Claim No. 2012 Folio 1578

Neutral Citation Number: [2013] EWHC 3713 (Comm)

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

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 29/11/2013

Before :

MR JUSTICE FIELD

- -

Between :

The Insurance Company of the State of Pennsylvania	**Claimant/ Respondent**
- and -	
Equitas Insurance Limited	**Defendant/ Applicant**

- -
- -

Stuart Isaacs QC and Rebecca Sabben-Clare QC (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
Alistair Schaff QC and Fionn Pilbrow (instructed by **Slaughter and May**) for the **Defendant**

Hearing date: 18 September 2013

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Judgment

Mr Justice Field:

Introduction

1. On 30 November 2012, the Claimant ("ICSOP") issued a Claim Form in this court claiming to be indemnified by the Defendant ("EIL") pursuant to three contracts of reinsurance subscribed to by Lloyd's Underwriters which reinsured risks covered by ICSOP's insurance of Castle & Cooke Inc ("C & C") under two umbrella excess liabilities policies 418-4200 and 4171-5059 (respectively "policy 418" and "policy 4171"). The reinsurance of the risk under policy 418 was for the period 1 October 1968 to 1 October 1971 and provided cover of US$5 million in excess of US$0 million and US$15 million in excess of US$ 5 million. The reinsurance of the risk under policy 4171 was for the period 1 October 1971 to 1 October 1974 and provided cover of US$15 million in excess of US$5 million. The percentage lines of the reinsurance contracts alleged to have been subscribed to by Lloyd's Underwriters in respect of the two layers covered by policy 418 and the layer covered by policy 4171 were 75%, 25% and 33.33% respectively. Policies 418 and 4171 are governed by Hawaiian law.

2. Since the late 1960's C & C (which changed its name to Dole Food Company Inc in 1991) has been involved in growing and selling bananas and between 1968 and the late 1970s it used Dibromochloropropane ("DBCP") as a soil fumigant and nematocide on its fruit farms and plantations. ICSOP alleges that: (i) large numbers of fruit farm and plantation workers have brought claims against C & C for a range of ill-effects caused by DBCP in respect of which ICSOP has indemnified C & C under the two umbrella policies and incurred certain costs in a total sum exceeding US$30 million; and (ii) by reason of the alleged reinsurance contracts the Defendant is liable to indemnify ICSOP in the sum of US$10,246,025.

3. The claim is brought against EIL rather than the subscribing Lloyd's syndicates because the rights and obligations of Lloyd's names in respect of 1992 and prior business (other than life business) were transferred to EIL pursuant to an order made by Blackburne J on 25 June 2009 under s.111 in Part VII of the Financial Services and Markets Act 2000.[1]

4. ICSOP's claims against EIL were first raised in 2008 when sporadic discussions began between ICSOP's brokers, Heath Lambert, and Mr Patrick Benedict Coldstream of Resolute Management Service Ltd ("RMS"), an English company which is a member of the Berkshire Hathaway Group in the U.S.A. RMS managed the run off of 1992 and prior business as agent for Lloyd's Names and has continued to do so for EIL since 2009. In 2009, RMS undertook a search for documents relating to the alleged reinsurances but found few of relevance and there was a meeting on 2 November 2010 between Mr Coldstream and Mr Irwin Nirenberg, a Vice President of ICSOP's parent company, AIG, at which Mr Coldstream handed over such documentation as had been located. Thereafter the discussions petered out but, by letter dated 16 October 2012 to RMS, ICSOP's then solicitors, Chadbourne & Parke, proposed that there be a standstill agreement in respect of ICSOP's claims while investigations continued. RMS did not respond to this proposal and, as already recorded, ICSOP issued the Claim Form herein on 30 November 2012.

[1] *Re Equitas Ltd* [2010] Lloyd's Rep I.R. 69

5. A copy of the Claim Form was sent (but not by way of service) to EIL under cover of a letter dated 12 December 2012 from Berwin Leighton Paisner ("BLP") who were now acting for ICSOP. The letter recorded that it had been necessary to issue the Claim Form as there had been no response to the request for a standstill agreement and further stated that ICSOP "remain happy to talk to Equitas and the brokers, with a view to resolving this before further costs are incurred, when the Claim Form is formally served."

