IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C # 450/91
CICA (CIVIL) APPEAL NO. 5/93

14-12-98 4

BEFORE : THE RT. HON. MR. JUSTICE EDWARD ZACCA, PC., OJ., PRESIDENT
THE RT. HON. MR. JUSTICE TELFORD GEORGES, PC., JA.
THE RT. HON. MR. JUSTICE JAMES KERR, JA.

BETWEEN INSURCO INTERNATIONAL LTD.
(Formerly Agrichem Insurance Co. Ltd.)
Plaintiff/Appellant

AND VOLUNTARY PURCHASING GROUP INCORPORATED
First Defendant/
First Respondent

AND FERTI-LOME DISTRIBUTORS INCORPORATED
Second Defendant/
Second Respondent

Mr. R. Henriques QC. instructed by Mr. Steven Roy of
Messrs. C. S. Gill & Co for the Plaintiff/appellant

Mr. Paget-Brown and Mr. Charles Quin of
Messrs. Paget-Brown Quin & Hampson for the
1st and 2nd Defendants/Respondents

On 11th, 12th, and 13th October 1994, 13th December 1994 and
20th April 1995

JUDGMENT

KERR, J.A. :

The Plaintiff/Appellant ("Insurco") is an insurance company incorporated in the Cayman Islands on May 13, 1985. Under the laws of the Cayman Islands it is an exempt company and is permitted to carry on business, other than domestic business, from within the Cayman Islands. Insurco, on June 1, 1985, took over the insurance business of Agrichem Insurance Company Limited, its assets and liabilities. Agrichem Limited, formerly Agrichem Insurance Company Limited, is also a Cayman Company.

The Respondents, Voluntary Purchasing Groups Inc. ("VPG") and its wholly-owned subsidiary, Ferti-Lome Distributors Incorporated ("Ferti"), are corporations in and under the laws of Texas and hold or have held policies of insurance issued by Insurco and its predecessor, Agrichem.

In the action here, the Plaintiff's causes of action and the remedies sought are as summarised in the endorsements to the writ filed October 31, 1991, thus:

> The Plaintiff's claim is against the Defendants for:
>
> 1. "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, AEXAL-101, AGAPC-102 and 103 and

UML-0002, apart from any provision 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.

2. An order for the recission of the said policies of insurance.

3. Alternatively, a declaration that on the terms 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.

4. 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."

Upon service of the proceedings being effected pursuant to leave granted for the purpose, the Respondents entered a general appearance on December 6, 1991.

In the interim, on November 8, 1991, VPG had filed action in the District Court of Tarrant County, Texas. The action rested on underlying actions against VPG as a result of damage to property from the escape of injurious substances produced by VPG's processing plant and equipment which were leased to and used by a chemical company in Texas and the refusal of Insurco and Agrichem to indemnify VPG in accordance with the terms of the relevant policies. The action filed by VPG with Ferti and as co-plaintiff against Agrichem and Insurco, was based on the

following causes:

(1) **Breach of Contract of policies** in effect from February 15, 1980 to April 30, 1984, under which VPG is entitled to recover that portion of their ultimate net loss that does not exceed $4,050,000 less the amount of underlying insurance. The amount of such underlying insurance does not exceed $500,000.

(2) **Breach of the Duty of Good Faith and Fair Dealing** Texas imposes upon the insurer a duty of good faith and fair dealing which is a distinct tort under Texas law.

(3) **Unreasonable Denial of Payment** such unreasonable delay and refusal has resulted in actual damages to plaintiff. These actual damages include, but are not limited to, the impaired credit-worthiness and impaired business reputation of plaintiff, in addition to the damages caused by defendants' breach of contract.

(4) **Unfair Claims Settlement Practices** in addition, defendants have engaged in numerous unfair claims settlement practices in violation of Article 21.21 of the Texas Insurance Code.

Causes (2), (3) and (4) above, were the creation of Texas legislation.

In response, Insurco on December 19, 1991, filed a motion claiming that the United States District Court lacked personal jurisdiction and on February 6, 1992, filed in this jurisdiction, an application for an ex parte injunction to restrain VPG and its privies from prosecuting the action in Texas or instituting proceedings for similar causes outside the jurisdiction of the Court of the Cayman Islands. On February 7, 1992, Sir Denis Malone, C.J., granted the injunction in the terms

prayed. The Respondents by summons dated June 16, 1992, applied for the discharge of this injunction and after a contested hearing, Harre, C.J., on February 26, 1993, made an order discharging the injunction. From this decision the Plaintiff appealed by notice of appeal filed March 3, 1993.

