BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 238 OF 2006

BETWEEN:

MARBLE POINT ENERGY LTD.

Claimant

AND

MULTIPERILS INTERNATIONAL INC.

Defendant

Appearances:

Mr. Michael Pringle of Maples & Calder for the Claimant
Gerard St. C. Farara Q,C. of Farara Kerins for the Defendant

2007: April 13th and 27th May 4th

JUDGMENT

(Civil practice – stay of proceedings – stay granted on a forum challenge – application to lift stay to permit a summary judgment application – Court's jurisdiction to lift stay – considerations to be taken into account)

[1] Joseph-Olivetti, J.: - On 12th December, 2006 I ordered a stay of this action on the ground of forum non conveniens in favour of the courts of Canada. Marble Point Energy Ltd. ("Marble Point") appealed the decision and it seems to me that the Court of Appeal, perhaps unwittingly, but consistent with the prevailing spirit of the World Cup Cricket series currently underway here in the Caribbean delivered a 'chinaman' as, acting ostensibly on a "hint from the court"[1] Marble Point's appeal was adjourned to allow it to bring this application to lift the stay for the limited purpose of applying for summary judgment. As it

[1] I advisedly use Mr Farrara's description as counsel could not agree on precisely what took place before the Court of Appeal. In order not to be influenced by the exchange between counsel and the Bench at that hearing I had indicated to counsel that I would refrain from reading the portion of the transcript exhibited by Marblepoint as in any event those discussions are in no way binding on this court and the most that could be inferred is that the Court of Appeal, **without deciding the point,** as it was not before them, were inclined to the view that such an application could in law be made, hence the grant of the adjournment. I regard those discussions no higher than that.

is, and had he not done so, it would have been surprising, Learned Queen's Counsel for Multiperils, has boldly asserted[2] that by entertaining this application I have been called upon to hear an appeal from my own decision, hence my reference to that quintessential English game.

The Background

[2] The events giving rise to the action itself and to the stay were fully set out in my judgment which imposed the stay ("the Judgment") and it would be superfluous to repeat them here.

The Submissions in Opposition

[3] Mr. Farara QC for Multiperils strenuously opposed the application. His arguments, in a nutshell, are (1) that this application is not one which could properly be brought in law hence the dearth of precedent, (2) that it amounts to a re-hearing of the forum challenge or to a "second bite at the cherry" as the court had considered the matter of summary judgment as part of the arguments advanced by Marble Point in opposition to the forum challenge and had properly rejected it, (3) the assignment from Majestic Capital did not change anything as Marble Point still had the duty to prove the fraud in which it alleged that Multiperils was a party to, and (4) that in any event this was not a proper case for summary judgment as Marble Point could not establish that it would succeed as a matter of course, which was the required standard it had to meet. on this application. He also raised issues of delay in bringing the application. Counsel relied on several authorities in both his written and oral submissions including Woodhouse v. Consignia Plc[3]. He sought to distinguish the cases relied on by Marble Point which included Merrill Lynch, Pierce Fenner & Smith Inc. v. Raffia[4], Standard Chartered Bank v. Pakistan National Shipping Corporation and others[5] and Adria Services YU v. Grey Shipping Co. (30th

[2] Defendant's submissions para 7
[3] [2002]1 WLR 2558
[4] [2001]1LPR437
[5] [1995]2 Lloyds Report 365

July 1993) which had been followed in a line of English cases and in Febvre Company Limited v. Grape Expectations SA[6], in this jurisdiction.

Court's Analysis

[4] The novelty of an application has never been among the criteria for holding that the court has no jurisdiction to entertain it and common law is rife with examples of novel applications and arguments which have succeeded and have established the foundation for righting wrongs which would otherwise have been left without remedies.[7]

[5] To my mind, where no precedent for a particular relief or claim exists one must perforce have regard to the relevant general principles to determine whether or not the court has jurisdiction.

[6] What then is the court's jurisdiction to grant a stay of proceedings generally? Under the proviso to s. 18 of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap. 80 which deals with injunctions or prohibition of proceedings in the High Court or the Court of Appeal it is implicit that the High Court has an inherent discretion to direct a stay of proceedings in any cause or matter pending before it.

[7] And, under s. 7 of Cap. 80, the High Court is vested with the same jurisdiction (save in Admiralty) and with the same powers and authorities incidental to its jurisdiction as were vested in the High Court of Justice in England on 1st January 1940. Further, by s. 11 the jurisdiction vested in the High Court in civil proceedings is to be exercised in accordance with Cap. 80 and any other law in force in the BVI and rules of court and where no special provision exists as nearly as may be in conformity with the law and practice of the High Court of Justice in England.

