re's application as explained above, were, I considered, supported by my view that that application was anyway flimsy and lacking in substance.

32. Although not referred to in the originating summons, counsel for the App Re also relied in argument before me on section 33(2) of the Law. Section 33 provides

"(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall determine if proceedings are to be conducted by –

(a) oral hearing for the presentation of evidence;

(b) the production of documents and other written materials;

(c) the use of telecommunications technology;

(d) a combination of the above.

(2) Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, upon the request of a party, hold such hearings at an appropriate stage of the proceedings"

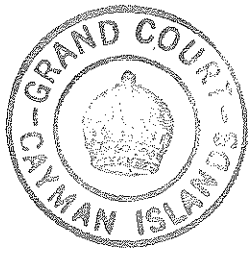
Counsel contended that by not holding an oral hearing the Tribunal had been in breach of subsection (2) above. However, I considered that this was also a flimsy argument in the overall circumstances of this case. The Tribunal complied with subsection (1) above and determined that there should no oral hearing. Subsection (2) does not refer to oral hearings. The Tribunal did consider the parties submissions on various occasions and also held an organizational meeting by telephone and accordingly held several hearings during the course of the arbitration. App Re threatened legal proceedings, including an injunction, against the members of the Tribunal in relation to their decision to hear

Greenlight's application for summary judgment without the need for an oral hearing as App Re had not put forward any evidence. But App Re did not proceed to make any injunction application. Instead it continued to participate in the arbitration to and make written submissions as required by the Tribunal. I also concluded that there was a reasonable inference in all the circumstances that App Re's demand that there should be an oral hearing was simply part of its overall strategy of delay. I did not find the argument that the Tribunal had breached section 33 of the Law to be persuasive. It was, in my judgment, also flimsy and insubstantial.

33. In opposing Greenlight's application for security for the Award, counsel for App Re also relied heavily on a further factor referred to in the judgment in the *A v B* case. After considering the threshold factor, which I have already considered in relation to this case, Flaux J then turned to address another factor said to be relevant to the exercise of the court's power under both sections 67 and 68 of the English Act. After considering other sections of the English Act he said:

" *50 Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award (whether under section 67 or, indeed, either of the other sections* [i.e. sections 68 and 69] *will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced.*

51 Applying that principle to the facts of the present case, I am quite satisfied that on the material before the court, there is no evidence that A's application to challenge the award will prejudice enforcement of the award by B. B has not only commenced enforcement proceedings in Kazakhstan but, at a hearing on 6 December 201, the court in Kazakhstan granted B's applications and the enforcement orders have immediate



effect. The sections 67 and 69 applications have no effect whatsoever on enforcement in Kazakhstan……..

After considering various other submissions the judge concluded:

"*56 Accordingly, in my judgment, there is no evidence whatsoever that the challenge to the jurisdiction under section 67 will prejudice enforcement by B and, in those circumstances, it is not appropriate to order security under section 70(7).*"

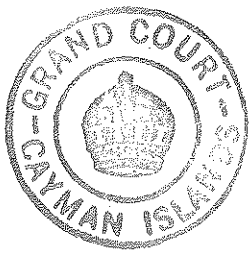
34. It was contended on behalf of App Re that Greenlight's counsel had not addressed the issue of whether the existence of App Re's challenge to the Award in these proceedings would prejudice Greenlight's ability to enforce the Award and it was said that there was no evidence of a risk of dissipation of assets by App Re. It was argued that Greenlight had not produced any evidence concerning App Re's financial affairs from which such a risk could be inferred and that App Re was under no obligation to disclose its assets in these proceedings. It was submitted that no adverse inference should be drawn from App Re not having produced any evidence of its financial position. Reference was made to a decision of the Court of Appeal in a case concerning an application for security for costs that no adverse inference may be drawn from a company's decision not to provide information about its finances when there was no obligation on it to do so: see *BTU Power Management Company v. Hayat [2011] (1) CILR 31.* Accordingly, counsel contended, Greenlight had not demonstrated that App Re's challenge of the Award by these proceedings will prejudice its ability to enforce the Award and that for that reason also it would be inappropriate to order security for the Award under section 77(8) of the Law.

35. It did seem to me that in determining whether to exercise its general discretion to order security to be given for an arbitral award pursuant to section 77(8) of the Law, the court must have regard to the particular circumstances of the case and I did not understand Flaux J to have said otherwise in the *A v B* case. He made it clear that he was not laying down hard and fast rules and that the principle he then outlined was a general one, so not

one inevitably applicable to all circumstances. In his reference to dissipation of assets he said the applicant will "often" have to demonstrate that but he did not say that was inevitably so in all circumstances. He also acknowledged that there may be other ways in which enforcement of the award may be prejudiced.

36. In my view the circumstances in the *Peterson* case and in the *A v B* case respectively were significantly and materially different from the circumstances in the instant case. Although the judge in the *A v B* case said that the need for the applicant for security to show prejudice to its enforcement of the arbitral award applied to set aside applications based on section 68 and well as applications under section 67 of the English Act, both the *Peterson* case and the *A v B* cases were in fact section 67 cases in which the awards concerned would therefore not have been assumed to be valid at that stage. The courts in each case had also determined that the consequently applicable threshold test had not been met by the applicant for security; accordingly the court in each case was satisfied that the respective set aside applications were not flimsy but were of substance. That was itself sufficient to enable the court in each case to decline to order security for the award. In the present case I had concluded the exact opposite, namely that the set aside application by App Re was not a jurisdictional one and consequently that the Award was to be presumed to be valid. Furthermore, I had also determined that the application to set aside the Award was anyway flimsy and lacking in substance.

