IN THE CAYMAN ISLANDS COURT OF APPEAL

BEFORE:

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Right Hon Sir Anthony Campbell, Justice of Appeal

CICA 9 of 2012
(FSD 94/2011-CQJ)

BETWEEN:

EMBASSY INVESTMENTS LIMITED

Appellant

- and –

HOUSTON CASUALTY COMPANY

Respondent

Mr Matthew Nicklin with **Mr Tim Richards** of Mourant Ozannes for the Appellant
Mr Manuel Barca QC with **Mr Jeremy Walton** and **Mr Shaun Tracey** of Appleby for the Respondent

Hearing: 28-29 November 2012
Reasons for Judgment released: 31 July 2013

REASONS FOR JUDGMENT

Sir John Chadwick, President

1. This is an appeal from an order made on 26 January 2012 refusing to set aside a default judgment entered on 3 May 2011. The appeal was heard and dismissed by this Court on 28 November 2012. When dismissing the appeal we indicated that we would put our reasons in writing.

The circumstances leading to the default judgment

2. The appellant, Embassy Investments Limited ("Embassy"), is a company incorporated and registered in Jersey. Its business includes the ownership and operation of hotels. In December 2003 it acquired ownership of the Hyatt Regency Hotel in Grand Cayman. It entered into arrangements for the insurance of the hotel with a number of

insurers. The respondent, Houston Casualty Company ("HCC") – a company registered and domiciled in Texas - was one of six insurers providing coverage under a middle layer of the total cover. Its exposure under the arrangements was US$1,173,475.

3. On 11 and 12 September 2004 Grand Cayman was struck by Hurricane Ivan. The hotel, in common with many other properties on the Island suffered extensive damage.

4. Embassy claimed under its insurance. On 16 June 2005 it issued these proceedings in the Grand Court seeking payment from the six co-insurers in respect of the coverage under the middle layer. HCC was named as the sixth defendant to those proceedings. On 29 July 2005 HCC filed a defence denying liability. On 26 August 2005 Embassy sought summary judgment against HCC and the other five co-insurers. That application was dismissed by Justice Henderson on 4 November 2005 for reasons which he gave in a written judgment handed down on 20 March 2006. Embassy did not appeal from Justice Henderson's order. On 16 June 2006 Justice Henderson ordered that these proceedings be consolidated with proceedings against other insurers and gave case management directions in the consolidated proceedings. Those case management directions included an order that a pre-trial review take place by 31 March 2007.

5. In the meantime, on 3 April 2006, Embassy notified HCC and its co-insurers that it intended to bring a claim for punitive damages in Texas, alleging bad faith and breaches of the Texas insurance code in the handling of its claims under the insurance policy. The allegations of bad faith and breach of the Texas code relied, in part, on the insurers' conduct as defendants to these proceedings. The damages to be sought in the Texas proceedings were put at a sum in excess of $20,000,000; and it was said that, under the law of that State, triple damages could be awarded if the court thought fit. The insurers' response was to seek an anti-suit injunction in the Grand Court to prohibit Embassy from commencing such proceedings in Texas. On 26 July 2006 that application was adjourned by consent upon undertakings given by Embassy in a "Standstill Agreement". That agreement provided that no party would commence any new proceedings in any jurisdiction arising out of or relating to these (Cayman) proceedings or the Texas claim until these proceedings were either settled or had been

concluded by judgment. The agreement was made subject to English law and provided for arbitration by a sole arbitrator sitting in London.

6. These proceedings continued, with applications and cross-applications for discovery, throughout 2007. In particular, on 7 August 2007, Justice Henderson refused Embassy's application for specific discovery; on 9 October 2007 he gave permission to appeal from that refusal; Embassy filed notice of appeal (which it did not pursue); on 21 September 2007 Embassy issued a further summons for specific discovery (which, on 12 December 2007, it withdrew); and on 30 January 2008 Justice Henderson made an order requiring Embassy to give specific discovery.

7. Settlement negotiations had taken place in October and December 2007. On 7 February 2008 HCC, through its solicitors in London, made an offer to settle the claim against it by payment of US$1,173,474, including interest and costs, on terms that Embassy would give a full release of any extra-contractual or bad faith claims in Texas or elsewhere. On 15 February 2008 the other five co-insurers in respect of the middle layer made an offer to settle on payment of US$7,451,525, including interest and costs. Those offers reflected the full policy limits under the middle layer. Embassy did not accept the offer made on behalf of HCC. On 27 February 2008 it purported to accept the offer made on behalf of the other five co-insurers; but sought to attach a condition which caused those co-insurers to take the view that terms of settlement had not been reached. On 31 October 2008 HCC put forward a revised offer comprising, in addition to the US$1,173,474 already offered, payment of US$312,000 in respect of interest and US$300,000 in respect of costs. The aggregate sum (US$1,785,474) was offered in full and final settlement of Embassy's claim in these proceedings; but without seeking to restrict Embassy from pursuing its bad faith claim in Texas. The terms of that revised offer were repeated in letters from HCC's London solicitors dated 13 May 2009 and 17 June 2009. There was a dispute whether that revised offer was accepted unconditionally: HCC contending that unconditional agreement had not been reached. On 4 August 2009 that dispute was referred to arbitration under the terms of the Standstill Agreement.

8. In the meantime, on 27 July 2009, Embassy commenced proceedings against HCC in Texas, alleging violation of that State's insurance code and of duties of good faith and fair dealing. HCC's response was, first, to seek and obtain an interim anti-suit

injunction in the Commercial Court in London; and, second, by letter dated 14 August 2009, to withdraw its offer of 31 October 2008, "whilst [it] considered its position". But it indicated that it remained willing to settle the policy claim (on terms to be agreed) notwithstanding Embassy's bad faith claim in Texas. On 18 September 2009 the Texas Court ordered a stay of its own proceedings, pending the London arbitration.

9. On 8 January 2010 the sole arbitrator appointed under the Standstill Agreement (Mr Males QC) delivered his Award. He found: (i) that Embassy had breached the Standstill Agreement by commencing proceedings against HCC in Texas; (ii) that Embassy and HCC had not agreed terms of settlement of these (Cayman) proceedings; (iii) that the Cayman proceedings had not been finally determined or resolved within the meaning of the Standstill Agreement; and (iv) that the Standstill Agreement remained binding and enforceable by HCC.

10. On 18 March 2010 Embassy came to an overall agreement with the defendants to the consolidated proceedings (other than HCC) to accept a sum of US$16,750,000 in settlement of the policy claims. But it failed to file notices of discontinuance. That failure led to an application on behalf of the other defendants for an order that the claims against them in these proceedings be struck out on the grounds that, having regard to the settlement agreement, continued pursuit of those claims had become frivolous, vexatious and an abuse of process. That application came before Justice Quin on 26 May 2010. It was successful, for reasons which he gave in a judgment delivered on 20 September 2010.

11. During the first five months of 2010 – in a period commencing just before the arbitrator delivered his Award on 8 January 2010 and ending just before these proceedings were struck out against the defendants other than HCC - Embassy conducted a media campaign which was plainly designed to put pressure on HCC to accede to its demands. In particular, the following letters and articles appeared in, or on, Cayman Net News and CaymanNewsService: on-line news and current affairs services which enjoy a significant readership within the Cayman Islands:

    (1) On 7 January 2010 ("the first publication"), under the heading "Hyatt misses government ultimatum", an article in these terms:

". . . The property is not for sale, according to Bill Powers, General Manager of the Grand Cayman Beach Suites, who said he has spoken directly to Mr Bhatia [who is said to be the ultimate beneficial owner of the hotel]. The restoration of the property has been delayed due to an insurance claim filed following Hurricane Ivan.

> 'My understanding is that there is an insurance claim that is being disputed in the courts', said Mr Powers, 'and that the owner intends to reopen the resort once the insurance claim is settled.'

The insurance companies involved include Houston Casualty Company . . .

Mr Powers told Cayman Net News that a settlement figure agreed upon in Cayman's courts remained unpaid by the insurers, and that the real problem was 'the failure of insurance companies to honour their obligations under insurance policies and the inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims' . . ."

(2) On 27 January 2010 ("the second publication"), under the heading "Letter: Grand Cayman Beach Suites position statement", the following:

". . . After Judge Henderson finally decided in favour of the hotel (i.e. on the application on 9 October 2007 referred to by the Court in its recent letter to the press), Houston Casualty Company's co-insurers . . . seemed to realize that the writing was on the wall and agreed to meet the hotel's owner for some proper settlement discussions, which eventually led to a settlement figure being agreed with Houston Casualty Company's co-insurers on 11 July 2008.

