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IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CICA (CIVIL) APPEAL NO. 23 OF 1993

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA PC, PRESIDENT
THE HON. MR. JUSTICE KENNETH C. HENRY, J.A.
THE HON. MR. JUSTICE JAMES S. KERR, J.A.

BETWEEN:	INSURCO INTERNATIONAL LTD. (formerly Agrichem Insurance Co. Ltd.)	Plaintiff/ Appellant
AND:	COWAN COMPANY	Defendant/ Respondent

Messrs. C.S. Gill & Co. for the Appellant
Messrs. W.S. Walker & Co. for the Respondent

AND

CICA (CIVIL) APPEAL NO. 23 OF 1993

BETWEEN:	AGRICHEM LTD. (Formerly Agrichem Insurance Co. Ltd.)	
AND:	INSURCO INTERNATIONAL LTD.	Plaintiffs
AND:	MUTUAL SERVICES CO.	1st Defendant
AND:	FRIT INDUSTRIES INC.	2nd Defendant

Mr. Henriques Q.C. instructed by Mr. S. J. Barrie of Messrs. C. S. Gill & Co. for the Appellant.
Mr. Pierre Lamontagne Q.C. instructed by Mrs. G. E. Maierhofer of Messrs. Bruce Campbell & Co. for 1st Defendant.
Mr. M. Parkinson of Messrs. Ritch & Conolly for the 2nd Defendant.

Monday 21st, 22nd, 23rd, 24th, 25th thru 28th, 29th and 30th March, 1994 and 10th August, 1994

KERR, J.A. :

Agrichem Limited ("Agrichem") formerly known as Agrichem Insurance Company Limited, was incorporated in Cayman under the relevant laws of the Cayman Islands and with registered office in George Town, Grand Cayman.

Insurco International Limited ("Insurco") was similarly incorporated on May 13, 1985 and on June 1, 1985, acquired the business of Agrichem. These companies are exempt companies under the provisions of the Companies Law (Cap. 22). Their business is known in the insurance trade as captive insurance.

Frit Industries Inc. ("Frit") and Gowan Company ("Gowan") are United States Corporations. Frit was incorporated in the State of Alabama and Gowan in the State of Arizona. Both companies are manufacturers and distributors of agro-chemicals. Agrichem and its successor, Insurco, provide to each Corporation under a policy of insurance, coverage for product liability, completed operations and contractual liability. Mutual Service Limited ("Mutual") is a Minnesota Corporation and also provides insurance cover for Frit.

Claims were made against both Frit and Gowan in the United States - Frit, in North Carolina, and Gowan in California - for injuries caused by the manufacture and/or distribution of dangerous chemicals.

Mutual, as a co-insurer to Frit, instituted proceedings in Alabama against Frit and a number of other co-insurers including the appellants, denying liability and alleging that Frit was primarily liable and the co-insurers liable to undertake the costs of Frit's defence and for any damages that may be awarded.

Gowan has instituted similar proceedings against Insurco with an additional cause of action based on the law of California, namely for "breach of implied covenant of good faith and fair dealing".

By writs filed in the Grand Court, the Plaintiffs sought declarations in which the particulars, as endorsed, indicate the nature of the stand of the Plaintiffs in each case.

RE MUTUAL AND FRIT

ENDORSEMENT

The Plaintiffs' claim is against the Defendants for:-

1. A declaration that the Plaintiffs are not liable to defend or indemnify the Defendants or either of them for claims made against both or either of them arising out of Civil Action No: 90-CVS-902, Civil Action No: 90-CVS-1076 and Civil Action No: 90-CVS-1077, filed in the General Court of Justice, Superior Court Division, Moore County, North Carolina, in the United States of America, under Master Policy of Insurance No: AGL-2000 and Certificate of Insurance No: AGL-2030 issued by the Firstnamed Plaintiff and the Secondnamed Defendant and/or Policy No: UML-0011 issued by the Secondnamed Plaintiff to the Secondnamed Defendant.

2. A declaration that the Plaintiffs are not liable to defend or indemnify the Defendants or either of them for any claims made against them under the said policies as the Plaintiffs have already paid out the policy limits for the year in respect of which the said claims are made and consequently are under no duty to defend or indemnify the Defendants or either of them for claims arising out of the same occurrence.

3. A declaration that on the terms and conditions of the said policies of insurance the Plaintiffs are not liable to defend or indemnify the Defendants or either of them for any claims made against them under or in connection with the said policies.

RE GOWAN

ENDORSEMENT

The Plaintiff's claim is against the Defendant for:-

1. A declaration that the Plaintiff is not liable to indemnify the Defendant under Master Policy of Insurance No. AGL 2000 and Certificate of Insurance No. AGL 2023, Umbrella Policy No. UML-0009 issued by the Plaintiff or its predecessors to the Defendant in respect of claims made against the Defendant in Civil Action No. 914400, Civil Action No. 920427, Civil Action No. 939483 and Civil Action No. 939526 filed in the San Francisco Superior Court, San Francisco, California in the United States of America on the ground that the occurrence which caused the Plaintiff's damage in the said civil actions is either prior to the time the policies issued to the Defendant took effect or is excluded by the terms of the said policies of insurance issued to the Defendant by the Plaintiff.

