EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHMT 2012/0256

BETWEEN:

GULF INSURANCE LTD.

Claimant

V

CREQUE'S INSURANCE LTD.

Defendant

Appearances:

Mr. John Carrington of McW. Todman & Co. for the Claimant
Ms. Lynette Ramoutar of Financial Services Commission for the Defendant

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2012: October 15th, November 2nd

JUDGMENT

[1] **Ellis J**: By Claim Form filed on 28th September 2012, the Claimant seeks a permanent injunction against the Defendant restraining it from acting in breach of its contract with the Claimant and/or inducing or procuring breaches of and/or unlawfully interfering with contracts between the Claimant and its policyholders in the Territory of the Virgin Islands, by transferring policies of the Claimant pursuant to the directives issued by the Financial Services Commissions (FSC) on 1st and 17th August 2012 pending determination of the appeal by the Claimant and the Defendant against such directives to the Financial Services Appeal Board.

[2] From the Claimant's statement of claim it appears that on 1st August 2012, the FSC issued a Directive to the Defendant to transfer all of the Claimant's policies to other insurers by 31st August 2012. This directive was amended by the FSC on 17th August 2012 extending the period for the transfer of non- property policies to 30th September 2012.

[3] The Claimant alleges inter alia that the said Directive is illegal and ultra vires the powers of the FSC under the Financial Services Commission Act ("the Act") and on 31st August 2012 both the

Claimant and the Defendant have appealed against the directives to the Financial Services Appeal Board.

[4] It follows that the Defendant is obliged to and has by its letter dated 17th September 2012 indicated its intent to continue to comply with the FSC directive unless restrained by a Court. The Claimant alleges that in so doing, the Defendant is acting in breach of its contractual obligations with the Claimant.

[5] By Notice of Application filed on 28th September 2012, the Claimant sought an interlocutory injunction restraining the Respondent from taking or transferring any policies issued by the Claimant to other insurers licensed to operate in the Virgin Islands pursuant to the directive issued by the FSC.

[6] At the hearing of this application on 4th October 2012, the FSC appeared and indicated that it wished to apply to be joined as a party to the proceedings. A formal application was filed on 5th October 2012 in which the FSC advanced the following grounds:

1) That the Claimant has failed to disclose all relevant facts to the Court. The full details of the facts which the Applicant contends should have been disclosed by the Claimant are set out in the affidavit filed in support of the Application.
2) An injunction would render the Directive issued by the FSC null and void.
3) The FSC would be severely hindered in the performance of its regulatory functions by the grant of an injunction.
4) The joinder of the FSC is necessary and in the interest of justice.

This Application is trenchantly opposed by the Claimant.

[7] Ultimately it is the Court's duty is to seek to give effect to the overriding objective by the CPR i.e. to deal justly with the case when exercising any discretion given by the rules; or interpreting any rule. In exercising its discretion the Court must therefore have regard to the nature of the proceedings in which joinder is sought as well as the particular factual context of the application.

THE OVERALL CONTEXT

[8] Counsel for the Claimant contends that the nature of the proceedings in this case militates against the joinder of the FSC.

[9] He submitted that this is a claim which is based on the contractual relationships between the Claimant and the Defendant and between the Claimant and its policy holders. He further submitted that the subject

proceedings are simple private law proceedings between a principal and its agent in which the principal is seeking relief to avoid a threatened breach of contract and economic torts on the part of the Defendant. In this context he submitted that the validity of the FSC directives is not in dispute in these proceedings, but rather are the subject of an appeal filed by both the Claimant and the Defendant to the Financial Services Appeal Board.

[10] Counsel also submitted that the FSC has not met the threshold requirements of CPR Part 19.3 (2). He noted that to date, the Defendant has not entered a defence to the Claim and so it is unclear what, if any, matters are in dispute. He submitted that the FSC cannot be joined simply because it feels that it is able to mount a defence to the Claim. Indeed, in the event that the Defendant concedes the Claim or fails to enter a defence, the Counsel for the Claimant questioned where that would leave the FSC if they were in fact joined as a party.