People and businesses obviously pay insurance premiums on the basis that when they have a loss arising from a natural catastrophe such as Hurricane Ivan in 2004, insurers will honour their obligations under insurance policies and indemnify the victims promptly.

Here we have a situation where a settlement figure has been agreed with the insurers some time ago yet the insurers continue to delay payment of the agreed settlement figure for several years, which simply has to be unacceptable as a matter of public policy, especially for an island such as Cayman.

The hotel will give the insurers 14 more days to pay the agreed settlement figure, failing which we will go back to the Cayman court to promptly enforce payment of the agreed settlement figure against the insurers."

(3) On 21 February 2010 ("the third publication"), under the heading "Hyatt dispute rolls on as hotel crumbles", an article in these terms:

"Almost five and a half years after it was devastated by Hurricane Ivan, the former Hyatt hotel remains a derelict crumbling ruin as a result of continuing legal battles between the insurance company and the owners of the hotel. Despite pressure from the previous administration and threats from the current government to significantly increase the daily fines for failure to maintain upkeep of a property, the owners say the issue is in the hands of the court as the insurance company has refused to pay the agreed settlement of over $18 million, ordered more than 18 months ago.

> In a statement this week, the owners of the hotel, Embassy Investments, said that Houston Casualty Company's co-insurers . . . have still not paid the settlement of US$18,223,474, which was, the owners said, agreed with them on 11 July 2008. The owners said they had instructed Campbells, the hotel attorneys, to enforce payment of the agreed settlement in the Cayman Court as quickly and effectively as possible . . .
>
> Judge Alex Henderson decided in favour of the hotel regarding its 9 October 2007 application, which eventually led to the settlement figure being agreed with Houston Casualty Company's co-insurers on 11 July 2008.
>
> 'People and businesses obviously pay insurance premiums on the basis that when they have a loss arising from a natural catastrophe such as Hurricane Ivan in 2004, insurers will honour their obligations under insurance policies and indemnify the victims promptly,' Bill Powers, the manager of the Beach Suites, said recently. 'Here we have a situation where a settlement figure has been agreed with the insurers some time ago yet the insurers continue to delay payment of the agreed settlement figure for several years, which simply has to be unacceptable as a matter of public policy, especially for an island such as Cayman.' . . .
>
> The dispute over the hotel insurance settlement has been in the Cayman courts since the passing of Hurricane Ivan in 2004 . . .
>
> According to a letter from Campbells to the insurance firm's attorneys, the issue seems to rest on a related claim by Embassy, which the insurers had at one point insisted should be withdrawn before the payment regarding the [actual] property damage claim could be settled. The letter, however, however, indicates that the parties may now have agreed to sever the two issues and deal with the contractual claim in a separate forum, paving the way for the Grand Court settlement of $18 million plus to be paid to the owners".

(4) On 24 March 2010 ("the fourth publication"), in Cayman Net News under the heading "Hyatt Regency repairs still on hold", an article in these terms:

> "All the formerly disputed insurance claims blamed for the delay in repairs to the Hyatt Regency Resort on Seven Mile beach have been paid except one.
>
> Still dragging behind its decision to pay the claim or reinstate the hotel – nearly six years after Hurricane Ivan demolished the centerpiece building – is Houston Casualty Company, according to the manager of the property, Bill Powers . . .
>
> Mr Asif Bhatia, the owner of the Hyatt who resides in London, has been in a legal battle with his insurers over a reported $50 million plus claim, alleging that the insurance firm offered considerably less than this sum, which he refused to accept, leaving the prime hotel site in ruins . . .
>
> The property manager said that the insurance company agreed in 2008 to pay the disputed claim to the limits of the policy, but has since reneged on its claim . . .
>
> 'However, the hotel owner is still waiting for Houston Casualty Company to decide whether it will pay for the damage caused by Hurricane Ivan or, at its discretion, reinstate the hotel in accordance with the terms of the insurance

policy,' he said, 'because there is a risk that no matter how sensible the option the owner picks, Houston Casualty Company may subsequently seek to argue that it would have been better to do something else instead.'

The owner is concerned that if he decides to tear down the damaged buildings to rebuild, the HCC may subsequently 'seek to argue' that it would have been better instead to repair the existing shell.

'The hotel owner is particularly wary about Houston Casualty Company's intentions, as Houston Casualty Company has already sought to wrongly void the insurance policy on false pretences in a desperate ploy,' said Mr Powers, 'concocted just a few days before the hearing, to escape Summary Judgment when Houston Casualty Company had no genuine defence, as both parties' real figures put the loss well above Houston Casualty Company's policy limit.'

All 15 of the other insurers have paid for damages according to their policies, said Mr Powers.

'Houston Casualty Company has not paid a single cent under the same policy, despite its clear obligation to either pay for the damage caused by Hurricane Ivan or, at its option, to reinstate the hotel,' he said.

Premier McKeeva Bush threatened action in July 2009 against the hotel owner if he did not repair the property by the end of 2009, but no action was taken. Government can force a sale of the property, should it be determined that the property has been abandoned; however Mr Powers said that the owner is simply waiting for the insurance company to make up its mind.

'There is a lot more at stake here than the reinstatement of our hotel since, as previously stated,' said Mr Powers, 'given Cayman is in an area which is prone to hurricanes, the failure of insurance companies to honor their obligations under insurance policies and the ability/inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims will be key issues for most local citizens and businesses on the Island as well as the Sister Islands.'"

(5) Also on 24 March 2010 ("the fifth publication"), on CaymanNewsService under the heading "Hotel dispute may be at the final hurdle", an article in these terms:

"Whilst the legal arguments regarding the former Hyatt hotel are not over, the hotel management has indicated that a resolution appears close at hand. Having recently revealed the details of its long standing insurance dispute, the management at Grand Cayman Beach Suites, formerly the Hyatt, has announced that Houston Casualty Company's co-insurers have finally paid the insurance policy proceeds which have been agreed with them since 1 July 2008. Bill Powers, the hotel's general manager, said this news reinforced the validity of earlier public statements made by the Hotel and demonstrated the benefits of a free and open press in Cayman.

He said as a result of this latest development, Houston Casualty Company had to decide whether it will pay for the damage caused by Hurricane Ivan or reinstate the Hotel in accordance with the terms of the insurance policy.

‘There is a lot more at stake here than the reinstatement of our hotel since, as previously stated, given Cayman is in an area which is prone to hurricanes, the failure of insurance companies to honor their obligations under insurance policies and the ability/inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims will be key issues for most local citizens and businesses on the Island as well as the Sister Islands.’ Powers said.

The owners of the hotel have been in dispute with their insurance companies for more than five years, since Hurricane Ivan destroyed the northern side of what was formerly the Hyatt. The owners were able to salvage the southern side of the hotel site, which was renamed the Grand Cayman Beach Suites after the Hyatt removed its branding support as the insurance problem rolled on.

Powers claimed that the legal wrangling was also impacted by the unlawful arrest during the discredited Operation Tempura investigation of Justice Alex Henderson, who had presided over some of the legal proceedings in the Hyatt dispute.

The general manager said that after Justice Henderson’s arrest on 24 September, Houston Casualty Company itself finally dropped its unreasonable conditions and agreed to pay the insurance policy proceeds due to the hotel without continuing to insist on its earlier unreasonable terms.

‘However, following Justice Henderson’s reinstatement as a Judge in Cayman, Houston Casualty Company has tried to renege from paying the agreed insurance policy proceeds due to the Hotel,’ he stated. ‘In anticipation of Houston Casualty Company’s decision, which the owner is hopeful of now finally receiving imminently following the benefits of the increasing openness and transparency resulting from the recent press articles relating to this matter, the Hotel owner will begin undertaking a further assessment of the state of the buildings as they now stand in order to establish the best way forward.’

Powers explained that as soon as Houston Casualty Company decides which option to pursue, the hotel’s owner can act accordingly. He said that whatever option the hotel takes, because there is a risk involved, the insurance company may subsequently seek to argue that the hotel owner should have done something else instead. ‘If the Hotel owner chooses to tear down the damaged buildings and then rebuild, Houston Casualty Company may subsequently seek to argue that it would have been better to repair the existing shell,’ he added.

The owners are particularly wary about the insurer’s intentions. ‘Houston Casualty Company has already sought to wrongly void the insurance policy on false pretences in a desperate ploy,’ said Mr Powers, ‘concocted just a few days before the hearing, to escape Summary Judgment when Houston Casualty Company had no genuine defence, as both parties’ real figures put the loss well above Houston Casualty Company’s policy limit,’ Powers stated. ‘Remarkably, Justice Henderson found in favour of Houston Casualty Company at that hearing for Summary Judgment, following which Houston Casualty Company has insisted that Justice Henderson continues to hear the matter even though he is not seized of it.’