2. A declaration that the Plaintiff is not required under the terms and conditions of Master Policy of Insurance No. AGL 2000 and Certificate of Insurance No. AGL 2023, Umbrella Policy No. UML-0009 issued by the Plaintiff or its predecessors to the Defendant; to defend on behalf of the Defendant Civil Action No. 914400, Civil Action No. 920427, Civil Action No. 939483 and Civil Action No. 939526, or any of these actions filed in the San Francisco Superior Court, San Francisco, California in the United States of America, by the Plaintiffs named therein on the ground that the occurrence which caused the Plaintiff's damage in the said civil actions, is either prior to the time the policies issued to the Defendant took effect or is excluded by the terms of the said policies of insurance issued to the Defendant by the Plaintiff.

3. Further or alternatively:

   A declaration that the Certificate of Insurance No. AGL 2023 issued under Master Policy of Insurance No. AGL 2000 and Umbrella Policy No. UML-0009 issued by the Plaintiff or its predecessors to the Defendant, are void ab initio and that the Plaintiff is entitled to avoid the said policies on the ground that they were obtained by the non disclosure of material facts or by the representation of facts which were false in some particular, namely that the use

> of the chemical DPCP by the Defendant had already given rise to a claim against the Defendant, by Mary F. Shavies and that the Defendant was exposed to liability or potential liability by virtue of said proceedings No. 774219 in the San Francisco Superior Court, San Francisco, California in the United States of America arising out of the use by the Defendants of said chemical.

Leave was granted for service out of the jurisdiction on all Defendants. Upon service being effected all sought by appropriate summons to have the order for leave for service abroad discharged. Frit and Gowan also sought orders that the writ of summons and service of notice of writ be set aside and the actions be dismissed while Mutual prayed for an order that the proceedings in Cayman be stayed.

After a consolidated hearing, Schofield, J., held "the Defendants in both suits will have the orders they seek and also their costs".

Against this judgment the Plaintiffs appealed.

On the first day of hearing two questions of a preliminary nature were raised.

The first by Mr. Turner for Gowan, was to the effect that grounds 1-4 of the appellants' grounds should be struck out on the basis that they were in relation to interlocutory orders and as no notice of appeal was given, the Court ought not to entertain arguments based on those grounds.

The first three grounds were in respect of a ruling by Schofield, J., in response to a summons filed on behalf of Gowan, that certain affidavits tendered on behalf of the Plaintiff should be excluded. The fourth ground challenged the order for consolidated hearing.

As regards the objections of Mr. Turner, Mr. Henriques submitted that assuming that the orders, which included the

ruling excluding the affidavits, were interlocutory orders, as no formal orders had been perfected as required by rule 12 of the Grand Court Rules the time in which to appeal had not yet begun to run. Mr. Turner agreed with this submission and abandoned his preliminary objections.

As regards the exclusion of the Plaintiffs' affidavits, we are in agreement with the learned Judge that interlocutory matters should not be cluttered with unnecessary affidavits and should be expeditiously heard. However, in the instant case, the affidavits had already been filed and copies duly served on the other side and were relevant in responding to affidavits recently filed on behalf of Gowan. No time limitation had been imposed on the filing of affidavits. Accordingly, this Court, taking the liberal approach to "fresh evidence" in interlocutory proceedings, set aside the ruling excluding the affidavits, admitted the affidavits in evidence but granted 21 days in which affidavits in reply may be filed, and directed that no further affidavits should be filed after the expiration of 14 days thereafter.

The second, was by Mr. Henriques for the appellants with regard to ground 4 which challenged the order for consolidated hearing. Mr. Henriques, apparently with an awareness that it would be at best a pyrrhic victory if perchance an order for separate hearing was made and that this Court could adequately deal with such differences between or special circumstances in the two cases, prudently did not pursue this ground.

In the judgment of Schofield, J., there were two main plinths common to both cases:

(1) that Cayman was not the appropriate forum; and

(2) that the declarations sought were negative declarations and on principle should not be granted.

On the question of forum non conveniens all sides accepted the broad basic test as expressed by Lord Goff in Spiliada Maritime Corp v. Cansulex Ltd, The Spiliada [1986] 3 ALL ER at p. 854:

> "In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows:
>
> - 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 available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice." (Emphasis supplied).

The generality of the sentence emphasised demands consideration of all relevant factors, the weight to be attached to each factor having regard to all the attendant circumstances and the cumulative effect of these factors one way or the other. In that regard one cannot be unmindful of the following sage observations of Lord Templeman in the Spiliada case at p. 846:-

> "The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose."

In the same vein but more pointedly, Lord Goff said at p. 856:

> "So it is for connecting factors in this sense that the Court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Credit Chimique v. James Scott Engineering Group Ltd. 1982 SLT 131), and the places where the parties respectively reside or carry on business."

With this indicator it is not surprising that considerable argument was centred both in the Court below and also before us on the proper law of the contract. For the Plaintiffs it was strongly urged that the proper law is Cayman and for the Defendants to the contrary. While the Plaintiffs relied on this factor Counsel for Frit and Gowan, while admitting it was a relevant factor, expressed the view to the effect that it was not conclusive; Counsel for Mutual submitted that at the best, it was of minimal importance to the question of forum conveniens.

