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

**Cause No: FSD 94 of 2011 – *CQJ***
**(Formerly Cause No. 278 of 2005**
Consolidated with 98/06
127 &128/06)


**BETWEEN:**

**EMBASSY INVESTMENTS LIMITED**

PLAINTIFF

**AND:**

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

DEFENDANT

**CONSOLIDATED WITH**

**Cause No: 98/06**

**BETWEEN:**

1. **SIMON WHITE (FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF SYNDICATE 1200 AT LLOYD'S)**
2. **CHRISTINE DANDRIDGE (FOR AND ON BEHALF OF HERSELF AND ALL OTHER MEMBERS OF SYNDICATE 609 AT LLOYD'S)**
3. **TALBOT 2002 UNDERWRITING CAPITAL LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 1183 AT LLOYD'S)**
4. **CATLIN SYNDICATES LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2003 AT LLOYD'S)**
5. **BRIT UW LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2987 AT LLOYD'S)**
6. **WELLINGTON UNDERWRITING AGENCY LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2020 AT LLOYD'S)**

**PLAINTIFFS**

**AND:**

1. **EMBASSY INVESTMENTS LIMITED**
2. **BEACH SUITES INVESTMENTS LIMITED**
3. **HYATT INTERNATIONAL CORPORATION**

**DEFENDANTS**

**IN THE MATTER OF THE PLAINTIFF'S APPLICATION TO SET ASIDE JUDGMENT**

| | |
|---|---|
| **APPEARANCES:** | **Mr. Matthew Nicklin instructed by Mr. Tim Richards of Mourant Ozannes for the Plaintiff** |
| | **Mr. Manuel Barca Q.C. instructed by Ms. Marit Hudson of Appleby for the Defendant** |
| **Before:** | **Honourable Mr. Justice Charles Quin** |
| **Heard:** | **27th September 2011** |

**IN THE MATTER OF THE SIXTH DEFENDANT'S APPLICATION TO STRIKE OUT THE PLAINTIFF'S WRIT OF SUMMONS**

| | |
|---|---|
| **APPEARANCES:** | **Mr. Stephen Berry Q.C. instructed by Mr. Tim Richards of Mourant Ozannes for the Plaintiff** |
| | **Mr. Jeremy Walton and Ms. Marit Hudson of Appleby for the Defendant** |
| **Before:** | **Honourable Mr. Justice Charles Quin** |
| **Heard:** | **6th and 7th October 2011** |

## *Introduction*

I have decided to deliver a composite Ruling on the Sixth Defendant's application to strike out the Plaintiff's Writ and Statement of Claim filed on the 15th March 2011 and heard on the 6th and 7th October 2011, together with my decision on the Plaintiff's application to set aside my Judgment dated the 3rd May 2011, which application was filed on the 11th May 2011 and heard on the 27th September 2011.

There is an overlapping chronology and common submissions in the two separate applications.

I am grateful to Deborah Tutuianu for the transcript of the hearing on the 27th September, which I received on the 22nd November 2011, and for the transcript of the hearings on the 6th and 7th October 2011, which I received on the 2nd December 2011.

For convenience I now set out the following table of contents.

## *Contents*

## JUDGMENT

### *The Sixth Defendant's Summons*

1. On the 15th March 2011 the Sixth Defendant, Houston Casualty Company, hereinafter called ("HCC" or "the Sixth Defendant") issued a Summons for the following relief:

   i. *That pursuant to GCR O.18 r.19(1)(d) and the inherent jurisdiction of the Court, the Writ and Statement of Claim in Cause 278 of 2005 of Embassy ("the Plaintiff") be struck out for intentional and contumelious default amounting to an abuse of the process of the Court, that the Plaintiff's actions in Cause 278 of 2005 against the Defendant be dismissed and that the Defendant be at liberty to enter judgment for its costs as provided for below; and*

   ii. *That the Defendant's costs of this action including its costs of, and occasioned by, this Summons, be taxed on an indemnity basis and paid by the Plaintiff.*

2. In support of its Summons the Sixth Defendant relies on the Fourth Affidavit of Clive Jackson ("Mr. Jackson") dated the 17th March 2011, and the Fifth Affidavit of Mr. Jackson dated the 15th April 2011.

3. In its opposition to the Sixth Defendant's Summons the Plaintiff relies substantially on the First Affidavit of Leticia Herviou ("Ms. Herviou") filed on the 9th June 2011, and on her Third Affidavit, sworn on the 30th September 2011.

***The Plaintiff's Summons to Set Aside Judgment of the 3rd May 2011***

4. On the 11th May 2011 the Plaintiff issued a Summons for the following relief:

*i. That pursuant to GCR O.19 r.9 and/or the inherent jurisdiction of the Court, the Order of the Honourable Mr. Justice Quin dated 3rd May 2011 (the "Default Judgment Order") be set aside.*

*ii. [That] insofar as is necessary, pursuant to GCR O.20 r.5 and GCR O.18 r.9, the Plaintiff be granted leave to re-amend the Reply and introduce a Defence to Counterclaim in the form attached hereto [and,] alternatively, pursuant to GCR O.3 r.5(1) the Plaintiff be granted an extension of time for filing the Reply and Defence to Counterclaim.*

*iii. That the Sixth Defendant do serve a Reply to the Defence to Counterclaim within 28 days.*

*iv. [That] the Sixth Defendant's costs of its application dated the 3rd March 2011, up to and including the 28th April 2011 be taxed on the standard basis and paid by the Plaintiff.*

*v. That all other costs occasioned by this application and the amendment referred to in paragraph ii be in the cause.*

*vi. Further or alternatively:*

*a. [That] the Plaintiff be granted leave to appeal against the Default Judgment Order;*

*b. [That] pursuant to GCR O.3 r.5(1), the Plaintiff's time for lodging a notice of appeal and/or renewing its application for leave to appeal against the Default Judgment Order be extended until 28 days after the hearing of this Summons;*

c. *That there be a stay of execution of the Default Judgment Order pending appeal or the Plaintiff's renewed application for leave to appeal.*

5. In support of its Summons the Plaintiff relies on the Second Affidavit of Ms. Herviou filed on the 13th September 2011.

6. Although these proceedings are acrimonious and hotly contested, much of the history and background is common ground and uncontroversial. For the sake of convenience I have prepared what I consider to be a relevant chronology based on the following:

i. The Fourth Affidavit of Mr. Jackson dated the 17th March 2011;

ii. The First Affidavit of Ms. Herviou, dated the 1st June 2011;

iii. The award of the London Arbitrator, Stephen Males Q.C., dated the 8th January 2010 and exhibited to Ms. Herviou's First Affidavit at Tab 13; and

iv. The Affidavit of Marit Hudson, dated the 7th October 2011.

***The Parties***

7. The Plaintiff, Embassy, is a company registered in Jersey in the Channel Islands, whose business includes the ownership and operation of hotels. The Plaintiff purchased the Hyatt Hotel, Grand Cayman in December 2003, and obtained property and business interruption insurance in respect of its ownership of the Hyatt.

8. The Sixth Defendant, HCC, is an insurance company registered and domiciled in Texas and with a London branch ("HCL"). HCC writes property and casualty business. It is part of a corporate group whose ultimate holding company is HCC Insurance Holdings Inc. – a Delaware corporation, with its head office in Texas. The London branch, HCL, was established in 1998 and has been writing insurance in the London market since the 1st January 2000, as an FSA regulated insurer. Although it is not a separate corporate entity from HCC, it was HCL which wrote the insurance in issue.

***The Insurance Policy***

9. The first layer of insurance obtained by the Plaintiff was for US$10,000,000.00, obtained from three insurance companies. The second or middle layer was for 57.5% of an additional US$15,000,000.00 of coverage in excess of the initial US$10,000,000.00 policy. The Sixth Defendant was one of the insurers providing coverage on this middle layer. The third layer was for 57.5% of the US$25,000,000.00 of coverage in excess of the total of US$25,000,000.00 already referred to. The middle and third layers represented 57.5% of the order. The balance of 42.5% was provided by a parallel excess policy, which provided for US$40,000,000.00 of coverage in excess of the initial US$10,000,000.00 policy.

10. The Sixth Defendant was one of six insurers providing coverage under a middle layer for 57.5% of US$15,000,000.00, in excess of US$10,000,000.00. The total exposure under the policy for the Defendant was US$1,173,475.00, being 13.6055% of 57.5% of US$15,000,000.00. The policy was expressly governed

by Cayman Islands law, and provided for the jurisdiction of the Courts of the Cayman Islands.

***Hurricane Ivan***

11. On the 11th to the 12th of September 2004 Hurricane Ivan struck the Cayman Islands causing great destruction of property. The Hyatt suffered extensive damage. The Plaintiff claimed under its insurance. The Plaintiff's position is that the total cost of repairs and business interruption losses substantially exceeded the US$50,000,000.00 coverage which it had.

***Chronology of the Plaintiff's Action against the Sixth Defendant***

12. On the 16th June 2005 the Plaintiff issued its Writ of Summons and Statement of Claim against the six co-insurers on the middle layer, and HCC was the Sixth Defendant.

13. On the 29th July 2005 the Sixth Defendant filed its Defence to the Plaintiff's claim denying liability.

14. On the 26th August 2005 the Plaintiff brought an application for summary judgment against the Sixth Defendant and the five co-insurers.

15. On the 4th November 2005 the Plaintiff's application for summary judgment was dismissed by Henderson J.

16. On the 20th March 2006 Henderson J. gave his reasons for judgment. Neither Henderson J's Order, nor his reasons, have been appealed by the Plaintiff.

17. On the 16th June 2006 Henderson J. made an Order consolidating the various actions and providing for discovery and the inspection of documents, the exchange of factual witness statements, interrogatories, and, the exchange of experts' reports – with up to six experts in various disciplines on either side. Henderson J's Order ordered that a pre-trial review should take place by the 31st March 2007.

18. On the 11th May 2006 the Plaintiff issued a Summons for specific discovery against all the Defendants.

19. On the 3rd day of April 2006 the Plaintiff notified the Sixth Defendant (and the other Defendants) that it intended to bring a claim for punitive damages in Texas for alleged bad faith and breaches of the Texas insurance code in the handling of the Plaintiff's policy claim, including the conduct of the Cayman proceedings. The Plaintiff at various stages argued that it was entitled to damages in a sum exceeding $20,000,000.00 and further, that under Texas law, it was entitled to treble damages.

20. On the 25th day of May 2006, all the Defendants, including the Sixth Defendant, applied to the Grand Court of the Cayman Islands in Cause Number 198 of 2006 for an ant-suit injunction to prohibit the Plaintiff from bringing the proposed Texas proceedings.

21. On the 2nd day of June 2006 the Sixth Defendant made a without-prejudice offer to pay approximately 75% of the claim made against the Sixth Defendant under its policy with the Plaintiff.

22. The Defendants' (including the Sixth Defendant) anti-suit application was adjourned by consent upon undertakings given by the Plaintiff in a "Standstill Agreement", effective as at 28th July 2006, which provided that neither of the parties would file any new legal proceedings in any jurisdiction arising out of or relating to the Cayman proceedings or any Texas claim, until the Cayman Islands litigation was either settled or proceeded to judgment (including any appeals). The parties also agreed to suspend all the running of all statutes of limitation. A Standstill Agreement was expressly subject to English law and arbitration by a sole arbitrator in London.

