

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA
COMMERCIAL DIVISION**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2015/0992

BETWEEN:

BANCROFT LIFE & CASUALTY, ICC, LTD

Claimant/ Respondent

And

TELEBRANDS INSURANCE COMPANY IC, LIMITED

Defendant/ Applicant

Appearances:

Mr. Bota Mc Namara for the Claimant/ Respondent

Mr. Leslie Prospere, and with him Mr. Vilan Edward, for the Defendant/Applicant

2016: April 06
May 03

Stay of proceedings pursuant to Civil Procedure Rules (CPR) 2000 Rule 9.7A – forum non conveniens – place of incorporation, choice of forum and governing law clauses as basis for jurisdiction as of right – identification of sources of hearsay evidence in affidavits - Rule 30.3 (4) of CPR 2000 – and section 53 of Evidence Act -- extension of time to file defence – relief from sanctions.

This is an interlocutory application brought by the defendant/ applicant Telebrands Insurance Company IC Limited (“Telebrands”) seeking a declaration that this court not exercise its jurisdiction to try the instant case and grant a stay of proceedings until the conclusion of earlier proceedings commenced against the claimant/ respondent Bancroft Life & Casualty, ICC, Ltd (“Bancroft”) and others in the Superior Court of New Jersey, Essex County (“the NJ court”) in the United States of America (“the USA”).

Telebrands relies on the grounds of forum non conveniens and asserts that the NJ court is the more appropriate and convenient forum to try the issues canvassed in the instant claim, in conjunction with numerous other allegations made in the New Jersey claim ('the NJ claim'). They contend that New Jersey is the forum with which this claim has the most real and substantial connection and the interest of both parties and the ends of justice will best be served there. Telebrands further contends that if the instant claim continues alongside the NJ claim the same issues might be determined differently in the two countries, leading to inconsistency in the decisions.

The court is also asked to grant an extension of time to file a defence and relief from sanctions, in the event that a stay is refused.

Bancroft opposes the application on the grounds that Saint Lucia is the natural forum as both parties are incorporated here, with registered and business offices onshore. Further the parties have selected Saint Lucia as the forum of choice and governing law for settling disputes, in three written agreements which govern the relationship between them. They contend that these factors should receive predominant consideration in deciding whether a stay should be granted.

Bancroft has also challenged the affidavit evidence of Telebrands claiming that these affidavits do not comply with the relevant provisions of the CPR 2000 and the Evidence Act¹ in relation to extensive hearsay evidence, submitting that such information should be expunged from the affidavits.

The parties do not dispute that this court has jurisdiction to try the instant claim based on place of incorporation, choice of forum and governing law.

Held: The court exercises its discretion to grant a stay of proceedings and awards costs to Telebrands in the sum of \$1,500.00, for the following reasons:-

(i) Telebrands affidavits do not offend the relevant sections of the CPR 2000 or the Evidence Act with respect to hearsay evidence, to warrants expunging such evidence from the record. While the identification of the sources of hearsay is couched in very general language, as opposed to naming specific individuals, this cannot be deemed to be a breach of the law, as if there had been absolutely no disclosure of the sources.

(ii) The court is satisfied that the NJ court is the other available court having competent jurisdiction to try this claim and that it is clearly and distinctly the more appropriate forum, having regard to the interests of the parties and the ends of justice.

(iii) The Court could not find any special circumstances on the evidence, to support the finding that a stay should not be granted, on the basis that, to do so would create injustice to Bancroft.

¹ Chapter 4.15 of the Revised Laws of Saint Lucia 2001

(iv) Mindful that Bancroft has also filed an application for stay of proceedings in the NJ court, either party may apply to the court on notice, to vary or discharge the stay in the event that circumstances change.

(v) Having stayed the proceedings the aspects of the application concerning extension of time to file defence and relief from sanctions need not be addressed.