[11] Counsel for the Claimant contended that were the injunction to be granted, there is nothing which would excuse or permit the Defendant to act in breach of the Claimant's rights as it must be taken that the directive contemplates that the Defendant is to comply in such a way that it does not breach an order of the court or any of the rights of third parties. He therefore concluded that the directives would not be affected if the injunctive relief were granted.

[12] Not surprisingly the FSC does not agree. Counsel for the FSC submitted that the permanent injunctive relief claimed would effectively nullify the directives issued by the FSC and may well render moot any appeal which may be pending before the Financial Services Appeal Board.

[13] She contended that there is no question that the directives are in fact the origin and not merely the background to this action. They are germane to the breach of contract which is alleged. On the Claimant's own pleadings they have affected the contractual obligations between the parties. She also pointed out that the vires of these directives are disputed by the Claimant who at paragraph 8 of the Statement of Claim and ground 6 of the Notice of Application filed on 28th September 2012 indicates that there is a good and arguable case that the directives are ultra vires the terms of the the Act.

[14] Counsel for the FSC submitted that it would set a dangerous precedent were the Claimant to obtain injunctive relief which would impact the regulatory functions of the FSC without giving it an opportunity to make representations.

[15] This action is brought within a context of regulatory action taken by the FSC. The FSC is a regulatory body established by the Legislature with functions which are detailed at section 4 of the Act. These functions

include the supervision, monitoring and regulation of financial services business in the Territory. In carrying out these functions, the FSC must have regard to

1. The protection of the public whether within or outside the Territory, against financial loss arising out of the dishonesty, incompetence, malpractice or insolvency of persons engaged in financial services business in the Territory.

2. The protection and enhancement of the reputation of the Territory as a financial services centre.

3. The reduction of crime and other unlawful activities relating to the financial services business.

[16] Counsel for the FSC submits that it is compliance with its duty to protect policy holders from the Claimant's insolvency which informed the FSC's decision to issue the directives in question.

[17] Directives were issued on the 1st August 2012 to both the Defendant and the Claimant although on entirely different bases. They were issued pursuant to section 40 (1) of the Act which provides that where the Commission is entitled to take enforcement action against the licensee, the Commission may issue a directive imposing a prohibition, restriction or limitation on the financial services business that may be undertaken by the licensee including that the licensee shall cease to engage in any class of or type of insurance business.

[18] In the case of the Defendant, the directive sets out that the grounds of the action taken which essentially relates the FSC's belief that the Defendant has been carrying on business in a manner detrimental to the interests of its clients, creditors or investors in that it has been placing insurance on behalf of clients with the Claimant when it knows or ought to have known that the Claimant has failed to maintain its business in a financially sound condition as required by the Insurance Act and without the required reinsurance.

[19] Counsel for the FSC contended that if the injunction were to be granted by the Court the FSC would be hindered in the performance of its regulatory functions. In the premises, she contended that the FSC has a clear interest in the proceedings because if the injunction is granted it will directly impact the effectiveness of the directives which have been issued by the FSC in furtherance of its statutory duties and functions.

[20] There is no question that litigation can be a demanding and costly exercise. The court therefore must carefully examine the circumstances where a party such as the FSC wishes to voluntarily undertake such a risk. The Court is mindful that in adding the FSC as a party they run the risk of being ordered to pay costs if the Claimant is successful and conversely if the Claimant were to fail it would be faced with two sets of bills instead of one.

[21] The Court cannot ignore that the principal mischiefs which the CPR were intended to counter were excessive costs and damages. It is clear that the Court has to exercise a balancing act in seeking to give effect to what it considers the just way of dealing with a particular case.

Should the FSC be permitted to be a party to these proceedings?

[22] The CPR provides that the Court can on its own motion and without application add a new party if (a) it is desirable to add the new party so that the court may resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

[23] There is however, no indication in the CPR of the factors which the Court may take into account on an application to join proceedings.

