



28/4/10

Foster

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

4 CAUSE NO: FSD 61 OF 2010-AJEF

5 BETWEEN:

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

11 Plaintiff

12 AND

- 14 (1) BRIAN PATRICK GILBERTSON
- 15 (2) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
- 16 (GP)
- 17 (3) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
- 18 (4) PALLINGHURST RESOURCES MANAGEMENT LP
- 19 (5) AUTUMN HOLDINGS ASSET INC.

21 Defendants

22 (By Original Action)

24 AND BETWEEN:

- 25 (1) BRIAN PATRICK GILBERTSON
- 26 (2) AUTUMN HOLDINGS ASSET INC

27 Plaintiffs to Counterclaim

29 AND

- 30 (1) VIKTOR VEKSELBERG
- 31 (2) VLADIMIR VIKTOROVICH KUZNETSOV
- 32 (3) RENOVA HOLDING LIMITED
- 33 (4) RENOVA RESOURCES PRIVATE EQUITY LIMITED

34 Defendants to Counterclaim

35 (By Counterclaim)

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

39 Appearances: Mr. James Eldridge of Maples and Calder for the Plaintiff and the
40 Defendants to Counterclaim

41 Mr. Graeme Halkerston of Appleby for the First and Fifth
42 Defendants and the Plaintiffs to Counterclaim

44 Heard: 15th April 2010

RULING (2)

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

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

1. (1) *Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.*

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3. (1) *Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or that part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*

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5. (1) *Where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to paragraph (3) the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.*

(2) *Rules 2,3 and 4 apply in relation to an application under this rule as they apply in relation to an application under rule 1 but with the following modifications, that is to say –*

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

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

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

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

Background

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

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

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

16
17 6. By a summons dated 29th September 2009 the 4 defendants to the counterclaim,
18 including the plaintiff in the action, (together for these purposes "the defendants
19 to the counterclaim") applied for alternative orders under the GCR. They applied,
20 firstly, for summary judgment against the 1st and 5th defendants/plaintiffs to the
21 counterclaim (together for these purposes "the plaintiffs to the counterclaim")
22 pursuant to GCR O.14, r.12 on the ground that the plaintiffs to the counterclaim
23 have no prospect of success in the counterclaim and alternatively for orders that

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

6
7 7. During the course of the hearing of the applications by the defendants to the
8 counterclaim, and at a somewhat late stage, leading counsel for the plaintiffs to
9 the counterclaim submitted, during his response to the applications, for the first
10 time, that the court has no jurisdiction to grant summary judgment to the
11 defendants to the counterclaim pursuant to the GCR O.14 in any event and that
12 accordingly the Court was confined to determining the applications of the
13 defendants to the counterclaim made pursuant to GCR O.18, r.19. The
14 significance of this is, of course, that, apart from the different tests applicable, in
15 an application pursuant to GCR O.14, r.12 the parties may file and the Court may
16 consider affidavit evidence whereas in an application pursuant to GCR O.18, r.19
17 on the ground that the claim concerned discloses no reasonable cause of action,
18 the Court is confined to considering the parties' pleaded cases and may not
19 consider any evidence. Since a considerable amount of affidavit evidence had
20 been submitted for purposes of the application pursuant to GCR O.14, r.12 and
21 already referred to by leading counsel for the defendants to the counterclaim in
22 support of the application, the jurisdiction of the Court to grant summary
23 judgment pursuant to O.14, r.12 was clearly an important issue.

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

15

16 **Arguments and Analysis**

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

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

5
6 10. In summary, counsel for the plaintiffs to the counterclaim argued that the GCR do
7 not provide for a defendant to a counterclaim to apply for summary judgment
8 against a plaintiff to a counterclaim and that the Court only has jurisdiction in
9 relation to summary judgment under and pursuant to the Rules. It has no inherent
10 or other jurisdiction to grant summary judgment on the application of a defendant
11 to a counterclaim. Accordingly, it was submitted, the Court has no jurisdiction to
12 grant the relief applied for by the defendants to the counterclaim pursuant to GCR
13 O.14, r.12 in the present proceedings.