DECISION

BACKGROUND

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Telebrands who is the defendant in this action has filed an Amended Complaint² in the Superior Court of New Jersey in the USA, against Bancroft who is the claimant in this action, alleging inter alia breach of fiduciary duty, negligence, professional malpractice, negligent misrepresentation, fraudulent inducement, conspiracy, breach of contract, conversion, unjust enrichment, and constructive trust.

[2] Telebrands has named several other defendants in the NJ claim, of whom only Bancroft and one other defendant are connected to Saint Lucia. That claim specifically alleged that Bancroft misappropriated and took control over US\$3.0 million belonging to Telebrands, held as a reserve fund in a Retainage Account at M & T Bank in the USA.

[3] In the prayer for relief Telebrands requests disgorgement of all professional fees arising from unlawful acts of Bancroft, damages for breach of contract, damages for wrongful and unlawful acts, constructive trust in relation to the funds in the M & T bank account, amongst other things. That claim was served on Bancroft in the USA³.

² Filed on December 14, 2015

³ Served on December 22, 2015

- [4] In the NJ claim Telebrands further avers that it participated in a captive insurance program in the USA which was created, managed and operated by Bancroft. Through a series of events the US Government launched an investigation into Telebrands business operations under the captive program, which led to extensive losses to the company. This led to a breakdown in relations between the parties culminating in Telebrands filing the NJ claim, which calls into question the services rendered by the Bancroft under the operating agreements between the parties.
- [5] Bancroft's subsequently initiated this claim⁴ against Telebrands in the civil division of the court claiming inter alia the sum of \$2,209,059.20 as unpaid fees for services provided to the applicant under the operating agreements, damages for breach of contract, specific performance of obligations arising under the said agreements, interest pursuant to Article 1009A of the Civil Code and costs.
- [6] Bancroft asserts that the parties had entered into the following agreements to govern their internal business relations:-
- (1) Incorporated Cell Operating Agreement ("the ICOA") dated December 30, 2009
 - (2) Reinsurance Agreement ("the REIA") effective August 1, 2010
 - (3) Retrocession Agreement ("the RETA") effective August 1, 2010
- [7] Each agreement contains a choice of forum and governing law clause which selects Saint Lucia as the exclusive jurisdiction for bringing disputes. Provision is also made for the court in Saint Lucia to receive expert evidence on American Law, when trying any dispute.
- [8] Telebrands filed an acknowledgment of service in this claim and the parties agreed in writing to an extension of time⁵ to file a defence. On the last day of the extended period Telebrands filed this application and the matter was transferred to the commercial division for determination.

⁴ Filed on December 23, 2015

⁵ Time extended to February 10, 2016

- [9] Both parties are international business companies incorporated under the laws of Saint Lucia. Telebrands is registered as an incorporated cell, licensed under the International Insurance Act⁶ for the purpose of engaging in international insurance business from Saint Lucia. Bancroft is registered as an incorporated cell company, also licensed to engage in insurance services through an incorporated cell. Telebrands was intended to function as that incorporated cell. Both parties have registered offices, registered agents and at least one resident director in Saint Lucia.
- [10] Under the ICOA the parties agreed that Bancroft would provide all the operational, managerial and actuarial services of Telebrands and ensure that Telebrands complied with the requirements of the Financial Services Regulatory Authority (“the FSRA”) in Saint Lucia. In turn Telebrands would co-operate fully with Bancroft in providing documents and information and otherwise comply with requests from Bancroft, in dispensing its obligations under these agreements. Telebrands also agreed to indemnify the Bancroft against any liability, costs or expenses incurred by Bancroft in connection with the ICOA.
- [11] Under the REIA Bancroft provided Telebrands with reinsurance coverage and Telebrands in turn deposited US\$3.0 million in a retainage account in the USA as a regulatory reserve fund for its reinsurance business.
- [12] Under the RETA Telebrands contracted to reimburse Bancroft for all claims, fees and expenses paid or incurred in dispensing its functions in relation to the reinsurance arrangement.
- [13] Telebrands is therefore seeking to have the instant claim stayed to allow all the issues between the parties to be ventilated and determined before the NJ court, as the natural and more appropriate forum.

