

**SAINT KITTS AND NEVIS
NEVIS CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHC2006/0009

BETWEEN:

CONDOR INSURANCE LIMITED

Applicant

and

[1] PROMED CASUALTY INSURANCE COMPANY LIMITED

[2] PROMED REINSURANCE LIMITED

Respondents

Before:

Ianthea Leigertwood-Octave

High Court Judge [Ag.]

Appearances:

Mr. Jeffrey Nisbett for the Applicant

Ms. Constance Mitcham with Mr. Ricaldo Caines for the Respondents

2006: March 16;
May 25.

JUDGMENT

The Ex parte order

- [1] **LEIGERTWOOD-OCTAVE:** On 20th February 2006, Condor Insurance Limited, [hereinafter referred to as "the Applicant"] filed an application without notice for an injunction against Pro Med Casualty Insurance Limited and Pro Med Reinsurance Company Limited [hereinafter referred to as "the Respondents"]. The application was supported by the affidavits of Thomas R. Cherry and Harvey T. Millam. Written submissions in support of the application were filed on 21st February 2006.

[2] On 22nd February 2006, the Court granted the injunction, with the usual undertaking as to damages by the Applicant, in the following terms:

- i) That the Respondents by their agents or servants or otherwise howsoever be restrained and an injunction is hereby granted restraining them from continuing or prosecuting or assisting in the prosecution of certain arbitration proceedings commenced by the Respondents in the United States of America against the Applicant until 16th March 2006.
- ii) That the Applicant by its counsel undertake to issue and serve a Claim Form within 21 days of the date of the Order.
- iii) That the Court would further consider the matter on the 16th March 2006.

The Application to vacate the order

[3] On 6th March 2006, the Respondents applied to vacate the order. The application was supported by the affidavit of Evan L. Smoak. In brief, the grounds of the application were that, in the application for the injunction, the Applicant had failed to disclose material facts to the Court and that the injunction had been obtained in bad faith and was merely a delaying measure aimed at stalling or stopping the arbitration process, to which both sides had agreed. Written submissions were filed by the Respondents on 14th March 2006.

[4] The application to vacate the order was set down for hearing on 14th March 2006. On that date the court ordered that the application would be heard on 16th March 2006, the date set for the further consideration, on the granting of the injunction. The injunction was ordered to continue until 16th March.

The Relationship between the parties

[5] Before considering the application for discharge, it is important to give some basic details of the relationship between the parties.

[6] The Applicant is an international insurance company, incorporated in the Federation of St. Kitts and Nevis. Pro Med Reinsurance Company Limited, is an international reinsurance company, similarly incorporated. The existence and status of the entity, Pro Med Casualty Insurance Limited, is central to the dispute between the parties.

- [6] What is not in dispute, however, is that sometime prior to May 2005, the Applicant and the Respondents entered into two Reinsurance Agreements, whereby the Respondents would pay premiums to the Applicant to cover certain risks. The first Agreement being the Excess of Loss Reinsurance Agreement and the second Agreement being the Quota Share Reinsurance Agreement. Both Agreements contain arbitration clauses.

The Procedural Challenge – CPR11.16

- [7] In their application to vacate the order, Respondents argued that the order for the injunction did not comply with the provisions of Rule 11.16 of Eastern Caribbean Supreme Court Civil Procedure Rules 2000 [hereinafter referred to "CPR"] and therefore should not stand.
- [8] CPR11.16 provides that where an order has been made on an application without notice, a Respondent may apply to the court to set aside or vary that order. Such an application must be made not more than 14 days after the service of the order on the respondent.
- [9] CPR11.16 (3) provides that the order must contain a statement telling the respondent of the right to make an application in accordance with the rule. The Respondents argued that the order for the injunction as filed and served did not contain the mandated statement and was therefore fatally flawed. This omission in their view has served as an additional disadvantage as the Respondents were made to suffer damages waiting on the stipulated time of the next hearing, until they were advised otherwise.
- [10] The Applicant in response to this argument accepts that the order did not advise the Respondents of their right to apply within 14 days to have it set aside but submits that the Respondents were not prejudiced by the form of the order. The Applicant is asking the Court to exercise its case management function under CPR26.9 [3], and put the matter right even though there has been failure to comply with CPR11.16 [3].
- [11] The purpose of CPR11.16 is quite clear, it is to ensure that a respondent against whom an order has been obtained on an application without notice is informed of his right to vary or

discharge it within a specified time and to prevent prejudice and injustice. It should be noted, however, that there is no sanction for non-compliance with the rule.

[12] In this case, although the order did not inform the Respondents of their right under CPR11.16 [3], they applied to discharge the order on 6th March 2006. I agree with Rawlins J in **David Carson v Richard Silva and Elizabeth Silva**¹, where he applied the decision of Matthew J in **Cecil Penn [as attorney for Harold Creque] v Natalie Creque and James Connor**² in holding that failure to comply with CPR17[4] and [5], which mandates the court to fix a date for the further hearing of an application for an interim order and fix a date on which an interim injunction will terminate, unless a further order is made on the further consideration of the application, will not invalidate an order, in the absence of prejudice to a respondent, as the rule did not provide a sanction for non-compliance.

