IN THE GRAND COURT OF THE CAYMAN ISLANDS

C 450/91

BETWEEN: INSURCO INTERNATIONAL LTD. Plaintiff

AND: VOLUNTARY PURCHASING GROUPS INC. First Defendant

AND: FERTI-LOME DISTRIBUTORS INCORPORATED Second Defendant

For the Appellants: Mr. Charles Quin and Mr. Stephen Hellman
For the Plaintiff: Raul Henriques Q.C. and Mr. Steven Roy

JUDGMENT

During the long course of these proceedings, two summonses, dated respectively, 10th August 1994 and 11th March 1996 were issued. The second of these subsumes the first and I deal with the matter on that basis. There is an application to strike out on the basis that the pleadings disclose no reasonable cause of action (a matter not pursued) or are otherwise an abuse of the process of this Court or alternatively that the action be dismissed or stayed on the ground of forum non conveniens. It is alleged that the appropriate forum is the 141st District Court of Tarrant County, Texas, where litigation is pending.

It is necessary to consider the pleadings in the respective jurisdictions. It is common ground that the plaintiff is an exempt insurance company incorporated in Cayman, that the defendants were at all material times incorporated and carrying on business in Texas and that the second defendant is a wholly owned subsidiary of the first. It is also common ground that the first defendant owned equipment which it leased to Crystal Chemical Company ("Crystal") in Houston, Texas which was used by Crystal and the first defendant to manufacture monosodium methylarsenate. Pollution litigation has

arisen and the plaintiff denies liability under various insurance policies for the reasons put out in its statement of claim. It claims the following relief-

> "A declaration that the Plaintiff is and has at all material times been entitled to avoid the policies of insurance Nos: AEUML-101; AEUML-102; AEUML-103; AEUML-103-2; AEUML-103-3; AGFEL-102; AKXAD-101; AGAPC-102 AND 103 and UML-0002, apart from any provisions contained therein on the ground that the said policies were obtained by the non-disclosure of material facts and/or by the representation of facts which were false in some material particular.
>
> An Order for the recission of the said policies of insurance.
>
> Alternatively, a declaration that on the term and conditions of the said policies of insurance the Plaintiff is not liable to defend or indemnify the Defendants or either of them for any loss or claim made against them under or in connection with the said policies.
>
> Further and/or alternatively a declaration that the Defendants are not entitled to be defended or indemnified against any loss or claim made against the Defendants or either of them as a consequence of their breaches and/or non-compliance by the Defendants of the terms and/or conditions of the said policies of insurance."

There is a counterclaim by the defendants in Cayman. It includes allegations which clearly resemble those in the Texas proceedings and the defendants claim that the declarations sought here are for the purpose of providing a defence to the proceedings in Texas.

It is to be noted that the parties to the respective proceedings are not the same. I do not regard the fact that Ferti-Lome Distributors Inc., the second Cayman defendant is not a

party to the Texas proceeding as significant. The policies were issued to the first defendant ("VPG") and if it's claim is valid, Ferti-Lome, it's wholly owned subsidiary, is covered. In Texas, there is an additional party, Agrichem Limited ("Agrichem") the predecessor in interest of the Cayman plaintiff. The position of Agrichem was considered in the Court of Appeal judgment dated 10th April, 1995 delivered by Kerr J.A., where the issue was the discharge of an ex parte injunction. Kerr J.A. said this-

> "Insurco took over from Agrichem Insurance Limited its insurance business, including it's liabilities and, after take-over, in 1985 issued new policies and Agrichem Insurance Limited became Agrichem Limited. There was a sort of reorganization. On the question of there being no formal assignment from Agrichem to Insurco of the relevant policies, [counsel] submitted that any judgment against Insurco would bind Agrichem.
>
> In my view, in the absence of a formal assignment, the primary liability is against Agrichem but in the light of the Insurco take-over of the liabilities which is apparently accepted and relied upon by the Respondents, they may now have the option to proceed against Insurco as well as Agrichem."

