Case No: 2007 Folio 1566

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 11 April 2008

BEFORE:
MR JUSTICE FLAUX

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BETWEEN:

(1) CAVELL USA INC

(2) KENNETH EDWARD RANDALL

Claimants

- and -

(1) SEATON INSURANCE COMPANY

(2) STONEWALL INSURANCE COMPANY

Defendants

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Mr S Hofmeyr QC and Miss Philippa Hopkins (instructed by Berwin Leighton Paisner LLP) appeared on behalf of the Claimants
Mr R Hill (instructed by Cadwalader Wickersham & Taft LLP) appeared on behalf of the Defendants

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Judgment

MR JUSTICE FLAUX:

1. The defendants in these proceedings, Seaton Insurance Company and Stonewall Insurance Company, are insurance companies registered in the United States, which have been in run-off for a number of years. They are owned and controlled by a Bermudian entity called Dukes Place Holdings LP. The first claimant is also registered in the United States and provides claims handling and management services for insurance companies in run-off. It is a company in a group owned principally by the second claimant, Mr Kenneth Randall, a British citizen who is domiciled here. His ownership is through Randall & Quilter Investment Holdings Plc; an English registered company.

2. Between dates in 1999 and 2000 respectively and 2006, the first claimant managed the run-off of the two defendant insurers pursuant to written administration agreements. Various disputes arose towards the end of that period between Dukes Place and Randall & Quilter and the claimants, as to the conduct of the run-off. Those disputes were resolved by an agreement dated 20 February 2006, described as a Term Sheet, which provides, so far as relevant as possible, as follows, and I read from the preamble:

> "This term sheet document is the agreement between the parties identified as parties below with respect to the orderly termination of the contractual and other relationships amongst them and the orderly handover by Cavell Management Services Limited, Cavell UK and Cavell USA Inc, Cavell USA, had run-off management and other services in connection with Seaton Insurance Company, Stonewall Insurance Company, Uniona Italiana UK Reinsurance Company Limited and Cavell Insurance Company Limited. Having regard to the regulatory responsibilities of Dukes Place and Randall and the interests of the policyholders of Seaton, Stonewall, Uniona and CIC."

Under "Parties:" there is then a definition in sub-clause 2 of Randall & Quilter Investment Holdings Limited as being:

> "For itself and on behalf of its partners, shareholders, directors, officers, subsidiaries, associated companies and affiliates, including, but without limiting the generality of the foregoing, Cavell US and Cavell UK and they are described in the remainder of the agreement compendiously as Randall."

3. It then sets out the agreed terms and I need only read two further clauses. Clause 13 provides as follows:

> "Duke Place hereby releases and forever discharges Randall of and from all actions causes of action, suits, claims and demands whatsoever, whether at law or equity whether known or unknown, suspected or unsuspected, disclosed or undisclosed, fixed or contingent, accrued or un-accrued, asserted or unasserted, if Dukes Place had ever had, had now had or hereafter can, shall or may have against Randall for, upon or by reason of any matter, cause or thing whatsoever arising out of or in connection with any business, commercial contractual or other

arrangement between or involving either of them as at the date of this term sheet save: (i) In respect of any obligations expressly set out in this term sheet; (ii) In respect of any actions, causes of action, suits, claims and demands arising from any breach by Randall of any provision of this term sheet and, (iii) in the case of fraud on the part of Randall."

Clause 29 provides as follows:
"This term sheet shall be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts."

4. Notwithstanding the settlement of disputes between the parties by that agreement, disputes continued and during the course of 2006 and 2007, Seaton and Stonewall sought to embroil Cavell in arbitration proceedings between themselves and their re-insurers, National Indemnity Company, whom I describe as NICO, which were taking place in the United States. In particular, Seaton and Stonewall sought subpoenas against various Randall entities in those arbitration proceedings and obtained orders in relation to those subpoenas from the US courts in Connecticut.

5. In August 2007, these two defendants commenced proceedings against Cavell USA and Mr Randall personally in the United States District Court for the Southern District in New York, in which they allege what is said to be a common law fraud under New York law. In particular, it is alleged that Cavell and Randall concealed from Stonewall and Seaton that they were intending to delegate claims handling to the companies' re-insurers, NICO, pursuant to a collaboration agreement entered into in August 2001. That complaint tracks in large measure a draft sent to Cavell USA in July 2006, although at that stage there was no case made against Mr Randall personally.

6. It is apparent that the complaint as eventually issued and served was pursued, because a point had arisen in the arbitration between NICO and Seaton and Stonewall as to why, if serious allegations were being made about the conduct of the run-off by Cavell, they, that is Stonewall and Seaton, had not issued proceedings against Cavell in the United States, to which the answer was evidently that they had issued such proceedings, at least then or immediately before then.