In the circumstances, Schofield, J., could not refrain from responding. He made what he was pleased to call "a provisional decision" by applying the English law approach in determining the proper law of a contract as he was enjoined to do by the statement to that effect 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."

As to the proper test, Lord Diplock in Amin Rasheed Shipping Corp v Kuwait Insurance C. The Al Wahab [1983] 2 ALL ER 884 at p. 888 cited with approval Lord Atkin's statement:

> "'The legal principles which are to guide an English court on 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.'"

and later went on to say:

> "There is no conflict between this and Lord Simond's pithy definition of the 'proper law of the contract to be found in Bonython v Commonwealth of Australia [1951] AC 201 at 210 which is so often quoted, ie '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 quotation is disjunctive".

Schofield, J., then purposefully considered the terms of the contract and the surrounding circumstances and, in the end, held:

> "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."

RE THE PROPER LAW OF THE CONTRACTS - CERTAIN FACTORS COMMON TO BOTH CASES

The appellants are registered as exempted companies having met the requirements of section 183 of the Companies Law which provide:-

> "A proposed exempted company applying for registration as an exempted company shall submit to the Registrar a declaration signed by a proposed director to the effect that the operation of the proposed exempted company will be conducted mainly outside the Islands."

and subject to the following limitations imposed by section 192:-

> "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."

The Insurance Law, 1979, incorporates this meaning of "exempted company" and defines "exempted insurer" as is relevant thus:

> "means an insurer incorporated as an exempted company ----------".

and excludes the Plaintiffs from being an "external insurer" thus:-

> "external insurer" means an insurer who is neither a local nor an exempted insurer"

and as affected by the Amending Law of 1987, "insurance business" means:-

> "the business of effecting and carrying out contracts -
>
> (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or
>
> (b) to pay a sum of money or other thing of value upon the happening of an event;
>
> and includes re-insurance business and running-off business including the settlement of claims".

The Plaintiffs hold an unrestricted Class "B" insurance licence under section 4(5) of the Insurance Law, 1979, which permits them to carry on insurance business other than domestic business from within the Cayman Islands.

The risks covered in respect of both Frit and Gowan are for operations in the United States of America. Both are members of the Plaintiffs' company under an agreement which makes membership a condition precedent to being a policyholder. This agreement is expressly to be governed by the laws of the Cayman Islands. The forms of the contract are on standard United States Insurance Forms.

In challenging the finding that the proper law of the contract was not Cayman the appellants' Attorney, Mr. Henriques,

argued that the learned Judge erred in omitting to make a finding as to the place of the contract - locus contractus or the place of performance of the contract - locus solutionis and in finding that the Plaintiffs' place of business was where the risks lay. He submitted that the place where the contract was formed, i.e. where the proposals for insurance were accepted and the premiums received, is Cayman and the place of performance, i.e. where claims for indemnity were payable is also Cayman.

I interpret the relevant provisions of the Company Law as being in harmony with the Insurance Laws. A proposal is an offer and prima facie the acceptance would be in the company's office from where the policy would be issued. Both the formation of the contract and the settlement of claims are in keeping with the policy and permissible by the laws of Cayman.

Accordingly, I am of the view that Cayman is the place of formation and also the place of performance in relation to the contracts of insurance. In that regard, I am fortified on the point of the locus contractus by the reasoning and conclusion in the cases, Entores, Ltd vs Miles Far East Corporation [1955] 2 ALL ER 493 and Brinkibon Ltd. vs Stahag Stahl UND Stahlwarenhandels-Gesellschaft m.b.H [1982] 2 W.L.R., 265 and by the following statement of Lord Hanworth M.R. in relation to the business of insurance in United General Insurance Corporation Ltd. [1927] 2 Ch. at p. 57:-

> "To my mind emphasis must be laid on the making and terms of the contract under which the relation between the insured and the corporation was established; the locality where the loss arises does not dominate the business, which had its origin in London and the purpose of which was to give the security of, or indemnity under, an English contract, in respect of claims which might arise elsewhere."

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 the Amin Rasheed case made the following observations, p. 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 ---------- "

and

> "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 that claims were payable in Kuwait, shows how little wieght the parties themselves attached to the lex loci solutionis."

With regard to the place of business, I adopt the approach and opinion in MacGillivray & Parkington on Insurance Law, Eight Edition at paragraph 1331, p. 552 et seq:

> Carrying on business. Section 2 of the 1982 Act lays down the general rule (subject to exceptions mentioned below) that no person may carry on any insurance business in the United Kingdom unless authorised under section 3 or 4. This immediately raises the question, what constitutes "carrying on insurance business"? The words connote some element of continuity, as opposed to mere isolated transactions, but it has been held on the construction of a similar statutory prohibition that a single transaction may afford sufficient evidence of "carrying on business". While the Act contains no general definition, it must be noted that the definition of each class of insurance business in the Schedules to the Act begins with the words "effecting and carrying out contracts of insurance ...." These words reflect the fact that insurance business contains two principal elements, first, the conclusion of contracts and, secondly, the execution of those contracts by, in particular, paying claims. It is clear that if both these

> activities take place in the United Kingdom, business is being carried on here. On the other hand, if neither activity takes place here, business is not carried on here and the fact that insured property or insured persons may be located in the United Kingdom is irrelevant. In this respect, the insurance supervision law of the United Kingdom is sharply distinguished from that of the majority of other countries, where the ambit of the legislation is determined by "the situs of the risk" - a concept unknown to our law."

