

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 35 of 1998
Civil Appeal No. 21 of 1997
Grand Court Cause No. 450 of 1991

BETWEEN:

**INSURCO INTERNATIONAL LTD.
(FORMERLY AGRICHEM INSURANCE COMPANY LTD.)**

(Plaintiff) APPELLANT

- and -

VOLUNTARY PURCHASING GROUPS INC.

(First Defendant) FIRST RESPONDENT

FERTI-LOME DISTRIBUTORS INCORPORATED

(Second Defendant) SECOND RESPONDENT

BEFORE: The Rt. Honourable Mr. Justice Edward Zacca, President
The Rt. Honourable Mr. Justice Telford Georges, Justice of Appeal
The Honourable Mr. Justice Gerald Collett, Justice of Appeal

Mr. R.N.A. Henriques, Q.C. and Mr. Steven Roy instructed by Messrs. C.S. Gill and Company for the Appellant.

Mr. Stephen Hellman instructed by Messrs. Quin & Hampson for the Respondents.

April 13th, 14th, 15th 1999; December 10th 1999

JUDGMENT

GEORGES, J.A.

The writ in the action from which this appeal arises was filed on 31 October 1991. The appellant (Insurco) is an exempt company incorporated in the Cayman Islands. It is the holder of a Class B insurance license which permits it to carry on insurance business other than domestic business

from within the Cayman Islands. The respondents, Voluntary Purchasing Groups Inc. and Ferti-Lome Distributors Incorporated are companies incorporated in Texas. Ferti-Lome Distributors Inc. is a wholly owned subsidiary of Voluntary Purchasing Groups Inc. They engaged principally in the business of distributing chemicals for use in agriculture. They shall be referred to hereafter as "VPG".

Insurco is a "captive" insurance company. It issues policies only to entities which are members of the company. It took over all business carried on by Agrichem Insurance Company and assumed all its contracts and liabilities. It can be described as the predecessor company of Insurco.

Over the period February 1980 to April 1982 Insurco issued to VPG policies covering a variety of risks. VPG made claims against Insurco for losses which it alleged were covered by these policies. It also called on Insurco to defend claims made against it and which under the terms of the policies it was entitled to such defence.

No doubt anticipating that VPG would file claims in a court in Texas to enforce what it conceived to be its entitlements under the policies, Insurco filed the action in the course of which this appeal has arisen. The endorsement set out 5 claims – (1) a declaration that Insurco was entitled to avoid the policies because the said policies had been obtained by non-disclosure of material facts or by representation of facts which were false in some material particular; (2) an order for the rescission of the said policies; (3) a declaration that on terms and conditions of the policies Insurco was not liable to indemnify VPG for any loss or claims made against it; (4) a declaration that VPG was not

entitled to be defended against or indemnified with regard to any of its claims because of breaches or non-compliance with terms of the policy; (5) such further or other relief as seemed just.

Insurco sought and obtained leave to serve this writ on VPG outside of the jurisdiction. VPG entered unconditional appearance and filed a defence and counterclaim after having been granted an extension of time so to do. In the counterclaim VPG claimed the following remedies – (1) a declaration that Insurco was never entitled to avoid the policies; (2) a declaration that Insurco was liable under the terms and conditions of the policies to defend VPG and indemnify it; (3) payments of sums due under the policies; (4) damages for breach of contract; (5) damages for loss and damage sustained by reason of VPG’s breach of the duty of good faith and fair dealing and violation of Article 21.21 of the Texas Insurance Code; (6) such further and other relief as may be deemed just ; and (7) costs.

As part of its Defence VPG did aver that Insurco’s action in the Cayman Islands should be –

“stayed or dismissed on the ground of forum non-conveniens in favour of the litigation of these issues filed in the 141st District Court of Tarrant County, Texas.”

That action had been filed on 8 November, 1991 (The Texas action).

Various procedural steps were taken by VPG in the Texas action including requests for production of documents and the administration of interrogatories.

On 7 February, 1992, on the application of Insurco Harre, C.J. issued an ex parte order staying the Texas action. On 16 June, 1992 VPG took out a summons seeking the discharge of that ex parte injunction. Meanwhile, the action in the Grand Court proceeded. Lists of documents were exchanged. Affidavits were filed by both parties in support of and opposing the application for discharge of the ex parte injunction.