[8] The English court's jurisdiction to grant a stay, which pertains to our courts as well by virtue of the foregoing provisions of Cap. 80, is succinctly set out in Halsburys Laws of England 4th edn. Vol. 37 para. 437 – 446 para. 437 - "The court's power to stay proceedings may be exercised under particular statutory provisions, or under the rules of the supreme court or under the court's inherent jurisdiction or under any or all of these powers, since they are cumulative, and not exclusive, in their operation."

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[6] BVIHCV2006/0168

[7] My mind immediately reflects on Norwich Pharmacal disclosure orders and the "neighbour principle" enunciated in Donoghue v. Stevenson as examples of novel claims.

[9] In the case of a forum challenge the court's jurisdiction to grant a stay arises under its inherent jurisdiction as well as under CPR 9.7, those powers are concomitant and discretionary. See the Court of Appeal (Rawlins, JA) in Addari v Addari.[8] There is, I think, no cavil about this.

[10] As the court has power to grant a stay it must follow logically that included in that power is the power to lift or remove the stay. Again Halsburys op. cit is instructive. Para. 438 – "Effect of stay of proceedings. A stay of proceedings is not the equivalent of a judgment or of a discontinuance, and may be removed if proper grounds are shown, even if the stay is imposed by a consent order. In contrast with a judgment for the defendant or the dismissal or discontinuance of an action, in the case of a stay of proceedings, whether conditional or absolute, the action still subsists, it is still "pending", and the stay is always potentially capable of being removed. A stay may be removed if good cause or proper grounds are shown or the continuance of the stay could cause or produce injustice or prejudice or where there has been a change in the law." (Emphasis added)

[11] I am therefore satisfied from this brief review of the general principles that the court has jurisdiction to entertain this application even if there is no precedent on all fours with the application before us.

[12] Is this in effect a second application for summary judgment or a re-hearing of the application for a stay? Marble Point's rejoinder to Multiperils' submission on this is that the issue of summary judgment was only raised in a peripheral manner as part of Marble Point's objections to the forum challenge and that the court did not consider the merits of a summary judgment application and in fact there was no application for summary judgment before it. The argument that if Multiperils had no defence there would be no necessity for a trial and thus no need for a stay was advanced before the court.

[13] The stay was granted on the basis that the courts of Canada (Ottawa) were the more appropriate courts for the trial of this action. It is obvious, but for these purposes, it is necessary to underscore the fact that the very essence of a forum challenge is deciding which court is the more appropriate one for the trial of the action. See Dicey, Morris and Collins The conflict of laws (14th edn. 206) para.12-026n5. Thus the gravamen of the

[8] BVI Civil App. No 21 of 2005 para.15

arguments advanced for and against the forum challenge was geared towards showing which court was the more appropriate forum for the trial of the action having regard to the principles in Spiliada Maritime Corp. v Cansulex Ltd.[9] It is correct that Marble Point on the forum challenge hearing relied on its assessment of Multiperils defence to argue that as Multiperils had no realistic prospect of defending the action it should not be stayed as it would deprive Marble Point of a substantial benefit, that is the opportunity to apply for summary judgment and it made in-depth submissions on the merits of the defence. However, it was not argued that because Multiperils had no realistic prospects of defending the case there was no need for a trial either here or in Canada and that accordingly no stay should be imposed.

[14] I also note that where both an application for stay and an application for summary judgment are pending the proper course is to consider the summary judgment application first. For example, this was the approach adopted in Standard Chartered Bank v. Pakistan National Shipping Corporation and others.[10] In that case the court had before it both an application to stay on the basis that there was an agreement (bill of lading) to refer all disputes to Pakistan, and a summary judgment application. The court dealt with the summary judgment application first, see page 10 para. 4. This approach is that which I followed in Febvre and accords with logic and is supported by the Adria line of cases if logic alone does not suffice.

[15] Furthermore, unlike the Adria line of cases there was no summary judgment application pending which would have compelled the Court to logically determine that issue first. What we had before us was only a clear indication from Marble Point that it intended to make such an application if it successfully opposed the forum challenge. Furthermore, having regard to our system of law no court embarks on deciding issues on arguments which were not advanced before it unless it is an obvious case. Accordingly, I find that Multiperils' argument that this application amounts to an appeal from my own judgment or a second application for summary judgment, untenable.

