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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SWETT & CRAWFORD, Cross-complainant and Appellant, v. SEDGWICK GROUP LTD, Cross-defendant and Respondent.	B183940 (Los Angeles County Super. Ct. No. BC194469)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Reversed.

Law Offices of Bruce H. Dunn & Associates, Bruce H. Dunn for Cross-complainant and Appellant.

Shoecraft ♦ Burton, Robert D. Shoecraft, Michelle L. Burton for Cross-defendant and Respondent.

In this appeal, we determine that an English insurance brokerage firm is subject to personal jurisdiction in California. The brokerage firm purposefully interjected itself into California for a period of 50 years, transacting millions of dollars in business with 12 California insurance brokers for the purpose of obtaining insurance premiums and commissions from California clients. In particular, the English company brokered the insurance coverage that is at issue in this case, on behalf of California residents. Notions of fair play and substantial justice support the conclusion that the English company should defend its conduct with respect to the insurance policy, in California.

FACTS

Swett & Crawford (Swett) is a California excess and surplus line insurance broker. Sedgwick Group Ltd. (Sedgwick) is an English insurance broker that has been in business for nearly a century, and is authorized to negotiate underwriting commitments from the syndicates at Lloyd's of London (Lloyd's).[1] The parties had a business relationship for at least 50 years. Swett employed Sedgwick's services to procure insurance for California residents through foreign underwriters such as Lloyd's.

During the 1950's, Swett sought excess liability coverage for its insured, International Truck & Engine Corporation (Truck). Truck's insurance was obtained by Sedgwick, with underwriting by Lloyd's. In 1998, Truck brought suit in California against its insurers and Swett, demanding coverage for environmental remediation at a site in San Diego that Truck's predecessors polluted between 1927 and 1960. Swett cross-complained against Lloyd's and Sedgwick, seeking equitable indemnity, declaratory relief, and damages for breach of contract.

Sedgwick specially appeared to challenge jurisdiction, arguing that there are no minimum contacts between it and California, and that California is an inconvenient forum. Sedgwick maintained that it has no substantial, continuous, and systematic

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[1] Sedgwick was acquired by another company in 1998, and ceased to do business.

contacts with California, nor did it purposefully avail itself of California laws. It has no bank accounts or offices in California and does not solicit business here. Sedgwick obtained quotations and arranged coverage with English underwriters on behalf of Swett because Swett was not licensed to transact business in the United Kingdom. Sedgwick had no direct contact with the insured, Truck. The insurance contract arranged by Sedgwick was negotiated in Great Britain.

As described by Sedgwick, it acted as a wholesale broker, placing business produced by Swett in the London and international insurance markets. From 1951 until 1998, Sedgwick transacted business with 12 different California-based insurance brokerages. It admittedly placed coverage for California insureds in the London market, including Lloyd's. Sedgwick admits that it received commissions for placing insurance for California residents, but it refused to answer interrogatories aimed at pinpointing the dollar volume of business it placed for California insureds, or the amount of the commissions it received due to such placements. Sedgwick admits that for the past 53 years, it communicated with Swett concerning the placement or marketing of insurance for California residents.

In opposition to the motion to quash, Swett replied that Sedgwick not only had a physical presence in California, but solicited millions of dollars in business in this state. Swett submitted a 1995 Sedgwick brochure touting its "98 offices worldwide." The accompanying map shows several offices in California. Sedgwick was briefly listed on the New York Stock Exchange from 1997 until 1999. It "indirectly owned companies based in California . . . ." Over the years, Sedgwick has retained attorneys and other experts in California. Sedgwick defended a lawsuit in California from 1997 to 1999.

Swett submitted a lengthy declaration from John Cominski, III, who worked for Swett from 1985 until 1997, and for Swett's successor, Aon Corporation, from 1997 until 2004. Since then, he has worked periodically as a consultant on matters regarding Swett. Cominski declares that he was custodian of Swett's business records at the time he investigated and reviewed documents. During his tenure with the company, he was the

person most responsible for supervising litigation at Swett, for communicating with Sedgwick, and for reviewing Sedgwick's archives.

