Neutral Citation Number: [2006] EWHC 1730 (Comm)

Case No: 2006/365

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2006

Before :

THE HON MR JUSTICE MORISON

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Between :

GOSHAWK DEDICATED LTD	**Claimant**
- and -	
ROP INC	**Defendant**

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Mr Steven Berry QC (instructed by **Berwin Leighton Paisner**) for the **Claimant**
Mr David Lord (instructed by **CMS Cameron McKenna LLP**) for the **Defendant**

Hearing dates: 8 May 2006

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Judgment

The Hon. Mr Justice Morison :

1. The Claimant, Goshawk, in its capacity as sole member of Lloyd's Syndicate 2021, issued an Arbitration Claim Form naming ROP Inc [ROP] as the Defendant.

2. Goshawk made an application for an anti-suit injunction against ROP to restrain ROP from

   (1) furthering in any way its application for leave to intervene in a US action in the Federal Court in the Northern District of Georgia, Atlanta Division between Goshawk and an entity called Southwestern Financial Services Corporation [SFSC], a Delaware corporation and
   (2) pursuing in that court an application to restrain Goshawk from pursuing its arbitration application in this jurisdiction.

3. Goshawk is in run-off. Its business is managed by managing agents [Cavell]. The particular business which underlies these proceedings is, effectively, a stop loss insurance written by the Syndicate for viatical companies purchasing life insurance policies in the US viatical settlements market. Viatical settlement companies buy life insurance policies covering people of any age who are believed to be terminally ill and in respect of people over the age of 65. The viatical settlement company

undertakes to pay out on the policy in the event of death and therefore the price it pays for the purchase is dependent upon the accuracy of the view taken of the expectation of life of the individuals. In order to assess the risk, the viatical settlement company buys from a life evaluation company a life expectancy report.

4. PSCI is a viatical company based in Atlanta, Georgia. The Claimant issued a Contingent Cost Insurance Policy, 'the Policy', in January 1999. The business was placed through a Lloyd's broker, Tyser Special Risks Limited [Tyser] acting on behalf of the prospective Insured. The Policy operated as an open cover to which PSCI could declare purchased life policies during the period 15 January 1999 to 15 July 1999. The Policy provided for disputes and differences to be referred to London for Arbitration under ARIAS London Arbitration Rules. In addition, the Policy provided that the Laws of England were to be the governing law.

5. On 23 April 1999 the Policy was, by an endorsement, 'novated' in favour of ROP who became the Insured, and a pool of some 212 Life Policies were declared to the Cover with a combined face value of over US$20 millions. Apart from a change of loss payee, the Endorsement provided that otherwise "*all other terms and conditions remain unaltered*". ROP is a company incorporated in the State of Delaware and is a subsidiary of another Delaware company called SFSC, which is in turn a subsidiary of Swiss Re (America).

6. It is the Claimant's case that ROP is responsible for any breaches by PSCI of the duties of utmost good faith and disclosure at the time of the original placement by reason of condition 21 and by reason of an implied representation by ROP that PSCI had complied with its duties.

7. Under the Policy there was a Measurement Date at which time a calculation would be made to determine whether the costs of maintaining policies, which were in a pool, exceeded the recoveries under them. The Date was October 2001 and the claims investigator appointed on behalf of the Syndicate [Mr Diamant of Claims Specialists International Limited] reported that a claim was triggered because the costs and expenses exceeded the likely recoveries. A further life expectancy report showed that life expectancies "today" are significantly greater than when coverage was first mooted.

8. On 8 February 2002, ROP and other parties entered into an Escrow agreement which provided for the payment of just over US$14 millions by the Syndicate into an escrow account pending assignment of the non-matured life policies to it and in return funds were to be released to ROP from the escrow account upon proof that the assignments

had occurred; in this way the Syndicate was able to take control of the maintenance of the non-matured policies.

9. In February 2003, there was a visit by the claims investigator to the offices of the escrow agent handling the PSCI/ROP pool, namely the Bank of New York, to inspect their files. Representatives of Cavell also visited the premises of both PSCI and the Bank to inspect files.

