28/4/10
Foster

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 61 OF 2010-AJEF

BETWEEN:

RENOVA RESOURCES PRIVATE EQUITY LIMITED
(A company incorporated in the Bahamas suing as shareholder of the Second Defendant, Pallinghurst (Cayman) General Partner LP (GP) Limited)

Plaintiff

AND

(1) BRIAN PATRICK GILBERTSON
(2) PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP)
(3) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
(4) PALLINGHURST RESOURCES MANAGEMENT LP
(5) AUTUMN HOLDINGS ASSET INC.

Defendants

(By Original Action)

AND BETWEEN:

(1) BRIAN PATRICK GILBERTSON
(2) AUTUMN HOLDINGS ASSET INC

Plaintiffs to Counterclaim

AND

(1) VIKTOR VEKSELBERG
(2) VLADIMIR VIKTOROVICH KUZNETSOV
(3) RENOVA HOLDING LIMITED
(4) RENOVA RESOURCES PRIVATE EQUITY LIMITED

Defendants to Counterclaim

(By Counterclaim)

Coram: The Hon. Mr. Justice Angus Foster, QC

Appearances: Mr. James Eldridge of Maples and Calder for the Plaintiff and the Defendants to Counterclaim
Mr. Graeme Halkerston of Appleby for the First and Fifth Defendants and the Plaintiffs to Counterclaim

Heard: 15th April 2010

RULING (2)

1. This Ruling concerns the jurisdiction of the Court to give summary judgment for a defendant to a counterclaim pursuant to O.14 of the Grand Court Rules (GCR) or otherwise.

2. The relevant parts of GCR O.14 provide as follows:

> *1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.*
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> . . . . . .
>
> *3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or that part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*
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> . . . . . .
>
> *5. (1) Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3) the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.*
>
> *(2) Rules 2,3 and 4 apply in relation to an application under this rule as they apply in relation to an application under rule 1 but with the following modifications, that is to say –*

(a) references to the plaintiff and defendant shall be construed as references to the defendant and plaintiff respectively;

. . . . . .

12. (1) Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the whole or part of the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for the defendant on the whole or part of the claim.

. . . . . .

14. (1) Unless on the hearing of an application under rule 12 either the Court dismisses the application or the plaintiff satisfies the Court that he has a prospect of succeeding on the whole or part of his claim and, where the claim includes a claim for damages, that he has a prospect of recovering more than nominal damages, the Court may dismiss the whole or part of the claim and give judgment for the defendant.

. . . . . .

There is clearly no express provision in O.14 for the grant of summary judgment to a defendant to a counterclaim.

Background

4. It is unnecessary for present purposes to set out the factual background to these ongoing proceedings. Insofar as considered relevant, it is summarized in some detail in my earlier Ruling dated 14th April 2009. The procedural background is that on 20th May 2008 the plaintiff issued its Writ of Summons and Statement of Claim against the 5 defendants and on 6th June 2008 was given leave to serve the

1st and 5th defendants out of the jurisdiction. On 3rd July 2008 the 1st and 5th defendants acknowledged service of the plaintiff's Writ.

5. The plaintiff's claim is a derivative one and after a contested hearing in February 2009 I gave leave to the plaintiff to continue the action pursuant to GCR O.15, r.12 (A) for the reasons set out in my said Ruling dated 14th April 2009. On 11th May 2009 the 1st and 5th defendants filed and served a defence and counterclaim. The counterclaim is against the plaintiff and also against 3 additional parties, being 2 individuals and another company all of whom are involved in one way or another in the dispute which is the subject of the action. On 5th August 2009 I gave leave to the 1st and 5th defendants to serve their defence and counterclaim on the 3 additional parties out of the jurisdiction. On 22nd September 2009 the plaintiff filed a reply to the 1st and 5th defendants' defence and a defence to the counterclaim. On 23rd October 2009 the 1st and 5th defendants filed and served a reply to the plaintiff's defence to their counterclaim.

6. By a summons dated 29th September 2009 the 4 defendants to the counterclaim, including the plaintiff in the action, (together for these purposes "the defendants to the counterclaim") applied for alternative orders under the GCR. They applied, firstly, for summary judgment against the 1st and 5th defendants/plaintiffs to the counterclaim (together for these purposes "the plaintiffs to the counterclaim") pursuant to GCR O.14, r.12 on the ground that the plaintiffs to the counterclaim have no prospect of success in the counterclaim and alternatively for orders that

various specific paragraphs of the counterclaim should be dismissed and summary judgment given for the defendants to the counterclaim on the same ground. Secondly, in their summons the defendants to the counterclaim applied pursuant to GCR O.18, r.19 for those same paragraphs of the counterclaim to be struck out on the grounds that they disclose no reasonable cause of action.