On 26 February, 1993, the Chief Justice discharged the ex parte injunction restraining VPG from continuing the Texas action.

On 1 March, 1993, the first working day following the order discharging the ex parte injunction, VPG obtained a default judgment against Insurco in the Texas action. This totalled US\$ 17,106,910.00 with continuing interest at 10% per annum. On 3 March, 1994 Insurco filed Notice of Appeal against that default judgement. This was determined on 8 June, 1994. The appeal was allowed and the judgment set aside. The Appellate Court ruled that Insurco was amenable to service under the Texas Insurance Code having transacted insurance business in the State of Texas but that the record failed to show that service of process had been effected in strict compliance with the provisions of the Texas Insurance Code. The Appellate Court remitted the matter to the District Court for hearing on the merits.

Shortly after, on 29 July, 1994, Insurco appealed to the Cayman Islands Court of Appeal against the order of the Chief Justice setting aside the injunction restraining VPG from proceeding with the Texas action. On the same day Insurco filed a summons for directions to set down for hearing the trial of this action. VPG responded on 10 August, 1994 with an application for a stay of Insurco's action on the basis of forum non-conveniens.

On 20 April, 1995, the Court of Appeal dismissed Insurco's appeal. The injunction restraining VPG from proceeding with the Texas action was thus lifted. That was, however, subject to the condition that VPG would give an undertaking that it would not require Insurco to provide a bond in the sum awarded in the default judgment as a condition precedent to defending the Texas action. This undertaking was not given until 6 October, 1995.

On 12 March, 1996, VPG filed the summons from which this appeal arises asking that paragraphs 1-5 of the Indorsement on the Writ of Summons be struck out on the grounds that they disclosed no reasonable cause of action and/or were otherwise an abuse of the process of the Court. In the alternative they asked that the proceedings be "dismissed or alternatively stayed, on the ground of forum non-conveniens." They asserted that the appropriate forum was the District Court in Texas where the litigation of the issues in the action was currently pending.

On 10 June, 1996 VPG filed a Voluntary Petition with the United States Supreme Court. This was followed by a Suggestion of Bankruptcy which was to act as -

"notice that pursuant to 11 U.S.C. s. 362 the bankruptcy automatic stay is in effect to prohibit any individual or entity from the commencement or continuation, including the issuance or employment of process of a judicial, administrative, other action or proceeding against the debtor that was or could have commenced before the commencement of a case under Title 11 of the United States Code, or to recover a claim against the debtor that arose before the commencement of the case under that Title; any act to obtain possession or control of property of the estate or property from the estate, or any act to create perfect or enforce against the estate, or property of the debtor any lien to the extent such lien secures a claim that arose before the commencement of a case under Title."

After several relistings of its summons for direction, the court on April 8, 1997, in the presence of both parties, set the action down for trial over the period 22 September, 1997 to 10 October, 1997.

VPG then sought by a motion heard in Texas District Court on 19 September, 1997 to obtain

“a temporary restraining order for an injunction enjoining Defendants
...from proceeding with their claims in Cayman Islands.”

The motion was denied after argument.

Thereafter, VPG listed its application for the striking out of Insurco's action or its stay on the ground of forum non-conveniens for the date fixed for the trial – 22 September 1997. The Chief Justice, over the objections of counsel for Insurco, ruled that he would take that application before proceeding with the trial.

Having heard arguments on both issues the Chief Justice gave a decision on 30 September, 1997 staying the action on the basis of forum non-conveniens. He gave Insurco leave to appeal on the basis of which Insurco filed a notice of appeal on 7 October, 1997. Written reasons were delivered on 1 September, 1998 – some 11 months later. In these reasons the Chief Justice ordered that Insurco's action be also struck out as an abuse of the process of the Court. Insurco filed a fresh notice on 9 October 1998 with the memorandum and grounds following on 13 October, 1998. This is the appeal which now falls for consideration.

For Insurco it was contended that on 22 September, 1997 the Chief Justice ought not to have heard VPG's summons to strike out or to stay and should have heard the substantive action. Much time had been spent on preparing for a comparatively lengthy trial which required the attendance of witnesses outside of the Cayman Islands.

It should be noted that there was an averment in paragraph 27 of the Statement of Defence filed on 23 December, 1992 that the action should be stayed or dismissed on the ground of forum non-conveniens. Both that issue and the issue of striking out on the ground of abuse of the process of the Court could have been raised without summons but merely by notice as preliminary points, the disposal of which could dispose of the hearing of the substantive action.