23. On the 4th September 2006 the Sixth Defendant served its list of documents on the Plaintiff, and on the 6th September 2006 the Plaintiff served its list of documents on the Sixth Defendant.

24. On the 5th April 2007 all the Defendants, including the Sixth Defendant, offered to settle the Plaintiff's claim on the basis of a payment of US$14.75 million in relation to all claims. The settlement figure was to include costs and interests and a waiver of any extra contractual or bad faith claims in Texas or elsewhere.

25. On the 7th August 2007 Henderson J. rejected the Plaintiff's application for specific discovery.

26. On the 9th October 2007 Henderson J. gave the Plaintiff leave to appeal against his Ruling dated the 7th August 2007 and the Plaintiff filed a Notice of Appeal.

27. On the 21st September 2007 the Plaintiff issued a further summons for specific discovery.

28. On the 12th December 2007 the Plaintiff was given leave to withdraw its Summons.

29. On the 12th December 2007 the Sixth Defendant's application for specific discovery was heard by Henderson J.

30. On the 30th January 2008 Henderson J. made an Order for specific discovery against the Plaintiff.

31. On the 20th February 2008 Mr. Asif Bhatia ("Mr. Bhatia") filed his Sixth Affidavit on behalf of the Plaintiff in response to Henderson J's Order for specific discovery delivered on the 30th January 2008.

32. In October 2007 and December 2007 settlement meetings took place.

33. On the 7th February 2008 the Sixth Defendant's London solicitors, Clyde & Company, wrote to the Plaintiff to propose a face-to-face meeting, and at the same time made a settlement offer for payment of US$1,173,474.00, including interest, costs and taxes (if any), on terms which included a full release of any extra contractual or bad faith claims in Texas or elsewhere. This was an offer to pay the Sixth Defendant's full policy limit, but did not include anything to cover costs or interest.

34. On the 15th February 2008 the other five insurers of the middle layer (that is, not the Sixth Defendant) put forward their own settlement offer in the sum of US$7,451,525.00, including interest, costs and taxes, if any, but otherwise on the same terms as the offer previously made on behalf of all the insurers. This represented full policy limits for these insurers.

35. On the 27th February 2008 the Plaintiff responded to the other five insurers that it was prepared to accept this figure, but added further conditions, which indicated that it was prepared not to recover interest or costs against these five insurers because it would seek to recover them from the Sixth Defendant, HCC, in Texas. Accordingly, the Plaintiff was insisting that it would keep open its right to recover interest and costs from the Sixth Defendant, failing which, the other five insurers would be brought into the Texas proceedings.

36. On the 20th March 2008 the Plaintiff wrote again to Mr. Schell, (the President and CEO of the Sixth Defendant, HCC) at HCC's head office in Texas in the US stating that its email of the 27th February 2008 had been in acceptance of the settlement offer dated the 15th February 2008, made by the other five insurers of the middle layer.

37. There were further mediation meetings in March 2008 with Mr. Bhatia and Mr. Le Seelleur on behalf of the Plaintiff and the Sixth Defendant's representatives.

38. On the 4th April 2008 the other insurers (the other five Defendants) wrote to the Plaintiff saying that there had not been an acceptance of their offer made on the 15th February 2008 and that the claim against them had not been settled and that the terms of settlement had still not been agreed.

39. On the 7th July 2008 the other Defendants repeated their earlier offer of the 21st January 2008 to settle the Plaintiff's claim in the sum of US$16.75 million. However, for various reasons the terms of the settlement between the Plaintiff and the other Defendants were not agreed.

***The October 2008 Offer***

40. On the 31st October 2008 the Sixth Defendant, through its London solicitors, offered to settle the Plaintiff's claim by payment of US$1,173,474.00, which was the policy limit, together with US$312,000.00 representing interest, and a further sum of US$300,000.00 representing costs. Thus the total sum offered was US$1,785,474.00 which was to be in full and final settlement of the Plaintiff's claim, without restricting the Plaintiff from continuing its Texas bad faith claim.

41. On the 19th February 2009 the Plaintiff wrote to the Sixth Defendant purporting to accept what it described as:

> "*...the latest combined offers from HCC and its co-insurers*" and stated that
>
> "*...various representatives of the Defendant and its co-insurers continue to be instructed to wrongfully withhold these policy proceeds of US$18,223,474.00.*"

The Plaintiff stated that the Cayman proceedings can only be settled if the Sixth Defendant:

> "*and its co-insurers are finally instructed to make the payment US$18,223,474.00, which HCC and its co-insurers have offered and Embassy has accepted in relation to the policy claim, without insisting that the Plaintiff waives its right to claim in Texas.*"

The Plaintiff also stated that in the absence of any such instruction it would have no choice but to continue with the Cayman proceedings. The Plaintiff's letter also claimed that the alleged bad faith damages claim in Texas had reached US$180 million.

42. On the 9th April 2009 the Plaintiff's US attorneys, Baker Botts, wrote to the Sixth Defendant's Texan attorneys and their Cayman attorneys stating:

> *"Because your client has agreed to pay [the Plaintiff] the combined sum of US$18,223,474.00 in settlement of the Cayman actions with [the Defendant] paying US$1,473,474.00 consisting of policy proceeds of US$1,173,474.00 and recoverable costs of US$300,000.00 payable by [the Defendant] to [the Plaintiff] and [the Defendant's] co-insurers paying US$16,750,000.00, the provisions of the standstill agreement would have been satisfied, save for your client's ongoing failure, in breach of contract and in bad faith, to pay the agreed aggregate settlement figure to [the Plaintiff]."*

The letter further stated that the Plaintiff would seek to pursue its proceedings in the Texas Court within ten (10) days and bring an end to the Standstill Agreement.

43. On the 17th April 2009 the Sixth Defendant's London solicitors wrote to the Plaintiff denying that the Sixth Defendant had agreed to pay the Plaintiff any monies in settlement of the Cayman actions and saying that the Sixth Defendant had made an offer to settle subject to terms which the Plaintiff had failed to accept. Furthermore, the Sixth Defendant's London solicitors stated that, in view of the terms of the Standstill Agreement, the Plaintiff had no right to commence any proceedings in Texas. The Sixth Defendant's October 2008 offer remained open and alive.

44. On the 5th May 2009 the Plaintiff wrote to the other insurers, but copied it to the Sixth Defendant, stating that there had been an agreement relating to policy proceeds, but alleging that, the fact that it had not been settled is further evidence that the Sixth Defendant was continuing to instruct the other insurers in further bad faith

*"... to seek to further delay/frustrate settlement of the Cayman proceedings, and thereby also the Plaintiff's proceedings in Texas against the Defendant, by continuing to wrongfully withhold the agreed settlement figure in respect of the Cayman proceedings."*

The Plaintiff stated that if a payment were not made it would continue in its efforts to resolve this matter by communicating directly with the Sixth Defendant's board of directors in Texas.

45. On the 13th May 2009, the Sixth Defendant's London solicitors wrote another lengthy letter to the Plaintiff, which concluded by repeating the Sixth Defendant's willingness to settle the policy claim (but not the Texas claim) on the terms set out on the 31st October 2008 letter, and enclosed a formal draft agreement. Again the Plaintiff did not reply to this letter but instead wrote again to Mr. Schell in Houston, Texas, accusing the Sixth Defendant's London solicitors of factual inaccuracies and misleading statements.

46. On the 17th June 2009 the Sixth Defendant's London solicitors wrote again to the Plaintiff, stating that the Sixth Defendant was willing to settle on terms set out in its letter of the 13th May 2009, which was a repeat of the 31st October 2008 offer.

47. On the 27th July 2009 the Plaintiff commenced proceedings against the Sixth Defendant in Texas, which alleged violation of the Texas insurance code and duties of good faith and fair dealing.

48. On the 4th August 2009 the Sixth Defendant sought and obtained an interim anti-suit injunction against the Plaintiff before the Commercial Court in London.

49. Also on the 4th August 2009 the Sixth Defendant served an arbitration notice on the Plaintiff seeking an arbitration under the Standstill Agreement.

50. On the 14th August 2009 the Sixth Defendant's London solicitors wrote to the Plaintiff's London solicitors, again enclosing a copy of their letter dated the 13th May 2009, as well as the draft settlement agreement. The Sixth Defendant's London solicitors pointed out that, due to the commencement of the Texas lawsuit against the Sixth Defendant, the Sixth Defendant's October 2008 offer to settle the Cayman litigation was withdrawn, whilst the Sixth Defendant considered its position. This letter confirmed that the Sixth Defendant remained willing to settle the policy claim without prejudice to the Plaintiff's bad faith claim in Texas.

51. On the 7th September 2009 Mr. Males Q.C., who was the Plaintiff's nominee, was appointed by the President of the Chartered Institute of Arbitrators, and with the consent of the parties, to act as sole Arbitrator pursuant to the arbitration clause in the Standstill Agreement.

52. On the 4th August 2009 a stay of the Texas proceedings was ordered in light of the anti-suit injunction imposed by the Commercial Court in London. The Order was continued on the 4th September 2009.

53. On the 18th September 2009 the Texas Court ordered a stay of its own proceedings in favour of the London arbitration.

54. On the 8th January 2010 the Arbitrator, Mr. Males, found and declared, *inter alia*, that:

i. *The Plaintiff had breached the Standstill Agreement by commencing the Texas proceedings against the Sixth Defendant;*

ii. *The Plaintiff and the Sixth Defendant had not agreed terms of settlement of the Cayman actions;*

iii. *The Cayman proceedings had not been finally determined or resolved within the meaning of Clause 1.5 of the Standstill Agreement.*

iv. *The Standstill Agreement had not ended and remains binding and enforceable by the Sixth Defendant.*

55. On the 18th March 2010 the Plaintiff came to an overall agreement with the other Defendants in a settlement sum of $16,750,000.00.

56. The Plaintiff failed to file the necessary Notices of Discontinuance which caused the other Defendants to apply to strike out the Plaintiff's action against the other Defendants on the 26th April 2010.

57. On the 26th May 2010 I struck out the Plaintiff's claims against the other Defendants on the ground that the Plaintiff's claims and their pursuit were then frivolous, vexatious and an abuse of the process of the Court, the claims having been fully and finally settled on the terms of the settlement agreement dated the 16th March 2010. I gave my reasons for this decision on the 20th September 2010 and my decision has not been appealed.

58. On the 26th May 2010 Campbells were given leave to come off the record as attorneys for the Plaintiff.

59. The Award made by Mr. Males on the 8th January 2010 had not been appealed or challenged by the Plaintiff and on the 5th July 2010 a consequential award of costs was made in favour of the Sixth Defendant.

60. On the 17th August 2010 the Sixth Defendant obtained an Order from Cresswell J. in Cause FSD 184 of 2010 and pursuant to s.5 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) that it be permitted to enforce the award and the related award in respect of costs in the Cayman Islands.

61. On the 19th August 2010 Cresswell J's Order was served on the Plaintiff's registered office. The Plaintiff did not respond to this service, nor did it apply to set aside the Order.

62. In September 2010 the Sixth Defendant brought proceedings in Cause Number 339 of 2010 for a charging order over property owned by the Plaintiff in order to enforce the costs award in connection with the arbitration originally granted by Mr. Males on the 5th July 2010. The Plaintiff made a non-conditional payment in the sum of US$571,015.62 together with costs in the sum of US$15,978.66.