7. During the course of the hearing of the applications by the defendants to the counterclaim, and at a somewhat late stage, leading counsel for the plaintiffs to the counterclaim submitted, during his response to the applications, for the first time, that the court has no jurisdiction to grant summary judgment to the defendants to the counterclaim pursuant to the GCR O.14 in any event and that accordingly the Court was confined to determining the applications of the defendants to the counterclaim made pursuant to GCR O.18, r.19. The significance of this is, of course, that, apart from the different tests applicable, in an application pursuant to GCR O.14, r.12 the parties may file and the Court may consider affidavit evidence whereas in an application pursuant to GCR O.18, r.19 on the ground that the claim concerned discloses no reasonable cause of action, the Court is confined to considering the parties' pleaded cases and may not consider any evidence. Since a considerable amount of affidavit evidence had been submitted for purposes of the application pursuant to GCR O.14, r.12 and already referred to by leading counsel for the defendants to the counterclaim in support of the application, the jurisdiction of the Court to grant summary judgment pursuant to O.14, r.12 was clearly an important issue.

8. In the circumstances, particularly in view of the fact that leading counsel for the defendants to the counterclaim had already completed his opening submissions in support of the application pursuant to GCR O.14, r.12 and in view of the relatively limited time remaining, it was agreed that the parties' leading counsel should conclude their submissions on the substantive merits of the applications made pursuant to GCR O.14, r.12 as well the applications made pursuant to GCR O.18, r.19 *de bene esse* and that the question of the Court's jurisdiction under GCR O.14, r.12 should be the subject of a separate hearing as soon as practicable. It was agreed that I should defer ruling on the principal applications until I had ruled on the question of jurisdiction. The hearing on jurisdiction took place before me on Thursday 15th April 2010 and this is my Ruling on that issue. In the circumstances I have thought it more practical and convenient to give this Ruling on the question of jurisdiction separately and before my ruling on the principal applications.

Arguments and Analysis

9. Counsel for the plaintiffs to the counterclaim submitted that the Court's jurisdiction to grant summary judgment is confined to its powers pursuant to GCR O.14 and that the Court has no inherent or other jurisdiction to grant summary judgment outside the provisions of O.14. That jurisdiction is expressly extended by GCR O.14, r.5 to an application for summary judgment by a plaintiff to a counterclaim against a defendant to the counterclaim. I was informed that GCR O.14, r.12, which enables a defendant to obtain summary judgment against a

plaintiff in respect of the plaintiff's claim was introduced into the GCR in 1996 and amended in 2008. O.14, r.12 effectively mirrors r.1. However, there is no express rule mirroring r.5 enabling a defendant to a counterclaim to seek summary judgment against the plaintiff to a counterclaim.

10. In summary, counsel for the plaintiffs to the counterclaim argued that the GCR do not provide for a defendant to a counterclaim to apply for summary judgment against a plaintiff to a counterclaim and that the Court only has jurisdiction in relation to summary judgment under and pursuant to the Rules. It has no inherent or other jurisdiction to grant summary judgment on the application of a defendant to a counterclaim. Accordingly, it was submitted, the Court has no jurisdiction to grant the relief applied for by the defendants to the counterclaim pursuant to GCR O.14, r.12 in the present proceedings.

11. Counsel for the defendants to the counterclaim argued that it would be extraordinary if the Court considered that a counterclaim had no prospects of success yet had no jurisdiction to do anything other than to allow such a counterclaim to proceed to trial. He contended that there are 4 different ways by which the Court could and should seek to avoid such a result, consistent with the proper exercise of its jurisdiction. I propose to consider each of these in turn.

Construction of O.14 r.12 in accordance with overriding objective

12. The first argument of counsel for the defendants to the counterclaim was that the GCR should be construed liberally and broadly in such a way as to secure the

"just, most expeditious and least expensive determination of every cause or matter on its merits" in accordance with the overriding objective contained in the preamble to the GCR. In particular, the following parts of the overriding objective were relied upon:

1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.

1.2 Dealing with a cause or matter justly includes, as far as practical –

(a) ensuring that the substantive law is rendered effective and that it is carried out;

(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;

(c) saving expense;

(d) dealing with the cause or matter in ways in which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.

2.1 The Court must seek to give effect to the overriding objective when it –

(a) applies or exercises any discretion given to it by these Rules; or

(b) interprets the meaning of any Rule

2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, must expeditious and least expensive determination of every cause or matter on its merits.

3. *The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect".*

It was noted also that the GCR include an Explanatory Memorandum that expressly states that it is not intended to be a comprehensive guide nor is it to be regarded as a substitute for the Rules. It states *inter alia* as follows:

"2.1 The preamble sets out the overriding objective of the rules which is to enable the court to deal with every cause or matter in a just, expeditious and economical way. The contents of the preamble are not rules of the court. Rather, it is a statement of the policy upon which the rules are founded. The judiciary will interpret and apply the rules with a view to giving effect to this policy.

2.2 Whenever a cause or matter comes before the Court the Judge will consider what direction should be made with a view to achieving these overriding objectives".

13. It was submitted that O.14, r.12 should be interpreted in accordance with the overriding objective and that therefore the word "defendant" should be construed so as to include a defendant to a counterclaim. This would ensure that, where a counterclaim has no prospect of success, the matter is dealt with in a just manner, and in the most expeditious and economic way, rather than allowing such a counterclaim to go to trial. To allow such a claim to go to trial would be contrary to and inconsistent with those objectives. It was argued that there is no justification for excluding a defendant to a counterclaim from being able to obtain summary judgment pursuant to O.14, r.12 in the same way as a defendant to an original action and that there is an obvious lacuna in the rules in this respect. It was said that there is no reason not to equate a counterclaim, as far as possible, with an independent action and that this is the policy behind O.14. It was

contended that this proposed interpretation of r.12 is consistent with and meets the overriding objective, which, while clearly not giving the Court power to amend or replace a Rule, nonetheless permits, indeed requires, the Court to adopt a broad interpretation of a Rule, particularly where the circumstances give rise to an otherwise extraordinary result. Such a construction of r.12 fulfills the desired factors expressly included in the definition of "deal with a cause or matter justly" as set out above and meets the overriding objective.

14. It is clear that the overriding objectives in the preamble to the GCR are not rules. In my view they are not intended to enable, still less require, the Court, to interpret the rules other then in accordance with their ordinary meaning in their context and adopting the usual rules of construction. In ***Powell & Another v Attorney General*** [2009] CILR 298 I made reference to the overriding objective in taking a liberal view of the procedure under GCR O.53, r.3 in the particular circumstances of that case and having regard to established general practice. However, the rule concerned and the issue concerning the appropriate practice pursuant to that rule were very different from the considerations in the present case and the jurisdiction in question here. There was also English precedent in this case for adopting the view which I took. Furthermore, I made it clear that the overriding objective did not entitle me to interpret a rule contrary to its clear meaning. In the submissions of counsel in the present case I was not made aware of any reported case in which the Court has made reference to the overriding objective in considering the interpretation of any specific rule. In my opinion the

interpretation of any particular rule and the effect of the overriding objective in its construction and applicability will always depend to a large degree on the nature, consequence and context of the rule concerned.

15. O.14 clearly distinguishes between an original action and a counterclaim. If the suggested construction of O.14, r.12 is appropriate, O.14, r.5 would be otiose. There would be no need for a specific rule relating to a plaintiff to a counterclaim if the word "plaintiff" in O.14, r.1 was to be construed so as to include a plaintiff to a counterclaim. It seems to me that logically, if express provision is required to give the Court jurisdiction to grant summary judgment to a plaintiff to a counterclaim as was effected by r.5, similar express provision is necessary in order to empower the Court to grant summary judgment to a defendant to a counterclaim. In my view the overriding objective does not require the Court to apply anything other than a normal construction to the Rules when the Rules are drafted in such a way as to enable that. The ordinary and usual construction of O.14, r.12 does not, in my opinion, either expressly or impliedly in the overall context, extend to providing for an application for summary judgment by a defendant to a counterclaim. Such a construction is not consistent with the overall scheme and format of O.14 and the clear distinction it makes between an original action and a counterclaim.

16. The submission by counsel for the defendants to the counterclaim that, if the Court considers that the counterclaim has no prospect of success it should not be constrained to accept that it has no jurisdiction to do anything other than to allow

the counterclaim to proceed to trial, seems to me to put matters the wrong way round. In my view, where there is a question as to the Court's jurisdiction to grant a particular application the Court must first address the question of whether it has jurisdiction before it can proceed to consider the merits of the application concerned. If, and only if, the Court concludes that it does have such jurisdiction should it then move on to consider the merits of the application. It is not right, in my opinion, that the Court should, as it were in a vacuum, spend time considering evidence and submissions with a view to determining whether or not a counterclaim has any prospect of success and, then, if it does reach that conclusion, hunt around to see whether it can take jurisdiction to do anything about that. For a Court to grant judgment on a claim at a preliminary stage without a trial involving discovery and evidence in the usual way is, to my mind, a strong thing to do and is not something which the Court should lightly do unless it has very clear jurisdiction to do so pursuant to clear express statutory or procedural provision. I certainly accept the intent and desirability of the overriding objective but I would be reluctant to conclude that those objectives entitle the Court to assume the power to grant judgment on a claim summarily in any particular circumstance or matter without the clearest express indication that it may do so.

17. I was taken through the history of the Court's jurisdiction to grant summary judgment both here and in England. The position in England was summarized in ***C.E. Heath PLC v Ceram Holding Co & Another*** [1988] 1 WLR 1219 by Neill

LJ. Save as provided by a specific summary procedure under the Bills of Exchange Act 1855, the English Court had no power to grant summary judgment on the lines covered by of the Rules of the Supreme Court (RSC) O.14 until the Supreme Court of Judicature Act 1873, which remained in force, with various amendments, until 1962. Prior to the introduction of the Civil Procedure Rules (CPR) in 1999 there was no provision in England even for a defendant to an action to apply for summary judgment against a plaintiff and it was not apparently considered that the Court had any jurisdiction to grant summary judgment in such a case.

18. In this jurisdiction the former Grand Court (Civil Procedure) Rules provided only for a plaintiff to apply for summary judgment in an action commenced by specially endorsed writ claiming a liquidated sum. The suggestion that the Court had jurisdiction to grant summary judgment in any other circumstances was clearly rejected by the then Chief Justice (Collett CJ) in ***Cayman Islands News Bureau v Cohen & Another*** [1988-89] CILR 56. The present GCR were introduced in 1995 and, with certain changes which are not material to the present case, effectively re-stated the then RSC, including O.14, r.1 and r.5. GCR O.14, r.12 enabling a defendant to seek summary judgment in respect of a plaintiff's claim was introduced in 1996 and, I was informed, amended in 2008. As I have said, there was never any equivalent of that provision in the RSC. GCR O.14, r.5 was not amended in 1996 or in 2008 nor was O.14, r.12 originally drafted or subsequently amended so as to apply in respect of a defendant to a counterclaim. It was submitted for the plaintiffs to the counterclaim that since an express rule

was required in the RSC in 1962 and in the GCR in 1995 to enable a defendant bringing a counterclaim to seek the equivalent of a plaintiff's summary judgment under O.14, r.1, an express rule would equally be required to enable a defendant to a counterclaim to seek the equivalent of a defendant's summary judgment under O.14, r.12; that could not simply be implied in O.14, r.12.

19. It is clear that the jurisdiction of the High Court in England to grant summary judgment has grown gradually and incrementally over time and only by statute or by express provision in Rules made pursuant to statutory powers. The GCR have themselves developed incrementally in this respect as demonstrated initially by incorporation of the jurisdiction provided by the then RSC and then by the later inclusion of r.12. I do not accept that I can assume that the lack of a provision for the obverse of O.14, r.5 with regard to a defence to a counterclaim is simply an accidental omission. As I have already pointed out, no provision enabling application for summary judgment in such circumstances, or even by a defendant to an original action, was introduced in England until the CPR came into effect.

20. I should add that I am not persuaded that in this case adopting the interpretation of O.14, r.12 which was proposed would necessarily achieve the overriding objective in any event. As I have said already, it seems to me an inappropriate approach for the defendants to the counterclaim to assume, even hypothetically, success on the merits of their submission, purportedly pursuant to O.14, r.12, that the counterclaim has no prospect of success, in order to thereby found the jurisdiction of the Court under O.14, r.12 to grant the summary judgment which

they seek. In fact there is a strong dispute between the parties as to whether a trial of the counterclaim at the same time as the trial of the original action would or would not add significantly to the length and the cost of the trial and therefore whether adopting the broad interpretation of O.14 would anyway further the specific overriding objective of expedition, economy and proportionality relied on by the defendants to the counterclaim.

Inherent Jurisdiction

21. In the alternative, counsel for the defendants to the counterclaim submitted that the Court anyway has an inherent jurisdiction in appropriate circumstances which may be exercised where there is an obvious lacuna in the GCR and where it would not be contrary to or inconsistent with the Rules to exercise such an inherent jurisdiction. It was submitted that the ability of the Court to grant summary judgment to a defendant to a counterclaim is entirely consistent with its jurisdiction to grant summary judgment to a defendant in an original action, and that there is clearly an inadvertent omission from the GCR in this respect. This inherent jurisdiction enables the Court to consider what steps it should take to interpret the Rules on summary judgment and to supplement and complement them where necessary in such a way that is not contrary to or inconsistent with the GCR. In this regard I was referred to ***Tombstone Limited v Raja and Another*** [2009] 1WLR 1143 which was also a "lacuna" case in which the Court exercised its inherent jurisdiction to avoid an otherwise absurd result. In that case Mummery LJ said:

> "[Counsel] *has suggested no reason why the Rules should provide that an application to set aside an order made without notice can be made if the order is made pursuant to an application notice; but that an application to set aside cannot be made if the order is made pursuant to an application which is not supported by an application notice. Such a distinction makes no sense.*

He went on to say:

> *The CPR introduced a new code. It was intended to be comprehensive. If there is a lacuna, the omission should be made good in a way which is consistent with the Rules. Our procedural regime would be incoherent if an application to set aside a judgment pursuant to the CPR involved the exercise of a discretion in accordance with the overriding objectives but an application outside the Rule involves the exercise of a narrower discretion or no discretion at all.*

22. In the present case it was argued that it makes no sense that a plaintiff in an action may apply for summary judgment, a plaintiff to a counterclaim may apply for summary judgment and a defendant to an action may apply for summary judgment but a defendant to a counterclaim may not. This is, it was submitted a clear gap in the Rules which may and obviously should be filled by the exercise of the Court's inherent jurisdiction. Accordingly the Court may, in the exercise of that inherent jurisdiction grant summary judgment to a defendant to a counterclaim when the counterclaim has no prospect of success. It was emphasized that the Court is not being asked to exercise its inherent jurisdiction to dis-apply or vary an existing rule but, on the contrary, it is being requested to address an inadvertent omission in the Rules which it can do in a way that is clearly not contrary to or inconsistent with the GCR. In that regard, it was argued that the recent case of ***HSH Cayman 1 GP Ltd. and Others v ABN Amro Bank NV*** (CICA 9th December 2009 unreported) is distinguishable in that it concerned

the exercise of the Court's inherent jurisdiction to dis-apply or vary the relevant Rules whereas the present case concerns supplementing the Rules where there is an obvious gap, in a way which is consistent with the rules.

23. In ***CE Heath Plc & Another v Ceram Holding Co.*** (ibid) Neill LJ said at page 1228:

> *"Similarly the scope of Order 14 proceedings has been a matter which has been determined by the Rules. There would therefore appear to be little, if any, room for an argument that the court has some wider powers in these fields than conferred by the Rules, or that it has some residual or inherent jurisdiction to grant relief where it is just to do so.....*

That passage is cited with approval in the 1999 Supreme Court Practice Vol. 1 at para.14/5/2. Counsel for the plaintiffs to the counterclaim submitted that the jurisdiction of the Court to supplement or complement a procedural rule depends upon the rule in question. Where a rule has developed over time out of the ordinary general practice and procedure of the Court in the exercise of its historic inherent jurisdiction there is a continuing inherent jurisdiction to supplement or complement such a rule where necessary and consistent with the rule concerned. However, where a particular jurisdiction to the Court has not arisen in such a way but has been created by statute or rule there is no scope for the application of such an inherent jurisdiction. An example of the latter type of rule is GCR O.23 which provides for the Court's power to order security for costs. That rule was created and codified by rule and the circumstances in which such an order may be made may not be extended and are exhaustive as set out in the rule (see 1999 Supreme Court Practice Vol. I para.23/3/1 and the cases cited there). It was submitted that

the Court's jurisdiction to grant summary judgment was created by statute and has only been extended by express rules; it does not derive from any inherent jurisdiction. This does not seem surprising to me. As I have already said, the power of the Court to grant judgment in favour of a party without a trial of the merits of the claim is an extraordinary and exceptional jurisdiction and one of great significance to the parties concerned and one which one would expect to require to be legislated for, whether by statue or rule. It is, therefore, it is argued, a jurisdiction which may not be extended, supplemented or complemented by the exercise of an inherent jurisdiction; that may only be done by legislation or by rule made pursuant to statutory power. It was submitted that it follows from this that even if there is a lacuna in O.14 it may not be filled by the exercise of an inherent jurisdiction. It seems to me that this is right and that the Court's power to grant summary judgment is statutory or pursuant to express Rules and that there is no scope to exercise an inherent jurisdiction in that respect.

24. As I have already mentioned, I am not persuaded in the circumstances that I can necessarily assume that the absence of a provision in the GCR enabling a defendant to a counterclaim to obtain summary judgment is necessarily an inadvertent omission. There was no "reverse summary judgment" provision in favour of a defendant in England until the introduction of the CPR in 1999, yet I was not referred to any English case prior to 1999 where the English Court exercised an inherent jurisdiction to supplement or complement the existing rules there with a procedure enabling summary judgment in favour of a defendant,

which was apparently, by the time the CPR were introduced, considered appropriate.