10. Cavell's investigation of the policies in the pool has highlighted what they believe to be material facts which were known to PSCI/ROP prior to the inception of the Policy and prior to the 'novation' (in each case through Mr Collins), who, they say, acted for both PSCI and ROP, but which were never disclosed to Goshawk or their underwriter (Mr Toomey).

11. After consultation, Cavell took the view that there were grounds for the avoidance of the Policy for material non-disclosure and misrepresentation and their solicitors wrote to confirm this by letter dated 14 February 2006. On the same date, the solicitors commenced the arbitral process by nominating a QC as their arbitrator, and serving a Notice of Arbitration on ROP and PSCI. Simultaneously Goshawk commenced two sets of proceedings in the District Court in Georgia: first against SFSC and the second against PSCI. The PSCI complaint is designed to force PSCI to arbitrate and, alternatively, for damages. The Syndicate's concern was that as a result of the 'novation' the arbitration clause might have been regarded as terminated. PSCI has filed a Motion to dismiss the complaint for damages, and in relation to the arbitration claim have reserved all their rights, "*including the right to deny the enforceability of the referenced arbitration agreement*".

12. The SFSC complaint arises out of Portsmouth Financial Group's control and direction of the purchase and administration of the pool of viators. The complainants allege that SFSC, a wholly-owned subsidiary of Portsmouth, is successor to Portsmouth's liabilities as a result of two mergers in 2000 and 2002. The claim in this complaint is in tort because the Syndicate had no contractual relations with Portsmouth. In their affidavit in support of the application before me, the deponent says that

"*The claim against [Portsmouth] (and thus the present claim against SFSC) is in tort and, because [Goshawk] is not party to any contract with [Portsmouth] is not covered by any arbitration clause. As far as I am aware, the basis on which [Portsmouth] is sued in Georgia does not render it a party, as PSCI's alter ego, to the Arbitration Agreement,*"

13. ROP did not respond to Goshawk's Notice of Arbitration, and Goshawk's solicitors wrote to ARIAS UK on 3 March 2006 asking them to appoint an arbitrator in default. Notice of this was given to ROP and Swiss Re asked for a further 14 days to respond and reserved ROP's rights meanwhile. Thereafter, on 23 March 2006, Swiss Re notified Goshawk's solicitors that they had appointed Bryan Kellett as ROP's party appointed arbitrator and it is now for the two arbitrators to appoint a third so that the panel is then constituted. In relation to the PSCI arbitration, the arbitral tribunal is fully constituted.

14. On 28 March 2006, ROP filed a Motion in the Federal Court in Georgia seeking leave to intervene in the proceedings against SFSC. ROP also applied for an injunction to stop Goshawk from further pursuing and proceeding with the London Arbitration. The grounds upon which this application has been made are that Goshawk's claim in the London arbitration is based on the same misrepresentations as those at issue in Goshawk's complaint against SFSC; there is a statute of the State of Georgia which renders the arbitration agreement unenforceable by that law and it would be unduly expensive and disruptive for ROP to have to participate in the London Arbitration when their parent company is involved in litigating the same issues in the Federal Court. Goshawk sought and was granted further time to prepare its answer to ROP's Motion and this extension was approved by the Federal Court.

15. On 24 April 2006, Ramsey J granted, without notice, Goshawk's application for an interim injunction restraining ROP from proceeding with their Motion in the court in Georgia and for permission to serve the Motion out of the jurisdiction upon ROP and its registered agent.

16. The purpose of the inter partes hearing before me was to consider whether I should continue the injunction granted ex parte and whether the order for permission to serve out of the jurisdiction should be set aside.

17. In a nutshell, the arguments for ROP are these:

(1) The claim that there was a novation of the Policy to ROP does not tie in with what Goshawk is asserting in the USA. Goshawk have commenced both London arbitration proceedings and proceedings in the federal court against PSCI. If there had been a true novation of the Policy then there would be no contractual connection between Goshawk and PSCI, and therefore no arbitration provision and no claim for misrepresentations inducing a contract.
(2) What the case is really about is the desire of Goshawk to have returned to them the money they have paid to the Escrow Agent pursuant to the agreement made in February 2002. That agreement is governed by a New York choice of law and jurisdiction clause.

