# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2019: No. 309

**BETWEEN:**

**ATHENE HOLDING LTD.**

**Plaintiff**

**-and-**

**CAMBRIA COUNTY EMPLOYEE'S RETIREMENT SYSTEM**

**Defendant**

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**Before:** **Hon. Chief Justice Hargun**

**Appearances:** **Mr Kevin Taylor and Mr Benjamin McCosker, Walkers (Bermuda) Limited, for the Plaintiff**

**Date of Hearing:** **29 July 2019**

**Date of Ruling:** **29 July 2019**

## RULING
## (Extempore)

**Introduction**

1. This matter relates to the Originating Summons which has been filed on behalf of Athene Holding Ltd. ("Athene" or "the Company"), against Cambria County Employees' Retirement System ("Cambria County" or "the Defendant"). It seeks substantive relief under the inherent jurisdiction of the court, and in the factual circumstances summarised in Annex A to the Summons. It seeks an order that a Defendant be permanently enjoined from taking any further steps to positively advance or otherwise participate in the New York State court proceedings.

Secondly, that the Defendant pay the Plaintiff's costs of the application on an indemnity basis.

2. For the purposes of this morning, we are dealing with the ex parte summons which has been filed. In relation to the ex parte application, Athene seeks an order that until further order of the Honourable Court, Cambria County, whether in its own capacity or by its servants, agents or otherwise, be enjoined from taking any further steps to advance or otherwise positively participate in the proceedings commenced by Cambria County derivatively on behalf of the company against Athene Asset Management LLC ("AAM") and Apollo Global Management LLC ("Apollo"), in the Supreme Court of the State of New York, county of New York with index number 653273 of 2019, save that the defendant be required to take steps as soon as reasonably possible to obtain a stay of those proceedings pending the hearing of Athene's application before this court for a permanent injunction pursuant to section 19(c) of the Supreme Court Act 1905 and/or the inherent jurisdiction of the Court.

3. By paragraph 2 it also seeks relief in terms that Cambria County shall be at liberty to apply to this court to vary or discharge the order by giving Athene's attorneys notice in writing of not less than seven days.

4. Paragraph 3 seeks an order that a concurrent originating summons be issued by the court in the same terms as the originating summons in this matter.

5. Fourthly, that the Plaintiffs have leave to serve out a sealed copy of the concurrent originating summons in these proceedings on the Defendant outside the jurisdiction, pursuant to Order 11, Rules 1(1)(d) and (ff), and the address is given.

6. The application is supported by an affidavit of Mr Beilinson dated 27 July 2019. The essential point in these proceedings and in relation to this particular application is Bye-Law 84. Bye-Law 84 is in broad terms, and it provides that:

*"In the event that any dispute arises concerning the Act, or in connection with these bye-laws, including any question regarding the existence and scope of any bye-law, and/or whether there has been any breach of the Act (that is the Companies Act 1981) or these bye-laws by an officer or Director, whether or not such a claim is brought in the name of a shareholder or in the name of a company, any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda."*

7. Briefly, Bye-Law 84 provides for an exclusive jurisdiction clause in relation to the subject matter which is set out in that particular Bye-Law. It will be seen that the wording of Bye-Law 84 is in extremely wide terms.

8. It applies to any dispute concerning the Companies Act 1981, or any dispute in connection with the Bye-Laws, or any question regarding the scope of the Bye-Laws, or any breach of the Companies Act 1981 by the Directors. Importantly, it not only applies to direct claims brought by shareholders, but it also specifically and expressly applies to claims brought by shareholders on behalf of the Company derivatively.

9. It is of some importance that Bye-Law 84 expressly applies to derivative actions brought by the shareholders to enforce the rights of the company.

10. It is not really in dispute that the Bye-Laws, as a matter of Bermuda law, constitute a multilateral contract. It is a contract between the shareholders of the company, that is to say, that all the shareholders are in a contractual position with each other in relation to those Bye-Laws, such that any shareholders can enforce the rights given to them in the Bye-Laws against other shareholders. Importantly for present purposes, it is also a contract between the shareholder and the company.