GCR O.15, r.5 and r.6

25. On the assumption that, contrary to his principal submissions, the Court must have regard only to the express provisions of GCR O.14 as strictly construed, counsel for the defendants to the counterclaim submitted that there are other means available to the Court pursuant to the GCR which would avoid what is, in his submission, the unacceptable consequence if summary judgment for the defendant to a counterclaim which has no prospect of success is not available pursuant to O.14. In particular he relied on GCR O.15, r.5 which provides that the Court may order separate trials if it appears to the Court that the joinder of causes of action or of parties may embarrass or delay the trial or is otherwise inconvenient. Sub-Rule (2) of r.5 provides that if it appears that a counterclaim ought for any reason to be disposed of by a separate action the Court may order the counterclaim to be struck out or to be tried separately. It was argued that if the Court accepts that the counterclaim in the present action has no prospect of success it may order either that the counterclaim proceed by way of a separate trial or that the counterclaim be recommenced separately as a new action with respect to which GCR O.14, r.12 would then be applicable. Another alternative approach contended for by counsel for the defendants to the counterclaim, again on the assumption that the Court had somehow reached the view that the counterclaim had no prospect of success, was for the Court to order pursuant to

GCR O.15, r.6 (2) that the defendants to the counterclaim should cease to be parties to the counterclaim on the ground that they had been mis-joined to it.

26. It seems to me that the first and most obvious difficulty is that the defendants to the counterclaim simply have not made any applications pursuant to O.15 and have not sought to do so. The whole matter was argued before me on the basis of their applications pursuant to GCR O.14, r.12 and O.18, r.19. There was no application pursuant to O.15 and it was not even mentioned, nor were the authorities on O.15 referred to, let alone analysed. The discretion of the Court pursuant to O.15, r.5 to order separate trials or to order that the subject matter of a counterclaim should be disposed of by separate action is predicated upon either the existence of the express circumstances set out in the r.5 (1) and the exercise of the Court's discretion generally. The express circumstances and reasons why such orders were said to be appropriate would require detailed analysis in the particular case and, there would no doubt be extensive argument as to the applicability and relevance of the propounded reasons, all having regard to the authorities relating to O.15, r.5. Furthermore, in circumstances such as these, where the sole intention of the putative applicant for an order pursuant to GCR O.15, r.5 is admittedly simply to get around the Court's lack of jurisdiction to grant summary judgment to a defendant to a counterclaim pursuant to O.14, r.12, I am not persuaded that the Court would consider it appropriate to exercise its discretionary jurisdiction to order separate trials or to require the counterclaim to be disposed of by a separate action pursuant to O.15. To my mind O.15 is not an indirect route for a defendant to a counterclaim to seek to achieve summary

judgment when he cannot do so pursuant to O.14. The jurisdiction of the Court to grant summary judgment in any particular circumstances is set out in and, in my view confined, to O.14. As far as O.15, r.6 is concerned, apart from the fact that there was and is again no application pursuant to that rule, in my view the argument for the defendants to the counterclaim is misconceived. The question whether the wrong parties have been joined to the counterclaim seems to me to be a different question from whether the counterclaim has no prospect of success. They may overlap but they are not the same test. Furthermore, in the circumstances of the present case I cannot anyway see any basis for determining that the wrong parties have been joined to the counterclaim, given the involvement in one way or other of all the defendants to the counterclaim in the circumstances on which the counterclaim (and the Defence) is based.

Grand Court Law Section 18

27. As a further alternative counsel for the defendants to the counterclaim relied on Section 18 of the Grand Court Law (2008 Revision) ("the GCL") which provides as follows:

> *"18. (1) subject to this or any other law, the jurisdiction of the court shall be exercised in accordance with any Rules made under this law.*
>
> *(2) in any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply as far as local circumstances permit and subject to any directions which the Court may give in any particular case".*

It is my understanding that the Grand Court Rules Committee made a general policy decision after the CPR were introduced in England in 1999 not to adopt those Rules generally for the Grand Court and the GCR continue to be based almost entirely on the former RSC. In light of the radical changes made by the CPR it is perhaps somewhat surprising that Section 18 (2) of the GCL has not been repealed or amended. The Explanatory Memorandum to the GCR, already referred to, specifically states that the RSC 1965 ceased to apply to proceedings in the Grand Court after 1st June 1995, albeit the GCR follow the layout of the RSC and in most respects are identical to them, as they existed prior to the enactment of the CPR. That seems to me to indicate an intention to depart from English practice and procedure as such. Nonetheless, the present provisions of Section 18(2) of the GCL remain in place and continue to govern the position in appropriate circumstances, unsatisfactory as that may be given the significant differences between the GCR and the RSC on the one hand and the CPR on the other hand.