It is clearly correct as stated by Beldam L.J. in Halliday v Halliday [1993] 1 W.L.R. 1 at p.5 that an application to strike out part of a defendant's pleading as disclosing no defence should be made at the earliest opportunity. A court should not at the eleventh hour embark on the hearing of such an application when the costs of preparing for the trial have already been incurred.

The facts of this case are, however, markedly different from those of the Halliday case in which the judge had been under the impression, perhaps mistakenly, that the defendant had agreed to the application being heard. The decision to strike out the pleadings rested on an assessment of affidavits which set out conflicting versions of facts. The order to

strike out deprived the defendant the opportunity to call witnesses to prove facts which might have established the averments which had been struck out.

In this case VPG had raised the issue of forum non-conveniens in the pleadings. Insurco had sought to restrain VPG from continuing with the Texas action and this matter had been litigated up to the Caymans Appeal Court. Insurco had been unsuccessful. The Chief Justice cannot be said to have exercised his discretion wrongly when he decided to hear summons to strike out and stay before hearing the action.

Although in his determination of the matter he ruled on the issue of a stay on the grounds of forum non-conveniens before dealing with the application to strike out the pleadings, I find it convenient to deal first with the latter. In his ruling the Chief Justice stated that he was greatly assisted by the judgment of Kerr L.J. in Insurco International Limited v Gowen & Frit [1994-5] CILR 210 stressing the need for the exercise of caution in granting what could be described as “negative declarations” when no other remedy was sought.

The starting point must accordingly be a determination as to whether the declarations sought in this matter can be classed as “negative”, since the warning of caution is closely related to “negative” declarations. A very early formulation is contained in an obiter dictum of Pickford L.J. in Guaranty Trust v Hannay [1915] 2 KB 536 at pp. 564-5 –

“I think that a declaration that a person is not liable to an existing or possible action is one that will hardly ever be made, but 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 view that I do of the effect of Order 25 rule 5 I am not prepared to say that it is beyond the power of the Court in a very exceptional case to make such a declaration.”

The declarations sought in this case are not plainly negative declarations. In the first claim there is sought a declaration that the Insurco was “entitled to avoid” itemised policies “on the ground that the said policies were obtained by non-disclosure of material facts and/or by representation of facts which were false in some material particular.” The second claim is for an order for rescission of the policies.

Declarations (3) and (4) could be categorised as negative. No. 3 seeks “in the alternative” a declaration that on the terms and conditions of the said policies Insurco was not liable to defend or indemnify VPG for any loss or claim made against them. No. 4 seeks further “and/or alternatively” that VPG was not entitled to be indemnified against any loss or claim under the policies because of their breaches or non-compliance with the terms of the contract.

Claims 1 and 2 are, in my view, clearly not claims for negative declarations. Together they constitute a claim for rescission on the ground of non-disclosure of material facts and misrepresentation. If they succeed then the claims under 3 and 4 will fall by the wayside.

This case, on the facts, appears to me to be distinguishable from the case of Insurco v Gowan and Frit (supra). In that Kerr L.J. stated at p. 235 –

“With respect to the declarations sought, unlike the case of Frit, there is a positive averment of wrongdoing in para 3 of the indorsement. However

this should not be treated in isolation. It would be manifestly inconvenient and unwarranted to carve out from the other issues this particular one. Further, although accusatory in form, its defensive purpose is plain and it is agreed on all sides that the court in California would not be bound by the declaration granted under this head.”

In this case there could be an order for rescission based on findings of material non-disclosure and misrepresentation. These remedies constitute the essence of the claim, and, should they succeed, the remedies sought in paragraphs 3 and 4 would not arise.

Regard must, however, be paid to the argument considered by Hirst J. in John Robert Charman and another v W.O.C. Offshore B.V. [1993] 1 Lloyd’s Rep 378 at p. 385 –

“Although this point is academic, I think it right to deal with it briefly, since it was argued on both sides.

Mr. Swainston submitted that, having regard to the decision of the Court of Appeal in The Volvox Hollandia [1998] 2 Lloyd’s Rep. 361, and in particular passages in the judgment of Lord Justice Kerr at p. 371 claims for declarations and in particular negative declarations “must be viewed with great caution in all situations involving conflicts of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping”; consequently the Court should not in its discretion permit the plaintiffs to continue this action, which is essentially of that character.”