The respondent's Counsel, in general, supported the reasoning of Schofield, J., and his conclusion that Cayman was not the proper law of the contracts. First, Counsel adverted to Christopher Beauman being the managing director of both Agrichem and Insurco and with Alfred Beauman were directors of a company called Beauman International Ltd with a Post Office Box in George Town. Christopher lives in Florida, U.S.A. and Alfred, in the Isle of Man. Alfred is a director of Agrichem and one Don Beauman is a director of Insurco. All three are directors of Beauman and Beauman Inc., a company incorporated in Florida. It is a contested issue whether or not this Florida company is an agent soliciting business for the appellants. The case of Sfeir & Co. v. National Insurance Company of New Zealand, Ltd. [1964] Lloyd's List Law Reports Vol 1, p. 330, illustrates the limited effect an agency may have in determining the proper law of the contract. In the circumstances this issue may safely be left for determination at the trial.

It is clear that the Beaumans, occupying commanding positions in the appellant companies as they do, establish thereby significant links between the companies here and their other foreign corporations. However, this in no way can affect the basic facts that the appellants as legal personae have origin and being in the Cayman Islands with secretary and registered office here and, therefore, for all purposes are Cayman insurance companies accepting proposals for policies and settling claims for indemnity presented here by their policyholders.

Secondly, with respect to the shareholders' agreement being expressly governed by Cayman law, appellants' Counsel asked that it should be inferred therefrom, an intention that the same law governed the policies. On the other hand, Counsel for Mutual and Frit argued that if such was the intention it was easy for a similar statement to be included in the policy. When these contentions were put before the learned Judge, he preferred the view of the respondents. Before us Counsel for Gowan said that this point was irrelevant and of no assistance in determining the proper law of the contract.

My own view is that the shareholders' agreement is a different type of transaction from the contract of insurance and no implication can be drawn from its omission from the policy. What is unchallenged is that astute business persons from the industrial and developed countries of North America came to the Cayman Islands to avoid the rigors of taxation in their own countries and set up the companies here to take advantage of the tax haven here and the liberal business-incentive legislation. Benefits and burdens usually go hand in hand. If while taking the benefits of the laws of Cayman, they wish to avoid incidental provisions or implications that are unfavourable or inconvenient, then to that end they should seek avoidance, if such can be lawfully done, by clear expressions or by unambiguous implications with respect to the relevant transactions.

This brings me to a point strongly relied on by the respondents, namely, that the form of the contract in these matters are all on the standard United States form, that words and phrases therein have been given judicial interpretation by American Courts, that the parties are all Americans and would be familiar with the terms of the contract and an

intention that they should be governed by American law should be inferred.

Waiving aside for the moment the fact that there is no one federal law dealing with contracts of insurance in the United States of America, I derive some help from the following statement on inferred intention in Cheshire's Private International Law, Seventh Edition, at page 189:

> "In the first place, it is a complete myth to regard the ultimate decision by the judge as a fulfilment of the common intention of the parties. For the judge to persuade himself that such is his aim is, as BIRKETT, L.J., stressed in The Assunzione, to live in a world of unreality. If, as invariably happens, counsel has argued with force that the plaintiff's mind was throughout directed to the law of X and that he would never have agreed to the law of Y, as suggested by his opponent; while opposing counsel has argued with equal force that the defendant would never have accepted the law of X, how can it be said with any approach to truth that the court, whichever way it decides the matter, will give effect to what both parties would presumably have accepted?"

There are Americans on both sides in contention over this point and, accordingly, in the absence of express intention, I am unwilling in the special circumstances of this case to rely on inferred intention for the proper law of the contract as asked by the respondents.

In support of the argument based on the form of the contract, the respondents referred to cases in which the finding of the proper law of the contract was in keeping with the form of contract familiar to and emanating from a particular jurisdiction. These cases include:

(a) The Amin Rasheed case (supra)

In that case the form of policy was based upon Lloyd's standard form and was clearly an important factor in the determination that English law was the proper law.

However, there is one significant distinguishing feature between that case and the instant case and its importance was recognised in the following statement by Lord Diplock at p. 889:

> "The crucial surrounding circumstance, however, is that it was common ground between the expert witnesses on Kuwaiti law that at the time the policy was entered into there was no indigenous law of marine insurance in Kuwait."

Therefore, it is enough to say that in the instant case that at all material times there was Cayman legislation dealing with this type of insurance (see provisions referred to or quoted ante). In addition, in the cited case, it was an English insurance company using an English form; here it is a Cayman company using an American form.

(b) E.I. Du pont De Nemours & Co. and Endo Laboratories Inc. v. I.C. Agnew, K.W. Kerr and Others [1981] 2 Lloyd's Law Reports 585.

