

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 278 OF 2005

IN THE ACTION (Consolidated with Cause Nos. 98, 127 and 128 of 2006 pursuant to the Order of Mr Justice Henderson dated 16 June 2005)

BETWEEN EMBASSY INVESTMENTS LIMITED PLAINTIFF

AND HOUSTON CASUALTY COMPANY DEFENDANT

CONSOLIDATED WITH

CAUSE NO. 98 OF 2006

BETWEEN (1) SIMON WHITE (for and on behalf of himself
and all other members of Syndicate 1200 at Lloyd's)

(2) CHRISTINE DANDRIDGE (for and on behalf of herself
and all other members of Syndicate 609 at Lloyd's)

(3) TALBOT 2002 UNDERWRITING CAPITAL LTD
(for and on behalf of itself and all other members
of Syndicate 1183 at Lloyd's)

(4) CATLIN SYNDICATES LTD (for and on behalf of
itself and all other members of Syndicate 2003 at Lloyd's)

(5) BRIT UW LTD (for and on behalf of itself and all other
members of Syndicate 2987 at Lloyd's)

(6) WELLINGTON UNDERWRITING AGENCY LTD
(for and on behalf of itself and all other members of
Syndicate 2020 at Lloyd's)

PLAINTIFFS

AND (1) EMBASSY INVESTMENTS LIMITED
(2) BEACH SUITES INVESTMENTS LIMITED
(3) HYATT INTERNATIONAL CORPORATION

DEFENDANTS

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 14TH DAY OF DECEMBER 2010

APPEARANCES: The Plaintiff unrepresented
Ms. Marit Hudson of Appleby for the Sixth Defendant
in Cause 278 of 2005

RULING

1. The Summons before me, which is dated 29 September 2010, seeks leave, pursuant to Order 20 rule 5 of the Grand Court Rules, for Houston Casualty Company (“HCC”) to re-amend its Defence to introduce a counterclaim, together with an order for costs of and occasioned by the amendment to be in the cause.
2. I have heard from Counsel for HCC alone. She has confirmed that the Summons and evidence in support of this application have been served upon Embassy Investments Limited and that Ogier, who were mistakenly included in the Court List for this application, have contacted HCC’s attorneys, her firm Appleby, and informed them that Ogier act in another capacity for Embassy Investments Limited but they have no instructions to appear before me today in relation to this application. With Embassy Investments Limited having notice of this application, there is no obvious good reason why Ogier’s instructions should be limited in that way.
3. I am satisfied that it is convenient for the counterclaim, which seeks redress for various alleged defamatory statements made by the Plaintiff about HCC, to be introduced into Cause 278 of 2005 which presently relates to the Plaintiff’s claim against HCC in connection with an insurance policy in the Cayman Islands. The counterclaim directly relates to HCC’s conduct of that policy claim and the Cayman proceedings generally. As such, it is entirely suitable and convenient for the defamation claim to be in the same proceedings: it relates to these very proceedings.
4. Further, Counsel for HCC has explained that, in the event that leave were refused, HCC would then have to issue a fresh action and apply for any fresh action for defamation to be consolidated with these proceedings and so the net result would be the same; however,

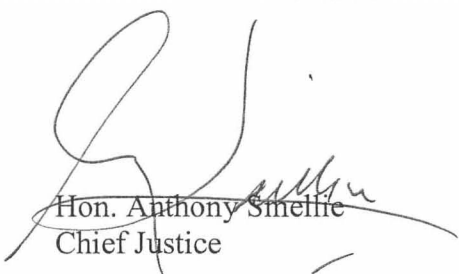
greater costs would be incurred by both parties in the event that HCC is forced to issue a fresh action and seek consolidation.

5. Aside from case management issues, I have considered the fact that the counterclaim that HCC seeks to bring is based upon matters arising since the date of the original pleading it seeks to amend.
6. Whilst there has been case law in this jurisdiction which holds that a party is not able to amend an original pleading to include matters that have occurred subsequent to the date of that pleading (*Giger v Coconut Harbour [1992-93] CILR N-6* at tab 18), that holding is based on the English case of *Eshelby v Federated European Bank Limited [1932] 1 KB 254* which is no longer good law in England. The case of *Maridive v CAN Insurance [2002] EWCA Civ 369* confirms that the English Court now adopts a modern approach in the exercise of its discretion which allows the Court to depart from the rule of practice in *Eshelby* in accordance with the imperatives of doing justice in the case.
7. Furthermore, the amendment sought in the now disapproved *Eshelby* case related to a claim in which the plaintiffs had an incurably bad cause of action in the first place on two counts: (i) the conditions for them to sue under a building contract had not in fact arisen; and (ii) they had failed to serve a notice of default as required by the contract. Such circumstances do not arise in the present case: here HCC's defence has stood the test of summary judgment proceedings, and it now clearly has a cause of action against the Plaintiff in defamation (which it was not in a position to advance at the time of its original pleading).
8. Having seen the actual transcript of the judgment given on 13th August 1992, in *Giger v Coconut Harbour* (above) it appears that GCR Order 18 was not expressly considered by

the Court in that case on the single aspect of its several holdings which is relevant here. I am satisfied, in particular by reference to notes to the Rules of the Supreme Court 1999 Edition at page 324 (which deals with the old English rules of court in terms nearly identical to GCR Order 18 Rule 9) that the wording of GCR Order 18 Rule 9 means that a counterclaim may be allowed to be introduced if based on matters arising since the original pleading was filed. The matters arising here are defamatory comments published since the commencement and in respect of the existing action. They are therefore matters that come within the realm of Order 18 rule 9 for the purposes of the requirements of pleadings and so may properly be allowed to be pleaded by way of counterclaim now.

9. In light of the above, leave is therefore granted in accordance with GCR Order 20 Rule 5 and GCR Order 18 Rule 9 for HCC to amend its Defence to introduce a counterclaim on the basis that it states at the head of the pleading that the matters pleaded in the counterclaim have arisen since the issue of the writ in this matter. A formal order is to be extracted and filed for execution in keeping with the terms of this ruling.

10. Costs in the cause.


Hon. Anthony Smellie
Chief Justice

14 December 2010

Written Judgment released on 1st August 2011

