

30/12/08

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

CAUSE NO. 278 OF 2005

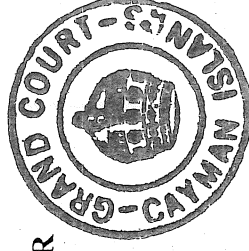
BETWEEN:

EMBASSY INVESTMENTS LIMITED

Plaintiff

AND

- (1) ASCOTT CORPORATE NAME LIMITED (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 1414 AT LLOYD'S)
- (2) FARADAY CAPITAL LIMITED (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 435 AT LLOYD'S)
- (3) SIMON KING (FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF SYNDICATE 2010 AT LLOYD'S)
- (4) WURTTENBERGISCHE VERSICHERUNG AG
- (5) ECCLESIASTICAL INSURANCE COMPANY LIMITED
- (6) HOUSTON CASUALTY COMPANY
- (7) SIMON WHITE (FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF SYNDICATE 1200 AT LLOYD'S)
- (8) CHRISTINE DANDRIDGE (FOR AND ON BEHALF OF HERSELF AND ALL OTHER MEMBERS OF SYNDICATE 609 AT LLOYD'S)
- (9) TALBOT 2002 UNDERWRITING CAPITAL LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 1183 AT LLOYD'S)



- 3071108
- (10) CATLIN SYNDICATES LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2003 AT LLOYD'S)
- (11) BRIT UW LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2987 AT LLOYD'S)
- (12) WELLINGTON UNDERWRITING AGENCY LTD (FOR AND ON BEHALF OF ITSELF AND ALL OTHER MEMBERS OF SYNDICATE 2020 AT LLOYD'S)

**Defendants**

Consolidated with Proceedings in Cause Nos. 98, 127 and 128 of 2006

**Appearances:** Mr. Jeremy Walton of Appleby for the Plaintiffs/Applicants  
Mr. Ross McDonough of Campbells for the Defendants/Respondents

**Before:** Hon. Justice Henderson

**Heard:** December 12, 2007

**JUDGMENT**

The underwriters, plaintiffs in cause 98/06 and defendants in causes 278/05, 127/06 and 128/06, apply for specific disclosure of certain documents and classes of documents itemized in three schedules.

The respondents raise two preliminary objections. First, they argue that the court's jurisdiction, found in Order 24, is confined (upon the necessary pre-conditions being proved) to ordering a party to prepare an affidavit (or further affidavit) of documents. This, they say, follows from the plain language of the rule.

Our rule is, in all material respects, identical to Order 24 of the *Rules of the Supreme Court, 1965*, in the United Kingdom. Notwithstanding the lack of a clear mandate in the wording of the rule to do so, the practice for some time has been to order a party to make specific disclosure of a document, and not just to swear an affidavit of documents, where there is sufficient evidence that the document exists, that it is relevant, and that it is in the possession, custody or power of a party. This practice is described with approval in *Supreme Court Practice, 1999*, volume 1 at page 471 (paragraph 24/7/2).

Second, Order 24 Rule 7 (3) of *The Grand Court Rules* requires an application for specific discovery to be “supported by an affidavit stating the belief of the deponent that the party from whom the discovery is sought under this rule has, or at some time had, in his possession, custody or power the document or class of documents specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.” The respondents say that the affidavit of Catherine Percy, upon which the applicants rely, does not do this. Ms. Percy’s affidavit does not contain an explicit exertion of her belief in accordance with the wording of the rule. However, her affidavit (which runs to eleven and a half pages) is in substance an assertion of her belief, together with the grounds for it, that the respondents have relevant but undisclosed documents in their possession, custody or power. That is sufficient. I see no merit in requiring a supplementary affidavit from Ms. Percy which simply repeats verbatim the wording of the rule.

Items a and b of schedule 1 request production of the files of Mr. Asif Bhatia and of Embassy Investments Limited itself. The respondents have asserted on more than one occasion that all discoverable documents have now been listed and disclosed. Like Ms. Percy, I entertain some doubt that Mr. Bhatia and Embassy would not have maintained their own files relating to the insurance claim. Such files would clearly be of central importance. I am directing that Mr. Bhatia file within fourteen days an affidavit asserting that neither he nor Embassy has any further relevant documents to disclose or, alternatively, making the necessary further disclosure.

Item c of schedule 1 requests disclosure of the files of London Plaza Hotels Limited, a co-insured under the policies and not a party to this action. Even assuming that these files are within the custody or power of the respondents, I am not satisfied they have relevance to the present proceeding. This request is dismissed.

