

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN
3

4 Cause No: FSD 94 of 2011 – CQJ
5 (Formerly Cause No. 278 of 2005
6 Consolidated with 98/06
7 127 & 128/06)
8

9 BETWEEN:

10 EMBASSY INVESTMENTS LIMITED

11 PLAINTIFF

12 AND:

- 13 ~~1. ASCOT CORPORATE NAME LIMITED (FOR~~
14 ~~AND ON BEHALF OF ITSELF AND ALL OTHER~~
15 ~~MEMBERS OF SYNDICATE 1414 AT LLOYD'S)~~
16 ~~2. FARADAY CAPITAL LIMITED (FOR AND ON~~
17 ~~BEHALF OF ITSELF AND ALL OTHER~~
18 ~~MEMBERS OF SYNDICATE 435 AT LLOYD'S)~~
19 ~~3. SIMON KING (FOR AND ON BEHALF OF~~
20 ~~HIMSELF AND ALL OTHER MEMBERS OF~~
21 ~~SYNDICATE 2010 AT LLOYD'S)~~
22 ~~4. WÜRTTEMBERGISCHE VERSICHERUNG AG~~
23 ~~5. ECCLESIASTICAL INSURANCE COMPANY~~
24 ~~LIMITED~~
25 ~~6. HOUSTON CASUALTY COMPANY~~
26 ~~7. SIMON WHITE (FOR AND ON BEHALF OF~~
27 ~~HIMSELF AND ALL OTHER MEMBERS OF~~
28 ~~SYNDICATE 1200 AT LLOYD'S)~~
29 ~~8.—~~
30 ~~9. CHRISTINE DANDRIDGE (FOR AND ON~~
31 ~~BEHALF OF HERSELF AND ALL OTHER~~
32 ~~MEMBERS OF SYNDICATE 609 AT LLOYD'S)~~
33 ~~10. TALBOT 2002 UNDERWRITING CAPITAL LTD~~
34 ~~(FOR AND ON BEHALF OF ITSELF AND ALL~~
35 ~~OTHER MEMBERS OF SYNDICATE 1183 AT~~
36 ~~LLOYD'S)~~
37 ~~11. CATLIN SYNDICATES LTD (FOR AND ON~~
38 ~~BEHALF OF ITSELF AND ALL OTHER~~
39 ~~MEMBERS OF SYNDICATE 2003 AT LLOYD'S)~~
40 ~~12. BRIT UW LTD (FOR AND ON BEHALF OF~~
41 ~~ITSELF AND ALL OTHER MEMBERS OF~~
42 ~~SYNDICATE 2987 AT LLOYD'S)~~
43 ~~13. WELLINGTON UNDERWRITING AGENCY LTD~~
44 ~~(FOR AND ON BEHALF OF ITSELF AND ALL~~
45 ~~OTHER MEMBERS OF SYNDICATE 2020 AT~~
46 ~~LLOYD'S)~~
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48 DEFENDANT
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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

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**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**

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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.

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1 JUDGMENT

2
3 *The Sixth Defendant's Summons*

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

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

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

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

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

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

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

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

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

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

13 iv. *[That] the Sixth Defendant's costs of its application dated the 3rd March*
14 *2011, up to and including the 28th April 2011 be taxed on the standard basis*
15 *and paid by the Plaintiff.*

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

18 vi. *Further or alternatively:*

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

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

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

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

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

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

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

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

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

16 ***The Parties***

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

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

3 *Hurricane Ivan*

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

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

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

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

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

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

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

- 1 17. On the 16th June 2006 Henderson J. made an Order consolidating the various
2 actions and providing for discovery and the inspection of documents, the
3 exchange of factual witness statements, interrogatories, and, the exchange of
4 experts' reports – with up to six experts in various disciplines on either side.
5 Henderson J's Order ordered that a pre-trial review should take place by the 31st
6 March 2007.
- 7 18. On the 11th May 2006 the Plaintiff issued a Summons for specific discovery
8 against all the Defendants.
- 9 19. On the 3rd day of April 2006 the Plaintiff notified the Sixth Defendant (and the
10 other Defendants) that it intended to bring a claim for punitive damages in Texas
11 for alleged bad faith and breaches of the Texas insurance code in the handling of
12 the Plaintiff's policy claim, including the conduct of the Cayman proceedings.
13 The Plaintiff at various stages argued that it was entitled to damages in a sum
14 exceeding \$20,000,000.00 and further, that under Texas law, it was entitled to
15 treble damages.
- 16 20. On the 25th day of May 2006, all the Defendants, including the Sixth Defendant,
17 applied to the Grand Court of the Cayman Islands in Cause Number 198 of 2006
18 for an ant-suit injunction to prohibit the Plaintiff from bringing the proposed
19 Texas proceedings.
- 20 21. On the 2nd day of June 2006 the Sixth Defendant made a without-prejudice offer
21 to pay approximately 75% of the claim made against the Sixth Defendant under
22 its policy with the Plaintiff.