[13] In my view, it has not been shown that the Respondents suffered any prejudice or damages as a result of the Applicant's non-compliance.

[14] CPR26.9[2] states that failure to comply with a rule does not invalidate any step in the proceedings, unless the court so orders. I do not find it just in these circumstances to make such an order and the order filed on 23rd February 2006 is held to be valid.

Discharge of the order: Non-disclosure of Material Facts

[15] The Respondents submits on this ground that in the application for the injunction, the Applicant failed to give the Court a true account of its relationship with the Respondents.

In addition, the Applicant failed to disclose the following material facts that:

- i) The Applicant had specifically agreed to arbitrate "any" dispute, including "formation and validity" which is the basis of their challenge in this court;
- ii) The Applicant had agreed that the "venue of the arbitration would be New York City.
- iii) On 17th February 2006, the respondents had filed a Petition to Compel Arbitration in the U.S. District court for the Southern District of New York, which is the district in which the arbitration will be held.

¹ BVIHCV2001/0130

² BVIHCV2001/0099

- iv) After learning of the facts that underlie its challenges to the Reinsurance Agreements, the Applicant had continued to ratify the Agreements by accepting premiums;
- v) The Applicant further ratified the Reinsurance Agreements by invoking the Access to Records Clause of the Reinsurance Agreements to conduct an inspection of the Respondents books in August 2005;

- [16] In his affidavit in support of the application for the injunction, Harvey T. Milam, President of Condor, deposed that at a meeting of 19th May 2005, he had been advised by Jeffrey Brunken that Pro Med Casualty Insurance Limited, the entity that had issued the policies to the public via the agency PRU, may not have ever been properly established as a company in Nevis.
- [17] Mr. Milam further states that after a meeting in August 2005, Condor "passively received a minimal premium payment" which has been held in escrow pending a resolution of the matter and which should not be deemed a waiver or ratification of the illegal conduct in the carry out of the underlying insurance business.
- [18] In a second affidavit on 13th March 2006, Mr. Milam states that the last premium payment Condor received was on 21st July 2005, in the amount of US\$31,296.01 representing a premium payment under the Agreement for the month of June 2005.
- [19] The Respondents contend in the affidavit of Evan L. Smoak filed on 6th March 2006 that the Applicant continued to accept premiums in the months of July, August and September 2005 and which the Applicant challenges for lack of proof. In addition, Mr. Smoak states that from 1st to 4th August 2005, two of the Applicant's representatives inspected the Respondents' files exercising its right to access under Access to Records Clause of the Excess of Loss Agreement. This was not disclosed by the Applicant.
- [20] It is the Respondents' submissions on non-disclosure of material facts in relation to the arbitration proceedings which I find to be of particular significance. I think it important to reproduce the relevant text of the arbitration clauses in the two agreements between the parties.

[21] Article 12 of the Excess of Loss Agreement states as follows:

"As a condition precedent to any right hereunder, all matters of difference between the parties arising under, out of or in connection with this Agreement, including formation and validity, and whether arising during or after the period of this Agreement, shall be referred to an arbitration tribunal in the manner hereinafter set out.

...

The place of the arbitration may be chosen by the parties, but in default of such choice, the place of arbitration shall be in London."

[22] Section 12 of the Quota Share Reinsurance Agreement states:

"As a condition precedent to any right hereunder, all matters of difference between the parties arising under, out of or in connection with this Agreement, including formation and validity, and whether arising during or after the period of this Agreement, shall be referred to an arbitration tribunal in the manner hereinafter set out.

...

The place of the arbitration will be set by the arbitration tribunal, but in the default of such choice, the place of arbitration shall be in Nevis."

[23] On the issue of the arbitration proceedings, Harvey T. Milam in his affidavit of 20th

✓ February 2006, stated that pursuant to the Respondents had demanded arbitration with the Applicant and selected an arbitrator, Diane M. Nergaad. He further states that "in order to avoid the risk of default if Condor ignored the demands for arbitration, Condor responded to the arbitration demand with a full reservation of rights and with a vigorous
✓ objection to the panel's subject matter jurisdiction of the panel by nominating an arbitrator". Other than to state that Condor is in immediate jeopardy and would suffer irreparable harm if the "current ad hoc arbitration" were to proceed, Mr. Milam makes no further reference to the Applicant's participation in the arbitration process. Neither the affidavits of Thomas R. Cherry nor Roy Bray, in support of the application for the injunction provide any additional information on the Applicant's role.

I have considered the affidavit evidence of Evans L. Smoak with exhibits in support on the point and which remain unchallenged. The exhibits reveal communication between the parties, which I find to be crucial.