7. This court, of course, is not presently concerned with the merits of that complaint, but it should be noted firstly, that Mr Randall and Cavell deny all the factual allegations made. As set out in his witness statement in the present proceedings, Mr Randall says, the senior management of Dukes Place and of the two defendant companies were well aware of that collaboration agreement at the time. I should add that similar allegations by Seaton and Stonewall were dismissed in the NICO arbitrations in the United States. .

8. Secondly, Mr Randall and Cavell contend that the allegations that are made in the United States of America do not amount to "fraud" within the meaning of

clause 13 of the Term Sheet, but are effectively a pretext to get around the release provisions of that clause.

9. On 19 October 2007, the claimants filed a Motion to Dismiss in the New York proceedings on the grounds that firstly, the New York proceedings had been commenced in breach of the Term Sheet and that any claim should be brought before the English courts, because of clauses 13 and 29 of the Term Sheet and secondly, that Stonewall and Seaton effectively had no cause of action against the present claimants in circumstances where no fraudulent misrepresentation is alleged, but at best a non-disclosure or concealment.

10. It should be noted that in the Motion to Dismiss and in the Memorandum of Law served supporting it, the claimants do not say that they intended to commence proceedings in England, although, of course, in one sense it is implicit in the whole Motion that the claimant's position is that, if Stonewall and Seaton wish to pursue what the claimants contend is a misconceived claim, then they must do so before the English courts. The reason for not having alluded in the Motion to Dismiss to potential proceedings in England is said to be that, it was not really until November 2007, when Seaton and Stonewall served their Memorandum in Opposition that the claimants realised that the defendants were serious in bringing the proceedings and that the United States proceedings were not simply tactical.

11. During the period between November and January, the Motion in the United States was fully briefed on both sides. No oral hearing has been called for and so the matter is now with a judge in New York and it is evident that that judgment could be rendered at any time in the relatively near future. There is no specific evidence about it, but doing the best one can it seems to me fair to assume that the judge will be likely to deliver judgment in the next couple of months.

12. In the meantime, on 13 November last year, the claimants applied for permission to serve the present proceedings on Seaton and Stonewall in the United States of America. That application was supported by the witness statement of Mr Randall and on 20 November 2007, I granted permission to serve the proceedings out of the jurisdiction and the proceedings were then issued. The Claim Form seeks declarations that the claims and the Complaint in the United States had been compromised pursuant to clause 13 of the Term Sheet and, that the claimants had no liability to the defendants in respect of those claims, either by virtue of the Term Sheet or at all. The Claim Form also claims damages for breach of the Term Sheet by in broad terms, causing the arbitration panels in the dispute between Seaton and Stonewall and NICO to issue subpoenas and the obtaining of the injunctive relief from the Connecticut courts to force the claimants to comply with the subpoenas and it also claims damages for the breach of the Term Sheet by the bringing of the claim in New York.

13. On 10 January 2008, the Claim Form was served on the defendants in the United States. That was just before the Motion to Dismiss became fully briefed. On 31 January 2008, the defendants filed an Acknowledgement of Service

indicating an intention to contest the jurisdiction of the English court. Under the Civil Procedure Rules, the time for making such an application under Part 11, as extended by the tables in relation to service out of the jurisdiction, was due to expire on 28 February 2008. It was in those circumstances that, before that period of time did expire, the defendants' solicitors, Cadwalader, wrote a letter to the Commercial Court dated 15 February 2008, making an application for a stay of the present proceedings, alternatively, for an extension of time to challenge the jurisdiction under Part 11 in each case until after the determination of the Motion to Dismiss by the judge in New York. They asked the judge to deal with that application on paper.

14. On 19 February 2008, Berwin Leighton Paisner for the claimants wrote to the court objecting to the matter being dealt with on paper on the basis that it was a heavy application, which should only be dealt with at a hearing. However, it is fair to say that letter did not vouchsafe the substantive grounds upon which the claimants would resist the defendant's application.

56. The matter was put before Field J as a paper application on 20 February. For some reason he did not have the Berwin Leighton Paisner letter in the papers before him, although he was apparently aware that the claimants objected to the matter being dealt with on paper. He considered the matter that day and apparently granted the reief that the defendants were seeking, although the order to that effect staying these proceedings was not drawn up and sealed until 4 March 2008.

16. Once this came to the attention of Berwin Leighton Paisner, they sent a further letter of 4 March, enclosing a copy of their letter of 19 February, to the judge. He indicated via his clerk that he had not had the letter of 19 February, but had been aware that the claimants were resisting the matter being dealt with on paper. Berwin Leighton Paisner wrote another letter on 7 March, indicating that they were going to make a formal application to set aside the order, but inviting the judge before they did so to revoke the order under CPR 3.1 (7). Via his clerk, Field J indicated that he had decided not to proceed under 3.1 (7), and that if the claimants wanted to set aside the order they should issue an application which he would consider at a short oral hearing where he would also consider the substantive merits of the defendant's application.