63. On the 15th March 2011 the Sixth Defendant issued its Summons to strike out the Plaintiff's Writ and Statement of Claim for intentional and contumelious default amounting to an abuse of the process of the Court.

64. The Defendant filed the Third Affidavit of Mr. Jackson in support of its Summons.

65. On the 24th March 2011 the Sixth Defendant served its Summons to strike out the Plaintiff's action and the Fourth Affidavit of Mr. Jackson, on the Plaintiff.

66. On the 28th April 2011 Mourant Ozannes filed a Notice of Change of Attorneys and came on the record for the Plaintiff.

67. On the 1st June 2011 Ms. Herviou filed her First Affidavit in these proceedings in opposition to the Defendant's application to strike out the Plaintiff's action.

***Chronology of the Sixth Defendant's Counterclaim against the Plaintiff***

68. On the 27th July 2010 the Sixth Defendant served a Notice of Intention to Proceed on the Plaintiff. From a review of the evidence and the Court's file, the Plaintiff did not respond to this step taken by the Sixth Defendant.

69. On the 26th September 2010 the Sixth Defendant issued and filed its Summons for leave to re-re-amend its Defence by introducing the Counterclaim with a return date of 14th December 2010.

70. On the 13th October 2010 the attorneys for the Sixth Defendant wrote to the Plaintiff and served a sealed copy of its Summons dated the 29th September 2010 to re-re-amend its Defence by introducing the Counterclaim and the second affidavit of Mr. Jackson. To give the Plaintiff an opportunity to consider whether it wished to consent to the Application, the Sixth Defendant's attorneys, Appleby, confirmed that they would not seek a hearing date earlier than the 27th October 2010, being fourteen (14) days from service of its letter, with the Summons, on the Plaintiff. The Plaintiff did not respond to Appleby's letter or to the service of the Sixth Defendant's Summons. Accordingly, the return date of the 14th December 2010 stood.

71. On the 14th December 2010, the day of the hearing of the Sixth Defendant's Summons for leave to re-re-amend its Defence by introducing the Counterclaim,

Ms. Herviou, a director of Basel CDS Limited ("Basel"), which is the corporate director of the Plaintiff, wrote to the Sixth Defendant's attorneys stating, *inter alia*, that the Plaintiff had expected the Sixth Defendant to withdraw its application.

72. On the 14th December 2010 counsel for the Sixth Defendant appeared before the learned Chief Justice. There was no appearance on behalf of the Plaintiff. At this hearing the Sixth Defendant was given leave by the learned Chief Justice to re-re-amend its Defence and to introduce a Counterclaim pursuant to GCR O.18 r.9 and GCR O.20 r.5.

73. On the 20th December 2010 the Plaintiff was served with a sealed copy of the Sixth Defendant's re-re-amended Defence and Counterclaim dated the 17th December 2010 and a sealed copy of the Order of the learned Chief Justice dated the 14th December 2010. The Plaintiff did not respond to this Order. The Plaintiff did not file a Notice of Intention to Defend, nor did it file any defence up to the 3rd March 2011 when the Sixth Defendant issued its Summons for interlocutory judgment in default of defence.

74. On the 24th March 2011 the Sixth Defendant served the Plaintiff with a sealed copy of its Summons dated the 3rd March 2011 for interlocutory judgment in default of defence, together with the Third and Fourth Affidavits of Mr. Jackson.

75. On the 24th March 2011 Mourant Ozannes wrote to the Sixth Defendant's Cayman attorneys stating that Mr. Bhatia is not authorised to speak on behalf of the Plaintiff, and the opinions he expressed in his email of the 8th March 2011 are his personal opinions.

76. On the 28th April 2011 Mourant Ozannes filed a Notice of Change of Attorneys and wrote to the Defendant's attorneys with their re-amended draft reply and Defence to Counterclaim.

77. On the 3rd May 2011 Quin J. granted the Sixth Defendant interlocutory judgment against the Plaintiff in default of Defence to the Sixth Defendant's Counterclaim, with damages to be assessed.

78. On the 10th May 2011 the Plaintiff issued its application to set aside the Sixth Defendant's Judgment in Default of its Counterclaim.

***The Sixth Defendant's Position on Strike Out Application***

79. The Sixth Defendant contends that the Plaintiff has failed to take any steps since February 2008, and instead of pursuing its insurance claim in these proceedings against the Sixth Defendant, it has chosen to pursue a course of conduct aimed at forcing the Sixth Defendant to pay substantial damages to the Plaintiff for alleged bad faith. Accordingly, the Sixth Defendant requests that the action be struck out as an abuse of the Grand Court's process.

80. The Sixth Defendant alleges that the Plaintiff has conducted this abuse of process by:

i. Conducting a tactical letter-writing campaign by email and fax to the Sixth Defendant's Cayman attorneys, to the Sixth Defendant's officers in Texas, and to officers and board members of the Sixth Defendant's ultimate parent company.

ii. Attacking the Sixth Defendant by publishing defamatory statements about the Sixth Defendant which are false in the Cayman media, to members of the Government of the Cayman Islands, and to UK Members of Parliament and the European Commission.

iii. Attempting to pursue abusive proceedings against HCC in Texas in breach of a Standstill Agreement where alleged breaches of the Texas insurance code and the duties of good faith and fair dealing (claiming damages including exemplary and/or punitive damages in excess of US$210 million) forcing the Sixth Defendant to commence arbitration proceedings in London to enforce a Standstill Agreement.

iv. The Sixth Defendant contends that the abusive conduct in these proceedings was perpetrated by Mr. Bhatia; Bill Powers ("Mr. Powers"), the General Manager of the Hyatt Beach Suites; Peter Le Seelleur ("Mr. Seelleur"); Ms. Herviou; and other employees and directors of Embassy.

81. The Sixth Defendant relies on the fact that the Arbitrator, Mr. Males, held in favour of the Sixth Defendant and rejected the principal reasons given for Embassy's delay in pursuing the Cayman proceedings, namely:

i. Pursuing the Cayman litigation would be an "unnecessary waste of resources";

ii. The insurers wanted to settle;

iii. There were, in Mr. Bhatia's words, "questions about the judiciary in Cayman."

82. The Sixth Defendant highlights the fact that its Summons was served on the Plaintiff on the 24th March 2011 and the Plaintiff failed to respond or take any action in relation to the Summons until the 24th May 2011 when Mourant Ozannes wrote to the Sixth Defendant's attorneys requesting an adjournment and adding that the Plaintiff would be applying to transfer the action to the Financial Services Division (FSD) of the Grand Court of the Cayman Islands.

83. The Sixth Defendant submits that the reason for the delay is that the Plaintiff has been seeking to force the Sixth Defendant into making a substantial payment in relation to the Plaintiff's spurious punitive damages claim in Texas, by making constant and endless allegations of bad faith and inequitable conduct.

***The Plaintiff's Position on the Strike Out Application***

84. The Plaintiff submits that the Sixth Defendant cannot and does not allege any prejudice due to the Plaintiff's delay, nor that a fair trial is impossible. The Plaintiff further contends that to strike out the Plaintiff's claim on the grounds of delay, which has caused no prejudice or risk to a fair trial, is a draconian sanction, capable of inflicting unfairness, and would be so disproportionate as to be penal.

85. The Plaintiff submits it is not in contumelious default and has a genuine intention to pursue a claim to judgment and as such, continuing these proceedings is not an abuse of process. The Plaintiff states that that is what it wishes to do and that is what it has instructed its attorneys to do.

86. The Plaintiff accepts that its claim, in general, could have been better handled. However, the Plaintiff submits that the board of the Plaintiff's company took

over the management of the dispute in January 2011 and, for this purpose, relies on the affidavit evidence of Ms. Herviou. Ms. Herviou maintains that the board accepts that, in the past, the directors of Embassy usually acted on Mr. Bhatia's recommendations. However, Ms. Herviou avers that the board continued to supervise Mr. Bhatia and did not grant him any power of attorney to act on behalf of the company or to allow him to exercise unfettered discretion in relation to the company's affairs.

87. The Plaintiff submits that from January 2011, following Mr. Bhatia's increasingly erratic behaviour, there was what has been described as a "regime change" in the management of the Plaintiff's claim against the Sixth Defendant – both in terms of legal status and in practice.

88. It is the Plaintiff's position that even if Mr. Bhatia's state of mind could be equated with the Company's state of mind (which is not accepted) it was not contumacious and there was no deliberate lack of intention to proceed to judgment which could amount to an abuse of process.

89. The Plaintiff submits that the delay can be divided into four separate periods:

i. March 2008 to April 2009: The Plaintiff submits that it was seeking to settle litigation with the Sixth Defendant globally and, as part of the strategy, the Plaintiff took no active steps in the litigation. The Plaintiff's position is that, whether this was a good or a bad strategy, it was not contumacious or abusive.

ii. April 2009 to January 2010: The Plaintiff submits that the Sixth Defendant's October 2008 offer was an offer of 100% plus interest

plus costs, but was subject to ancillary conditions. The Plaintiff submits that Mr. Bhatia took the view that he could not safely settle separately with the Sixth Defendant and the other insurers in terms which might release the Defendant from bad faith claims. Mr. Bhatia analysed the Sixth Defendant's offer as a tender of policy limits and that in any event, the Plaintiff is not contumacious or abusive of the proceedings. Moreover, the Plaintiff now accepts that its strategy was misguided.

iii. January 2010 to January 2011: The Plaintiff claims that following the handing down of Mr. Males' award in January of 2010 there was a period of intense negotiation which resulted in a settlement agreement with the other Defendants, signed on the 16th March 2010. It is the Plaintiff's position that there was a short dispute about whether the settlement agreement was properly concluded, and this was finally resolved by my Order striking out the Plaintiff's claims against the other Defendants dated the 26th May 2010, leaving the Sixth Defendant as the only insurer which had yet to settle with the Plaintiff.

The Sixth Defendant served a Notice of Intention to Proceed on the Plaintiff on the 27th July 2010, and then sought leave to amend its Defence to include a counterclaim in September 2010. The Plaintiff took the view that the revised pleadings would have to be settled before the underlying dispute could be taken forward.

iv. January 2011 to March 2011: The Plaintiff states that a new regime took over the management of this dispute from Mr. Bhatia. The Plaintiff maintains that it has worked hard to instruct Mourant Ozannes in order to produce a substantial Defence to the Sixth Defendant's counterclaim.

90. It is the Plaintiff's position that the allegation that it conducted a campaign of defamation against the Sixth Defendant is conduct outside of, and irrelevant to, the Plaintiff's claim in these proceedings.

91. The Plaintiff dissociates itself from Mr. Bhatia's earlier expressed and or implied criticisms of the Cayman Islands judiciary.

92. The Plaintiff contends that the Sixth Defendant has not demonstrated that the Plaintiff has no intention of taking its case to trial, and further, the Plaintiff has demonstrated that it intends to take its case to trial.

93. Finally, the Plaintiff submits that a striking out would be too draconian an exercise of the Court's jurisdiction.

***The Plaintiff and Mr. Bhatia***

94. The Plaintiff's position is that Mr. Bhatia's past conduct does not give rise to inferences as to its current intention. Furthermore, Mr. Bhatia's conduct was not and is not attributable to the Plaintiff. The Plaintiff maintains that Mr. Bhatia was never the alter ego of the Plaintiff. The Plaintiff further submits that Mr. Bhatia's conduct did not and does not evince the intention not to pursue this case to trial in the event of failure of the settlement negotiations. At worse, Mr. Bhatia's conduct was misguided.

