



In The Supreme Court of Bermuda

CIVIL JURISDICTION

(COMMERCIAL COURT)

2016: No. 394

BETWEEN:

- (1) IRONSHORE INSURANCE LTD.**
- (2) STARR INSURANCE AND REINSURANCE LIMITED**
- (3) IRON-STARR EXCESS AGENCY, LTD.**

Plaintiffs

-and-

- (1) MF GLOBAL ASSIGNED ASSETS LLP**
- (2) MF GLOBAL HOLDINGS LTD**

Defendants

2016: No.393

ALLIED WORLD ASSURANCE COMPANY LTD

Plaintiff

-and-

- (1) MF GLOBAL ASSIGNED ASSETS LLP**
- (2) MF GLOBAL HOLDINGS LTD**

Defendant

EX TEMPORE RULING

(in Chambers)

Application for leave to discontinue proceedings-governing principles-Order 21 rule (3) of the Rules of the Supreme Court 1985-compliance with US Bankruptcy Court Order requiring that Bermuda proceedings be “dismissed” on a without prejudice basis

Date of Hearing: January 24, 2017

Mr. Alex Potts, Sedgwick Chudleigh Ltd, for the Plaintiffs

Ms Lilla Zuill and Mr Jayson Wood, Zuill & Co (Harneys), for the Defendants.

Introductory

1. In this matter, the Plaintiffs each seek the following relief by Summonses issued on 24 January 2017, that is today:

“1. The Plaintiff shall be given leave by the Court, pursuant to RSC Order 21, rule 3, to discontinue its action against the Defendants in these proceedings, and to withdraw the claims made against the Defendants in its Originating Summons dated 14 November 2016, on the following terms:

a. There be no order as to costs, as between the Plaintiff and the Defendants; and

b. The discontinuance by the Plaintiff of its action against the Defendants in its Originating Summons dated 14 November 2016, shall be without prejudice to the Plaintiff’s rights, as a matter of Bermuda law, to bring a subsequent action against the Defendants, whether for the same, or substantially the same, cause of action or relief, or at all.

2. The time for service of this Summons on the Defendant shall be abridged, pursuant to RSC Order 3, rule 5.”

2. No issue was taken by the Defendants on the issue of time and, to the extent that it is strictly necessary, I do abridge time.

How the application arises

3. The application comes before the Court at the instance of the Plaintiffs in response to an Order entered in the United States Bankruptcy Court for the Southern District of

New York (Judge Martin Glenn) in Case No.11-15059 (MG), Adv. Proc. No: 1601251(MG). The substantive part of the Order made by Judge Glenn yesterday reads as follows:

“By this Order, within one day of the date of this Order, the Bermuda Insurers are ordered to dismiss the Bermuda proceedings against the Plaintiffs, and to cease any further proceedings against the Plaintiffs in any court other than this Court.”

4. A further Order was made by Judge Glenn today in response to an ‘Emergency Motion for Clarification of This Court’s Order Finding that the Bermuda Insurers Violated the Barton Doctrine and Ordering Relief’ filed by Allied World Assurance Company, Ltd. The substantive part of today’s Order reads as follows:

“By this Order, the Court clarifies that the proceedings in Bermuda are to be dismissed WITHOUT PREJUDICE.”

Legal basis for the form of Order sought from the Bermuda Court

5. Mr Potts has explained to the Court that the form of relief sought in the two Summonses is based on the nuances of Bermuda law which does not permit “dismissal of an action without prejudice” as contemplated by the plain words of Judge Glenn’s Order. I agree that the form of relief sought is the best approximation that can be achieved under Bermuda’s procedural rules to ‘dismissal without prejudice’.
6. This conclusion is supported by Order 21 rule 3 of the Rules of the Supreme Court 1985¹. That rule is explained in the Supreme Court Practice 1999, which while formally a commentary on the rules of England and Wales is a commentary² on a rule in the same terms as the Bermuda Rules. It is therefore highly persuasive and is a source routinely cited in these courts. The commentary most significantly, explaining the concept of discontinuance with leave, says this³:

¹ Order 21 rule 3 provides:

“21/3 Discontinuance of action, etc. with leave

(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, rule 7.”

² As regards Order 21 rule 3 of the English pre-CPR Rules.

³ At paragraph 21/5/1.

“The former power of a plaintiff at common law to claim a non-suit, or of a plaintiff in equity to dismiss his bill at his own option, at any time, no longer exists. The term ‘discontinuance’ is used in a broad sense, and is intended to cover both forms of procedure.”

Conclusion

7. In these circumstances it is clear as a matter of Bermuda law that the Plaintiffs are seeking relief which complies to the fullest extent possible under our law with the requirements of Judge Glenn’s Order of 23 January 2017 as explained by his subsequent Order of today’s date. I accordingly grant the Plaintiffs’ applications in terms of their Summonses.
8. I should add for completeness that Ms Zuill indicated on behalf of the Defendants that they took no position on the present application which they regarded as entirely a matter for the Plaintiffs.

Dated this 24th day of January 2017 _____
IAN RC KAWALEY CJ