14
15 11. Counsel for the defendants to the counterclaim argued that it would be
16 extraordinary if the Court considered that a counterclaim had no prospects of
17 success yet had no jurisdiction to do anything other than to allow such a
18 counterclaim to proceed to trial. He contended that there are 4 different ways by
19 which the Court could and should seek to avoid such a result, consistent with the
20 proper exercise of its jurisdiction. I propose to consider each of these in turn.

21
22 **Construction of O.14 r.12 in accordance with overriding objective**

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

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

5
6 1.1 *The overriding objective of these Rules is to enable the Court to deal with*
7 *every cause or matter in a just, expeditious and economical way.*

8
9 1.2 *Dealing with a cause or matter justly includes, as far as practical –*

10
11 (a) *ensuring that the substantive law is rendered effective and that it is*
12 *carried out;*

13
14 (b) *ensuring that the normal advancement of the proceeding is*
15 *facilitated rather than delayed;*

16
17 (c) *saving expense;*

18
19 (d) *dealing with the cause or matter in ways in which are*
20 *proportionate –*

21
22 (i) *to the amount of money involved;*

23
24 (ii) *to the importance of the case;*

25
26 (iii) *to the complexity of the issues;*

27
28 (e) *allotting to it an appropriate share of the Court’s resources, while*
29 *taking into account the need to allot resources to other*
30 *proceedings.*

31
32 2.1 *The Court must seek to give effect to the overriding objective when it –*

33
34 (a) *applies or exercises any discretion given to it by these Rules; or*

35
36 (b) *interprets the meaning of any Rule*

37
38 2.2 *These Rules shall be liberally construed to give effect to the overriding*
39 *objective and, in particular, to secure the just, most expeditious and least*
40 *expensive determination of every cause or matter on its merits.*

41

1 3. *The parties are obliged to help the Court to further the overriding objective.*
2 *In applying the Rules to give effect to the overriding objective the Court*
3 *may take into account a party's failure to help in this respect".*
4

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

8 "2.1 *The preamble sets out the overriding objective of the rules which is to*
9 *enable the court to deal with every cause or matter in a just, expeditious*
10 *and economical way. The contents of the preamble are not rules of the*
11 *court. Rather, it is a statement of the policy upon which the rules are*
12 *founded. The judiciary will interpret and apply the rules with a view to*
13 *giving effect to this policy.*
14

15 2.2 *Whenever a cause or matter comes before the Court the Judge will*
16 *consider what direction should be made with a view to achieving these*
17 *overriding objectives".*
18

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

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

8
9 14. It is clear that the overriding objectives in the preamble to the GCR are not rules.
10 In my view they are not intended to enable, still less require, the Court, to
11 interpret the rules other than in accordance with their ordinary meaning in their
12 context and adopting the usual rules of construction. In *Powell & Another v*
13 *Attorney General* [2009] CILR 298 I made reference to the overriding objective
14 in taking a liberal view of the procedure under GCR O.53, r.3 in the particular
15 circumstances of that case and having regard to established general practice.
16 However, the rule concerned and the issue concerning the appropriate practice
17 pursuant to that rule were very different from the considerations in the present
18 case and the jurisdiction in question here. There was also English precedent in
19 this case for adopting the view which I took. Furthermore, I made it clear that the
20 overriding objective did not entitle me to interpret a rule contrary to its clear
21 meaning. In the submissions of counsel in the present case I was not made aware
22 of any reported case in which the Court has made reference to the overriding
23 objective in considering the interpretation of any specific rule. In my opinion the

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

4
5 15. O.14 clearly distinguishes between an original action and a counterclaim. If the
6 suggested construction of O.14, r.12 is appropriate, O.14, r.5 would be otiose.
7 There would be no need for a specific rule relating to a plaintiff to a counterclaim
8 if the word "plaintiff" in O.14, r.1 was to be construed so as to include a plaintiff
9 to a counterclaim. It seems to me that logically, if express provision is required to
10 give the Court jurisdiction to grant summary judgment to a plaintiff to a
11 counterclaim as was effected by r.5, similar express provision is necessary in
12 order to empower the Court to grant summary judgment to a defendant to a
13 counterclaim. In my view the overriding objective does not require the Court to
14 apply anything other than a normal construction to the Rules when the Rules are
15 drafted in such a way as to enable that. The ordinary and usual construction of
16 O.14, r.12 does not, in my opinion, either expressly or impliedly in the overall
17 context, extend to providing for an application for summary judgment by a
18 defendant to a counterclaim. Such a construction is not consistent with the overall
19 scheme and format of O.14 and the clear distinction it makes between an original
20 action and a counterclaim.

