

ROYAL COURT
(Samedi Division)
31st October, 1996

201.

Before: The Judicial Greffier

Between	John Stuart Clements, Lance Dorian Ranger and Attendus Treuhandgesellschaft (suing as the trustees of J.D. Hawe Settlements Nos. 1 and 3)	Plaintiffs
And	Walbrook Trustees (Jersey) Limited	First Defendant
And	Jefferson Seal Limited	Second Defendant
And	Jefferson Seal Limited (joined at the instance of the First Defendant)	Third Party

(1) Application of the Plaintiffs for an Unless Order to enforce compliance with a previous Order of the Judicial Greffier.

(2) Application by Second Defendant for an Order setting aside the Unless Order and declaring that the Unless Order had been complied with.

Advocate A.D. Robinson for the Plaintiffs;
Advocate A.D. Hoy for the Second Defendant.

THE JUDICIAL GREFFIER: This Judgment has been written to provide the parties and the Court with a statement of my reasons for two sets of decisions, both of which have now been appealed to the Royal Court.

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This action is one of a number relating to an investment made in the Confederation Life Insurance 9.875% 2003 Bond. The Plaintiffs are the current trustees of certain trusts and the Second Defendant was the stockbroker.

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On 15th July, 1996, after hearing the Plaintiffs and the Second Defendants through the intermediary of their advocates I ordered *inter alia* that the Second Defendant shall, within twenty-eight days from the date hereof, furnish the Plaintiffs with, and file particulars of and produce for the inspection of the Plaintiffs, documents in the manner set out in paragraphs 1, 2, 3, 6, 7 and 8 of Schedule Two to that Order.

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On 25th September, 1996, I received a letter from Advocate Robinson together with a draft Summons seeking an Unless Order against the Second Defendant for non-compliance with my Order dated 15th July, 1996 which letter contained a request that I

abridge the time period for giving notice for fixing a date for the Summons to 24 hours. I granted this application and, accordingly, Advocate Robinson was able to give notice to Advocate Hoy to attend before my Secretary at 3 p.m. on 27th
5 September, 1996, to fix a date for the hearing of the Summons, which Summons was, in fact fixed for 10 a.m. on 10th October, 1996. The Unless Order sought in that Summons related solely to the failure of the Second Defendant to produce certain documents in accordance with the Order of 15th July, 1996.

10 When the two advocates appeared before me on the morning of 10th October, 1996, it transpired that Advocate Robinson had, earlier that morning, received a bundle of documents from Advocate Hoy, which purported to comply with the parts of the
15 earlier Order relating to the production of documents and had had no opportunity to check these.

20 Advocate Robinson submitted that, as there had been a very clear breach of the previous Order, which allowed a twenty-eight day period for compliance, and which had expired about eight weeks earlier, with no application having been made for an extension of time within which to comply with the previous Order and as he had not been given the opportunity, by virtue of the late arrival of documents from Advocate Hoy even to check whether
25 there had been compliance, he should be granted an Unless Order and full indemnity costs.

30 Advocate Hoy indicated that the failure to provide these documents had been a complete oversight and that this had only been brought to his attention nine working days before when the Second Defendant had given notice for the fixing of the date for the Summons. He also indicated that once he had applied his mind to the provision of the documents there had been some difficulties relating to variations between different lists of
35 documents held by his clients. He suggested that the making of an Unless Order would be an unnecessarily forceful action. Advocate Robinson, in reply submitted that there had been a history of the Second Defendant's dealing with matters at the last possible moment and that the late production of these
40 documents was yet another example of this.

45 The action was placed on the pending list on 8th December, 1995, and the Second Defendant neither filed a pleading within the twenty-one day period nor applied for an extension of time as a result of which an application under Rule 6/7(5) for Judgment in default of an Answer was brought before the Royal Court on 19th January, 1996. The Summons which led to the hearing on 15th July, 1996, was fixed on 6th June, 1996, but the Second Defendant did not consent to any Orders being made and forced the
50 Plaintiffs to a hearing on every point although indicating at the hearing that Orders in relation to six paragraphs of requests were not opposed.

It therefore seemed to me that the Second Defendant has on all occasions sought to obtain as much time as possible in order to deal with procedural steps. In relation to the Order dated 15th July, 1996, the Second Defendant totally failed to apply its mind to the part of the Order relating to the disclosure of documents. In so doing, it appeared to me that they had acted in a cavalier manner. Court Orders are an important matter and they ought to be treated seriously. I also took into account the fact that if I had adjourned the Summons seeking the Unless Order until the Plaintiffs had had an opportunity to check these documents and if it had subsequently transpired that all the documents had not been provided then the Plaintiffs would have had to incur additional costs in bringing the matter back before me so that I could then make an Unless Order. I was also aware that in the numerous other actions brought against the Second Defendant on a similar basis the Second Defendant had always been slow in taking procedural steps. In the light of all these factors I decided that the appropriate Order was to make the Unless Order and I also decided that I should order that the Second Defendant pay the costs of and incidental to the application for the Unless Order on a full indemnity basis. It has, in the past, been my usual practice in cases in which a party has had to bring a Summons by way of enforcement of a previous Order, to order full indemnity costs in favour of the applying party unless there is some good reason not so to do. To do otherwise leaves a party who is not in any way at fault paying part of their costs when the additional Summons has been entirely occasioned by the defaulting party.

Subsequently, on 16th October, 1996, the Second Defendant brought a further Summons before me in relation to this matter. In that Summons the Second Defendant sought a declaratory Judgment that it had complied with the terms of the Unless Order. However, although this application was not included in the further Summons, it was clear that the Second Defendant was also effectively applying for me to set aside the previous Unless Order which I had made on the basis that there had now been substantial compliance.

Advocate Hoy, on behalf of the Second Defendant frankly admitted that subsequent to the provision of the original documents on 10th October, 1996, he had realised that parts of certain documents had not been supplied to the Plaintiffs and had now supplied these. I was left with the suspicion that if I had not made an Unless Order on 10th October, 1996, Advocate Hoy would not have further applied his mind to these documents in the way in which he had and that they might well have not been provided without the Second Defendant's having to take some further action. Advocate Hoy was concerned at the possibility that despite his best efforts and those of his clients it might subsequently be found that there were further documents which had not been provided and that the Unless Order might take effect thus striking out his client's Answer. I can only deduce from this submission that he and his clients were not absolutely sure



5 that there had been compliance. In the light of this, it was quite impossible for me to make the declaration sought. However, I went on to consider whether there had been sufficient compliance to enable me to vary the previous Order. I asked myself whether there had been subsequent circumstances to justify a variation of that Order. In my view, there had not because what had actually occurred subsequent to the decision on 10th October, 1996, had rather tended to confirm the need for an Unless Order on that date. Furthermore, it seemed to me that 10 Advocate Hoy's fears were not properly founded. If, after using its best endeavours, the Second Defendant for some reason found that it had not fully complied with the Order then it would be able to apply for an extension of time in which to comply with the Unless Order. In so doing, it would have to make full and 15 frank disclosure of the failure and provide affidavit evidence to explain this failure but if that were forthcoming and if the Judicial Greffier were to accept the explanation then it could be expected that the time period would be extended upon terms as to costs.

20 Accordingly, I dismissed this application to set aside the previous Order and ordered that the Second Defendant pay taxed costs of and incidental to the two applications.

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No Authorities