

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN
3 FINANCIAL SERVICES DIVISION
4

5 Cause No: FSD 94 of 2011 – CQJ
6 (Formerly Cause No. 278 of 2005
7 (Consolidated with 98/06, 127 & 128/06)
8

9 BETWEEN:

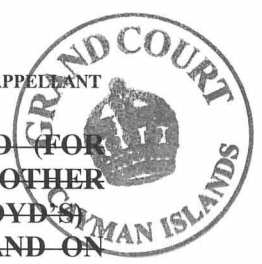
10 EMBASSY INVESTMENTS LIMITED

11 PLAINTIFF/APPELLANT

12 AND:

- 13 1. ~~ASCOT CORPORATE NAME LIMITED (FOR~~
14 ~~AND ON BEHALF OF ITSELF AND ALL OTHER~~
15 ~~MEMBERS OF SYNDICATE 1414 AT LLOYD'S)~~
16 2. ~~FARADAY CAPITAL LIMITED (FOR AND ON~~
17 ~~BEHALF OF ITSELF AND ALL OTHER~~
18 ~~MEMBERS OF SYNDICATE 435 AT LLOYD'S)~~
19 3. ~~SIMON KING (FOR AND ON BEHALF OF~~
20 ~~HIMSELF AND ALL OTHER MEMBERS OF~~
21 ~~SYNDICATE 2010 AT LLOYD'S)~~
22 4. ~~WÜRTTEMBERGISCHE VERSICHERUNG AG~~
23 5. ~~ECCLESIASTICAL INSURANCE COMPANY~~
24 ~~LIMITED~~
25 6. ~~HOUSTON CASUALTY COMPANY~~
26 7. ~~SIMON WHITE (FOR AND ON BEHALF OF~~
27 ~~HIMSELF AND ALL OTHER MEMBERS OF~~
28 ~~SYNDICATE 1200 AT LLOYD'S)~~
29 8. ~~CHRISTINE DANDRIDGE (FOR AND ON~~
30 ~~BEHALF OF HERSELF AND ALL OTHER~~
31 ~~MEMBERS OF SYNDICATE 609 AT LLOYD'S)~~
32 9. ~~TALBOT 2002 UNDERWRITING CAPITAL LTD~~
33 ~~(FOR AND ON BEHALF OF ITSELF AND ALL~~
34 ~~OTHER MEMBERS OF SYNDICATE 1183 AT~~
35 ~~LLOYD'S)~~
36 10. ~~CATLIN SYNDICATES LTD (FOR AND ON~~
37 ~~BEHALF OF ITSELF AND ALL OTHER~~
38 ~~MEMBERS OF SYNDICATE 2003 AT LLOYD'S)~~
39 11. ~~BRIT UW LTD (FOR AND ON BEHALF OF~~
40 ~~ITSELF AND ALL OTHER MEMBERS OF~~
41 ~~SYNDICATE 2987 AT LLOYD'S)~~
42 12. ~~WELLINGTON UNDERWRITING AGENCY LTD~~
43 ~~(FOR AND ON BEHALF OF ITSELF AND ALL~~
44 ~~OTHER MEMBERS OF SYNDICATE 2020 AT~~
45 ~~LLOYD'S)~~
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47 DEFENDANT/RESPONDENT
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CONSOLIDATED WITH

Cause No: 98/06

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

APPEARANCES:

Mr. Tim Richards of Mourant Ozannes for the Plaintiff/Appellant

Mr. Jeremy Walton and Mr. Shaun Tracey of Appleby for the Sixth Defendant/Respondent

Before: Honourable Mr. Justice Charles Quin

Heard: 20th June 2012

1 **JUDGMENT**

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3 1. On the 26th January 2012 I delivered a composite Judgment on an application by
4 Houston Casualty Company, the Sixth Defendant, (“HCC”), filed on the 15th
5 March 2011 and heard on the 6th and 7th October 2011, to strike out the Plaintiff’s
6 Writ and Statement of Claim, together with my decision on the Plaintiff’s
7 application to set aside my Judgment dated the 3rd May 2011, which application
8 was filed on the 17th May 2011 and heard on the 27th September 2011.