6. Thereafter, there were further discussions between the parties, some open and some on "without prejudice" terms, in the course of which papers were served by each side on an open basis in which their respective positions on various issues were set out. In EIL's paper it was contended that ICSOP had to prove that a valid reinsurance policy was in place and had to identify the specific syndicates who were alleged to have subscribed to the policy and in respect of what percentage. It was not enough for ICSOP to rely on the fact that the rights and obligations of Lloyd's names in respect of 1992 and prior non-life business had been transferred to EIL. Apart from anything else, this approach was inconsistent with the terms of the Part VII transfer scheme under which: (i) EIL was entitled to all defences, claims and rights of set-off under the transferring policies as would have been available to the Names; and (ii) EIL was novated to the outwards reinsurances that protected the Names in respect of inward liabilities. EIL also raised the question of limitation and called for proof that the claims were covered by the underlying policy and the reinsurance contracts.

7. In its reply paper, ICSOP argued that since EIL was the assignee of the rights, title and interest of all Lloyd's syndicates in respect of all 1992 and prior non-life liabilities under contracts of insurance and reinsurance underwritten by Lloyd's syndicates, it was not necessary for ICSOP to identify the specific syndicate or syndicates who underwrote the reinsurances sued on. The question whether the syndicates purchased their own reinsurance was a matter for those syndicates and EIL (and their outwards placing broker), not ICSOP. ICSOP also relied on certain lay-off sheets as evidencing the level of participation of Lloyd's underwriters in the reinsurances and provided details of the DBCP claims against C & C that had been settled. As to limitation, ICSOP stated that to the extent EIL relied on such a defence ICSOP reserved the right to allocate sums paid under the umbrella policies going forward, such that the layers would be exhausted in any event.

8. On 8 March 2013, EIL agreed to extend time for the service of the Claim Form to 26 April 2013. By an email dated 22 April 2013, ICSOP sought an extension to 31 May 2013, stating that the process of filtering what was required to answer EIL's concerns was taking time. ICSOP also stated in this email: "We have been working with our client, US coverage counsel and UK counsel to formally particularise the claim and in doing so address a number of the points that have been raised in your note of 15 February 2013". Thereafter, two further extensions of time were agreed on 25 April 2013 (to 28 June) and 26 June 2013 (to 26 July), the latter being at the request of EIL.

9. ICSOP's Claim Form and Particulars of Claim were served on EIL on 26 July 2013. Three days later, EIL received a letter dated 29 July 2013 from BLP informing it that on 26 July 2013 ICSOP had filed a Complaint in the United States District Court, Southern District of New York ("the US Court") making the same claim as was made in this court in London. The letter continued:

> We can confirm that it is not the intention of our client to proceed with litigation in England at the same time as the New York proceedings (i.e. there will not be concurrent proceedings in different jurisdictions addressing the same issues). If, however, for whatever reason, the New York proceedings cannot proceed, then our client will proceed with the English action.
>
> In the circumstances we would invite you to agree to stay the English proceedings. If you do not agree, then we will file an Application with the English court requesting that the English proceedings be stayed.

10. The Complaint claims that the US Court has subject matter jurisdiction pursuant to 28 U.S.C.§ 1332 (a)(2) and personal jurisdiction by virtue of a service of suit clause alleged to be contained in the reinsurance contracts sued on which provided:

> SERVICE OF SUIT CLAUSE (USA)
>
> It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction and will comply with all the requirements necessary to give Such Court jurisdiction and all matters hereunder shall be determined in accordance with the law and practice of such Court.

11. This wording is taken from a document entitled "Certificate of Insurance" bearing the reference number 12-0078/A and which was apparently issued by CV Starr & Co, the underwriting agent to ICSOP for the 1971-1974 reinsurance policy. This Certificate refers to insurance from "Companies in England" and cross refers to "Certificate #12-0078". A partial copy of a "Certificate of Insurance" bearing the number #12-0078 refers to "Underwriters at Lloyd's, London". At the bottom of the document there is a "Service of Suit Clause (U.S.A.)", but it is illegible. A further unsigned document dated 8 October 1971 states that it is "attached to and forming part of 12-0078" and provides that the reinsurance is said to be "a reinsurance of and warranted same gross rate, terms and conditions as to and to follow the settlements of [ICSOP]". This document also says that CV Starr & Co procured this cover "in accord with the terms and conditions of the form(s) attached". Both the Certificates state that CV Starr & Co procured this cover "in accord with the terms and conditions of the form(s) attached". Certificate 12-007 states that it is not valid unless signed by CV Starr & Co.