It should be noted that Kerr L.J. was directing his attention to “improper” forum shopping. This is understandable since a litigant should be expected to seek to have his dispute decided in the court which it regards as the most convenient.

The case in which Kerr L.J. made the statement quoted above was an apt example of “improper” forum shopping. That was a case in which shipowners against whom a claim

had been made sought a declaration of limitation of liability in the Dutch Courts which acknowledgedly had jurisdiction to decide that issue. This notwithstanding, the companies which had suffered the loss filed an action in England claiming that the shipowners were not entitled to limit their liability and/or that the loss, damage and expense did not occur without the shipowners' actual fault.

Kerr L.J. noted that under existing Conventions the shipowners alone had the right to make a claim for limitations of liability. Both counsel had agreed that the claim for a declaration of the nature sought in the suit was unprecedented. The purpose was clearly to compel the shipowners to litigate in the English courts. He referred to The Sennar (no. 2) [1985] 1 Lloyd's Rep 52. In that case the arrest of a sister ship of The Sennar had provided the basis for filing an action in England arising from damage allegedly caused by the sister ship.

He stated at p. 361 –

“ Lord Diplock said that maritime claims are particularly vulnerable to forum shopping of which that case provided a particularly blatant example. He was speaking about the misuse of the power of arrest. I would say precisely the same thing about the present case as a blatant misuse of O. 11. Properly viewed these claims for negative declarations are a novel type of pre-emptive forum shopping with novel implication. They distort the settled law and practice of shipowners to seek to limit their liability. They involve an exorbitant assumption of jurisdiction by the English Court under O.11 without regard for the implications of two relevant international Conventions.”

This was the background against which Kerr L.J. issued his judicious warning. Here the circumstances are very different. Insurco is a company incorporated and registered in the

Cayman Islands. It has its head offices there. It carries on its business there. Applying the established principles of private international law, the Courts of the Cayman Islands would be the appropriate forum in which it should be sued. Indeed, the Texas Court in September 1997 refused a request by VPG for a temporary restraining order and anti-suit injunction to enjoin Insurco from proceeding with its action in the Court of the Cayman Islands.

When it sought leave to serve VPG out of the jurisdiction it was taking advantage of the power existing under the law of the Cayman Islands to serve writs or notices of writ outside the jurisdiction. Whilst this action clearly indicated a preference and a desire to have its dispute determined in the Courts of the Cayman Islands, I have difficulty in characterising this action as “forum shopping”. And even if it is so described it cannot be characterised as “improper”.

It should be noted that VPG entered an unconditional appearance to the writ. It sought an extension of time to file its defence. In addition to its defence it filed a counterclaim. In the defence it raised the issue of forum non-conveniens.

In my view, therefore, it is far from obvious that the remedy sought by Insurco can be characterised as “negative declarations”. In the circumstances of this case it does not appear to me that the conclusion can be drawn that Insurco was engaged in “improper forum shopping” which merited the striking out of its claims as an abuse of the process of the Court. The issue was one of forum non-conveniens to which I now turn.

The Chief Justice relied on the formulation by Bingham L.J. of the approach to be taken in deciding such cases. This is set out in DuPont v Agnew [1987] 2 Lloyd's Rep 585 at p.

588 –

“ In general the burden rests on the defendant to persuade the Court to exercise its discretion to grant a stay. But if the Court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. The initial burden on the defendant is not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. The first step is to see what factors there are which point in the direction of another forum. One must look for connecting factors which point towards another forum as that with which the action has the most real and substantive connection. Such factors may not only affect convenience or expense (such as availability of witnesses) but may also relate to the law governing the relevant transaction and the places where the parties respectively reside or carry on business. If the Court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If however the Court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. If the plaintiff can establish objectively by cogent evidence that he will not obtain justice in the foreign jurisdiction, that is a very relevant consideration.

As this summary makes plain, the correct approach to this problem in principle is to compare the relative appropriateness of the English with the competing foreign forum for a just trial of the action in question. It is less important than it was once thought to be whether a stay will deprive the plaintiff of a legitimate personal or juridical advantage. This aspect is to be considered as part of a more general judgment on which is the appropriate forum in the interests of all parties and in the interest of justice.”

As will be noted, this formulation by Bingham L.J. was concerned with cases where a party duly served with proceedings within the jurisdiction seeks to stay them.