As described by Cominski, Swett is a wholesale insurance broker. An insured has exclusive contact with a retail broker. The retail broker communicates with a local wholesale broker (like Swett). The local wholesale broker, in turn, communicates with a London wholesale broker (like Sedgwick), which has exclusive communication with the London underwriting market (like Lloyd's). Cominski believes that the business relationship between Swett and Sedgwick began in the 1930's. He attaches as exhibits correspondence between the parties dating from the 1950's. One letter suggests that the premiums paid on the insurance policy in this case totaled $4.75 million by 1960. Truck's insurance was terminated in 1965. The parties continued to conduct business on behalf of other California insureds. In 1983, Swett booked $8.7 million in insurance business with Sedgwick.

Sedgwick objected to Cominski's declaration on the grounds that he lacks personal knowledge of the facts and cannot authenticate the documents attached to his declaration. The trial court did not rule on the objections.

The trial court originally denied Sedgwick's motion to quash, finding that the English broker purposefully established contacts with California and plaintiff's cause of action arises out of those contacts. Sedgwick's continuing obligations give rise to specific jurisdiction. The court also found that California would not be a seriously inconvenient forum for the litigation. Sedgwick pursued a writ petition in this court, challenging the court's decision. (Case No. B181322.) We issued an alternative writ and the trial court complied by granting Sedgwick's motion to quash.

DISCUSSION

1. Appeal and Review

An appeal may be taken from an order granting a motion to quash service of the summons and complaint for lack of personal jurisdiction. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1248; *Gould, Inc. v. Health Sciences, Inc.* (1976) 54 Cal.App.3d 687, 690, fn. 1.) If there is no conflict in the evidence, the reviewing court

independently reviews the record and addresses jurisdiction as question of law. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*).) If the jurisdictional evidence is in dispute, the trial court's determination is reviewed for substantial evidence. (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1091.)

2. Res Judicata

Sedgwick argues that the alternative writ issued by this Court in April 2005 operates as a final judgment in this case. The writ commanded the superior court to vacate its order denying Sedgwick's motion to quash, or show cause why a peremptory writ of mandate should not issue. The trial court elected to comply with the alternative writ, vacated its order and entered a new order granting Sedgwick's motion.

Sedgwick reasons that the alternative writ "is now the law of the case and is res judicata in later proceedings." Sedgwick is mistaken. If the superior court complies with the writ, the petition "becomes moot." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240.) If the superior court does not perform the act specified in an alternative writ, the matter then "becomes a 'cause' that must be decided 'in writing with reasons stated.'" (*Id*. at p. 1241; *Kowis v. Howard* (1992) 3 Cal.4th 888, 893.) It is only when the matter is fully briefed, argued, and decided by a written opinion that the writ proceeding becomes law of the case upon a later appeal. (*Kowis v. Howard, supra,* 3 Cal.4th at p. 894; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 182.)

In this instance, the trial court complied with the writ, and no opinion was issued by this Court. The writ is not the law of the case. Upon closer scrutiny and further research, it now appears that our directive to the trial court was mistaken, and should not have issued. The trial court's original ruling, denying the motion to quash, was correct, for the reasons discussed in this opinion.

3. General Principles Regarding the Exercise of Jurisdiction

California's "long arm" statute permits the exercise of jurisdiction over nonresident defendants to the extent allowed by the state and federal constitutions. (Code Civ. Proc., § 410.10; *Snowney, supra,* 35 Cal.4th at p. 1061.) The court weighs the facts of each case to determine whether a nonresident defendant has sufficient "minimum

contacts" with California so that the exercise of jurisdiction is reasonable and comports with principles of fair play and substantial justice. (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-317; *Snowney, supra,* 35 Cal.4th at p. 1061.)

A nonresident who engages in substantial, continuous, and systematic activities in a state is subject to its "general" jurisdiction. (*Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 445-446; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445.) A nonresident who has no substantial, systematic contacts with a state may be subject to its "specific" jurisdiction.

Specific jurisdiction "depends upon the quality and nature of [the defendant's] activity in the forum in relation to the particular cause of action." (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147-148; *Kulko v. California Superior Court* (1978) 436 U.S. 84, 92.) It arises when the nonresident has purposefully availed itself of the benefits and protections of the state's laws; the controversy arises out of the nonresident's contacts with the state; and it would be fair and just to assert jurisdiction. (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472; *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269; *Vons Companies v. Seabest Foods, supra,* 14 Cal.4th at p. 446.) "'Purposeful availment' means 'an action of the defendant purposefully directed toward the forum State.' (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112 . . . .) But 'purposeful availment' may be established even if the nonresident defendant maintains no offices, property, or employees in the forum. '[I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State.' (*Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 307 . . . .)" (*Southeastern Express Systems v. Southern Guaranty Ins. Co.* (1995) 34 Cal.App.4th 1, 6.)