[24] As deposed by Mr. Smoak and supported by the exhibited correspondence, relevant aspects of the arbitration proceedings were as follows:

- i) The Respondents instituted the arbitration process on 7th October 2005.
- ii) On 3rd November 2005, indicating that they reserved their rights, the Applicant appointed Mr. Klaus Kunse as arbitrator. In correspondence dated 11th November 2005, Thomas L. Cherry, counsel for the Applicant, wrote to Evans Smoak stating that "although the agreement sets London as the venue, we propose that New York may be more a suitable and convenient alternative ...".
- iii) On 3rd November 2005, the Respondents appointed Dianne M. Nergaard as arbitrator.
- iv) On January 10th 2006, counsel for the Applicant wrote to Paul Dassenko, who had been selected to serve as Umpire of the arbitration tribunal that Condor could meet on 22nd February 2006. This was in response to the Umpire's suggestion that the arbitrators' calendars could accommodate an Organizational Meeting on February 22nd and 23rd 2006.
- v) On January 19th 2006, the Umpire wrote to the parties requesting a statement of position in order to assist the panel at the Organizational Meeting, scheduled for 22nd February 2006.
- vi) On 17th February 2006, the Respondents filed a Petition to Compel Arbitration in the US District Court, Southern District of New York.

The Duty to make full and frank disclosure on an application without notice

[25] The compelling duty on a litigant to make full and frank disclosure on an application without notice is not in dispute, as held in **Memory Corporation Plc and another v Sidhu**³. That case involved an application for discharge of a freezing order obtained on an application without notice on the grounds that the applicant had failed to inform the court of the possibility that the evidence of bank accounts had been obtained illegally.

[26] In holding that an applicant's duty is well established, Robert Walker LJ⁴ endorsed the view Warrington LJ in **Rex v Kensington Income Tax Commissioners, Ex parte de Polignac (Princess)**⁵:

"It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage

³ [2000] 1 WLR 1443

⁴ Ibid at 1453

⁵ [1917] 1 K.B. 486 at page 509

he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

- [27] One could not require a clearer statement of the law. With the duty to disclose firmly established, the question for the court is whether the applicant has failed to disclose a material fact which might have affected the granting of the injunction, this position is supported by the case of **Fitzgerald et al v Williams**⁶. Where the Court finds that a material fact is not disclosed, it must decide whether the non-disclosure is significant.
- [28] In applying the principle to the instant case, the contents Notice of Application without notice filed by the Applicant for the interim injunction must be examined. It states that Condor is seeking to restrain the commencement in the United States, or continuing or prosecuting or assisting in the prosecution of certain proceedings commenced by the Respondents in the United States of America. The order granted by the court was essentially in those terms. The injunction spoke directly to the arbitration proceedings.
- [29] The Applicant never disclosed the role it had played in the arbitration proceedings. Their evidence in support refer to an "ad hoc arbitration", where in effect both sides had taken steps to proceed with the arbitration as set out in the Agreements. The Applicant was involved in choosing the venue for the arbitration, they had appointed an arbitrator and had agreed to participate in the organization meeting with the arbitration panel on February 22nd 2006. It is my view that these are material facts which the Applicant was compelled to disclose in its application for the injunction as they relate to the substance of the injunction and might have affected the granting of the order.

Severability of the arbitration clause/Illegality of the Agreements

- [30] Both sides presented written and oral submissions on the severability of the arbitration clause from the Agreements and the illegality of the Agreements. Their submissions were supported by authorities. In light of my ruling on the discharge of the injunction for material

⁶ [1995] Q.B. 657

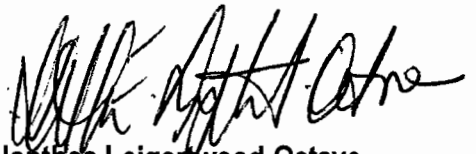
non-disclosure, I do not intend to rule on those submissions, as any finding would in my view would be on a substantive issue.

Variation of ex parte order – Filing of the Claim Form

- [31] In the order of 22nd February 2006, the Applicant was directed to issue and serve a Claim Form within 21 days of the date of the order. Time expired on 15th March 2006. At the hearing on March 16th 2006, the Applicant made an oral application to extend time, invoking the court's case management powers under CPR26.1[2][k]. That rule gives the court the power to extend time for compliance with an order even if the application for the extension is made after the time for compliance has passed.
- [32] Counsel submitted that although the Applicant had not complied with the order by filing on or before 15th March 2006, they had rectified the position by filing on the morning of the 16th March and the application had been made promptly.
- [33] I agree with the Applicant's submissions and grant the application accordingly.

Order

- [34] Based on the foregoing, I make the following orders:
- i) The Application to vacate the order of court dated 22nd February 2006 is granted.
 - ii) The injunction granted by the court on 22nd February 2006 and continued on 14th March 2006 and on 16th March 2006, is hereby discharged.
 - iii) Costs of the application to be costs in the cause.
 - iv) The order of court of 22nd February 2006 is varied to the extend that time is extended to 16th March 2006 for the Applicant to issue a Claim Form.
 - v) Service of the Claim Form to be in accordance with Part 5 of CPR 2000.


Ianthea Leigenwood-Octave
High Court Judge [Ag.]