Powers claimed that the fact that these are false pretenses by Houston Casualty Company is clearly evident because all the other 15 insurers have now paid the agreed policy proceeds. 'Yet, in stark contrast to all the other 15 insurers, Houston Casualty Company has not paid a single cent under the same policy, despite its clear obligation to either pay for the damage caused by Hurricane Ivan or, at its option, to reinstate the hotel,' Powers said . . ."

(6) On 16 April 2010 ("the sixth publication"), following a letter dated 7 April 2010 which it attorneys, Appleby, had written to the press on behalf of HCC and under the heading "Letter: Response to letter from Houston Casualty Company's attorneys", Cayman Net News published a letter from Mr Powers in these terms:

". . . However, it is disappointing that the letter, which Houston Casualty Company has instructed Appleby, its Cayman lawyers, to write to the press, contains allegations that are false, misleading and/or misrepresentative.

Houston Casualty Company's apparent ability to influence all the Excess Insurers, including via its numerous representatives and through its relationship with Heritage, which acted as the lead Insurer on behalf of all the Excess Insurers after AIG, Mitsui and Zurich paid their policy limits over four years ago, is evident from, amongst other things, Heritage Underwriting Agency PLC's Admission to Trading on AIM filing that is a public document.

In this important public document, Houston Casualty Company's parent company is described as being Heritage's largest shareholder and a 'controller of Heritage and of its corporate members'. In addition to being the largest shareholder, Houston Casualty Company's representatives held management positions within Heritage. . . .

Also contrary to the misleading and/or misrepresentative letter, which Houston Casualty Company has instructed Appleby to write to the press . . .

As already stated, Houston Casualty Company sought to wrongly void the insurance policy in a desperate ploy concocted just a few days before the hearing, to escape Summary Judgment when Houston Casualty Company had no genuine defence as both parties' real figures put the loss well above Houston Casualty Company's policy limit . . .

As evident from a letter to Houston Casualty Company on 10 August 2007, Houston Casualty Company's most senior executives and ultimate decision makers in Texas are fully aware that their representatives have made allegedly false and/or misleading statements on behalf of Houston Casualty Company to the courts in sworn affidavits in Cayman as well as in London, where the Arbitrator has in fact recognized that he has no jurisdiction to deal with Embassy's bad faith claims that are already pending in the Texas courts against Houston Casualty Company, which Houston Casualty Company sought to refer to arbitration in London. . . .

The fact that Houston Casualty Company has no legitimate reason to continue to withhold insurance policy proceeds which are rightfully due to Embassy is clearly evident from the fact that all the other 15 insurers have now already paid the agreed policy proceeds yet, in stark contrast to all the other 15 insurers, Houston Casualty Company has not paid a single cent under the same

policy, despite its clear obligation to either pay for the damage caused by Hurricane Ivan or, at its option, to reinstate the hotel.

There is a lot more at stake here than the reinstatement of our hotel since, as previously stated, given Cayman is in an area which is prone to hurricanes, the failure of insurance companies to honor their obligations under insurance policies and the ability/inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims will be key issues for most local citizens and businesses on the Island as well as the Sister Islands."

(7) On 21 May 2010 ("the seventh publication), following a further letter (dated 4 May 2010) which Appleby had written to the press on behalf of HCC and under the heading "Letter: Response to Houston Casualty Company", Cayman Net News published a letter from Mr Powers in these terms:

". . . However, it is disappointing that the latest letter, which Houston Casualty Company has instructed Appleby, its Cayman lawyers, to write to the press, contains allegations that are false, misleading and/or misrepresentative.

Houston Casualty Company's attorneys wrote a letter to the Arbitrator on 1 February 2010 stating 'HCC has been put to considerable trouble and expense in dealing with Embassy's Texas proceedings, investing appreciable legal costs in them and removing them from the State Court, where Embassy originally filed suit, to Federal Court, which HCC considers the most suitable and expedient venue' and then went on to state 'Further Judge Hughes is already familiar with the matter. For all these reasons HCC has a legitimate interest in seeing Embassy's proceedings remaining stayed, rather than terminated and re-filed in a different Court at a later date.'

Unless HCC know something in relation to Judge Hughes in Texas that Embassy doesn't and it would obviously be wholly improper for HCC to be communicating with Judge Lynn N Hughes without Embassy . . .

Further, given the fact that as far as Judge Lynn N Hughes was concerned the case in his court in Texas was stayed until both parties were to jointly notify him together of any change, it seems remarkably coincidental that Judge Lynn N Hughes just happened, out of the blue, to suddenly initiate a request for a status update on a case that was already stayed in Texas under a UK Court Order on exactly the same date as the date of the UK Arbitrator's initial questionable ruling i.e. on 8 January 2010!

. . . As clearly noted in the Arbitrator's subsequent attached clarification in Embassy's favour, even the Arbitrator himself highlights HCC's unreasonable tactical manoeuvrings in Texas and remarks on HCC's continuing insistence that the case in Texas only be heard in a Court being presided over by Judge Lynn N Hughes.

. . . Having insisted that Judge Henderson be the only judge in Cayman to hear their case, it is particularly noteworthy that HCC are now similarly continuing to be remarkably insistent that only Judge Lynn N Hughes hear Embassy's case against HCC in Texas, especially considering the fact that Embassy actually filed suit in State Court i.e. not Federal Court where Judge Lynn N Hughes sits and HCC arranged for it to be subsequently transferred."

12. On 26 May 2010 (following the other defendants' successful application before Justice Quin) Campbells, the attorneys then acting for Embassy, applied for, and obtained, leave to come off the record. But it was not until eleven months later, on 28 April 2011, that Notice of Change of Attorneys was given on behalf of Embassy and its present attorneys, Mourant Ozannes, came on the record. During that period of eleven months, Embassy had no attorneys on the record in these proceedings; and took no steps in these proceedings.

13. HCC was not inactive during that period. On 26 July 2010 HCC served on Embassy Notice of Intention to Proceed. On 26 September 2010 HCC issued and filed a summons seeking leave to re-re-amend its defence by introducing a counterclaim. By its counterclaim HCC sought damages (including exemplary damages) for libel on the basis of statements made in the articles published in, or on, Cayman Net News and CaymanNewsService in the period 7 January 2010 to 21 May 2010, an injunction to restrain Embassy, whether by its directors, officer, servants agents or otherwise, from publishing the words complained of, or similar words defamatory of HCC, and costs on an indemnity basis. That application came before the Chief Justice on 14 December 2010. Embassy did not appear and was not represented; although there is no doubt that it was aware of the application and that it was to be heard on that day. The Chief Justice gave the leave sought. The re-re-amended defence and counterclaim, dated 17 December 2010, and a sealed copy of the Chief Justice's Order of 14 December 2010 were served on Embassy on 20 December 2010. Embassy did not respond: in particular, it did not, within the time limited by the Grand Court Rules, file Notice of Intention to Defend the counterclaim or a defence to the counterclaim. On 3 March 2011 HCC issued a summons for interlocutory judgment on the counterclaim in default of defence.

14. On 15 March 2011 HCC applied by summons for an order striking out Embassy's writ and statement of claim in these proceedings on the grounds of intentional and contumelious default amounting to an abuse of process. On 24 March 2011 that summons, and the summons seeking interlocutory judgment on the counterclaim, were served on Embassy.

15. The summons seeking interlocutory judgment on the counterclaim was listed for hearing before Justice Quin on 2 May 2011. As I have said, Mourant Ozannes came

on the record as attorneys for Embassy on 28 April 2011. They did so following an enquiry by Appleby in a letter of 28 April 2011 whether "your firm will now be filing a Notice of Change/Appointment in the litigation to enable your firm to address [any remaining issues between the parties] . . . in the on-going litigation". That enquiry was prompted by a letter dated 24 March 2011 from Mourant Ozannes to Clyde & Co (solicitors in London acting for HCC) from which Appleby had become aware (for the first time) that Mourant Ozannes had received instructions from Embassy.

16. Also on 28 April 2011, at or about the same time as Mourant Ozannes came on the record as attorneys for Embassy, they wrote to Appleby, enclosing "by way of service" Embassy's proposed re-amended reply and defence to counterclaim, and expressing the view that "our client is entitled to serve a Defence to the Counterclaim, as a result of GCR Order 18 rule 3, that Defence should be incorporated into the Reply rather than being served as a separate pleading". In a letter dated 2 May 2011, Appleby responded in strong terms:

> "Your letter dated 28 April 2011 and its contents demonstrate an outrageous and reprehensible abuse of process. Your client is not entitled to serve a Defence to the Counterclaim without leave of the Court (which you have not sought), . . ."

In so far as Mourant Ozannes were asserting that Embassy was entitled to serve a defence to counterclaim long out of time without the leave of the Court, that assertion was plainly misconceived – as Appleby pointed out in their reply dated 2 May 2011. GCR Order 18, rule 3(4) provides, in terms, that a defence to counterclaim must be served by the plaintiff before the expiration of 14 days after the service on him of the counterclaim to which it relates. Further, GCR Order 19 – which contains provisions relating to the entry of judgment in default of pleadings – includes, at rule 8, the following:

> "O.19, r.8: A defendant who counterclaims against a plaintiff shall be treated for the purposes of rules 2 to 7 as if he were a plaintiff who had made against a defendant the claim made in the counterclaim and accordingly, where the plaintiff or any other party against whom the counterclaim is made fails to serve a defence to counterclaim, those rules shall apply as if the counterclaim were a statement of claim, the defence to counterclaim a defence and the parties making the counterclaim and against whom it is made were plaintiffs and defendants respectively, and as if references to the period fixed under these Rules for service of the defence were references to the period so fixed for service of the defence to counterclaim."

17. Notwithstanding Appleby's letter of 2 May 2011 – which draws attention, in the plainest terms, to the need to obtain leave to serve a defence to HCC's counterclaim out of time - when Mourant Ozannes appeared on the hearing of HCC's summons for interlocutory judgment before Justice Quin on 2 May 2011, they made no application on behalf of Embassy for leave to serve a defence to the counterclaim. In the course of the judgment which he delivered on the following day (3 May 2011) the judge made these observations:

> 34. This Court finds that the Plaintiff has breached the Rules of the Grand Court in not filing a Notice of Intention to Defend or a Defence within the time allowed for by the Grand Court Rules.
>
> 35. Furthermore, knowing that the Defence is out of time, the Plaintiff has not asked the Sixth Defendant for any extension of time or filed a Summons seeking the leave of the Court to file and serve its Defence to the Counterclaim out of time. The Court notes that almost four months have elapsed since the Defence was due to be filed. The Plaintiff has ignored the deadlines imposed by the Grand Court Rules for filing its Defence to the Sixth Defendant's Counterclaim.
>
> 36. The Court can take judicial notice of the fact that the Plaintiff has at its disposal professional servants and agents, highly experienced in business such as Ms Herviou [whom he had described, in paragraph 22 of that judgment as 'a director of Basel CDS Limited, which is the corporate director of the Plaintiff', and who, as he pointed out in that, and the following, paragraph, had been aware of the counterclaim since 14 December 2010]. Furthermore, Mourant Ozannes will now be the third firm of Cayman attorneys acting in this matter, so the Plaintiff is well aware of the capacity of Cayman attorneys to act and comply with the Rules of the Grand Court of the Cayman Islands.
>
> 37. There has been no indication that a Defence would be filed. There has been no indication that leading counsel in England had been retained to prepare and settle the draft Defence that was submitted to the Plaintiff's attorneys (*sic*) on the 28th April 2011. In fact there has been what the Sixth Defendant's counsel described as 'a striking absence of any explanation' either before Mourant Ozannes were retained or since."

It is clear from the judgment which he delivered on 3 May 2011 that (notwithstanding his reference in paragraph 37 to the draft Defence having been submitted to "the Plaintiff's attorneys") Justice Quin was aware that a draft Defence to HCC's counterclaim had been sent to HCC's attorneys on 28 April 2011, a few days before the hearing; but there is nothing in that judgment (or before this Court) which suggests that he had seen that document.

18. There has been no explanation, either before the judge or in this Court, why Embassy (or its attorneys) chose not to seek leave, at the hearing of HCC's summons for

summary default judgment, to serve a defence to HCC's counterclaim out of time – or even to put before the judge the contents of the draft Defence to Counterclaim on which it sought to rely. But it is impossible to avoid the conclusion that choice was made, and made deliberately, having regard to Appleby's letter of 2 May 2011. Embassy chose to allow the hearing to proceed on the basis, as the judge put it, that "there was no indication that a defence would be filed".

19. In the absence of any application for leave to serve a defence to the counterclaim – or any indication what the defence would be if leave were sought and obtained – the judge was satisfied, on the material before him and for the reasons set out in his judgment of 3 May 2011, that he should give interlocutory judgment on HCC's counterclaim; and he did so. On 3 May 2011 he made an order in these terms:

> "i. That interlocutory judgment on the Sixth Defendant's Counterclaim be entered against the Plaintiff in default of Defence to Counterclaim with damages to be assessed and costs (including the costs of such assessment) to be taxed on an indemnity basis.
>
> ii. That a permanent or final injunction is granted against the Plaintiff forthwith in the following terms:
>
> a A permanent injunction is hereby granted to restrain the Plaintiff (Embassy Investments Limited) whether by its directors, officers, servants agents or otherwise, from howsoever publishing the words 'complained of by the Sixth Defendant' (Houston Casualty Company) in its counterclaim, or any similar words defamatory of the Sixth Defendant.
>
> iii. That damages be assessed before a Judge of the Grand Court, the appointment for such assessment to be made upon the application of the Sixth defendant to the Clerk of the Court within fourteen (14) days of the date Judgment is entered in accordance with paragraph i above.
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> iv. That at least seven (7) days before the date of such appointment, the Sixth Defendant shall serve notice of the same on the Plaintiff.
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> v. That the Sixth Defendant serve affidavit evidence to be relied on at the assessment of damages hearing within twenty-eight (28) days of the date Judgment is entered in accordance with paragraph i above.
>
> vi. That the Plaintiff do serve any evidence in reply within twenty-eight (28) days thereafter.
>
> vii. That the parties exchange Skeleton Arguments seven (7) days prior to the assessment of damages hearing."

The words complained of in the counterclaim

20. As I have said, HCC's counterclaim sought damages for libel and an injunction to restrain publication of the words said to be defamatory of HCC or similar words. In particular it was alleged that, in their natural and ordinary or inferential meaning:

(i) words in the first publication meant and were understood to mean that, despite having agreed a settlement figure in the Grand Court, HCC was dishonestly and unlawfully refusing to honour its insurance-policy obligations to pay for the damage done to the Hyatt regency Hotel by Hurricane Ivan in 2004;

(ii) words in the second and third publications meant and were understood to mean that, while its co-insurers were unlawfully deferring payment of an (allegedly) agreed settlement sum pursuant to a settlement agreement, HCC's bad faith was even more reprehensible in that it was not even prepared to honour its legal obligations promptly to indemnify the victims of hurricane Ivan under its insurance policies;

(iii) words in the third publication meant and were understood to mean, further, that, together with its co-insurers, HCC had unsuccessfully attempted to impose unreasonable settlement terms on Embassy;

(iv) words in the fourth publication meant and were understood to mean (a) that, although its co-insurers had all paid up on the Hyatt insurance claims, HCC was still acting in bad faith by unlawfully delaying payment of an (allegedly) agreed settlement sum and therefore refusing to honour its legal obligations promptly to indemnify the victims of Hurricane Ivan under its insurance policies, (b) that, having originally agreed to pay the disputed sum to the limits of the policy in 2008, HCC had since improperly reneged on that agreement, (c) that, because it knew that it had no genuine defence to the Hyatt's insurance claim, HCC was deliberately concocting specious excuses as part of a desperate attempt to avoid liability (or delay payment) on its policy under false pretenses and (d) that HCC's dishonest refusal to honour its legal obligations under its insurance policies was a cause of real public concern to the citizens and businesses of the Cayman Islands;

(v) words in the fifth publication had, and were understood to have, the meanings set out under (a), (b) and (d) of (iv) above; and, further, meant, and were understood to mean, (a) that HCC had dishonestly and/or improperly sought to exploit the arrest and subsequent reinstatement of the Cayman judge who had presided over hearings in the legal dispute over the Hyatt insurance claims by dropping its earlier insistence on unreasonable terms and conditions (and agreeing to pay the

insurance policy proceeds) following the judge's arrest but then attempting to renege on its agreement to pay the insurance policy proceeds when the judge was later reinstated, (b) that because HCC knew that it had no genuine defence to the Hyatt's insurance claim, HCC had dishonestly abused the Cayman court's process by concocting a specious ploy, a matter of days before a summary judgment hearing, in a desperate attempt to avoid liability (or delay payment) on its policy under false pretences and (c) that HCC had finally agreed to pay out on the Hyatt insurance claim only because it had been shamed into doing so by adverse publicity in the Cayman press;

(vi) words in the sixth publication had, and were understood to have, the meaning set out under (d) of (iv) and (b) of (v) above; and, further, meant, and were understood to mean, (a) that HCC had dishonestly instructed its Cayman lawyers to write letters to the Cayman press containing what it knew to be false, misleading and/or misrepresentative allegations concerning the Hyatt insurance dispute, (b) that, because it knew that it had no genuine defence to the Hyatt's insurance claim and in a desperate attempt to avoid liability on the policy, HCC had deliberately abused its ability to influence all the Excess Insurers, including the exploitation of its position as Heritage's largest shareholder, (c) that HCC's most senior executives and ultimate decision makers in Texas had dishonestly instructed or allowed its legal representatives to make sworn affidavits on HCC's behalf in both Cayman and London which they knew to be misleading and thereby abused the process of the courts in both Cayman and London, and (d) that although its 15 co-insurers had all paid the agreed policy proceeds on the Hyatt insurance claims, and despite knowing that it had no legitimate reason to do so, HCC was dishonestly refusing to honour its clear legal obligation to pay the owners of the Hyatt under its insurance policy; and

(vii) words in the seventh publication meant and were understood to mean (a) that HCC had dishonestly continued to instruct its Cayman lawyers to write letters to the Cayman press containing what it knew to be false, misleading and/or misrepresentative statements concerning the Hyatt insurance dispute and (b) that, not least given its unreasonable insistence that its legal disputes with Embassy be heard by Judge Hughes in Texas and Justice Henderson in the Cayman Islands, HCC was to be suspected of having corrupted or otherwise improperly influenced one or both of those judges.

The application to set aside the default judgment

21. As I have said, on 15 March 2011 HCC had issued a summons seeking an order that Embassy's Writ and Statement of Claim be struck out for intentional and contumelious default amounting to an abuse of the process of the Court. In support of that summons, HCC relied on evidence in the fourth and fifth affidavits of Clive Jackson, dated respectively 17 March and 15 April 2011. In opposition to that summons Embassy relied on the evidence in the first and third affidavits of Letitia Herviou, dated respectively 9 June and 30 September 2011. On 10 May 2011, Embassy issued a summons seeking to set aside the interlocutory judgment on the counterclaim, which had been entered some seven days earlier (on 3 May 2011). In support of that summons, Embassy relied on the evidence in the second affidavit of Ms Herviou, filed on 13 September 2011. Ms Herviou exhibited to that affidavit, as exhibit LH-2, a draft defence to HCC's counterclaim. In that affidavit Ms Herviou stated only that:

> "I confirm that Embassy believes that the facts pleaded in the Defence to Counterclaim are true (LH2, tab 1). Further, Embassy has evidence to support the allegations made in the Defence to Counterclaim and considers that its pleaded Defence to Counterclaim discloses a good defence on the merits to Houston Casualty Company's defamation claim."

22. Embassy's application to set aside the interlocutory judgment came before Justice Quin for hearing on 27 September 2011. HCC's application to strike out the writ and statement of claim came before him some ten days later, on 6 and 7 October 2011. On 26 January 2012 the judge delivered what he described as a composite Ruling in respect of both applications. For the reasons set out in that Ruling, he struck out the writ and statement of claim; and he refused to set aside the interlocutory judgment.

23. The judge made separate orders in respect of each application. In particular, by the order dated 26 January 2012 (but filed on 1 March 2012) which is the subject of this appeal, he dismissed Embassy's application to set aside the interlocutory judgment of 3 May 2011; he refused Embassy's application for leave to re-amend its Reply so as to introduce a Defence to HCC's Counterclaim; and he ordered that Embassy pay HCC's costs of the summons issued on 10 May 2011 on an indemnity basis. On 6 July 2012 the judge gave leave to appeal that order.

24. For completeness I should add that the judge refused leave to appeal from his order (also dated 26 January 2012) striking out the writ and statement of claim; and refused leave to appeal from that order. Leave to appeal was granted by this Court on 29 November 2012; and that appeal was heard (by a different constitution of the Court) in April 2013. That appeal is not the subject of these Reasons for Judgment.

The judge's reasons for refusing to set aside the judgment of 3 May 2011.

25. The judge's reasons for refusing to set aside the judgment of 3 May 2011 are set out in paragraphs 181 to 265 of his composite Ruling dated 26 January 2012. At paragraph 181 he set out the terms of the order which he had made on 3 May 2011; at paragraph 182 he referred to Embassy's summons to set aside that order; and at paragraph 183 he referred to Ms Herviou's second affidavit and set out the passage to which I have already referred. He then, at paragraphs 184 to 217, reviewed the allegations made by HCC in its counterclaim in relation to the seven publications; and the defences to those allegations which Embassy had sought to advance in its draft defence. In particular, he identified the defences of justification, qualification, fair comment, and reply to attack. At paragraph 218 the judge said this:

> "218. The plaintiff contends that the Court must be especially careful as, here, the claim is one which interferes with the right of freedom of expression. To that end, the Plaintiff submits that if the Court were to refuse to set aside the Judgment in Default it would leave the Plaintiff facing an inquiry as to damages and imposing upon the Plaintiff an injunction without any investigation into the merits of its defences."

He referred, at paragraphs 219 to 222, to observations of Lord Justice Kennedy in *McKenzie v Business Magazines (UK) Ltd* (Unreported CA 18 January 1996, at page 12), to observations of Sir Thomas Bingham, Master of the Rolls, in *Basham v Gregory* (Unreported CA 21 February 1996, at page 10), to observations of Lord Denning, Master of the Rolls, in *Slim v Daily Telegraph* [1968] 2 QB 157, at page 170, and to a passage in *Gatley on Libel and Slander* (11th Edition, 2008, at paragraph 12.13). At paragraphs 223 and 224 of his judgment, the judge considered, in principle, the defences of reply to attack – in relation to which he referred to a passage in *Duncan and Neill on Defamation* (3rd Edition, at paragraph 16.22) - and justification.

26. At paragraphs 225 to 243 – under the general heading "Analysis and Conclusion on Plaintiff's Application to Set Aside the Interlocutory Judgment" – the judge reviewed "all of the evidence presented before me, including the Plaintiff's draft defence to the

Defendant's Counterclaim and . . . the submissions from both counsel". He reached the following conclusions:

(1) There was no evidence to support Mr Powers' statement, reported in the first publication, that:

> ". . . a settlement figure agreed upon in Cayman's courts remained unpaid by the insurers. . . "

and that the real problem was:

> ". . . the failure of insurance companies to honour their obligations under insurance policies and the inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims. . ."

Rather, he found, from his review of all the evidence before him, that no settlement figure had been agreed upon in the Cayman Courts; that there was no failure by HCC to honour its obligations under the insurance policy; and no evidence of any inability of the local judiciary to properly and promptly deal with disputes relating to insurance claims. It followed, in the judge's view, that the purported defences of fair comment and/or justification, in relation to the words complained of on the first publication, lacked conviction and had no real prospect of success.

(2) There was no evidence to support Mr Powers' statement, reported in the second publication, that:

> "Here we have a situation where a settlement figure has been agreed with the insurers some time ago yet the insurers continue to delay payment of the agreed settlement figure for several years, . . ."

That statement was untrue. There was no basis for the comment that:

> ". . . [this] simply has to be unacceptable as a matter of public policy, especially for an island such as Cayman."

It followed that the purported defences of fair comment and/or justification, in relation to the words complained of in the second publication, and repeated in the third publication, lacked conviction and had no real prospect of success.

(3) There was no evidence to support Mr Powers' statement, reported in the third publication, that:

> ". . . the issue is in the hands of the court as the insurance company has refused to pay the agreed settlement of over $18 million, ordered more than 18 months ago."

The statement was untrue. The purported defences of fair comment and/or justification, in relation to the words complained of in the third publication, lacked conviction and had no real prospect of success.

(4) There was no evidence to support Mr Bhatia's statement, reported in the fourth publication, that:

> ". . . the insurance firm offered considerably less than this sum, which he refused to accept, leaving the prime hotel site in ruins . . ."

or to support Mr Powers' statements, also reported in the fourth publication, that:

> ". . . the insurance company agreed in 2008 to pay the disputed claim to the limits of the policy, but has since reneged on its claim . . ."
>
> "The hotel owner is particularly wary about Houston Casualty Company's intentions, as Houston Casualty Company has already sought to wrongly void the insurance policy on false pretences in a desperate ploy . . . concocted just a few days before the hearing, to escape summary judgment when Houston Casualty Company had no genuine defence . . ."

Those statements were untrue. The purported defences of fair comment and/or justification, in relation to the words complained of in the third publication, lacked conviction and had no real prospect of success.