When jurisdiction is challenged by a nonresident defendant, the initial burden is on the plaintiff to demonstrate, by a preponderance of competent evidence, that minimum contacts exist between defendant and California to justify imposition of personal jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 110.) If the plaintiff meets this burden, the defendant must show that the exercise of

jurisdiction would be unreasonable. (*Snowney, supra*, 35 Cal.4th at p. 1062; *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 228.) If the defendant is a national of another country, the courts pay especially close attention to the jurisdictional facts. (*Asahi Metal Industry Co. v. Superior Court, supra,* 480 U.S. at p. 115; *In re Automobile Antitrust Cases I & II, supra,* 135 Cal.App.4th at pp. 109-110.)

4. The *Harris Rutsky* Case

Of particular relevance is *Harris Rutsky & Co. Ins. Serv., Inc. v. Bell & Clements* (9th Cir. 2003) 328 F.3d 1122 (*Harris Rutsky*). Harris Rutsky is a California insurance brokerage firm that customarily enters agreements with nonadmitted foreign surplus line insurers, thereby allowing the foreign insurer to gain access to California's lucrative insurance market. Harris Rutsky used a Lloyd's-affiliated insurance broker in London, Bell & Clements (B&C), as an intermediary. B&C, a United Kingdom corporation, received a commission for acting as an intermediary. Harris Rutsky and B&C communicated frequently with each other via phone, fax and mail during the five years that they transacted business. B&C acted as an intermediary for several other California-licensed brokers, apart from Harris Rutsky. Harris Rutsky and B&C eventually parted ways, and B&C thereafter deliberately disrupted the California broker's relationships with London insurers by urging them not to do business with Harris Rutsky. Harris Rutsky sued B&C in California for tortious interference with contract and economic advantage, breach of fiduciary duty and unfair competition. The action was removed to federal court, based on diversity jurisdiction. B&C moved to dismiss for lack of personal jurisdiction. (328 F.3d at pp. 1127-1128.)

Applying California's long arm statute, the federal appeals court found that B&C purposefully availed itself of "the privilege and opportunity of doing business in California" by acting as a "Lloyd's-affiliated London broker for several California-qualified insurers." This required regular communication with Harris Rutsky. B&C received substantial commissions for its work as an intermediary between Harris Rutsky and the London insurers. (328 F.3d at pp. 1130-1131.) The court was unconcerned that B&C's activities took place in London, because the company intentionally directed its

conduct into California. (*Id*. at p. 1131.) B&C had ongoing contacts with California over a period of years, and its conduct had the effect of injuring Harris Rutsky in California. The injury would not have occurred but for B&C's California-related activities. (*Id*. at pp. 1131-1132.)

The court cited seven factors for determining whether the exercise of jurisdiction would be unreasonable: "(1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum." (328 F.3d at p. 1132.)

The court determined that jurisdiction was appropriate in California. First, B&C purposefully interjected itself into California by transacting significant and remunerative business in California under a contract that was mostly performed here. Second, though it would be a burden for B&C to defend in California, the burden would not be overwhelming. Third, the United Kingdom has no particular interest in adjudicating the dispute, though concededly the defendant and witnesses are British. Fourth, California has an interest in providing redress to its residents who are tortiously injured. Fifth, virtually all of the evidence and witnesses were in London, which would make England a more efficient forum. Sixth, it would be inconvenient for the plaintiff to litigate in the United Kingdom. Seventh, British courts provide an obvious alternative forum. (328 F.3d at pp. 1132-1134.) "On balance," the court concluded, "B&C has not met its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice." (*Id*. at p. 1134.)

5. <u>Jurisdictional Facts in the Case at Bench</u>

a. <u>General Jurisdiction</u>

When a nonresident defendant's activities are extensive, wide-ranging, or substantial, continuous and systematic, general jurisdiction is appropriate and it is not necessary that the plaintiff's specific cause of action be connected with the defendant's

business relationship to California. (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 711.) In this case, Sedgwick admits that it had ongoing business relationships with California residents for half a century. As a result of these business relationships, Sedgwick arranged for California residents to pay millions of dollars in premiums for insurance coverage. Sedgwick received commissions for making these arrangements.