37. In the particular circumstances of this case I did consider it appropriate in the exercise of my discretion to order that security for the Award should be provided by App Re. The Award not having been set aside was presumed to be valid and the challenge to it was flimsy and insubstantial. The evidence had satisfied me that App Re had adopted a deliberate strategy of delay from the very start of the arbitration, which had persisted since and was continuing by and in these proceedings. Indeed, there was, in my opinion, some justification for the submission by counsel for Greenlight that it was to be inferred that App Re's initiation of the arbitration proceedings had been itself a delaying tactic. From the start App Re singularly failed to provide the Tribunal (or Greenlight) with any substantive case on the issue of the amount of collateral payable pursuant to the



retrocession agreements. It appeared that right up to the time of the hearing of Greenlight's application before me App Re had still not stated how much collateral it contended is payable to Greenlight. Instead it embarked on a course of creating as much delay as possible. I have to say that I was not convinced that the present proceedings had been commenced by App Re in good faith rather than as a further delaying tactic. App Re delayed for over 3 weeks after the Tribunal gave notice of the Award before filing its originating summons and waited a further 10 days before serving it on Greenlight. It waited a further 1 ½ months before filing any evidence in support of its application. I have already mentioned App Re's delay in issuing a summons for leave to serve the proceedings out of the jurisdiction on the individual arbitrators which it has also chosen to name as defendants. My impression was that App Re's tactic of delaying enforcement by Greenlight of payment of the amount of collateral due under the retrocession agreements as established by the Award has continued with these proceedings and App Re's approach to them.

38. It appears that similar delaying conduct has been adopted by certain affiliates of App Re, Appalachian Underwriters Inc. and Insurance Services Group (together "the Guarantors"), who guaranteed App Re's obligations under the retrocession agreements. Greenlight commenced legal proceedings before the United States District Court for the Southern District of New York against the Guarantors for payment under their guarantees of the collateral claimed by Greenlight pursuant to the retrocession agreements. Since then the Guarantors have apparently similarly avoided advancing a positive case and have never advanced any argument as to why the sums claimed by Greenlight pursuant to the retrocession agreements are not payable or what sums they say are payable. Instead they sought to persuade the United States court to stay the legal proceedings until the conclusion of the arbitration. As Ms. Acurso said in her affidavit, it thus appeared that on the one hand the Guarantors were attempting to delay the United States proceedings in favour of the arbitration while on the other hand App Re was making no effort to progress the arbitration it had initiated but rather to delay it as much as possible. Ms. Acurso noted in her evidence that in refusing the Guarantors' application to dismiss the New York proceedings the judge said Greenlight had

"*provided documentation suggesting that Defendants have used arbitration as a delay tactic and have failed to adhere to both the arbitration timeline and the arbitration procedures provided for in the Retrocession Agreements*". Since then the Guarantors have apparently engaged in further delaying conduct, for example refusing to respond to discovery requests in accordance with the time frame set by the court and in accordance with the applicable procedural rules.

39. I reached the view that the circumstances of this case gave rise to a justifiable conclusion that App Re, as counsel for Greenlight put it, finds itself unable or is struggling to meet its financial obligations under the retrocession agreements and is continuing to seek to "buy time" or, possibly, to force a compromise by bringing and pursuing these proceedings. In my opinion, App Re's acts and defaults throughout, including the further delay caused by the bringing of and its conduct in these proceedings did give rise to legitimate and serious concerns about Greenlight's ability to enforce the Award. Delay in and general hindrance of enforcement of the amounts payable pursuant to the retrocession agreement as now reflected in the Award seemed to me to be App Re's deliberate strategy. I also bore in mind the fact that App Re is a Bermudan company carrying on business outside the jurisdiction of this court.

40. Even if it was appropriate to apply unqualified the same approach as was followed in the *A v B* case to the very different facts of this case, I concluded that the circumstances here were such that App Re's purported challenge of the Award by these proceedings was indeed prejudicial to Greenlight's ability to enforce the Award. Although there was no direct evidence of risk of dissipation of assets (and it was not clear to me how Greenlight could have been expected to produce such direct evidence in the absence of access to App Re's financial details), I considered that overall the evidence was such that I should conclude that App Re's challenge to the Award by these proceedings and the manner in which it has conducted them was, and, I inferred, was intended to be, prejudicial to Greenlight's enforcement of the Award, whether by deliberate delay of such enforcement for its own financial or other reasons or with a view to forcing acceptance of payment of a reduced amount, and I did so conclude.

Conclusion

41. For all these reasons, having heard the comprehensive submissions of counsel for the parties at the hearing, having reviewed the authorities to which they referred and re-read their skeleton arguments and the affidavits of Ms. Acurso and of Mr. James Webster for App Re and the respective exhibits to those affidavits as well as the further exhibits handed up at the hearing, I concluded that, pursuant to my power under Section77(8) of the Law and in the exercise of my discretion in light of all the circumstances, I should make the 27th November Order and I duly did so.

Dated 5th day of February 2014

The Hon Mr Justice Angus Foster
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS