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

CAUSE NO. 450 OF 1991

BETWEEN:	INSURCO INTERNATIONAL, LTD. (FORMERLY AGRICHEM INSURANCE COMPANY, LTD)	PLAINTIFF
AND:	VOLUNTARY PURCHASING GROUPS, INC.	DEFENDANT
AND:	FERTI-LOME DISTRIBUTORS INCORPORATED	DEFENDANT

For the defendants: Mr. Ian Paget-Brown
For the plaintiff: R. N. A. Henriques Q.C. Mr. D. Nicol

HARRE C.J.

REASONS FOR RULING

On 7th February 1992, this Court made an order on the plaintiff's ex parte application restraining the first defendant from continuing to prosecute certain legal proceedings against the plaintiff in Texas. I now give my reasons for discharging that order following an inter partes hearing. Henceforth in these reasons I shall refer to the plaintiff simply as Insurco and the first and second defendants respectively as VPG and FLD.

Insurco is an exempted insurance company incorporated in the Cayman Islands. It is permitted to carry on business other than domestic Cayman Islands business from within these Islands. It was formed to take over the business, assets and liabilities of four other Cayman registered insurance companies to which shares in it were issued in proportion to the net assets of each company.

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Agrichem Ltd, which I shall call "Agrichem" was formed by several manufacturing concerns primarily for the purpose of obtaining products liability insurance coverage in respect of the excess over its members' primary policies. It is a party to the Texas proceedings but not the proceedings in Cayman and there is evidence that it was the sole basic insurer until 1985.

VPG and its wholly owned subsidiary, FLD, are corporations incorporated under the laws of Texas. By its Texas action VPG has sued both Insurco and Agrichem, alleging breach of contract in respect of certain insurance policies and claiming damages.

The plaintiff's action here is for various declarations absolving it from liability on the ground of non-disclosure or misrepresentation of material facts, and breach and/or non-compliance with the terms of the insurance policies. There is also a claim for rescission of the policies. The first defendant (as it admits) owned certain equipment which it leased to a chemical company in Houston, Texas. The equipment was used by the two companies to manufacture, in Texas, a substance which became the subject of pollution lawsuits arising out of the operations of the chemical company. These resulted in a demand from the defendants for an indemnity from the plaintiffs which was not met. On 8th November 1991 the defendants filed action in Texas against Insurco and Agrichem. So the main issue, as formulated by the Cayman defendants in support of the discharge of the ex parte injunction was this -

"Should an exparte injunction, obtained by the

> Plaintiff, a Cayman Islands 'offshore' insurance company, notwithstanding the Defendants had entered an appearance, which restrained the Defendants, both Texas corporations, domiciled in Texas, from continuing Texas legal proceedings against the Plaintiff, and another Cayman Islands insurance company, Agrichem Ltd. ("Agrichem") formerly known as Agrichem Insurance Company, not a party to the Cayman islands proceedings, claiming relief, relating to insurance policies issued by Insurco and Agrichem in respect of risks located in Texas insured, available under Texas Law but not available under Cayman islands law, be discharged?"

I will, at this point, consider two questions. They were framed on behalf of the defendants as follows -

> Has Insurco shown that VPG by beginning and intending to prosecute its action in the United States, invaded or threatened to invade a legal or equitable right of Insurco for the enforcement of which VPG is answerable to the jurisdiction of the Cayman Court?
>
> Has Insurco shown that VPG, by so doing acted unconscionably?

These questions are drawn from two of the three basic principles enunciated by Lord Brandon in South Carolina Co. v Assurantie NV (1987) 1 AC 32 at 41. The third principle was

described by Lord Brandon in the following way -

> "The third basic principle is that among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned.
>
> The latter form of injunction may be granted in such circumstances as to constitute an exception to the second basic principle stated above. This may occur where one party has brought proceedings against another party in a foreign court which is not the forum conveniens for the trial of the dispute between them, as that expression was defined and applied in MacShannon v Rockware Glass Ltd [1978] A.C. 795. In such a case the party who has brought the proceedings in the foreign court may not by doing so, have invaded any legal or equitable right of the other party, nor acted in an unconscionable manner. The court nevertheless has power to restrain him

> from continuing his foreign proceedings on the ground that there is another forum in which it is more appropriate, in the interest of justice, that the dispute between the parties should be tried.".