Embassy claims an indemnity for the cost of reinstating the hotel to its pre-hurricane condition but has not in fact carried out a reinstatement. The applicants say that Embassy's failure to reinstate must be shown to be reasonable; that places in issue Embassy's reason for failing to reinstate. Embassy replies that it has always intended to reinstate but has not done so because it has not received payment of its insurance claim. Given the magnitude of the claim, Embassy says its failure to reinstate is objectively reasonable. A considerable number of documents are sought under this heading including, for example, communications between Embassy and its banker, internal communications between Hyatt entities connected with reinstatement, and "all documents

relating to pre-purchase due diligence” (the reference is to Embassy’s purchase of the hotel). I am not satisfied that the proper resolution of the issues in this proceeding will require an assessment of how, when, and in what circumstances Embassy came to the decision not to reinstate immediately. These are not documents which, in the words of Order 24, Rule 8, are “necessary either for disposing fairly of the cause or matter or for saving costs.” The requests set out in items d, f, g, h, i, j, k, and l of schedule 1 are dismissed.

The applicant underwriters (with one exception) have sought to avoid the excess coverage policy on the grounds of misrepresentation and non-disclosure. Items e and n of schedule 1 have clear relevance to this issue. I think it reasonable to direct Mr. Bhatia to include in his affidavit an assertion that there are no further documents of these classes to be disclosed or alternatively, making the necessary further disclosure. I do so now.

Item m of schedule 1 calls for disclosure of documents arising from a series of meetings between Embassy and AIG, the primary insurer. AIG asked for and obtained the assurance of Embassy that at least one of the meetings would be on a without prejudice basis. The result, however, was that AIG agreed to pay 100% of the policy amount. It extracted no concession from Embassy during the meetings. The purpose of the meetings appears to have been to allow Embassy to argue (which it did successfully) that AIG should simply honour the policy. In these circumstances, Embassy must establish some public policy justification for claiming the protection of the privilege: see Thanki et al, *The Law of Privilege*, first edition, chapter 7; and *Muller v. Linsley and Mortimer* [1996]

1 PNLR 74 (CA). There is no evidence that Embassy offered or made any concession and, as a consequence, an insufficient evidentiary basis for concluding that disclosure would contravene public policy. I order that the respondents are to disclose, within fourteen days, the documents described in item m of schedule 1 except where those documents are protected by solicitor client privilege.

Item o of schedule 1 is relevant to (and might be important to) the court's determination of the policy wording issues. I order that these documents be disclosed within fourteen days.

Items p, q, r, s and t of schedule 1 refer to classes of documents relevant to the calculation and assessment of the quantum of damages. The respondents concede that these documents would have some relevance, but argue that "in most cases" disclosure is unnecessary because the same information in consolidated form has already been provided. The requested items – including daily occupancy reports, a breakdown of marketing costs, and journal entries – appear to me to have sufficient importance that the respondents should not be required to rely upon consolidations alone. I order that these items be disclosed within fourteen days.

The entirety of schedule 2 requests classes of original records which would substantiate in detail Embassy's claim for damages. For example, with respect to certain claims submitted after Hurricane Ivan, purchase orders and cheque requisitions have already been disclosed; the applicants now request the invoices for these same items. The

respondents resist this branch of the application on the ground that disclosure is unduly onerous and not "necessary" for disposing fairly of the action or for saving costs. It is clear that these documents have relevance. What is unclear is the extent of the burden placed upon the respondent if it is ordered to produce them. Embassy is at liberty to apply within the next fourteen days for an order declaring that production of these records would impose an unreasonable burden; in the absence of such an application, the documents must be produced.

Schedule 3 is a lengthy list of specific documents which are referred to in other documents contained in Embassy's document discovery. The documents of schedule 3 are missing. Embassy has provided a detailed response to schedule 3 which, in essence, asserts that all appropriate enquiries have been made and all relevant and existing documents have been disclosed. I think it appropriate to direct Mr. Bhatia, as I now do, to incorporate these explanations in his forthcoming affidavit of documents. There is one exception. Item 35 of schedule 3 requests transcriptions of certain handwritten notes; that is no part of the duty of a party making document disclosure.

Since the parties have enjoyed divided success on this application, I leave each of them to absorb their own costs.

Dated this 30th day of January, 2008

*Henderson, J.*

Henderson, J.  
Judge of the Grand Court