And later-

> "In favour of upholding the discharge of the injunction are...that in the absence of a proper assignment of the policies it would be manifestly unjust by injunction to prohibit VPG from pursuing its claim against Agrichem, who is not a party to the proceedings here but as a distinct and separate entity was quite properly joined in the Texas proceedings."

In another passage in the same judgment Kerr LJ expressed, obiter, a view on the forum issue. I shall be referring to that again later. This Court had already expressed the following view of the real nature of the Cayman action-

> "It is in my view a simplistic view of the Cayman action to say that it relates only to the interpretation and construction of the insurance policies. There are a number of other issues of Texas law, notable the issue of whether there was a joint venture between Crystal Chemical and VPG; construction of the equipment lease between them; the effect of misrepresentation in connection with an insurance policy; and the effect of various other matters pleaded in the Statement of Claim. Witnesses of fact from Texas will need to be called."

That passage is to be found in my reasons for my order discharging the ex parte injunction in favour of the plaintiff restraining the Texas proceedings. VPG has included in its counterclaim causes of action created by Texas legislation. Other issues are the true construction of clauses which have been incorporated into the plaintiff's policies from underlying policies which were governed by Texas law. These deal with liability for pollution, voluntary payments and subrogation and damage to property. There are difficult questions of fact and law as they relate to Texas.

In ***Du Pont v Agnew*** *(1987) 2 Lloyds Rep 535 at 591* Bingham LJ, as he then was, said this about policies which are expressed to follow other policies-

> "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: cf ***Cantieri Navali Riuniti S.p.A. v N.V. Omne Justitia and Others (The Stolt Marmaro) [1985] 2 Lloyd's Rep. 428***. The rights and obligations of contracting parties are defined by the law which governs their

contract. Different laws must give rise to a possibility of differences of definition. To the extent that there are or may be differences of definition the intention that one policy shall have the same effect as and be identical in risk to another is defeated."

Both parties found some support in this case. It is important not only for that reason but because it contains the following valuable summary by Bingham LJ of the principles applicable in this field as comprehensively and authoritatively stated by Lord Goff of Chieveley in ***Spiliada Maritime Corporation v Cansulex Ltd. (1986) 3 WLR 973*** and adopted as applicable to Cayman no less than to England-

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

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 are 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 substantial 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 the parties and in the interest of justice."

I now need, therefore to take the first step which is referred to in that passage and consider the following question-

<u>What factors are there which point in the direction of another forum?</u>

It was necessary for the plaintiff to invite me to determine that the proper law was the law of the Cayman Islands and to attach great weight to that. In Cayman law, as in English, the proper law 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 [per Lord Atkin, ***R v International Trustee for the Protection of Bondholders Aktiengesellschaft, , [1937] A.C. 500 at p. 529].***

That is consistent with the well known definition of the proper law of a contract by Lord Simonds as-

> "...the system of law by reference to which the contract was made of that with which the transaction has its closest and most real connection. [***John Lavington Bonython & Ors. v Commonwealth of Australia [1951] A.C. 201 at 219]***

It is I think, self evident that there are arguments as to "closest and most real connection" which will be applicable both to proper law and to forum.

As a general proposition, 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. Many policies have worldwide application, and risk and cover travel with, for example, an aircraft or a ship. In the related case of ***Insurco Ltd. v Gowan Co. 1994-5 CILR 210*** the Court of Appeal considered the question of the proper law. Its view of the significance of its provisional finding that the proper law was the law of the Cayman Islands when balanced against other factors indicating a connection with California was succinct. It was expressed thus by Kerr J.A.-

> "There is really but one factor in favour of the Cayman Islands, namely, my provisional finding that the proper law of the contract is the law of the Cayman Islands. Assuming for present purposes

> that, either from judicial comity or from applying its own conflict of laws approach, the California court would accept or hold that the law of the Cayman Islands was the proper law of the contract, it would need no more than one expert witness of the requisite learning and experience to give credible evidence of the relevant Cayman law."