(3) When Goshawk asked for and agreed to an extension of time for responding to ROP's Motion no mention was made of their intention to come to this court and seek an anti-suit injunction. Had they made their position plain, then no agreement would have been reached to accommodate their request for an extension of time and ROP would have sought directions from the court in Georgia for the determination of the question whether there should be arbitration in London or litigation in the federal court.

(4) In any event, England is not a convenient forum for the hearing of the disputes between the parties. ROP's corporate location is in the USA. There are related claims against two related entities: PSCI and SFSC which will determine the same facts as will have to be determined in the proceedings against ROP and it would be unfortunate if there was a risk of conflicting decisions from the USA and England. Most of the witnesses are located in the USA; ROP's witnesses are no longer their own employees and they will have to be subpoenaed to secure their evidence. The two principal witnesses are a Mr Collins and a Mr Loy and they would have to travel from the USA to England if the arbitration proceeds in this country. This will add greatly to the expense. Furthermore, documents will have to be requisitioned from third parties as ROP no longer has any of them in their possession. The allegations against ROP are serious and the Court in Georgia is likely to order that the three claims be consolidated. "It would be unfortunate and highly undesirable if, at the same time those actions were being tried in Georgia, ROP had to arbitrate the same issues in arbitration proceedings in London.

18. Counsel for ROP summarised his arguments in this way:

(1) By their conduct Goshawk have agreed that the issues raised by the cross motion should be decided in Georgia. Effectively, Goshawk are trying to hijack the jurisdiction issue and he relied upon the judgment of Langley J. in *General Star International Indemnity Ltd v Stirling Cooke Brown Reinsurance Brokers Ltd* [2004] WL 116704 and in particular the passage at paragraph 9 where the Judge said:

> "*Moreover I can see no justification for the course adopted by SCB in seeking to set on foot proceedings in New York after the issue of these proceedings rather than seeking to apply to this court to decline jurisdiction. If Mr Millett were right it would be open to any Defendant properly sued in an English Court to take proceedings in another jurisdiction claiming an anti suit injunction and to have the English proceedings stayed whilst the other court pronounced on the jurisdiction of this court. That cannot be right.*"

Here, Goshawk started proceedings in the USA and then came to the English court seeking an anti-suit injunction rather than asking the court in the USA to decide the jurisdictional question.

(2) Goshawk are unable to show a good arguable case for a clear breach of an arbitration agreement.

(3) The injunction is neither necessary nor desirable in the interests of justice.

(4) This is not a case where the court is being asked to intervene to prevent 'vexatious' conduct. If the court were to conclude that arbitration in England was the natural forum for the determination of the disputes between the parties that would not be sufficient for the grant of an injunction.

> "*The conclusion that England is the natural forum is not as a matter of law sufficient of itself for this court to grant an anti-suit injunction. That requires the extra ingredient that I must be satisfied that the complaint in New York [the motion by ROP] is vexatious and oppressive.*" per Langley J. in the *General Star* case at paragraph 16.

(5) In the exercise of the court's discretion, an injunction should not be ordered.

19. He submitted that the court should either decline to take jurisdiction and discharge the injunction or accept jurisdiction and consider whether it would be right to stay the proceedings and await the outcome of the proceedings in Georgia. At most the court should grant an anti-arbitration injunction and allow the proceedings in Georgia to continue.

20. For Goshawk, counsel made these points:

(1) It is clear on the facts that ROP accepted that they were bound by the Policy after the Novation.

(a) The assignment agreement [where PSCI was the assignor and ROP the assignee] dated the same day as Goshawk's underwriter scratched the endorsement recording that ROP was the new assured, provided in a Recital that

> "*Whereas, Assignor desires to assign and Assignee desires to accept the assignment of the Tyser Cover Note and the Lloyd's Slip and all rights, privileges, benefits, duties and obligations pursuant to this Agreement*".

(b) ROP were provided with a legal opinion from an English firm of solicitors which addressed the validity of the assignment. That advice concluded that the Slip and Endorsements constituted a legally binding contract between Goshawk and ROP.

> "*… it is our opinion that:*
>
> *(a) the slip and Endorsements 1 and 2 constitute a legally binding contract between the Syndicate and ROP which has been validly entered into in accordance with English law and is enforceable by ROP against the Syndicate in accordance with the terms of the Slip and Endorsements 1 and 2;*

(b) nothing in the Slip and Endorsements 1 and 2 violates any existing provision of English law."