General jurisdiction lies in this case. This was not a one-time contact with California by a foreign company. Sedgwick's contacts were not "'random,'" "'fortuitous,'" or "attenuated.'" (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at p. 475.) Rather, Sedgwick enjoyed decades of profit as a result of purposeful and deliberate business practices aimed at California residents. The insurance contracts arranged by Sedgwick are continuous and ongoing. The premiums and commissions involved were substantial. Sedgwick would not have reaped a benefit but for its longtime cultivation of a profitable business relationship with its California clientele, including appellant. After economically benefiting for so long from the California insurance market, Sedgwick cannot claim a lack of contact with California merely because it did not physically enter the state.[2] (*Id.* at p. 476; *Quill Corp. v. North Dakota* (1992) 504 U.S. 208, 307; *Southeastern Express Systems v. Southern Guaranty Ins. Co., supra,* 34 Cal.App.4th at p. 6.)

b. Specific Jurisdiction

Sedgwick is subject to California's specific jurisdiction. The company purposefully availed itself of California's insurance laws, which enabled it to do business with local brokers. In this way, Sedgwick was able to partake in and profit from the lucrative California market, despite its lack of a license to transact business here. A defendant need not invoke California law for jurisdiction to exist, so long as the

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[2] Sedgwick's claim of having no physical presence in California is dubious, given its 1995 brochure showing 98 offices worldwide, including several in California. Sedgwick does not deny the truth or accuracy of its own brochure.

defendant "purposefully and voluntarily directs its activities toward the forum state in an effort to obtain a benefit from that state." (*Snowney, supra,* 35 Cal.4th at p. 1067.) Swett's claims against Sedgwick arose directly from Sedgwick's placement of insurance for a California resident, for an insured event that arose in San Diego. In other words, "but for" Sedgwick's business relationship with a California broker, placing insurance for a California insured, Swett's injury would not have arisen.

The *Harris Rutsky* case controls here. Like the defendant in *Harris Rutsky,* Sedgwick purposefully availed itself of "the privilege and opportunity of doing business in California" by acting as a "Lloyd's-affiliated London broker for several California-qualified insurers." It bears emphasizing that London insurance brokers are the agents of the insured under English and California law, not the agent of Lloyd's. (*Edinburgh Assur. Co. v. R.L. Burns Corp.* (C.D. Ca. 1979) 479 F.Supp. 138, 151, revd. in part on other grounds (9th Cir. 1982) 669 F.2d 1259.) When the insured makes a claim on the insurance, the London broker has the responsibility of presenting the claim to Lloyd's "in the best way possible." (479 F.Supp. at p. 146.) Thus, a London broker like Sedgwick has an ongoing duty to the insured so long as a claim may be made on the insurance.

Like the defendant in *Harris Rutsky*, Sedgwick admittedly engaged in ongoing communications with the California broker to carry out its business, and earned substantial commissions for that work. The defendant in *Harris Rutsky* conducted business with the California plaintiff for only five years; in our case, that relationship endured for over 50 years. Like the Ninth Circuit in *Harris Rutsky*, we are not concerned that the London broker acquired the insurance in England, because the conduct that preceded the negotiation of the London insurance contracts was all directed at California. Without the California connection, there would have been no demand for foreign insurance, and no contracts.[3]

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[3] Sedgwick relies on a case that is inapposite, *Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430. The defendant Equitas was not a broker, unlike Sedgwick

A nonresident defendant may be subject to jurisdiction in California if there is an ongoing business relationship with California residents through telephone communications. (*West Corp. v. Superior Court* (2004) 116 Cal.App.4th 1167, 1176-1177.) This is true even if the nonresident defendant had no employees or physical presence in California, did not advertise in California, was not licensed in California, did not initiate telephone calls to California, did not mail anything to California, and did not bill California residents for its services. (*Id*. at p. 1171 [jurisdiction found over nonresident defendant telemarketer who made misrepresentations in a sales pitch during a call initiated by a California resident].)