12. A partial copy of a broker's slip for the 1971-1974 reinsurance policy was provided to ICSOP during the pre-claim discussions. The slip contains the words "As Original… Full R/I Clause … S of S Clause P.T. (N.M.A.)" and ICSOP contends that the wording of the "S of S Clause" is provided by the clause in the aforesaid Certificate of Insurance issued by CV Starr & Co. (EIL does not admit that the "S of S" clause was incorporated into the reinsurances and put ICSOP to strict proof that it was).

13. EIL and RMS were extremely surprised to be told that ICSOP had started proceedings in the US Court. Mr Coldstream promptly expressed his outrage on the phone to Mr Nirenberg. Although there had been mention at a meeting on 29 July 2009 of the risk to EIL if ICSOP chose to litigate the matter in the US, there was no mention of any intention by ICSOP to litigate in New York in the discussions and correspondence that took place in the period 12 December 2012 to 26 July 2013[2], all of which had been in the context of the English Claim Form sent to EIL on 12 December 2012. Nor was any reference made to the "S of S" clause. As a consequence, EIL had participated in the post-12 December 2012 discussions on the basis that if no settlement were concluded, ICSOP would sue EIL in London.

14. Mr Schaff QC for EIL contends that in light of the circumstances recounted above EIL is entitled to an anti-suit injunction restraining ICSOP from continuing with the Complaint issued in the US Court. With the principles articulated in *Deutsche Bank AG v Highland Crusader Partners (LP)* [2010] 1 WLR 1023 well in mind, particularly principle (3), Mr Schaff submits that London is the natural forum for the determination of ICSOP's claim and, given the circumstances related above which he contended showed that ICSOP had elected to sue in England and had impliedly represented that if there were no settlement suit would be brought and prosecuted in England, it is vexatious and/or oppressive for ICSOP to sue EIL in the US Court.

15. In the alternative, Mr Schaff invites the court to refuse to stay the English action either in whole or, at the very least, in respect of EIL's Counterclaim for declarations: (1) that to establish liability against EIL, ICSOP must prove the participation of identified syndicates on the relevant reinsurance and the percentage of the signed line underwritten by each syndicate; and (2) to the extent that ICSOP's liability to C & C was established before 30 November 2006, any claim against EIL in respect of such liability will be and is time-barred.

16. ICSOP resists EIL's application for an anti-suit injunction and applies for a stay of the London proceedings pending the outcome of motions filed by EIL in the US Court to stay the New York action on jurisdictional/forum non conveniens/comity grounds. If the US Court grants a stay of the New York proceedings, ICSOP will continue with the English action.

17. Mr Isaacs QC for ICSOP submitted that the US Court was the appropriate forum and that ICSOP had not acted vexatiously or oppressively in starting the US Court proceedings. He argued that the court should not find that ICSOP had elected to sue in England or that ICSOP had impliedly represented that if the post-12 December 2012 negotiations failed, England was where ICSOP's claim would be brought. Relying on *AG v Arthur Andersen & Co* [1989] ECC 224, he also submitted that the court should stay the English proceedings until it was known whether the US Court accepted jurisdiction over the US claim.

Is the Commercial Court in London the appropriate forum?

18. As between the London Commercial Court and the US Court, I consider the facts that the umbrella policies are governed by Hawaiian law and the DBCP claims against C

[2] Including the email of 22 April 2013 referred to in paragraph 7 above.

& C may have been made under many different foreign laws to be of neutral significance since these factors apply equally to both of the competing forums.

19. It seems tolerably clear that from a limitation point of view, ICSOP could be better off in proceedings in the US Court than in the English proceedings. Limitation is therefore probably a factor in favour of New York, although the true measure of this advantage to ICSOP is difficult to gauge because: (i) it is not clear to what extent (if any) settlements were entered into more than 6 years before the issue of the English Claim form; and (ii) ICSOP reserved the right in its position paper to allocate sums paid under the umbrella policies going forward so that the layers will be exhausted in any event.

20. It would seem that in neither forum will there be witnesses giving direct factual testimony as to the formation of the reinsurance contracts. ICSOP's principal place of business is New York where the overall claims handling is being undertaken. However, the DBCP claims are being managed by a California law firm. In paragraph 56 of his 2nd witness statement, Mr Sacher of BLP states that "The documents concerning the underlying losses and the question of ICSOP's liability to its Insured are held by AIG personnel in the US and/or their attorneys there" but he does not say where in the US. If substantial quantities of documents relating to the underlying claims were in New York, I would have expected Mr Sacher to say so. I accordingly infer that the great bulk of the documents relating to the underlying claims are in California and not in New York, which in my view is a neutral factor as between the US Court and the London court.