95. According to Ms. Herviou, Mr. Bhatia always reported to the directors and was supervised by the board. The Plaintiff is owned by Basel and Ms. Herviou is one of its six directors. Basel holds Embassy as trustee of the Diplomat Trust and the Plaintiff claims that Mr. Bhatia is one of the beneficiaries.

96. Mr. Bhatia filed his First Affidavit in these proceedings on the 9th September 2005 in support of the Plaintiff's application for Summary judgment in which he confirmed that he was "*the major ultimate beneficial owner and senior vice president of the Plaintiff.*"

97. In his First Affidavit Mr. Bhatia spoke from his own knowledge on the following issues:

i. The insurance programme;

ii. Hurricane Ivan and the loss adjustment to the 31st December 2004;

iii. His meetings on behalf of the Plaintiff with representatives of the excess layers' leading underwriters when they visited Cayman, and his discussion with MARSH regarding insurance cover;

iv. Payment by the primary layer of insurers;

v. Relations with the excess layer insurers;

vi. His reasons for saying that the Defendants had no defence to the Plaintiff's claim.

98. On the 26th September 2005 Mr. Bhatia swore a Second Affidavit in support of the Plaintiff's claim for Summary Judgment and, in reply to points raised in Affidavits filed by the Defendants in these proceedings.

99. On the 11th May 2007 Mr. Bhatia swore a Third Affidavit in support of the Plaintiff's application for specific discovery.

100. On the 18th May 2007 Mr. Bhatia filed his Fourth Affidavit on behalf of the Plaintiff.

101. On the 14th August 2007 Mr. Bhatia filed his Fifth Affidavit on behalf of the Plaintiff.

102. On the 20th February 2008 Mr. Bhatia filed his Sixth Affidavit in response to the Judgment of Henderson J., delivered on the 30th January 2008, seeking further disclosure and discovery from the Plaintiff.

103. Up to February 2008 Mr. Bhatia was the only person who filed any evidence on behalf of the Plaintiff and it appears from all the evidence before this Court that, not only did he act for the Plaintiff, but he was the directing mind of the Plaintiff. Consequently, I find that Mr. Bhatia's acts, up to February 2008, were attributable to the Plaintiff.

104. In the London arbitration proceedings the issue raised was whether the Plaintiff's commencement of the proceedings in Texas on the 29th July 2009 constituted a breach of the Standstill Agreement, so as to entitle the Sixth Defendant to declarative, injunctive and monetary relief.

105. I understand that the Plaintiff, through Mr. Bhatia, nominated Mr. Males, and that in any event, the parties agreed that Mr. Males should be appointed to act as the sole Arbitrator of this dispute.

106. At the hearing before the arbitrator, Mr. Males, in London, the only person who gave evidence on behalf of the Plaintiff was Mr. Bhatia.

107. At paragraph 15 of his award, dated the 8th January 2010, Mr. Males stated:

> *"In his own words, the "major ultimate beneficial owner" of Embassy, and also its senior vice president, is Mr. Asif Bhatia. Mr. Bhatia is also an employee of Embassy. The company's decision making is carried out by a board of directors of which he is not a member. In practice, however, the directors act upon Mr. Bhatia's recommendations, at least unless there is a very strong reason not to do so. So far as the events with which this arbitration are concerned, the decisions made by the directors (of Embassy) and the correspondence which they sent were in every case made or sent with the approval, or upon the recommendation of Mr. Bhatia."*

108. At paragraph 81 of his award Mr. Males also found that,

> *"The true position is that, faced with the setback of the unsuccessful summary judgment application in the Cayman Islands, Mr. Bhatia decided to pursue the prospect of a very substantial award of damages in Texas and is prepared to say whatever he needs to say to enhance that prospect."*

109. Mr. Males declared that the Plaintiff was in breach of the Standstill Agreement by virtue of commencing proceedings in Texas and reserved, for future determination, the Sixth Defendant's claim for damages for the breach.

110. Over a year after delivering his award Mr. Males wrote to the parties on the 14th February 2011 stating,

> *"Dear All. It is now more than a year since I issued my award and its addendum and more than six months since I issued my costs award in which I reserved the issue of damages. Would the parties please advise whether this matter is still live and, if it is, what proposals they have for bringing it the conclusion...."*

111. In response to Mr. Males's letter of the 14th February 2011, Mr. Bhatia wrote on behalf of the Plaintiff to Mr. Males and others on the 8th March 2011 quoting from Ms. Herviou's letter dated the 20th October 2010 to the Sixth Defendant's board of directors and stating, *inter alia*, that,

> *"Any comments the Arbitrator has made in relation to matters outside of his jurisdiction are obviously not binding, which is why Embassy was advised there was no need to appeal his ruling, no matter how wrong it may have been."*

Mr. Bhatia went on to state, in language similar to the language used by Ms. Herviou in her letter dated the 14th December 2010 to the Sixth Defendant's attorneys:

> *"In the absence of **full, proper and prompt** settlement by HCC we obviously leave the US Department of Justice to investigate all this as part of a wider enquiry under the Obama administration's revamped Foreign Corrupt Practices Act (FCPA) investigating (amongst other things) the various questionable rulings which HCC has managed to remarkably obtain from the Cayman Court and you."*

On the face of it, this letter is written on behalf of the Plaintiff to the Arbitrator and the Court notices that Mr. Males copied his letter to Ms. Herviou, and Mr. Bhatia copied his letter to Ms. Herviou.

112. There is no evidence that the Plaintiff, or Ms. Herviou, or anyone from Basel, has written to the Arbitrator stating that Mr. Bhatia does not act on behalf Embassy, nor has there been any action taken in relation to Mr. Bhatia's use of the word "*we*", meaning the Plaintiff and its potential complaint about the Sixth Defendant to the US Department of Justice. In fact, Mr. Bhatia and Ms. Herviou seemed to be acting in tandem. Again, the Court finds that Mr. Bhatia's actions were attributable to the Plaintiff.

113. On the 18th March 2010 the Plaintiff and the other Defendants came to an agreement whereby the Plaintiff accepted the sum of US$16.75 million in full and final settlement. Mr. Bhatia, acting on behalf of the Plaintiff, acknowledged receipt of the settlement sum and indicated that he would forward the email exchange between the Defendants and himself to the Plaintiff's attorneys, who at that time were Campbells, "*so that they are aware of what needs to be done.*"

114. The other Defendants, naturally, assumed that Mr. Bhatia would instruct the Plaintiff's attorneys to file the required Notices of Discontinuance. After hearing from the Plaintiff's then attorneys, Campbells, and reviewing the email exchange between Mr. Bhatia and the Defendants, it became quite apparent that, (and as I found at paragraph 13 of my Ruling dated the 20th September 2010) Mr. Bhatia was informing the Defendants' representatives that he was instructing the Plaintiff's attorneys to execute and file Notices of Discontinuance, whilst at the same time not giving the Plaintiff's attorneys any instructions whatsoever. Accordingly, on the 26th May 2010 the Court was compelled to strike out the Writ and Statement of Claim in these proceedings against the other Defendants to give effect to the settlement agreement between them, dated the 16th March 2010.

115. Again, at this juncture in the Plaintiff's proceedings I find that Mr. Bhatia's conduct was attributable to the Plaintiff.

***The Plaintiff and the New Regime***

116. The Plaintiff maintains that it is owned by Basel as Trustee of the Diplomat Trust of which Mr. Bhatia is only one beneficiary. Basel is the corporate director of Embassy. The Plaintiff now maintains that it has instructed Mourant Ozannes to take this case to trial as quickly as possible.

117. The Court notes, from Ms. Herviou's evidence, that Basel was appointed as corporate director of Embassy in April 2009. It is clear from Ms. Herviou that Mr. Bhatia worked closely with the previous directors and the various law firms appointed to represent Embassy in the Cayman Islands, Texas and England.

118. Ms. Herviou contends that as Mr. Bhatia has spent many years in the hotel business and in managing numerous commercial disputes, they were content for Mr. Bhatia to remain

> "*...closely involved in managing this dispute after it (Basel) was appointed as corporate director of Embassy.*"

119. The Plaintiff's position as taken from Ms. Herviou's evidence was that Mr. Bhatia was only ever acting as an agent of Embassy and he was never Embassy's alter-ego. In fact Ms. Herviou's testimony is that Mr. Bhatia always reported to the board and discussed and agreed key issues with the board before steps were taken.

120. However, although Ms. Herviou deposes to the fact that Mr. Bhatia had to seek the agreement of the board before taking any steps, the board now, some many

months later, disassociates itself from the articles in the newspaper and letters to third parties written on the Plaintiff's behalf by Mr. Bhatia.

121. The Plaintiff contends that relations between Basel and Mr. Bhatia finally broke down in January 2011, and it was then that the board of Embassy decided to take over the running of these proceedings.

***Delay***

122. On the 16th June 2006 this Court made an Order consolidating the various actions and for directions in relation to discovery, culminating in an Order that the pre-trial review should take place by the 31st March 2007.

123. The Plaintiff took no steps to issue a Summons for directions. Mr. Bhatia's Sixth Affidavit was filed on the 13th February 2008 on behalf of the Plaintiff. The Plaintiff took no further steps in 2008 or in 2009 or in 2010.

124. On the 26th May 2010 Campbells was granted leave to come off the record.

125. On the 28th April 2011 Mourant Ozannes filed a Notice of Change of Attorneys and came on the record for the Plaintiff.

126. So far as these proceedings are concerned, although Mourant Ozannes wrote to the Sixth Defendant's Cayman attorneys on the 24th March 2011 stating that Mr. Bhatia was not authorised to speak on behalf of the Plaintiff, no formal step was taken by the Plaintiff until the 28th April 2011 when Mourant Ozannes filed a notice of change of attorneys and wrote to the Sixth Defendant's attorneys with a draft Re-Amended Reply and Defence to Counterclaim. Therefore, the Plaintiff took no formal steps in its action for a period of over three years.

127. As I noted, settlement negotiations did take place in 2007, leading to several offers by the Sixth Defendant's London solicitors to settle these proceedings.

128. On the 31st October 2008, as set out in paragraph 40 above, the Sixth Defendant offered the total policy limit sum of US$1,785,474.00 in addition to interest in the sum of US$312,000.00 and costs in the sum of US$300,000.00. What is of particular note is that this offer to settle these proceedings was without prejudice to any claim the Plaintiff wished to make against the Sixth Defendant in Texas or elsewhere.

129. This offer remained open until the 14th August 2009. The Plaintiff never wrote to reject the offer but instead instructed its attorneys to write on different occasions, claiming to accept an overall combined offer, always inextricably linked to the other Defendants. Indeed, the Sixth Defendant has consistently complained that the Plaintiff's legal advisers and, in particular, its US attorneys, always wrote stating that the Sixth Defendant had agreed to pay a settlement sum, which was far from accurate.

130. What this Court finds completely baffling and inexplicable is why the Sixth Defendant's October 2008 offer was not accepted by the Plaintiff.