9 2. Also on the 26th January 2012, I made an Order (the “Strike Out Order”) that,
10 pursuant to GCR O.18 r.19(1)(d) and the inherent jurisdiction of the Court, the
11 Plaintiff’s Writ and Statement of Claim in Cause Number 278 of 2005 be struck
12 out for intentional and contumelious default, amounting to an abuse of the
13 process of the Court and that the Plaintiff’s action in Cause Number 278 of 2005
14 against the Sixth Defendant be dismissed. In addition, I ordered that the Sixth
15 Defendant’s costs be taxed on the indemnity basis and paid by the Plaintiff. This
16 Order was filed on the 1st March 2012.

17 3. On the 26th January 2012 I also made an Order (the “Set Aside Order”) that the
18 Plaintiff’s application to set aside the Judgment dated the 3rd May 2011 in favour
19 of the Sixth Defendant on its counterclaim be dismissed. I also ordered that leave
20 for the Plaintiff to re-amend its reply to introduce a defence to the Sixth
21 Defendant’s counterclaim be refused, and that the Sixth Defendant’s costs
22 occasioned by the Plaintiff’s Summons dated the 10th May 2011 be taxed on an
23 indemnity basis and paid by the Plaintiff.

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1 4. On the 7th March 2012 the Plaintiff issued a Summons for leave to appeal against
2 paragraphs 1 and 2 of the Strike Out Order, and for leave to appeal against
3 paragraphs 1, 2 and 3 of the Set Aside Order.

4 5. Section 6(f) of the Court of Appeal Law reads:

5 “No appeals shall lie:- without the leave of the Grand Court from an
6 interlocutory judgment made or given by the Judge of the Grand Court...”

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8 with certain exceptions which are not relevant for the purposes of this Judgment.

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The Law

10 6. The Grand Court has consistently applied the dicta of Lord Woolf MR in *Swain*
11 *v. Hillman* 2001 1 All E.R. 91, 1999 TLR 745. Sanderson J. in *Telesystem*
12 *International Wireless Incorporated and T.I.W. Do Brasil Limitada v.*
13 *CVC/Opportunity Equity Partners L.P. and Three Others* 2001 CILR Note 20
14 stated as follows:

15 “ The general test of whether leave to appeal should be granted is:
16 Does the appeal have a real (i.e. realistic, not fanciful) prospect of success?
17 (*Swain v. Hillman* [1999] TLR 745, dicta of Lord Woolf, M.R. applied) In
18 exceptional circumstances leave will be granted even where no such
19 prospect exists if the appeal involves an issue which should be examined by
20 the Court of Appeal in the public interest, e.g. when a public policy issue
21 arises or a binding authority requires reconsideration. The relevant
22 significance of the issues and the costs necessary to examine them will be a
23 relevant factor.

24 In an appeal on a point of law (including on the ground that a
25 finding of the lower court is supported by evidence), leave should not be
26 granted unless the court considers there is a real prospect that the Court of
27 Appeal will come to a different conclusion that will materially affect the
28 outcome of the case.

29 In appeals on questions of fact, leave will be appropriate if the
30 lower court has drawn an untenable inference from primary facts or should
31 have drawn a materially different inference, and no particular benefit has

1 *been received from the court's having seen the witnesses. Leave will*
2 *nevertheless rarely be given for an appeal based on the judge's evaluation*
3 *of oral evidence and requiring an examination of the detail of his factual*
4 *investigation. The court must give its reasons for granting or refusing leave*
5 *in all factual appeals. Leave will also rarely be granted to appeal on the*
6 *basis of the court's wrongful exercise of its discretion, unless the case raises*
7 *a point of general principle requiring the opinion of the appellate court."*

8

9 7. The Cayman Islands Courts have consistently followed and applied the *English*
10 *Practice Direction (Court of Appeal: Leave to Appeal in Skeleton Arguments)*
11 [1999] 1 W.L.R. where Lord Woolf, the then Master of the Rolls, set out the
12 practice and procedure for dealing with applications for Leave to Appeal in
13 further detail. Lord Woolf stated at paragraph 7 of the *English Practice*
14 *Direction:*

15 " Courts of first instance have a crucial role in determining
16 applications for leave to appeal. The guidance in the Practice Direction is
17 designed to ensure that this crucial role is exercised as constructively as
18 possible, and to assist parties, their legal advisers and trial judges in the
19 Court of Appeal to deal justly and effectively with applications for leave to
20 appeal."