21
22 16. The submission by counsel for the defendants to the counterclaim that, if the
23 Court considers that the counterclaim has no prospect of success it should not be
24 constrained to accept that it has no jurisdiction to do anything other than to allow

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

20
21 17. I was taken through the history of the Court's jurisdiction to grant summary
22 judgment both here and in England. The position in England was summarized in
23 *C.E. Heath PLC v Ceram Holding Co & Another* [1988] 1 WLR 1219 by Neill

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

10
11 18. In this jurisdiction the former Grand Court (Civil Procedure) Rules provided only
12 for a plaintiff to apply for summary judgment in an action commenced by
13 specially endorsed writ claiming a liquidated sum. The suggestion that the Court
14 had jurisdiction to grant summary judgment in any other circumstances was
15 clearly rejected by the then Chief Justice (Collett CJ) in Cayman Islands News
16 Bureau v Cohen & Another [1988-89] CILR 56. The present GCR were
17 introduced in 1995 and, with certain changes which are not material to the present
18 case, effectively re-stated the then RSC, including O.14, r.1 and r.5. GCR O.14,
19 r.12 enabling a defendant to seek summary judgment in respect of a plaintiff's
20 claim was introduced in 1996 and, I was informed, amended in 2008. As I have
21 said, there was never any equivalent of that provision in the RSC. GCR O.14, r.5
22 was not amended in 1996 or in 2008 nor was O.14, r.12 originally drafted or
23 subsequently amended so as to apply in respect of a defendant to a counterclaim.
24 It was submitted for the plaintiffs to the counterclaim that since an express rule

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

6
7 19. It is clear that the jurisdiction of the High Court in England to grant summary
8 judgment has grown gradually and incrementally over time and only by statute or
9 by express provision in Rules made pursuant to statutory powers. The GCR have
10 themselves developed incrementally in this respect as demonstrated initially by
11 incorporation of the jurisdiction provided by the then RSC and then by the later
12 inclusion of r.12. I do not accept that I can assume that the lack of a provision for
13 the obverse of O.14, r.5 with regard to a defence to a counterclaim is simply an
14 accidental omission. As I have already pointed out, no provision enabling
15 application for summary judgment in such circumstances, or even by a defendant
16 to an original action, was introduced in England until the CPR came into effect.

17
18 20. I should add that I am not persuaded that in this case adopting the interpretation of
19 O.14, r.12 which was proposed would necessarily achieve the overriding
20 objective in any event. As I have said already, it seems to me an inappropriate
21 approach for the defendants to the counterclaim to assume, even hypothetically,
22 success on the merits of their submission, purportedly pursuant to O.14, r.12, that
23 the counterclaim has no prospect of success, in order to thereby found the
24 jurisdiction of the Court under O.14, r.12 to grant the summary judgment which

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

7
8 **Inherent Jurisdiction**

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

1
2 “[Counsel] has suggested no reason why the Rules should provide that an
3 application to set aside an order made without notice can be made if the
4 order is made pursuant to an application notice; but that an application to
5 set aside cannot be made if the order is made pursuant to an application
6 which is not supported by an application notice. Such a distinction makes
7 no sense.
8

9 He went on to say:

10
11 *The CPR introduced a new code. It was intended to be comprehensive. If*
12 *there is a lacuna, the omission should be made good in a way which is*
13 *consistent with the Rules. Our procedural regime would be incoherent if*
14 *an application to set aside a judgment pursuant to the CPR involved the*
15 *exercise of a discretion in accordance with the overriding objectives but*
16 *an application outside the Rule involves the exercise of a narrower*
17 *discretion or no discretion at all.*
18

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

1 the exercise of the Court's inherent jurisdiction to dis-apply or vary the relevant
2 Rules whereas the present case concerns supplementing the Rules where there is
3 an obvious gap, in a way which is consistent with the rules.
4