(5) There was no evidence to support the allegation, reported in the fifth publication, that:

> "Houston Casualty Company has already sought to wrongly void the insurance policy on false pretences in a desperate ploy, concocted just a few days before the hearing, to escape Summary Judgment when Houston Casualty Company had no genuine defence, as both parties' real figures put the loss well above Houston Casualty Company's policy limit"

(6) There was no evidence to support the allegations contained in Mr Powers' letter, published on 16 April 2010 (not 16 January 2010 as the judge mistakenly stated at paragraph 236 of his judgment) (the sixth publication), that HCC had "an apparent ability to influence all the Excess Insurers", that HCC had instructed its attorneys of writing a misleading or misrepresentative letter, that HCC's resistance to summary judgment was "a desperate ploy concocted just a few days before the hearing"; nor that, having reviewed a letter to HCC in August 2007, HCC's most senior executives and ultimate decision makers in Texas:

> ". . . are fully aware that their representatives have made allegedly false and/or misleading statements on behalf of Houston Casualty Company to the courts in sworn affidavits in Cayman as well as in London, . . ."

The purported defences of fair comment and/or justification, in relation to the words complained of in the sixth publication, lacked conviction and had no real prospect of success.

(7) There was no evidence to support the statements, contained in Mr Powers' letter published on 21 May 2010 (the seventh publication), that:

> ". . . the latest letter, which Houston Casualty Company has instructed Appleby, its Cayman lawyers, to write to the press, contains allegations that are false, misleading and/or misrepresentative."

and that HCC:

> ". . . insisted that Judge Henderson be the only judge in Cayman to hear their case, . . ."

Those statements were untrue; and, again, the purported defences of fair comment and/or justification lacked conviction and had no real prospect of success.

27. The judge summarized his conclusions at paragraphs 245 to 247 of his judgment. He said this:

> "245. The allegations contained in these publications can, as set out by the Sixth Defendant, be divided into four headings:
>
> i The Sixth Defendant is still acting in bad faith by unlawfully delaying payment of an 'allegedly' agreed settlement sum, and by refusing to honour its legal obligations to indemnify Embassy.
>
> ii The Sixth Defendant has improperly reneged on its agreement to pay the disputed policy claim to the limits of the policy in July 2008.
>
> iii The Sixth Defendant has dishonestly or improperly sought to exploit the arrest and subsequent reinstatement of Mr Justice Henderson by dropping its earlier insistent (*sic*) on unreasonable terms and conditions (and agreeing to pay the policy proceeds) following the Judge's arrest, but then attempting to renege in its agreement to pay the policy proceeds when the Judge was reinstated.
>
> iv The Sixth Defendant knew it had no defence to the Plaintiff's policy claim but abused the Court's process by advancing a specious defence, days before the summary judgment hearing to avoid liability or to delay payment on its policy.
>
> 246. These allegations were investigated by the Arbitrator and rejected by him in his Award of January 2010.
>
> 247. I have reviewed the Plaintiff's draft defence to the Sixth Defendant's Counterclaim and all the evidence put before this Court and find that there is no basis for these allegations, and further, that many of the statements made in the seven publications are untrue. What is clear is that Mr Powers is an employee of the Plaintiff and I find that he caused the publications complained of by the Sixth Defendant. I do not know what Mr Powers was told by Mr Bhatia and Ms Herviou, or what instructions he was given, but I find that

neither Mr Bhatia nor Ms Herviou could reasonably have found any of these allegations, made by the Plaintiff against the Sixth Defendant, to be true. As I stated earlier, it is hard to imagine a more damaging allegation against an insurance company that to allege that it improperly reneged on its agreement to pay. I find the allegation, however often repeated, to be false."

28. The judge reminded himself that the court had power, under GCR Order 19 rule 9, to set aside a default judgment entered under that Order. He referred to the notes in the Supreme Court Practice 1999 (in the commentary on Order 13 rule 9(7) of the former Rules of the Supreme Court, on which the Grand Court Rules are based) that:

> "If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (*Farden v Richter* (1889) 23 QBD 124. ' At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason,' per Huddleston B *ibid* p.129 approving *Hopton v Robertson* [1884] WN 77, reprinted 23 QBD 126n."
>
> "For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence".
>
> "The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle*, [1986] 2 Lloyd's Rep 221 at 223."
>
> "(a) It is not generally sufficient to show merely an 'arguable' defence that would justify leave to defend under O.14 [of the former Rules of the Supreme Court]; it must have 'a real prospect of success' and 'carry some degree of conviction'. Thus the Court must form a provisional view of the probable outcome of the action.
>
> (b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppels at law, must be considered 'in justice' before exercising the court's discretion to set aside."

29. The judge observed that the default judgment of 3 May 2011 was a regular judgment. Indeed, this was not a judgment "entered in default" without a hearing; as the judge reminded himself when referring to findings that he had made when setting out his reasons, in the Ruling on 3 May 2011, for making the order for summary default

judgment which he did. He referred to the note in the Supreme Court Practice 1999 to the effect that an application to set aside a default judgment should be made promptly and within a reasonable time. He pointed out that, although Embassy had issued its summons seeking to set aside the default judgment on 11 May 2011 (within seven days of the order), that summons was not supported by evidence; and that, as the judge put it, it was only after being prompted by HCC's attorneys, that Embassy filed a supporting affidavit – "in the form of the lamentably short Second Affidavit of Letitia Herviou" - on 13 September 2011, some four months after the issue of the summons. He observed (at paragraph 255 of his judgment) that, "in the circumstances of this case, and without any explanation, a four month delay could never be described as 'prompt and within a reasonable time'".

30. The judge went on to say this, at paragraphs 257 to 260 of his judgment:

> "257. The Court finds that the Plaintiff has failed to file any substantive evidence which either carries 'some degree of conviction' or demonstrates a 'real likelihood' that its draft defence can succeed.
>
> Ms Herviou's Second Affidavit contains a mere two paragraphs in which she makes the bare assertion that
>
> > 'Embassy believes that the facts pleaded in the Defence to Counterclaim are true'
>
> and that
>
> > 'Embassy has evidence to support the allegations made in the Defence to Counterclaim and considers that its pleaded Defence to Counterclaim discloses a good defence on the merits.'
>
> 258. The Plaintiff has studiously avoided providing any explanation for its blatant and prolonged failure to comply with the Rules of the Grand Court which led to my Judgment dated the 3rd May 2011.
>
> 259. The Plaintiff has given no explanation as to why it took four months after it issued its Summons to set aside my Judgment, to file any affidavit in support of its application.
>
> 260. The Plaintiff has failed to provide an affidavit setting out the merits of its application. In Ms Herviou's Third Affidavit (*sic*) she does not state any facts which show a defence on the merits and merely exhibits a bald draft pleading."

His conclusion is expressed in these terms, at paragraphs 262 and 263:

> 262. In conclusion I find that the Plaintiff has failed to show that its draft defence to the Sixth Defendant's Counterclaim has any real prospect of success, nor does it carry the necessary degree of conviction required for me to set aside my judgment of the 3rd May 2011. In addition, I find that the Plaintiff has consistently and deliberately ignored the rules of the Grand Court of the

Cayman Islands with full knowledge of the consequences. Accordingly I reject the Plaintiff's application to set aside my judgment dated the 3rd May 2011.

263. In consequence of my decision I refuse to grant the Plaintiff leave to re-amend its Reply to introduce a defence to the Sixth Defendant's Counterclaim."

The grounds of appeal

31. The grounds of appeal are summarized at paragraph 2 of Embassy's Memorandum of Grounds of Appeal dated 7 August 2012. It is said that the judge's approach "was unfortunately erroneous throughout". In particular, it is said that he erred in three respects:

(1) That he applied the wrong test to the question whether or not a default judgment should be set aside; and set the threshold too high. Embassy submits (i) that its application to set aside the judgment in default should only have been refused if the pleaded defences had no real prospect of succeeding and (ii) that the judge was wrong to take into account both (a) its conduct and (b) the absence of any substantive evidence in support of its proposed defence.

(2) That he misunderstood the nature of each of the defences which Embassy wished to raise in relation to the counterclaim "and therefore repeatedly failed correctly to analyse and assess the prospects of success of each of them". It is said that he made factual findings, "as a result of his misunderstanding of the defences which Embassy sought to advance", which were erroneous and, in any event, not open to him on an application of this type and/or on the evidence which was before him. In consequence, it is said, his conclusions in respect of each of the seven publications were vitiated by his errors in approach.

(3) That he failed to consider Embassy's argument that, even if the judgment was not set aside, the court would be required to consider many of the disputed facts in order to adjudicate upon HCC's claim for exemplary damages. It is said that "if the Court was going to have to litigate these issues in any event, it was perverse not to allow Embassy to have the benefit of any findings in its favour in respect of the substantive defences it wished to advance."

Those grounds were developed fully and at length in the Memorandum, in the appellant's skeleton argument and orally at the hearing of the appeal. It is convenient to consider them in turn.