131. I find myself in complete agreement with Mr. Males, where he found at paragraph 173 of the Award,

> *"I can see no reason why those terms should not have been accepted by Embassy. They amount to full payment of HCC's policy limit, together with interest calculated at a reasonable commercial rate and a reasonable sum in respect of HCC's share of responsibility for the cost of the Cayman Islands' proceedings. They make clear that Embassy was not giving up*

*whatever right it may have had to bring a claim against HCC in Texas, while HCC, for its part, denied any liability for such a claim, and reserved all rights and defences in relation thereto.*"

132. I am also in complete agreement with Mr. Males' finding that,

"*Embassy could not have achieved more than this against HCC if it had pursued the Cayman Islands proceedings to a successful conclusion.*"

133. There can be no good reason for the Plaintiff not to accept this offer in full and final settlement of its policy claim and, again, from all the evidence I have read and all that I have heard from counsel for both parties, I am compelled to agree with Mr. Males when he found at paragraph 176 of the Award that the Plaintiff did not want to settle the policy claim because it wished,

"*...to maintain and magnify the allegation that HCC is "blocking" settlement of all the insurers*"

and that the Plaintiff,

"*...calculated, or was advised that, its eventual prospects in Texas would be enhanced by seeking to create a record on the basis of which it would make further allegations of inequitable conduct on the part of the insurers and collusion between them.*"

134. The Plaintiff engaged in an aggressive and hostile style of writing starting as far back as the 3rd April 2006, when the Plaintiff's then Texas attorneys, Baker Botts, wrote to the Sixth Defendant's head office in Houston that the Sixth Defendant,

"*... in concert with other underwriters of the 15 XS10 insurance policy, have refused to indemnify (the Plaintiff) either by payment or, at (the Sixth*

*Defendant's) option by reinstatement, and eventually sought to avoid the policy. There is no just reason for avoiding the policy or refusing to indemnify the Plaintiff.*"

This letter went on to state that the Plaintiff believed that the Sixth Defendant had committed multiple violations of the Texas insurance code.

135. In late December 2007 the Plaintiff maintained that the alleged bad faith claims against the Sixth Defendant had become a major obstacle to the resolution of the policy claim.

136. It is common ground that, from on or about February 2008, right through to August 2009 the Sixth Defendant made repeated unsuccessful attempts to engage the Plaintiff in settlement negotiations by putting forward without-prejudice settlement offers. In particular, the Sixth Defendant made its offer right up to the full policy limit on the 31st October 2008, which the Plaintiff inexplicably neither rejected nor accepted.

137. Instead, the Plaintiff embarked on further correspondence stating that the Sixth Defendant had agreed to pay the Plaintiff damages, when no such agreement ever existed.

138. The Plaintiff continued to maintain that there had been an, "*agreed settlement*" of its policy claim. I note that despite being repeatedly asked to communicate through their respective attorneys, the Plaintiff continued to communicate directly with the Sixth Defendant's officers, and with Mr. Schell of the ultimate parent company in Texas.

139. The Plaintiff, through Mr. Bhatia, although with Ms. Herviou often acting as a conduit, began sending hostile and, according to the Sixth Defendant, defamatory

emails, to third parties. One such email, which reveals the intention behind this correspondence, was a letter from Mr. Bhatia to the Premier of the Cayman Islands, dated the 2nd August 2010 in which he stated,

> *"Hopefully the increasing public pressure on HCC (which is looking increasingly exposed) will result in them settling very soon due to the clear benefits of the greater openness and transparency which has resulted from a somewhat free and open press in Cayman."*

140. In addition to writing, what can only be described as threatening letters to the Sixth Defendant's parent company and prejudicial letters to third parties, the Plaintiff began to engage in using the media to present its position. By way of an example, on the 7th January 2010 it was reported in the Cayman Net News that the manager of the Hyatt Grand Cayman Beach Suites, Mr. Powers, stated,

> *"A settlement figure agreed upon in Cayman Courts remained unpaid by the insurers and 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 the insurance claims."*

This was repeated in an open letter, penned under Mr. Powers' signature in the Cayman Net News of the 27th January 2010 in which he stated,

> *"The hotel will give the insurers fourteen 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 between the insurers."*

Mr. Powers continued to use the media in Cayman right up to April 2011, again maintaining that a settlement figure had been agreed. This was clearly untrue. Mr. Powers went on to state that the Sixth Defendant had tried to renege on paying the agreed insurance policy proceeds to the hotel. This was also untrue. In fact, it is noteworthy that neither Mr. Bhatia nor Mr. Powers ever refer to the fact that the Sixth Defendant's October 2008 offer remained open and alive for almost 10 months.

141. Ms. Herviou continued with this threatening practice. In a letter dated the 14th December 2010 to the Sixth Defendant's attorneys she accused the Sixth Defendant and its officers of misconduct and stated in her final paragraph,

> *"If your client persists with this further wrongdoing then we will report it to the US Department of Justice to investigate this as part of a wider inquiry under the Obama administration's revamped Foreign Corrupt Practices Act (FCPA) investigating (amongst other things) the various questionable Rulings which HCC has managed to remarkably obtain from the Cayman Court and the sole arbitrator in London, as further detailed and included in our letters and or faxes of 20th October 2010, 14th September 2010, 13th September 2010, 3rd September 2010, and, 19th August 2010 to HCC."*

This language mirrors the language of Mr. Bhatia and reveals how closely Ms. Herviou and Mr. Bhatia were working together.

142. There have been no appeals to any of the rulings in the Cayman Court, nor was the award of Mr. Males in January 2010 appealed.

143. The Court notes that Mr. Males found that the Plaintiff's "*campaign of letter writing*" addressed to the officers of the Sixth Defendant, and to its ultimate

parent company in Texas, was an "*attempt to manufacture a Texas connection where in fact none existed.*"

144. From a review of the evidence I accept the Sixth Defendant's contention that the Plaintiff falsely portrayed that there had been an "*agreed settlement*" of its policy claim yet, at the same time, took no steps to apply for Summary Judgment in these proceedings.

145. The Plaintiff's Writ and Statement of Claim were settled by one firm of attorneys. The first set of attorneys came off the record in early March 2007. They were replaced by a second firm of attorneys who were then given leave to come off the record on the 26th May 2010. The Plaintiff remained unrepresented for 11 months. The Plaintiff's third firm of attorneys did not to come on the record until 28th day of April 2011, despite the fact that they were apparently instructed in early January to look at the costs issue. These facts are somewhat at odds with Ms. Herviou's statement that "*Embassy's instructions were to pursue the case to judgment as soon as possible.*"

146. Somewhat out of the blue, and on the same day as they were served with the Sixth Defendant's Summons to strike out their claim, the Plaintiff instructed new attorneys to write to the Sixth Defendant's London Solicitors saying,

> "*We have been authorised by Embassy to write to you to confirm that Mr. Bhatia is not authorised to speak on behalf of Embassy, and the opinions he expressed in his email of the 8th March 2011 are as his personal opinions. Mr. Bhatia is not a director, officer or employee of Embassy.*"

This is a terse statement and studiously avoids stating anything about Mr. Bhatia's authority to speak or act on behalf of the Plaintiff from 2005 until the 24th March 2011.

147. However, on the 1st April 2011 the Plaintiff's Cayman attorneys wrote to the Sixth Defendant's Cayman attorneys stating that, in fact, Mr. Bhatia had acted unilaterally and without the Plaintiff's authority or knowledge when he wrote his letters dated the 8th March 2011 and the 29th March 2011.

***The Law***

148. It is common ground between the parties that following the learned Chief Justice's ruling in ***Geninvest SA v. Bank of Butterfield*** [1999] CILR 223 the Grand Court of the Cayman Islands has accepted that the Court has an inherent jurisdiction to strike out a case which is an abuse of process and actual prejudice does not need to be shown. This is in accordance with the principles laid down by the House of Lords in ***Grovit v Doctor*** [1997] 1 W.L.R. 640.

149. In ***Grovit v Doctor*** the Plaintiff failed to take any steps to progress the action for two years. At first instance the Deputy Judge held that there had been inordinate and inexcusable delay and that the Plaintiff had no interest in actively pursuing the litigation and he dismissed the action. The English Court of Appeal dismissed the Plaintiff's appeal. The Plaintiff appealed to the House of Lords, which rejected the appeal and dismissed the Plaintiff's action on the grounds that he had committed an abuse of process. The House of Lords was satisfied, from the evidence of the Plaintiff's delay, that he had commenced and was continuing proceedings which he had no intention of bringing to a conclusion. The House of Lords found that the Plaintiff's inactivity for two years was a sufficient basis for

the Court to dismiss the action, notwithstanding that there was no risk that a fair trial would not be possible and notwithstanding that the Defendants had not suffered any identifiable prejudice. The House of Lords ruled that the Court, in the exercise of its inherent jurisdiction, and in the interest of protecting the general integrity of the process of the Court and of its ability to deliver justice to all litigants, was entitled to dismiss the action. Delivering the decision of the House of Lords, Lord Woolf stated at paragraph G on page 647:

> "*The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in* ***Birkett v James*** *[1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*"

150. The Sixth Defendant also relies on the earlier English Court of Appeal decision of ***Culbert v Stephen G Westwell*** Ltd [1993] 2 P.I.Q.R. 54, whereby Parker LJ (with the agreement of Nolan and Kennedy LJJ) stated at page 16:

> *"... An action may be struck out for contumelious conduct, or abuse of the process or because a fair trial of the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of their consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court..."*

***Analysis and Conclusion on Strike Out Application***

151. The House of Lords found the two-year delay in ***Grovit v Doctor*** to be an inordinate and inexcusable delay and I am compelled to find that, taking no action in these proceedings from February 2008 until late April 2011 constitutes an inordinate and inexcusable delay.

152. The Court cannot ignore the fact that the Plaintiff failed to comply with Henderson J's Order for directions dated the 16th June 2006, and further, the Plaintiff took the active decision not to file any Summons for directions or Notice of Intention to Proceed.

153. The Plaintiff relies heavily on the fact that there is now a new regime, which intends to proceed with this action. However, the new regime took over in late April 2009 and Ms. Herviou, who has filed three Affidavits from June to September 2011, stated in her First Affidavit that Mr. Bhatia "*always reported to the Board and discussed and agreed key issues with the Board before steps were taken.*"

154. Furthermore Ms. Herviou averred in her Third Affidavit that:

> "*Although Mr. Bhatia was managing the litigation on behalf of the corporate director of the Plaintiff, the corporate director was in control at all times as was demonstrated by the fact Mr. Bhatia was stripped of his responsibilities in relation to the litigation in January 2011 when the directors became concerned about his conduct.*"

155. From a review of the evidence before it the Court finds that Mr. Bhatia, Ms. Herviou, and the Basel Board, were all responsible for the fact that no steps were taken by the Plaintiff in these proceedings for over two years.

156. Whilst finding that the Plaintiff took no steps to progress its claim, the Court also examines the conduct of the Plaintiff and how it conducted these proceedings – both against the other Defendants, this Sixth Defendant, and in relation to the Sixth Defendant's counterclaim.

157. It is common ground that the Plaintiff entered into a settlement agreement with the other Defendants on the 16th March 2010. Under this Settlement Agreement the other Defendants provided payment to the Plaintiff of US$16,750,000.00, and there was an irrevocable release and discharge of any and all claims between the Plaintiff and the other Defendants.