17. Against this background, Mr Stephen Hofmeyr Q.C. for the claimants submits, that the order of Field J should be set aside on two broad bases. First of all, he submits that the claimants are entitled to have the order set aside as of right, either because it was an order which it was never appropriate to deal with on paper or because it was made in breach of the principles of natural justice. Secondly, if he is wrong about that, he submits that the court should look at the matter anew and should not make any order the effect of which is to stay these proceedings pending the events in the United States of America, essentially on the basis that there is an exclusive jurisdiction clause in the Term Sheet and that there is neither any genuine basis for challenging the jurisdiction nor any reason why these proceedings should be put on hold pending the determination of the Motion to Dismiss.

18. Although the written arguments of both parties were wide-ranging, in the event the areas for determination on this application have come down to a much narrower compass, as will be apparent from the remainder of this judgment. Speaking for myself, had I been faced with this application on paper knowing that there was an objection to it being dealt with on that basis, even without seeing the letter of 19 February 2008 from Berwin Leighton Paisner, I would have ruled that the matter should be the subject of a hearing, for two reasons. First, because of the nature of the application itself. Although I do not accept it is a heavy application, it is an application for a stay, which if contested could only be dealt with at a hearing. Second, because, as the Commercial Court Guide provides at paragraph F.4.1.(c), where one party objects to a matter being dealt with as a paper application, it will only be in an exceptional case that the court will proceed on that basis and it seems to me that there really are no grounds here for saying that this was an exceptional case.

19. Having said that, it does not follow that by dealing with it as he did the judge can be said to have breached the principles of natural justice, essentially for two reasons. First of all, even if one might have taken a different course oneself the judge undoubtedly had a discretion to deal with the application without a hearing under Part 23.8(c) of the CPR. The effects of doing so in circumstances where there was no agreement by the claimants was that under the Practice Direction to Paragraph 23, paragraph 11, the court would treat the matter as one where it makes an order of its own initiative, so that the party who objects has a right to apply to set aside the order under Part 3.3.(5). This is clear from the notes in the White Book at 23.8.1 and the judge appears to have appreciated that the claimants had this right, as that is presumably what he was alluding to in the email from his clerk on 7 March.

20. Secondly, the claimants had failed to articulate their substantive grounds for objecting to the order that the defendants were seeking either in the letter of 19 February, or in the subsequent correspondence to the court of 4 and 7 March 2008. Whilst, as I have indicated, I make no criticism at all of the Claimant's solicitors, had they indicated what their substantive grounds of objection were, it seems to me it is more than likely that the judge would not have made an order without a hearing. It is perhaps not surprising that in the particular circumstances his view was that the order should stand.

21. Having said all of that, I do consider that the correct approach is that under Part 23.8 as supplemented by the Practice Direction and Part 3.3.(5), the claimants have a right to apply to set aside the order. In considering that application the court, as I see it, has to reconsider the merits of the underlying application by the defendants which led to the order in the first place. In other words, the matter is heard *de novo* and not, as it were, as an appeal and in that context I reject Mr Hill's submissions on behalf of the defendants that because the claimants had had an opportunity to make submissions to Field J as to the substantive merits and had not done so, the court should treat this application as a limited review. It seems to me that the rules contemplate that the circumstances where an application to set aside an order made without a hearing may be made include where such an order was made on notice and where some representations have been made by the party who objects to the matter being

dealt with without a hearing. That much it seems to me is clear from the notes at 23.8.1 of the White Book.

22. Mr Hill seeks to characterise the present matter as a narrow case management decision. He accepts that in circumstances where his clients have not submitted to the jurisdiction of the English court, they can only invite the court to exercise case management powers in relation to their proposed application to challenge the jurisdiction under Part 11. He submits that that is all that they were doing here, inviting the court to extend the time for making an application under Part 11. He contends that the discretion that is given to the court to extend time for making a Part 11 application both under that Part itself and under Part 3.1 (2) (c) of the CPR is not limited, as Mr Hofmeyr suggests, to giving the defendant more time to prepare for an application, but will include granting an extension of time whenever there is good reason for doing so.

23. I agree with Mr Hill that the court's case management powers in relation to extending time for a challenge to the jurisdiction to be made are not as circumscribed as Mr Hofmeyr suggested. But nonetheless, absent additional time needed for preparation for such an application, it seems to me it will only be in rare cases that the court will extend time and it will only do so where there is shown to be good reason for doing so. Otherwise, the whole thrust of Part 11 that a challenge to the jurisdiction should be dealt with promptly would be subverted.