The first ground: whether the judge applied the wrong test

32. It is accepted that, in the exercise of the power to set aside conferred by GCR Order 19 rule 9, the judge has an unfettered discretion: *Evans –v- Bartlam* [1937] AC 473 8). It is accepted that the judge was correct to have regard to the guidance given by the Court of Appeal of England and Wales in the *Saudi Eagle* (*supra*). But it is said that the judge fell into error in his application of the requirement to show a "good defence on the merits"; in that he failed to consider and apply the overriding principle that justice must be done. Reliance is placed on the observation of Lord Justice Millett in *The Mortgage Corporation Ltd –v- Sandoes & Others* [1997] PNLR 263, 279, that "Loss of the claim, or loss of a defence, is not an appropriate penalty for breach of procedural rules." Reference is made, also, to observations of Chief Justice Smellie, in this jurisdiction, in *Ahmad Hamad Algosaibi & Brothers Company –v- Saad Investments Company Limited & Others* (2 December 2011) and of Sir Andrew Morritt, Vice-Chancellor, in *Douglas –v- Hello (No.3)* [2003] EMLR 601.

33. It is submitted that, in the light of those observations, *Saudi Eagle* cannot stand as authority for the proposition that the Court can or should have regard to the conduct of the defaulting party on an application to set aside a default judgment. The *sole* question is whether the party applying to set aside the default judgment has demonstrated a good defence on the merits and (if it arises) whether a fair trial is possible. The judge was wrong to take the conduct of Embassy into account in reaching his decision to refuse to set aside the judgment in default.

34. In *Saudi Eagle*, Sir Roger Ormrod, delivering the judgment of the court – and after rejecting the reasoning of the judge below which he described as "a two-pronged moral judgment on the behavior of the defendants to the Court rather than an assessment of the justice of the case as between the parties" - said this ([1986] 2 Lloyd's Rep 221, 223):

> "The following 'general indications to help the Court in exercising the discretion' (per Lord Wright at p.488) can be extracted from the speeches in *Evans v Bartlam* [1937] AC 473, bearing in mind that in matters of discretion no one case can be authority for another' (*ibid*, p 488):
>
> (i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;
>
> (ii) the Rules of Court give to a Judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the Court should not 'lay down rigid rules which deprive it of its jurisdiction' (per Lord Atkin at p 486);

(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) the primary consideration is whether the defendant 'has merits to which the Court should pay heed' (per Lord Wright at p 489) not as a rule of law but as a matter of common sense, since there would be no point in setting aside a judgment if the defendant has no defence and if he has shown 'merits' the Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication [*ibid* p 489 and per Lord Russell of Killowen at p 482].

(v) Again, as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant –

> . . . found himself bound by a judgment regularly obtained to which he could have set up some serious defence [per Lord Russell of Killowen at p 482]"

The Court went on to say this (at p 223):

> "In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In the course of his argument Mr Clarke QC used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (eg *Burns v Kendel* [1977] 1 Lloyd's Rep 554 and *Vann v Awford*). This phrase is commonly used in relation to RSC O.14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their Lordships in *Evans v Bartlam.* All of them clearly contemplated that a defendant who is asking the Court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. . . . Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction."

35. There are, as it seems to me, a number of points which emerge from the guidance in the *Saudi Eagle*. First, the approach in a case where the claimant has obtained a regular judgment – *a fortiori*, where that judgment has been obtained after a hearing at which the defendant was represented – is not the same as that (i) in a case where the claimant is seeking summary judgment under GCR O.14 (the equivalent of RSC O.14 under the former Rules of the Supreme Court) and the defendant is seeking leave to defend or (ii) in a case where the defendant (against whom no judgment has been entered) is seeking an extension of time in which to file a defence. Nor is such a case

analogous with a case where one party is seeking to strike out the claim or defence of the other. The reason is that an order setting aside a regular judgment deprives a claimant of substantive rights which he has obtained in accordance with the process of the Court. That should not be done unless the court is satisfied that justice requires it. It is necessary, "in order to arrive at a reasoned assessment of the justice of the case", for the Court to form a provisional view as to the outcome if the case were to be fought at trial: the proposed defence must carry some degree of conviction. Second, if the application of the primary consideration - "has the defendant merits to which the Court should pay heed" – leads to the conclusion that the proposed defence does not carry the required degree of conviction, the court should not set aside the default judgment: there would be no purpose to be served by doing so. But, third, in addressing the question whether the defendant has merits to which the court should pay heed, it is appropriate for the court to take into account the circumstances in which "the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence". It is pertinent to have in mind that, in the *Saudi Eagle* itself, the Court of Appeal, in deciding that the defendants had not shown that they had any reasonable prospect of success, did take into account their conduct. In the penultimate paragraph of the judgment Sir Roger Ormrod said this:

> "The conduct of the defendants in this respect [in failing to produce the charterparty in response to the plaintiff's challenge to do so, or to supplement the evidence of their principal witness] and in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the defendants proceed against these defendants is a matter to be taken into account in assessing the justice of the case. . . . the Court can and must consider it."

36. The judge asked himself whether the various defences which Embassy sought to advance in its proposed defence to counterclaim had a real prospect of success, or carried "the necessary degree of conviction". In my view it cannot be said that he set the threshold too high and so erred in law. In addressing the "primary consideration" he was entitled to have regard to the facts (i) that Embassy had been aware of the counterclaim since December 2010; (ii) that Embassy had (it seemed) waited until March or April 2011 to instruct Mourant Ozannes (who were already acting in connection with the costs of the London arbitration) to address the counterclaim, (iii) that, after receiving such instructions and notice of the default judgment hearing, Mourant Ozannes had made no contact with Appleby until a few days before the

hearing, (iv) that Embassy, through Mourant Ozannes, made no application, at or in advance of the hearing on 2 May 2011, for leave to serve a defence to the counterclaim; (v) that Embassy, through Mourant Ozannes, did not rely on the proposed defence to counterclaim at the default judgment hearing, and (vi) that it was not until September 2011 that Embassy filed evidence which indicated that it intended to rely on the proposed defence to counterclaim. In my view those were all matters which required consideration in the context of determining whether the proposed defence carried the required degree of conviction. The judge was right to take them into account. I reject the submission that he erred in doing so.

The second ground: whether the judge misunderstood the nature of the defences which Embassy wished to raise by its proposed defence to counterclaim

37. In its proposed defence Embassy sought to rely on one or more of the defences of justification, fair comment and qualified privilege in respect of the seven publications. There is no substance in the complaint that the judge failed to appreciate that. In the course of his judgment, in analysing Embassy's position in relation to the publications (at paragraphs 184 to 224) he refers to each of those defences. But it is said that he failed to appreciate how those defences operated. In support of that complaint, counsel set out, for the benefit of this Court, what was said to be a summary of the relevant principles of law.

38. It is said that the defence of justification requires only proof that the substance of the words complained of is true: the defence does not depend on the defendant being able to prove true every literal statement contained within the publication. Reliance is placed on observations in *Gatley on Libel and Slander* (11th edition, 2008) at paragraphs 11.8 and 11.9:

> "It is the imputation contained in the words [i.e. the defamatory sting] which has to be justified, not the literal truth of the words, nor some other similar charge not contained in the words… the defendant may succeed in a plea of justification even though what he has said may be inaccurate in a number of respects."
>
> "Some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the defendant proves that the main charge, or gist, of the libel is true, he need not justify statements or comments which do not add to the sting or charge….When considering substantial truth it is important to "isolate the essential core of the libel and not be distracted by inaccuracies around the edge – however substantial."

Accordingly, it is said, determining the meaning of the words complained of is central to analysing whether or not a justification defence stands any chance of success, because it is truth of the substance of that meaning against which the prospects of any justification has to be measured.

39. There is, in my view, no basis on which to reach the conclusion that the judge did not understand that. At paragraph 224 of his judgment he referred to Embassy's submission that "it is a defence to a claim for libel for a defendant to prove the defamatory allegation to be substantially true".

40. It is said that it is a defence (fair comment) to show that any defamatory statements of opinion and inferences of fact (as opposed to pure statements of fact) contained in a publication are based upon true facts and fall within the generous ambit allowed for the expression of opinions. Reference is made to the observations of Lord Denning, Master of the Rolls, in *Slim v The Daily Telegraph* [1968] 2 QB 157, 170. The judge himself set out those observations at paragraph 221 of his judgment. Reliance is placed on observations in *Gatley* (*ibid*) at paragraph 12.23 that:

> "A comment may be fair even if it is irrational, stupid or obstinate or expressed in pungent and offensive tones. A number of older dicta refer to the comment being 'warranted' by the facts or as being such as a 'fair- minded' person might make, but these expressions, too, are potentially misleading. The question which the jury must answer is this: 'Would any [honest] man, however, prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism?' Could an honest person, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view—could an honest person have been capable of writing this? That is a totally different question from the question, 'Do you agree with what he has said?'''