- 1 22. The Defendants' (including the Sixth Defendant) anti-suit application was
2 adjourned by consent upon undertakings given by the Plaintiff in a "Standstill
3 Agreement", effective as at 28th July 2006, which provided that neither of the
4 parties would file any new legal proceedings in any jurisdiction arising out of or
5 relating to the Cayman proceedings or any Texas claim, until the Cayman Islands
6 litigation was either settled or proceeded to judgment (including any appeals).
7 The parties also agreed to suspend all the running of all statutes of limitation. A
8 Standstill Agreement was expressly subject to English law and arbitration by a
9 sole arbitrator in London.
- 10 23. On the 4th September 2006 the Sixth Defendant served its list of documents on
11 the Plaintiff, and on the 6th September 2006 the Plaintiff served its list of
12 documents on the Sixth Defendant.
- 13 24. On the 5th April 2007 all the Defendants, including the Sixth Defendant, offered
14 to settle the Plaintiff's claim on the basis of a payment of US\$14.75 million in
15 relation to all claims. The settlement figure was to include costs and interests and
16 a waiver of any extra contractual or bad faith claims in Texas or elsewhere.
- 17 25. On the 7th August 2007 Henderson J. rejected the Plaintiff's application for
18 specific discovery.
- 19 26. On the 9th October 2007 Henderson J. gave the Plaintiff leave to appeal against
20 his Ruling dated the 7th August 2007 and the Plaintiff filed a Notice of Appeal.
- 21 27. On the 21st September 2007 the Plaintiff issued a further summons for specific
22 discovery.

- 1 28. On the 12th December 2007 the Plaintiff was given leave to withdraw its
2 Summons.
- 3 29. On the 12th December 2007 the Sixth Defendant's application for specific
4 discovery was heard by Henderson J.
- 5 30. On the 30th January 2008 Henderson J. made an Order for specific discovery
6 against the Plaintiff.
- 7 31. On the 20th February 2008 Mr. Asif Bhatia ("Mr. Bhatia") filed his Sixth
8 Affidavit on behalf of the Plaintiff in response to Henderson J's Order for
9 specific discovery delivered on the 30th January 2008.
- 10 32. In October 2007 and December 2007 settlement meetings took place.
- 11 33. On the 7th February 2008 the Sixth Defendant's London solicitors, Clyde &
12 Company, wrote to the Plaintiff to propose a face-to-face meeting, and at the
13 same time made a settlement offer for payment of US\$1,173,474.00, including
14 interest, costs and taxes (if any), on terms which included a full release of any
15 extra contractual or bad faith claims in Texas or elsewhere. This was an offer to
16 pay the Sixth Defendant's full policy limit, but did not include anything to cover
17 costs or interest.
- 18 34. On the 15th February 2008 the other five insurers of the middle layer (that is, not
19 the Sixth Defendant) put forward their own settlement offer in the sum of
20 US\$7,451,525.00, including interest, costs and taxes, if any, but otherwise on the
21 same terms as the offer previously made on behalf of all the insurers. This
22 represented full policy limits for these insurers.

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

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

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

15 38. On the 4th April 2008 the other insurers (the other five Defendants) wrote to the
16 Plaintiff saying that there had not been an acceptance of their offer made on the
17 15th February 2008 and that the claim against them had not been settled and that
18 the terms of settlement had still not been agreed.

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

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The October 2008 Offer

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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.

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

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

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

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

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

1 “... to seek to further delay/frustrate settlement of the Cayman proceedings,
2 and thereby also the Plaintiff’s proceedings in Texas against the Defendant,
3 by continuing to wrongfully withhold the agreed settlement figure in respect
4 of the Cayman proceedings.”

