8/5/10
Foster

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 61 OF 2010-AJEF

BETWEEN:

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

Plaintiff

AND

(1) BRIAN PATRICK GILBERTSON
(2) PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP)
(3) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
(4) PALLINGHURST RESOURCES MANAGEMENT LP
(5) AUTUMN HOLDINGS ASSET INC.

Defendants

(By Original Action)

AND BETWEEN:

(1) BRIAN PATRICK GILBERTSON
(2) AUTUMN HOLDINGS ASSET INC

Plaintiffs to Counterclaim

AND

(1) VIKTOR VEKSELBERG
(2) VLADIMIR VIKTOROVICH KUZNETSOV
(3) RENOVA HOLDING LIMITED
(4) RENOVA RESOURCES PRIVATE EQUITY LIMITED

Defendants to Counterclaim

(By Counterclaim)

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

Appearances: Plaintiff/Defendants to counterclaim – Mr. Richard Millett Q.C. and Mr. Marc Kish of Maples and Calder

First and Fifth Defendants/Plaintiffs to counterclaim – Mr. Alain Choo-Choy Q.C. and Mr. Graeme Halkerston of Appleby

Heard: 10th, 11th and 12th March 2010

RULING (3)

1. By summons dated 29th September 2009 the 4 defendants to counterclaim applied, first, pursuant to GCR O.14, r.12 for an order that the whole of the counterclaim be dismissed and summary judgment entered for the defendants to counterclaim on the ground that the plaintiffs to counterclaim have no prospect of succeeding at trial. In the alternative they applied for orders dismissing certain specified paragraphs of the counterclaim and for summary judgment to be entered in respect of those paragraphs, again on the ground that the plaintiffs to counterclaim have no prospect of succeeding at trial in respect of those paragraphs. Secondly, the defendants to counterclaim applied in their summons for orders pursuant to GCR O.18, r.19, firstly that a specific paragraph of the defence in the original action be struck out on the basis that it discloses no reasonable ground for defending the claim and, secondly and in the alternative, for orders that certain specific paragraphs of the counterclaim be struck out on the ground that they disclose no reasonable cause of action.

2. Following further argument on 15th April 2010 concerning the jurisdiction of the Court to grant summary judgment in favour of a defendant to a counterclaim pursuant to GCR O.14, r.12, I ruled on 28th April 2010 (Ruling (2)) that the Court did not have such jurisdiction. Accordingly, I would dismiss the applications of the defendants to counterclaim pursuant to GCR O.14, r.12 and confine this Ruling to their applications pursuant to GCR O.18, r.19. However, in light of the fact that the question of the Court's jurisdiction pursuant to GCR O.14, r.12 is a

contested issue, I have thought it would be of assistance to set out my brief views also on the merits of the applications pursuant O.14, r.12 at the end of this Ruling. However, in the circumstances, I will rule first on the applications pursuant to GCR O.18, r.19, although at the hearing before me leading counsel for the plaintiff/defendants to counterclaim commenced with and devoted most of his submissions to the applications for summary judgment pursuant to O.14, r.12, which in his skeleton argument he said was his primary application (skeleton arguments of defendants to counterclaim paragraph 6).

3. For convenience, when referring to parties individually I shall refer to them by name, using the same names as in my Ruling dated 14th April 2009 but since the present applications relate to the counterclaim (with one exception which relates to a specific paragraph of the defence), I shall in this Ruling, when referring to the parties collectively, refer to them respectively as "the plaintiffs to counterclaim" (being the first and fifth defendants in the original action, namely Mr. Gilbertson and Autumn) and as "the defendants to counterclaim" (being the plaintiff in the original action together with three additional parties, namely Mr. Vekselberg, Mr. Kuznetsov and Renova Holding).