In considering the general question of forum it is important to remember the position of the plaintiff under Cayman Company and Insurance Law. It was at the material time an exempted company subject to the restriction on trading in the Cayman Islands imposed by S 192 of the Companies Law (Revised).

It held a Class "B" insurance licence under s.4(5) of the Insurance Law (1979) which permitted it to carry on insurance business (as defined in that Law) other than domestic business from within the Cayman Islands. 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.

Another factor which I was invited to consider was that the defendants are shareholders of the plaintiff under the terms of a shareholders agreement which is expressly governed by Cayman law. This membership of the plaintiff company was a condition precedent to becoming a policy holder. It would be surprising if an arrangement relating to the corporate structure of a Cayman Islands company were governed by any law other than the law of the Islands. Despite this relationship between the shareholding agreement and eligibility to become a captive insurance policyholder the insurance contracts themselves are transactions of a quite different nature. I attach no weight to the share arrangements in considering this matter before me, although it was singularly unfortunate that an express provision as to Cayman law was included in an arrangement where the governance of that law was really self-evident but not in the insurance policies.

Of much greater significance is the argument that to determine the proper law of each contract by reference to the state with which the action had its closest connection would lack uniformity and certainty of law. There must be a governing law at the outset of the contract and this cannot be decided retrospectively by reference to an event which is uncertain at the time when the contract is concluded. As Kerr J.A. said in ***Insurco International Ltd. v Gowan Company(supra)***

> "Thus there would be at all times manifest uncertainty if the proper law of the contract depended on the law of the place where the risk occurred. Accordingly, I take the provisional view that the balance is weighted in favour of the law of the Cayman Islands being the proper law of these contracts"

That, however, was said in relation to the following finding of Schofield J –

> "The answer must be to deal with each policy separately and determine with which State it has the closest and most real connection. For the purposes of these proceedings I need merely give my provisional view that the law of the Cayman Islands is not the proper law of these insurance policies."

But here we are not for the reasons to which I am about to refer, dealing with what Kerr JA described as a "moveable law" within the United States which would be in conflict with the accepted principle that the proper law is determinable at the formation of the contract.

In any event, Kerr JA continued thus-

> "However, on the question which is clearly the more appropriate forum for the cases now pending in the US courts and those

> instituted here by the plaintiffs, the decided cases illustrate that the proper law of the contract, though a relevant factor, is neither decisive nor determinant of that question. Therefore, notwithstanding this finding, I turn to examine in each case the connecting factors."

Both parties seek to distinguish ***Insurco v Gowan***. The defendants say that in the circumstances of this case the proper law was determinable as Texas law when the contracts were formed. The plaintiff says that more weight should be given in this case to the question of the proper law than was given by the Court of Appeal in the ***Gowan*** case and that the proper law is, as was provisionally found in ***Gowan,*** Cayman law.

The ***Gowan*** case was consolidated with another matter , also involving Insurco, in which an insurance claim was being made by a company called Frit Industries Inc. ("Frit"). Frit was incorporated in Alabama and Gowan in Arizona. Claims were made against Frit in North Carolina and Gowan in California. These were not matters where, as in the present case the choice lay between the Cayman Islands and a single State of the USA. This case has nothing to do with any State of the USA other than Texas. The insurance policies concerned are policies which provide additional cover for risks insured by underlying policies governed by Texas law. It would be remarkable indeed if it had been the intention of the parties that identical wording in underlying and following policies should be governed by different systems of law and I have already referred to the observations on that which were made by Bingham LJ in ***Du Pont v Agnew (supra).*** The case for Texas law being the governing law of the contract is stronger than was the case for any American State in either ***Gowan*** or ***Frit.*** Indeed one of the complaints made by the plaintiff is that there was no disclosure of any operation other than at Bonham, Texas misrepresenting and concealing the fact that they were engaged in the joint venture with Crystal at Houston, Texas. I take the provisional view (and at this interlocutory stage, despite the arguments of counsel my view is that that is all I need do) that the proper law is the law of Texas. As Bingham LJ said in ***Banco Atlantico SA v. The British Bank of the Middle East*** (1990) 2 Lloyds LR 504 –

"It is usually not necessary and often not possible at the interlocutory stage to reach more than a prima facie view of the proper law."