He drew a distinction between these cases and cases where the exercise of jurisdiction by the English Court is resisted not by a party duly served pursuant to Order 11 r. 1 of the Rules of the Supreme Court of England. He stated at pp 588-9 –

“... the Court’s task is essentially the same: to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. But in this case the burden is on the plaintiff to persuade the Court to exercise its discretionary power to permit service on the defendants outside the jurisdiction. The plaintiff must show that England is clearly the appropriate forum. In considering whether this is clearly shown, the significance of the different O. 11 grounds will vary greatly from case to case.”

The case under consideration is sui generis. VPG was indeed served, with leave of the Cayman Court, outside of the jurisdiction. It did, moreover, enter an appearance, file a defence and significantly a counterclaim. In my view the filing of the counterclaim is an indication of an acceptance of the Cayman Courts as an appropriate forum for the determination of the issues raised, despite the averment of forum non-conveniens raised in the defence. Since by that time VPG had already filed an action against Insurco in the Tarrant County Court in Texas, it would have been adequate merely to file the defence and take steps to stay the Cayman action until 10 August, 1994. By that date Insurco had already filed a Summons for Directions to have the action set down for trial.

Even if this case is classified as one in which the burden is on Insurco to show that Cayman is clearly the appropriate forum, I would hold that the factors just discussed can be taken into account in establishing that finding. As Bingham L.J. has stated, the grounds for such a finding will vary greatly from case to case.

Among the factors of importance would be the determination of the proper law of the contract. The Chief Justice concluded that the proper law of the contract was the law of Texas and not the law of the Caymans.

In doing so he applied the well-settled tests of Lord Atkin in R v International Trustee for the protection of Bondholders Akliengesellschaft [1937] A.C. 500 at p. 529 –

“The legal principles which are to guide an English court in the question of the proper law of a contract are now well-settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.”

He also noted Lord Diplock’s comment in Pick v Manufacturers’ Life Insurance Co.

[1958] 2 Lloyd’s Rep. 93 at 97:

“There is no conflict between this and Lord Simonds’ pithy definition of the “proper law” of the contract to be found in Bonython v Commonwealth of Australia ... which is so often quoted, i.e. “the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. It may be worth while pointing out that the “or” in this connection is disjunctive.”

The Chief Justice noted the status of Insurco as an exempt company holding a Class B insurance licence permitting it to carry on insurance business (as defined in the Insurance Law) other than domestic business from within the Cayman. He continued –

“To achieve consistency between these provisions, business of an exempted company carried on outside the Islands must, in the case of an insurance company, be equated with insurance business other than domestic business.”

If I understand correctly the purport of the passage, it appears to assert that since insurance business carried on by an exempt company cannot be domestic business, the proper law applicable to such business cannot be Cayman law.

This is not correct. Section 192 of the Companies Law (Revised) which deals with the legal capacity of exempt companies reads –

“An exempted company shall not trade in the Islands with any person, firm or corporation except in furtherance of the business of the exempted company carried on outside the islands:

PROVIDED that nothing in this section shall be construed so as to prevent the exempted company effecting and concluding contracts in the Islands and exercising in the Islands all of its powers necessary for the carrying on of its business outside the Islands.”

It was, therefore, well within the powers of Insurco under Cayman law to enter into a contract in the Cayman Islands to insure property in Texas.

There is evidence by affidavit to support a finding that the place of formation of the insurance contract in this case was Grand Cayman. This was the place where the proposals for insurance were accepted and where the premiums were received. It was

also the place from which payment for indemnification accepted as due would have been made.

There was also affidavit evidence seeking to establish that Insurco, through persons acting on its behalf, carried on activity in Texas and in the United States generally, which would amount to carrying on business in Texas under the Texas Insurance Code. At this point, however, when the issue for determination is the proper law of the contract, the principles to be applied are to be found in the private international law of the Cayman Islands. Specific provisions of the Texas Insurance Code intended to achieve purposes regarded as desirable in that State would not be relevant.

As the Chief Justice himself stated –

“As a general rule, it must be right that insurance business is not, without more, carried on where the risk arises or the loss occurs or that the proper law is determined on that basis.”

The fact, therefore, that the risks covered were situated in Texas and that the losses occurred there would not have created a close connection with Texas. On the other hand, the fact that the contract was formed in the Cayman Islands and that performance would take place here does create a close connection with the Cayman Islands.

