

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/01104**

BETWEEN

**GREAT LAKES INSURANCE SE
(as Subrogee of Mt. Daufuskie Charters Inc)**

Plaintiff

AND

BRILAND GAS AND OIL COMPANY LIMITED

Defendant

Before: The Hon. Madam Justice G. Diane Stewart
Appearances: Mrs. Tara Archer-Glasgow, Mr. Audley Hanna and
Mr. Trevor Lightbourn for the Plaintiff
Ms. Rodger Outten for the Defendant
Hearing Date: 31st May 2021 and 21st June 2021
Ruling Date: 20th October, 2021

RULING

1. By Amended Summons filed the 12th May 2021, the Defendant, the Briland Gas and Oil Company Limited (the “**Defendant**”) seeks an anti-suit injunction against the Plaintiff, Great Lakes Insurance SE (as Subrogee of Mt. Daufuskie Charters Inc) (the “**Plaintiff**”). The Defendant seeks the anti-suit injunction on the basis that the present action was commenced by the Plaintiff in breach of an exclusive jurisdiction clause contained in an agreement between the Mt. Daufuskie Charters Inc (the “**Assured**”) and the Plaintiff.
2. The Defendant relies on the Affidavit of Danielle A. McKenzie filed the 21st May 2021 and the Supplemental Affidavit of Danielle A. McKenzie filed the 31st May 2021 in support of its Amended Summons.
3. The Defendant in opposition to the application filed two Affidavits of Shayla Campbell, one of which exhibited an unfiled affidavit of Alexander Mark Thomas, the witness statement of Mark Thomas files May 3rd, 2021, affidavit of Oluwfolakemi Swain and the witness statement of Douglas Wager.
4. The Defendants application by summons filed February 1st, 2021 for leave to adduce hearsay evidence was allowed by the Court.
5. The Plaintiff opposes the Defendant's application on the following grounds:
 1. it was out of time,
 2. it was filed without the leave of the court and constitutes an irregularity,

3. the Defendant's unconditional appearance waived its right to challenge the Court's jurisdiction,
 4. the Defendant was not a party to the agreement in which the exclusive jurisdiction clause is contained.
6. As it pertains to the Plaintiff's contention that the Amended Summons was filed without the leave of the Court, I granted the Defendant leave to file the Amended Summons. The Defendant's initial summons was filed on the 1st February, 2021. While the Amended Summons was filed outside the time set in the Second Case Management Order made on the 11th November 2020 and filed the 14th December 2020 (**the "Second Case Management Order"**) I considered the fact that the Plaintiff also failed to comply with the order as well as considered the setbacks caused worldwide by the unexpected and horrid pandemic of COVID-19.
7. While directions given during case management should be followed, the Court is given the power to manage cases before it in order to ensure that the matter proceeds expeditiously, efficiently and fairly. Those directions given by the Court however, should not be taken lightly in order to avoid sanctions to a party's detriment. Alternately, the discretion to disallow a party from being heard is something that should also not be taken lightly.

Background Facts

8. The Plaintiff, an insurance company (**the "Insured"**), insured the vessel the M/V 'Wani Kanati' which was owned by the Assured Mr. Daufuskie Charters Inc. (**the "Vessel"**). In 2018, the captain of the Vessel purchased fuel from the Defendant which he claims was contaminated and caused damage to the Vessel. As a result of the damage, the Assured submitted a claim to the Insured in relation to the loss sustained.
9. Following an extensive investigation, the Insured and Assured entered into a settlement agreement and the Assured's claim was settled in the amount of US\$146,000.00. The Plaintiff, as subrogee of the Assured now seeks damages from the Defendant for negligence, breach of contract and breach of statutory duty for selling the bad fuel to the Assured.

ISSUES

9.1 The issues for the Court's determination are:

1. whether an anti-suit injunction should be granted because of the exclusive jurisdiction clause contained in the Insuring Agreement and the Settlement Agreement.
2. Further, whether the action constitutes an abuse because of these clauses.