There are significant jurisdictional advantages to the defendants in pursuing their action in the Texas court where protective legislative provisions are in place. These were referred to as follows by the Court of Appeal in its judgment dated 20th April 1995 when it upheld the judgment of the Grand Court which discharged an ex parte injunction restraining proceedings in Texas. The following passage is from the judgment of Kerr J.A.

> "It is clear that there is significant juridical advantage to VPG litigating the action in the Texas court. It is equally clear that there would be corresponding disadvantage to Insurco. The causes of action created by Texas legislation were obviously designed to protect the insured holding policies covering operations within the confines of the State against defaulting or dilatory insurance companies. Such legislation is not unusual nor should it be unexpected by insurance companies whose primary business is its coverage of operations in foreign countries. Reasonable prudence would demand their acquainting themselves whether or not such legislation existed and its effect on their liability.
>
> VPG has included in its counter-claim in the Cayman proceedings, the causes of action created by Texas legislation. Relying on this Mr. Henriques submitted that should the Cayman court find on the primary cause of action, namely, the breach of contract as pleaded, then that court could effectively deal with the statutory causes of action...Now it would be asking too much of the Cayman court to entertain these causes of action, which are unfamiliar and unknown in this jurisdiction and which are peculiar creation of Texas legislation, tortious in nature with attendant punitive damages. These causes of action are eminently more suitable for litigation in a Texas forum."

Although I am dealing with an issue which differs from that which was at that time before the Court of Appeal, I respectfully agree and adopt that passage from the judgment of Kerr J.A., and I remind myself of the observation of Bingham LJ that it is less important than it was once thought to be whether a stay will deprive the plaintiff of a legitimate personal or judicial advantage.

In the end it is a matter of looking at the remaining factors identifying the real centre of gravity of this case.

THE JURISDICTION POINT

On 1st March 1993 VPG obtained a default judgment in Texas against Agrichem Ltd and Insurco International Ltd., the plaintiff in the present action. This was reversed on appeal on the ground of lack of proper substituted service and the matter was sent back for trial on the merits. The judgment on the appeal contains the following passage –

> "Having appeared to attach the default judgment, appellants are presumed to have entered their appearance to the term of the trial court at which the mandate shall be filed."

The Court to which the case was remitted was the 141st Court of Tarrant County.

Since that time other steps have been taken in the action. There is dispute as to whether a visiting judge made an observation at a hearing on 19th September 1997 that since the insurance is outside Texas it cannot apply in Texas. In any event there is no finding as to lack of jurisdiction and the Texas court has been actively exercising it.

Counsel for the plaintiff seeks support for his submission of lack of jurisdiction in Texas from an English case, ***Adams v. Cape Industries plc*** (1991) 1 All ER. In issue were the circumstances in which an English Court would recognize a foreign court as competent to give a judgment in personam capable of enforcement in England. This is a relevant

consideration in relation to the forum issue now before me. A court whose judgment would not be enforced against Insurco here lacks an important characteristic of an appropriate forum. The findings in ***Adams v. Cape Industries*** related to the view which an English Court would take in this context of the enforcement of a judgment with regard to the "presence" in a country of a company incorporated outside that country. The English court will be likely to treat a trading corporation incorporated under the law of one country (an overseas corporation) as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a 'branch office' case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business – per Slade LJ at page 1014. He then went on to particularise a number of questions which are likely to be relevant to the question of whether a representation of an overseas corporation had been carrying on the business of the overseas corporation or simply his own. The following passage of his judgment is at page 1015 –