The reasons for the need for caution in relation to such injunctions were given by Lord Goff in Bank of Tokyo v Karoon (1987) 1 AC 45 at p 59 -

> "Furthermore it has been repeatedly stated that the jurisdiction must be exercised with extreme caution, indeed sparingly: this is partly because concurrent proceedings in different jurisdictions are tolerated, but also because of desire to avoid conflict with other jurisdictions. For it is accepted, as is indeed obvious, that courts of two different jurisdictions, one in this country and one in a foreign country, can have jurisdiction over the same dispute. It is not prima facie vexatious for the same plaintiff to commence two actions relating to the same subject matter, one in England and one abroad; but the court may be less ready to tolerate suits in two jurisdictions in the case of actions in rem than is the case of actions in personam. All these principles are well

established and indeed non-controversial, and apparent to be common in both the English and the United States jurisdictions. But the jurisdiction to grant such an injunction has only rarely been granted.".

The matter of restraint of foreign proceedings was also considered in Societe Nationale Industriale Aerospatiale v Lee Kui Jak (1987) AC 87 where their Lordships concluded that where a remedy is available in more than one court, a plaintiff will only be restrained from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that as a general rule, the court must conclude that it provides the natural forum for the trial of the action, and 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. See British Airways v Laker (1985) 1 AC 58. As part of its complaint that the order should not have been made ex parte, the plaintiff enumerated a number of procedural advantages in Texas about which it had not had the opportunity to give evidence. They included pretrial depositions; discovery from persons not party to the action including U.S. citizens living abroad; estoppel collateral in respect of other proceedings. There is also the weighty substantive advantage tht punitive damages can be awarded in Texas, and indeed

they have been claimed. So matters of forum fall to be considered, while exercising great caution in granting or maintaining an injunction restraining foreign proceedings.

It is well established that in seeking to ascertain the natural forum the court will look for connecting factors which include the law governing the relevant transactions and the places where the parties respectively reside or carry on business. The business which I now have to consider is that of offshore insurance, where the place of business of the insurer is determined by fiscal considerations independent of the chosen insurance market rather than that market itself. In that connection the following observation from the Eighth Edition of MacGillivnay & Parkington on Insurance Law with regard to the law governing the contract is pertinent -

> "In some types of contract, the place of performance is of great significance, but this is not the case where, as in a contract of insurance, performance consists in the payment of money by one party or the other, sometimes using an international rather than a national currency. It is submitted that the courts give the greatest weight to the system of law governing the conduct of the insurers business, which is often identified by reference to the insurer's principal place of business but may, particularly in specialist classes of insurance business, be identified

by reference to an insurance market in which the insurer operates."

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 in this matter, had the advantage of reading both the judgment at first instance of Schofield J and the judgment of Kerr JA in the appeals in Causes No. 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 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;

(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.

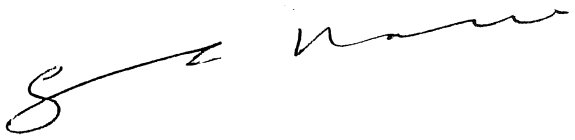
(d) that there was no express provision as to governing law in the contracts, notwithstanding the assertion in the affidavit of Mr. Law on behalf of the plaintiff that Cayman law applied.

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 were material matters of non disclosure.

The plaintiffs submit that the Cayman action was begun before the Texas action - as indeed it was - and that the defendants have submitted to the jurisdiction of this Court and taken steps in the action. But there is no step taken to stay the Cayman action and no objection in principle to proceedings in more than one jurisdiction.

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, notably 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.

It is, I think, premature for me to enter the fray at the stage of this application on the matter of whether this court has jurisdiction to grant the declarations asked for. I was satisfied for the other reasons to which I have referred that the injunction should be discharged and the Texas action allowed to proceed.



G. E. Harre
Chief Justice

5th October 1994.