Judgment 41/2005 **Koken (as liquidator of Reliance Insurance Company) v Brownstone Agency Incorporated et al – Royal Court (Civil Action File 785) – 29 July 2005**

Royal Court Civil Rules, 1989 –Strike out application – circumstances in which extrinsic evidence may be admissible – estoppel – application allowed in part

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 29th day of July, 2005 before Catherine Mary Newman, QC, Lieutenant Bailiff; sitting alone

In the matter of:

M DIANE KOKEN, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA IN HER OFFICIAL CAPACITY AS LIQUIDATOR OF RELIANCE INSURANCE COMPANY

(Appellant)

v.

1. BROWNSTONE AGENCY INC

("the First Respondent")

2. REBORE THORPE & PISARELLO P.C.

("the Second Respondent")

Whereas on 25th and 26th April, 2005, the Lieutenant Bailiff considered an application by Brownstone Agency Incorporated in the terms attached hereto for certain paragraphs of the Cause enumerated in the said application to be struck out pursuant to Sections 36 and 43 of the Royal Court Civil Rules and heard thereon Advocates R. G. Shepherd and A. M. Ozanne, Counsel for the Applicant and Respondents respectively

The Lieutenant Bailiff this day gave judgment in terms attached hereto and declined to strike out the paragraphs as sought save in so far as the last sentence of paragraph 45, which was struck out, paragraph 51 which was struck out and the words "and an opinion obtained by the Liquidator from the New York law firm of Allen & Overy" in paragraph 49 which were struck out

And awarded costs on the standard recoverable basis to the Applicant.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text
29.07.08

OFFICIAL TRANSCRIPT

FRIDAY 29TH JULY 2005

IN LA COUR ORDINAIRE

Before

Catherine Mary Newman, QC
Lieutenant Bailiff

RELIANCE INSURANCE v. BROWNSTONE & REBORE
(Civil Action No. 785)

Ruling given by Lieutenant Bailiff Newman on an application to strike-out by Brownstone

THE LIEUTENANT BAILIFF:

1. I am ruling on a case management application issued by Brownstone Agency Incorporated, which I shall hereafter call "Brownstone" made on 25th January 2005 and which I heard argued fully on 25th and 26th April 2005.

2. Brownstone asks me first to limit the issues to be resolved by the Court at the trial of the matter to those set out in a draft list of issues annexed to the application, which schedule also identifies the law said to be applicable to these issues. Alternatively, Brownstone asks the Court to identify the issues raised by the Pleadings which are proper to put before the Jurats at trial. This would exclude Reliance's estoppel claim. Secondly, Brownstone ask for seven paragraphs of the Cause, enumerated in the application, to be struck out pursuant to Sections 36 and 43 of the Royal Court Civil Rules. These paragraphs include those which set out the essential facts upon which Reliance relies for its estoppel claim.

3. In argument no additional points were raised on paragraph 1 of the application and in this judgment I shall treat paragraph 1 as standing or falling with paragraph 2. The statement of issues annexed to the present application was prepared by Brownstone. It asserts that there are two principal issues to be tried. I paraphrase slightly in setting them out.

4. First, the meaning of the word "losses" in the Order in Judgment issued by the Supreme Court of the State of New York on 4th December 2000. Brownstone says that the construction of this word in the document is governed by both New York and Guernsey law. To get to the meaning of the word "losses" Brownstone contends that the Court will have to consider what, if any, assistance may be derived from the terms of the re-insurance agreement, that is paragraph 2(a) of the Statement of Issues. This too is said to be governed by New York and Guernsey law. A second, subsidiary, consideration along the way is said to be the law on the proper construction of the New York judgment. That exercise is also said to be governed by New York and Guernsey law; that is paragraph 2(b) of the Statement of Issues. In any event there is no real material distinction between issue 2(b) and issue 1.

5. Secondly, the Statement of Issues asserts that once the Court has resolved the first issue by way of the two subsidiary pathways, it must go on to determine what re-insurance liability Brownstone continues to maintain with respect of Reliance Insurance Companies, Brownstone Programme Insurance Policies, on and after January 1st 1999. This question is said to be governed exclusively by New York law. The substantive relief sought at trial by Reliance Insurance Company, a Pennsylvanian Corporation appearing by its liquidator, to which I shall hereafter refer to as "Reliance", is first a declaration that the proper meaning of "losses" in paragraph 1(c) of an award of an arbitration panel of 28th June 2000, as incorporated into a Court Order and Judgment issued by the Supreme Court of the State of New York on 4th December 2000, was to render Brownstone in respect of policies which incepted before 1st January 1999 responsible for its quota share of losses that occurred before 1st January 1999, notwithstanding that such losses might not have been paid by Reliance after 1st January 1999. Secondly, Reliance also raises an estoppel claim.