> "This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the judge (see p. 964 hj) was intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard the proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve 'a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted'***: La Bourgogne*** [1899] P1 at 18 per Collins LJ.
> Nevertheless, we agree with the general principle stated thus by Pearson J in ***Jabbour v. Custodian of Absentee's Property of State Of Israel*** [1954] 1 All ER 145 at 152, [1954] 1 WLR 139 at 146:
>
> > 'A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the

> there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval.'
>
> On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, ,never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation."

All these observations are on the premise that the corporation concerned has a fixed place of business in the foreign country, whether itself or through an agent.

It may be that with the development of "electronic commerce" the very concept of business being conducted from a fixed place of business is becoming obsolete. In any event, the question of what is the most appropriate forum depends on other considerations, although the matter of whether any judgment obtained in such a forum could be enforced must be among them.

That line of thinking is reflected in another context – determination of the proper law – in the following passage in the judgment of Kerr J.A. in the Gowan case (supra) at page 221 –

> "But the place of formation of the contract and the place of performance are no more than factors worthy of consideration in determining the proper law of the contract. On these factors, Lord Diplock in Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., The Al Wahab (1) made the following observations ([1983] 2 All ER at 889)):
>
> > "I mention, in passing, that, in these days of modern methods of communication where international contracts are so frequently negotiated by telex, whether what turns

> out to be the final offer is accepted in the country where one telex is situated or in the country where the other telex is installed is often a mere matter of chance. In the result the lex loci contractus has lost much of the significance in determining what is the proper law of contract ... As respects the lex loci solutionis the closeness of the connection of the contract with this varies with the nature of the contract. A contract of insurance is performed by the payment of money, the premiums by the assured, claims by the insurers, and, in the case of marine insurance, very often in what is used as an international rather than a national currency. In the instant case, the course of business between the insurers and the assured established before the policy now sought to be sued on was entered into, ignoring, as it did, the provision in the previous policies and claims were payable in Kuwait, shows how little weight the parties themselves attached to the lex loci solutionis."

It is a measure of the astonishing strides in electronic communication in the fifteen years since that case was heard that the reference to the modernity of the telex is already taking on a quaintly old-fashioned appearance. The point which was being made then is abundantly stronger now.

Insurco was doing business within Texas within the meaning of the Texas Insurance Code, Article 1.14-1 Section 2(a). Moreover, Insurco appealed the default judgment against it which was obtained following the lifting of the injunction by this Court. That was not an involuntary decision, and one of the "points of error" advanced by Insurco was -

> "The district court erred in granting the default judgment on March 1, 1993, because neither defendants nor defendants' Counsel received notice of the hearing on VPG's motion for A default judgment, and the hearing was held in violation of defendants' rights to due course of law under the Texas Constitution and due process under the United States Constitution."

That does not sit happily with the submission of lack of jurisdiction of the Texas Court.

I have read carefully Sections VIII and IX of the affidavit of J.Stephen Gibson dated 30th December 1992 in which he sets out his evidence in support of the arguments that Insurco and Agrichem are deemed subject to personal jurisdiction in the United States and transacted insurance business in Texas. I am satisfied as to both these matters.

It is also noteworthy that this Court, on an inter partes hearing, has already given assistance to the Texas court at a time when the default judgment which was set aside was still in place, on an application by letters rogatory from the Tarrant Court. See 1994-95 CILR p. 84.

I find that the jurisdiction of the Texas courts should be recognised by this court.