⁶ Chapter 12.15 of the Revised Laws of Saint Lucia

- [14] Bancroft has since filed an application in the NJ court asking that court to decline jurisdiction to try the claim filed there, based on the exclusive jurisdiction clauses in the agreements and contends that it has not accepted the jurisdiction of that court.
- [15] In oral submissions Counsel for Bancroft challenged Telebrand's affidavits in support of the application, for adducing hearsay without disclosing the sources of the information⁷.

THE ISSUES

- [16] The issues for this court's determination are as follows:
- (1) Whether the applicant's affidavit evidence contravenes Rule 30.3 (2) of CPR 2000 and section 53 of the Evidence Act in relation to hearsay evidence contained therein, to warrant excising the relevant paragraphs from these affidavits.
 - (2) Whether the Court should exercise its discretion to grant a stay of the instant claim, pending determination of the earlier claim filed in the NJ court on the basis that the NJ court has competent jurisdiction to try the claim and that it is the most suitable and appropriately forum for doing so, having regard to the interests of all the parties and the ends of justice.
 - (3) In the event that the court is satisfied that a stay ought to be granted, whether there are any special circumstances by reason of which justice requires that a stay should nevertheless not be granted, if to do so would bring about injustice to Bancroft.

THE LAW

Hearsay Evidence in Affidavits in Civil Proceedings

⁷ Counsel for Bancroft made an oral application to cross examine the deponent of Telebrands affidavits. This was denied for non-compliance with CPR 2000 Rule 30.1 (30 & (4).

- [17] The law permitting hearsay to be adduced in affidavits is contained in CPR 2000 at Rule 30.3 and reads as follows:-

“Contents of affidavits

- 30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
(2) An affidavit may contain statements of information and belief –
(a) if any of these Rules so allows; and
(b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –
(i) which of the statements in it are made from the deponent’s own knowledge and which are matters of information or belief; and
(ii) the source of any matters of information and belief.
(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.”

- [18] The Evidence Act at section 63 also states the following in relation to hearsay in civil proceedings:-

“63. Exception: interlocutory proceedings

The hearsay rule does not prevent the admission or use of evidence adduced in interlocutory proceedings if the party who adduces it also adduces evidence of its source.”

- [19] These provisions contain no ambiguity and allow hearsay to be included in affidavits in support of interlocutory applications in civil proceedings as long as the source of such information is disclosed. Where the source of hearsay is not identified, that information will be inadmissible.

Bancroft’s Challenge to Telebrands Affidavit Evidence

- [20] Telebrands evidence is contained in two affidavits deposed by Mr Michael Gordon a director of the company. The first is in support of the application⁸ and the second is in reply to the respondent’s affidavits in reply⁹.

⁸ Filed on February 10, 2016

⁹ Filed on March 14, 2016

- [21] In instances where the information was not within the knowledge of this deponent paragraph 2 of each affidavit stated as follows:
- “2. I have also acquired my information and knowledge from Mr Leslie Prospere (Mr Prospere) an attorney in the law firm who has conduct of the instant proceedings as well as from representatives of the Defendant/ Applicant’s head office whose principal place of business is 81 Two Bridges Road, Fairfield, Essex County, New Jersey 07004 and from the New Jersey Attorneys for the Defendant/ Applicant.”
- [22] The same wording was restated in the relevant paragraphs of each affidavit, depending on the source of the information as follows:
- (1) “I am informed by representatives of the Defendant/ Applicant’s head office and I verily believe that
- (2) “I am informed by the New Jersey Attorneys for the Defendant/ Applicant and I verily believe that
- [23] Counsel for Bancroft Mr McNamara submits that the manner in which the sources were identified, in particular the information said to be obtained from Telebrands “New Jersey Attorneys” was unacceptable and this information is inadmissible. He contends that the relevant paragraphs should be expunged from the record.
- [24] Counsel for Telebrands Mr Prospere submits that there exists an inference that references to “the New Jersey Attorneys of the Defendant/ Applicant” in Telebrands affidavits referred to Stone & Magnanini LLP and the evidence supports this. In addition he contends that the practice in this jurisdiction is to use general descriptions for legal practitioners and not reference them by name.
- [25] It is clear that the several exhibits furnished by Telebrands lend support to and verifies the information contained in the affidavits, the most critical being the NJ claim tendered as Exhibit MG1. It was filed by the New Jersey law firm of Stone & Magnanini LLP on behalf of Telebrands. Various other exhibits comprising emails and letters dating from