158. On the 17th and 18th March 2010 Mr. Bhatia, on behalf of the Plaintiff, informed the other Defendants' representatives that the Plaintiff's attorneys would file the agreed forms of Notices of Discontinuance in the Grand Court of the Cayman Islands. What is particularly disturbing is that Mr. Bhatia, on behalf of the Plaintiff, was informing the other Defendants' representatives that he was instructing his attorneys to do what needed to be done, namely, to execute and file Notices of Discontinuance while, at the same time, not giving his attorneys any instructions to do so. It is noteworthy that this was at a time when the new regime had been in control of the Plaintiff for nearly twelve months.

159. As a result of the Plaintiff taking no steps and issuing no instructions, the Court was compelled to strike out the Plaintiff's claim against the other Defendants. The Plaintiff's claim had become an abuse of process by reason of the fact that the Plaintiff's claim against the other Defendants had been fully and finally settled under the terms of the settlement agreement, and yet the Plaintiff

deliberately failed to instruct its attorneys to file the necessary Notices of Discontinuance.

160. The Court cannot ignore the fact that, again, no steps were taken to progress the claim by the Plaintiff, all through 2010.

161. On the 27th July 2010 the Sixth Defendant served its Notice of Intention to Proceed. On the 26th September 2010 the Sixth Defendant issued and filed its Summons for leave to re-re-amend its defence by introducing the Counterclaim. There was correspondence between the Sixth Defendant and the Plaintiff, and it is clear from an email dated the 14th December 2010 from Ms. Herviou – writing as a director of Basel – that the Plaintiff was fully aware that the Sixth Defendant was proceeding with its Counterclaim, as Ms. Herviou stated that the Plaintiff had expected the Sixth Defendant to withdraw its application set for the 14th December 2010.

162. Despite this Court's Order striking out the Plaintiff's claim as an abuse of process against the other Defendants on the 26th May 2010, and despite the Plaintiff's knowledge of the Sixth Defendant's prosecution of its Counterclaim, the Plaintiff took no steps to progress its claim, which only gives credence and support to the Sixth Defendant's contention that the Plaintiff had no intention of continuing the proceedings against the Sixth Defendant.

163. The Plaintiff allowed its claim to stagnate and, at the same time, took the active decision not to accept the Sixth Defendant's unequivocal October offer to settle these proceedings up to the full policy limit without any conditions. This also gives credence and support to the Sixth Defendant's contention that the Plaintiff had no intention of proceeding with its claim.

164. As I stated before, the Sixth Defendant's offer was never rejected nor accepted. It remained open for the Plaintiff to accept from the 31st October 2008 up to the 17th April 2009 when the new regime took over as the sole corporate director of the Plaintiff. The October 2008 offer continued to remain open in late April, May, June, July, until the 14th day of August 2008. Again, the new regime chose not to reject or accept it.

165. It is clear to this Court that the Plaintiff, through either Ms. Herviou or Mr. Bhatia, or more likely both, decided not to accept this offer. In fact, instead of accepting the offer the Plaintiff chose to breach the Standstill Agreement it had reached with the Sixth Defendant and to file proceedings in Texas. The Arbitrator found that no settlement sum had ever been agreed between the Plaintiff and the Sixth Defendant and further that the Plaintiff was in breach of the Standstill Agreement.

166. Although it is clear that the Plaintiff was aware of the Sixth Defendant prosecuting its Counterclaim, it chose to ignore the Sixth Defendant's Summonses and did not instruct its new firm of attorneys to come on the record until the 28th April 2011 – some six weeks after the Sixth Defendant's Summons to strike out the action. There is no explanation for the further delay on the part of the Plaintiff from either Mr. Bhatia or Ms. Herviou.

167. The Plaintiff, whether by the action or inaction of Mr. Bhatia or the new regime, allowed the inordinate and inexcusable delay to continue and must have been fully aware of the consequences of failing to instruct attorneys and failing to prosecute that claim.

168. I agree with the Arbitrator's conclusion that the Plaintiff's reasons for not pursuing the Cayman litigation – namely *"...an unnecessary waste of resources"; "...that the insurers said they wanted to settle"* and that *"...there were questions about the judiciary in Cayman*" are implausible.

Furthermore, the Arbitrator, Mr. Males, after hearing all the evidence,

> "*...found it impossible to understand why it was so important for Embassy to preserve in any settlement a right to bring proceedings against the other insurers in Texas*"

and went on to add,

> "*There is no reason why it [the Plaintiff] should not have been prepared to accept the terms offered, not only by HCC but also by the other insurers.*"

169. In relation to the Sixth Defendant's contention that the Plaintiff did not want to settle the policy claim, which is the subject of these proceedings, the Arbitrator came to the conclusion that the Plaintiff did not want to settle the policy claim in these proceedings, because it wished to maintain and magnify the allegation of the Sixth Defendant "blocking" settlement by all the insurers.

170. From all the evidence I have read in these proceedings, presented by the Plaintiff and the Sixth Defendant I find myself in agreement with the Arbitrator's conclusion. Furthermore, I find that the sole responsibility for the inordinate delay in the progress of the Plaintiff's claim falls entirely on the Plaintiff.

171. After a thorough review of evidence presented by the witnesses for both parties, the Arbitrator came to the conclusion that the Sixth Defendant was not, in any

way, guilty of inequitable conduct and my view concurs with that of the Arbitrator.

172. Finally, in relation to the Arbitration proceedings, the Arbitrator found Mr. Bhatia to be the major, ultimate beneficial owner of the Plaintiff. And as to the practical realities, despite Ms. Herviou's contention in these proceedings (that Basel was in control at all times), the Arbitrator stated:

> "*In practice, the directors acted upon his [Mr. Bhatia's] recommendation, unless there was a very strong reason not to do so.*"

Further, the Arbitrator found:

> "*that so far as the events with which this arbitration are concerned, the decisions made by the directors and the correspondence which they sent were, in every case made or sent with the approval or upon the recommendation, of Mr. Bhatia.*"

173. One would have expected a reasonable Plaintiff to immediately progress its claim after Mr. Males found for the Sixth Defendant in the London Arbitration. However, rather than progress its claim through this Court, the Plaintiff continued to allege that the Sixth Defendant was acting in bad faith by unlawfully delaying payments and by refusing to honour its obligation to pay the "agreed settlement" sum. The Plaintiff consistently stated in the media, through Mr. Powers, that the Sixth Defendant had improperly reneged on its agreement to pay the disputed policy claim to the limits of the policy in July 2008. Furthermore, the Plaintiff wrote, mostly through Mr. Bhatia, voluminous correspondence to this effect to the third parties in the governments of the Cayman Islands, the United Kingdom and the European Union.

174. From my review of the evidence filed in these proceedings by the Sixth Defendant and the Plaintiff, I find that there is no truth to this allegation. It is hard to imagine a more damaging allegation to be made against an insurance company. What is absolutely clear is that the Sixth Defendant had never entered into an agreed settlement sum with the Plaintiff, nor had the Sixth Defendant improperly reneged on any agreement to pay an alleged agreed sum. To make these untrue allegations after the Plaintiff chose not to accept the Sixth Defendant's open offer to settle these proceedings, for almost twelve months, constitutes, in my view, contumelious behaviour.

175. This hostile campaign against the Sixth Defendant, orchestrated by Mr. Bhatia and condoned by the new regime, was succinctly summed up in Mr. Bhatia's email of the 2nd August 2010 referred to in paragraph 139 above. This was a clear attempt to exert pressure on third parties to force the Defendant to agree to its unreasonable demands.

176. I find Mr. Bhatia's conduct is attributable to the Plaintiff from the issue of the Plaintiff's Writ in 2005, up to the letter from Mourant Ozannes to the Sixth Defendant's attorneys in March 2011. Furthermore, although Ms. Herviou avers that some time in January 2011 the new regime removed Mr. Bhatia from his role in these proceedings, the fact remains that Basel was the corporate director of the Plaintiff since April 2009 and must take responsibility for the Plaintiff's complete lack of progress in these proceedings. The new regime must also take responsibility for the Plaintiff's attempt to influence third parties and force the Sixth Defendant into an unreasonable settlement.

177. Accordingly, despite the very late flurry of action, the Court finds the Plaintiff's conduct to be intentional and contumelious. The Plaintiff deliberately allowed its action to remain dormant. The Plaintiff took no steps whatsoever. The Plaintiff allowed its second firm of attorneys to come off the record in May 2010 and did not instruct new attorneys to come on the record until late April 2011. Consequently, it was quite reasonable for the Sixth Defendant to conclude that the Plaintiff had no intention to proceed with its action in these proceedings.

178. Whether under Mr. Bhatia's direction, or after April 2009 under Basel's control, adopting Parker LJ's words in ***Culbert v. Westwell***, I find that the Plaintiff is guilty from the 16th June 2005, when it issued its Writ of Summons and Statement of Claim, until late April 2011 when its third set of attorneys came on the record, of causing separate inordinate and inexcusable delays in complete disregard of the Grand Court Rules and with full awareness of the consequences.

179. I have no difficulty in finding the Plaintiff guilty of intentional and contumelious action which, together with the inordinate and inexcusable delay, amounts to an abuse of process of this Court. Accordingly I strike out the Plaintiff's Writ and Statement of Claim and grant the relief sought by the Sixth Defendant in its Summons dated the 14th March 2011, which I heard on the 6th and the 7th of October 2011.

180. In addition, I order that the Sixth Defendant's costs of this action, including its costs of and occasioned by its Summons dated the 14th March 2011, be taxed on an indemnity basis and paid by the Plaintiff.

***Plaintiff's Application to Set Aside the 3rd May 2011 Judgment***

181. On the 3rd May 2011 I made an Order in the following 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.*
>
> *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.*
>
> *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 Sixth Defendant serve any evidence in response within fourteen (14) days thereafter.*

viii. *That the parties exchange Skeleton Arguments seven (7) days prior to the assessment of damages hearing.*

182. On the 11th May 2011 the Plaintiff issued a Summons to set aside my Interlocutory Judgment.

183. On the 13th September 2011 the Plaintiff filed the Second Affidavit of Leticia Herviou in support of its application to set aside the Default Judgment, and exhibited the Plaintiff's draft defence to the Sixth Defendant's Counterclaim. In this Affidavit Ms. Herviou states that she,

> *"...confirms that Embassy believes that the facts pleaded in the Defence to the Counterclaim are true."*

Ms. Herviou goes on to add,

> "*Further, Embassy has evidence to support the allegations made in the Defence to Counterclaim and considers that its pleaded Defence to the Counterclaim discloses a good defence on the merits to Houston Casualty Company's defamation claim.*"

***Plaintiff's Position on Application to Set Aside***

*First Publication – Cayman Net News, 7th January 2010*

184. The Sixth Defendant pleads in its Counterclaim that this publication alleged that the Sixth Defendant was:

> "*...dishonestly and unlawfully refusing to honour its insurance policy obligations to pay for the damage caused to the Hyatt by Hurricane Ivan in 2004.*"

185. In its draft defence to the Counterclaim the Plaintiff denies that the foregoing words "*complained of*" are meant or were understood to mean that the Sixth Defendant had been acting dishonestly. The Plaintiff submits that no reference is made to "dishonesty" in this first publication, and further that the Plaintiff seeks to defend any meaning that it had been "*wrongfully and disgracefully refusing to honour its insurance policy obligations*" as fair comment.

186. The Plaintiff submits that it is open for it to express the opinion that the Sixth Defendant had wrongfully failed to pay out under the contract of insurance, even where subsequently the Court ruled that it was entitled to do so. The Plaintiff submits that at the heart of a fair comment defence is whether the Sixth Defendant has proved true sufficient facts upon which an honest commentator could express the opinion sought to be defended.