In that case, the Lloyd's policy was issued in London, the first defendant being the representative underwriter of the insurer and the policy was negotiated by Lloyd's brokers -

> "Held: none of the insurance contracts contained an express choice of law; the proper law of the Lloyd's policy, which was the lead policy, was English; it was negotiated by Lloyd's brokers and issued in London; notice of potential claims was to be given to Lloyd's brokers; the policy was for world-wide cover and unless displaced the inference that English law was intended to govern was overwhelming".

Here again the policy was English in form and issued by an English insurance company.

From these cases, I extract the proposition that much more is needed than the form of the contract to support a finding that the proper law of the contract is that of the place from which the form originated as a standard form.

Any American cases interpreting the words and phrases would be useful or of persuasive value for its dictionary effect. As illustrated in The Assunzione [1954] 1 ALL ER 278 where the contract was in the English language between French charterers and Italian shipowners it was held "on the facts, on balance, Italian law must be deemed to have been intended to apply to the contract."

There is, however, one factor which clearly tips the scales down in favour of Cayman law and it is inherent in the finding of Schofield, J., to the effect that to determine the proper law of the contract, each policy must be dealt with separately and be determined by the State with which the contract has its closest connection. Such a finding in relation to the type of contract with which we are here concerned, lacks uniformity and certainty of law. It is agreed on all sides that it is open to each insured company to have its manufacturing and distributing operations in any number of States in the U.S.A. in addition to the State in which the company is registered and that each State has its own laws dealing with insurance. The insurance business is one of calculated risks and there is a direct relationship between premiums and estimated liability. Such a moveable law in relation to a policy would be in conflict with the accepted principle that the proper law is determinable at the formation of the contract.

As stated in Dicey and Morris, 12th Edition at p. 11 67:-

> "The relevant time. The intention of the parties, or, where it is relevant, the connection of the contract with a given legal system, must be determined with reference to the time at which the contract is alleged to have been made. There must be a governing law at the outset of the contract, and the governing law cannot fall to be decided, retrospectively, by reference to an event which is uncertain when the contract is concluded (e.g. when the place of average adjustment or place of arbitration is selected). ----------"

To the same effect is the statement of McNair, J., in Rossano v. Manufacturers Life Insurance Co., Ltd. [1962] ALL ER p. 219:

> "The proper law must be determined as at the making of the contract, though the court will, of course, give effect to changes in that proper law which arise after the making of the contract."

Dicey and Morris in the same edition dealt specifically with contracts of insurance at page 1289, thus:

> "(2) If an intention to choose the proper law has not been expressed in the insurance policy and cannot be inferred from the circumstances, and if there is nothing to show that the contract is more closely connected with another system of law, the contract (especially if it is a contract of life insurance) is governed by the law of the country in which the insurer carries on its business, and, if it carries on its business in two or more countries, by the law of the country in which its head office is situated."

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 down in favour of the law of the Cayman Islands being the proper law of these contracts.

However, on the question which is clearly the more appropriate forum for the cases now pending in the Courts of America 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.

RE MUTUAL AND FRIT

The three actions against Frit which formed the bases for the present proceedings here as well as those in Alabama were instituted between October 1990 and December, 1990, in the Superior Court Division, North Carolina, for injuries to three persons (two now dead) caused by the supply by Frit of contaminated fertilizer. Frit gave notice of these proceedings to all insurers including the Plaintiffs.

On March 5, 1992, Mutual commenced proceedings in the United States of America, Federal Court in Alabama, against Frit denying liability to indemnify Frit and against the Plaintiffs and other co-insurers alleging that they are liable to defend Frit and to indemnify Frit against liability.

On May 13, 1992, Frit filed an answer and a counter-claim against Mutual and a cross-claim against Agrichem/Insurco alleging in each case that as insurers under the terms of the policies they were liable to defend the actions and indemnify against damages, if awarded.

The Plaintiffs' consistent denial of liability is to the effect that in 1986 an action brought by W.A. Grace & Company in a North Carolina Court, Frit was found liable and in settling that action the Plaintiffs had exhausted their liability coverage for the relevant insurance year, April 30, 1984, to April 30, 1985 and they were not now liable to defend the North Carolina actions or to indemnify Frit for any damages that may be awarded.

On June 17, 1992, the Plaintiffs instituted proceedings in the Grand Court here and leave was granted for service out of the jurisdiction by an order of June 22, 1992.

On June 22, 1992, a motion filed in the Alabama Court by Agrichem/Insurco alleging that that Court had no jurisdiction

was unsuccessful and there was a similar fate on a reconsideration of this question on December 1992. In between these endeavours, Agrichem/Insurco, in September, 1992, filed answers in the Alabama proceedings. There was a number of interlocutory motions before the Alabama Court ending with an order of April 26, 1993, declaring that Agrichem/Insurco have a duty to defend Frit in the North Carolina actions and dismissing without prejudice the question whether they have a duty to indemnify. Although this order is subject to an application to amend, I refer to it merely to indicate the stage reached in the Alabama proceedings.

Before reasoning to a conclusion on the more appropriate forum, it seems convenient to deal with what I regard as the special position of Mutual. Mr. Henriques submitted that unlike Frit, Mutual entered a general appearance and, accordingly, submitted to the jurisdiction and, therefore, the only remedy open to Mutual was an order to stay the Cayman proceedings.