September 2014 through to January 2016 refer to that firm as representing and acting on behalf of Telebrands, particularly in relations to events surrounding the NJ claim.

- [26] The NJ claim itself is also replete with references to dealings between Bancroft and officers of Telebrands taking place in New Jersey and other places in the USA. Mr Gordon as a Director of Telebrands is authorized to tender these exhibits.
- [27] Counsel for Telebrand's relied on two cases in support of the submission on inadmissibility of the hearsay evidence. namely;(i) **Development Bank of St Kitts-Nevis v Osbert Chapman etal**¹⁰ and (ii) **Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyer**¹¹ The first case concerned circumstances in which no form of identification was given of the source providing the information which constituted hearsay in an affidavit. The relevant paragraphs were considered inadmissible and excised from the affidavit. I believe that case should be distinguished on the basis that Telebrands affidavits adduced some evidence on the sources of information, albeit in a generalized form. The other case dealt with hearsay in an Investigative Report tendered in evidence at trial (containing information from interview notes and tape recordings) and was of little assistance to the Court.
- [28] On the issue of admissibility had the deponent simply said "I am informed and verily believe" without more, that would have been a direct and incurable contravention of both CPR 30.3(2) and section 63 of the Evidence Act. The question, to my mind, is whether the omission to name individuals, in the context of the practicability of this case, sufficient to warrant inadmissibility of the information.

¹⁰ SKBHCV2012/0168 delivered on June 7, 2013-unreported

¹¹ Civil Appeal No.12 of 2006 delivered on June 16, 2016-unreported

- [29] In this jurisdiction the language used to identify sources of information take varied forms and may be specific or general, depending on the circumstances of the case. In the absence of a rule, practice direction or settled binding authority which clearly delineates the form or language for such disclosure, what amounts to an acceptable description of sources of information will be discretionary, having regard to the expediency and peculiar circumstances of each case.
- [30] It is advisable that legal practitioners, as much as possible, adopt the practice of disclosing the names of individuals providing information and their respective position, when hearsay evidence is adduced in affidavits. I consider this to be best practice, as the court should be satisfied that the person who relayed the information to the deponent would have been in a position to know what is being relayed. It would also assist when assessing credibility and applying weight to such evidence.
- [31] However the practice of using generalized descriptions for sources of information in the circumstances of this application is not unusual. I am satisfied that the relevant paragraphs do not offend the applicable provisions of the law so as to warrant removal from the record. I find no difficulty in accepting the affidavits, in the manner presented, having regard to the various exhibits which give credence to the sources of the information.

Stay of Proceedings

- [32] This application is brought pursuant to CPR 2000 Rule 9.7 and Rule 26.1 (2) (q). Under Rule 9.7 a defendant who disputes the court's jurisdiction to try a claim must apply to the court for a declaration to that effect. The rule sets out the procedure for such application. Rule 26.1 (2) (q) empowers

the court to stay the whole or part of any proceedings generally or until a specified date or event.