187. The Plaintiff relies upon the fact that the first publication came nearly six years after Hurricane Ivan had damaged the Hyatt, and the Plaintiff had not received one cent in compensation. The Plaintiff submits that the issue is whether an honest person could hold this view and whether the Plaintiff did hold this view. For these reasons the Plaintiff submits that its defence to the Sixth Defendant's

claim for defamation in relation to the first publication has a real prospect of success.

*The Second Publication – Cayman Net News, 27th January 2010.*

188. The Defendant's claim in its Counterclaim is that the Plaintiff was alleging that the Defendant was

> *"…unlawfully delaying payment of an (allegedly) agreed settlement sum pursuant to a settlement agreement. The Sixth Defendant's bad faith was even more reprehensible in that it was not prepared to honour its legal obligations promptly to indemnify the victims of Hurricane Ivan under its insurance policies."*

189. The Plaintiff seeks to defend this second publication on the grounds of fair comment. The Plaintiff repeats its defence to the first publication and argues that its defence is based on the same facts. Furthermore the Plaintiff contends that the Sixth Defendant has failed "*promptly to indemnify the victims of Hurricane Ivan under its insurance policies*" by virtue of the fact that it has not paid a single cent to the Plaintiff and continues to deny liability.

190. Accordingly the Plaintiff contends that it has a defence with a real prospect of success in relation to the second publication.

*The Third Publication – Cayman News Service, 21st February 2010*

191. The Sixth Defendant claims in its Counterclaim that the third publication made the same allegation as the second publication and additionally alleged that the Sixth Defendant had "*unsuccessfully attempted to impose unreasonable settlement terms on [Embassy].*"

192. The Plaintiff seeks to defend the third publication as fair comment. The Plaintiff defends the allegation common to the second publication and on the same basis as its defence to the second publication. In addition the Plaintiff seeks to defend as fair comment the additional allegation that the

> *"The Defendant had been seeking to impose unreasonable settlement terms on the Plaintiff and was not negotiating with the Plaintiff or seeking to resolve the dispute in good faith."*

193. Again the Plaintiff contends in its draft defence to the Sixth Defendant's Counterclaim that the Sixth Defendant continued to deny liability in these proceedings, and further states that the Sixth Defendant's attempts to impose on the Plaintiff a term which would require the Plaintiff to compromise any claim in Texas, is conduct it describes as opportunistic, unprincipled and oppressive.

194. The Plaintiff maintains that the issue is whether, if proved true, an honest person could have expressed the opinion sought to be defended on those facts, and whether the Plaintiff believed the opinion expressed. The Plaintiff concludes by again submitting that it has a defence with a real prospect of success in relation to the third publication.

*The Fourth Publication – Cayman Net News, 24th March 2010*

195. The Sixth Defendant complains that in their natural and ordinary or inferential meaning, the words in the fourth publication meant and were understood to mean:

> i. *That although its co-insurers had all paid up on the Hyatt insurance claims, the [Sixth] Defendant was still acting in bad faith by unlawfully delaying payment of an [allegedly] agreed settlement*

*sum and thereby refusing to honour its legal obligations promptly to indemnify the victims in Hurricane Ivan under its insurance policies;*

ii. *That having originally agreed to pay the disputed claim to the limits of the policy in 2008, the Sixth Defendant has since improperly reneged on that agreement;*

iii. *That because it knew it had no genuine defence to the Hyatt insurance claim the [Sixth] Defendant was dishonestly concocting specious excuses as part of a desperate attempt to avoid liability (or delay payment) on its policy under false pretences;*

iv. *That the [Sixth] Defendant'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.*

196. The Plaintiff maintains that the first of the four above is repetitive of meanings alleged to be borne out in the first three publications and that the Plaintiff would defend that on the same basis. The Plaintiff maintains that, as with its defence to the first publication, it denies that the words "*complained of*" made any allegation of dishonesty and repeats that the fourth publication does not mention dishonesty.

197. In addition the Plaintiff pleads and avers in its draft Defence that

> "*At practically the eleventh hour before a Summary Judgment application and in a desperate ploy, spuriously claimed that it was entitled to void the Plaintiff's insurance policy.*"

198. The Plaintiff avers that the Sixth Defendant , "*reneged on an earlier offer to pay the full value of the claim"* and further that the Sixth Defendant had been

"*seeking to impose unreasonable settlement terms on the Plaintiff and was not negotiating with the Plaintiff or seeking to resolve the dispute in good faith.*"

199. The Plaintiff maintains that these aforesaid statements are expressions of opinion. Further, the Plaintiff maintains that the other Defendants had paid out under their policies leaving the Sixth Defendant alone in disputing liability. The Plaintiff maintains that this is a matter on which the local general manager, Mr. Powers, was entitled to express his opinion.

200. The Plaintiff further contends that it has a defence to the claim under the fourth publication with a real prospect of success.

*The Fifth Publication – Cayman News Service, 24th March 2010*

201. The Sixth Defendant complains of six meanings which it contends are borne by the fifth publication. Four of those meanings are same meanings as the four complained of in relation to the fourth publication and the Plaintiff contends that it will seek to defend those on the same basis.

202. The Sixth Defendant complained that the Plaintiff had alleged:

> "*…that the Defendant 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:*
>
> *(a) dropping its earlier insistence on unreasonable terms and conditions (and agreeing to pay the insurance policy proceeds) following the Judge's arrest; but then*
>
> *(b) attempting to renege its agreement to pay the insurance policy proceeds when the Judge was later reinstated.*"

203. The Sixth Defendant complained that the Plaintiff alleged in the fifth publication

> *"that the [Sixth] Defendant 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."*

204. The Plaintiff denies that the fifth publication bears the meanings pleaded above by the Sixth Defendant.

*The Sixth Publication – Cayman Net News, 16th April 2010*

205. The Sixth Defendant pleaded and complained that the Plaintiff has alleged:

> *"(i) That the Defendant 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;*
>
> *(ii) That because it knew it had no genuine defence to the Hyatt insurance claim, and in a desperate attempt to avoid liability on its policy, the Sixth Defendant had dishonestly abused; (a) its ability to influence all the Excess Insurers, including the exploitation of its position as Heritage's largest shareholder; and (b) the process of the Cayman Courts by concocting a specious ploy, a matter of days before a Summary Judgment hearing;*
>
> *(iii) That the Defendant's most senior executives and ultimate decision makers in Texas had dishonestly; (a) instructed or allowed its legal representatives to make sworn affidavits on the Defendant's behalf in both Cayman and London, which they knew to be false and misleading, and (b) thereby abuse the process of the Courts in both the Cayman Islands and England;*
>
> *(iv) That although its fifteen 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, the Defendant was dishonestly refusing to honour its clear legal obligation to pay the owners of the Hyatt under its insurance policy;*

*(v) That the Defendant'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."*

206. The Plaintiff contends that in relation to the sixth publication it has pleaded the defences of justification, qualified privilege and fair comment. In relation to the justification defence the Plaintiff maintains that they are the plain meanings that the words are capable of bearing and the particulars of justification are capable of supporting these meanings.

207. The Plaintiff relies on s.6 of the Defamation Law which reads:

> "*In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges*."

208. Further the Plaintiff seeks to defend the sixth publication on the basis of reply to attack qualified privilege – in that, Mr. Powers' letter was a response to the first letter written by Appleby.

209. The Plaintiff seeks to defend these expression of opinion pleaded as fair comment.

210. Again, the Plaintiff contends that each of these defences has a real prospect of success in relation to the sixth publication.

*Seventh Publication – Cayman Net News, 21st May 2010*

211. The Sixth Defendant has complained and pleaded that the Plaintiff has alleged:

> "*that the [Sixth] Defendant had dishonestly continued to instruct its Cayman lawyers to write letters to the Cayman press complaining what it knew to be false, misleading and/or misrepresentative statements concerning the Hyatt insurance dispute.*"

Further, the Plaintiff complained that the Sixth Defendant

> "*…given its unreasonable insistence that its legal disputes with the Plaintiff be heard by Judge Hughes in Texas and by Judge Henderson in the Cayman Islands, the Defendant was to be suspected to having corrupted or otherwise improperly influenced one or both of these Judges.*"

212. In relation to this publication the Plaintiff denies that the words "*complained of*" bore the second meaning or any meaning alleging dishonesty.

213. Furthermore the Plaintiff will seek to rely on two defences – justification and qualified privilege. The Plaintiff maintains that the words "*complained of*" bore the meaning that the Sixth Defendant had instructed its lawyers to write letters to the Cayman press, the purpose of which was to give a misleading account of the dispute with the Plaintiff, when they are true in substance and in fact.

214. The Plaintiff maintains that the meaning sought was to be justified as plainly a capable meaning and the facts pleaded to support it are probative of this meaning.

215. The Plaintiff again relies upon s.6 of the Defamation Law.

216. The Plaintiff submits that the qualified privilege defence is based again on a "reply to attack", and that the seventh publication was a response to the second Appleby letter.

217. The Plaintiff contends that with these defences it has a real prospect of success in relation to its defence of the claim for defamation in relation to the seventh publication.

218. The Plaintiff submits that the Court must be especially careful as, here, the claim is one that 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 for damages and imposing upon the Plaintiff an injunction without any investigation into the merits of its defences.

219. The Plaintiff relies on the Judgment of Kennedy LJ in ***McKenzie v. Business Magazines (UK) Ltd.*** (Unreported CA 18th January 1996) where he stated at page 12:

> *"In my judgment it is particularly important in an action of this type that both sides should, if at all possible, be allowed to deploy their case as they wish. The Plaintiff seeks to vindicate his reputation. It would be a poor form of vindication if it were only obtained by half muzzling the other side."*

220. The Plaintiff also relies on the Judgment of Sir Thomas Bingham, Master of the Rolls, as he then was, in ***Basham v. Gregory*** (Unreported CA, 21 February 1996) where he stated at page 10:

> *"The Plaintiff brings this action to vindicate his reputation, no doubt hoping that the jury will accept that he has been seriously libelled and award him damages appropriately. There must, I think, be a serious question as to how*

*valuable a vindication is if it is one against the Defendant who is not able to advance the defence he would wish.*"

221. The Plaintiff submits that the defence of honest opinion is the key method by which the common law gives effect to the protection of freedom of expression and cites Lord Denning as Master of the Rolls, as he then was, in ***Slim v. Daily Telegraph*** [1968] 2 Q.B. 157 where he stated at 170:

> "*The right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.*"

222. The Plaintiff relies on other authorities and cites ***Gatley, on Libel and Slander*** the 11th Edition, (2008 Sweet & Maxwell) where the width of protection for expressing opinions is very wide. The learned editors state at paragraph 12.13:

> "*A comment may be "fair" however exaggerated or even prejudiced be the language of the criticism. In deciding an issue of fair comment the jury has no right to apply the standard of its own taste and measure the right of a critic accordingly. If it were so, there would be an end of all just and necessary criticism, for a jury would be able to find a criticism unfair merely because they did not agree with the views expressed by the critic or think them correct. "The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable man or woman who sits on a jury". The comment may be fair even if it is irrational, stupid or obstinate or expressed in pungent and offensive tones.*"

***Reply to Attack***

223. The Plaintiff refers to the letters written by Appleby, on behalf of the Sixth Defendant, in response to the early allegations made by the Plaintiff, namely a letter dated the 7th April 2010 in the Cayman Net News, and a second letter in the Caymanian Compass dated May 2010. The Plaintiff states that this is a "Reply to

Attack" situation. The Plaintiff submits that, rather like boxing, when someone climbs into the ring and throws a few punches, he can hardly complain if he receives a few punches back. Defamation law recognises that publications which respond to attack can be protected by qualified privilege.