This approach derives support from the support from the judgment of Kerr L.J. in Insurco v Gowan and Frit (supra). The Chief Justice appears to distinguish that case from this on the basis that in Insurco v Gowan and Frit more than one State in the

United States of America was concerned. Frit was incorporated in Alabama and Gowan in Arizona. Claims against Frit had been made in North Carolina and against Gowan in California. That distinction is, in my view, immaterial.

There is no term of the contract prescribing what the proper law of the contract was to be. It is, however, clear from a perusal of the affidavit of Stephen Beauman that Insurco and its promoters devised and implemented a carefully elaborated system of carrying out business to ensure that the company could not be said to be doing business in Texas. Whether they succeeded or not is another matter but the intention is abundantly clear.

It is relevant also to note section 2 (b) (4) of the Texas Insurance Code. This defines various acts which under the Code would constitute doing insurance business in the State of Texas. It provides –

- “2(b) The provisions of this section do not apply to: ...
(4) transactions involving contracts of insurance independently procured through negotiations occurring entirely outside of the state which are reported and on which premium tax is paid in accordance with this Article.”

In an affidavit filed on behalf of Insurco, Jack Thetford states that VPG accepted the responsibility to report the transactions and to pay that premium tax. Tax returns filed by VPG set out answers given by VPG to questions contained in the forum headed “Applicable to Independently Procured Insurance”.

The questions were intended to elicit answers which would indicate whether the tax was payable and the sum due. VPG there stated that it had in force insurance written by a

company not licensed or authorised to do business in the State of Texas. It listed no agents or brokers from whom it had obtained the insurance. No solicitation by any broker or by the unauthorised insurer had taken place there, nor had the policies been delivered or issued there. This is an indication that VPG at one stage did not dispute that the policies were independent and did not fall under the Code. This supports the view that the intention of the parties was not to make Texas law the law of the contract.

One further issue needs to be addressed. All the policies were commercial umbrella liability policies. The coverage was to pay the ultimate net loss in excess of the applicable underlying policy. There was no express clause in any of the policies stating that they should be governed by the same law as that applicable to the underlying policies.

Arguments were advanced based on DuPont v Agnew (supra). In that case, as in this, the policies being considered were policies intended to cover the loss which might be incurred over and above the limit of loss already covered by what was described as “primary policies”. That term, it would appear, is the equivalent of the term “underlying policy” used in this case. It was agreed in that case that the primary policies had no bearing on the issues of the appeal – see p. 589 second column. The policies under consideration were described as “a first excess layer”. This was made up of five policies, the first of which was a Lloyd’s Policy No. 4402608. That policy was said to be the leading policy which the other policies in the first and second layers were to follow. It is in that context that Bingham L.J. stated at p. 591 –

“It could of course happen that a following policy contained an express or implied choice of law different from that of the policy it was to follow. It would then, like any other contract, have to be construed in accordance with what were found to be its terms. But there must be a prima facie inference that a following policy is governed by the same law as the policy it follows.”

There are references to the underlying policies in two of the agreements under consideration. In policy AGFEL 102 described as an “Emp of Wassau” policy, Clause 1 states –

“The provisions of the underlying policy
Except as regards the premium, the obligation to investigate and defend and for costs and expenses incident to the same, the amount and limits of liability, the renewal agreement, if any, additional coverage provided by a discovery period provision, and any other provision therein inconsistent with this policy are hereby incorporated as part of this policy.”
[Emphasis supplied]

In policy AEXAL – 101, Clause 2 of the Terms and Conditions states –

“Except as may be inconsistent with the Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of the underlying insurance (whether primary or excess) immediately preceding the layer of coverage provided by this Certificate, including any change by endorsements.”

Four underlying policies are listed in the Certificate –Occidental Fire & Casualty Co., Wilshire Insurance Co., Travellers Insurance Co., and Alliance Insurance Co. There is no evidence of a choice of law clause in any of these policies and conceivably the proper law of each of these contracts may not be identical.

Accordingly, I would find that the proper law of the contract is the law of the Cayman Islands – the place where the contract was made and where the obligations undertaken in it were to be performed.

In Spiliada Maritime Corp v Cansulex Ltd. [1986] 3 W.L.R. 972, Lord Templeman did state that an appellate court should be slow to interfere since the determination of the issue of forum non conveniens was one of discretion involving the evaluation of many diverse factors. Where as here, however, the trial judge did not come to the correct decision on the issue of the proper law of the contract, the issue becomes open to review.