[24] The Court is mindful that this is a matter of discretion and that Part 19.3 expressly confers a wide discretion on the Court. The Court is of the view that the exercise of this discretion must be informed by the overriding objective, bearing in mind the factors mentioned in Part 19.2 (3) (a) and (b).

[25] CPR 2000 Part 19 provides for the addition and substitution of parties.

> Part 19.2 (3) provides that: "The court may add a new party to proceedings without an application if –
>
> a. it is desirable to add the new party so that the court may resolve all the matters in dispute in the proceedings; or
> b. there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

[26] Part 19.3 (1)

> "The court may add, substitute or remove a party on or without an application."
>
> Part 19.3 (2)
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> "An application for permission to add, substitute or remove a party may be made by –
> (a) an existing party, or
> (b) a person who wishes to become a party."

[27] It is clear therefore that under CPR Part 19 the Court may add a party in the absence of an application; however an application to add a party may also be made by any person who wishes to become a party.

[28] Blackstone Civil Practice 2009 at paragraph 14.80 describes the scope of the Court's discretion in the following terms:

> "The Court is given wide discretion under CPR to order that a person be added, removed or substituted as a party to a claim, provided that, (in the case of adding a party), the limitation period has not expired. The Court's attitude is permissive, provided the other party can be appropriately compensated in costs. This power may be exercised upon application by a party or by a person who wishes to intervene in proceedings to become a party, or by the Court acting on its own initiative."

[29] There is an abundance of case law which speaks to the proper exercise of the Court's power to add parties under the Old Rules of the Supreme Court. The Court in International Distillers and Vinters Ltd. v. J.F. Hillebrand (UK) Ltd. (2000) Times 25 January 2000, adjudged that the principles as expounded under the Old Rules were equally applicable to CPR 2000 Part 19.

[30] The English Court of Appeal in United Film Distribution Ltd. and Another v. Chabria and Others (2001) Times, 5 April, also confirmed that the discretion to add a party under CPR 19.2(2) (CPR 2000 rule 19.2(3) equivalent) is as wide as under its predecessors to that paragraph, namely RSC Order 15 rules 4 and 2(b).

[31] In the Eastern Caribbean the scope of this discretion was examined by Wilkinson J in Treasure Bay (St. Lucia) Limited v Gaming Authority et al. Claim No. SLUHCV2011/0456 in which she noted the older authority of Bryne v. Browne (1889) 22 Q.B.D. 657 where at page 666 Lord Esher said:

> "One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have the power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence and the main inquiry, will be the same, and the Court then has power to bring in the new parties and to adjudicate in one proceeding upon the rights of all the parties before it."

Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those Acts in orders to carry out as far as possible the two objects I have mentioned."

[32] Wilkinson J also noted the case Gurtner v. Circuit and Another [1968] 2 Q.B. 587 where the Court allowed the Motor Insurers' Bureau to be added as a Respondent to the proceedings. Lord Denning at pages 595 and 596 of that case said:

> "It seems to me that when two parties are in dispute in an action in law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion, may allow him to be added as a party on such terms as it thinks fit. By doing so, the Court achieves the object of the rule. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome…It is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill."

[33] Counsel for the FSC contends that on the face of the pleadings there is an issue which involves the FSC and which is connected to the matters in issue in this claim.

[34] Counsel for the Claimant contends that there are no matters in issue as the Defendant has not yet entered a defence to the Claim. A similar argument was considered by the Court in Humber Work Boats Limited v The Owners of M.V. "Selby Paradigm" [2004] 2 Lloyd's Rep. 714 (albeit at the opposite end of the proceedings). In that case, the applicant underwriters applied for judgment in default to be set aside and for permission to intervene in an action and be joined as defendants with permission to defend the claim. The Claimant argued that no such joinder could be made because following the judgment there was no "matter in dispute" in the proceedings.

