

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

CAUSE NO. 356 OF 1992

INSURCO INTERNATIONAL LTD. - PLAINTIFF
(FORMERLY AGRICHEM INSURANCE COMPANY LTD)

v.

GOWAN COMPANY - DEFENDANT

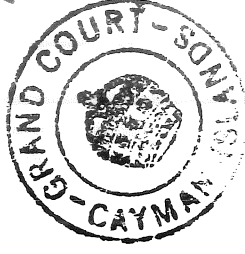
ORDERS

Mr. Foster for defendant/applicant
Mr. Barrie for plaintiff/respondent

Schofield J.

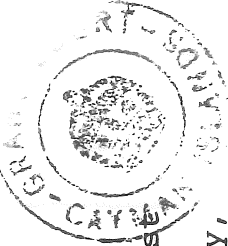
The writ in this action seeks declarations regarding the validity of, and liability of the plaintiff under, insurance policies issued by the plaintiff to the defendant. The defendant is the manufacturer and formulator of a certain chemical which, say four city authorities in California U.S.A., contaminated the cities' water supplies. The defendant faces four actions in the Superior Court of the State of California in the regard and maintains that the insurance policies issued to it by the plaintiff provide cover to it against those claims. The plaintiff denies this and seeks orders of this Court in effect declaring that it is not liable to cover the defendant under the policies.

The writ was filed on 2nd October, 1992. The plaintiff is a company registered in the Cayman Islands. The defendant is a United States Corporation with its principal place of business in Yuma, Arizona, U.S.A. On 6th October, 1992, the plaintiff sought and was granted leave to serve the process out of the jurisdiction. On the 4th November, 1992, leave was granted to the defendant to file a conditional appearance to the action. On the 8th December, 1992, the defendant filed a summons for orders that the order for leave to serve out of the jurisdiction be discharged, that the writ and service of notice beginning the



2-06-93

CJP



action be set aside and the action be dismissed. The first available date for hearing of that summons was 8th February, 1993, but that date was vacated at the behest of the defendant. The application now appears in the list for Monday and Tuesday of next week, the 7th and 8th June, 1993.

The defendant filed two affidavits in support of the application on the 8th December, 1992. John Jessen is the President of the defendant company and deposed to the factual background on the issue of the insurance policies. Basically he maintained that although the insurance policies were issued from these Islands by a Caymanian Company, that was purely incidental and the whole purpose of the plaintiff was to provide insurance to United States Agricultural companies against potential liabilities in the United States. Jonathan B. Sokol is the American attorney representing the defendant in this action and, it seems, the action filed in the California Courts. He deposed to his belief that the issues raised in this action should be litigated in the California Courts and not in the Cayman Islands. He set out in his affidavit seven main reasons upon which his belief is founded, some of which reasons are based on his knowledge of California Law and Court practice.

On the 22nd October, 1992, Mr. Sokol filed action in the Superior Court of the State of California against the plaintiff, among other insurance companies, in relation to its alleged failure to fulfil its obligations under the insurance policies. The defendant sought to have that action quashed on the basis of forum non conveniens. The application was dismissed on the 2nd February, 1993, and the action is still pending.

The plaintiff, on 26th January, 1993, filed two affidavits in reply to the defendants' affidavits. Christopher A. Beauman the managing director of the plaintiff company and a director of Beauman International Ltd., which apparently negotiated the insurance contracts which led to this action, deposed to the

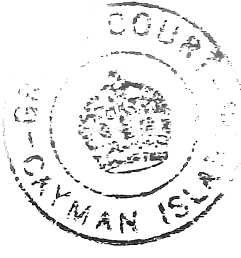
facts. His affadavit was in response to Mr. Jessen's.


G. Geoffrey Robb is the United States attorney representing the plaintiff. His affadavit was in response to that of Mr. Sokol and mainly dealt with his view of the law and practice governing such actions as this.

Messrs. Sokol and Jessen, on 2nd and 11th March, 1993 respectively, filed further affadavits in response to those of Messrs. Robb and Beauman.

There the matter rested until Friday of last week the 28th May, 1993. On that date the plaintiff filed yet further affadavits in response to those of Sokol and Jessen. Mr. Robb has deposed further on the law and informs us that he has, on behalf of his client, appealed the decision of the California State Court to refuse to strike out the defendant's claims in that Court. Mr. Barrie, the plaintiff's Cayman attorney, has tendered a telefax copy of a further affadavit of Mr. Beauman dealing with factual matters referred to in Mr. Jessen's affadavit. Those affadavits only came to the attention of Mr. Foster, acting for the defendant, on Monday the 31st May 1993. on his return from overseas. They had been filed and served the previous Friday. Mr. Foster had no forewarning of the plaintiff's intention to file such affadavits.

I am asked in this summons to take these latest affadavits off the file; that they be not read or otherwise used in evidence on the hearing of the defendant's summons of the 8th December, 1993. The defendant argues that on its summons affadavits have been filed, according to the usual practice, from the applicant in support of its application, from the respondent in reply and further from the applicant in answer to that reply. If the respondent wishes to file any further affadavit leave should be applied for. In any event the defendant points to the time scale. The defendant's last affadavits were filed in March, 1993, some eleven weeks before the affadavits which are the





subject of this application were filed. It is unfair, says the defendant, to leave him merely one week in which to file his own affidavits in reply. With his witnesses being overseas he is left with a decision to apply for an adjournment of his long-pending summons or agree to deal with the summons on the plaintiff's last word.

Mr. Barrie, for the plaintiff, points to the fact that there is no Rule of Court either in our jurisdiction or in England from which we can reach a conclusion that he is precluded from filing the further affidavits in response to the defendant's affidavits. They are not scandalous, frivolous or oppressive, and they deal with new issues of fact some which were raised by the deponents for the defendant in their affidavits. He also particularly points to the new evidence that the decision of the California State Court not to halt to related California suit is being appealed against and the present position of that appeal.

Although there is no formal rule as to the number of times a party can counter the opposing party's affidavits by filing affidavits of his own, I accept counsel's submission that in this Court a practice has grown up that an applicant files affidavits in support of his application, the respondent then files affidavits in reply and the applicant may then, if need be, file final answering affidavits. The point has never been raised before me, hence the need for me to adjourn this ruling for a short while to consider it; but it is right and proper that there be a general rule as to the number of times a party can counter his opponent's affidavits and that the limit be set at a point following the applicant's affidavits in answer. To hold otherwise would be to lead parties into a free-for-all situation, each jockeying for the correct timing for them to have the last word. It is also right and proper that litigants should know as far in advance of the hearing as possible what factual basis their opponent's rely on. This cannot of course, be a hard and fast rule. Circumstances may occur where it is just and proper

that further affidavits be filed, for example where the applicant's affidavits in answer raise entirely new and important matters which require a response so that all facts are properly before the Court. Something may occur after the applicant's affidavits in answer have been filed which changes the whole face of the application. In such a case it is difficult to see how the Court could keep a further affidavit out. But as a general principle there must be a restriction on the number of times a respondent is permitted to reply to the applicant, and I adopt the defendant's counsel's argument in that regard.

I have perused the new affidavits filed by the plaintiff. They basically deal with the defendant's affidavits filed on the 11th March, 1993. The only new matter raised is the fact and status of the appeal against the decision in the related Californian proceedings. Bearing in mind the time it has taken the plaintiff to file these new affidavits and the proximity of the hearing of the summons, and further bearing in mind that the plaintiff's attorney gave their opponents no warning that they intended to file further affidavits, I make the orders applied for in the defendant's summons. I am reinforced in my view by reference to the recent authorities on the forum non conveniens principle. The Courts are urged not to become bogged down in a morass of fact but, to take broad view of the matter. A consideration of further affidavits in this case would tend to lead the Court into a morass.

Costs follow the event.



D. Schofield



Date this 2nd day of June, 1993