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

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

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

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

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

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

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

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

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

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

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

- 1 i. *The Plaintiff had breached the Standstill Agreement by commencing the*
2 *Texas proceedings against the Sixth Defendant;*
- 3 ii. *The Plaintiff and the Sixth Defendant had not agreed terms of settlement of*
4 *the Cayman actions;*
- 5 iii. *The Cayman proceedings had not been finally determined or resolved within*
6 *the meaning of Clause 1.5 of the Standstill Agreement.*
- 7 iv. *The Standstill Agreement had not ended and remains binding and*
8 *enforceable by the Sixth Defendant.*

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

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

14 57. On the 26th May 2010 I struck out the Plaintiff's claims against the other
15 Defendants on the ground that the Plaintiff's claims and their pursuit were then
16 frivolous, vexatious and an abuse of the process of the Court, the claims having
17 been fully and finally settled on the terms of the settlement agreement dated the
18 16th March 2010. I gave my reasons for this decision on the 20th September 2010
19 and my decision has not been appealed.

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

- 1 59. The Award made by Mr. Males on the 8th January 2010 had not been appealed or
2 challenged by the Plaintiff and on the 5th July 2010 a consequential award of
3 costs was made in favour of the Sixth Defendant.
- 4 60. On the 17th August 2010 the Sixth Defendant obtained an Order from Cresswell
5 J. in Cause FSD 184 of 2010 and pursuant to s.5 of the Foreign Arbitral Awards
6 Enforcement Law (1997 Revision) that it be permitted to enforce the award and
7 the related award in respect of costs in the Cayman Islands.
- 8 61. On the 19th August 2010 Cresswell J's Order was served on the Plaintiff's
9 registered office. The Plaintiff did not respond to this service, nor did it apply to
10 set aside the Order.
- 11 62. In September 2010 the Sixth Defendant brought proceedings in Cause Number
12 339 of 2010 for a charging order over property owned by the Plaintiff in order to
13 enforce the costs award in connection with the arbitration originally granted by
14 Mr. Males on the 5th July 2010. The Plaintiff made a non-conditional payment in
15 the sum of US\$571,015.62 together with costs in the sum of US\$15,978.66.
- 16 63. On the 15th March 2011 the Sixth Defendant issued its Summons to strike out the
17 Plaintiff's Writ and Statement of Claim for intentional and contumelious default
18 amounting to an abuse of the process of the Court.
- 19 64. The Defendant filed the Third Affidavit of Mr. Jackson in support of its
20 Summons.
- 21 65. On the 24th March 2011 the Sixth Defendant served its Summons to strike out the
22 Plaintiff's action and the Fourth Affidavit of Mr. Jackson, on the Plaintiff.

1 Ms. Herviou, a director of Basel CDS Limited (“Basel”), which is the corporate
2 director of the Plaintiff, wrote to the Sixth Defendant’s attorneys stating, *inter*
3 *alia*, that the Plaintiff had expected the Sixth Defendant to withdraw its
4 application.

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

10 73. On the 20th December 2010 the Plaintiff was served with a sealed copy of the
11 Sixth Defendant’s re-re-amended Defence and Counterclaim dated the 17th
12 December 2010 and a sealed copy of the Order of the learned Chief Justice dated
13 the 14th December 2010. The Plaintiff did not respond to this Order. The Plaintiff
14 did not file a Notice of Intention to Defend, nor did it file any defence up to the
15 3rd March 2011 when the Sixth Defendant issued its Summons for interlocutory
16 judgment in default of defence.

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

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

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

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

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

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

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

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

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

- 1 ii. Attacking the Sixth Defendant by publishing defamatory statements about
2 the Sixth Defendant which are false in the Cayman media, to members of
3 the Government of the Cayman Islands, and to UK Members of Parliament
4 and the European Commission.
- 5 iii. Attempting to pursue abusive proceedings against HCC in Texas in breach
6 of a Standstill Agreement where alleged breaches of the Texas insurance
7 code and the duties of good faith and fair dealing (claiming damages
8 including exemplary and/or punitive damages in excess of US\$210 million)
9 forcing the Sixth Defendant to commence arbitration proceedings in London
10 to enforce a Standstill Agreement.
- 11 iv. The Sixth Defendant contends that the abusive conduct in these proceedings
12 was perpetrated by Mr. Bhatia; Bill Powers (“Mr. Powers”), the General
13 Manager of the Hyatt Beach Suites; Peter Le Seilleur (“Mr. Seilleur”); Ms.
14 Herviou; and other employees and directors of Embassy.
- 15 81. The Sixth Defendant relies on the fact that the Arbitrator, Mr. Males, held in
16 favour of the Sixth Defendant and rejected the principal reasons given for
17 Embassy’s delay in pursuing the Cayman proceedings, namely:
- 18 i. Pursuing the Cayman litigation would be an “unnecessary waste of
19 resources”;
- 20 ii. The insurers wanted to settle;
- 21 iii. There were, in Mr. Bhatia’s words, “questions about the judiciary in
22 Cayman.”