SUBMISSIONS

DEFENDANT'S SUBMISSIONS

10. The Defendant contends that as the subrogee of the Insured, the Plaintiff is bound by the terms of the Insuring Agreement SYP/8/COM which provides an established and

agreed position on the choice of the law and forum in the event of any dispute; specifically Clause 11 which states that:

“any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty Law and practice but where no such well established, entrenched precedent exists this insuring agreement is subject to the substantive laws of the State of New York.....any dispute arising hereunder shall be subject to the exclusive jurisdiction of the Federal Courts of the United States of America, in particular, the Federal District court within which you the Assured resides or the Federal District court within which your insurance agent resides....”

11. The Settlement Agreement executed between the Plaintiff and the Assured contained a Venue clause at clause 13 thereof, which states;

“It is also hereby agreed that any dispute arising hereunder shall be to exclusive jurisdiction and venue in the United States District Court for the Southern District of New York.”

12. On their construction, the Defendant submits that Clause 11 and Clause 13 unequivocally lead to the determination that an exclusive jurisdiction clause exists and the Assured and the Insurers agreed to submit any dispute arising out of the insuring agreement and the settlement agreement, which the Defendant maintains includes all claims stemming from all matters relating to both agreements to the exclusive jurisdiction of the Federal District of New York.

13. The Defendant contends that the Court has a discretion to grant an anti-suit injunction in cases where it would appear to be just and convenient to do so and where the ends of justice so required. The two main grounds for granting an anti-suit injunction being that the foreign proceedings constituted the breach of a jurisdiction clause in a contract between the parties and that these proceedings are otherwise vexatious or oppressive.

14. The Defendant relies on **Turner v Grovit [2001] UKH 65** where Lord Goff discussed the applicability of granting an anti-suit injunction,

“Under English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause. The applicant does not have to show that the contractual forum is more appropriate than any other; the parties’ contractual agreement does that for him. Similarly, where as in the present case there has been clearly unconscionable conduct on the part of the party sought to be restrained, this conduct is a sufficiently strong element to support the affected party’s application for an order to restrain such conduct. This, as well, is not based upon the complaint that the action has been brought in an inappropriate forum – the doctrine of forum non conveniens.”

15. The Defendants also submit that the proceedings are vexatious and oppressive due to the mere fact that the Plaintiff breached its contractual obligation to litigate in the United States and outside of the one year timeframe outlined in the Insuring Agreement. They rely on **Turner** where Lord Goff stated, *inter alia*...**“This follows the same basic logic as the grant of a restraining order where the unconscionable conduct lies in the pursuit of proceedings elsewhere.”**

PLAINTIFF'S SUBMISSIONS

16. The Plaintiff submits that an anti-suit injunction is an equitable relief which restrains a person from continuing or commencing proceedings in a foreign court. They submit that the Defendant's entrance of an unconditional appearance on 22nd August, 2019 is an effective waiver of any irregularity relative to a writ or its service, or any objection to the jurisdiction of the court or any failure to comply with the Rules of the Supreme Court.
17. A conditional appearance is a complete appearance to the action for all purposes, subject only to the right reserved by a defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. The Defendant did not avail itself of the option to enter a conditional appearance pursuant to Order 12 rule 7 of the RSC which would have entitled it to object to any irregularity in the issue or service of the writ or to the jurisdiction of the court.
18. The Plaintiff relies on **Tiffany Glass Ltd v F Plan Ltd (1979) 31 WIR 470** where Kelsick JA held:

“Entry of an unconditional appearance to a defective writ waives any objection to the jurisdiction of the court as well as any irregularity in the commencement of the proceedings. So also does any fresh step taken, with the knowledge of the irregularity, with a view to defending the action on its merits. See the note to Order 2, rule 2, in the Supreme Court Practice 1979, page 10, and the cases there cited. In my judgment the failure to comply with Order 6, rule 2(1)(c), was an irregularity which was waived by the defendant when it entered an unconditional appearance to the writ.”
19. The Plaintiff alternatively submits that the Defendant has no locus standi to enforce any right or obligation contained in the SYP/8/COM or the Settlement Agreement as it is not a party to either contract. The Plaintiff claims that the Defendant admits that both agreements are between the Assured and the Insured at paras. 3.8 and 3.11 of its submissions. The Plaintiff submits that no stranger to a contract can take advantage of it, although made for his benefit.