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22 Lord Woolf continued at paragraph 8:

23 " The Court which has just reached a decision is often in the best
24 position to judge whether the case is or is not one where there should be an
25 appeal. It should not leave the decision to the Court of Appeal. Courts of
26 first instance can help to minimise the delay and expense which an appeal
27 involves."

28 " However, if the court of first instance is in doubt whether an
29 appeal would have a real prospect of success or involves a point of general
30 principle, the safe course is to refuse leave to appeal. It is always open to
31 the Court of Appeal to grant leave."

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General Test for Leave

Lord Woolf stated at paragraph 10:

“ The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.”

A Point of Law

Lord Woolf stated at paragraph 12 of the **English Practice Direction**:

“ Leave should not be granted unless the judge considers that there is a real prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case.”

A Question of Fact

Lord Woolf stated at paragraph 13:

“ The Court of Appeal will rarely interfere with a decision based on the judge’s evaluation of oral evidence as to the primary facts or if an appeal would involve examining the fine detail of the judge’s factual investigation.

And at paragraph 14 he added:

“ Leave is more likely to be appropriate where what is being challenged is the inference which the judge has drawn from the primary facts, or where the judge has not received any particular benefit from having actually seen the witnesses, and it is properly arguable that materially different inferences should be drawn from the evidence. In such a case the judge, if he grants leave, should expressly indicate that this is the basis on which leave is granted.”

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Questions of Discretion

Lord Woolf stated at paragraph 16:

“ The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong. The burden on an appellant is a heavy one (many family cases do not qualify for leave for this reason). It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required.”

Strike Out Order

- 8. In relation to the Strike Out Order, the Plaintiff submits that the Court erred in law and that, in fact, the Court failed to exercise my discretion properly at all on the following grounds:
 - i. Mr. Bhatia did not act intentionally and contumeliously or abuse the process;
 - ii. Mr. Bhatia’s state of mind was never attributed to the claimants;
 - iii. In any event, Mr. Bhatia’s conduct and state of mind was not attributable to the claimant after January 2011, and, from January 2011 there was no intentional or contumelious abuse of conduct or intent;
 - iv. The Court should not have struck out in the absence of continuing the intentional and contumelious default or abuse of process at the time of the hearing or at the time of the Summons;
 - v. The Judge failed properly or at all to exercise a discretion.

- 1 9. The Appellant submits that its appeal is based on both points of law and
2 questions of fact. The Appellant submits that the grounds it has raised have a real
3 prospect of success – not the least of which is because the factual findings made
4 by the Judge were made without the benefit of oral evidence from the relevant
5 witnesses.
- 6 10. Although the Appellant submits that when it is a question of the Court’s exercise
7 of discretion the power of the Court to interfere is limited, they, nevertheless,
8 submit that I misdirected myself, failed to take into account relevant matters,
9 took into account irrelevant matters, and, I was plainly wrong.
- 10 11. I do not consider it necessary to set out the history or background to this matter
11 as I respectfully suggest that this was fully dealt with in my Judgment dated the
12 26th January 2012.
- 13 12. The Appellant made no application to cross-examine the Respondent’s/Sixth
14 Defendant’s witnesses and was content to rely on the three affidavits filed by
15 Leticia Herviou on the 1st June, the 8th September and the 30th September 2011.
- 16 13. I have had the benefit of reading Mr. Bhatia’s earlier affidavits, Ms. Herviou’s
17 three affidavits and the substantial exhibits, and can find no basis for coming to a
18 conclusion that the Court of Appeal would overturn any of my findings of fact.
- 19 14. I have carefully read and reviewed the Plaintiff/Appellant’s five draft grounds
20 and submissions on the Strike Out Order, and have to respectfully conclude that,
21 in my view, there is no real prospect of the Court of Appeal coming to a different
22 conclusion on a point of law, which would materially affect the outcome of the
23 case.