(c) ROP filed claims as an assured.

(d) ROP is defined in the Escrow Agreement as "Borrower" and 'Borrower' is referred to as the Assured under the Policy.

(2) It is not suggested either by PSCI or ROP that they are not bound by the arbitration clause: their only point is to rely on a local statute which bars reliance on such a clause. The issue before the court in Georgia is not whether the parties agreed to be bound by the arbitration clause but rather whether they can say that the clause is 'struck down' by the Georgia State Code. Thus the question before the federal court is peculiar to the jurisdiction in the USA. There is no real danger of conflicting decisions or ungainly findings.

(3) It is ROP who have hijacked the jurisdiction issue by their application to join in the proceedings in the USA despite having appointed their arbitrator in the English Arbitration some five days previously.

(4) The authority relied upon by ROP is inapplicable where, as here, there is an express choice of law and arbitration clause. The following are the principles of law which the court should apply, taken from a helpful summary of them enunciated by Thomas J. in *Akai Pty Ltd v People's Insurance Co. Ltd* [1998] 1 Lloyd's Law Reports 90.

"*It is the policy of the English Court to hold parties to the bargain in respect of their choice of forum by use of a jurisdiction clause, unless there is good reason to the contrary: see The Chaparral [1968] 2 Lloyd's Law Reports 158*".

"Where a plaintiff seeks an injunction to restrain foreign proceedings where there is a clear breach of a foreign jurisdiction clause, an injunction should not be granted as a matter of course, but usually should be granted unless good reason was shown why it should not: see The Angelic Grace [1995] 1 Lloyd's Law Reports 87 at page 96".

In considering whether to grant an injunction, the court will also take account of: (a) whether the plaintiff seeking an injunction had applied promptly and before foreign proceedings were too far advanced: see The Angelic Grace. The longer the delay that occurs before the application is made, the more likely a Court is to refuse it; (b) any voluntary submission to the jurisdiction of the foreign court, particularly where proceedings have progressed for any period of time: see A/s D/s Svendborg v Wansa [1996] 2 Lloyd's Law Reports 559 at page 570; (c) the undesirability of a second set of proceedings where the matter is already being litigated elsewhere, except where there are powerful reasons for so doing: see The Abidin Daver [1984] I Lloyd's Reports 339 at pages 344 and 351; [1984] A.C. 398 at pages 411 and 423."

Decision

21. It seems to me that Goshawk have a very good case for their contention that ROP contracted with them on the Policy terms including the terms as to choice of law and jurisdiction: namely an English Arbitration. The reasons for such a choice are sound: the Policy was written at Lloyd's through a London based Lloyd's broker acting as agent for the Assured. If English Law applies, it is sensible that the provisions of the Marine Insurance Act and concepts of non-disclosure and misrepresentation should be construed by arbitrators well versed in that area of the law, subject to the supervision of the Commercial Court which also has considerable experience in that field. I cannot finally decide that question at this stage but it seems to me that the facts are compelling, as outlined by Goshawk's counsel.

22. I am dealing, therefore, with a case where one of the two parties to a contract is seeking to renege on the agreement and seek to have the case determined in a forum of their choice rather than in the agreed forum. It is necessary, therefore, for ROP to show good reason why an anti suit injunction should not be granted. I am not impressed by any of the reasons advanced.

23. I can deal with them in turn.

24. In the first place, the primary purpose of the proceedings commenced in the USA against PSCI is to compel them to arbitrate. It is Goshawk's case that, despite the 'novation', PSCI remain bound by the Policy until the date of the novation, including the arbitration clause. But I can see the contrary argument that when the contract was novated, PSCI dropped out of the picture altogether and are under no contractual obligation to resort to English arbitration in relation to disputes arising out of the way the Policy came to be written. The existence of these other proceedings is a factor which I must take into account. But it seems to me to be a misrepresentation of the picture to argue that Goshawk's case against ROP on the jurisdiction issue is somehow inconsistent with what Goshawk is asserting against PSCI. As against ROP, Goshawk allege that ROP must take responsibility for misrepresentations and non-disclosures which may have been 'continuing' through to the date when they became the assured. What may have been said on behalf of PSCI when the Policy was first written may become ROP's responsibility when the novation was entered into. In this sense, if it is held in due course that the arbitration clause in relation to PSCI is not applicable either because of the effect of the novation or because of a local law striking down the arbitration clause, that would not be incompatible with ROP being bound by the arbitration clause. But, in that event, there is a risk that the federal court will have to consider the same matters of misrepresentation and non-disclosure as might arise in the Goshawk/ROP arbitration. But this is not a case where the plaintiff is seeking to have an issue litigated in two different jurisdictions. Nor is it a case where the same issues will be decided by English arbitrators and the