This court, responding to a motion on behalf of the appellants, on August 10, 1994, ordered a restoration of the injunction pending the hearing of the appeal.

Now it is unchallenged that the general approach of a Court of Appeal in reviewing the decision of the Judge in interlocutory injunction is as stated by **Lord Diplock** in Hadmor Productions Ltd v Hamilton [1982] All ER at page 1046 thus:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the court of Appeal or your Lordships' House is not to exercise an independent discretion of its own. It must defer the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that the particular facts existed or did not exist, which, although it was one t hat might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that

> there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court had reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

More specifically, it was agreed on all sides that the guiding principles relevant to the grant of an injunction restraining a party from pursuing his action in a foreign court were industriously reviewed and acceptably restated in **Aerospatiale v Lee Kui Jak [1987] 3 All ER 510.** Lord Goff after referring to the long history of the law and a number of cases, identified the following principles at page 519:

> "First, the jurisdiction is to be exercised when the 'ends of justice' require it (see **Bushby v Munday [1821] 5 Madd 297 at 307, [1814-23] All ER Rep 304 at 306 per Leach V-C.**
>
> Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
>
> Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court against whom

> an injunction will be an effective remedy: see eg Re North Carolina Estate Co [1889] 5 TLR 328 per Chitty J.
>
> Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see Cohen v Rothfield [1919] 1 KB 410 at 413 [1918-19 All ER Rep 260 at 261 per Scrutton LJ and, in more recent times, Castonho's case [1981] 1 All ER 143 at 149]1981] AC 557 at 573 per Lord Scarman."

and later said at page 519:

> "Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter":

and at apge 520:

> "The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground on which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As Bowen LJ said in McHenry v Lewis [1882] 22 Ch D 397 at 407-408:
>
> > 'I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle

> that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.'

and at 521 concisely concluded:

> "To justify the grant of an injunction the defendant must show (a) that the English court is the natural forum for the trial of the action to whose jurisdiction the parties are amenable and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court."

Mr. Henriques submitted that the learned Chief Justice erred in discharging the injunction by taking into condiseration matters which were irrelevant. In that regard, he referred to the following passages in the reasons for Judgment (page 8):

> "In support of the application to discharge the ex parte order the defendants submitted that there had not been sufficient grounds for the order having been granted ex parte and that there had not been full disclosure of material facts. The following list of alleged matters of non-disclosure is not exhaustive, but includes those to which I attach the most weight -
>
> (a) Most importantly, that the parties to the Cayman actions were not the same as those in the Texas action;
>
> (b) that the insurance policies the subject of the action had not been assigned by Agrichem to Insurco;
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> (c) that Insurco and Agrichem had in proceedings in the United States already used the same arguments as to lack of United States jurisdiction

> as in the present case. At the date of the ex parte hearing no determination had been made and the Chief Justice should not have restrained the Texas proceedings in absence of that, protracted and expensive though the Texas proceedings may be;
>
> (d) that there was no express provision as to governing law in the contracts, notwithstanding the assertion in the affidavit of Mr. Law on behalf of the plaintiff that Cayman law applied.
>
> I accept that an ex parte injunction should not be granted unless there are strong grounds for the exception to the basic rule of natural justice that both parties should be heard. It is, however, a matter of history that this injunction was so granted ex parte, though the Chief Justice could have ordered service and an inter partes had he seen fit. The fact that he did not cannot in itself be a ground for discharging the injunction but I have to consider whether his decision was based on a material non-disclosure. It is not a case for setting aside regardless of the merits, but of the facts now disclosed pointing on those merits to a contrary decision. Contrary to what Mr. Henriques submitted, there was material matters of non-disclosure."

With regard to these findings, Mr. Henriques argued that the affidavits on both sides expressly accepted that Insurco's take-over of Agrichem included the liabilities and that in reality there were no material non-disclosures; Insurco would be liable for the debts or default of Agrichem. In the Cayman proceedings Insurco was suing as formerly Agrichem.

However, the realities are that Agrichem Insurance Company Limited and Insurco are two separate and distinct companies and co-existed. It is Agrichem Limited that was formerly Agrichem Insurance Company Limited. What then is the effect of the misdescription of the plaintiff as formerly Agrichem Insurance Company Limited?

Mr. Henriques explained that the policies in issue in the Texas action are the same as in the instant case. Insurco took over from Agrichem Insurance Limited its insurance business, including its liabilities and, after the 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, he 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. These facts were well known to the Respondents at the inter-parties hearing. However, as Agrichem in the Texas action is treated as a distinct and separate entity this will be relevant to the indirect effect of the injunction on the proceedings there in relation to Agrichem and will be dealt with later.

