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IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 104 OF 1995

BETWEEN: **OMNI SECURITIES** PLAINTIFF

AND: DELOITTE & TOUCHE et al DEFENDANTS



Appearances:

Mr. Dominic McCahill of W.S. Walker & Co., for the plaintiff
Mr. Nigel Clifford of Hunter & Hunter for the 8th defendant
Mr. Graham Ritchie of Charles Adams Ritchie & Duckworth for the 1st - 7th 9th and 10th defendants.

Ruling

As a preliminary point of objection taken on the 22 February 1999, the defendants complained at the seemingly deliberate and calculated failure by the plaintiff to comply with the order of 13 November 1998 - the same order which is in issue today. That failure was then noted by the Court as having been aggravated by the fact that although the deadline of 31 December 1998 had been set by the order for the filing of the plaintiff's application to amend its statement of claim, the plaintiff's summons issued for

1 that purpose and the proposed re-draft amendments were not filed until 9 February 1999
2 and then without any extension of time sought or granted by the Court.

3 On the 22 February Mr. Turner's explanation that the plaintiff's advisers did not seek to
4 make an application for an extension of time because they did not anticipate any
5 objection, betrayed the misconception that the Court's orders need not be obeyed if the
6 other side does not object.

7 I expressed my concerns then about that manner of the flouting of the orders of the Court,
8 for in effect, what the plaintiff appeared to have achieved was an extension of time by the
9 mere expedient of filing an application beyond the time originally set.

10 In effect that is the position which the plaintiff has again brought about in relation to the
11 discovery aspects of the Order of 16 November, which set the deadline of 1st March 1999
12 for service of list of documents and 15 March 1999 for inspection of documents.

13 The plaintiff's application for the extension of time for discovery compliance was not
14 filed until the 26 February 1999, with the first return date not until today. Thus, in effect,
15 the plaintiff has obtained an extension of more than 3 weeks without the sanction of the
16 Court.

17 All this is against the background that it was upon the defendants' summons, seeking to
18 progress the action, that the Orders of the 13 November 1998 were made to begin with.

19 With that history of the matter in mind I am obliged to share the concerns expressed now
20 by Mr. Ritchie and Mr. Clifford at the manner of the plaintiff's conduct of this litigation.

21 In this regard Mr. McCahill's insistence in his arguments upon the rule that the Court
22 may extend time even if the application is not made until after the expiry of the set

1 period, is equally revealing of a tendency to take the Court's process for granted as was
2 Mr. Turner's unacceptable explanation on the 22 February last.

3 It is therefore perhaps just as well that I repeat my acceptance of defendants' submissions
4 on that occasion - that the conduct of litigation is no longer to be approached as it was in
5 the by - gone era when parties would simply conduct their case as it suited their own
6 ends.

7 The modern approach to case management now dictates that deadlines set by the Court
8 must be met not simply for the sake of the parties to the particular case, but also for the
9 more overall effective administration of justice through the Courts.

10 Where, as I find to be the case here, no proper explanation is given for the failure to meet
11 the deadlines of 1st and 15th March, it simply is not good enough for the defaulting party
12 to say that the other side can claim no prejudice from its failure to comply.

13 The longer a case runs the longer will be the hardship and expenses it imposes upon a
14 defendant and so hardship and prejudice are always to be presumed, at least unless the
15 defaulting party can show otherwise.

16 That is the approach I take to the present matter and I conclude that the plaintiff's failure
17 to comply with the orders of the Court, though not yet contumacious, is deserving of
18 being addressed by the imposition of strict conditions.

19 Before expressing the order I make now, I wish for it to be understood that I place no
20 personal blame for the delay with Mr. McCahill who, although somewhat misguided in
21 his submissions as to the modern application of the rules, has no doubt been very pressed
22 to keep abreast of the many and varied demands of this complex case. I am however
23 particularly concerned at the lapse of time between July of last year when he had

1 personally completed the preliminary selection of documents in Switzerland for
2 discovery in this action, and 3rd March of this year – 8 or 9 months – before those
3 documents were simply photocopied and delivered to Cayman. That state of affairs can
4 only be explained by the failure on the part of the plaintiff to dedicate the necessary
5 resources to the task and, even if that was the result of the liquidator’s conservative
6 approach to costs, that does not excuse the failure. I have already commented upon the
7 impact of delay upon the defendants. I find that for the purposes of meeting the terms of
8 the orders for discovery, the documents were well within the power of the plaintiffs so
9 that they could reasonably have done so and, if unable to give full and complete
10 discovery at once, a proper demonstration of the plaintiff’s bona fides would have been
11 the offer of a first list with an application to allow for a supplemental list or lists to
12 follow.

13 In the result I find that the plaintiff has failed without due cause to meet the orders for
14 discovery and that its failure is more than of a technical nature. I do not however think
15 that matters have reached the stage where I need to address the plaintiff’s failure with an
16 “unless” order. Given the nature of the action and the fact of the ongoing liquidation of
17 the plaintiff in the hands largely of uninterested professionals, for now the approach I still
18 take is that a word to the wise should be sufficient. An “unless” order is an order of last
19 resort where failure to comply will ordinarily require the imposition of the ultimate
20 sanction of striking out the defaulting party’s case: Hytex Information Systems Ltd v
21 Coventry City Council [1997] 1 W.L.R. 1666. I do not think we have quite yet reached
22 the stage where such an order is necessary. That may well be at the next step in the event
23 of any further default.

1 The order I make is that the plaintiff will have a final extension of time - for the provision
2 of its list of documents and for inspection - to the times sought in its summons; ie: 3rd
3 May and 17th May respectively and the 8th defendant's summons seeking an unless order
4 will be dismissed.


5 Nonetheless I find, given the history outlined above, that there were reasonable grounds
6 for its issuance by the 8th defendant.

7 Costs of these proceedings to the defendants, in any event, on both summonses
8 respectively, to be taxed if not agreed.

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14 Anthony Smellie
15 CHIEF JUSTICE
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17 DATED THIS 25TH DAY OF MARCH 1999.

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