6. The application before me is supported by an affidavit of Advocate Alison Ozanne, who appeared for Brownstone. It is opposed by an affidavit of Advocate Robert Shepherd, who appeared for Reliance. I find this procedure a little odd, not least because the concept of the Advocate giving evidence could potentially cause serious difficulties in the presentation of a case, but nothing may turn on that problem on this particular occasion. Reliance argues that it will be relevant for this Court to have before it all the contractual arrangements which gave rise to the arbitration. I accept that submission. The Court would be assisted by having before it any interlocking and interdependent agreements, which are part of the contractual package, and thus of the factual matrix and relevant legal context.

7. Reliance also argues that the position taken by the parties going into the arbitration are relevant, and I quote from the skeleton argument:-

    a. *"Because they show the way in which the parties had previous used or defined particular words."*

8. Reliance argues that it is material for the Court to know the scope of the dispute.

9. As to conduct following the arbitration award, or following the Order in Judgment, Reliance does not submit that such conduct is relevant to construction, but it does argue that the meaning which the parties ascribe to the word "losses" immediately after the award and before the judgment, is relevant, because Brownstone, it says, would be estopped from now seeking to ascribe to words in the judgment a different meaning.

10. In contrast Brownstone argues that the conduct of the parties after the award in judgment is inadmissible in construing the award and judgment, see *Munro v. Taylor (1848) 8 Hare [51]* subsequently affirmed on appeal, and *Belton v. Bass, Ratcliffe & Gretton Limited (1922) 2 Ch. 449*. In its skeleton argument Brownstone contends that the only material which the Court should look at is the reinsurance agreement itself and the evidence given by experts on New York Reinsurance Law. Brownstone also denies that any estoppel is capable of arising in this case.

11. The Court's power to strike out under Rule 36 of the Royal Court Civil Rules is well known and needs no elucidation from me, as is the fact that it almost precisely reflects Order 18, Rule 19 of the Rules of the Supreme Court 1999, which were in force in England and Wales prior to the new regime imposed by the Civil Procedure Rules. The Royal Court also has an inherent jurisdiction to strike out.

12. The jurisdiction to strike out a pleading or part of a pleading on the ground that it discloses no reasonable cause of action or is obviously frivolous, vexatious, unsustainable or otherwise an abuse of the process is one to be exercised only in plain and obvious cases. The jurisdiction to strike out a part of a pleading on the ground that it would tend to prejudice,

embarrass, or delay the fair trial of an action plainly includes the jurisdiction to strike out irrelevant material which will not assist the Court in determining the real dispute between the parties. After all it is trite law that the function of pleadings is to set out the material facts on which the parties will rely at trial and which they will seek to prove by relevant and admissible evidence.

13. Both parties submitted that in construing the language of the award and of the judgment the Court should pay regard to what lawyers commonly call the relevant factual matrix. It appears to be common ground that the Court's purpose is to find what a reasonable person, circumstanced as the parties were, would have understood the parties to have meant by the language which they used. See for example the speech of Lord Steyn in *Sirius International Insurance Co. (Publ) v. FAI General Insurance Limited [2004]1 WLR 3251*. In that case Lord Steyn also endorsed the modern trend away from literalism towards the interpretation of documents in accordance with commercial common sense, or the reasonable expectations of honest businessmen, a concept found in his speech in the earlier decision *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [197]) A C. 749.* It is further common ground that the mere subjective intention of one party is not a proper factor to be taken into account in construing the meaning of the words used in a document. Thus far it may swiftly be discerned that the principles advanced by the parties in argument were identical to those which would cited to the Court if a contract were being construed.

14. Extrinsic evidence is generally inadmissible to contradict or vary a judicial document. However, when it is necessary to identify the issues resolved by the judgment or award extrinsic evidence contemporaneous or roughly contemporaneous with the judgment or award is frequently resorted to. Where, as here, parties disagree about the meaning of words in a judgment or award it is necessary to look at extrinsic evidence to set the disputed words in their proper legal context, and, at least in this case, this exercise may fairly and properly be conducted in accordance with the principles applicable to the construction of contracts.