21. I turn now to the important topic of governing law. Mr Schaff submitted that pursuant to the conflict of law rules operative at the relevant time, English law will govern the reinsurance contracts on the basis that it is the implied choice of law. The factors supporting this implication were: (i) the contracts were broked and written in London on the Lloyd's market and were purportedly contained in or evidenced by London market forms with premium to be paid and claims processed in London; and (ii) the reinsurance underwriters were all solidly based in England. EIL's submission was not seriously disputed by Mr Isaacs who accepted that the reinsurances were probably governed by English law. I agree with Mr Schaff. In my judgement, it is overwhelmingly likely that in this court at trial English law will govern the issues: (i) whether the alleged contracts of reinsurance were entered into, with which underwriters, for what percentage lines; (ii) the meaning and effect of the contracts; and (iii) the nature, meaning and effect of the Part VII transfer sanctioned by Blackburne J in *Re Equitas Ltd* [2010] Lloyd's Rep I.R. 69.

22. In the US proceedings, ICSOP intend to argue on the basis of the "S of S clause" that the reinsurances are governed by New York Law. EIL will contest that argument, asserting, inter alia, that: (i) the "S of S clause" does not apply where the reinsured has earlier opted to sue in a non-US jurisdiction, as happened here; and (ii) the chosen law under the "S of S clause" includes the conflicts of law rules of the US Court whose application should lead to the application of English, rather than NY, law.

23. Mr Isaacs accepted that an expectation on the part of the underwriters that the reinsurances would be governed by English law would ordinarily weigh heavily with the court when deciding the issue of the appropriate forum, but he argued that the "S of S clause" precluded EIL from advancing this argument. Mr Isaacs' point was a

pertinent one, although its potency depends on the arguability of EIL's contentions set out in paragraph 22 above. In my opinion, those contentions are reasonably arguable.

24. In my judgement, the applicability of English law to ICSOP's claims means that the Commercial Court is the appropriate forum, rather than the US Court, notwithstanding the possible limitation advantage to ICSOP if the claims are heard in New York. As I have said, it is arguable that under the New York conflicts rules the governing law of the reinsurance contracts is New York law by reason of the "S of S clause", but EIL have reasonable arguments to the contrary. Further, and in any event, as Christopher Clarke J observed[3] in *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2011] Lloyd's Rep I.R. 171, there is authority[4] that the English court should favour its own conflict of law rules, and as I have already held, under those rules it is overwhelmingly likely that English law governs the formation and meaning and effect of the reinsurance contracts. It also seems to me likely that ICSOP will advance arguments in the US Court on the meaning and effect of the Part VII transfer designed both to establish EIL's liability on the reinsurances and to obviate the necessity of proving the identity of the original underwriters and the percentage lines underwritten; and in that event, I consider it perfectly possible that the US Court will apply English law to determine these issues.[5] I appreciate that ICSOP may well be of the view that it has available a contractual argument that EIL agreed to accept the liabilities of the original underwriters (cf *The Narragansett Electric Co v American Home Assurance Co*[6]) and that it now has sufficient contemporaneous evidence to prove the reinsurances without relying on the Part VII transfer, but it would I think be surprising if ICSOP limited itself to these contentions to the exclusion of any reliance on the Part VII transfer.

25. I am also of the view that even if the US Court held that the governing law of the reinsurances was New York law, it is likely that evidence as to the practices of the London reinsurance market would be called to assist on the issues going to the formation of the contracts.

26. The US Court will of course be well accustomed to determining questions of foreign law on the basis of expert evidence, but I consider that there is a real advantage in having the issues of English law decided here in the English Commercial Court. My reasons are in substance the same as those given by Christopher Clarke J in paragraphs 37 and 39 of his judgement in *Stonebridge*. Rather than engaging in the secondary process of determining principles of law as fact on the basis of the opinions of experts, the Commercial Court will determine by reference to its own law what are the relevant principles and will do so with the advantage of a special degree of experience in reinsurance disputes between reassureds and Lloyd's underwriters, including the practices of the Lloyd's reinsurance market.

Are ICSOP acting oppressively or vexatiously in bringing the proceedings in the US Court?