[33] The law and principles to be applied when considering applications for a stay of proceedings on the basis of forum non conveniens are authoritatively set out in the lead judgment of Lord Goff of Chieveley in the House of Lords decision in **Spiliada Maritime Corporation v Consulex Ltd**¹². They are summarized below as follows:

- (i) A stay of proceedings will only be granted on grounds of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. a forum in which the case may be more suitably tried, in the interest of all the parties and the ends of justice.
- (ii) The burden of proof rests on the defendant (applicant) seeking the stay to persuade the court to exercise its discretion to grant the stay. If the court is satisfied that there is another forum which is prima facie more appropriate the burden will shift to the claimant (respondent) to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction.
- (iii) Lord Goff noted the approach of the courts in the USA and Canada where these courts are hesitant to disturb a claimant's choice of forum unless the balance of factors weighs **strongly** in favour of the defendant. In contrast English law has no presumption or extra weight in favour of a claimant where that claimant has founded jurisdiction as of right. It is only in cases where no particular forum can be described as the natural forum and there are pointers to a number of different jurisdictions, that the English court would refuse to grant a stay.
- (iv) The burden on the defendant is to show that there is an alternative forum for the trial and that forum is clearly or distinctly more appropriate than the forum where the stay is sought.
- (v) In considering whether a stay should be granted the court must examine what is the "natural forum". A concept described by Lord

¹² [1987] 1 AC 460].

Keith of Kinkel in **The Abidin Daver**¹³ as “that with which the action has the most real and substantial connection”. The court must look for connecting factors which will include matters affecting convenience or expense such as availability of witnesses, the law governing the relevant transactions or to which the fructification of the transaction might be subject, the place where the parties reside or carry on business, the languages that they speak, in tortious claims the place where it is alleged that the tort took place and the list can go on. These factors are not intended to be exhaustive but rather indicative of the nature of the issues that a court should consider when exercising its discretion.

- (vi) If after considering these factors the court concludes that there is no other available forum which is clearly more appropriate for trial of the action, it will ordinarily refuse a stay. Conversely if the court concludes that there is some other available and prima facie more appropriate forum it will ordinarily grant a stay. However there may be occasions where justice requires that in the circumstances a stay should nevertheless not be granted. For instance if it can be shown that the claimant will not obtain justice in the foreign (appropriate) jurisdiction. This fact must be established objectively, on cogent evidence, which must be adduced by the claimant.

[34] These principles have been widely accepted in this jurisdiction and applied in several decisions of the Court of Appeal and Privy Council dealing with grant or refusal of stay of proceedings¹⁴. The common thread in the leading cases in which a stay has been granted, is that there has always been another clearly more appropriate forum, where the interest of the parties and the ends of justice could best be served, without incurring any injustice or disadvantage to a claimant.

[35] Applying the principles to this case the following considerations must unfold in order to grant or refuse a stay:-

¹³ [1984] 1 Lloyd's Rep. 339

¹⁴ Texan Management et al v Pacific Electric Wire and Cable Co. Ltd [2009] UKPC 46; Imanagement Service Ltd v Cukurova Holdings A S-HCVAP2007/025; IPOC International v L V Finance Group et al-unreported September 19, 2005; OMB Limited v LSJ LLC – unreported June 3, 2011; Commercial Bank Cameroun v Nikson Financial Group Ltd-HCVAP2001/005

- (1) This court must be satisfied that the NJ court is a court of competent jurisdiction which is evidently more appropriate and convenient than this court, for trial of the action. It must be best suited to serve the interests of all the parties and the ends of justice. To this end Telebrands must demonstrate that New Jersey is not merely a forum of “practical convenience” but one of distinctive appropriateness, which must be clearly discernible on the facts.
- (2) In considering the issue of suitability the court will have to determine where the natural forum lies by examining whether it is New Jersey or Saint Lucia which has closer ties and substantial connection to the parties and the issues to be tried in this claim. Some of the factors referred to in **The Abidin Daver** the **Spiliada** case will have to be assessed. The court will examine availability of witnesses, the place where the parties and witnesses reside and carry on business, availability of documents to be produced in evidence, the place where the transactions on which the claim is premised took place and the law governing these transactions, amongst others factors.
- (3) The initial burden is on Telebrands to persuade this court to exercise its discretion to grant a stay.
- (4) If that burden is discharged it becomes the responsibility of Bancroft to demonstrate that quite apart from Saint Lucia having exclusive jurisdiction, other circumstances exist, wherein the due dispensation of justice requires that the trial should nevertheless be held in Saint Lucia.
- (5) Finally the court must be satisfied that Bancroft would not be denied justice, if the claim is to be tried in New Jersey or that it would be deprived of some legitimate advantage to be derived only in Saint Lucia.