Background

4. The factual background to this dispute is summarised in my said Ruling dated 14th April 2009 by which I granted leave to the plaintiff pursuant GCR O.15, r.12 A (2) to continue this derivative action. The procedural background leading up to

the present applications is summarised in my said Ruling dated 28th April 2010 (Ruling (2)) concerning the jurisdiction of the Court under GCR O.14, r.12. I do not propose for these purposes to repeat what I have already summarised in those Rulings. However, briefly stated, the plaintiff's claim against Mr. Gilbertson and Autumn is a derivative action for the Company (the second defendant) itself and also in its capacity as general partner of the third defendant and in turn the fourth defendant, the Master Fund, in respect of alleged breaches of fiduciary duty by Mr. Gilbertson owed, as a director, to the Company. The plaintiff also makes a claim against Autumn, which is a family entity of Mr. Gilbertson's, for alleged knowing receipt of property traceable to Mr. Gilbertson's alleged breaches of fiduciary duty. The proceedings arise out of a business venture between Mr. Vekselberg and Mr. Gilbertson relating to the establishment and operation of a Cayman Islands private equity fund, the Master Fund. The venture was reflected in an agreement of November 2005, known as the Letter Agreement, between Mr. Gilbertson and Renova Holding, the third defendant to counterclaim. Renova Holding is a company within the Renova Group which is ultimately controlled by Mr. Vekselberg. The effect, relevance, applicability and consequences of the Letter Agreement and the parties' actions in relation thereto over the period from December 2006 in particular up to about June 2007 are all matters of considerable dispute between the parties. A diagram of the corporate and partnership structure, known as the Pallinghurst Structure, which was established pursuant to the Letter Agreement is to be found at page 158 of my said Ruling dated 14th April 2009. The particular matters in dispute concern the proposed acquisition by the

Pallinghurst Structure (although there is a dispute whether such acquisition was an approved investment of the Pallinghurst Structure) of the rights to the Fabergé brand, including the famous Fabergé eggs, ("the Rights") and the circumstances by which the Rights eventually came to be owned indirectly by the Mr. Gilbertson and other different investors through their acquisition of a majority ownership of the SPV company established to acquire the Rights (PEL), leaving the Master Fund, and thus the Pallinghurst structure, with only an insignificant interest, and the consequences of all that.

5. The plaintiff was granted leave to serve its Writ of Summons on Mr. Gilbertson and Autumn out of the jurisdiction on 6th June 2008. On 3rd July 2008 Mr. Gilbertson and Autumn acknowledged service and, as I have already mentioned, I granted leave to the plaintiff to continue this derivative action on 14th April 2009. On 11th May 2009 Mr. Gilbertson and Autumn filed their Defence and Counterclaim and on 5th August 2009 I granted them leave to serve the counterclaim on Mr. Vekselberg, Mr Kutznetsov and Renova Holding out of the jurisdiction. I note that a copy of the counterclaim was provided to the attorneys acting for the plaintiff prior to the application for leave to serve the counterclaim out of the jurisdiction and they were made aware in advance of the hearing of that application. The application was supported by an affidavit by a partner of the English lawyers acting for Mr. Gilbertson and Autumn which summarised each of the claims made in the counterclaim at some length. The affidavit also, as required by GCR O.11, confirmed that the counterclaim amounted to a good

cause of action and that there was a real issue between the parties to the counterclaim which the plaintiffs to the counterclaim might reasonably ask the Court to try. The application for leave to serve out was, of course, made *ex parte* but there was no attempt by the defendants to counterclaim to oppose the application or to set aside the order made or otherwise to challenge the Court's implicit acceptance, in granting leave to serve out of the jurisdiction, that the counterclaim constituted a good cause of action and was a proper case for service out under GCR O.11.

The Defence and the Counterclaim

6. In their Defence Mr. Gilbertson and Autumn deny any liability in respect of the plaintiff's claims. In particular, Mr. Gilbertson refutes any obligation to accept what he alleges were the new terms which Mr. Vekselberg insisted upon in relation to the funding of the acquisition of and the ownership of the Rights. He asserts that Mr. Vekselberg was insisting on changing the terms of the joint venture constituted by the Letter Agreement and that, whether in his capacity as a director of the Company or as one of the parties to the joint venture, he was not obliged to agree to this variation of the agreed arrangements concerning the Pallinghurst Structure and the acquisition of the Rights. Mr. Gilbertson also relies on his contention that after the Rights had been acquired indirectly by him with alternative funding, his proposals to bring the Rights back within the Pallinghurst Structure were rejected by Mr. Vekselberg and/or those acting at his behest (including Mr. Gilbertson's co-director of the Company, Mr. Kuznetsov, the

second defendant to counterclaim). Mr. Gilbertson contends that the agreement to acquire the Rights as an investment of the Pallinghurst Structure was in the circumstances repudiated by Mr. Vekselberg and his associates and that accordingly he was at liberty to accept that repudiation, which he did by pursuing the opportunity to acquire the Rights with other investors. The particular paragraph of the defence which it is sought (presumably by the plaintiff and not by the defendants to counterclaim as the summons states) to strike out pursuant to GCR Order 18 Rule 19 on the grounds that it discloses no reasonable ground for defending the claim (Defence, paragraph 42.9) is the paragraph in which Mr. Gilbertson pleads repudiation of the Letter Agreement and his consequent entitlement to accept such repudiation by pursuing the acquisition of the Rights as he did.

7. The counterclaim is predicated upon the plaintiff establishing liability in respect of the relief claimed against Mr. Gilbertson and Autumn, notwithstanding their defence, and their suffering loss through their obligation to pay damages as a result. In summary, the principal allegation in the counterclaim relates to the alleged repudiatory breach of the Letter Agreement and the alleged acceptance of the repudiation by Mr. Gilbertson. A further, and related, claim is that the alleged breach of the Letter Agreement by Renova Holding was induced and/or procured by Mr. Vekselberg and/or Mr. Kutnetsov and that they are accordingly guilty of the tort of inducing or procuring breach of contract and consequently liable to Mr. Gilbertson for the full amount of any loss the Company has sustained and which

Mr. Gilbertson is found liable in the original action to pay. The counterclaim further pleads both "lawful means" and "unlawful means" conspiracy between the defendants to counterclaim to cause or resulting in damage to Mr. Gilbertson through the Master Fund in which he had a substantial economic interest at the time by attempting to divert the intended ownership of the Rights away from the Pallinghurst Structure. It is averred that the measure of damages for which the defendants to counterclaim are liable in respect of the tort of conspiracy is in this case again the same measure of damages for which Mr. Gilbertson is, on this hypothesis, found liable in the original action. Lastly, as far as the substantial claims in the counterclaim are concerned, it is pleaded that Mr. Gilbertson is entitled to indemnity or contribution from his co-director of the Company, Mr. Kuznetsov, since his loss in respect of any liability in the original action was caused or substantially contributed to by Mr. Kuznetsov's own breaches of his fiduciary duties to the Company. With the exception of the claim to indemnity or contribution, it is the paragraphs by which the other claims summarized above (breach of the Letter Agreement, inducing or procuring such breach and conspiracy by two means) are pleaded in the counterclaim which are objected to and it is sought to have struck out pursuant to GCR O.18, r.19 on the ground that they each disclose no reasonable cause of action.

GCR O.18, r.19

8. The relevant parts of GCR O.18, r.19 provide as follows:

> *19 – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the*

action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be

. . . . . .

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub-paragraph (1) (a)

. . . . . .

The principles which are followed by the Court in considering applications to strike out pleadings under this rule or its equivalent are well established and were substantially laid down in England by the House of Lords in ***Williams & Humbert Ltd v WH Trade Marks (Jersey) Ltd*** [1986] AC368. Those principles were adopted with approval by the Court of Appeal in ***Lhasa Investments Ltd & anor v ICI Company (Overseas) Ltd (in liquidation)*** [1994-95] CILR 293. In giving the judgment of the Court Georges JA said (page 310):

"I turn now to Appeal M1 of 1994. This was an application to strike out significant portions of the original statement of claim. The trial judge acceded to an application in limine on behalf of the respondent that this application be struck out. This has been vigorously attacked.

In acting as he did the trial judge relied on a comment in a speech by Lord Mackay of Clashfern in ***Williams & Humbert Ltd v WH Trade Marks (Jersey) Ltd*** (ibid) *at 441:*

"If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out

and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18 r.19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worthwhile".

The language is strong and, with respect, properly so. The formulation is termed "a general rule".

For the appellants, it was vigorously urged that they were the victims of an injustice – being shut out before being heard. Obviously, Lord Mackay of Clashfern must have been fully aware that this would be an inevitable consequence if that general rule was applied. Nonetheless he propounded it in clear language.

The trial judge was at the stage of the hearing of this application familiar with the pleadings and the issues which they raised. Attorneys for the appellants had intimated to attorneys for the respondent by a letter dated February 21st, 1994, that they planned to make the application to strike out. By a letter dated February 25th, 1994, attorneys for the respondent had replied stating their intention to ask that such a summons be struck out in limine.

At the beginning of a four day hearing an "Outline of the argument of Lhasa and Concorde: The Strike Out Summons" was handed to the judge. He did not see the outline of the argument intended to be advanced in support of the contention that the statement of claim was embarrassing and prejudicial.

The rule propounded by Lord Mackay is, with respect, salutary. Long drawn out preliminary skirmishes often achieve nothing but delay which prejudices the due administration of justice. It was obvious to the trial judge from the pleading that there was a serious issue to be tried between the parties and that that issue was identifiable on the pleadings. Defences had been filed and fairly voluminous particulars delivered on request.

It was urged that in ***Morris v Mahfouz (No. 3)*** [English Chancery Division, May 25th, 1994] *Rattee J heard and ruled on a number of preliminary objections based on what could be called defects in pleading. He made clear at the end of his ruling that he may have wasted time. He stated:*

> *"With hindsight, I take the view that I allowed myself to be tempted by the skilful advocacy of counsel for the respondents to listen to such points for considerably longer than was appropriate. I see no reason to compound my error by dealing with such points any further in the judgment".*
>
> *The arguments which were not advanced by way of preliminary objection to the pleadings have not been rejected. They will be available, if thought useful in the course of the hearing.*
>
> *I see no reason for differing from the trial judge in the course he followed in this case. The principle is well established that no case should be struck out on the basis that the statement of claim is defective unless the defect is irremediable. Having listened at some length to the arguments presented here, I am satisfied that the application in this case could not succeed and that the trial judge acted properly in acceding to the preliminary objection. This appeal must also be dismissed".*

9. I was also referred to a further passage in ***Williams & Humbert v WH Trade Marks*** (ibid) at page 435 where Lord Templeman made the following comment:

> *"In **Hubbuck & Sons Ltd v Wilkinson** [1899] 1 QB 86 Sir Nathaniel Lindley, MR pointed out the distinction between Ord. 18, r.19 (then Ord. xxv, rule 4), which dealt with striking out and Ord. 33, r.3 (then Ord. xxv, r.2), which enables a point of law to be set down and argued as a preliminary issue. He said, at 91:*
>
> > *"Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. xxv, r.2; the other is to apply to strike out the statement of claim under Ord. xxv, r.4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks".*
>
> *The observations of Lindley MR directed to striking out a statement of claim apply equally to applications to strike out a defence or part of a defence".*

This principle that it is only in plain and obvious cases that recourse should be had to the summary process under [O.18, r.19] is set out in the 1999 Supreme Court Practice at paragraph 18/19/6. It goes, on by reference to ***Wenlock v Moloney*** [1965] 1 WLR 1238, to state that [the summary process under O.18, r.19] cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. If there is a point of law which requires serious discussion an objection should be taken on the pleadings and the point set down for argument under O.33, r.3.

The Objections to the Pleading of the Counterclaim

10. A principal criticism by leading counsel for the defendants to the counterclaim of the pleaded case of the plaintiffs to counterclaim relates to their allegation of repudiatory breach of the Letter Agreement by Renova Holding (as allegedly procured by Mr Vekselberg and/or Mr Kuznetsov) in light of the fact that in their defence it is pleaded that it is common ground (and is accepted by all parties) that pursuant to its terms (clause 8.2) the Letter Agreement was, in May 2007, agreed by the parties to it, in the circumstances, to have no legal effect *ab initio*. Accordingly, it is argued, the Letter Agreement cannot have been terminated in late 2006 or early 2007 by any acceptance by Mr. Gilbertson of any alleged repudiatory breach of the Letter Agreement by Renova Holding. Various objections to the relevant paragraph of the defence (referred to above) and of the consequential pleading of the relevant part of the counterclaim in that regard were

developed in a lengthy and detailed analysis of the pleadings. Related to this, substantial submissions were made concerning the pleading of the counterclaim in respect of the claim of the alleged inducement or procurement by Mr. Vekselberg and/or Mr. Kuznetsov of Renova Holding's alleged breach of the Letter Agreement, which was also analysed in considerable detail. Further criticism was made at length of the pleading of the counterclaim regarding the claim based on the alleged conspiracy between the Plaintiff, Mr Vekselberg, Mr Kuznetsov and Renova Holding and, in particular, the legal requirements of a "lawful means" conspiracy and of an "unlawful means" conspiracy respectively were analysed in some depth. It was argued, following an extensive review of the relevant law, that the facts pleaded in the counterclaim could not in law found an action based on either type of conspiracy. Lastly, again in summary, it was also argued at length, on behalf of the defendants to counterclaim, that the claim against Mr Kuznetsov for indemnity and contribution in his capacity as a co-director of the Company did not constitute a good cause of action on the facts pleaded.

General Comments

11. All of the objections to and criticisms of the pleading of the various claims in the counterclaim and of the specific paragraph of the defence were rejected and responded to at length by leading counsel for Mr. Gilbertson and Autumn, the plaintiffs to counterclaim. Although, as explained above, the application pursuant to GCR O. 18, r. 19 was heard together with the purported application pursuant to GCR O.14, r.12 and a significant amount of evidence, particularly

correspondence, was referred to and most of the time was spent on submissions in support of the latter application, the hearing before me nonetheless took 2½ days (and the further hearing on the court's jurisdiction under GCR O. 14, r. 12 took a further ½ day). Accordingly I now find myself in a position similar to that of Rattee J in ***Morris v Mahfouz (No. 3)*** (ibid) in that with hindsight I consider that regrettably I allowed myself, contrary to established principle, to listen to a very lengthy and detailed examination and analysis of a considerable number of objections to the pleading of each of the various claims in the counterclaim and of part of the defence and then to the response thereto, in considerably more depth and for much longer than was appropriate. I did unfortunately indeed listen to a "minute and protracted examination" of the pleadings in relation to the application pursuant to GCR O. 18, r. 19 and of the documents and the facts of the case in relation to the purported application pursuant to GCR O.14, r. 12. Furthermore, although there was no submission to that effect by leading counsel for Mr. Gilbertson and Autumn, it does, on reflection, seem to me that at least certain of the points made by leading counsel for the defendants to counterclaim did amount to points of law which might have been more appropriately argued on an application pursuant to GCR O. 33, although I would be extremely reluctant to further delay the progress of these proceedings to trial by allowing any such application to be made now. In particular, the interpretation of the particular clause of the Letter Agreement relating to its mutual termination as agreed in May 2007 and the consequences for the relevant parts of the defence and the counterclaim of the Letter Agreement ceasing to have legal effect *ab initio* seem

to me to amount to significant points of law inappropriate for resolution in a summary application such as this pursuant to either GCR O. 18, r.19 or O.14, r.12. I consider that this applies also at least in respect of the conspiracy claims made in the counterclaim and perhaps too in relation to the claim against Mr. Vekselberg and/or Mr. Kuznetsov in respect of the tort of inducement or procurement of the alleged breach by Renova Holding of the Letter Agreement. Strongly contested difficult issues of law do not seem to me to be appropriate for disposal at a hearing of a summary nature; it cannot be said that such issues are "*plain and obvious so that any master or judge can say at once that the* [counterclaim or defence] *as it stands is insufficient, even if proved, to entitle the plaintiff* [or defendants to counterclaim] *to what he* [or they] *asks*".

12. There was substantial argument between leading counsel for the parties as to whether or not striking out the parts of the counterclaim in issue (and if all the specific paragraphs objected to were struck out, it would mean effectively striking out the whole counterclaim) and allowing it instead to proceed to trial with the main action would add substantially to the length and cost of the trial of the main action or, put another way, whether a strike of the counterclaim out now would result in a substantial saving of time and cost. It was pointed out by leading counsel for the defendants to counterclaim that the counterclaim is made, not only against the plaintiff but also against the three new parties, Mr Vekselberg, Mr Kuznetsov and Renova Holding, all of whom are outwith the jurisdiction. It was contended that a trial of the issues raised in the counterclaim would inevitably add

to the length and complexity of the trial of the original action and involve additional time and cost. Counsel for the plaintiffs to counterclaim strenuously rejected this argument. He contended that the three additional parties were each anyway intimately involved in all the issues which are already the subject of the original action. The counterclaim is, of course, predicated upon the plaintiff succeeding in establishing liability against Mr. Gilbertson and Autumn, with the consequence that all the issues raised in the counterclaim overlap with the issues raised in the original action and the defence. It was argued that there would be no advantage to be gained by dealing with the counterclaim summarily and separately and no substantial saving by doing so.

Conclusions

13. In the circumstances I have outlined and in light of my general comments above I have concluded that nothing is to be gained and, indeed that it would be inappropriate for me to spend time analysing and commenting on the pleading of the specific paragraphs of the counterclaim and the particular paragraph of the defence, which were objected to, in any more detail in this Ruling on a summary application. As a consequence of the plaintiff's initial application in June 2008 for leave to serve out of the jurisdiction, then the plaintiff's application to continue the action pursuant to GCR O.15, r.12A which resulted in my Ruling dated 14th April 2009 and then the application of the plaintiffs to counterclaim in August 2009 for leave to serve the counterclaim out of the jurisdiction, I am now very familiar with, and I believe I have a clear understanding of, the issues in

these proceedings and of the parties' several claims as reflected in the various pleadings. Before the latest hearing I was also provided with substantial skeleton arguments by counsel for the parties and I have also heard lengthy submissions on the pleadings, albeit with hindsight I believe I should have declined to hear them. Nonetheless, those skeleton arguments and submissions further reinforced my familiarity with the details of this dispute and have confirmed my firm view that there are serious issues between the parties which should be tried and that those issues are clearly identifiable from the present pleadings in both the original action and the counterclaim. I consider that it is appropriate in the overall interests of justice that these issues be tried together in the usual way. It would, in my judgment, be inappropriate to deal with the issues raised in the counterclaim summarily. Also, in my view, the trial of the issues raised in the counterclaim, dependent as they are on the same circumstances as arise in the original action, will not add to the length and costs of the trial to such an extent as to make it appropriate or desirable to deal with the main action and the counterclaim separately or to resolve the counterclaim or the specific paragraphs objected to in a summary way. In my opinion it is not plain and obvious that the objections to the pleading of the counterclaim and to the specific paragraph of the defence obviously demonstrate that they do not constitute good causes of action. As I have said there are clearly significant and extensive arguments, including difficult and important legal points, involved which are not, in my view, appropriate for summary disposal pursuant to GCR O.18, r.19.

14. I am accordingly not willing to grant the applications of the defendants to counterclaim pursuant to GCR O.18, r.19. However, I have not determined their objections to the relevant pleadings and they have not been rejected; they are simply not to be resolved on a summary basis. They will be available to the defendants to counterclaim at the trial of the original action and the counterclaim if they see fit to make them.

Applications pursuant to GCR O.14, r.12

15. As explained above, I have already ruled (Ruling 2) that I do not have jurisdiction to grant summary judgment to the defendants to counterclaim on the counterclaim or specific parts of it on the ground that the claims have no prospect of success at trial. If I am wrong about that, the basis upon which I am wrong may, arguably, be relevant. In particular, if I am wrong in rejecting, as I have, the argument that pursuant to Section 18(2) of the Grand Court Law the practice and procedure of the High Court in England pursuant to Part 24 of their Civil Procedure Rules (CPR) is applicable here it may, as I pointed out, be arguable that the test to be applied on an application for summary judgment by a defendant to a counterclaim is that expressly provided for by r.24.2 of the CPR. That provides as follows:

> *"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*
>
> *(a) It considers that –*
> *(i) that claimant has no real prospect of succeeding on the claim or issue*
>
> . . . . . .

(b) *there is no other compelling reason why the case or issue should be disposed of at a trial".*

GCR O.14, r.12 and r.14 on the other hand provide as follows:

> *"(12). Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for that defendant.*
>
> . . . . . .
>
> *(14) Unless on the hearing of an application under rule 12 either the Court dismisses the application or the plaintiff satisfies the Court that he has a prospect of succeeding on the whole or part of his claim and.....the Court may dismiss the claim and give judgment for the defendant.*
>
> . . . . . .

16. In ***Re Omni Securities Ltd (No. 3)*** [1998] CILR 259 Smellie CJ, in considering the applicable test under O.14, r.12 (prior to the introduction of the CPR) and, having referred to the decision of this Court in ***Cribb v Reed*** [1997] CILR N-5 said:

> *"I agree with those statements. I think they properly emphasise the need to show that the plaintiff's case has no prospect of success. Indeed it is at some risk of pedantry that one would seek further to define the test but it is a risk worth taking, I believe, in order to emphasise that there should be rationalisation between the test upon an application by a plaintiff with that upon an application by the defendant. I would therefore only add that in any rational application of the rule, there must be implicit the tests of reasonableness and realness.*
>
> *I agree with Mr Brindel that the rule could not properly be predicated only upon a fanciful or improbable prospect of the plaintiff's claim succeeding. And the fact that the rule is engrafted upon O.14, allowing also for the defendant's application for summary dismissal, does to my*

mind imply the reverse of the test of O.14, r.1 which is applicable where a plaintiff applies for summary judgment. That test as stated in the headnote to ***National Westminster Bank plc v Daniel etc*** *([1994] 1 All ER at 156) requires a defendant seeking unconditional leave to defend to "satisfy that court that there is a fair or reasonable probability of having a credible defence and not merely that there is a faint possibility that he has a defence".*

17. In light of this it may be said that as far as the test of showing no prospect of success is concerned, there may be little practical difference between the test applicable to GCR O.14, r.12 and the test under CPR r.24.2 in that respect. However, there clearly is no express equivalent in GCR O.14 of the provision in r.24.2 (b) of the CPR requiring the court's consideration of whether there is any other compelling reason why the case or issue should be disposed of at a trial. Nor was I provided with any guidance as to what such other compelling reason might be. Since no application was made by the defendants to counterclaim pursuant to CPR Part 24 or the practice and procedure thereunder, that is not surprising.

18. However, this is probably an academic issue in the present case since I am satisfied that this is not a case in which it would be appropriate for me to determine summarily that the plaintiffs to counterclaim have no real or reasonable prospect of success and I decline to do so. As I have already said, I was taken through a considerable amount of evidence by leading counsel for the defendants to counterclaim in support of their applications for summary judgment pursuant to O.14, r.12 but it is quite clear to me that much, if not most, of that evidence, or rather the significance, interpretation and legal consequences of it, is strongly

disputed. In my opinion, this is not a case in which it can fairly be said that the plaintiffs to counterclaim have only a faint possibility of success on their claims. I note too that in ***Re Omni Securities Ltd (No. 3)*** (ibid) Smellie CJ went on to say:

> *"In applying this test, while one must be mindful of the cautionary words of Danckwerts L.J. in* ***Wenlock v Moloney*** [referred to above] *at 1244 – expressed upon an Order 18, rule 19 application – not to usurp the position of the trial judge by embarking upon "a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination...". There nonetheless has to be some assessment of the evidence presented in support of the plaintiff's case to see whether there is a fair and reasonable probability or more than a faint possibility of success... And, contrary to the express prohibition arising upon on an Order 18 application, I think O.14, r.13, by its terms implies some consideration of the evidence where it expressly invites a plaintiff to show cause against a defendant's application by filing and serving evidence in reply".*

19. As I have said above, a consideration of the evidence to which I was referred by both leading counsel does not cause me to believe that the plaintiffs to counterclaim have only a faint possibility of success in the claims which they make. On the contrary, this seems to me to be very much a case which should go to trial in the usual way and is not one in which judgment on any of the respective claims of the parties should be granted summarily. I would, had I considered that I had jurisdiction to consider the applications of the defendants to counterclaim pursuant to GCR O.14, r.12, have refused to grant them summary judgment on the counterclaim or any part thereof. In my opinion, this is undoubtedly a case which should go to trial and the respective claims of the parties determined after full discovery and oral evidence with cross examination in the usual way. Much of

WH Trademarks (Jersey) Ltd. (ibid) at page 441). This is precisely what has happened. The only consequence has been to delay the progress of the proceedings to trial and to cause significant costs as well as taking up substantial court time. In the circumstances I order that the costs of the plaintiffs to counterclaim of and incidental to these applications, and as taxed if not agreed, shall be paid by the defendants to counterclaim in any event.

Dated: 5th May 2010

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