27. In my judgement, the manner in which ICSOP has acted in launching its claim in New York after several months of negotiations focussing on an English Claim Form

[3] At para 33
[4] *Irish Shipping v Commercial Union Assurance Co plc* [1991] 2 QB 206, per Staughton LJ at 229G
[5] I regard it as significant that it was not disputed in *The Narragansett Electric Co v American Home Assurance Co* that English law applied to the interpretation of the Scheme and the Part VII transfer.
[6] 2012 WL 4075171 (S.D.N.Y.)

without any mention of an intention to sue in New York if there were no settlement, was most unsatisfactory. Throughout the negotiations, EIL and RMS reasonably proceeded on the basis that if there were no settlement there would be English proceedings, and they did so as a direct result of the way ICSOP dealt with them in the period 12 December 2012 to 29 July 2013. Mr Coldstream cannot say precisely what would have happened if ICSOP had indicated that it intended to or was contemplating proceeding in New York, but he is definitely able to say and does say that EIL would not have proceeded as they did.

28. Mr Sacher states in paragraph 19 of his 2nd witness statement that ICSOP always intended to pursue the New York action alone if possible and was aware of the more favourable limitation position in that jurisdiction. If so, the appropriate way to proceed consistently with today's requirement of a "cards on the table" approach to litigation was to issue proceedings simultaneously in New York and London and if negotiations were going to be opened in respect of one claim, to inform EIL of the other claim and to specify the preferred forum. Instead, by proceeding as it did, ICSOP has been able to test the water in respect of an English claim and not finding it sufficiently sweet due to the stance adopted by EIL in negotiations vis à vis an English claim, has launched proceedings in New York.

29. Generally speaking, parties to litigation, threatened or on foot, are entitled to know where they stand with the opposition but I think when considering whether a party should be held to a particular position in a case not covered by the CPR or some other established rule, the court ought in general to have regard to the extent of the other's party detrimental reliance as well as to the reasons for the first party's departure from his previous position. Pursuant to this approach, I have reached the view that EIL's detrimental reliance on the impression created by ICSOP that only English proceedings were in contemplation is not sufficiently prejudicial for it to be unjust (vexatious or oppressive) for ICSOP to sue in New York where there is a potential limitation advantage and in circumstances where ICSOP intends to apply to discontinue or apply to obtain the dismissal of the London proceedings if the US Court denies EIL's motions for a stay. I say this because the claims made in the two jurisdictions are essentially the same and the positions taken in the open negotiations are as applicable to the claims in New York as to those made in the English Claim Form to the extent that English law is the relevant law. And EIL is in as good a position today to deal with the proposition that some or all of the claims are governed by US law as it would have been if ICSOP had proceeded as it should have done by issuing in both jurisdictions and informing EIL that New York was its preferred venue. It may be that EIL has incurred costs in taking steps it would not have taken if it had known of ICSOP's intention to sue in New York if there were no settlement, but the sums involved cannot have been particularly significant and such detrimental reliance is not advanced on behalf on EIL as a justification for the injunction sought. Wasted costs are therefore not a foundation for an anti-suit injunction in this case, although they may be relevant to any terms the court may impose should ICSOP apply to have the English proceedings discontinued or dismissed upon the US Court dismissing EIL's motions for a stay. Unsatisfactory as ICSOP's manner of proceeding was, I have accordingly decided after due consideration that ICSOP ought not to be restrained from continuing with the New York proceedings.

ICSOP's application for a stay of the English proceedings

30. In *AG v Arthur Andersen & Co* [1989] ECC 224 the plaintiff sought a stay of proceedings he had started in England on 24 January 1985 and served in January 1986 against the defendant firm on behalf of the Department of Economic Development, a Government Department in Northern Ireland. The pleadings in the English action had closed but discovery and inspection had not yet started. It had always been the plaintiff's contention that proceedings should be brought in the US District Court for the Southern District of New York as the appropriate forum for the determination of the claim. The plaintiff accordingly commenced proceedings in the New York court on 15 February 1985 but against the contingency of a successful attack by the defendant on the jurisdiction of that court, the plaintiff also started the English proceedings to save the English time limit. At first instance Steyn J held that the plaintiff had shown that justice required that the English action should be stayed pending a decision of the New York court as to jurisdiction. On appeal to the Court of Appeal, Mustill LJ (with whom Sir Denys Buckley agreed) upheld Steyn J's decision. In paragraph 13 of his judgement, Mustill LJ said:

> ... if a plaintiff has thought fit to commence an action, with all the hardship to the defendant which this involves in terms of expense, worry and disruption, he should in general be made to face up to the situation which he has chosen to create, and should not be permitted to conduct the action to a timetable which corresponds only to his own whimsy. Having put his hand to the plough he should continue to the end of the furrow. This is only fairness and common sense. But the same considerations must demand that in some instances the approach should be different. The question for the learned judge, and for us reviewing his decision, is to my mind no more than this, whether the good management of the concurrent sets of proceedings clearly requires the English court, in charge of one set of proceedings, to decree that a temporary halt should be called—temporary, because we must wait to discover what the American court is going to do.

31. Since the decision in *Arthur Andersen*, the approach of courts at first instance to applications for a stay of proceedings brought by the party who started the proceedings has been that such an application will only be granted in special or rare circumstances. Thus in *Ledra Fisheries Ltd v Turner* [2003] EWHC 1049 (Ch), Neuberger J said at para 13:

> …. it appears to me that, where a claimant has brought a claim against the same defendants for essentially the same relief arising out of the same facts in two jurisdictions, then, absent special circumstances, it would be wrong for the court to grant a stay of one set of proceedings at the instigation of the claimant, the very person who has brought both sets of proceedings.

And in *Klöckner Holdings v Klöckner Beteiligungs* [2005] EWHC 1453 (Comm) Gloster J said at para 21 (i) & (ii):

> (i) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has voluntarily brought

> the two sets of proceedings, a stay should only be granted in very rare circumstances …
>
> (ii) Even where there are such reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party … [7]

32. Citing a passage[8] in the judgement of Moore-Bick J in *Reichhold v Goldman Sachs* [1999] 2 Lloyd's Rep 567 (whose decision was upheld on appeal), it was argued on behalf of ICSOP that the approach adopted by Neuberger and Gloster JJ was not the right approach. Instead, the only question on a stay application was whether the stay sought was in the interests of justice.

33. I reject this submission. In *Rheichhold*, the stay was sought by the defendant, not the claimant, and involved a question of timetabling: should an arbitration in Norway between the claimant and a third party be held before determination of the High Court claim because of its relevance to the tripartite relationship between the parties? Such a stay is very different from a stay whose effect will be that a claim will not be heard and determined in a court in which it has been proceeding. It is also to be noted that Moore-Bick J went onto say that the granting of a stay of an action pending the outcome of proceedings by the plaintiff against some other person in arbitration or before a foreign court was a step that "should only be taken if there are very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff."[9]

34. In my judgement, by reason of the manner in which it negotiated with EIL by reference to contemplated English proceedings without informing EIL that it would sue in New York if the negotiations failed, ICSOP has failed to show that this is one of those exceptional cases where a claimant having brought an action against a defendant should be granted a stay even of a temporary nature pending the outcome of interlocutory proceedings started in another court. In short, in the circumstances of this case, justice does not require that the English action, including EIL's counterclaim, be stayed, but on the contrary that it should continue with ICSOP having the burden of seeking an order of discontinuance or dismissal of its claim should the US Court dismiss EIL's stay motions.

35. ICSOP submitted that its stay application was made in circumstances that closely resembled those in *Arthur Andersen* and that I should follow that decision and grant their application. But the facts of *Arthur Andersen* were very different from the situation before me. In *Arthur Andersen*, the plaintiff did not mislead the defendant into thinking that the claim would be litigated in England; nor did the plaintiff sue in New York only after having tested the water in England. Instead, the plaintiff was up front from the outset issuing claims in England and New York more or less at the

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[7] See also *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 at para 78, per Gloster J

[8] "Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the Court's discretion in the interests of justice". Page 571

[9] In the Court of Appeal Lord Bingham CJ at pp. 581-582 recognised the risk that Moore-Bick J's decision may lead to a flood of applications from evasive and manipulative defendants and said: "… I have no doubt that Judges (not least commercial Judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."

same time and informing the defendant that he considered New York to be the appropriate forum.

Conclusion

36. For the reasons given above, EIL's application for an anti-suit injunction fails as does ICSOP's application for a stay pending the US Court's determination of EIL's motions for a stay. Having put its hand to the plough, ICSOP must continue to the end of the furrow in England unless and until it can persuade the court to allow it to discontinue or to dismiss its claim.