ANALYSIS

Is the New Jersey Court clearly and distinctly more appropriate than this Court for trial of the instant claim?

[36] The main reasons advanced by Telebrands for granting a stay are as follows:

(1) that the parties substantially performed their contractual obligations in relation to the instant claim in the USA and not in St Lucia; (2) none of the parties conducted business locally as their licenses precluded this; (3) the parties only maintain a registered offices and registered agents here for the purpose of complying with the local financial regulatory regime, to maintain their respective licenses; (4) both parties are headquartered and operate their core business in the USA; (5) the majority of the witnesses for the trial of the legal and factual issues arising in both proceedings are from the USA and not Saint Lucia; (6) documentary evidence required in both proceedings exist in the USA and not in Saint Lucia; (7) the cost of having witnesses (including experts) travel from the USA to engage in proceedings in Saint Lucia is prohibitive; (8) that the NJ claim concerns alleged mismanagement of Telebrands by Bancroft and misappropriation of fund belonging to Telebrands; (9) there exists a significant overlap in the issues in both proceedings, in that they both touch and concern the duty of the respective parties under the governing agreements; (10) the issues in this claim are linked to the issues in the NJ claim; (11) that with a pending prior claim in the NJ court there is a great risk of both courts arriving at inconsistent decisions on the same issues, if a stay is not granted to permit all the issues to fully ventilated in the NJ court; and (12) that Bancroft will suffer no prejudice on account of trial of all the issues in the New Jersey forum.

[37] Telebrands exhibits comprised (1) the Amended Complaint filed in the NJ court, (2) the Stipulation Extending Time to Respond to the Complaint filed by Bancroft (which also contains a statement of acceptance of service on behalf of the Bancroft defendants), (3) a copy of an Incorporated Cell Formation & Investment Account Management Agreement between Bancroft and Juno (Telebrands parent company), (4) a copy of the ICOA,

(5) copies of five “Defendants Answer to Complaint & Counterclaim” filed on behalf of defendants in unrelated suits commenced by Bancroft in the USA and (6) exchanges of letters and emails between attorneys for Bancroft and Stone & Magnanini as attorneys for Telebrands referencing missing funds from Telebrands retainage account in the USA and other matters between the parties.

[38] In the NJ claim Telebrands contests the legality of the very services which form the basis of sums claimed by Bancroft in the instant claim, in breach of the governing contracts. It avers that Bancroft was responsible for “all aspects of the management and operations” of Telebrands insurance business. This included accounting, actuarial and tax services as well as regulatory filings. The provision of these services were outsourced by Bancroft to other defendants in the NJ claim (CIBIZ, Bartlett Actuarial Group Ltd / William H Bartlett, Stuart Anolik, Mark Anolik and others) who reside and conduct their business operations in the USA.

[39] It is evident that the witnesses in the areas of overlap between the two cases have their principal place of business and operations in the USA and are already joined as defendants in the NJ claim. That claim discloses extensive conduct of business between the parties, in New Jersey and other parts of the USA. This indicates to a closer connection with the New Jersey forum. Bancroft’s evidence does not refute this, neither does it established to the satisfaction of the court that the documents and witnesses required for this case are available in Saint Lucia.

[40] I am more convinced that the majority of the witnesses and the documentary evidence for this claim exists in New Jersey and do not believe that documents which reside with the FRSA will be very relevant to the real issues involved in this case. I am also not convinced that the International Insurance Act or the laws of this jurisdiction will feature prominently in either claim.