28. It was submitted that the practice and procedure in the High Court in England does now enable a defendant to a counterclaim to obtain summary judgment and reference was made to Part 24 of the CPR. Rule 24.3 empowers the High Court to *"give summary judgment against a claimant in any type of proceedings"*. It was argued that the conditions to the applicability of the practice and procedure of the High Court in England as set out in Section 18 (2) of the GCL are all met in the present case. In particular the requirement that *"no provision is made by this*

or any other law or by any other law or by any Rules" should, it was argued, be interpreted to mean that no provision is made for the specific procedural issue before the Court, namely, in this case, the ability to grant summary judgment to a defendant to a counterclaim. The GCR clearly do make provision for the grant of summary judgment to the plaintiff and to the defendant respectively in an original action and to the plaintiff to a counterclaim but make no provision for the grant of summary judgment on the application of a defendant to a counterclaim. There is, so it was submitted, therefore an absence of a provision in the relevant practice or procedure in relation to the Court's ability to grant summary judgment to such a party. It was argued that such an approach is consistent with the approach in ***C. Lemos and Others v Coutts & Company (Cayman) Limited and Others*** [1992-93] CILR 5 in which, according to the Headnote, Harre J held that:

> "in the Cayman Islands the Grand Court (Civil Procedure) Rules, r.47 provided for the discovery of documents. This Rule would have been applicable had it been merely inadequate by comparison with the corresponding English rule but neither r.47 nor any other provision in the Grand Court (Civil Procedure) Rules provided for the special case of the inspection and copying of documents referred to in pleadings or affidavits. Since there was a fundamental distinction between those rules and the general rules on discovery applicable in the Cayman Islands there was effectively no applicable local provision and therefore, by virtue of the Grand Court Law, s.20 [the predecessor to s.18] and r.62 of the Rules, the practice and procedure of the English Rules of the Supreme Court as embodied in O.24, r.10 applied in the Islands".

It was contended for the defendants to the counterclaim that in the present circumstances it is not a question of the relevant existing rule being "inadequate" by comparison with the corresponding rule in the CPR but of there being no rule at all. Counsel argued that there is simply a lacuna in the GCR and not a

deliberate restriction relating to a defendant to a counterclaim. He argued that there is a clear and obvious distinction between the GCR and the CPR in England as far as the availability of summary judgment to a defendant to a counterclaim is concerned. No such provision is made in the GCR.

29. The qualifying words *"so far as local circumstances shall permit"* in s.18 (2) of the GCL are, it was submitted, to ensure that only such practice and procedure of the High Court in England will apply, where there is a lacuna in the GCR, which is not inconsistent with the GCR. It was submitted that the practice and procedure of the CPR in enabling a defendant to a counterclaim to apply for summary judgment in appropriate circumstance is in no sense inconsistent with the provisions of O.14 of the GCR and that pursuant to s.18 (2) of the GCL the Court clearly retains the ability to manage the effect of the application of such practice and procedure of the English High Court by giving appropriate directions.

30. It was pointed by counsel for the plaintiffs to counterclaim that there was and is no application by the defendants to the counterclaim pursuant to CPR rule 24.3, or seeking its application, before the Court and that accordingly none of the jurisprudence on the scope of and the appropriate test for the applicability of Part 24 were before the Court either. Furthermore the applications of the defendants to the counterclaim were not argued on the basis of an application pursuant to Part 24 or the practice and procedure thereunder. In addition it was submitted that it is settled law that Section 18 (2) of the GCL is only applicable where there is no provision at all under the Cayman Islands rules relating to the matter concerned.

If the GCR simply provide for a more limited or narrower procedural option then the practice and procedure of the English High Court is not applicable and there is no scope for relying upon the Section. In ***Cayman Islands News Bureau Limited v Cohen & Another*** (ibid) the plaintiff sought summary judgment against the defendants on the grounds of certain alleged admissions by the defendants. The plaintiff's application was made in reliance upon O.27, r.3 of the RSC and the question was whether that rule of the RSC applied in the Cayman Islands pursuant to GCL Section 20 (2) (which was the then equivalent to the present Section 18 (2)). It was held that the GCL only permitted the application of English practice and procedure where there was no local provision at all in existence and that since there was some provision under the Grand Court (Civil Procedure) Rules relating to summary judgment, the RSC, despite their wider scope, were not applicable. In his judgment Collett CJ said (p.59):

"In the absence of any authority directly in point the matter is largely one of first impression. To my mind the alleged distinctions between the jurisdiction under [the Cayman Islands provision] *and that under* [the English provision] *are essentially ones of detail only. In essence what such a practice and procedure seeks to do is to ensure to a plaintiff a ready means of obtaining a judgment by a summary process without the delay and expense inherent in a trial in open court in a case where the merits of his claim freed from any possibility of effective rebuttal can clearly be perceived at an early stage of the proceedings. It is only in such cases that the justice of the matter permits of its disposition by a summary process of that nature, without oral evidence, discovery or full trial.*

Viewed in this way it is to my mind significant that the framers of the Cayman Rules have chosen to restrict the availability of the summary judgment process by r.23 to actions commenced by specially endorsed writ claiming a liquidated amount. This, it could be argued, is an inadequate provision by comparison with what the English RSC provide, but it could not be argued that it is no provision at all for obtaining judgments by that kind of process. And it is the latter rather than the former which is the proper test of the present issue as was held by Summerfield CJ in ***Rawson v GCTC Ltd.*** [1980-83] *CILR 214 as well as in the earlier case of* ***In re Aramco Ltd.*** [1980-83] *CILR 2002.*

Since I have reached the conclusion that provision is indeed made by r.23 of the local Rules, although it is not a provision of which the plaintiff here can take advantage, it follows that in my judgment O.27, r.3 of the English Rules has no application to the Cayman Islands".