Mr. LaMontagne in reply adverted to the difference between the Cayman rules and the English rules relevant to service out of the jurisdiction as recognized in the judgment of the Grand Court in Rawson Trust Company Limited v. G.C.T.C. Limited (in liquidation) (Bittel, Langer and Blass, Third Parties) [1980-83]CILR 14. He submitted that having regard to the wide discretion conferred by the Cayman rule, conditional appearance does not arise. In dealing with this question, Schofield, J., concluded:

> "Mutual did not claim in its summons that there was anything wrong with the writ; it attacked the proceedings. Mutual does not seek to have the writ set aside and the action dismissed. But it is proper for Mutual to apply not only for a stay of these proceedings but also for an order setting aside the leave to serve out of the jurisdiction, these being applications going to matters of proceedings (see for example, Re Harrods (Buenos Aires) Ltd. (No 2) [1991] 4 ALL ER 348, 351).

The relevant rules dealing with service of original process read:

"13. (1) Except where the defendant, in person or by his legal representative, undertakes to accept service or enters an appearance, originating process shall, wherever practicable, be served by delivering to the defendant a copy thereof sealed with the seal of the Court, but if the Court is satisfied, on application made by the plaintiff, that service cannot conveniently be so affected, it may make an order for substituted or other service, or for service of notice by advertisement or otherwise as may seem just.

(2) Substituted service may be ordered to be effected by delivery of the document -

(a) to some adult of the defendant's or respondent's known place of residence; or

(b) to some agent within the Islands of the person to be served, or to some other person through whom it appears to the Court that there is a probability that the document will come to the knowledge of the person to be served.

(3) No such process shall be served outside the jurisdiction without the leave of the Court, and no sub-process shall be issued without such leave, if it is apparent from the document that service outside the jurisdiction will be required. When leave to serve outside the jurisdiction is granted a copy of the order for such service shall be served therewith:

Provided that when leave is given for service of process outside the jurisdiction upon a person who is not a British subject nor within Her Majesty's dominions, notice thereof and not the process itself shall be served."

The following rules dealing with appearance are relevant:

"16. (5) A defendant to an action may with the leave of the Court enter a conditional appearance.

16. (6) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court within fourteen days for an order setting aside the writ and the Court makes such an order."

Summerfield, C.J., in the Rawson Trust case, after an in-depth analysis of the relevant Grand Court Rules, was of the view that neither the saving provisions of section 20(2) of the Grand Court Law nor the implied incorporation of the practice and procedure of the High Court of England in rule 62 of the Grand Court Rules, where the law and rules of the Cayman Islands are silent, render Order 11 rule 1 applicable because:

> Order 11 r. 1 is jurisdictional in nature. It defines the cases in which process of a certain kind is available. It does not spell out any particular procedure or practice"

and with reference to the Cayman rule:-

> "It can be observed here that that provision is complete in itself. It may not be as detailed as the English provisions; it may not be as sophisticated or polished as those provisions but it is sufficient to cover all foreseeable cases, including this one."

In my view, the provision for conditional appearance was intended to give notice to all concerned that a preliminary strike would be made against the order granting leave to serve abroad and when such normal bases for jurisdiction as residence, or place of business in, or contractual relations with the jurisdiction, are non-existent, the provision for the entry of conditional appearance is tailor-made for such cases.

One obvious advantage in the English rule is the certainty as to the exercise of the jurisdictional permit to serve a party abroad where the application is made for service in a case categorised by Order 11, rule 1. However, notwithstanding the generality of the Cayman rule, implicit in the existence of the option to enter a conditional appearance is that jurisdiction is not rendered irrelevant but is subsumed or encapsuled in the generality of the Cayman rules. Accordingly, it could never be the proper exercise of the discretion, if at the inter-parties hearing it was established that there was

really no basis for jurisdiction. Mr. Henriques' endeavour to justify holding Mutual in this jurisdiction on the basis of presumed submission is understandable as there is little else to support it.

Although perhaps by a somewhat different route of reasoning, I am in agreement with Schofield, J., that a failure to enter a conditional appearance would not preclude the Court from making an order to discharge the order for service abroad in a proper case.

The claims for indemnity brought by Mutual and Frit rest on primary liability of Frit, while the claims based on the contractual obligation to defend Frit, rest on the very existence of the actions pending against Frit in the North Carolina Court. The liability of Frit in the North Carolina actions is being contested and apparently not considered groundless as in seeking leave to serve process out of the jurisdiction on Mutual and Frit, Mr. Dominic Francis Bannon, on behalf of the Plaintiffs, said:

> "That the Plaintiffs also aver and believe ------ that the alleged injuries do not arise or are due to the supply of the alleged ingredients of the contaminated fertilizer."

However, it is not necessary for the purpose of these interlocutory proceedings to determine whether the obligation to defend is independent from the obligation to indemnify though this seems implicit in the ruling of the Alabama Court.

From the factors set out herein, I am of the view that the scale is heavily weighted down in favour of the Court in Alabama being the more appropriate forum.