- [41] The breaches complained of in this claim are in relation to the governing agreements and the respective obligations arising thereunder. In particular the ICOA features in both claim. The relief for special damages in this claim relates to services rendered under the ICOA and outstanding fees for these services. There is a direct overlap in the formal relief sought in the prayers to the two actions in relation to the fees claimed in this claim and the request for disgorgement of fees in the NJ claim. It is my considered opinion that Bancroft's claim for recovery of fees, Telebrands challenge to the services rendered and the allegation of misappropriation of Telebrands funds in the retainage account must of necessity be tried together.
- [42] In order to properly defend this claim Telebrands may well have to assert the same allegation already made in the NJ claim. I can find no expediency in these two cases being litigated separately. There is no real reason why this entire claim could not be easily incorporated and determined in the NJ claim as part of Bancroft's defence and counterclaim. I am satisfied that both claims touch and concern the same set of events and circumstances, with the NJ claim having a much wider ambit to cause the issues in this claim to be fully settled in the interest of the parties and consonant with the ends of justice.
- [43] The totality of Telebrands assertions lend support to a prima facie finding that the instant claim, in actuality, has more real and substantial connections to New Jersey. I accept Telebrands evidence as pointing to the New Jersey forum as the one having the convenience, economy, efficacy, availability of witnesses, documents, locale of the transactions between the parties and the all-round suitability that the court is required to look for, in determining the natural and more appropriate forum to try this claim.

[44] In **The Abidin Daver** Lord Diplock admonished that allowing litigation on the same subject matter in two different jurisdictions would involve more expense and inconvenience than to litigate in only one. To compound matters there could be two conflicting decisions with a race to obtain judgment first, consequently giving rise to estoppel issues in the other claim. He opined that (1) where an action is already pending in a foreign forum which is a natural and appropriate forum for resolution of the dispute and (2) a defendant seeks to initiate an action as of right in another forum, involving the same subject matter, where the same facts will be in issue and the testimony of the same witnesses required, the additional expense and inconvenience which must result from allowing two sets of proceedings can only be justified if the claimant in the later proceedings is able to show objectively and by cogent evidence that there is an advantage that is so important, that to be deprived of it would lead to an injustice.

[45] It should be mentioned that Telebrands submitted exhibits of five copies of “Defendants Answer to Complaint & Counterclaim” filed on behalf of defendants in unrelated suits commenced by Bancroft in the USA in support for the contention that Bancroft engages in similar litigation in the USA when it suits its purpose to do so. The nature of these documents was such that I considered them to be immaterial to the issue at hand and the Court did not draw any inferences from them. No consideration or weight was given to this information.

Are there any special circumstances by reason of which justice requires that the trial should nevertheless take place in Saint Lucia?

[46] Bancroft’s evidence was contained in two affidavits deposed by Mr Marc Anolik and Mr Nicholas John. Collectively these affidavits addressed the following matters: (1) formalities of incorporation of the parties and their

corporate genealogy, (2) the existence of the three agreements which governed the relationship between the parties, (3) a chronology of events from December 2012 to present providing some background to the relationship between the parties following the launch of investigations into Telebrands captive insurance program and (4) Telebrands non-compliance with the requirements of the FSRA.

[47] Mr Anolik asserts that relations were cordial between the parties, which proceeded in accordance with the dictates of the governing agreements. The exhibits to his affidavit comprised (1) the three governing agreements, (2) a demand letter dated December 16, 2014 from Bancroft's attorneys to David Stone of Stone & Magnanini requesting payment of the sum specified in the instant claim, (3) a letter dated October 25, 2015 from David Stone on behalf of Telebrands enquiring about missing funds from Telebrands retainage account in the USA believed to be in Bancroft's possession, (4) affidavit of service of the NJ claim on Marc Anolik and (5) a legal opinion dated April 8, 2005 from Greenburg Traurig (an international law firm founded in Miami, Florida, USA) on which Bancroft relies to assert that Telebrands should have conducted its own due diligence in relation to its captive insurance program. All these exchanges take place between the parties in New Jersey and other parts of the USA.