5 23. In CE Heath Plc & Another v Ceram Holding Co. (ibid) Neill LJ said at page
6 1228:

7 *"Similarly the scope of Order 14 proceedings has been a matter which has been*
8 *determined by the Rules. There would therefore appear to be little, if any, room*
9 *for an argument that the court has some wider powers in these fields than*
10 *conferred by the Rules, or that it has some residual or inherent jurisdiction to*
11 *grant relief where it is just to do so.....*
12

13
14 That passage is cited with approval in the 1999 Supreme Court Practice Vol. 1 at
15 para.14/5/2. Counsel for the plaintiffs to the counterclaim submitted that the
16 jurisdiction of the Court to supplement or complement a procedural rule depends
17 upon the rule in question. Where a rule has developed over time out of the
18 ordinary general practice and procedure of the Court in the exercise of its historic
19 inherent jurisdiction there is a continuing inherent jurisdiction to supplement or
20 complement such a rule where necessary and consistent with the rule concerned.
21 However, where a particular jurisdiction to the Court has not arisen in such a way
22 but has been created by statute or rule there is no scope for the application of such
23 an inherent jurisdiction. An example of the latter type of rule is GCR O.23 which
24 provides for the Court's power to order security for costs. That rule was created
25 and codified by rule and the circumstances in which such an order may be made
26 may not be extended and are exhaustive as set out in the rule (see 1999 Supreme
27 Court Practice Vol. I para.23/3/1 and the cases cited there). It was submitted that

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

15
16 24. As I have already mentioned, I am not persuaded in the circumstances that I can
17 necessarily assume that the absence of a provision in the GCR enabling a
18 defendant to a counterclaim to obtain summary judgment is necessarily an
19 inadvertent omission. There was no "reverse summary judgment" provision in
20 favour of a defendant in England until the introduction of the CPR in 1999, yet I
21 was not referred to any English case prior to 1999 where the English Court
22 exercised an inherent jurisdiction to supplement or complement the existing rules
23 there with a procedure enabling summary judgment in favour of a defendant,

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

3
4 **GCR O.15, r.5 and r.6**

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

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

3
4 26. It seems to me that the first and most obvious difficulty is that the defendants to
5 the counterclaim simply have not made any applications pursuant to O.15 and
6 have not sought to do so. The whole matter was argued before me on the basis of
7 their applications pursuant to GCR O.14, r.12 and O.18, r.19. There was no
8 application pursuant to O.15 and it was not even mentioned, nor were the
9 authorities on O.15 referred to, let alone analysed. The discretion of the Court
10 pursuant to O.15, r.5 to order separate trials or to order that the subject matter of a
11 counterclaim should be disposed of by separate action is predicated upon either
12 the existence of the express circumstances set out in the r.5 (1) and the exercise of
13 the Court's discretion generally. The express circumstances and reasons why
14 such orders were said to be appropriate would require detailed analysis in the
15 particular case and, there would no doubt be extensive argument as to the
16 applicability and relevance of the propounded reasons, all having regard to the
17 authorities relating to O.15, r.5. Furthermore, in circumstances such as these,
18 where the sole intention of the putative applicant for an order pursuant to GCR
19 O.15, r.5 is admittedly simply to get around the Court's lack of jurisdiction to
20 grant summary judgment to a defendant to a counterclaim pursuant to O.14, r.12,
21 I am not persuaded that the Court would consider it appropriate to exercise its
22 discretionary jurisdiction to order separate trials or to require the counterclaim to
23 be disposed of by a separate action pursuant to O.15. To my mind O.15 is not an
24 indirect route for a defendant to a counterclaim to seek to achieve summary

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

13
14 **Grand Court Law Section 18**

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

18 *“18. (1) subject to this or any other law, the jurisdiction of the court shall be*
19 *exercised in accordance with any Rules made under this law.*

20
21 *(2) in any matter of practice or procedure for which no provision is made*
22 *by this or any other law or by any Rules, the practice and procedure in similar*
23 *matters in the High Court in England shall apply as far as local circumstances*
24 *permit and subject to any directions which the Court may give in any particular*
25 *case”.*
26