[35] The judge in that case unhesitatingly rejected this submission. He noted that the test prescribed by the rule was whether it was desirable in all the circumstances. The Court considered and applied the overriding objective, as well as Gurtner v Circuit [1968] 2 Q.B. 587 and concluded that there was a discretionary jurisdiction to achieve justice in this case despite the existence of a default judgment.

[36] What is clear in this case is that even assuming Creque's Insurance Ltd concedes or declines to defend the claim, the FSC would, given its actions and it statutory role have a clear interest in the resulting outcome. Either way, the FSC should, in the court's view be allowed to make representations as to whether the equitable relief which is sought ought to be granted, given the particular circumstances of this case. Indeed given the particular circumstances of this case, it is precisely the possibility of the Defendant capitulating on this claim which would make it desirable that FSC should be joined as a party. The Court is guided by the dicta of Lord Denning in Gurtner v. Circuit and Another.

[37] Case law in the region also shows that the court will allow a third party to intervene "if the determination of that dispute will affect a third party in his legal right or in his pocket…"Jamaica Citizens Bank Ltd. vs. Dyoll Insurance Co. Ltd. & Anor. [1991] 28 J. L. R. 415

[38] The FSC has legal interest in the outcome of this litigation which warrants its joinder. It would in the Court's view be unreasonable if the FSC were bound to stand idly by, watching the Claimant obtain an injunction against the Defendant without saying a word when the effect of judgment could effectively negate the exercise of its statutory powers.

[39] Both sides agree that the pending appeal before the Financial Services Appeal Board does not operate as a stay of the directive and so the Defendant would be obliged to comply with the directive pending the outcome of any appeal. Short of a court order, the Defendant must on pain of enforcement action by the FSC, therefore proceed to transfer the policies as directed. The Defendant has on the Claimant's own pleadings indicated this to be the motivation for its purported breach. Clearly the FSC in exercising its legislative powers, could prima facie be said to be procuring or compelling the Defendant's alleged breach of contract.

[40] In spite of this, the Claimant has not sought to join the FSC as a party to the proceedings. Rather Counsel for the Claimant states that it is for the named Defendant to raise the directives as a defence to the claim. He went so far as to suggest that the Defendant could presumably obtain affidavit evidence from the FSC which would support its defence.

[41] The Court does not believe that the FSC needs to await an invitation by the Defendant in such circumstances. The Court considers that the nature of the proceedings makes it desirable in all the circumstances that the FSC should be a party to these proceedings.

[42] The Court is aware that there is an appeal pending before the Appeal Board where the *vires* of the directives will no doubt be fully examined. This is appropriate given the clear statutory jurisdiction

of the Financial Services Appeal Board. The Court does not accept however that allowing the FSC to be joined as a party in this action would in any way impinge upon that jurisdiction.

[43] Pending a determination of the vires of these directives, they are legally enforceable and it is the import of this fact more than any other that the court would need to hear representations from the FSC.

[44] Finally, Counsel for the Claimant submitted that the appropriate test for joinder under Part 19 is not that of non-disclosure. The Court agrees with this contention. However what is clear is that the facts disclosed by the FSC in support of their application reinforce the need to allow it to make representations regarding the grant of the equitable relief sought.

[45] Given its wide discretion under CPR, and after carefully considering the particular factual and legal context of this case as well as counsel's submissions, the Court finds that striking a balance in this case warrants the joinder of the FSC.

[46] In the premises the order of the Court is as follows:

1. Application to add the Financial Services Commission as a Defendant to the action is hereby granted.

2. Continuation of this action will therefore be in accordance with Part 19.3 (7). The Claimant must however within 7 days file and serve an amended claim form and statement of claim and all other supporting documents on the Financial Services Commission.

3. The Claimant will also serve the amended Notice of Application and supporting affidavits on the FSC within 7 days of today's order.

4. The FSC will have 7 days to file and serve evidence in reply to that application

5. This Order is to be served on all parties to these proceedings.

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Vicki Ann Ellis
High Court Judge