[48] The thrust of Bancroft's rebuttal to this application is that this court has jurisdiction to try the instant claim by reason of incorporation, choice of forum and governing law and that Bancroft has filed this claim as of right in the exclusive jurisdiction selected by the parties. They assert that the case may well require testimony from the FSRA and other witnesses residing in Saint Lucia namely BDO and Hewanorra Corporate Services Limited. Further that any other witnesses for the case can be readily flown in or give evidence by video link. For these reasons Saint Lucia should be deemed the natural forum and the place with which the claim has the more real and substantial connection.

- [49] I do not accept that it would be this simple if Telebrands is to properly defend the instant claim. Telebrands has averred that the cost of bringing its witnessed to Saint Lucia would be prohibitive.
- [50] The **Spiliada** case clarifies the position that issues of domicile and exclusive jurisdiction on their own do not necessarily equate to “natural forum”. Irrespective of these factors a court of exclusive jurisdiction may defer to another court, once satisfied that this other court is the more appropriate forum for trial of the claim, that it has competent jurisdiction to try the issues and that a claimant will not be disadvantaged in any way, by a trial there.
- [51] Bancroft asserts that it has been unable to persuade Telebrands to respond to its requests for information to meet its obligations under the agreements. In contrast Telebrands asserts that in 2012 upon discovering that all was not well with representations made by Bancroft and having been subjected to investigations of fraud on account of Bancroft's mismanagement, relation between the parties became strained. Following this Telebrands changed its registered agent and director in Saint Lucia and requested information from Bancroft for the purpose of preparing documents required for complying with the FSRA which Bancroft has failed to provide.
- [52] There appears to be a fair amount of controversy over these matters and these are all issues to be tried in one set of proceedings and resolved in one suitable forum. Telebrands has already initiated proceedings concerning these matters, as part of its complaint before the NJ court and it would more expense and inconvenient to litigate these matters separately.
- [53] The light of these circumstances the burden rests on Bancroft's to show that special circumstances exist to warrant this Court not exercising its

discretion to decline jurisdiction and grant a stay. This must be established objectively on cogent evidence. Bancroft's evidence has not shown any personal or juridical advantage to be derived from this claim being tried in Saint Lucia, which will be lost if the claim is tried in New Jersey. Neither has it been demonstrated that Bancroft will not receive justice in the NJ court if this claim is tried there.

[54] I have found nothing on the facts, which require that the trial should nevertheless be held in Saint Lucia, to avoid injustice to Bancroft. That burden has simply not been discharged.

CONCLUSION

[55] I am guided by the principles enunciated in the authorities cited above. The evidence supports the finding that both claims arose out of the same subject matter and should best be litigated in one court, for a just, real and proper outcome. I believe that the NJ court is a court of competent jurisdiction as both parties have their principal place of business there and in other parts of USA and the transactions concerned in both claims have their genesis and fructification there. The NJ court is the natural and more appropriate forum for trying this claim and I am satisfied that the interests of all the parties and the ends of justice will best be served there without any prejudice to Bancroft.

[56] For these reasons the Court declares as follows:

- (1) That the claim form and statement of case filed in claim No.SLUHCV2015/0992 is hereby stayed pending the determination of the proceedings before the Superior Court of New Jersey Law Division, Essex County Docket No.L-008292-15.
- (2) Either party is at liberty to apply to the court to vary or discharge this order, on notice to all parties, should the circumstances change.

- (3) Having concluded that the proceedings should be stayed, the applicant's request for an extension of time to file a defence and relief from sanctions need not be addressed.
- (4) Costs is awarded to the applicant in the sum of \$1,500.00.

Cadie St Rose-Albertini
Commercial Court Judge