In denying the declarations, Schofield, J., in his written judgment quoted with evident approval the following statement of Kerr, L.J., in the Volvox Hollandia [1988] 2 Lloyd's Report at page 371:

> "Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflict of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping."

and later from that learned Judge's statement to the same effect in First National Bank of Boston v. Union Bank of Switzerland and others [1990] 1 Lloyd's Reports at p. 36 including:

> "I then come to the considerations which, quite apart from these matters, are generally relevant to the approach of our Courts to claims for negative declarations, in particular declarations of non-liability. There is clear authority that these will be viewed with great caution, particularly where they arise in the contract of an international dispute involving conflicting jurisdictions."

More directly in point with the circumstances of the instant case are the following comments of Lord Wilberforce in Camilla Cotton Oil Co. v. Granadex S.A. and Tracomin S.A.; Shawnee Processors Inc. v. Same [1976] 2 Lloyd's Reports at p. 14:

> "Attention is first attracted by the nature of the relief sought. It is declaratory, but that is in itself no objection, since both under the rule R.S.C., O. 15, r. 16 (formerly O. 25, r. 5) and authorities since 1803 the Courts have a very wide discretion as to granting declarations which have increasingly been recognized as a very useful remedy. ----------
> ----------
> But in addition to this factor there are others here. The declaration claimed is of a negative character and as Lord Sterndale himself had said
>
> > . . . a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made [l.c. p. 564].
>
> "Hardly ever" is not the same as "never" but the words warn us that we must apply some careful scrutiny. So I inquire whether to grant such a negative declaration would be useful."

Schofield, J., in keeping with the dicta in these cases, said:

> "The jurisdiction of the Grand Court to grant declarations is, it seems, as wide as that of the English Courts. But it is clear that we must exercise great caution before granting negative declarations of the kind sought by the plaintiffs in this case."

Therefore, it is clear that he found that the Court had jurisdiction to grant declarations including negative declarations, but a prayer for negative declarations, such as these are, should be approached with the caution advocated in the dicta in the decided cases. He then considered, inter alia, the factors which would operate against granting orders which would interfere with the pending proceedings in Alabama including the fact that the foreign Court would not be bound by the decision and the risk of conflicting decisions between the Cayman Court and the foreign Court and concluded that the granting of the declarations would be an abuse of the process of the Court.

Now it was held in the First National Bank of Boston v. Union Bank of Switzerland and Others (supra) p. 32, that:

> "----- it would serve no useful purpose to allow FNBB's claim for a negative declaration to proceed; the issues raised were already before the Swiss Court and even if the claim for a negative declaration were to proceed this would have no effect on UBS or the Swiss proceedings".

In the proceedings against Mutual and Frit, the Plaintiffs made no allegation of breach of contract against Frit or any wrong-doing by Mutual or Frit. The declarations sought were based on similar allegations to those in the defence to the actions against the Plaintiffs pending in the Alabama Court. This then was no more than a pre-emptive defensive strike; it was a bold endeavour to obtain declarations to the effect that the Plaintiffs had an indefeasible defence to the actions in Alabama.

I am in agreement with Schofield, J., that the prayers for these negative declarations in this case would be an abuse of the process of the Court and were properly denied.

There remains to be ironed out one wrinkle in the case of Mutual. The summons filed on behalf of Mutual specifically prayed:

> "1. THAT the ex-parte Order for service abroad be discharged with respect to the First Defendant.
>
> 2. THAT the proceedings be stayed as against the First Defendant."

The formal order, however, notwithstanding the final sentence in the judgment quoted ante, contained in addition to the remedies specifically requested in the summons:

> "THAT paragraphs 1, 2 and 3 of the Indorsement to the Writ of Summons be struck out on the grounds that they are an abuse of the process of the Court."

Counsel for Mutual said that the draft order in these terms was approved by the Attorneys on the other side.

It is of interest to note that the order on behalf of Frit contains the following:

> 1. The Order made herein on the 22nd day of June 1992 giving the Plaintiffs leave to serve notice of Writ of Summons filed on the 17th day of June 1992 on the 2nd Defendant out of the jurisdiction be discharged.
>
> 2. The said Writ of Summons and the service of the said Writ on the 2nd Defendant be set-aside.
>
> 3. The action be dismissed as against the 2nd Defendant."

As indicated earlier, notwithstanding Mutual's presumed submission to the jurisdiction, it would be open to the Court to discharge the order for service abroad if there was no basis for jurisdiction. On the face of it, ordering a stay of the

proceedings and striking out the endorsement to the writ are inconsistent. However, it is self-evident that Mutual's case for dismissal of the action is much stronger than Frit's. In my view, under the general prayer of "such other and further relief", the grant of an order in terms similar to that in the case of Frit would be in order.

For the reasons set out herein, I would dismiss the appeal and, subject to the amendment advocated above, affirm the orders in the Court below. with cost to the Respondent to be agreed on Taxed.

RE GOWAN

As stated earlier, my reasoning and provisional conclusion that the law of the Cayman Islands is the proper law of the contract also apply to the relevant policies in this case.