The fact that the proper law of the contract is the law of the Cayman Islands, though of some importance, is not decisive of the question of forum non conveniens.

There is need to review the pleadings, identify the issues and evaluate as best as one can, having regard to relevant evidence to be called, which jurisdiction appears the most convenient for the trial.

One of the principal grounds on which Insurco sought to have the policies rescinded was that of misrepresentation. It alleged that VPG had entered into a joint venture enterprise with a company called the Crystal Chemical Company of Houston, Texas for the manufacture and distribution of monosodium methyl arsenate (MSMA). In replies to a questionnaire which it was alleged formed the basis of the issuance of the policy, VPG stated that it carried on business only in Bonham, Texas and it packaged MSMA

but manufactured only arsenic acid. The case for VPG was that its arrangement with the Crystal Company was not a joint venture but one of lease of equipment owned by VPG to the Crystal Company. VPG had also denied that it held any "Hold Harmless" or Indemnity Agreements from anyone whereas in fact it held a "Hold Harmless" agreement from the Crystal Company. Insurco also alleged that VPG had failed to disclose claims made against it in relation to the joint venture with the Crystal Company.

At this stage it does not appear that the investigation of that dispute would require the attendance of many witnesses of facts as to what actually happened in Houston, Texas at the Crystal Company. The determination is more likely to depend on the examination of documents – agreements and correspondence – and their interpretation. This will, of course, necessitate the application of the law of Texas and expert witnesses in that regard would need to be called. On the other hand, since the law of the Cayman Islands is the proper law of the contract, the effect of the proof of any misrepresentation allegedly made would have to be decided on the basis of that law. If the trial were held in Texas, evidence of that law would have to be led.

The sustainability of the claim for what may be called "aggravated" damages in the counterclaim rests on the assertion that the policies are Texas policies governed by the Texas code. There are claims for "breach of the duty of good faith and fair dealing owed to [VPG] by virtue of the obligations undertaken by [Insurco]". There is also a claim for unfair claims settlement practice and other unfair and deceptive practice in the business of insurance". This is based on an article in the Texas Insurance Code which

would not be applicable if Texas law did not apply. Expert testimony proving Texas law would not then be necessary.

Arguments were addressed to the issue as to whether the Courts of the Cayman Islands would recognise a judgment of the Texas Court. The likelihood is that they would. It is argued on behalf of VPG that Insurco submitted to the jurisdiction of the Tarrant County Court, Texas. The act of submission was the filing of an appeal against a default judgement entered against it in that Court. Insurco argues that its appearance in the Texas Court of Appeal to upset the default judgment was an appearance “solely to protest the jurisdiction of the Tarrant District Court to enter that judgment and was not a submission to the jurisdiction of that court” – Henry v Geoprosco International [1975] 2 All E.R. 702 per Roskill L.J. at p. 719. It did not by virtue of that step submit to the jurisdiction of the Texas Court.

An examination of the judgment of the Second Court of Appeals of the District of Texas shows that the provisions for substituted service set out in the Texas Insurance Code were not strictly complied with. The judgment ended with the statement –

“Having appeared to attack the default judgement, appellants are presumed to have entered their appearance to the term of the trial court at which the mandate shall be filed.”

This action was remanded for trial on the merits.

This indicated that the appeal was not argued on the basis that there was a complete lack of jurisdiction in the Texas Courts, but rather on faulty service. Insurco could quite logically have ignored the default judgement and defended itself against any attempt by VPG to enforce it in the Courts of the Cayman Islands on the ground that the court in which it had been entered had no jurisdiction to determine the matter. On the contrary, Insurco continued to participate in the Texas action taking among other steps the filing of a Motion for Summary Judgment in January 1996.

There was another issue of importance to be considered. On 10 June, 1996, VPG filed a Voluntary Petition with the United States Bankruptcy Court. This was followed on 29 August, 1996 with a Suggestion of Bankruptcy.

As I understood the arguments on this issue the contention appeared to be that the filing of a petition for bankruptcy acted as an automatic stay. Section 362 (a)(1) of the United States Bankruptcy Code provides –

“362 Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under 5(a)(3) of the Securities Investor Protection Act of 1970 operates as a stay, applicable to all entities of –

(1) the commencement or continuation, including the issuance, or employment of process of a judicial, administrative, or other action or proceedings against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;”

The Suggestion of Bankruptcy in effect merely served as a notice that the bankruptcy automatic stay pursuant to Chapter 11 United States Code s. 362 (quoted in part above) was in effect.