15. In approaching the detail I have asked myself whether Brownstone has clearly demonstrated that any particular averment cannot properly be part of the relevant factual matrix or legal context. I have reminded myself that this matter is not being tried now. The fact that certain averments may survive this strike out application does not mean that the Court has reached a view on what is the proper construction of the disputed word or on the estoppel claim, or even a view on what directions might hereafter be given to the Jurats at trial on the treatment of facts proved or admitted at trial.

16. Turning now to the statement of case put forward by Reliance.

17. Brownstone seeks to strike out paragraphs 10, 11, 12, 14, 15, the words *"by mutual agreement"* from paragraph 16, paragraphs 18 to 29 inclusive, 31 to 34, 37 to 41, 43 to 45, 47, 48 and 58, as frivolous, vexatious, prejudicial, embarrassing, or otherwise an abuse of the process. It seeks to strike out all and any references to a document called *"The Allen & Overy Opinion"* for the same reason. Finally, it seeks to strike out paragraphs 67 to 72 on the same grounds as the other paragraphs but also on the grounds that these paragraphs disclose no reasonable cause of action.

18. Paragraph 10 contains a reference to the Program Manager's Agreement. This was part of the package of contracts and thus part of the relevant legal context and it is not possible to understand the contractual arrangements between the parties without it. Leaving it in will not lead to the introduction of inadmissible evidence within conclusive negotiations. Paragraphs 11 and 12 go with paragraph 10, simply setting out the terms of the Program Manager's Agreement. It is noteworthy that Brownstone does not seek to strike out paragraph 13, which contains a reference to the Program Manager's Agreement. In the light of this it makes no sense for the Court to be unable to look at the documents.

19. Paragraphs 14 and 15 explain that during the currency of the agreement between the parties money flows were netted off and it seeks to identify the various forms of mutual accounting which were used. I do not accept the argument that this material is likely to lead to the presentation of inadmissible evidence by virtue of the fact that it will not be determinative of arguments for construction, nor did I understand Reliance to be suggesting that it was. Reliance simply says that to understand the award one has to understand the scope of the dispute and in broad terms I accept that submission. I must warn the parties that my acceptance of that submission however should not be taken as any encouragement to attempt to re-litigate the dispute, which I will not permit.

20. If I am the trial judge it is my intention to ensure that these matters are kept firmly in their place as matters of background, but I do accept that they have a place there. The Court may well want to know broadly what the parties were arguing about. That does not mean that the Court will be interested in re-trying, or tempted to re-try, the case.

21. I now turn to the words *"by mutual agreement"* in paragraph 16. Advocate Ozanne argues that these words introduce a factual dispute, resolution of which has no place in the application before me. In his skeleton argument Advocate Shepherd agreed to delete these words. I need to say no more about this aspect save to remark that so far as I am aware this amendment has not actually yet been executed.

22. Paragraphs 18 to 29: These paragraphs set out in fairly innocuous terms the history of the breakdown of the ordinary trading relationship and the scope of the dispute which was the subject of the arbitration. Reliance does not suggest that these paragraphs perform any wider function. I am not prepared to say that they should be struck out but I do give the same warning to the parties as I gave in relation to paragraphs 14 and 15: both parties must appreciate that the presentation of useful background material does not require wholesale reconsideration of every point which was previously in dispute. The Court has to rely on the good sense of the Bar in keeping these matters in check.

23. Paragraphs 31 to 34: After the award the parties agreed the calculations required by paragraph I.D of the Award. That figure then went into the judgment. Absent these paragraphs the figure of $9,546,657 would be incapable of being comprehended. I do not accept the submission that the explanation of how this figure has been arrived at by the parties and agreed between them is an attempt to re-litigate or an abuse of the process. However, Brownstone's skeleton does not suggest that any aspect of these paragraphs is likely to be seriously contentious in any material respect.

24. In *Prenn v. Simmonds (1971) WLR 1381,* Lord Wilberforce said that evidence of negotiations ought not to be received, rather the Court should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction. The 9.5 million-odd figure is not self-explanatory. It is not a step in negotiations, it is an agreed figure. I do not consider that my decision with respect to these paragraphs does anything more than permit the genesis of this otherwise incomprehensible agreed figure to be explained. I do not consider that my ruling is in any way inconsistent with the speech of Lord Wilberforce in *Prenn v. Simmonds*.