1 It is my understanding that the Grand Court Rules Committee made a general
2 policy decision after the CPR were introduced in England in 1999 not to adopt
3 those Rules generally for the Grand Court and the GCR continue to be based
4 almost entirely on the former RSC. In light of the radical changes made by the
5 CPR it is perhaps somewhat surprising that Section 18 (2) of the GCL has not
6 been repealed or amended. The Explanatory Memorandum to the GCR, already
7 referred to, specifically states that the RSC 1965 ceased to apply to proceedings in
8 the Grand Court after 1st June 1995, albeit the GCR follow the layout of the RSC
9 and in most respects are identical to them, as they existed prior to the enactment
10 of the CPR. That seems to me to indicate an intention to depart from English
11 practice and procedure as such. Nonetheless, the present provisions of Section
12 18(2) of the GCL remain in place and continue to govern the position in
13 appropriate circumstances, unsatisfactory as that may be given the significant
14 differences between the GCR and the RSC on the one hand and the CPR on the
15 other hand.

16
17 28. It was submitted that the practice and procedure in the High Court in England
18 does now enable a defendant to a counterclaim to obtain summary judgment and
19 reference was made to Part 24 of the CPR. Rule 24.3 empowers the High Court
20 to “*give summary judgment against a claimant in any type of proceedings*”. It
21 was argued that the conditions to the applicability of the practice and procedure of
22 the High Court in England as set out in Section 18 (2) of the GCL are all met in
23 the present case. In particular the requirement that “*no provision is made by this*

1 or any other law or by any other law or by any Rules” should, it was argued, be
2 interpreted to mean that no provision is made for the specific procedural issue
3 before the Court, namely, in this case, the ability to grant summary judgment to a
4 defendant to a counterclaim. The GCR clearly do make provision for the grant of
5 summary judgment to the plaintiff and to the defendant respectively in an original
6 action and to the plaintiff to a counterclaim but make no provision for the grant of
7 summary judgment on the application of a defendant to a counterclaim. There is,
8 so it was submitted, therefore an absence of a provision in the relevant practice or
9 procedure in relation to the Court’s ability to grant summary judgment to such a
10 party. It was argued that such an approach is consistent with the approach in C.
11 Lemos and Others v Coutts & Company (Cayman) Limited and Others [1992-
12 93] CILR 5 in which, according to the Headnote, Harre J held that:

13
14 “in the Cayman Islands the Grand Court (Civil Procedure) Rules, r.47 provided
15 for the discovery of documents. This Rule would have been applicable had it
16 been merely inadequate by comparison with the corresponding English rule but
17 neither r.47 nor any other provision in the Grand Court (Civil Procedure) Rules
18 provided for the special case of the inspection and copying of documents referred
19 to in pleadings or affidavits. Since there was a fundamental distinction between
20 those rules and the general rules on discovery applicable in the Cayman Islands
21 there was effectively no applicable local provision and therefore, by virtue of the
22 Grand Court Law, s.20 [the predecessor to s.18] and r.62 of the Rules, the practice
23 and procedure of the English Rules of the Supreme Court as embodied in O.24,
24 r.10 applied in the Islands”.

25
26 It was contended for the defendants to the counterclaim that in the present
27 circumstances it is not a question of the relevant existing rule being “inadequate”
28 by comparison with the corresponding rule in the CPR but of there being no rule
29 at all. Counsel argued that there is simply a lacuna in the GCR and not a

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

5
6 29. The qualifying words "*so far as local circumstances shall permit*" in s.18 (2) of
7 the GCL are, it was submitted, to ensure that only such practice and procedure of
8 the High Court in England will apply, where there is a lacuna in the GCR, which
9 is not inconsistent with the GCR. It was submitted that the practice and procedure
10 of the CPR in enabling a defendant to a counterclaim to apply for summary
11 judgment in appropriate circumstance is in no sense inconsistent with the
12 provisions of O.14 of the GCR and that pursuant to s.18 (2) of the GCL the Court
13 clearly retains the ability to manage the effect of the application of such practice
14 and procedure of the English High Court by giving appropriate directions.