1 15. In addition, I can find no matter of general or important public interest which I
2 consider is appropriate for the appellate court.

3 16. I exercised my discretion and found the Plaintiff guilty of intentional and
4 contumelious default amounting to an abuse of the process of this Court on the
5 following facts:

6 i. The Plaintiff took no steps in the proceedings from the 13th February 2008
7 until April 2011;

8 ii. The Plaintiff failed to comply with Henderson J's Order for Directions on
9 the 16th June 2006, or to file any Summons for Directions or Notice to
10 Proceed;

11 iii. The Plaintiff took an active decision not to accept the Sixth Defendant's
12 settlement offer which was for the full policy limit and without conditions
13 restricting the Plaintiff from pursuing its litigation in Texas;

14 iv. The Plaintiff ignored the Sixth Defendant's Summons, and delayed, for
15 several months to instruct its third attorneys to go on the Court record in
16 these proceedings;

17 v. The Plaintiff is guilty of inordinate and inexcusable delay;

18 vi. The Plaintiff made untrue allegations that the Sixth Defendant had reneged
19 on a settlement, when in fact, no settlement had been agreed;

20 vii. The Plaintiff deliberately allowed its action to remain dormant for
21 approximately three years.

1 iii. The Judge wrongly took the conduct of Embassy into account on this limb
2 and wrongly condemned the evidence relied upon by the Plaintiff/Appellant
3 in support of its application when, in fact, the factual basis underpinning the
4 Appellant's pleaded defences was essentially unchallenged by the Sixth
5 Defendant.

6 20. In relation to ground 2 the Appellant contends:

7 i. The Judge misunderstood the nature of each of the defences raised by the
8 Appellant to the counterclaim and therefore repeatedly failed correctly to
9 analyse and assess the prospects of success of each of them;

10 ii. The Judge also made factual findings as a result of his misunderstanding of
11 the defences advanced by the Appellants, which were:

12 (a) erroneous and, in any event

13 (b) not open to him on an application of this type and/or on the
14 evidence before him.

15 22. The Plaintiff/Appellant submits on draft ground 3 that the Court failed to have
16 regard to the impact of the exemplary damages claim. The Judge failed to consider
17 at all Embassy's argument that, even if the Judgment were not set aside, the Court
18 would be duty bound to consider many of the disputed issues of fact, in order to
19 adjudicate upon HCC's claim for exemplary damages. If the Court were going to
20 litigate these issues in any event, it was perverse not to allow Embassy to have the
21 benefit of any findings in its favour in respect of the substantive defences it wished
22 to advance.

1 23. Having carefully reviewed the Plaintiff/Appellant's submissions and draft grounds
2 of appeal, I am prepared to grant leave, because I cannot conclude, unlike the Strike-
3 Out Order, that the appeal on the Set Aside Order has no realistic prospect of
4 success. In addition it is possible that the Court of Appeal could come to a different
5 conclusion on points of law which may materially affect the outcome of the case.

6 24. Accordingly, I am prepared to grant the Appellant leave to appeal on the draft
7 grounds that the Appellant contends that the wrong test was applied on a jurisdiction
8 to set aside judgment in default, to allow the Appellant to argue its second ground
9 that I misunderstood the nature of the defences to the Sixth Defendant's
10 counterclaim. In addition, I am prepared to grant the Appellant leave to appeal on
11 the question of whether the Court failed to have regard to the impact of the
12 exemplary damages claim.

13 25. For the above reasons I consider that these draft grounds set out by the Plaintiff
14 Appellant are appropriate for Appellate resolution, and hereby grant leave to appeal
15 on the Set Aside order.

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18 Dated this the 3rd day of July 2012

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The Honourable Mr. Justice Charles Quin
Judge of the Grand Court

