

7/8/07

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

**Cause Nos. 278 of 2005, 127 of 2006 &
128 of 2006**

BETWEEN: EMBASSY INVESTMENTS LIMITED

Plaintiff

AND

- (1) ASCOT CORPORATE NAME LIMITED (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 1414 AT LLOYD'S)
- (2) FARADAY CAPITAL LIMITED (FOR AND BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 435 AT LLOYD'S)
- (3) SIMON KING (FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF SYNDICATE 2010 AT LLOYD'S)
- (4) WURTTEMBERGISCHE VERSICHERUNG AG
- (5) ECCLESIASTICAL INSURANCE COMPANY LIMITED
- (6) HOUSTON CASUALTY COMPANY
- (7) SIMON WHITE (FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MAMBERS OF SYNDICATE 1200 AT LLOYD'S)
- (8) CHRISTINE DANDRIDGE (FOR AND ON BEHALF OF HERSELF AND ALL OTHER MAMBERS OF SYNDICATE 609 AT LLOYD'S)
- (9) TALBOT 2002 UNDERWRITING CAPITAL LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 1183 AT LLOYD'S)
- (10) CATLIN SYNDICATES LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2003 AT LLOYD'S)
- (11) BRIT UW LTD (FOR AND ON BAHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2987 AT LLOYD'S)
- (12) WELLINGTON UNDERWRITING AGAENCY LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2020 AT LLOYD'S)

Defendants

CONSOLIDATED WITH



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 MEMEBERS 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

(TOGETHER THE "CONSOLIDATED PROCEEDINGS")

Appearances: Mr. Ross McDonough and Ms. Melanie Crinis of Campbells for the Applicant/Plaintiff
Mr. Jeremy Walton and Mr. Chris Easdon of Appleby for the Respondents/Defendants

Before: Hon. Justice Henderson

Heard: August 7, 2007

RULING

I have a single application made in four separate causes before me.

The plaintiffs in causes 278 of 2005, 127 and 128 of 2006, and the defendants in cause 98 of 2006 apply for the following relief: First, that the respondents provide affidavits of documents; second, that the respondents provide a copy of a letter from Ellis Don to the underwriters and/or their agents, "which Ellis Don was prepared to read out but not to provide a copy of at the meeting on 29th November 2005 confirming that the Ellis Don estimate is in fact to reinstate the hotel to its pre-hurricane condition, i.e. ACB instead of new-for-old basis"; and, third, documents evidencing a certain fee dispute between the respondents and some of their professional advisors.

I have already determined that there is no relevance to the fee dispute documents and have dismissed that request.

I turn to the request for the Ellis Don letter. A number of points have been argued extensively relating to this request, but I need refer to one only as it disposes of the application. The respondents say this letter does not exist.

The applicants offer the following evidence that it does exist. First, a certain letter attached to the fourth affidavit of Mr. Bhatia on behalf of the applicants is a letter to Ellis Don from Fluor, the respondent's expert. At page 3 of that letter, Fluor, says to its counterpart, the plaintiff's expert:

"In relation to your estimate as agreed in our November 30th, 2005 meeting, we are still awaiting your unit price build up, a copy of

your field observations listing the reusable versus non-reusable FFNE items, responses to our July 28th, 2005 letter regarding the missing scope in the Strone estimate, and a copy of the Ellis Don letter which you read out in a meeting making it clear that your estimate was to reinstate the hotel to its pre-hurricane condition except where the cost of repair was greater than the cost of new, or where it was not possible to repair.”

The second bit of evidence from the applicants for the existence of the letter is found in the third affidavit of Mr. Bhatia at paragraph 6(A) where he deposes to his belief as follows:

“Embassy is particularly concerned about the searches conducted by the excess underwriters because it is aware of at least one letter and one category of documents which has not been included in the lists of disclosed documents. These were set out in Campbell's letter of eighth May and are as follows: (a) a letter from Ellis Don to the excess underwriters, [etc.].”

Thus, we have a bit of unsworn evidence contained in a letter from one expert to the other suggesting the existence of the requested document and the assertion of an opinion by a principal of the applicant to the effect that the letter exists.

Mr. Bhatia's affidavit does not assert that he was at the meeting where Ellis Don said they were prepared to read out the letter.

In response to Mr. Bhatia's affidavit, the respondents sent to the applicants a copy of a letter from Ellis Don to Proffered Global Technical Services dated May 10th, 2005. The solicitors to the respondents say that this is in fact the letter which Ellis Don was prepared to read out at the relevant meeting. The letter is some six pages in length and does indeed deal with the methodology by which Ellis Don approached the task of estimating the loss. In items one and two there is a

reasonably detailed description of how Ellis Don carried out that assessment. The respondents have not chosen to enter any sworn evidence that this is the letter in question.

There is no sworn evidence from anyone who attended the meeting asserting that this is not the letter.

This application is for specific disclosure pursuant to Order 24 Rule 7 of the Grand Court Rules.

Subrules 1 and 3 are pertinent. Subrule 1 reads:

“Subject to Rule 8, the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any documents specified or described in the application, or any class of documents so specified or described, is or has at any time been in his possession, custody or power, and if not then in his possession custody or power, when he parted with it and what has become of it.”

Subrule 3 reads:

“An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at sometime had, in his possession, custody or power, the document, or class of documents specified or described in the application, and that it relates to one or more of the matters in question in the cause or matter.”

Where a respondent to an application under Order 24 Rule 7 denies that the requested document exists, what is the burden on the applicant?

No authorities have been cited on this question and I have not discovered any.

Mr. Bhatia's third affidavit satisfies the requirement of Order 24 Rule 7(3), i.e., he does assert under oath a belief that the respondents have the requested document. That, however, cannot be the end of the matter. There must be some evidence, apart from the subjective opinion of the applicant, which gives the court reason to believe that the document exists. In other words, compliance with Rule 7(3) is necessary but not dispositive. The applicant carries a limited burden of showing objectively that there is reason to believe the requested document exists and that it is or has been in the possession, custody or power of the respondent. If the rule were otherwise, Order 24 Rule 7 could become a supposed justification for meritless and abusive applications.

The record here contains no such evidence. For that reason the application for specific disclosure must be dismissed.

Given this result, I do not see any justification for ordering the respondents to swear affidavits of documents. Before such an order will be made, there must be reason to suspect that the respondents have failed or will fail to comply fully with their disclosure obligation.

The applicants are, however, at liberty to apply again, on fresh evidence, for disclosure of the purported document or, if so advised, for an affidavit of documents.

Dated this 7th day of August, 2007

Henderson, J.

Henderson, J.
Judge of the Grand Court