It was agreed on both sides that at the inter-partes hearing, arguments were addressed on factors not specifically dealt with in the reasons for judgment. This is apparent from Mr. Henriques' written skeleton arguments which were prepared before the filing of the reasons for judgment. On that basis Mr. Paget-Brown referred to the penultimate sentence in the passage quoted above

and submitted that a fair interpretation of that sentence was that the learned Chief Justice considered all the factors presented in the arguments.

While that passage is capable of that interpretation the fact that the Chief Justice specifically dealt with the non-disclosures would indicate that they weighed heavily with him but this should not be taken to mean that the other factors did not contribute to the conclusion to which he eventually came. Therefore, it is open to this Court to consider all the relevant factors for and against the discharge of the injunction in determining whether the learned Chief Justice properly exercised his discretion and, in addition, to consider such subsequent events that may now be relevant to the determination of this appeal.

THE OTHER FACTORS

The Proper Law of the Contract

The learned Chief Justice in his reasons for judgment said:

> "Lengthy and interesting submissions were made with regard to the proper law of the contract. I have also, since the inter partes hearing in this matter, had the advantage of reading both the judgment at first instance of Schofield, J and the judgment of Kerr, J.A. in the appeals in Causes Nos. 205 and 356 of 1992 which also involved Insurco as plaintiff and in which some of the same issues arose. It was not necessary there to make a final determination of the proper law and it is the less so in the present matter where other factors point in my judgment conclusively in favour of discharging the injunction."

In the cases referred to in the reasons for judgment Schofield, J, was content to hold that the law of the Cayman Islands was not the proper law of the policies but that the law in each case should be determined by the State with which it had the closest connection. In the judgment of the Court of Appeal - Appeals nos. 22 and 23 - between Insurco International Ltd (formerly Agrichem Insurance Co. Ltd.), appellant, and Gowan Company, respondent, and between Agrichem Ltd. (formerly Agrichem Insurance Co. Ltd.) and Insurco International Ltd, appellants,and Mutual Services Company and Frit Industries Inc., respondents, delivered on August 10, 1994, the view was expressed that such a finding, having regard to the type of contract, "lacked uniformity and certainty of law" and found in favour of the law of the Cayman Islands being the proper law.

Notwithstanding, on the basis of the connecting factors the judgment upheld the finding in the lower court that the Cayman Islands was not the appropriate forum but the Court of the relevant State of the United States in each case. The cardinal issue in these cases was forum conveniens.

It is accepted that the proper approach of the Cayman court in determining the proper law of the contract is as stated by **Lord Diplock** in **Pick v Manufacturer's Life Insurance Company [1958] 2 Lloyd's Report 93, 97:**

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

It is implicit in this statement that a foreign court may apply its own test and in so doing could reasonably arrive at a different conclusion to the local court. It is against this background that in the Insurco cases the finding on the proper law of the contract was labelled "provisional".

In the instant case before this court neither side sought a final decision on this question. However, Mr. Henriques clearly intends to rely on the Insurco decision in favour of the law of the Cayman Islands. On the other hand, Mr. Paget-Brown, in addition to the United States standard form and the judicial interpretation of the words and phrases in the United States decided cases, adverted to: (1) the fact the proper law of the original contracts was Texas and while conceding that there was a difference between re-insurance policies and the excess policies in the instant case, nevertheless by parity of reasoning, submitted that the relevant policies should be governed by Texas law and sought support from dicta in **Du Pont De Memours & Co. ad Endo Laboratories Inc. v. Agnew K.W. Kerr and Others [1987] 2 Lloyd's Report, page 585;** and (2) the Texas legislation dealing generally with insurance business and particularly with the "transaction of insurance business" in **Article 1-14-1** of the **Texas Insurance Code.**

Consequently, it could not at this stage be ruled out that a Texas court applying its own tests as to the proper law of the contract (as it would be open to that court to do) would not find in favour of the proper law being the law of Texas. Therefore, as the proper law of the contract may depend on the forum of trial, the arguments on each side may be considered at this interlocutory stage as presenting an equation which it is not now necessary to solve having regard to the cardinal question on appeal. I am in agreement with Harre, C.J. in declining to decide this highly debatable question.

THE CONCURRENT PROCEEDINGS

The pleadings, procedures and the comparative stages of proceedings in the Cayman Islands and in Texas are, therefore, relevant and were referred to in the course of arguments by counsel on both sides.