The learned editors of ***Duncan and Neill on Defamation*** explained the principle as follows at paragraph 16.22 in their 3rd Edition:

> "*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.*"

***Justification***

224. Finally, the Plaintiff relies on the fact that it is a defence to a claim for libel for a defendant to prove the relevant defamatory allegation to be substantially true. The Plaintiff submits that, as well as trying to defend as true the facts that underpin its fair comment defences, the Plaintiff seeks to rely on the defences of justification in relation to these publications.

***Analysis and Conclusion on Plaintiff's Application to Set Aside the Interlocutory Judgment***

225. From my review of all the evidence presented before me, including the Plaintiff's draft defence to the Defendant's Counterclaim and of the submissions from both counsel, I can find no evidence to support Mr. Powers' statement reported in the first publication that:

> "*...a settlement figure agreed upon in Cayman 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.*"

226. From my review of all the evidence filed by the Plaintiff, I find that no settlement figure had been agreed upon in the Cayman Courts and this is an untrue statement. There was no failure on the part of the Sixth Defendant to honour its obligations under the insurance policy, and further there is no evidence that there was any inability of the local judiciary to properly and promptly deal with disputes relating to the insurance claims. Accordingly, in my view, the purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

227. The delay was caused solely by the Plaintiff's inactivity and its decision not to progress its claim for a period of over three years and not because the Sixth Defendant failed to pay any agreed settlement figure.

228. The Court notes that at paragraph 9 of its draft defence to the Counterclaim the Plaintiff has admitted that Mr. Powers is an employee of the Plaintiff.

229. In the second publication dated the 27th January 2010, Mr. Powers states:

> "*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.*"

There is no evidence before this Court to support this contention. The Court finds this statement by Mr. Powers on behalf of the Plaintiff to be untrue. Accordingly, in my view, the purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

230. In the third publication dated the 21st February 2010 it is again reported that the Plaintiff says:

> "*The issue is in the hands of the Court as the insurance company has refused to pay the agreed settlement of over US$18,000,000.00 ordered [by the Court] more than eighteen months ago.*"

There is no evidence before this Court to support this statement. The Court finds the statement to be untrue and therefore, in my view, the purported defences of fair comment and or justification have no real prospect of success and lack conviction.

231. Mr. Powers is again reported in the third publication as saying,

> "*Here we have a situation where a settlement figure has been agreed with the insurers sometime ago yet 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.*"

232. There is no evidence before this Court to support this statement. The Court finds this statement to be untrue and, accordingly, in my view, the purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

233. Again in the fourth publication dated the 24th March 2010, the Plaintiff is blaming the Sixth Defendant for dragging its feet in its decision to pay the claim or reinstate the hotel. Furthermore, Mr. Bhatia is reported as stating:

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

And the property manager, Mr. Powers, is reported as saying that the insurance company (the Sixth Defendant),

> *"...agreed in 2008 to pay the disputed claim to the limits of the policy but has since reneged on its claim."*

Mr. Powers goes on to state,

> *"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."*

Mr. Powers went on to further state that the Defendant had,

> *"...concocted, just a few days before the hearing, to escape summary judgment, when Houston Casualty Company had no genuine defence."*

234. Again there is no evidence to support the Plaintiff's statements. The Court finds these statements to be untrue and therefore, again, in my view, the purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

235. In the fifth publication dated the 24th March 2010 Mr. Powers is reported as stating,

> "*Houston Casualty Company (the Defendant) 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 at well above Houston Casualty Company's policy limit.*"

Again, there is no evidence to support this allegation.

236. In the sixth publication dated the 16th January 2010 Mr. Powers is reported as stating that the Sixth Defendant has "*an apparent ability to influence all the excess insurers*" and accuses the Sixth Defendant's attorneys of writing a misleading and or misrepresentative letter and repeats the allegation of the "*desperate ploy concocted just a few days before the hearing.*"

237. It is also reported that having reviewed a letter to Houston Casualty in August 2007, the Sixth Defendant's,

> "*...most senior executive 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, and sworn affidavits in Cayman as well as London where the Arbitrator has in fact expressed recognition that he has no jurisdiction to deal with Embassy's bad faith claims.*"

238. Apart from the fact that the Arbitrator accepted that he had no jurisdiction to deal with Embassy's bad faith claims, Mr. Powers omits to mention that the Arbitrator found that the Plaintiff's issuance of proceedings in Texas was a breach of the Standstill Agreement. There is no evidence to support the allegations contained in Mr. Powers' letter regarding false and/or misleading statements and so, the

purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

239. Mr. Powers in a letter on behalf of the Plaintiff states,

> *"It is disappointing that the latest letter which Houston Casualty Company has instructed Appleby, its Cayman lawyers, to write to the press contains further statements which appear to be false, misleading and/or misrepresentative."*

240. Mr. Powers also states that the Sixth Defendant,

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

241. There is no evidence before this Court to support either of the foregoing allegations. The Court finds both of the above statements to be untrue, and consequently, again, the purported defences of fair comment and/or justification have no real prospect of success and lack conviction.

242. In my Judgment of the 3rd May 2011 I found at paragraph 11 that,

> *"There is no evidence before this Court that Mr. Bhatia is no longer the "major ultimate beneficial owner" of the Plaintiff."*

243. Although further evidence has been filed in the form of three affidavits by Ms. Herviou on behalf of the Plaintiff, there is still no evidence before this Court that Mr. Bhatia is no longer the "major ultimate beneficial owner" of the Plaintiff. Furthermore, I can find no basis for the contention that s.7 of the Defamation Law affords any defence to the Sixth Defendant's Claims in relation to the sixth and seventh publications.

244. The new regime came into being in late April 2009 and was therefore in control of the Plaintiff at all times when these publications containing these serious allegations against the Defendant were published.

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 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 than to allege that it improperly reneged on its agreement to pay. I find the allegation, however often repeated, to be false.

248. In my judgment of the 3rd May 2011, I made the following findings:

At paragraph 11:

> "*There is no evidence before this Court that Mr. Bhatia is no longer the "major ultimate beneficial owner" of the Plaintiff*".

At paragraph 14:

> "*What causes this Court some concern is that Mr. Bhatia appears to admit that publication of these allegedly false defamatory statements in the Cayman media is part of a deliberate attempt to force the Sixth Defendant to settle the Plaintiff's claim....*"

At paragraph 15:

> "*This Court finds some force in the Sixth Defendant's counsel's submission that the Plaintiff has continued to attack the Sixth Defendant in correspondence to public figures in the United Kingdom, the Cayman Islands and the European Union, rather than prosecute its claims against the Sixth Defendant in these proceedings ...*"

At paragraph 17:

"*Having reviewed the content of the emails there is a clear indication that Mr. Bhatia is purporting to speak with the Plaintiff and his aim is to damage the Sixth Defendant in the eyes of important government figures in the United Kingdom, the Cayman Islands and Europe.*"

At paragraph 18:

"*Mr. Bhatia may no longer be an employee, but there is no suggestion that he was not speaking for the Plaintiff until receipt of the letter from the Plaintiff's Cayman attorneys of the 24th March 2011, some three months after the Sixth Defendant's Counterclaim was filed in this Court. Furthermore, there is no evidence before this Court that the recipients of Mr. Bhatia's emails understand that Mr. Bhatia does not speak for the Plaintiff. In fact, if anything, the contrary would appear to be the case.*"

At paragraph 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.*"

At paragraph 38:

"*For the aforesaid reasons I find that the Plaintiff is in breach of the Rules of the Grand Court and allowed the breach to continue for weeks and months...*"

249. The Plaintiff's application to set aside the Summary Default Judgment is made pursuant to GCR O.19 r.9 and or the inherent jurisdiction of the Court. Both parties accept that the rule provides for discretion to be exercised by the Court. Furthermore, the practice and authorities on setting aside a Judgment in Default of Notice of Intention to Defend contained within GCR O.13 r.9, are equally applicable to GCR O.19 r.9(1).

250. Both parties accept that my Judgment dated the 3rd May 2011 is a regular judgment and O.13 r.9(7) of the rules of the Supreme Court of the United Kingdom states:

> *"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 Q.B.D. 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] W.N. 77, reprinted 23 Q.B.D. 126 n."*

The learned editors of the 1999 Supreme Court Practice add at 13/9/7,

> *"For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence."*

251. This Court received considerable guidance from the classic House of Lords decision of ***Evans v. Bartlam*** [1937] A.C. 473, which the English Court of Appeal in ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. (The "Saudi Eagle")*** referred to, at length, and, like the English Court of Appeal, I must review the circumstances of the case and exercise my own discretion. Sir Roger Ormrod, giving the judgment of the Court in the ***Saudi Eagle*** stated at page 223 of the judgment:

> *"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] A.C. 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 the 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 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 is 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].*"

252. The principles governing the exercise of the discretionary powers of the Court are dealt with by the learned editors of the 1999 Supreme Court Practice at O.13 r.9/18 and state at the top of page 160,

> "*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 not 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.*"

253. The following principles, derived from Sir Roger Ormrod's judgment in the ***Saudi Eagle*** case, are also set out at O.13 r.9/18 of the 1999 Supreme Court Practice, namely:

> *"(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O.14; it must both 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 estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."*

254. Although the Plaintiff filed its Summons to set aside the Default Judgment on the 11th May 2011, it was not accompanied by supporting evidence. The learned editors of the Rules of the Supreme Court 1999 stated at O.13 r.9/12:

> *"The application should be made promptly and within a reasonable time."*

255. The Plaintiff did not file any affidavit in support of its application, and only after being prompted by the Sixth Defendant's attorneys did the Plaintiff file the supporting affidavit in the form of the lamentably short Second Affidavit of Leticia Herviou, filed on the 13th September 2011 – some four months after it issued its Summons. 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."

256. The Plaintiff has, by its blatant and continuous breaches of the rules of the Grand Court shown what can only be described as a contemptuous disregard for the Court's practice and procedure. As Sir Roger Ormrod stated at page 225 in his ***Saudi Eagle*** judgment:

> "*The conduct of the Defendants [*in this case the Plaintiff*] ... is a matter to be taken into account in assessing the justice of the case.*"

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 received evidence to support the allegations made in the Defence to Counterclaim and considers that its pleaded Defence to the 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 she does not state any facts which show a defence on the merits and merely exhibits a bald draft pleading.

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 a 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.

264. The Plaintiff did not address me on its alternative claim for leave to appeal against my Judgment of the 3rd May 2011 and, consequently, I have not dealt with the alternative relief sought in paragraph (vi) of its Summons dated the 11th May 2011.

265. For all the foregoing reasons I find that the Plaintiff has conducted this part of the proceedings leading to my rejection of its application to set aside my Judgment of the 3rd May 2011, improperly, unreasonably and negligently and therefore, I order that the Sixth Defendant's costs are to be paid by the Plaintiff on an indemnity basis, pursuant to GCR O.62 r.4(ii).

**Dated this the 26th day of January 2012**

GRAND COURT CAYMAN ISLANDS

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