The entry of conditional appearance not only precluded the presumption of submission to the jurisdiction that would attend the entry of general appearance but indicated an intention by interlocutory proceedings to challenge the exercise of the jurisdictional permit to grant leave for service on the Defendant out of the jurisdiction.

Under the relevant English rules, on a finding of Cayman being the proper law of the contract and, having regard to the allegations in paragraph 3 of the endorsement to the writ of non-disclosure of material facts that would render the contract of insurance void ab initio, the Plaintiff would have cleared the first hurdle - "the obstacle to the jurisdiction point" but would also have to overcome the second hurdle "the discretion point" (The Amin Rasheed case [1983] ALL ER at p. 886-7. On the discretion point, Lord Diplock said at p. 891:

"My Lords, the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under Ord. 11 r. 1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, ie it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of Ord 11, r 1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules. Such a forum in the instant case was afforded by the courts of Kuwait.

In order to decide whether a Kuwaiti court, as well as having jurisdiction, is also a forum conveniens for the dispute, one must start by seeing what are likely to be the issues between the parties in the proposed action."

In Rawson Trust v. G.C.T.C. Summerfield, C.J., commented at p. 222:

"----- obviously this court could take account of O. 11, r. 1 for guidance without feeling bound by it. The court would certainly consider whether the party ought to be served abroad was a necessary or proper party -----."

It is agreed on both sides that this is a case of forum conveniens and as it is clear from the argument that the determination of the proper or more appropriate forum is pivotal to the appeal, it is convenient to deal first with this question. Its determination involves a consideration of the action pending in the Court of California and the issues therein between the parties and other connecting factors.

Between July 1975 and July 1981, Gowan was the holder of successive insurance policies from six insurers. Their policies with Agrichem and Insurco of Cayman and Inter-Industry of the Isle of Man (for convenience "The Beauman Group"), covered the period September 15, 1981, to September 15, 1991, thus:

(i) with Agrichem - a master policy for period September 15, 1981, to June 1, 1987;

(ii) with Insurco (Agrichem's successor) - an Umbrella Policy issued October 1, 1985, for period then to June 1, 1987;

(iii) with Inter-Industry policy and Umbrella policy - June 1, 1987, to September 15, 1991.

There were eight underlying actions to the pending actions instituted by Gowan et al in California against Insurco and the first four were between June 1990 and September, 1992:

(a) by City of Dinuba -v-Shell Oil Company et al and a host of Company defendants, including Gowan;

(b) City of Lodi-v-Shell Oil Company et al or similar defendants, including Gowan;

(c) City of Modesto et al-v-Shell Oil Company et al or similar defendants, including Gowan;

(d) City of Fresno-v-Shell Oil Company et al or similar defendants, including Gowan.

The actions were all filed in the San Francisco Court, California, for contamination to the cities' water supplies by a certain agro-chemical (pesticide), supplied or distributed by the defendants. The filing of these actions were promptly brought to the attention of the "Beauman Group".

On October 22, 1992, Gowan, apparently as principal plaintiff with Dune Company of California, an associate company, as co-plaintiff, commenced proceedings against a number of co-insurers including the Beauman Group, claiming against them liability to defend and indemnify against damages in respect of the underlying actions and the collateral cause of action under the law of California for breach of implied covenant of good faith and fair dealing.

On February 2, 1993, motions on behalf of the Beauman Group to quash these proceedings on the grounds of want of jurisdiction and forum non-conveniens were denied. On appeal, the California Court of Appeal on September 28, 1993, affirmed that the Court had jurisdiction but made no declaration as to forum non-conveniens on the grounds that service was defective. The proceedings were duly re-served on Agrichem and Insurco on February 17, 1994 and the issue of forum non-conveniens was pending before the California Court. Gowan challenged the Cayman proceedings filed October 1992 by summons filed December 8, 1992, seeking:

(1) that the Order giving the leave to serve notice of the Writ of Summons on the Defendant out of the jurisdiction be discharged;

(2) that the Writ of Summons and service of notice thereof beginning this action be set aside;

(3) that the action be dismissed.

The summons was heard and determined on August 6, 1993 and the order made in terms prayed.

The allegations, upon which paragraphs 1 and 2 in the endorsement to the writ are based, are similar to those in the California Court and raise the same issues by way of defence in those proceedings. The underlying actions in California were in September 1993 settled as against Gowan for US$500,000.00. Gowan's U.S.A. domestic insurers agreed to pay Gowan's cost of defence of the underlying actions and to indemnify to the extent of US$400,000.00 towards settlement. The U.S.A. domestic insurers have assigned to Gowan their claims for subrogation in respect of contribution and indemnity against the Beauman Group.

Notwithstanding that the primary liability of Gowan has been thus established, in the Cayman proceedings as between Insurco and Gowan the issue is not closed, having regard to certain allegations upon which Insurco is denying liability in paragraphs 1 and 2 of the endorsement to the writ, namely:

> "----- on the ground that the occurrence which caused the Plaintiff's damage in the said civil actions is either prior to the time the policies issued to the Defendant took effect or is excluded by the terms of the said policies of insurance issued to the Defendant".

In supporting the Judge's conclusion on the question of the more appropriate forum, it was submitted that those allegations raised questions of mixed fact and law. In that regard, the following factual issues were identified: -