To Insurco's statement of claim filed on December 16, 1991, the Defendant on January 3, 1992, filed a defence and counter-claim. The counter-claim was based on the same allegations and had similar causes of action as in the Texas action. Those causes included those which were creation of Texas legislation. To this defence and counter-claim on

February 24, 1992, the Plaintiff filed a reply and on May 20, 1992, filed summons for directions.

In June, 1992, when the summons for directions and the Defendant's summons to discharge the injunction came up for hearing, on the summons for directions it was ordered that the Defendants produce the original policies of insurance, the Plaintiffs and Defendants to serve a list of documents with affidavits in verification and for inspection of documents by both parties. The date for trial and order for costs and the Defendant's summons for discharge of the injunction were adjourned. On February 28, 1993, there was compliance with the order on the summons for directions and further affidavits on both sides were filed pursuant to an order in that behalf of November 1992.

As a result of the ex parte injunction granted by the Cayman court, the Texas proceedings were frozen. Swiftly on the heels of the discharge of the injunction and on the first working day, VPG succeeded in the entry of a default judgment in the Texas action without notice or warning to the Plaintiff. Insurco promptly appealed against this default judgment and the Court of Appeal there on June 8, 1994, allowed the appeal on the ground that there was an error on the face of the record, namely, that as VPG had failed to comply with the strict Texas provision for substituted service and the cause was remanded for trial on its merit.

The Texas proceedings were put on hold by the injunction. Notwithstanding, it was still open to the Respondents by prompt preliminary proceedings to challenge the appropriateness of the Cayman court as being forum non-conveniens. Instead they took part in the pre-trial procedures including the filing of a counter-claim.

Mr. Henriques submitted, but for the question on appeal and subject to any further motion the Respondents may bring, the case in the Cayman court was now fit for trial and the only relevant item outstanding on the summons for directions was a date for trial. In contrast in the Texas proceedings, there are outstanding such pre-trial procedures as discovery, deposition to be taken from witnesses in Texas and other placed in the United States of America, Cayman, Isle of Man, Ireland, and proceedings for discovery and inspection of documents. These are extensive and expensive pre-trial procedures. Not to proceed with the Cayman issue now would be throwing away costs expended on the pre-trial procedures here.

THE ISSUES

The issues in contention will bear directly on the witnesses to be called and the attendant expenses. The averments in support of the causes of action summarised in the endorsement to the Plaintiff's writ were specifically denied in the pleaded defence

and it was contended, inter alia, that the answers to the questionnaire which were regarded as material non-disclosure were not part of the application for insurance policy, that their business with the chemical company was not a "joint venture" as alleged and that the liabilities of the insured were within the contemplation of the policies.

VPG in its counter-claim introduced a collateral cause of action, namely, that there was an agreement between the parties to defer resorting to litigation for a period of thirty days as negotiations for a settlement were in progress. For support, reliance was placed on correspondence between and by or on behalf of the parties. In reply, Insurco denied that there was any such agreement and contended in effect that it was incorrect to interpret the correspondence as indicating the existence of an agreement. These controversial issues are essentially matters for the court of trial.

The primary issues both in the actions in Cayman as well as in Texas are concerned mainly with a breach of contract and the interpretation of the terms and conditions of the contract. Whether in Cayman or Texas, there is likely to be the need for legal experts. However, in either court, it seems unlikely that there will be any necessity for a host of foreign witnesses. I do not consider this question of the witnesses to be called as a matter of weighty consideration.

JURIDICAL ADVANTAGE

The importance of a juridical advantage in determining whether or not to grant an injunction prohibiting a Plaintiff from pursuing proceedings in a foreign forum was expressly recognized by Lord Goff in the **Aerospatiale** case when he said:

> "In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."

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 actions 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. I find this argument inconsistent with his complaint that the punitive damages awarded as illustrated by the default judgment were irrelevant to any damages that could arise from a breach of the contract but was merely "money in VPG's pocket" and such punitive damages could not have been in contemplation when the premiums were being fixed. 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.

SUBSEQUENT EVENTS

On March 1, which was the first working day after the order was made discharging the injunction, VPG without any warning to the Defendants in the Texas action obtained a default judgment against Agrichem and Insurco. On the basis of the evidence tendered, judgment was entered for the following amounts:

(i) $4,050,000.00 - representing the amounts due and owing under the policies of insurance as reimbursements of sums paid in settlement of suit brought in U.S. District Court against VPG;

(ii) $134,482.00 representing un-reimbursed defence costs incurred by VPG in the same suit;

(iii) prejudgment interest on the settlement - $528,164.00;

(iv) prejudgment interest on reimbursed defence costs - $17,537.00;

(v) pursuant to the causes of action created by Texas legislation punitive damages (twice the actual damages) of $8,100,000.00; and

(vi) reasonable attorney fees incurred - $4,276,727.00 - amounting in the aggregate to $17,106,910.00.

The motion filed on March 12, 1993, to set aside the default judgment was struck out as a result of a counter-motion by VPG on the basis that the Defendants had not entered into a bond as security for the payment of any final judgment. The default

judgment was eventually set aside on a writ of error by the Court of Appeal on June 8, 1994. It was submitted on behalf of Insurco that notwithstanding this result, the judgment had the following consequences which were oppressive: (1) The Court of Appeal in setting aside the default judgment held that having appeared to attack the judgment, Agrichem and Insurco "are presumed to have entered appearance to the term of the trial court at which the mandate was filed"; on the basis of this finding, the case was remitted for trial on the merits, thus virtually putting an end to their challenge to the jurisdiction of the court; and (2) in order to defend the action in Texas, Insurco would be required to enter into a bond that is likely to be an amount equivalent to the amount in the default judgment.

In the **Aerospatiale** case the Plaintiffs gave an undertaking not to seek punitive damages nor trial by jury in the Texas court. On this Lord Goff observed (page 524):

> "Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralized by the plaintiffs' undertaking that neither of them will be pursued, and by their further undertaking that they will not invoke jury trial, which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had."

There has been no indication on the part of the Respondents in this case to make any such concessions and, accordingly, these factors remain for consideration. VPG's conduct in obtaining the default judgment surreptitiously and their prompt conducting of past judgment procedures while the validity of the default judgment was being challenged would indicate that the oppressive consequences were foreseeable even if the default judgment should be set aside.

In the **Aerospatiale** case Lord Goff with evident approval made the following reference at page 521:

> "As Bowen LJ said in **Peruvian Guano Co v Bockwoldt** 23 Ch D 225 at 233 [1881-5] All ER Rep 715 at 718, the court will interfere when a party is acting under colour of asking for justice 'in a way which necessarily involves injustice' to others."

I consider this passage relevant in determining what weight should be attached to the Respondents' conduct.

The dicta in the decided cases indicate: (1) that there are factors for consideration common to both the grant of an injunction and the determination as to which of two competing jurisdictions is the appropriate forum conveniens but the facts in support of the grant of an injunction must be more overwhelming than in the forum conveniens cases; and (2) that the institution by a party as Plaintiff in one jurisdiction a cause of action raising the same issues as an action in which

he is defendant in another is not per se vexatious although it is often undesirable that both actions should concurrently be pursued in both jurisdictions because of the risk of conflicting decisions.

To summarise, the important factors urged in favour of restoring the injunction are: (1) the stage reached in the proceedings here and the extensive and costly pre-trial procedures to be incurred if the proceedings in Texas are not stayed; and (2) the existing onerous consequences of the default judgment, and in particular, the requirement for the entry of a bond by the Defendants as a condition pursuant to defending the action in Texas.

In favour of upholding the discharge of the injunction are: (1) the juridical advantage to the Respondents in litigating in the Texas court the important causes of action founded on Texas legislation; and (2) 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.

Except for the factors arising from the events subsequent to the order for discharge of the injunction all the other factors were before the learned Chief Justice for his consideration.

I am mindful of the function of an appellate court in reviewing the discretion of a judge in relation to interlocutory injunctions as defined and described by Lord Diplock in the passage from the **Hadmor Productions** case quoted above. On the factors before him, it cannot be said that in discharging the injunction the learned Chief Justice erred in any of the manner specifically described by Lord diplock in that passage or that he was "so aberrant that it (his decision) should be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it" [See **Hadmor Productions** - quoted ante].

As regards the subsequent events, the most onerous factor is the requirement on the appellant to post a bond (which could be the amount of the default judgment) as a pre-condition to defending the action in Texas.

Now after the passage dealing with the Plaintiff's undertaking not to pursue certain juridical advantage in the **Aerospatiale** case Lord Goff said at page 522:

> "Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction on appropriate terms, just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate can likewise often be solved by granting a stay on terms."

From this passage it is quite clear that in a proper case this Court may discharge an injunction on terms. In my view, it would be sufficient in the present case to alleviate the real substantial detriment and burden to Insurco by granting a discharge of the injunction upon the condition that the Respondents waive the requirement for the bond from the Defendants in the Texas proceedings.

For these reasons I concurred in the judgment and order of the Court delivered on the 14th day of December, 1994.