15
16 30. It was pointed by counsel for the plaintiffs to counterclaim that there was and is
17 no application by the defendants to the counterclaim pursuant to CPR rule 24.3, or
18 seeking its application, before the Court and that accordingly none of the
19 jurisprudence on the scope of and the appropriate test for the applicability of Part
20 24 were before the Court either. Furthermore the applications of the defendants to
21 the counterclaim were not argued on the basis of an application pursuant to Part
22 24 or the practice and procedure thereunder. In addition it was submitted that it is
23 settled law that Section 18 (2) of the GCL is only applicable where there is no
24 provision at all under the Cayman Islands rules relating to the matter concerned.

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

13 In his judgment Collett CJ said (p.59):

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

24
25 *Viewed in this way it is to my mind significant that the framers of the Cayman*
26 *Rules have chosen to restrict the availability of the summary judgment process by*
27 *r.23 to actions commenced by specially endorsed writ claiming a liquidated*
28 *amount. This, it could be argued, is an inadequate provision by comparison with*
29 *what the English RSC provide, but it could not be argued that it is no provision at*
30 *all for obtaining judgments by that kind of process. And it is the latter rather than*
31 *the former which is the proper test of the present issue as was held by*
32 *Summerfield CJ in Rawson v GCTC Ltd. [1980-83] CILR 214 as well as in the*
33 *earlier case of In re Aramco Ltd. [1980-83] CILR 2002.*

1 *Since I have reached the conclusion that provision is indeed made by r.23 of the*
2 *local Rules, although it is not a provision of which the plaintiff here can take*
3 *advantage, it follows that in my judgment O.27, r.3 of the English Rules has no*
4 *application to the Cayman Islands”.*
5

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

12
13 32. In the case relied upon by counsel for the defendants to the counterclaim,
14 *C.Lemos & Others v Coutts & Company (Cayman) Limited & Others* (ibid), in
15 considering whether RSC O.24, r.10, providing for the inspection of documents
16 referred to in pleadings or affidavits, was applicable in the Cayman Islands, Harre
17 J (as he then was) made specific reference to the judgment of Slade, LJ in
18 *Dubai Bank Ltd. v Galadari (No. 2)* [1980] 2 All ER at 743. He said:

19
20 *Rules of court substantially corresponding with O.24, r.10 and the rules ancillary*
21 *to it have been in force for over 100 years. Lindley, LJ in Quilter v Heatley*
22 *(1883) 23 Ch. D.42 at 50 drew a distinction between these rules and the general*
23 *rules as to discovery of documents. He said:*

24
25 *“These rules were evidently intended to give the opposite party the*
26 *same advantage as if the documents referred to had been fully set*
27 *out in the pleadings”.*
28

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

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

4
5
6 It is accordingly clear that the decision in that case was based upon the judge’s
7 view, in reliance upon English authority, that there was a fundamental distinction
8 between inspection of documents referred to in pleadings and affidavits on the
9 one hand and general discovery on the other. That is not, in my view, inconsistent
10 with the judgment of Collett CJ in *Cayman Islands News Bureau v Cohen* (ibid);
11 indeed it is entirely consistent with it.

12
13 33. It seems to me that GCR O.14 clearly provides for circumstances in which a party
14 may apply for summary judgment and in which the Court has jurisdiction to grant
15 such an application. Although the current English practice and procedure
16 pursuant to the CPR is broader it cannot be said that there is a distinction between
17 the nature of the provisions of GCR O.14 in relation to summary judgment and
18 the wider provisions of the CPR in the necessary sense. The provisions of O.14
19 are somewhat more restrictive than the provisions of the CPR in that they do not
20 provide for the possibility of the grant of summary judgment to a defendant to a
21 counterclaim but the situation is akin to that in *Cayman Islands News Bureau*
22 case (ibid) rather than to that in the *Lemos v Coutts* case (ibid). If that is correct
23 there is no scope for reliance upon the provisions of the CPR in this respect. My
24 attention was also drawn to the fact that the grounds on which the High Court in
25 England may give summary judgment against a “claimant” or defendant are
26 different from the grounds on which this Court may grant summary judgment in

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


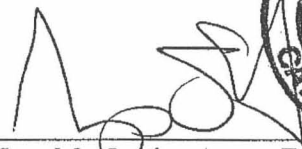
13 14 **Conclusions**

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

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

Dated: 28th April 2010



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