

21/2/06



1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3
4 CAUSE NO: 798 - 799/02; 801-802/02; 808-810/02

5
6 BETWEEN: NATIONAL CONCRETE & ORS PLAINTIFFS

7
8 AND: IVALEE SCOTT DEFENDANT

9
10 CORAM: MME. JUSTICE RAMSAY-HALE

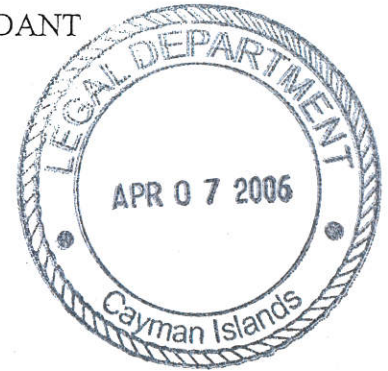
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12 Appearances:

13 Mr. Kyle Broadhurst of Broadhurst Barristers for the plaintiffs

14 Mr. Steve McField of Steve McField & Associates for the defendant

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16 Date of hearing: 21st February 2006

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18 RULING

19 This is an application by the plaintiffs that the defences filed in these matters be struck
20 out and judgment entered for the plaintiff as the defendant herein has failed to comply
21 with orders made for discovery, two of which were 'unless' orders made by Levers J.

22 Counsel for the Plaintiffs cited the Learned Editors of the *Supreme Court Practice 1999*
23 *Edition* in support of his application:

24 "An 'unless' order spells out the consequences of failure to comply with its terms
25 and disobedience to such an order is likely to be held to contumelious behaviour,
26 resulting in the dismissal of the action, or the striking out of the defence."

27 The authorities make it clear that, as a matter of principle, "The Court should not be
28 astute to find excuses for such failure since obedience to orders of the Court is the
29 foundation on which its authority is founded": *Re Jokai Tea Holdings Ltd* [1993] 1 All E
30 R 630.

1 The issue to be resolved is whether the defendant's failure is intentional and
2 contumelious. It is for the defendant to demonstrate to the Court that there was no
3 intention to ignore or flout the order and that the failure to obey was due to extraneous
4 circumstances.

5 Counsel for the defendant submitted that the defendant had not deliberately flouted the
6 orders but had experienced difficulty in obeying them because of her illness and because
7 of her husband's illness, as she is required to attend to his needs. He produced divers
8 documents which speak to his client's illness and ongoing treatment, but these were
9 unsupported by any evidence by the defendant herself going to show that she was unable
10 to instruct her attorney or make the appropriate disclosure as a result.

11 She is clearly in a position to make an Affidavit. She purports to do so in a document
12 dated February, 6th which was produced to the Court at the hearing of this matter and she
13 did in fact make an Affidavit in April 2005 in response to the Plaintiffs application for
14 Summary judgment at a time when she was undergoing treatment for cancer.

15 None of the matters put before me explain the defendant's failure to make disclosure in
16 response to the orders made in 2003. There is nothing in the fact that the Defendant
17 underwent surgery for breast cancer and chemotherapy in April of 2005 that satisfies me
18 that she has not been in a position at any stage to instruct her Attorneys and to make
19 disclosure. Her illness was a matter that was raised with Levers J. at the hearing of the
20 summons for an "unless" order in November of 2005 and that order was nonetheless
21 granted by the Learned Judge on terms she was satisfied the Defendant could meet.
22 Nothing said by the defendant in her Affidavit of 4th February, 2006 explains or
23 exonerates her failure to do so.

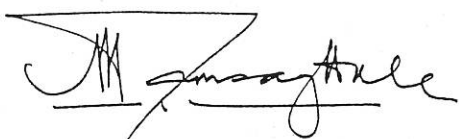
1 I am satisfied on the evidence that the defendant has consistently and without any
2 sufficient excuse, failed to obey the orders of the Court for disclosure.

3 I have had sight of the documents disclosed to the plaintiffs the day before this Hearing,
4 which documents were not included in the bundle. This attempt at compliance does not
5 cure the default complained of as the disclosure made falls far short of the disclosure
6 ordered.

7 I find her failure to be intentional and contumacious. That failure to disclose documents
8 has delayed the trial of this matter to the prejudice of the several plaintiffs herein. To
9 grant a further extension of time to a defendant who persists in default would be to permit
10 an abuse of process.

11 In the result, I order that the defences in the matter of National Concrete Ltd. and other
12 related matters be struck out. I enter judgment for the plaintiffs and award costs in the
13 action to the plaintiff on an indemnity basis.

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17 Hon. Justice Ramsay-Hale
18 Acting Judge of the Grand Court
19 21st February 2006