25. Paragraphs 37 to 41: It was not suggested in argument that these paragraphs are materially in dispute. Indeed paragraph 42 to which no objection is taken could be extremely difficult to understand without them. I decline to strike them out.

26. Paragraphs 43 to 45: Whilst what the parties did may be of assistance to the Court, what they thought will not be. I accept that part of this group of paragraphs strays too far into what Reliance thought. Accordingly, I will strike out the last sentence of paragraph 45, which is in any event overly tendentious. If Reliance wish to substitute simple wording such as *"they did so"* I will permit it.

27. Paragraphs 47 and 48: I accept Reliance's submission that these paragraphs are an integral part of the estoppel claim. I decline to strike them out. I have some further points to make on relevant aspects of New York Law later on in this judgment.

28. Paragraph 58: I accept Reliance's submission that the simple fact that there were no pre 1999 payments which were in issue, is potentially an important part of the factual matrix, and I decline to strike out this paragraph.

29. The Allen & Overy Opinion: References to an opinion from Allen & Overy appear in paragraphs 49 and 51. I accept Brownstone's argument that the substance of that opinion is demonstrably of no assistance to the Court on the question of construction. I will therefore strike out paragraph 51 and also the words *"and an opinion obtained by the liquidator from the New York Law firm of Allen & Overy"* in paragraph 49. I recognise that it is likely that the Jurats will learn that such an opinion was obtained but they should not need to know what it said. I recognise that the point is also taken that the Allen & Overy Opinion would be inadmissible hearsay. I accept the accuracy of that submission as a matter of law but it seems to me that the fundamental issue is that the opinion would be of no assistance whatsoever on the question of construction before the Court.

30. Paragraphs 67 to 72: By attacking these paragraphs in effect Brownstone seeks to take the heart out of the estoppel claim. They simply assert that it is bound to fail. They contend that estoppel cannot arise in the context of a judgment. Reliance argue that the judgment in this case has some characteristics of a Tomlin Order which is, of course, a type of contract. Whilst I accept that the position will not be straightforward it is in my judgment far from hopeless.

31. Brownstone also rely on a series of cases setting out the elements which it is necessary to plead to succeed on a case of estoppel by representation. I hope that Advocate Ozanne will not take offence if I do not refer to those cases in detail. One reason why I do not do so is that I accept Advocate Shepherd's submission that the cases cited do not convincingly or conclusively show that New York Law does not in any circumstances recognise the different category of estoppel claims, namely, estoppel by convention, which is the variant in play here. Another reason is that Reliance argues that the estoppel claims governed by Guernsey Law, which does recognise the doctrine of estoppel by convention. That dispute was not argued out to a conclusion before me and it would be wholly wrong for me to strike out the pleaded estoppel claim in such circumstances.

32. Advocate Ozanne also argues that estoppel is merely a shield and not a sword. I am bound to say that in my judgment that proposition has little more than a semantic role in estoppel by convention cases. If parties have agreed to use words in a certain way, the doctrine of estoppel may be used to prevent one of them from advancing a case based on a wholly different meaning. See the decision of the English Court of Appeal in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd (1982) 1 QB page 84.* After all, the real issue for the Court is not to attempt to define what a word means in the abstract but to interpret by permissible means what the parties intended the word to refer to, as Lord Hoffmann explains so well in his speech in *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. The same is true of consent orders.

33. On 6th October 2004, I gave directions which included a direction that Counsel should lodge an agreed statement of issues. I specifically provided that such agreed statement should state which matters in the action are governed by the Law of New York and which by the Law of Guernsey. Thus far this direction has not yet been complied with. Indeed it is plain to me that Brownstone have made no attempt to seek agreement on the statement of issues, preferring simply to put its own statement of issues before the Court. It is fair to say that I did not lay down any specific date by which the agreed statement of issues should be

provided. I had envisaged that at some point before the trial there would be a hearing at which the parties would, with such assistance as I can properly give, bring up any procedural or preliminary matters which, if left unresolved, might mar the smooth progress of the trial hearing with Jurats. An agreed list of issues would be required for such a hearing. If the parties cannot now agree on the precise formulation of each of the issues such a hearing would become even more useful because it would focus us all on what is and what is not agreed.

34. I thus remain ready to give further directions in this matter if required by the parties.

Are there any applications?

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I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

…… Suzanne M. O'Neill
Thursday 8th September 2005