Federal court. There is some risk of an overlap, but not, in my judgment, one which suggests that I should exercise my discretion not to grant the anti-suit injunction.

25. Secondly, it is argued that there has been a voluntary submission to the jurisdiction of the federal court by reason of Goshawk seeking an extension of time for putting in their response to ROP's application to intervene. In my view, that submission is far fetched. Although a court order was drawn up to reflect the parties' agreement, in no sense could it be said that by asking for an extension of time Goshawk were somehow submitting to the court taking jurisdiction over the Goshawk/ROP dispute. Goshawk had unquestionably submitted their dispute with PSCI to the jurisdiction of the federal court. ROP were seeking to intervene in that action and Goshawk wished to take time to respond so as to challenge ROP's intervention. The most that can be said is that by asking for an extension of time somehow or other Goshawk were representing that they would not challenge ROP's intervention in another jurisdiction despite the fact that ROP had recently appointed their arbitrator for the dispute to be resolved in this jurisdiction. It seems to me that the argument is thin, but I take it into account. The true picture is, as counsel for Goshawk submitted, that ROP is seeking to hijack the jurisdiction issue in breach of contract. It is a case of the pot calling the kettle black for ROP to complain about Goshawk's conduct in seeking this court's assistance. The conduct of ROP in seeking to intervene and obtain an anti-arbitration injunction immediately after appointing their own arbitrator has all the hallmarks of a contrived attempt to avoid a contractual commitment. As to the argument that the real complaint relates to the Escrow Agreement, I beg to differ. That Agreement is simply part of the story and is not part of the claim against ROP.

26. Finally, it is said that it would be inconvenient if the trial were to be held here because of the location of witnesses and documents. The fact that ROP has parted with possession of the documents is not a factor which bears one way or the other: wherever the litigation is held there may be difficulties over disclosure. In any event, I doubt whether it would make any significant difference in terms of convenience and expense whether the trial takes place here or there. When the Policy was written and its terms agreed, the parties would have known that had there been misrepresentations and non-disclosure an arbitration would take place here. As I have said, England is a natural forum for such disputes since questions of materiality and inducement may need to be considered along with market practice in Lloyd's. The broker is located in this jurisdiction. I very much doubt whether Georgia would be more convenient for a trial; it might be more convenient to ROP but that is not the question.

27. In my judgment, this is a case where an anti-suit injunction should be granted so as to enable the parties to arbitrate their disputes in accordance with their contractually agreed methods. Such an injunction is both necessary and desirable, in my judgment. It is necessary because ROP have decided for their own reasons to try and avoid their commitment to arbitration. If they offered an undertaking in appropriate terms then I would consider it in place of an injunction. Absent an undertaking, an order will be required. It seems to me that there is no sensible half way house and along with the

anti suit injunction ROP should be restrained from pursuing their own anti arbitration application to the federal court.

28. Arbitration will be a quick and relatively cheap forum for this type of dispute. It is entirely a matter for the federal court whether it would wish to proceed to trial of the action involving PSCI whilst the arbitration between Goshawk and ROP proceeds, and I would not wish to interfere with any such decision. What I wish to do is to prevent ROP from breaking their contract with Goshawk over jurisdiction and choice of law. There were no good reasons for ROP's opportunistic attempt to have their disputes litigated in the federal court. There is little risk of serious overlap; the application before me has been made timeously; the proceedings in the USA are not far advanced and there had been no submission to that court's jurisdiction to determine the question whether ROP should be compelled to arbitrate here in accordance with their contractual rights and obligations.

29. I will hear the parties on the form of order and on the question of costs.