31. It should also be noted, in passing, that the former Chief Justice declined to accept the plaintiff's alternative argument that the Court should exercise an inherent jurisdiction to grant summary judgment based on the existence of admissions in the defendants' pleading in the absence of any statutory jurisdiction and where only reasons of convenience, economy and time-saving could be urged in its favour.

32. In the case relied upon by counsel for the defendants to the counterclaim, ***C.Lemos & Others v Coutts & Company (Cayman) Limited & Others*** (ibid), in considering whether RSC O.24, r.10, providing for the inspection of documents referred to in pleadings or affidavits, was applicable in the Cayman Islands, Harre J (as he then was) made specific reference to the judgment of Slade, LJ in ***Dubai Bank Ltd. v Galadari (No. 2)*** [1980] 2 All ER at 743. He said:

Rules of court substantially corresponding with O.24, r.10 and the rules ancillary to it have been in force for over 100 years. Lindley, LJ in ***Quilter v Heatley*** (1883) *23 Ch. D.42 at 50 drew a distinction between these rules and the general rules as to discovery of documents. He said:*

> *"These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings".*

In my judgment there is no provision in the Grand Court (Civil Procedure) Rules relating to the production and inspection of documents referred to in pleadings or affidavits for the purpose described by Lindley, LJ in 1883 and which was perceived by Slade LJ over a century later as being distinct from the general rules

as to discovery. I regard that distinction as fundamental, and find that the practice and procedure embodied in English O.24, r.10 applies in the Cayman Islands".

It is accordingly clear that the decision in that case was based upon the judge's view, in reliance upon English authority, that there was a fundamental distinction between inspection of documents referred to in pleadings and affidavits on the one hand and general discovery on the other. That is not, in my view, inconsistent with the judgment of Collett CJ in ***Cayman Islands News Bureau v Cohen*** (ibid); indeed it is entirely consistent with it.

33. It seems to me that GCR O.14 clearly provides for circumstances in which a party may apply for summary judgment and in which the Court has jurisdiction to grant such an application. Although the current English practice and procedure pursuant to the CPR is broader it cannot be said that there is a distinction between the nature of the provisions of GCR O.14 in relation to summary judgment and the wider provisions of the CPR in the necessary sense. The provisions of O.14 are somewhat more restrictive than the provisions of the CPR in that they do not provide for the possibility of the grant of summary judgment to a defendant to a counterclaim but the situation is akin to that in ***Cayman Islands News Bureau*** case (ibid) rather than to that in the ***Lemos v Coutts*** case (ibid). If that is correct there is no scope for reliance upon the provisions of the CPR in this respect. My attention was also drawn to the fact that the grounds on which the High Court in England may give summary judgment against a "claimant" or defendant are different from the grounds on which this Court may grant summary judgment in

favour of a defendant against a plaintiff pursuant to GCR O.14, r.12. Under CPR rule 24.2 the High Court may grant summary judgment to a defendant if it considers that the *"claimant has no real prospect of succeeding on the claim or issue and that there is no other compelling reason why the case or issue should be disposed of at a trial"*. This is clearly not the same as the test specified by GCR O.14, r.12 which simply enables a defendant to apply for summary judgment on the ground that the plaintiffs claim has no prospect of success. If the practice and procedure under Part 24 of the CPR were to be applicable in this Court there would clearly be an issue as to which test was appropriate. This could result in different tests being appropriate depending on whether the application was by a defendant to an original action or was by a defendant to a counterclaim. This would clearly be unsatisfactory.

Conclusions

34. For the reasons outlined above I have concluded that as matters presently stand the Court does not have jurisdiction to grant summary judgment to a defendant to a counterclaim, whether pursuant to GCR O.14, r.12 or by the exercise of an inherent jurisdiction or by the application of the present practice and procedure of the High Court in England. I should say that I have reached this conclusion not without some regret and in my opinion the situation does merit the attention of the Grand Court Rules Committee. I also question whether the present provisions of Section 18 (2) of the GCL remain appropriate now that the practice and procedure

of the High Court in England under the CPR is so significantly different from our own practice and procedure under the GCR.

Dated: 28th April 2010

Hon. Mr. Justice Angus Foster, Q.C.
Judge of the Grand Court