

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert L. Pratter, Acting Insurance
Commissioner of the Commonwealth
of Pennsylvania, acting in his official
capacity as Statutory Liquidator of Reliance
Insurance Company (In Liquidation),

NO. 269 M.D. 2001

Plaintiff,

v.

Reliance Insurance Company,

Defendant.

RECEIVED AND FILED
COMMONWEALTH COURT
OF PA (PHILA)
2010 OCT 19 P 3:05

*In re: Malcolm John Cox On His Own Behalf And On Behalf Of Underwriting Members Of
Syndicate 990 At Lloyd's For 1995 and 1996 Years of Account, Respondents.*

APPLICATION OF THE STATUTORY LIQUIDATOR TO ENJOIN
MALCOLM JOHN COX AND THE UNDERWRITING MEMBERS OF
SYNDICATE 990 FOR THE 1995 AND 1996 YEARS OF ACCOUNT
FROM PROSECUTING THE ACTION IN LONDON, ENGLAND

1. Plaintiff Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, acting in his official capacity as Statutory Liquidator of Reliance Insurance Company ("Liquidator"), submits this application, pursuant to 40 P.S. § 221.5, and Pa. R.A.P. 123, to enjoin Malcolm John Cox¹ and the Underwriting Members of Syndicate 990 at Lloyd's for the 1995 and 1996 Years of Account ("Syndicate 990") from further prosecuting the action that was filed against Reliance Insurance Company (In Liquidation) ("Reliance") in the High Court of Justice, Queen's Bench Division in London, England. Syndicate 990 should be enjoined from prosecuting that action because it violates the

¹ Malcolm John Cox is the Lloyd's underwriter for the 1995 and 1996 Years of Account who commenced the action in London on his own behalf and on behalf of the Underwriting Members of Syndicate 990 for the 1995 and 1996 Years of Account. See Claim Form and First Witness Statement of Geoffrey Ian Bassford ("Bassford Witness Statement"), attached hereto as Exhibit "I."

anti-suit injunction in Paragraph 22 of this Court's Liquidation Order, Section 526(a) of the Insurance Department Act, 40 P.S. § 221.26(a), and the parties' agreement to arbitrate.

2. The Liquidator requested, but Syndicate 990 refused, to withdraw its action in London. Syndicate 990 also has requested that the arbitration panel defer taking any action until the English court rules even though the arbitration panel, not the English court, is the only proper forum authorized by the parties to resolve this dispute. Therefore, the Liquidator requests that the Court enjoin Syndicate 990 from proceeding with the action in London, order that it terminate that action with prejudice and order that the parties are to proceed with their pending arbitration and submit all disputes to the arbitration panel for resolution. In support of his application, the Liquidator states as follows:

3. Syndicate 990 was one of several reinsurers that provided reinsurance protection to Reliance for certain commercial general liability policies that Reliance wrote in 1995 and 1996 ("Treaties"). A copy of the 1995 reinsurance treaty is attached hereto as Exhibit "A."² Accordingly, this Court has both personal and subject matter jurisdiction over Syndicate 990 under Section 504(b)(ii). 40 P.S. § 221.4(b)(ii).

4. On May 29, 2001, Reliance consented to the entry of an Order of Rehabilitation by this Court.

5. On October 3, 2001, this Court ordered Reliance into liquidation.

6. The Liquidation Order expressly enjoined and barred any party from bringing any actions against Reliance. *See* Order of Liquidation at ¶ 22, attached hereto as Exhibit "B." A copy of the Liquidation Order was provided to Syndicate 990. *See* Sept. 22, 2010 letter from D. Cohen to R. Jones, attached hereto as Exhibit "J."

² The parties are still conferring about the 1996 Treaty wordings.

7. Paragraph 22 of the Order of Liquidation is consistent with the anti-suit injunction in Section 526(a) of the Act, which provides that “upon issuance of an order appointing the commissioner liquidator of a domestic insurer . . . , no action at law or equity shall be brought by or against the insurer, whether in this Commonwealth or elsewhere.” 40 P.S. § 221.26(a).

8. A dispute arose after Reliance billed Syndicate 990 for its share of losses for certain claims that fell within the scope of the Treaties and Syndicate 990 refused to pay, contending, *inter alia*, that some of the claims were time-barred under the English Limitations Act.

9. Reliance responded that U.S., not English, law provided the applicable statute of limitations, that the claims were not time-barred and that Reliance also timely notified Syndicate 990 of them. See April 1, 2010 letter from M. Maier to Markel International Insurance Company, Ltd. (“Markel”) and copied to C. Miller/R. Erswell of XL,³ attached hereto as Exhibit “C.”

10. Simultaneously, Reliance demanded arbitration. See April 1, 2010 letter from M. Maier to C. Miller/R. Erswell, attached hereto as Exhibit “D.”

11. The treaties contain a broadly worded arbitration clause which provides:

[a]ny unresolved difference of opinion between the Reinsurer and the Company [Reliance] with respect to the interpretation of this certificate or the performance of the obligations under this certificate shall be submitted to arbitration. Each party shall select an arbitrator within one month after written request for arbitration has been received from the party requesting arbitration. These two

³ XL is the company that is managing the run-off for Syndicate 990. Markel is another London reinsurer that also had failed to pay its share of the claims. Reliance demanded arbitration against both Markel and XL as the run-off manager for Syndicate 990. Syndicate 990 opposed a joint arbitration with Markel. That issue has been resolved and the arbitration at issue here is only between Reliance and Syndicate 990. Markel also is not a party to the action in London.

arbitrators shall select a third arbitrator within 10 days after both have been appointed. Should the arbitrators fail to agree on a third arbitrator, each arbitrator shall select one name from the list of three names submitted by the other arbitrator, and the third arbitrator shall be selected by lot between the two names chosen. The arbitrators shall be impartial and shall be present and former officials of other property or casualty insurance or reinsurance companies. The arbitrators shall adopt their own rules and procedures, and shall render their decision with a view to effecting the intent of the parties. The decision of the majority of the arbitrators shall be final and binding on the parties. The cost of the arbitration, including the fees of the arbitrators, shall be shared equally unless the arbitrators decide otherwise.

Exhibit "A" at ¶ N (emphasis supplied).

12. In response to the demand, Syndicate 990 agreed that the dispute is arbitrable, challenging only Reliance's position that the applicable law and jurisdiction was New York.⁴ See April 30, 2010 email from A. Ramage to M. Maier, attached hereto as Exhibit "E."

13. Reliance and Syndicate 990 appointed their respective party-appointed arbitrators and, consistent with the arbitration clause, the party-appointed arbitrators selected the umpire.

14. The arbitration panel is now fully constituted, available and ready to initiate the arbitration proceeding that will resolve this dispute.

15. The key issue in this dispute is what law applies to whether Reliance's claims are time-barred: the law of the U.S. or England.

16. While the arbitration panel was being selected, this Court decided another Reliance case that also involved a London reinsurer, in which the issue also was what law should

⁴ Syndicate 990 also opposed a joint arbitration with Markel, the only other non-paying reinsurer, but that issue has been resolved and the arbitration at issue here is only between Reliance and Syndicate 990. Markel also is not a party to the action in London, England.

be applied to determine if Reliance's claims were time barred.⁵ *See Ario v. Underwriting Members of Lloyd's of London Syndicates 33, 205 and 506*, No. 553 M.D. 2008 (Commw. Ct. June 4, 2010), designated as reported Memorandum Opinion (Commw. Ct. June 16, 2010) ("*Ario*"). Reliance provided Syndicate 990 with a copy of the *Ario* opinion. *See* June 21, 2010 email from J. Hyle to G. Bassford with copy of *Ario* opinion, attached hereto as Exhibit "F."

17. In *Ario*, this Court held that U.S., not English, law provided the applicable statute of limitations and that Reliance's claims were not time-barred under either Pennsylvania or New York's limitations period. *Id.* at 13-16. While the Court granted Reliance's motion for summary judgment with respect to the statute of limitations defense, it denied Reliance's motion with respect to the Syndicates' late notice defense because there were questions of fact about the notice requirement and the notice/prejudice issue that were not susceptible to resolution on the existing record. *Id.* at 16-17.⁶

18. Because of the similarity of facts and issues, Reliance forwarded *Ario* to Syndicate 990 and asked if it still wanted to proceed with the arbitration. *See* Exhibit "F."

19. While Syndicate 990 indicated a willingness to discuss settlement (which ultimately was unsuccessful), assuming the arbitration went forward, Syndicate 990 suggested that the arbitration panel decide the "question of applicable law as a preliminary issue ... to save costs." July 1, 2010 email from G. Bassford to J. Hyle, attached hereto as Exhibit "H."

20. However, once it became apparent to Syndicate 990 that, if the arbitration panel followed *Ario*, Reliance, not Syndicate 990, would win the arbitration, Syndicate 990

⁵ The Liquidator sued Syndicates 33, 205 and 506 in the Commonwealth Court because the treaty at issue in that case had no arbitration clause.

⁶ After the Court issued its ruling in *Ario*, the parties settled and the case was dismissed. *See* Praecipe to Discontinue, Settle and End with prejudice, attached to the Application as Exhibit "G."

undertook to undermine the arbitration process by seeking a ruling from the English court that England, not the U.S., is the proper “seat” of the arbitration. *See* Bassford Witness Statement, Exhibit “I” at ¶ 30.⁷

21. This Court has the power to enjoin Syndicate 990 from proceeding with the action in London because Syndicate 990 commenced it in violation of Paragraph 22 of this Court’s Liquidation Order that imposes a stay against initiating any action against Reliance. That stay has been in place since Reliance was placed in liquidation on October 3, 2001.

22. Syndicate 990 also is in violation of Section 526(a) of the Insurance Department Act, 40 P.S. § 221.26(a) that expressly prohibits any party from bringing an action against Reliance “whether in the Commonwealth or elsewhere.”

23. On September 22, 2010, Reliance advised counsel for Syndicate 990 that its action in London was filed in violation of the stay imposed by Paragraph 22 of the Order of Liquidation, as well as Section 526(a) of the Act, as interpreted and enforced by this Court’s ruling in *Koken v. Reliance Insurance Company*, 846 A.2d 778, 781 (Pa. Commw. 2004). *Accord Koken v. Research Underwriters, LLC*, 70 M.D. 2004, 2005 Pa. Commw. LEXIS 804 (Commw. Ct. Jan. 20, 2005). Reliance provided Syndicate 990 with a copy of the Liquidation Order and requested that Syndicate 990 withdraw its action in London with prejudice. *See* Exhibit “J.”

24. In response, Syndicate 990 refused to withdraw the London action. *See* Sept. 24, 2010 letter from Elborne Mitchell to D. Cohen, attached here to as Exhibit “K.” Syndicate 990 denied that it had contravened the Order of Liquidation and contended instead

⁷ Syndicate 990 even appended a copy of *Ario* to the papers that it filed in London. Exhibit “GIB3” to the Bassford Witness Statement, which is attached hereto as Exhibit “I.”

that, by commencing the arbitration, Reliance had “consented to the assistance of the [London] Court ... in respect of matters ancillary to those arbitral proceedings,” including “the [London] Court’s determination of the proper “seat” of the arbitration under s. 3 of the [English] Arbitration Act 1996.” *Id.*

25. However, by commencing the arbitration, Reliance did not consent to seeking any assistance from a London court. Quite to the contrary, Reliance consistently has taken the position that U.S., not English, law applies to this arbitration and that the arbitration should be conducted in New York. *See, e.g.*, Exhibits “C” and “D.”

26. Syndicate 990’s action in London is also contrary to U.S. federal and state law and public policy which strongly favors arbitration, and expressly authorizes the arbitration panel, not a court, to rule on all substantive and procedural issues.

27. The “seat” or venue for the arbitration is procedural and is for the arbitration panel, not a court, to decide.

28. English law generally shares the same strong public policy favoring arbitration as in the U.S., but is even more deferential to the arbitration panel which, under English law, is empowered to decide even issues of arbitrability. English Arbitration Act at § 30, attached hereto as Exhibit “L.” Section 30 of the English Arbitration Act expressly provides, in relevant part:

- (1) [u]nless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to
 - a. whether there is a valid arbitration agreement,
 - b. whether the tribunal is properly constituted, and
 - c. what matters have been submitted to arbitration in accordance with the arbitration agreement.

Id.

29. Despite the express limitations on the English court's right to intervene in an arbitration, and the express delegation of authority to the arbitration panel to resolve all issues, Syndicate 990 contends that resolution of the "seat" of the arbitration is within the purview of the London court under Section 3 of the English Arbitration Act.

30. Section 3 of the English Arbitration Act does provide that a court may rule on the seat of the arbitration, but it applies only when the parties, another arbitral or other institution or the arbitration panel has not already decided or been authorized to decide that issue. *See* Exhibit "L" at § 3. It plainly does not apply here where, pursuant to the arbitration clause of the reinsurance contracts at issue in this arbitration, "[a]ny unresolved difference of opinion between the Reinsurer and the Company [Reliance] with respect to the interpretation of this certificate or the performance of the obligations under this certificate shall be submitted to arbitration." In addition, the Panel may "adopt their own rules and procedures." *See* Exhibit "A" at ¶ N. This broad grant of authority surely encompasses the issues of venue and choice of law.

31. Syndicate 990 itself has admitted in the papers it filed in the London Commercial Court that ultimately the selection of both procedural and substantive law "is a matter for the tribunal to determine." *See* Bassford Witness Statement, Exhibit "I" at ¶26.

32. Syndicate 990 also admits that, even if it secures a ruling from the London court, it still will be required to proceed with the arbitration, and submit all of the choice of law and statute of limitation issues to the arbitration panel to resolve because all procedural and substantive issues are a "matter for the [arbitration] tribunal to determine." *See* Bassford Witness Statement, Exhibit "I" at ¶26. In other words, if Syndicate 990 is allowed to proceed with the action in London, it will be a very expensive and unnecessary proceeding parallel to the

arbitration that may well yield a ruling in London that conflicts with and is contrary to the arbitration panel's ruling as to the proper "seat" of the arbitration.

33. By commencing the action in London, Syndicate 990 has inflicted substantial prejudice on Reliance by frustrating Reliance's statutory right to collect reinsurance proceeds pursuant to the Act and its right to arbitrate the dispute promptly and efficiently.

34. Syndicate 990 also is interfering with the orderly administration of the Estate and wasting Estate assets by requiring the Estate to incur substantial legal fees and costs to retain both a Solicitor and Barrister⁸ in London to appear and defend Reliance in that action. Reliance has been advised that, if Syndicate 990 is not enjoined from proceeding in London, the English court likely will have a hearing on the jurisdictional issue in December (Reliance disputes the English court has jurisdiction). If the court rules that it has jurisdiction, the parties will then proceed to the actual issue of the "seat" which likely will not be resolved until well into 2011.

35. Reliance's legal fees and expenses incurred in connection with the London action are in addition to its costs associated with the arbitration, as well as this action seeking to enjoin Syndicate 990 from proceeding.

36. Because Syndicate 990 commenced the action in London in violation of this Court's Liquidation Order and Section 526(a) of the Act, it is appropriate for this Court to enforce its Order and issue a specific order directed to Syndicate 990 to enjoin Syndicate 990 from continuing to violate the Order.

⁸ Reliance was required to retain both a Solicitor and a Barrister for representation in London because only a Barrister can make arguments and appear in the court in which the action is pending.

37. Under 40 P.S. § 221.5, this Court has the authority and power to enjoin Syndicate 990 from prosecuting the action in London and has the authority to order Syndicate 990 to dismiss its action in London with prejudice.

WHEREFORE, Plaintiff Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, acting in his official capacity as Statutory Liquidator of Reliance Insurance Company, requests that the Court enjoin Mr. Cox on his own behalf and on behalf of the Underwriting Members of Syndicate 990 at Lloyd's for the 1995 and 1996 Years of Account to cease further prosecution of the action in High Court of Justice, Queen's Bench Division in London, England captioned *Malcolm John Cox On His Own Behalf And On Behalf Of Underwriting Members Of Syndicate 990 At Lloyd's For 1995 and 1996 Years of Account v. Reliance Insurance Company (In Liquidation)*, Claim No. 2010 Folio 1090, except as necessary to withdraw that action or to have it dismissed. Consistent with the parties' agreement to arbitrate and Syndicate 990's admission in Paragraph 26 of its submission to the English court that all procedural and substantive issues are a "matter for the [arbitration] tribunal to determine," *see* Bassford Witness Statement, Exhibit "I" at ¶ 26, Malcolm John Cox on his own behalf and on behalf of the Underwriting Members of Syndicate 990 at Lloyd's for the 1995 and 1996 Years of Account and Reliance Insurance Company (In Liquidation) should be ordered to proceed with their pending arbitration and to submit all disputes to the arbitration panel for resolution.

Respectfully submitted,

Deborah F. Cohen

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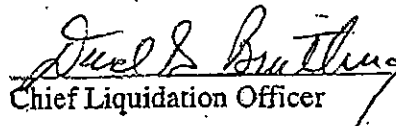
Attorneys for Robert L. Pratter, Acting
Insurance Commissioner of the
Commonwealth of Pennsylvania, acting
in his official capacity as
Statutory Liquidator of Reliance
Insurance Company (In Liquidation)

Dated: October 19, 2010

VERIFICATION

I, David S. Brietling, hereby verify that the statements made in the foregoing Application Of The Statutory Liquidator To Enjoin Malcolm John Cox And The Underwriting Members Of Syndicate 990 From Prosecuting The Action In London, England are true and correct to the best of my knowledge, information and belief and that I am authorized to make this verification on behalf of Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, acting in his official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation).

Dated: October 19, 2010


Chief Liquidation Officer

CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2010, I served a true and correct copy of the foregoing Application Of The Statutory Liquidator To Enjoin Malcolm John Cox And The Underwriting Members Of Syndicate 990 From Prosecuting The Action In London, England, and supporting Memorandum of Law by email and overnight delivery upon the following:

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