[16] Now, as the removal or lifting of a stay is a discretionary remedy the court must consider whether Marble Point has shown good grounds to lift it and in doing so I have considered

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[9] [1987] A.C. 460

[10] [1995] 2 Lloyds Rep 365

all the circumstances put forward. The basis on which this application is made is to allow Marble Point to make a summary judgment application as such a remedy is not available in Canada and would if successful determine the matter without a need for a trial anywhere. Accordingly, I must perforce first consider the merits of a summary judgment application as this is the raison d' etre for this application.

[17] Mr. Farara Q.C. argued, based on Woodhouse that to succeed, Marble Point has to 'speedily and categorically' demonstrate that its case for summary judgment is conclusive or in other words it has to prove at this, what I would call preliminary stage that the application must succeed. Is Woodhouse authority for this proposition?

[18] In Woodhouse, the Claimants each issued proceedings against the Defendants prior to the coming into force of the English Civil Procedure Rules 1998 but their actions were automatically stayed under CPR pt. 51 and para. 19 of the Transitional Arrangements Practice Directions when they were not brought before a judge between 26 April 1999 and 25 April 2000. The Claimants' applications for the stay to be lifted were refused by a district judge (Master) and they both appealed unsuccessfully to the judge. In the second case the Claimant then made a second application to the district judge for the stay to be lifted. The evidence in support of the stay had been available at the time of the first application and there was no good reason for the failure to place it before the court on that occasion. The district judge struck out the application as an abuse of process without considering the merits and the judge subsequently dismissed that Claimant's appeal.

[19] On appeal to the Court of Appeal both appeals were allowed. The court held that an automatic stay imposed by CPR pt. 51 and para. 19 of the practice direction fell to be treated as a sanction imposed for a failure to comply with any rule, practice direction or order within CPR r. 3.9 and that accordingly when determining whether to lift an automatic stay the court had to consider all the circumstances of the particular case including each of the nine items specifically listed in r.3.9 where relevant and that the judge had failed to do so in the first case by simply concentrating on inordinate delay.

[20] In the second case the court adverted to the general principle derived from Henderson v. Henderson[11] that there was a public interest in discouraging a party who had made an unsuccessful interlocutory application from subsequently applying for the same relief

[11] {1843) 3 Hare 100

based on material which was not but could have been deployed at the first application. However, it found that although that rule that in the absence of special circumstances parties should bring their whole case before the court had relevance in relation to successive pre-trial applications for the same relief, it ought to be applied less strictly than in relation to a final decision, at least where the earlier pre-trail application had been dismissed. The court found that in the second case the application was a second one based on evidence which was available at the time of the first application but not deployed then and that there was no good reason why this was not done. However, the court found that both the district judge and the judge treated the fact that it was a second application for the same relief as decisive and that this was clearly wrong as they failed to exercise their discretion as they did not take into account the evidence and failed to consider how cogent the case for granting the relief was. See para 58.

[21] An example used by the court is singularly apposite to this case and I will set it out in full. "… Suppose that an application for summary judgment in a substantial multi-track case under CPR r. 24 is dismissed, and the unsuccessful party then makes a second application based on material that was available at the time of the first application, but which through incompetence was not deployed at that time. The new material makes the case for summary judgment unanswerable on the merits. In so extreme a case, it could not be right to dismiss the second application solely because it was a second bite at the cherry. In those circumstances, the overriding objective of dealing with cases justly, having regard to the various factors mentioned in CPR r. 1.1(2) (similar to our CPR 2000 r. 1.1) would surely demand that the second application should succeed and that the proceedings be disposed of summarily. In such a case the failure to deploy the new material at the time of the first application can properly and proportionately be reflected by suitable orders for costs, and, if appropriate, interest. The judge would of course be entitled to dismiss the second application without ceremony unless it could be speedily and categorically demonstrated that the new material was indeed conclusive of the case." See para.56

[22] Clearly, Woodhouse dealt with a second application for the same relief and I agree with Mr. Pringle's interpretation that the standard of cogency required for second applications is stricter, and is not applicable here as I have held that this is not a second application to lift

[23] At this juncture Marble Point has to show that it has a realistic prospect of success on its summary judgment application: it does not have to establish that it has an unanswerable case. And, when it comes to the consideration of the application itself, Marble Point will be required to show that Multiperils has no viable defence. See The Bank of Bermuda v. Pentium (BVI) Ltd. and Landcleve Ltd.[12]