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

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

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

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

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

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

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

9 iii. January 2010 to January 2011: The Plaintiff claims that following
10 the handing down of Mr. Males' award in January of 2010 there was
11 a period of intense negotiation which resulted in a settlement
12 agreement with the other Defendants, signed on the 16th March
13 2010. It is the Plaintiff's position that there was a short dispute
14 about whether the settlement agreement was properly concluded,
15 and this was finally resolved by my Order striking out the Plaintiff's
16 claims against the other Defendants dated the 26th May 2010,
17 leaving the Sixth Defendant as the only insurer which had yet to
18 settle with the Plaintiff.

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

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

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

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

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

16

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

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

22

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

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

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

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

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

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

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

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

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

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

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

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

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

6 *Delay*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7

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

13 *“...to maintain and magnify the allegation that HCC is “blocking”*
14 *settlement of all the insurers”*

15 and that the Plaintiff,

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

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

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

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

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

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

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

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

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

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

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

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

8
9 140. In addition to writing, what can only be described as threatening letters to the
10 Sixth Defendant’s parent company and prejudicial letters to third parties, the
11 Plaintiff began to engage in using the media to present its position. By way of an
12 example, on the 7th January 2010 it was reported in the Cayman Net News that
13 the manager of the Hyatt Grand Cayman Beach Suites, Mr. Powers, stated,

14 *“A settlement figure agreed upon in Cayman Courts remained unpaid by the*
15 *insurers and the real problem was the failure of insurance companies to*
16 *honour their obligations under insurance policies and the inability of the*
17 *local judiciary to properly and promptly deal with disputes relating to the*
18 *insurance claims.”*

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

21 *“The hotel will give the insurers fourteen more days to pay the agreed*
22 *settlement figure, failing which we will go back to the Cayman Court to*
23 *promptly enforce payment of the agreed settlement figure between the*
24 *insurers.”*

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

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

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

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

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

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

1 parent company in Texas, was an “*attempt to manufacture a Texas connection*
2 *where in fact none existed.*”

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

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

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

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

1 This is a terse statement and studiously avoids stating anything about Mr.
2 Bhatia's authority to speak or act on behalf of the Plaintiff from 2005 until the
3 24th March 2011.

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

8 *The Law*

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

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

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

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

23
24 150. The Sixth Defendant also relies on the earlier English Court of Appeal decision
25 of *Culbert v Stephen G Westwell Ltd* [1993] 2 P.I.Q.R. 54, whereby Parker LJ
26 (with the agreement of Nolan and Kennedy LJJ) stated at page 16:

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

1 *Analysis and Conclusion on Strike Out Application*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 “...found it impossible to understand why it was so important for Embassy
7 to preserve in any settlement a right to bring proceedings against the other
8 insurers in Texas”

9 and went on to add,

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

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

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

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

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

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

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

9 Further, the Arbitrator found:

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

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

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

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

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

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

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

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

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

23

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

2 181. On the 3rd May 2011 I made an Order in the following terms:

3 *i. That interlocutory judgment on the Sixth Defendant's Counterclaim*
4 *be entered against the Plaintiff in default of Defence to*
5 *Counterclaim, with damages to be assessed and costs (including the*
6 *costs of such assessment) to be taxed on an indemnity basis.*

7 *ii. That a permanent or final injunction is granted against the Plaintiff*
8 *forthwith in the following terms:*

9 *a. A permanent injunction is hereby granted to*
10 *restrain the Plaintiff (Embassy Investments*
11 *Limited), whether by its directors, officers, servants,*
12 *agents or otherwise, from howsoever publishing the*
13 *words "complained of by the Sixth Defendant"*
14 *(Houston Casualty Company) in its Counterclaim,*
15 *or any similar words defamatory of the Sixth*
16 *Defendant.*

17 *iii. That damages be assessed before a Judge of the Grand Court, the*
18 *appointment for such assessment to be made upon the application of*
19 *the Sixth Defendant to the Clerk of the Court within fourteen (14)*
20 *days of the date Judgment is entered in accordance with paragraph*
21 *i., above.*

22 *iv. That at least seven (7) days before the date of such appointment, the*
23 *Sixth Defendant shall serve notice of the same on the Plaintiff.*

24 *v. That the Sixth Defendant serve affidavit evidence to be relied on at*
25 *the assessment of damages hearing within twenty-eight (28) days of*
26 *the date Judgment is entered in accordance with paragraph i.*
27 *above.*

1 vi. *That the Plaintiff do serve any evidence in reply within twenty-eight*
2 *(28) days thereafter.*

3 vii. *That the Sixth Defendant serve any evidence in response within*
4 *fourteen (14) days thereafter.*

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

7

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

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

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

16 Ms. Herviou goes on to add,

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

21

22

23

24

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

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

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

5 *“...dishonestly and unlawfully refusing to honour its insurance policy*
6 *obligations to pay for the damage caused to the Hyatt by Hurricane Ivan in*
7 *2004.”*

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

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

20 187. The Plaintiff relies upon the fact that the first publication came nearly six years
21 after Hurricane Ivan had damaged the Hyatt, and the Plaintiff had not received
22 one cent in compensation. The Plaintiff submits that the issue is whether an
23 honest person could hold this view and whether the Plaintiff did hold this view.

24 For these reasons the Plaintiff submits that its defence to the Sixth Defendant’s

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

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

4 188. The Defendant’s claim in its Counterclaim is that the Plaintiff was alleging that
5 the Defendant was

6 “...unlawfully delaying payment of an (allegedly) agreed settlement sum
7 pursuant to a settlement agreement. The Sixth Defendant’s bad faith was
8 even more reprehensible in that it was not prepared to honour its legal
9 obligations promptly to indemnify the victims of Hurricane Ivan under its
10 insurance policies.”

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

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

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

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

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

5 *“The Defendant had been seeking to impose unreasonable settlement terms*
6 *on the Plaintiff and was not negotiating with the Plaintiff or seeking to*
7 *resolve the dispute in good faith.”*

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

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

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

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

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

1 “seeking to impose unreasonable settlement terms on the Plaintiff and was not
2 negotiating with the Plaintiff or seeking to resolve the dispute in good faith.”

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

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

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

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

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

16 “...that the Defendant had dishonestly and/or improperly sought to exploit
17 the arrest and subsequent reinstatement of the Cayman Judge who had
18 presided over hearings in the legal dispute over the Hyatt insurance claims
19 by:

20 (a) dropping its earlier insistence on unreasonable terms and
21 conditions (and agreeing to pay the insurance policy
22 proceeds) following the Judge’s arrest; but then

23 (b) attempting to renege its agreement to pay the insurance
24 policy proceeds when the Judge was later reinstated.”

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

2 *“that the [Sixth] Defendant had finally agreed to pay out on the Hyatt*
3 *insurance claim only because it had been shamed into doing so by adverse*
4 *publicity in the Cayman press.”*

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

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

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

9 *“(i) That the Defendant had dishonestly instructed its Cayman lawyers*
10 *to write letters to the Cayman press containing what it knew to be*
11 *false, misleading and/or misrepresentative allegations concerning*
12 *the Hyatt insurance dispute;*

13 *(ii) That because it knew it had no genuine defence to the Hyatt*
14 *insurance claim, and in a desperate attempt to avoid liability on its*
15 *policy, the Sixth Defendant had dishonestly abused; (a) its ability to*
16 *influence all the Excess Insurers, including the exploitation of its*
17 *position as Heritage’s largest shareholder; and (b) the process of*
18 *the Cayman Courts by concocting a specious ploy, a matter of days*
19 *before a Summary Judgment hearing;*

20 *(iii) That the Defendant’s most senior executives and ultimate decision*
21 *makers in Texas had dishonestly; (a) instructed or allowed its legal*
22 *representatives to make sworn affidavits on the Defendant’s behalf*
23 *in both Cayman and London, which they knew to be false and*
24 *misleading, and (b) thereby abuse the process of the Courts in both*
25 *the Cayman Islands and England;*

26 *(iv) That although its fifteen co-insurers had all paid the agreed policy*
27 *proceeds on the Hyatt insurance claims, and despite knowing that it*

1 *had no legitimate reason to do so, the Defendant was dishonestly*
2 *refusing to honour its clear legal obligation to pay the owners of the*
3 *Hyatt under its insurance policy;*

4 (v) *That the Defendant's dishonest refusal to honour its legal*
5 *obligations under its insurance policies was a cause of real public*
6 *concern to the citizens and businesses of the Cayman Islands."*

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

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

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

18
19 208. Further the Plaintiff seeks to defend the sixth publication on the basis of reply to
20 attack qualified privilege – in that, Mr. Powers' letter was a response to the first
21 letter written by Appleby.

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

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

26

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

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

7 Further, the Plaintiff complained that the Sixth Defendant

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

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

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

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

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

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

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

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

13 219. The Plaintiff relies on the Judgment of Kennedy LJ in *McKenzie v. Business*
14 *Magazines (UK) Ltd.* (Unreported CA 18th January 1996) where he stated at page
15 12:

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

20
21 220. The Plaintiff also relies on the Judgment of Sir Thomas Bingham, Master of the
22 Rolls, as he then was, in *Basham v. Gregory* (Unreported CA, 21 February 1996)
23 where he stated at page 10:

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

1 “...a settlement figure agreed upon in Cayman Courts remained unpaid by
2 the insurers.”

3 and that the real problem was,

4 “...the failure of insurance companies to honour their obligations under
5 insurance policies and the inability of the local judiciary to properly and
6 promptly deal with disputes relating to insurance claims.”

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

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

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

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

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

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

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

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

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

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

15 *“Here we have a situation where a settlement figure has been agreed with*
16 *the insurers sometime ago yet insurers continue to delay payment of the*
17 *agreed settlement figure for several years, which simply has to be*
18 *unacceptable as a matter of public policy especially for an island such as*
19 *Cayman.”*

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

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

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

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

8 *“...agreed in 2008 to pay the disputed claim to the limits of the policy but*
9 *has since reneged on its claim.”*

10 Mr. Powers goes on to state,

11 *“The hotel owner is particularly wary about Houston Casualty Company’s*
12 *intentions, as Houston Casualty Company has already sought to wrongly*
13 *void the insurance policy on false pretences in a desperate ploy.”*

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

15 *“...concocted, just a few days before the hearing, to escape summary*
16 *judgment, when Houston Casualty Company had no genuine defence.”*

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

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

1 “Houston Casualty Company (the Defendant) has already sought to wrongly
2 void the insurance policy on false pretences. In a desperate ploy, concocted
3 just a few days before the hearing to escape summary judgment when
4 Houston Casualty Company had no genuine defence as both parties’ real
5 figures put the loss at well above Houston Casualty Company’s policy
6 limit.”

7 Again, there is no evidence to support this allegation.

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

13 237. It is also reported that having reviewed a letter to Houston Casualty in August
14 2007, the Sixth Defendant’s,

15 “...most senior executive and ultimate decision makers in Texas are fully
16 aware that their representatives have made allegedly false and/or
17 misleading statements on behalf of Houston Casualty Company to the
18 Courts, and sworn affidavits in Cayman as well as London where the
19 Arbitrator has in fact expressed recognition that he has no jurisdiction to
20 deal with Embassy’s bad faith claims.”

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

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

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

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

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

9 *“... insisted that Judge Henderson be the only Judge in Cayman to hear*
10 *their case.”*

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

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

16 *“There is no evidence before this Court that Mr. Bhatia is no longer the*
17 *“major ultimate beneficial owner” of the Plaintiff.”*

18
19 243. Although further evidence has been filed in the form of three affidavits by Ms.
20 Herviou on behalf of the Plaintiff, there is still no evidence before this Court that
21 Mr. Bhatia is no longer the “major ultimate beneficial owner” of the Plaintiff.
22 Furthermore, I can find no basis for the contention that s.7 of the Defamation
23 Law affords any defence to the Sixth Defendant’s Claims in relation to the sixth
24 and seventh publications.

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

4 245. The allegations contained in these publications can, as set out by the Sixth
5 Defendant, be divided into four headings:

6 *i. The [Sixth] Defendant is still acting in bad faith by unlawfully delaying*
7 *payment of an “allegedly” agreed settlement sum, and by refusing to*
8 *honour its legal obligations to indemnify Embassy.*

9 *ii. The [Sixth] Defendant has improperly reneged on its agreement to pay the*
10 *disputed policy claim to the limits of the policy in July 2008.*

11 *iii. The [Sixth] Defendant has dishonestly or improperly sought to exploit the*
12 *arrest and subsequent reinstatement of Mr. Justice Henderson by dropping*
13 *its earlier insistent on unreasonable terms and conditions (and agreeing to*
14 *pay the policy proceeds) following the Judge’s arrest, but then attempting to*
15 *renege in its agreement to pay the policy proceeds when the Judge was*
16 *reinstated.*

17 *iv. The [Sixth] Defendant knew it had no defence to the Plaintiff’s policy claim*
18 *but abused the Court’s process by advancing a specious defence, days*
19 *before the summary judgment hearing to avoid liability or to delay payment*
20 *on its policy.*

21 246. These allegations were investigated by the Arbitrator and rejected by him in his
22 Award of January 2010.