11. The position is that when a person elects to become a shareholder in a company, which is governed by the Companies Act 1981, there is, by the fact that he becomes a shareholder, a contract between the company and that particular shareholder. Just as the company can sue the shareholders in relation to the contractual obligations assumed by the incoming shareholder, the shareholder can sue the company likewise. It is a two-way stream. That position is not subject to any doubt because it is expressly so provided by section 16 of the Companies Act 1981.

12. The short point is that the Company is a contracting party to the provision contained in Bye-Law 84, and the Company is entitled to enforce that particular provision.

13. There is significant public interest at stake here. Shareholders in Bermuda companies, if they choose to become shareholders in companies which have exclusive jurisdiction clauses in their Bye-Laws, have to comply with that contractual obligation. It is, after all, what they have agreed to do when they became shareholders.

14. From a Bermuda law perspective, it is simply an issue for the Court to enforce a contractual obligation. By enforcing that contractual obligation, no disrespect is intended to any court, and certainly not the Courts of the United States. We have readily enforced any judgements given by the Courts of the state of New York.

15. It is not to the point, as is alleged in the Memorandum of Law in support of the Motion for a Temporary Restraining Order and Preliminary Injunction filed in the New York Court, to say that this particular plaintiff has no other business activities in Bermuda. The point remains that this plaintiff in the New York proceedings became a shareholder in a company which is governed by the Companies Act 1981, which contains in its Bye-Laws an exclusive jurisdiction clause. When it became a shareholder, it undertook that it will comply with that contractual obligation.

16. Likewise, I note from the letter which was sent to the Court this morning from Grant and Eisenhower dated 29 July 2019, and indeed the same point is made elsewhere, that in this case coming to Bermuda would not be an option for this plaintiff because it is said that under Bermuda law contingency fees are not allowed. I understand that the plaintiff is being represented on a contingency basis in the proceedings which have been filed in the New York Court. It is also said that because Bermuda procedural law allows a successful party to claim costs against the unsuccessful party, that these two rules mean that the plaintiff in the New York proceedings may not be able to pursue this action in the Bermuda Courts.

17. Again, that is not really an answer to the point, that by becoming a shareholder, this particular plaintiff in the New York proceedings agreed, and it has to be assumed agreed voluntarily, that it will comply with the contractual obligations which it necessarily assumed by becoming a shareholder.

18. The only real issue in this case, it seems to me at this stage, not having heard the argument from the other side, is really the scope of Bye-Law 84. Clearly, if what is being said in the New York proceedings is outside the scope of Bye-Law 84, Cambria County is of course free to pursue the New York proceedings.

19. However, if on proper analysis, the action which has been commenced in New York does come within the scope of Bye-Law 84, then to pursue that action, Cambria County would be acting in breach of the contractual obligations which it has assumed freely. In those circumstances, this court, applying well established principles of Bermudian procedural law, would ordinarily restrain a party from pursuing either arbitration proceedings or court proceedings in breach of its contractual obligations.

20. This particular set of proceedings has a degree of historical background because this is, as was mentioned in argument, not the first time a shareholder of Athene

has sought to commence proceedings in the Supreme Court of the State of New York, county of New York.

21. On 5 July 2019, I dealt with a similar application on behalf of Athene in circumstances where Central Laborers' Pension Fund had commenced similar proceedings in the New York court. In relation to those particular proceedings, the Complaint which had been filed in New York set out in paragraph 3 that:

> *"At the instigation of Apollo (which has de facto voting control of Athene) and Belardi,(who makes Athene's investment decisions) and with the acquiescence of breaches of fiduciary duties by the Board, Athene entered into extravagantly expensive IMAs with AAM, pursuant to which AAM provided Athene with asset and portfolio management services."*

22. It was alleged in that Complaint that Athene also entered into an extravagantly expensive master sub-advisor agreement with Apollo pursuant to which Apollo provided certain investment and management services.

23. So the substance of what was said in that Complaint is essentially the same in the Complaint which is being filed by Cambria County.

24. However, in the previous Complaint filed by Central Laborers', there were express allegations of breach of fiduciary duty. It was said in the Central Laborers' Complaint that each of the Athene Directors has a fiduciary relationship with Athene and as a result owes the company the highest duty of good faith, honesty, fair dealing, reasonable skill and care and loyalty.

25. It was then said that the Athene Directors breached their fiduciary duties and failed to safeguard the interests of Athene. First as set forth in the Complaint, the asset management fees and sub-advisory fees that Athene pays and Apollo under the respective Investment Management Agreements ("IMAs") and Master Sub

Adviser Agreements ("MSAA") were multiples over what would be charged by entities unaffiliated with Apollo, Belardi or Rowan for similar services.

26. So there was an express allegation of wrongdoing on the part of the Directors. It was also said that the Athene Directors approved amendments to the bye-laws that made it practically impossible for Athene to terminate the IMAs, while granting AAM an unfettered right to terminate.

27. Third, it was said that the Athene Directors never exercised their right to attempt to force Apollo to lower their asset management and sub-advisory fees or to terminate the IMAs and MSAA by failing to avail themselves of the IMA termination notice process and thereby the Athene Directors breached their fiduciary duties.

28. So the position in relation to the Complaint filed by Central Laborers' was that whilst the Directors of Athene were not made parties to the Complaint, the Complaint itself made express and serious allegations of breaches of fiduciary duties and other wrongdoings in the Complaint. It also sought a declaration that the Directors of Athene were in breach of their fiduciary duties.

29. Based upon those allegations made in the Central Laborers' Complaint, this Court took the view that the matters raised in the Complaint came clearly within Bye-Law 84 of Athene's Bye-Laws, and that in those circumstances the exclusive-jurisdiction clause contained in Bye-Law 84 was engaged.

30. What has happened now is that as a result of the injunction which was granted by this Court, Central Laborers' have indeed complied with it by filing a stay of the New York proceedings. However, in this case Cambria County have commenced similar proceedings in the New York Court.

31. It is clear from the comparison of the Complaints filed by Central Laborers' and Cambria County, that the draftsman of the Complaint has taken the Complaint

which was filed in the Central Laborers' proceedings and has sought to take out what were perceived to be the objectionable averments. There is no secret in relation to that, and it is indeed what is said in the letter from Grant and Eisenhoffer dated 29 July 2019.

32. What has happened is that any express references to breaches of fiduciary duties have been deleted. The relief that the Court declare the Directors to be in breach of fiduciary duties has been deleted. The original relief declaring that Apollo and AAM knowingly and dishonestly assisted Athene Directors with breaches of fiduciary duties has also been deleted. The relief declaring that Apollo and AAM knowingly misappropriated and received payment of Athene assets that were traceable to and paid as a result of Athene Directors' breach of their fiduciary duties has also been deleted.

33. Now the remaining reliefs remain and then there is an additional relief which is sought seeking to impose a constructive trust on monies that Athene transferred to Apollo. It is also said that in the IMAs and the MSAA there was an implicit promise that the Defendants would not charge Athene management fees that were excessive or commercially unreasonable.

34. As I said, the issue for the Court is whether the new Complaint does or does not breach Bye-Law 84. In my judgment, it is not an issue of analysing technical causes of action. Bye-Law 84 is expressed in wide terms; it expressly applies to derivative actions commenced by shareholders. It is a question of substance. In my judgment, if a proceeding is commenced by a shareholder on behalf of the Company and engages, not in a peripheral way, but as a matter of substance, then the exclusive jurisdiction clause contained in Bye-Law 84 applies to those proceedings.

35. If as a matter of substance the proceedings raise issues relating to the Bye-Laws, either their existence or scope, or whether there has been a breach of the Act or Bye-Laws, (which necessarily includes any statutory duties of Directors contained

in section 97 of the Companies Act 1981 including duties of care, fiduciary duties, and duties to act honestly) then Bye-Law 84 would apply.

36. For that purpose one needs to look at what is being said against the Directors and/or in relation to the Bye-Laws in the new Complaint, and for that purpose the starting point is that this is a derivative action commenced by Cambria County against AAM and Apollo.

37. By the very nature of a derivative action what is being said is that these are the rights of the Company which proceedings commenced by Cambria County seek to protect. What is being said in the derivative action is that these are rights which belong to the Company but which for some reason cannot be enforced by the Company.

38. It is important to underscore the point that certainly as a matter of Bermudian procedural law the rights which belong to the Company can only be enforced by the Company. That is a well-established rule of Bermudian company law, sometimes referred to as the rule in *Foss v Harbottle* [1843] 2 Hare 461.

39. However that basic fundamental rule that only the company can sue in relation to its causes of action has certain exceptions. One such exception is that a shareholder is allowed to sue if it can be demonstrated that there is a fraud on the minority. That is indeed the basis on which this particular derivative action is being pursued in the New York court. Paragraph 92 of the Complaint, states:

> *"In bringing this action, the plaintiff has satisfied all statutory and procedural requirements of applicable law. Because Athene is a Bermuda company, Bermuda law governs the circumstances under which a stockholder can assert a derivative claim. Under Bermuda law a stockholder can assert a derivative claim on behalf of a company if: (1) the unchallenged conduct infringes the shareholder's personal rights; (2) the conduct will require a special majority*

*to ratify (3) the conduct qualifies as a fraud on the majority, (4) the conduct consists of ultra vires act."*

40. In paragraph 93, it is said that the plaintiff is a registered holder of Athene Class A stock and has satisfied all of the requirements to assert a derivative claim because the defendants' actions constitute a fraud on Athene's minority shareholders.
41. So the New York action is proceeding on the basis that it constitutes a fraud on the minority. But one of the essential requirements of that particular exception is that the wrongdoers are in control. In this context it would mean that it is not possible for the Board to commence the proceedings on behalf of the Company. That necessarily means that the board of Directors, which would ordinarily be the organ of the company would commence an action to rectify any wrongdoing, is incapable of so acting. In this case it must necessarily mean that the Directors are the wrongdoers and as a result the action which should have been taken is not possible to be taken.

42. Indeed that is what appears to be alleged if one looks at paragraph 2 of the new Complaint. It is said that the defendants' actions cannot be corrected by a shareholders' vote because the defendants enjoy effective voting control over Athene through their ownership of Athene stock and defendants' stacking of Athene's board of Directors with Apollo executives and other Apollo loyalists.

43. What is being said is that there is not an independent board which can commence these proceedings. Also at paragraph 44, under the heading, *"Apollo Controls Athene",* the first sentence says, *"Apollo and designees on the Athene board control Athene"*. At paragraph 94 it is said:

*"As a result, plaintiff is not required under Bermuda law to demand prior to bringing this action that Athene pursue claims against defendants. In any event, plaintiff did not issue any demand on the board to institute this action because such a demand would have been a futile, wasteful and useless act."*

44. So it is quite clear from the pleaded case that what is being said is that this is fraud on the minority and the wrongdoers are in control, that is to say, that the Directors are the wrongdoers who are in control and are not capable of performing their independent duty. They are incapable of commencing these proceedings. It is for that reason that they are entitled to commence these derivative proceedings.

45. If that is indeed what is being alleged it necessarily means that the current Directors are acting in breach of their duties, as set out in section 97 of the Companies Act 1981.

46. The Directors under section 97 have a fiduciary duty to act in the best interest of the company as a whole. The Directors under section 97 have a duty to act honestly.

47. By the very pleading which supports this derivative action it is being said that the Directors are in breach of those duties. So that is the first point in relation to this action which is being pursued by way of a derivative action.

48. It is necessary to look at the other matters which have been pleaded in the new Complaint. Again in the preamble, the first introductory paragraph, it is said that Cambria County is proceeding derivatively to recover the hundreds of millions of dollars that the defendants have improperly extracted from Athene in the form of unfair, unreasonable and excessive "investment management fees".

49. It is said the defendants have used their control over Athene to cause Athene to enter into investment management agreements through which Athene made unauthorised distributions of capital to the defendants described as "ordinary management fees".

50. The agreements which they refer to are agreements which were entered into by the Directors of Athene. The necessary implication of that assertion is that those

Directors who entered into the agreements which are the subject matter of the Complaint were entered into in breach of the fiduciary duties of the Directors of Athene.

51. At paragraph 1 of the Complaint it is said that:

> *"This is a derivative action to recover damages arising from the improper looting of the company by its controlling shareholder Apollo. Apollo and AAM acting through Apollo co-founder and senior managing director, Mark Rowan, and AAM CEO, chief investment officer Belardi, who is also the chairman and CEO of Athene, concocted this scheme to divert company assets worth hundreds of millions of dollars annually to themselves via an investment management agreement, the IMA, between Athene and AAM. It is said that the defendants have used IMA to misappropriate (and seek to continue to misappropriate) hundreds of millions of dollars annually that rightfully should be retained by the company and derivatively, the company's other shareholders."*

52. Again to the extent that it is said that Mark Rowan and Belardi have played a role in concocting a scheme to divert Company's assets worth hundreds of millions of dollars, it necessarily means that those two Directors at any rate have not complied with their fiduciary duties, which they owed under the Companies Act 1981. Put another way, had they complied with their fiduciary duties, it would have been impossible to make that particular allegation in paragraph 1 of the Complaint.

53. At paragraph 2 of the Complaint, it is said that:

> *"The defendants' actions cannot be corrected by a shareholders vote because defendants enjoy effective voting control over Athene through their ownership of Athene stock, and defendants stacking of Athene's board of Directors with*

*Apollo executives and other Apollo loyalists and through Belardi's role as Athene's CEO and chairman".*

54. That allegation necessarily means that the present board of Directors is not discharging its duty properly. It necessarily means that the board of Directors are in breach of their fiduciary duties because it is said that they are not taking the actions to correct the current position, which they should do. It is perfectly true that the express allegations in relation to breaches of fiduciary duties have been deleted, but the substance of the claim, as is pleaded in paragraphs 1 and 2, remains that the board of Directors are acting in breach of their fiduciary duties.
55. In paragraph 3, it is said in the second full sentence that:

*"Athene entered into extravagantly expensive IMAs with AAM, pursuant to which AAM provided Athene with asset and portfolio management services. Athene also entered into an extravagantly expensive master sub-advisory agreement (MSAA) with Apollo, pursuant to which Apollo provided certain investment and management services."*

56. Now, this is an important allegation in the context of the new Complaint because that is the substance of what is being said. What is being said is that these two agreements were utilised for the purposes of siphoning off what would otherwise be profits as fees payable under these two agreements. But necessarily implicit in this allegation is the assertion that those Directors of Athene who signed off in relation to these agreements were in breach of their fiduciary duties which they owed to the Company. That is not a peripheral consequence of this allegation but a necessary consequence of what is being alleged in paragraph 1, 2, and 3.

57. Then in paragraph 44, as already noted, it is being alleged that Apollo controls Athene through its designees on the board. The implication being that those Directors who are Apollo designees are not carrying out their duties as they should. Then at paragraph 46, it is said that the defendants, Apollo and AAM,

have used their voting power in control over Athene to extract unfair and unreasonable terms in the IMAs and MSAA. It is said:

> *"The defendants have misused their power and control over Athene to benefit themselves at Athene's expenses, thereby constituting a fraud upon the minority Athene shareholders".*

58. The point remains that those agreements were signed by the Directors of Athene, and if the result of those agreements is that it constitutes a fraud on the minority shareholders, then it necessarily follows that those Directors who signed those agreements were in breach of their fiduciary duties to the Company as a whole and in breach of their duties under section 97 of the Companies Act 1981.
59. Then in paragraph 82, it is said that:

> *"By using their control over Athene to cause it to enter into the IMAs and the MSAA, defendants were able to gain an immediate return of their investment by causing Athene to pay grossly excessive management fees. These fees constituted an unauthorised return of capital that was not shared with Athene's other shareholders, including the Class A common shareholders."*

60. The necessary implication of this plea contained in paragraph 82 of the Complaint is that the Directors of Athene were in breach of their fiduciary duties when they agreed to these arrangements.

61. I have already noted that in paragraph 94 it is expressly pleaded that the plaintiff did not issue any demand that the board institute the action, because such a demand would have been a futile, wasteful and useless act. The necessary implication being that the board of Directors would not discharge its duty as required by the Companies Act 1981 and would not discharge its fiduciary duties as required.

62. Finally, in relation to the relief requested, paragraph (d) requests that the court:

*"Direct that Apollo and AAM, through their designees on and control over the Athene board, take the necessary actions to either amend the IMA and MSAA so that the fees paid to AAM and Apollo are fair and in the best interests of the company stockholders, or terminate the existing IMA and MSAA."*

63. So, having regard to these provisions which I have referred to, I am satisfied that the substance of what is alleged in the New York proceedings engages in a very substantial way the provisions of Bye-Law 84. I am satisfied that the substance of what is being alleged in the New York proceedings is wholesale breaches of fiduciary duties on the part of the Directors of Athene in entering the two agreements, which it is said are being utilised for the purposes of siphoning off profits and on the basis of this allegation that they constitute a fraud on the minority shareholders. So with that background, I consider the two applications which are being made.

64. I turn to the first application in relation to service out. In relation to that aspect, I have to be satisfied that there is a serious issue which is reasonable to be tried on the merits, i.e. a substantial question of fact or law or both. Secondly, that there is a good arguable case that the Plaintiff's claim made in the originating summons falls within one of the jurisdictional gateways. Thirdly, I have to be satisfied that in all the circumstances Bermuda is clearly and distinctly the appropriate forum for the trial of this dispute. It is important to make the point that the underlying cause of action in this case is the substantive injunction, and that is what I have to be satisfied in respect of.

65. So dealing with the first requirement as to whether there is a serious issue to be tried on the merits, one has to show that there is a realistic, as opposed to a fanciful, prospect of success. A realistic claim is one which carries a degree of conviction. In relation to that, I noted that as a matter of Bermuda procedural law, there is little doubt that the Bye-Laws constitute a contract between a shareholder and a company. That is provided for under section 16 of the Companies Act

1981. In this case, Bye-Law 84 on its face sets out an exclusive-jurisdiction clause stating that in relation to the subject matter of that bye-law, the exclusive jurisdiction is the Supreme Court of Bermuda.

66. So in those circumstances, I am satisfied that these proceedings raise a serious issue to be tried as to whether the company has a reasonable case for saying that the proceedings which have been commenced in the State of New York are in breach of Bye-Law 84. For the reasons which I have already given I take the view that they certainly raise a serious issue to be tried and I am also satisfied that this is a claim with a realistic prospect of success and which carries a degree of conviction, on the face of it. As a matter of Bermuda law, an exclusive-jurisdiction clause is a contractual obligation. In the ordinary course, this court would, absent exceptional circumstances, enforce a contractual obligation, either in relation to arbitration clauses, so that the matter is resolved by way of arbitration, or by way of an exclusive jurisdiction, whereby the parties agree that a particular court is to determine the controversy. In those circumstances, absent exceptional circumstances, the parties seeking to enforce the exclusive-jurisdiction clause would have a good claim for doing so.

67. The only issue in relation to this case is the scope of the exclusive-jurisdiction clause contained in bye-law 84. I am satisfied that there is, on the face of it, in the absence of argument to the contrary from the plaintiffs in the New York proceedings, a good case that the New York proceedings come within the scope of bye-law 84.

68. The second requirement is the jurisdictional gateway, and in this case I am satisfied that the service out comes within the gateways for order 11. Specifically it comes within order 11, rule 1(1)(d)(iii), which provides that the claim is brought to enforce, rescind, dissolve annul or otherwise affect a contract or to recover damages or to obtain other reliefs in respect of the breach of a contract being in either case a contract, which is, by its terms, or by implication, governed by the laws of Bermuda. As I said, the bye-laws of a Bermuda company are a contract

inter se the shareholders and between the shareholders and the company. These proceedings are instituted for the purposes of enforcing that contract.

69. Secondly, it also comes within the terms of order 11, rule (1)(1)(d)(iv), that it contains a term for the effect that a court shall have jurisdiction to hear and determine any action in respect of that contract. So given that it relates to an exclusive-jurisdiction clause, it also comes within that gateway.

70. The third requirement is that Bermuda is the appropriate forum for the trial of the action. The underlying cause of action is the enforcement of an exclusive-jurisdiction clause governed by Bermuda law contained in the bye-laws of a Bermuda company. On the face of it, in relation to that proceeding, clearly Bermuda is the appropriate forum, but also in relation to, and leaving aside that narrow issue, underlying claims made in the New York proceedings are breaches of duties alleged on the part of Directors of a Bermuda company. In those circumstances, leaving aside the exclusive-jurisdiction clause, ordinarily that would be a strong reason for saying that Bermuda is the appropriate forum.

71. The relief which is sought is the amendment, a court ordered amendment, to the bye-laws of a Bermuda company. Again, that would be a factor supporting that Bermuda is the appropriate forum. But the point remains that here there is an exclusive-jurisdiction clause. Ordinarily, unless there are exceptional circumstances, the fact that the parties have agreed that Bermuda is the place where the relevant dispute should be resolved is sufficient to satisfy the requirement that Bermuda is the appropriate forum.

72. So in those circumstances, I am content to give leave to serve outside the jurisdiction and I am satisfied that the evidentiary requirements in relation to the affidavit by Mr Beilinson have been satisfied.

73. I now turn to the question of the anti-suit injunction, and I accept that in relation to this issue, there are slightly different evidential burdens, depending upon

whether one is dealing with the injunction on the basis of equitable considerations or whether the injunction is sought to enforce contractual provisions. We are here dealing with a situation where the claim for an injunction is made based upon Bye-Law 84. It is based upon a contractual obligation. In those circumstances, ordinarily if a party is in breach of the contractual obligation, that in itself is sufficient. The fact of the alleged breach is itself unconscionable conduct and sufficient for the purposes of granting an injunction.

74. This is consistent with the practice of this Court in a number of other cases, primarily dealing with arbitration clauses where the court has ordinarily given a restraining injunction based upon the existence of an arbitration clause and the conduct (its breach) has been categorised as unconscionable, vexatious, or oppressive in those circumstances. I have in mind the judgement of Bell J in *Ace Bermuda Insurance Ltd. v Peers Pedersen as Plan Trustee for the Estate of Boston Chicken Inc* [2005] Bda LR 44. In those circumstances, unless there are exceptional circumstances, given that this would otherwise be a breach of Bye-Law 84, I would be minded to grant the injunction. As I mentioned in relation to the application for an injunction relating to the Central Laborers' case, the Court still retains a residual discretion as to whether to grant an injunction or not, and I was referred to the Court of Appeal decision in *IPOC International Growth Fund Limited v LV Finance Group* [2007] Bda LR 43.

75. Essentially the court would be reluctant to grant an injunction if it necessarily meant that if proceedings were commenced in this jurisdiction the foreign proceedings would still continue and there would be a serious risk of inconsistent rulings and findings. But in this case, I am satisfied that all the parties can be in Bermuda. In the last case, I took the view that is was possible to have all the parties in one jurisdiction. In that case I took the view that has the plaintiff commenced proceedings in Bermuda and served the Directors, either in Bermuda or outside Bermuda, then it would have been possible to serve Apollo Global and AAH outside the jurisdiction on the basis of necessary or proper parties.

76. That issue does not really arise in this case now, given that I am told that the New York attorneys for Apollo and AAM, the firm of Paul, Weiss, in their letter of 27 July 2019 have said that if proceedings were to be commenced by Cambria County in Bermuda that they would consent to the jurisdiction of the court in Bermuda. If that was the case, then all the parties would be in Bermuda and the fear of proceedings pending in two different jurisdictions does not arise. So in those circumstances, I am prepared to grant the injunction as sought in the ex parte summons.

Dated 29 July 2019

NARINDER K HARGUN
CHIEF JUSTICE