The judge himself had set out, at paragraph 222 of his judgment, an earlier passage from the same chapter of *Gatley* (*ibid,* para 12.13) which is to much the same effect.

41. Reply to attack qualified privilege is said to be available to a defendant who makes defamatory statements of another following a defamatory attack on their own character. It is said that "rather like a boxer who steps into the ring and throws a few punches, he can hardly expect not to receive a few back". Reliance is placed on a passage in *Duncan & Neill on Defamation* (3rd Edition, 2009) at paragraph 16.22:

> "A defamatory attack made publicly gives its victim a right to reply publicly. In doing so, the victim is entitled to make statements defamatory of his attacker, including statements impugning the attacker's credibility and motives. Provided that such statements are fairly relevant to a rebuttal of the

> attack and that the ambit of their dissemination does not significantly exceed that of the original attack, their publication will be the subject of qualified privilege."

The judge set out the same passage at paragraph 223 of his judgment.

42. Faced with the obvious difficulty that it could not be said that the judge did not direct himself correctly in relation to the law in relation to the defences of justification, fair comment and qualified privilege, it is submitted by counsel on behalf of Embassy that "the conclusion that the Plaintiff had failed to show that its draft Defence to the Counterclaim was flawed by his failure properly to understand, analyse and apply the defences relied upon by the Plaintiff".

43. Embassy seeks to make good that assertion by detailed submissions set out at paragraphs 27 to 68 of its skeleton argument. I intend no disrespect when I say that those submissions owe more to the skill and ingenuity of the specialist defamation counsel who prepared the skeleton argument than to the real issues raised by the counterclaim. As counsel for HCC pointed out, in his skeleton argument and submissions, this was not a case where the difference between the parties as to the defamatory meanings in relation to all the publications complained of was such as to make it necessary to determine the actual (single) meaning borne by each and every one of the separate publications. The true position, as the judge accepted (at paragraph 245 of his judgment), was that the defamatory allegations contained in the seven articles (which were, of course, repetitious) could be summarized under four heads. It was enough for him to address those four heads; as he did.

44. It is said on behalf of HCC, correctly in my view, that the critical fact underlying a consideration of the question whether any of the defences of justification or fair comment that Embassy proposed to advance by way of defence to counterclaim had a real prospect of success or carried the requisite conviction was that HCC had made, and Embassy had declined to accept, an offer ("the October 2008 offer") to pay Embassy's insurance claim to the full extent of its cover with interest and costs; free from any condition restricting Embassy's right to pursue its "bad faith" claim in Texas. In the course of his judgment of 3 May 2011 – which, of course, included consideration of HCC's strike out application – the judge had made a number of findings of fact:

(1) The offer made by HCC on 31 October 2008 was to pay Embassy's claim to the full extent of its cover, with interest and costs.

(2) The offer was without prejudice to any claim Embassy might wish to make against HCC in Texas or elsewhere (judgment, paragraph 128).

(3) Embassy, probably acting through both Ms Herviou and Mr Bhatia, chose not to accept that offer; notwithstanding that it remained open until 14 August 2009. Instead they chose to breach the Standstill Agreement and file proceedings against HCC in Texas (judgment, paragraphs 129 and 165).

(4) The failure to accept the October 2008 Offer was "completely baffling and inexplicable" (judgment, paragraph 130).

(5) The Arbitrator had been right to find (i) that there was no good reason for Embassy to have refused the October 2008 Offer; (ii) that Embassy could not have achieved more than the terms offered if it had pursued the Cayman proceedings against HCC to a successful conclusion; and (iii) that Embassy did not want to settle its policy claim against HCC in the Cayman proceedings because it wished – as part of a calculated strategy to bolster its multi-million dollar claim for punitive damages against HCC in Texas – to maintain and magnify its allegation that HCC was "blocking" settlement by all the insurers (judgment, paragraphs 131-133 and 168-170.

(6) It was noteworthy that neither Mr Bhatia nor Mr Powers referred in the publications complained of to the fact that the October 2008 Offer "remained open and alive" for almost 10 months" (judgment, paragraph 140).

(7) There was no truth in the allegations that HCC was acting in bad faith by unlawfully delaying payments or by refusing to honour the "agreed settlement" sum (judgment, paragraph 174).

(8) It was contumelious behavior to continue making these untrue allegations for almost 12 months after Embassy had chosen not to accept HC's open offer to settle the proceedings (judgment, paragraph 174).

(9) Neither Mr Bhatia nor Ms Herviou could reasonably have found these allegations to be true, however often they were repeated (judgment, paragraph 247).

(10) Any delay in resolving Embassy's financial claim was caused by Embassy's own inactivity and failure to progress its claim for over three years (judgment, paragraph 227)

(11) Mr Bhatia was speaking for Embassy as part of a strategy publicly to attack Embassy in the Cayman media and elsewhere in a deliberate attempt to force HCC to settle Embassy's claim.

45. It is said on behalf of HCC that it was open to the judge to make those findings on the incontrovertible (and uncontroverted) evidence that was before him on 3 May 2011. Reliance was placed on observations of Lord Hope of Craighead in *Three Rivers District Council v The Bank of England (No 3)* [2003] 2 AC 1, at page 94, Lord Justice Ward in *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 WLR 2150, at page 2157*a-d* and Lord Justice Potter in *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] CP Rep 51. I agree. Accordingly, and in the light of those findings, it was open to the judge to conclude that Embassy's pleaded defences of justification, fair comment and qualified privilege did not have any real prospect of success, and did not carry the requisite conviction. I agree with that proposition also.

46. Accordingly, I reject the complaint made under the second ground of appeal.

The third ground: failure to appreciate that the many of the disputed facts would have to be addressed in any event in order to adjudicate upon HCC's claim for exemplary damages

47. It is submitted that the judge failed to give any consideration to the fact that most of the issues on which Embassy would have relied on in defence of the substantive libel claim against it would be raised, and adjudicated on, as part of the determination of HCC's exemplary damages claim. In particular, it was said (i) that as part of its claim for exemplary damages, HCC alleged that the publications sued upon were known to be false by Embassy and published by it, calculating that the benefit to Embassy would outweigh any damages it might have to pay; (ii) that, to succeed with the first element of its claim for exemplary damages, HCC has to demonstrate that Embassy did not have any honest belief in the allegations that appeared in the various articles and letters sued on; and (iii) that to resolve this issue under the claim for exemplary damages Embassy would have to be permitted to advance most of the same issues that it would have advanced under its substantive defences to demonstrate the honesty of its belief and to rebut the claim for exemplary damages. It would be perverse to entertain continued litigation of those issues in the context of the exemplary damages

claim, whilst at the same time refusing to allow Embassy to rely on those same issues to resist liability.

48. Further, it is submitted that, if Embassy is successful in reversing the judge's order striking out its claim, the same point applies with equal force to the situation where the Court is litigating the main claim in which most of the issues of fact relevant to the libel claims would also be determined. It would again be perverse to allow the issues to be adjudicated upon in the context of the main claim, yet to shut Embassy out from relying on those same issues in defence of the Counterclaim.

49. In answer to the first limb under this ground, it is pointed out on behalf of HCC that, properly understood, the only issue which falls to be determined in relation to its exemplary damages claim is whether Embassy had an honest belief in the allegations that it was making in the words complained of. But, as was made clear in the pleaded counterclaim and in post-hearing submissions put before the judge, HCC's case is that that issue turns on the state of mind of Mr Bhatia alone. The sole question, in that context, is said to be whether Mr Bhatia, himself, honestly believed in the truth of the matters published; not whether those matters were in substance true or objectively defensible as comment. It is incorrect to assert that the determination of the exemplary damages claim would require the Court to address "most of the same issues" that Embassy would have advanced in support of its substantive defences to the defamation claims. That seems to me to be a correct analysis of the position.

50. HCC does not, in terms, address the second limb under this ground. But it seems to me that the same point can be made. Determination of the exemplary damages claim would not require the Court to address "most of the same issues" as the Court would have to address in the main action if the judge's strike out order were set aside. There is no basis for the assertion that the question whether Mr Bhatia had an honest belief in the truth of the matters published is an issue that would need to be addressed in the main action; if it were to continue.

Conclusion

51. For the reasons which I have set out, I was satisfied at the conclusion of the oral hearing that this appeal should be dismissed.

Sir John Chadwick, President

Elliott Mottley, Justice of Appeal:

I agree.

Sir Anthony Campbell, Justice of Appeal

I also agree.