24. Furthermore, I do not consider that the limited case management powers which the court has relating to what might be described as, regulating and supervising a putative Part 11 application by someone who by definition has not submitted to the jurisdiction and so has no *locus standi* to invite the court to exercise more general powers, could ever extend to staying the entire proceedings, as Field J did here.. I agree with Mr Hofmeyr that that would be to subvert the whole purpose and effect of Part 11 and it must on any view be arguable that a party could not achieve that end without submitting to the jurisdiction, although I accept that for the purposes of today's application the defendants have not so submitted.

25. As to why there is good reason for a short stay or an extension of time in the present case, Mr Hill on behalf of the defendants makes essentially two submissions. First of all he alludes to the fact that substantial costs have been incurred in the United States on the Motion to Dismiss and generally, in circumstances where the claimants chose to go down that route and delayed in bringing these proceedings, as well as in notifying the defendants of them. So, he says, substantial costs having been incurred, they will only be duplicated or at least increased, if the present proceedings continue before the determination of the matter by the judge in New York. Secondly, he submits that the resolution of the Motion to Dismiss in New York will make the determination of the challenge to the jurisdiction much easier and save costs in relation to it, because firstly, if the motion succeeds then if there is a jurisdiction challenge at all, it will be of a wholly different complexion from what it would otherwise be. Secondly, if the Motion fails then the defendants will contend that because the factual aspects of the claims in New York will continue to be litigated there, the

English court should not hear the claims in parallel, even if it concludes that clause 29 has the wide effect for which the claimants contend and encompasses all claims. Mr Hill submits that the defendants will invite the court to exercise its discretion to allow matters to proceed in New York rather than in England.

26. I will deal with those points in turn. First, as to the costs incurred in New York, I agree with Mr Hofmeyr that this sort of point, if it were a good one, could be made in any case where a party is faced with claims by a counter party in a foreign jurisdiction in breach of an exclusive jurisdiction clause. The party is faced with difficult choices and may have to take protective steps to challenge the jurisdiction in a foreign court as the claimants have done here. They should not be penalised for bringing the Motion to Dismiss first in circumstances where the English proceedings, although they had not been commenced, were commenced only a month later. There is also obvious force in Mr Hofmeyr's point that the existence of the Motion and the incurring of costs in the United States, some of which to continue to be incurred independently of the Motion, should not affect how this court acts in circumstances where the US proceedings are only there at all, if the claimants are right, because the defendants have acted in breach of the jurisdiction clause.

27. Secondly, as to the point of how the result of the Motion to Dismiss may in some way inform the jurisdiction application and how the court deals with it, I have to say that I am not impressed by that submission. If the Motion succeeds, I agree with Mr Hofmeyr that it is difficult to see how the defendants can challenge the jurisdiction of this court at that stage. There is some suggestion in Mr Hill's skeleton that one or more of the claimants was not party to the Term Sheet, but in the light of the definition of the "Randall" party in the Term Sheet, which I read out earlier in my judgment, that seems to me to be a totally hopeless point and it was not really pursued orally.

28. On the other hand, if the Motion fails then, as Mr Hofmeyr points out, by virtue of sections 32 and 33 of the Civil Jurisdiction and Judgments Act 1982, at least at the stage of the Part 11 challenge, any judgment of the New York court would not be binding on this court or on the claimants and Mr Hill essentially accepts that.

29. So far as concerns Mr Hill's point that the English court should not embark on some factual enquiry which the New York court is already engaged in, Mr Hofmeyr accepts that, but he submits that that is not what is envisaged. Rather, he says, the claimants will say to the court at the Part 11 hearing, in the event that the Notice of Motion in New York has failed, that the court should deal with issues of construction of the Term Sheet and specifically issues related to clauses 13 and 29. I agree with Mr Hofmeyr that those are quintessentially matters for this court to decide, given clause 29 of the Term Sheet. Whilst I am not determining the issue of jurisdiction today, I find it difficult to see how or why the English court would decline to assume jurisdiction over those construction issues, given the exclusive jurisdiction clause, merely because the defendants have chosen to pursue proceedings in New York. Of course, this all assumes that the court has discretion to decline jurisdiction and the claimants will also argue that it does not have such discretion, because of Article 23 of the

Judgments Regulation. I have indicated that that is not a matter for determination today, but it will no doubt arise at the hearing of any application under Part 11.

30. It follows that I reject the contention that the court will be assisted on the jurisdiction challenge by the judgment in New York or that any substantive costs will be saved. Although as I have indicated, I am not determining the issue of jurisdiction, I do remain profoundly unconvinced that whatever the New York court decides, the defendants have any legitimate or realistic ground for challenging the jurisdiction of an English court at least as regards the issues of construction which the Claim Form raises.

31 Accordingly, since as Mr Hill accepts, the court is only concerned with its case management powers in relation to the potential Part 11 application to challenge the jurisdiction, I consider that there is no good reason to extend time for making that application, let alone for staying these proceedings. It follows that the order of Field J will be set aside and the defendant's application is dismissed.

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