THE BANKRUPTCY POINT

On 10th June 1996 VPG filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code. It then filed a Suggestion of Bankruptcy to act as notice that a bankruptcy automatic stay was in effect to prohibit any individual or entity from commencing or continuing any action or proceeding against VPG. The Suggestion of Bankruptcy included the following –

> "Specifically, one of the matters which necessitated the Chapter 11 filing for Voluntary Purchasing Groups, Inc. was the proliferation of litigation and associated attorneys' fees. To date, in order to

> reduce the ongoing administrative costs being incurred by the bankruptcy estate, the counsel who was representing Voluntary Purchasing Groups, Inc. in this suit in the pre-petition period has not been retained. Further, this litigation, which clearly Constitutes property of the bankruptcy estate, will be specifically Addressed by the Chapter 11 plan of reorganization to be proposed in the bankruptcy case, but the debtor's exclusive time within which to propose a plan of reorganization has not yet expired."

The plaintiff says that this makes Texas a most inappropriate place for determination of this dispute. If a stay is granted here, there will be two stays. The matter has been pending for years already and the plaintiff is incurring expense all the time and wishes to have it resolved. It submits that there is no indication of when the bankruptcy matter will be resolved and that is the most telling aspect of the case. 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 reorganisation is an indication of the desirability of dealing with this Insurco matter 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.

It is unrealistic to believe that the outcome of a long and expensive trial here will really be the end of the story for the plaintiff.

The plaintiff is not seeking an award of money but declarations and an order which absolve it from paying any.

Matters in Texas will not be at a standstill. They will simply be taking a different course. The factors connecting this whole matter with Texas are so weighty that I am not moved from my view that Texas remains the appropriate forum. In particular –

1. There are complex issues of fact arising out of the Texas occurrence.

2. Prima facie, the proper law is the law of Texas.

3. The counterclaim raises statutory and other causes of action which are, in the words of Kerr JA to which I have already referred, "eminently more suitable for litigation in a Texas forum."

4. There is an argument that the primary liability under these policies is against Agrichem, there being no formal assignment to Insurco. Agrichem is not a party to the Cayman proceedings.

5. The juridical advantage to the present defendants which arise from proceeding in Texas is not vexatious or oppressive.

ABUSE OF PROCESS

What has so far appeared in this judgment is the reasoning which led me to grant the stay of the Cayman proceedings on the ground of forum nonconveniens. I did not at that time give a decision on the abuse of process point. This I now do. Once again I was greatly assisted by the judgment of Kerr JA in Insurco International Ltd. v Gowan Company and the appeal consolidated with it relating to Mutual Service Insurance Co. and Frit Industries Inc. 1994-5 CILR 210. The need for caution in granting negative declarations particularly in cases involving conflicts of jurisdictions was considered by Kerr JA at pages 229-30 of his judgment in relation to Frit and Mutual and 235 in relation to Gowan. In the case of Frit and Mutual the plaintiffs made no allegation of breach of contract against Frit or any wronging against Mutual or Frit. In the Gowan case there was a positive averment of material non-disclosure and misrepresentation on the basis of which

the plaintiffs sought a declaration that the relevant policies were void al initio and the plaintiff was entitled to avoid them.

Kerr JA said this at page 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 the present proceedings the third and fourth declarations sought are negative in both form and substance. The first is a declaration that the plaintiff is and has at all material times been entitled to avoid the policies enumerated on the ground of non-disclosure and misrepresentation. The claim for rescission is ancillary to the first declaration sought. What is sought in this action is no less a defensive and preemptive strike against the proceedings in Texas because a positive order is sought. The mischief is the same as that found to be an abuse of process in the cases of Gowan and Mutual & Frit. I grant the order sought in paragraph 1 of the first and second defendants' summons dated 11th March 1996 that paragraphs 1-5 inclusive of the Indorsement of the Writ of Summons herein and the Statement of Claim herein be struck out under O. 18 or 19 of the Grand Court Rules 1995 on the ground that they are an abuse of the process of the Court.

Costs in favour of the defendants.

1st September, 1998

G.E. Harre
Judge

GRAND COURT CAYMAN ISLANDS