Sedgwick contends that Swett did not present adequate competent evidence of Sedgwick's contacts with California. As Sedgwick observed in its trial court filing, a plaintiff has "the right to conduct discovery with regard to the issue of jurisdiction to develop the facts" needed to prove minimum contacts. The right to conduct discovery proved to be hollow, in this case, because Sedgwick stonewalled Swett by refusing to answer relevant questions regarding the amount of business it placed for California insureds or the amount of commissions it earned for those placements. Because these were commercial insurance contracts, it is safe to say that Sedgwick transacted millions of dollars in insurance placements though 12 California brokers over the course of 50 years. After refusing to divulge the amount of its business with California residents, Sedgwick cannot claim victory based on its own failure to disclose pertinent evidence. This is effectively a concession that Sedgwick has earned more money from California residents than it cares to admit.

6. <u>Fair Play and Substantial Justice</u>

"Even if minimum contacts are present, an assertion of jurisdiction by California over a nonresident company is improper if it would not comport with fair play and

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or the defendant in *Harris Rutsky*. Equitas was formed to reinsure the underwriters at Lloyd's. (84 Cal.App.4th at pp. 1434-1435.) Equitas's policy covered business risks in England. (*Id*. at p. 1440.)

substantial justice." (*West Corp. v. Superior Court, supra,* 116 Cal.App.4th at p. 1178.) It is fair and just to assert jurisdiction over Sedgwick. Sedgwick cannot reasonably expect to avoid jurisdiction in this state after engaging in the insurance business with California residents for 50 years, profiting handsomely from the endeavor. Sedgwick placed insurance on behalf of California insureds that is still in force for claims arising from occurrences during the policy period, even if the policy period began and ended in the 1950's. Truck's claim arose from such a policy. The passage of time does not erase Sedgwick's continuing contractual obligations to its California clients.

Sedgwick contends that it would more economical to defend itself in England. A defendant's burden in litigating in the forum will not overcome the justifiable exercise of jurisdiction unless the "'inconvenience is so great as to constitute a deprivation of due process.'" (*Panavision Intern., L.P. v. Toeppen* (9th Cir. 1988) 141 F.3d 1316, 1323; *West Corp. v. Superior Court, supra,* 116 Cal.App.4th at p. 1178.) Modern communications and transportation methods "'have significantly reduced the burden of litigating in another country,'" so this factor is no longer given much weight. (*Harris Rutsky, supra,* 328 F.3d at p. 1133.) Moreover, there is no language barrier between California and the English witnesses. (*Ibid*.) We give more weight to the quantity and quality of Sedgwick's contacts with California over a very long period of time in deciding that it is not unreasonable to exercise personal jurisdiction in this case.

7. <u>Forum Non Conveniens</u>

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751.) The court considers whether there is a suitable alternate forum. If so, the court next considers "the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Ibid*.)

The trial court in this case found that that California would not be a seriously inconvenient forum for the action. Substantial deference is accorded to the trial court's

determination. (*Stangvik v. Shiley, Inc., supra,* 54 Cal.3d at p. 751.) It is clear that England would provide a suitable forum, particularly since Sedgwick is willing to stipulate to jurisdiction there. On the other side of the equation, Swett elected to have its claims heard in California, where Swett and its insured Truck are domiciled, and where the pollution event giving rise to Truck's claim arose. Because this dispute is largely a matter of contract interpretation--to determine Sedgwick's duties to Swett--we feel confident that the state courts will have no difficulty in deciding the matter. Great numbers of expert or percipient witnesses will not be required.

We cannot say that the trial court abused its discretion in finding, on balance, that the convenience to Sedgwick of defending in England does not outweigh the right of Swett to have its case tried in California. Because the main action brought by Truck is in California, the public interest is in having the cross-complaint tried here as well.

8. Evidentiary Objections

Sedgwick objected at length to the admissibility of John Cominski's declaration. The trial court noted the objections, and indicated that it only considered admissible evidence in reaching its decision. The court did not rule on Sedgwick's objections. Sedgwick's failure to secure a ruling in the trial court on its evidentiary objections resulted in the forfeiture of those objections. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, fn. 17; *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710-713.)

Even if we ignore Cominski's declaration, the basic facts admitted by Sedgwick in its discovery responses militate in favor of finding jurisdiction. The admitted facts are that Sedgwick worked to obtain premiums and commissions from California residents by placing insurance for those residents for half a century. Sedgwick's contacts with the California brokers were substantial and continuous, and led to the very insurance that is at issue in Truck's lawsuit and Swett's cross-complaint. We need not consider Cominski's declaration to arrive at our conclusion that Sedgwick is subject to personal jurisdiction in California.

DISPOSITION

The judgment (order granting respondent's motion to quash) is reversed. Appellant is entitled to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.