DECISION

20. The Defendant seeks to challenge the jurisdiction of the Court on the ground that the Bahamian court is not the proper forum. They rely on clauses in an Insuring Agreement and a Settlement Agreement which were executed by the Insurer and the Assured. A defendant to an action is given the opportunity to challenge the jurisdiction of the Court under Bahamian Law but only within a specific timeframe after the filing and service of the writ of summons.
21. **Order 12 rule 7 (1) of the Rules of the Supreme Court (the “RSC”)** makes such a provision and states as follows:

“7. (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.”

22. This provision is only possible where a defendant enters a conditional appearance pursuant to **Order 12 rule 6 of the RSC** as opposed to an unconditional appearance. **Order 12 rule 6** provides as follows:

“(1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.”

23. I refer to **Peter and another v Ahmed Maheer Abouelenin [2008] 2 BHS J. No. 25**, where Evans J, as he then was, considered the effect of these provisions:-

“19 In the 1979 English Rules at paragraph 12/8/2, the learned authors state:

“The application must be made before entering an unconditional appearance. After unconditional appearances it is too late to object to any irregularity in the issue or service of the writ or notice of the writ, of which the defendant had knowledge, for appearance is a “fresh step” within Order 2 rule 2(1).

20 Further, the learned authors at 1979 Rules of the Supreme Court 1979 (12/7/4) state:

A conditional appearance or appearance under protest is a complete appearance to the action for all purposes, subject only to the right reserved by the defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. A conditional appearance is, although expressed to be “conditional,” nevertheless a complete appearance to the action for all purposes subject only to the right reserved by the defendant to apply to set aside the writ or service, and moreover it is a voluntary appearance and may thus amount to a submission to the jurisdiction. If a party, therefore, desires to avoid submitting to the jurisdiction, the safer course for him is not to enter a conditional appearance, but without entering any appearance to apply to set aside the service or the writ on the ground that the court has no jurisdiction to claim or exercise jurisdiction over him.” (Underline added).

21 It seems clear from the rules that a defendant wishing to raise an objection to the jurisdiction of the court should do so before entering an appearance or after having obtained leave to enter an unconditional appearance and then within the time limited for making such application, usually fourteen (14) days, failing which he is deemed to have submitted to the jurisdiction.”

24. The Plaintiff's writ of summons was filed on the 2nd August 2019. Within the requisite filing period, the Defendant entered its Memorandum of Appearance and Notice of

Appearance on the 22nd August 2019 and Defence filed on the 16th September, 2019. Moreover, the Defendant participated in the progress of the action to trial up to the filing of its Amended Summons. Therefore, the Defendant has waived its right to object to the Bahamian court not being the proper forum.

25. In the circumstances, I find that the Defendant has submitted to the jurisdiction of the Court thereby waiving its right to challenge its Jurisdiction. I need not address the further claim that the settlement agreement covers any and all proceedings which are not disputes arising from the agreement itself but are in fact proceedings to recover sums paid out to the assured. Further I need not address the second ground as the Defendant has waived its right to object on the basis of jurisdiction and cannot rely on the exclusive jurisdiction clause to support its abuse of process application. The Defendant's application for an anti-suit injunction is dismissed.
26. The Defendant shall pay the Plaintiff's costs to be taxed if not agreed.

Dated this 20th day of October 2021


Hon. G. Diane Stewart