23 247. I have reviewed the Plaintiff’s draft defence to the Sixth Defendant’s
24 Counterclaim and all the evidence put before this Court and find that there is no
25 basis for these allegations, and further, that many of the statements made in the
26 seven publications are untrue. What is clear is that Mr. Powers is an employee of

1 the Plaintiff and I find that he caused the publications, complained of by the
2 Sixth Defendant. I do not know what Mr. Powers was told by Mr. Bhatia and Ms.
3 Herviou, or what instructions he was given, but I find that neither Mr. Bhatia nor
4 Ms. Herviou could reasonably have found any of these allegations, made by the
5 Plaintiff against the Sixth Defendant, to be true. As I stated earlier, it is hard to
6 imagine a more damaging allegation against an insurance company than to allege
7 that it improperly reneged on its agreement to pay. I find the allegation, however
8 often repeated, to be false.

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

10 At paragraph 11:

11 *“There is no evidence before this Court that Mr. Bhatia is no longer the*
12 *“major ultimate beneficial owner” of the Plaintiff”.*

13 At paragraph 14:

14 *“What causes this Court some concern is that Mr. Bhatia appears to admit*
15 *that publication of these allegedly false defamatory statements in the*
16 *Cayman media is part of a deliberate attempt to force the Sixth Defendant to*
17 *settle the Plaintiff’s claim....”*

18 At paragraph 15:

19 *“This Court finds some force in the Sixth Defendant’s counsel’s submission*
20 *that the Plaintiff has continued to attack the Sixth Defendant in*
21 *correspondence to public figures in the United Kingdom, the Cayman*
22 *Islands and the European Union, rather than prosecute its claims against*
23 *the Sixth Defendant in these proceedings ...”*

24 At paragraph 17:

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

5 At paragraph 18:

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

13 At paragraph 34:

14 “*This Court finds that the Plaintiff has breached the Rules of the Grand*
15 *Court in not filing a Notice of Intention to Defend or a defence within the*
16 *time allowed for by the Grand Court Rules.*”

17 At paragraph 38:

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

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

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

4 *“If the judgment is regular, then it is an (almost) inflexible rule that there*
5 *must be an affidavit of merits, i.e. an affidavit stating facts showing a*
6 *defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. “At any*
7 *rate where such an application is not thus supported, it ought not to be*
8 *granted except for some very sufficient reason,” per Huddleston, B., ibid. p.*
9 *129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D.*
10 *126 n.”*

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

12 *“For the purpose of setting aside a default judgment, the defendant must*
13 *show that he has a meritorious defence.”*

14
15 251. This Court received considerable guidance from the classic House of Lords
16 decision of *Evans v. Bartlam* [1937] A.C. 473, which the English Court of
17 Appeal in *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.*
18 *(The “Saudi Eagle”)* referred to, at length, and, like the English Court of Appeal,
19 I must review the circumstances of the case and exercise my own discretion. Sir
20 Roger Ormrod, giving the judgment of the Court in the *Saudi Eagle* stated at
21 page 223 of the judgment:

22 *“The following “general indications to help the Court in exercising the*
23 *discretion” (per Lord Wright at p. 488) can be extracted from the speeches*
24 *in Evans v. Bartlam, [1937] A.C. 473, bearing in mind that “in matters of*
25 *discretion no one case can be authority for another” (ibid. p. 488):*

26 (i) *a judgment signed in default is a regular judgment from which,*
27 *subject to (ii) below, the plaintiff derives rights of property;*

28 (ii) *the Rules of Court give to the Judge a discretionary power to set*
29 *aside the default judgment which is in terms “unconditional” and*
30 *the Court should not “lay down rigid rules which deprive it of*
31 *jurisdiction” (per Lord Atkin at p. 486);*

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

4 (iv) *the primary consideration is whether the defendant “has merits to*
5 *which the Court should pay heed” (per Lord Wright at p. 489), not*
6 *as a rule of law but as a matter of common sense, since there is no*
7 *point in setting aside a judgment if the defendant has no defence*
8 *and if he has shown “merits” the –*

9 *...Court will not, prima facie, desire to let a judgment pass on which*
10 *there has been no proper adjudication [ibid. p.489 and per Lord*
11 *Russell of Killowen at p. 482];*

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

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

18

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

22 *“The purpose of the discretionary power is to avoid the injustice which may*
23 *be caused if judgment follows automatically on default. The primary*
24 *consideration in exercising the discretion is whether the defendant has*
25 *merits to which the court should pay heed, not as a rule of law but as a*
26 *matter of common sense, since there is no point in setting aside a judgment*
27 *if the defendant has not defence, and because, if the defendant can show*
28 *merits, the court will not prima facie desire to let a judgment pass on which*
29 *there has been no proper adjudication. Also as a matter of common sense*
30 *the court will take into account the explanation of the defendant as to how*
31 *the default occurred. The foregoing general indications of the way in which*
32 *the court exercises discretion are derived from the judgment of the Court of*
33 *Appeal in **Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co.***
34 ***Inc., The Saudi Eagle** [1986] 2 Lloyd’s Rep. 221 at 223.”*

35

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

4 “(a) It is not sufficient to show a merely “arguable” defence that would
5 justify leave to defend under O.14; it must both have “a real
6 prospect of success” and “carry some degree of conviction”. Thus
7 the court must form a provisional view of the probable outcome of
8 the action.

9 “(b) If proceedings are deliberately ignored this conduct, although not
10 amounting to an estoppel at law, must be considered “in justice”
11 before exercising the court’s discretion to set aside.”

12

13 254. Although the Plaintiff filed its Summons to set aside the Default Judgment on the
14 11th May 2011, it was not accompanied by supporting evidence. The learned
15 editors of the Rules of the Supreme Court 1999 stated at O.13 r.9/12:

16 *“The application should be made promptly and within a reasonable time.”*

17 255. The Plaintiff did not file any affidavit in support of its application, and only after
18 being prompted by the Sixth Defendant’s attorneys did the Plaintiff file the
19 supporting affidavit in the form of the lamentably short Second Affidavit of
20 Leticia Herviou, filed on the 13th September 2011 – some four months after it
21 issued its Summons. In the circumstances of this case, and without any
22 explanation, a four-month delay could never be described as “prompt and within
23 a reasonable time.”

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

1 *“The conduct of the Defendants [in this case the Plaintiff] ... is a matter to*
2 *be taken into account in assessing the justice of the case.”*

3

4 257. The Court finds that the Plaintiff has failed to file any substantive evidence
5 which either carries “some degree of conviction” or demonstrates a “real
6 likelihood” that its draft defence can succeed.

7 Ms. Herviou’s Second Affidavit contains a mere two paragraphs in which she
8 makes the bare assertion that

9 *“Embassy believes that the facts pleaded in the Defence to Counterclaim*
10 *are true”*

11 and that

12 *“Embassy has received evidence to support the allegations made in the*
13 *Defence to Counterclaim and considers that its pleaded Defence to the*
14 *Counterclaim discloses a good defence on the merits.”*

15 258. The Plaintiff has studiously avoided providing any explanation for its blatant and
16 prolonged failure to comply with the Rules of the Grand Court which led to my
17 Judgment dated the 3rd May 2011.

18 259. The Plaintiff has given no explanation as to why it took four months after it
19 issued its Summons to set aside my Judgment, to file any affidavit in support of
20 its application.

21 260. The Plaintiff has failed to provide an affidavit setting out the merits of its
22 application. In Ms. Herviou’s Third Affidavit she does not state any facts which
23 show a defence on the merits and merely exhibits a bald draft pleading.

1 262. In conclusion, I find that the Plaintiff has failed to show that its draft defence to
2 the Sixth Defendant's Counterclaim has any real prospect of success, nor does it
3 carry the necessary degree of conviction required for me to set aside my
4 judgment of the 3rd May 2011. In addition, I find that the Plaintiff has
5 consistently and deliberately ignored the rules of the Grand Court of the Cayman
6 Islands with a full knowledge of the consequences. Accordingly, I reject the
7 Plaintiff's application to set aside my judgment dated the 3rd May 2011.

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

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

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

19

20 Dated this the 26th day of January 2012

21 
22
23
24

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