On behalf of VPG it was argued that Insurco could have applied for relief under paragraph (d) of section 362 which reads -

“On request of a party in interest and after notice and a hearing the court shall grant relief from the stay provided under subsection (a) of this section such as by terminating, annulling, modifying or conditioning such stay ...”

It is not clear from the judgment of the Chief Justice whether he was aware that the automatic stay did not affect actions filed by the bankrupt but only to actions filed against the bankrupt. He stated –

“But in my view the indication in the Suggestion of Bankruptcy that the proliferation of litigation involving VPG will be specifically addressed by a proposed Chapter 11 plan of reorganization is an indication of the desirability of dealing with the Insurco matters as part of that arrangement. Any declarations and findings by the Cayman court in those circumstances are not likely to be followed by the Texas courts ... Matters in Texas will not be at a standstill. They will simply be taking a different course.”

We were informed by Mr. Hellman that the stay was lifted on 26 March, 1998. The order of the Chief Justice staying the action on the grounds of forum non conveniens is dated 13 November, 1997. He was almost certainly under the impression that the Texas

action had been stayed but would be dealt with as part of an overall settlement of the bankruptcy proceedings. This was not in my view the correct approach to the matter.

Ever since 11 October, 1994 when the Caymans Court of Appeal had finally discharged the injunction restraining VPG from proceeding with Texas action VPG could have taken steps to bring that action to a conclusion. The intervening bankruptcy in August 1996 was allowed to be seen as a continuing stay. The effect of the order by the Chief Justice was in effect to stay the trial of the action pending the unravelling of VPG's bankruptcy situation.

Evaluating the factors as they existed at the date of the ordering of the stay I would hold that they came down in favour of permitting the action which had been set down for hearing to proceed. The stay ought not to have been ordered.

Accordingly, the appeal is allowed. The order striking out paragraph 1 – 5 of the Statement of Claim is discharged. The stay is lifted. The respondents VPG will pay the costs of Insurco in this Court and in Grand Court.

ZACCA, P.

I have had the advantage of reading in draft form the judgment of Georges J.A. I agree with his reasons and conclusion, and would also allow the appeal. This judgment although available in August was not handed down at the request of the parties.

COLLETT, J.A.

I have had the advantage of reading in draft form the judgment to be delivered by Mr. Justice Georges in this appeal. I find myself in complete agreement with his reasoning and conclusions. There is, however, one additional factor, which leads me to an identical conclusion.

One singular feature of the current litigation is that the Respondent/Defendants, who have obtained the orders now appealed against, initially entered an unconditional appearance to the Writ of Summons and followed this up by filing a defence on the merits, although in the same pleading they raised the issue of 'forum non conveniens'. Moreover they included a counterclaim for relief against the Appellant/Plaintiff from the Court.

No further steps were taken to pursue the claim for a stay or dismissal of the proceedings until well over two years had elapsed and, in the event, the Respondent/Defendants' summons to stay or strike out was not listed to be heard before the morning of the very day which had been fixed for the substantive trial of the action.

To my mind a court should be slow to encourage any defendant to both approbate and reprobate at one and the same time in respect of the Court's jurisdiction to try the proceedings. To allow such a course to be pursued successfully on the day fixed for trial upon the merits risks quite significant damage to the process of justice itself. In the present instance an action commenced nearly six years before and which had at last reached the threshold of a final decision was thereby postponed

indefinitely – a postponement which has now lasted a further eighteen months; that moreover at a time when the alternative proceedings in the Texas Court had themselves been stayed by the bankruptcy affecting the Respondents at that time.

When this factor is taken into consideration it becomes even clearer to me that the trial of the present action in the Grand Court ought to have been allowed to proceed. The orders for stay and subsequently for strike out should not have been made. Accordingly I agree that this appeal succeeds with costs both here and below.

ZACCA, P.

The order of the Court is that the appeal is allowed and the judgment of the Grand Court is discharged. The stay is also lifted. The appellant is to have the costs of the appeal to be taxed if not agreed, and also the costs in the Grand Court.

Zacca, P.

Georges, J.A.

Collett, J.A.