[24] I have considered the arguments on the merits of a summary judgment application but I will not elaborate unduly for fear of prejudicing the likely outcome of the application itself if leave is granted to make one. Suffice it to say that having considered the claim, the Statement of Claim and the proposed amendments and the several affidavits filed for and on behalf of both parties and the authorities relied on, in particular Twinsectra Ltd. v. Yardley[13], in my judgment Marble Point has made out an arguable case for being allowed to make a summary judgment application. The authenticity of the ABN Amro bond is the central issue and whether or not the monies received by Multiperils, in an amount in excess of US $5.9M, which on the evidence one can reasonably infer came from the monies ($11M) entrusted to Majestic Capital by Marble Point, were monies for which Multiperils gave valuable consideration. Multiperils has indicated the nature of its defence and the evidence that it will rely on to refute the allegation that the bond or bonds are not authentic. I note that Multiperils is claiming that it received that sum as a fee to assist in obtaining the bond/bonds. It is interesting that according to Multiperils, a fee of such magnitude amounting to almost half of the sums paid by Marble Point was paid to it to assist in procuring a bond or bonds from ABN Amro and that ABN Amro is alleged to have issued those bonds excess of $US150 million for a meagre consideration of US$27,500.

[25] I also note the indication that Marble Point will bring evidence to show that Majestic never paid any monies to ABN Amro and the impact such evidence could have on the receipts relied on by Multiperils. At the risk of sounding naïve, one wonders if indeed the bond or bonds are valid then what is the difficulty in Multiperils, the person who was instrumental in

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[12] BVI No. 14 of 2003
[13] [2002]UKHL12

procuring them, in getting ABN Amro, a reputable bank of international standing, to honour them? I also note the allegations of fraud and the alleged involvement of persons against whom criminal actions have been taken in other jurisdictions and the care that should be taken in dealing with summary judgment applications where fraud is alleged. However, I remark that Standard Bank was a case alleging fraud though not of the scale alleged here, yet this of itself did not prevent the court from granting summary judgment. In short, this is a matter which lends itself to a summary judgment application having regard to the issues at the heart of the matter.

[26] I have also considered the other factors relied on by Marble Point in aid of its application to lift the stay and the opposing arguments and find Marble Point's arguments compelling. I accept that summary judgment procedure is not available in Canada, and that the matter will not be tried in Canada until the spring or autumn of 2008 and that even if it is successful Marble Point will still have to file suit here to recover the fruits of its judgment as Multiperils has no assets in Canada or elsewhere except the assets which are the frozen assets here. These factors in my view far outweigh the argument about the costs to date of the proceedings in Canada as evidence discovered in those proceedings has been relied on here and if in the final analysis Marble Point is successful in Canada then it would have to bear the full costs of a trial in Canada as well as the additional costs of enforcing that judgment here. At least in allowing it to file an application for summary judgment some of those costs for both parties might be minimized.

[27] Marble Point alleged substantial prejudice as if it is constrained to await trial in Canada it will be deprived of the early opportunity to recover substantial funds of which it alleges it was deprived by a most blatant fraud. Multiperils contended that there was no prejudice as the funds are frozen. However, in the world of commerce, to have such substantial funds sitting in the account of a court of law, even if interest bearing, is not the best way to utilize them as invariably the interest is much less than one could obtain normally. Doubtless, the owner could put them to much better use. It is therefore in both parties' interests that this matter be concluded as early as possible.

[28] I also note that Majestic Capital has given an assignment of its rights to Marble Point. This by itself is not such an overwhelming factor but taken with the other circumstances it enhances Marble Point's position for the lifting of the stay.

[29] With respect to delay in making this application I do not find that there was such inordinate delay as to bar Marble Point having regard to the complexity of the matter and to the fact that instructions originate from Canada.

[30] I have also considered the other part of the relief prayed for, that is to allow Marble Point to amend its pleadings and noted the objections thereto. In the normal course of proceedings, Marble Point would not need leave of court to amend as no case management conference has been held. It would be unfair to Marble Point to allow it to make a summary judgment application without allowing it to first amend its statement of claim. I do not consider that the amendments proposed in any way prejudice Multiperils as the substance of the case it is called to meet remains unchanged. I will therefore allow the amendments.

[31] In conclusion, to sum up, Marble Point has made out a good case for lifting the stay for the limited purpose applied for and to allow it to do so accords with the overriding objective of dealing with cases justly having regard to all the circumstances and to the particular factors set out in r. 1.1(2). Accordingly, the stay is lifted to allow Marble Point to: (1) amend its statement of claim in accordance with the amended statement of claim filed herein with correction of all typographical errors as subsequently advised to the court by copy letter to Farara Kerins dated April 24; (2) file a summary judgment application, and (3) to take all consequential steps to enforce the judgment if the application is successful. Marble Point is to have its prescribed costs in accordance with CPR 65.11. I will hear counsel on the directions consequential on the making of this order. Time for appeal is to run from the date of delivery of these written reasons as the ruling was given orally on the 27th April.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands