COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/00511

BETWEEN

SIGMA MANAGEMENT BAHAMAS LTD.

Plaintiff

AND

BELGRAVIA INTERNATIONAL BANK AND TRUST LIMITED

First Defendant

AND

BRETTON WOODS CORPORATION

Second Defendant

AND

CLAYTHORN INTERNATIONAL LIMITED

Third Defendant

AND

FRANK R FORBES

Third Party

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Raynard Rigby and Mr. Christopher Francis for the Plaintiff
Mr. N. Leroy Smith with him Mrs. Tara Cooper-Burnside and Mr. Jonathan Deal of Higgs & Johnson for the Defendants
Mr. Antoine Thompson of Lockhart & Co for Third Party Forbes

Hearing Date: 18 November 2019

Practice – Delivery-Up Order – Non-compliance - Unless Order – Claim of non-compliance by defendants - Whether or not there has been compliance – Whether form of order was defective – Whether claim should be struck out

The Court made an order directing the Plaintiff (Sigma) and the Third Party (Frank Forbes) to "deliver up and/or transfer to the Defendant's attorneys the corporate and trust records, financial records, and other documents and papers relating to the First Defendant (Belgravia) on or before 30 November 2017" ("the Delivery-Up Order"). The Delivery-Up Order was not complied with nor was an order for an extension of time sought and or obtained.

On 21 March 2019, the First and Second Defendant took out a Summons to strike out Sigma's Writ and Statement of Claim for non-compliance with the Delivery-Up Order.

On the 5 July 2019, the Court, on its own motion, gave Sigma/Mr. Forbes an unless order to comply with the Delivery-Up Order.

The key issue for determination in this case is whether Sigma and Mr. Forbes complied with the terms of the Unless Order

HELD: Sigma and Frank Forbes are to give full and frank disclosure and produce further documents and records. The parties will address the Court on costs.

1. As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars: **B.E. Holdings Limited v Piao Lianji** 2014/CLE/gen/01472 paras 7 – 11.

2. The Court of Appeal case of **Absa Bank Ltd. v. Meridien International Bank Ltd. (In Liquidation)** [2002] BHS J. No.15 (referring to the case of **Allen v Sir Alfred McAlpine & Sons Ltd** (1968) 2 QB 229) outlined the factors the court would consider upon a striking out application generally. Factors including whether the default has been intentional and contumelious or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible.

3. The Court has broad powers to deal with cases actively. The Court may make orders of its own initiative: O. 31A, r. 19. It may impose sanctions by reason of the failure of a party to comply with the rules, a practice direction or an order of the court: O.31A r. 24 and it may relieve a party from sanctions for failure to comply with any rule, order or direction. Where there is a failure to comply with an "unless" order, the sanction specified in that order will take effect automatically. It is up to the party in default to apply for relief if he wishes to avoid the consequences of non-compliance which are otherwise inescapable: see **Robert Adams (A beneficiary of the Estate of Raymond Adams) v Gregory Cottis (As Executor of the Estate of Raymond Adams)** 2018/PRO/cpr/00035 and **Barbados Rediffusion Services Ltd v Mirchandani** CCJ Appeal Civil No. 1 of 2005.

4. A party's failure to comply with an unless order would only, prima facie, be deemed to be "intentional and contumelious" if the noncompliance occurred without explanation: per Sawyer P in **Absa Bank.**

5. In the instant case, the Court is of the view that the Unless Order should have been more precise and specific especially since at the time it was made, the Admission was already disclosed to the Court and the Defendants' Counsel. An unless order should be certain from the point of view of the party required to comply with it. Any alleged non-compliance should be capable of being proved without the need to consider voluminous evidence or lengthy submission: **Marcan Shipping (London) Ltd v Kefalas** [2007] 3 All ER 365 applied.

6. In the circumstances, the Court does not strike out Sigma's Writ and Statement of Claim because to do so may be regarded as draconian especially since the Unless Order was not precise and specific. That said, Sigma and/or Frank Forbes must not "selectively and unilaterally determine" what they must disclose. Full and frank disclosure of the "*perhaps more than 20 filing cabinets and 90 bankers boxes"* must now be made otherwise Sigma/Frank Forbes must swear, within fourteen days hereof, an affidavit explaining whether the Relevant Documents have at any time been in their possession, custody or power but no longer is and they must detail when they parted with them and what has become of them.

RULING

Charles J:

Introduction

[1] The key issue before the Court is whether or not the Plaintiff, ("Sigma") and the Third Party ("Frank Forbes") complied with the terms of an Unless Order which was made on 5 July 2019.

Procedural history

[2] By a generally endorsed Writ of Summons filed on 4 July 2016, Sigma claimed against the First Defendant ("Belgravia"), the Second Defendant ("Bretton Woods") and the Third Defendant ("Claythorn") (collectively "the Defendants") the sum of $15,720,000.00 due to Sigma for various services rendered to the Defendants, and for which the Defendants failed and/or refused to settle Sigma's invoices, and damages stemming therefrom.

[3] Belgravia and Bretton Woods filed a Third Party Notice joining Frank Forbes as the Third Party. They claim, among other things:

> **"(2)…delivery up and/or transfer by the Plaintiff and/or Third Party Forbes to Belgravia of (a) the corporate and trust records, financial records and other documents and papers relating to the Belgravia Group including Belgravia, (b) all rights, title, interest or title in any**

assets property of or in any company or trust of the Belgravia Group or in any assets or property held for or on behalf of any company or trust of the Belgravia Group or member of the family which is the ultimate owner of the Belgravia Group, and (c) all right, title and interest currently held by the Plaintiff and/or Third Party Forbes in any and all bank and trust accounts related to Belgravia or any other company or any trust of the Belgravia Group."

[4] On 9 September 2006, Belgravia and Bretton Woods filed a Defence and Counterclaim in the action maintaining, *inter alia*, that the services referenced in Sigma's claims were terminated for bad faith, gross negligence, misconduct and/or incompetence.

[5] On 19 October 2016, Sigma filed a Reply and Defence to Counterclaim. Pleadings having been closed, Sigma did not file a Notice of Referral to Case Management as plaintiffs generally do.

[6] The next event was an application on 20 January 2017 by Belgravia and Bretton Woods for, *inter alia,* an order for summary judgment against Sigma and Frank Forbes for a delivery up of documents and records ("Delivery-Up Application"). The Affidavit of Damani Horton filed on 6 October 2017 was lodged in support of the Delivery-Up Application and it exhibited, among other things, letters dated 2 December 2015 and 10 December 2015: (1) pursuant to which Belgravia had (in *circa* December, 2015) terminated the services of Sigma and Frank Forbes and (2) which set out, in 'Schedule A', the certain corporate and trust records, financial records and other documents believed and understood to be in Sigma and/or Frank Forbes' possession and which were required to be delivered up to Belgravia.

[7] The Delivery-Up Application came before me on 16 October 2017. On this day, it was brought to my attention that Frank Forbes had suffered a debilitating stroke on or about 5 October 2017 and was unable to instruct his Attorneys.

[8] In perusing the Court's file, the Court observed that the Writ of Summons was filed on 4 July 2016 and pleadings were closed on 19 October 2016; three days shy of a year when this application came up. Notwithstanding Frank Forbes' unfortunate

health challenges, the Court opined that there was sufficient time for him to instruct his Attorneys as the Delivery-Up Application was pending for some time awaiting a hearing date. In light of that, the Court made an order ("the Delivery-Up Order") directing Sigma and Frank Forbes to "deliver up and/or transfer to…the Defendant's attorneys…the corporate and trust records, financial records, and other documents and papers relating to Belgravia and affiliated persons, entities, or trusts" (the "**Relevant Documents**") on or before 30 November 2017. This was not an Order for discovery but an Order for the return of the Defendant's property.

[9] Sigma and Frank Forbes did not comply with this Order and no order for an extension of the time limited for compliance was sought and/or obtained.

[10] In the intervening period, Higgs & Johnson became the new Counsel on record for Belgravia and Bretton Woods. In a letter dated 22 March 2019 addressed to the Court and Counsel for the parties, Higgs & Johnson (who were instructed in early 2019) stated that it was understood that the important corporate, trust and financial records which Sigma and Frank Forbes had been ordered to deliver up and/or transfer pursuant to the Delivery-Up Order "…are extremely voluminous and are known to have previously occupied more than **20 filing cabinets and 90 bankers' boxes.**"

[11] Higgs & Johnson subsequently took out a Summons filed on 21 March 2019 (the "**Strike-Out Summons**") to strike out Sigma's Writ and Statement of Claim for noncompliance with the Delivery-Up Order. The Strike-Out Summons was supported by the Affidavit of Bruno Roberts ("Mr. Roberts") which deposed, among other things, that:

(1) 'The Relevant Documents constitute the property of Belgravia.'

(2) 'The Relevant Documents are of tremendous significance to Belgravia and Bretton Woods' own interests.'

(3) ‘The Relevant Documents are also believed and understood to be highly material for the purposes of the instant proceedings insofar as they should contain/comprise materials evidencing (among other things) matters such as (i) whether Sigma and/or Frank Forbes actually performed the services for which payment was made and for which payment is claimed; (ii) the standard of any work done; (iii) whether Sigma and/or Frank Forbes was obliged to perform the services for which payment is claimed and whether Belgravia and Bretton Woods are obliged to pay for those services; (iv) the level of remuneration properly payable; and (iv) the nature and extent of wrongdoing by Frank Forbes.’

(4) ‘Despite the clear terms of the Delivery-Up Order, Sigma and Frank Forbes have failed and/or refused to comply with the said Order for approximately 19 months without lawful justification or excuse.’

[12] In or about May 2019, Frank Forbes regained some faculty. By letter dated 9 May 2019, Lockhart, Chilcott & Chancellors (“LCC”) as Counsel for Frank Forbes wrote confirming that: (1) Frank Forbes “is the only person with the requisite knowledge of the documents” and (2) Frank Forbes had “indicated…that the documents are perhaps more voluminous than “20 filing cabinets and 90 bankers boxes” and that they are not all “stored in the same place”.

[13] The Strike-Out Summons came before me on 5 July 2019 (“the Appointed Date”). Mr. Smith who appeared as Counsel for Belgravia and Bretton Woods urged the Court to dismiss the action for abusive and/or contemptuous conduct (irrespective of the relative merits of the offending party’s case) relying on the well-established jurisdiction of the Court to do so as well as the Affidavit of Mr. Roberts.

[14] By written submissions dated 3 July 2019 prepared in opposition to the Strike-Out Application, learned Counsel Mr. Rigby who appeared for Sigma expressly: (1)

acknowledged the LCC's 9 May 2019 Letter and (2) contended at paragraph 5.3(iii) that:

> **"…the implementation of an Unless Order is appropriate in this case and the Court can impose striking out as the sanction if the terms of the Unless Order to deliver up the documents is not complied with".**

[15] The parties appeared before the Court on the Appointed Date. Learned Counsel Mr. Rigby advised the Court that the Relevant Documents had been destroyed. He represented to the Court to the effect that:

> **"These documents will not be any document upon which we will rely in the claim. The documents relate to what Mr. Forbes produced as part of his services. These documents would not be the subject matter of the litigation."**

[16] Evidently, this did not sit well with learned Counsel Mr. Smith who pointed out that this assertion was outrageous in that: (1) the Relevant Documents are property of Belgravia upon which it is entitled to rely within the context of these proceedings wherein the central question necessitates detailed consideration of what services if any Frank Forbes provided to Belgravia and related entities and (2) the argument amounted to a contention by Sigma and Frank Forbes that they should be trusted to determine for Belgravia and Bretton Woods what is and what is not relevant for Belgravia and Bretton Woods' respective cases.

[17] The Court, of its own motion, on 5 July 2019, made the following order ("the Unless Order"):

> **"1. Unless the Plaintiff and the Third Party do by or before 5:00 PM on 26th July, 2019 deliver up and/or transfer to the First and Second Defendants' attorneys, Messrs. Higgs & Johnson, Lyford Crescent, Lyford Cay, New Providence, The Bahamas, the certain corporate and trust records, financial records and other documents and papers relating to the First Defendant and affiliated persons, entities or trusts that were previously ordered and directed to be delivered up and/or transferred pursuant to the terms of the Order herein dated 16th October, 2017 and filed on 3rd November, 2017, the Plaintiff's claims pursuant to its Writ of Summons and Statement of Claim shall**

stand dismissed with Costs to the First and Second Defendants, to be taxed if not agreed;

2. In the event of non-compliance with the foregoing paragraph, the First and Second Defendants' claims and counterclaim as against the Plaintiff and the Third Party, respectively, shall be proceeded with should the First and Second Defendants so choose;

3. The parties shall attend before the Court at 10:00 a.m. on 29 July 2019 for further case management directions."

[18] By letter dated 19 July 2019, Mr. Rigby wrote to the Court and Higgs & Johnson stating that:

> **"Post the hearing, it was subsequently brought to my attention that the documents were not in fact destroyed...I honestly believed the documents were in fact destroyed as was set out in a letter dated 20th June, 2019 from Store Away Ltd…I hereby confirm that the documents which were in the storage unit, are now in my possession and under my control. We are in the process of cataloguing the documents so that we are aware of the contents of the same."**

[19] According to Mr. Smith, no frank explanation was ever provided for that dramatic and abrupt *volte-face* which, among other things, derailed Belgravia and Bretton Woods' Strike-Out Application. More specifically, says Mr. Smith, it was never explained who, specifically, informed Baycourt (Mr. Rigby's Law Firm) that the documents had been destroyed and who, specifically, subsequently told Baycourt that the documents had not been destroyed. Additionally, Baycourt failed to address the fact that it had previously been confirmed by the LCC's 9th May 2019 Letter that the Relevant Documents were actually stored in different locations. Mr. Smith contended that these matters were and continue to be material, given that Frank Forbes was in Court on 5 July 2019 and thus present at the time that Mr. Rigby made the erroneous representations to the Court.

[20] On 26 July 2019, at approximately 3:16 pm, Sigma caused 70 banker's boxes (i.e. boxes having dimensions of approximately 13 inches x 16 inches x 10 inches) (the "Produced Boxes") to be delivered to Higgs & Johnson's Lyford Cay offices. Sigma stated that these are all the documents and records in its possession pertaining to

Belgravia and its affiliated entities. The Produced Boxes were not accompanied by any listing or index serving to explain their contents. In the circumstances, Higgs & Johnson was obliged to conduct a review of the Produced Boxes' contents.

[21] Pursuant to the terms of the Unless Order, the parties appeared before me on 29 July 2019 for Further Case Management. At that hearing, learned Counsel Mr. Smith emphasized that Sigma had not fully complied with the 'Unless' Order. Mr. Francis, one of the Counsel from Baycourt, reiterated that Sigma has delivered everything in its possession. Frank Forbes as well as his then Counsel were not present. The matter was further adjourned to 2 October 2019 and, at the request of Counsel for Belgravia and Bretton Woods by email correspondence, it was further adjourned to 7 November 2019.

[22] On 7 November 2019, Mr. Smith reiterated that Sigma and Frank Forbes failed to comply with the Unless Order and, as a result, they are in Contempt of Court and Sigma's Writ and Statement of Claim stand struck out.

[23] Mr. Rigby argued that Belgravia and Bretton Woods 'did not know what documents Sigma and Frank Forbes had and therefore could not prove noncompliance' and 'Sigma has given full discovery in these proceedings'. The matter was adjourned to 18 November 2019 for all parties to prepare submissions on the issue of compliance/noncompliance with the Unless Order.

The legislative framework

[24] RSC O. 18 r. 19(1) allows a party to attack the validity of its opponent's pleadings which may result in part or the whole of the pleadings being struck out. It provides:

> **"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; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court."

[25] In addition, O. 31A r. 20(1) provide further grounds for striking out a pleading or part of a pleading. It states:

> **21. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —**
>
> **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
>
> **(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;**
>
> **(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or**
>
> **(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."**

The court's powers to strike out

[26] In **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paras [7] to [11] as follows:

> **"[7] As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.**
>
> **[8] In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that**

the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: Ian Peters v Robert George Spencer, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of Order 31A of the RSC and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19.

[11] An application to strike out is essentially a summary procedure and it is not suitable for complicated cases which would require a mini-trial".

[27] These powers are not novel and all parties have accepted that they represent the law. In fact, these powers have been applied in many cases. For example, in the Court of Appeal case of **Absa Bank Ltd. v. Meridien International Bank Ltd. (In Liquidation) [2002] BHS J. No.15**, Sawyer, P. outlined the factors the court would consider upon a striking out application generally:

43 In Allen v Sir Alfred McAlpine & Sons Ltd (1968) 2 QB 229 a case dealing with the dismissal of a claim for want of prosecution at p. 259, Lord Diplock said:

> **"It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue" ... (Emphasis mine)**

45 In the later case of Birkett v James [1978] AC 297 Lord Diplock explained at p. 318 F that -

> **"The power [to dismiss a claim for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court ..." (Emphasis mine)**

46 Lord Diplock then continued at p. 321 that -

> **"The court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where, at the trial the case will turn upon the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for noncompliance with its order as to the time by which a particular step in the proceedings is to betaken. Disobedience to such an order would qualify as 'intentional and contumelious' within the meaning of the first principle laid down in Allen v. McAlpine" (Emphasis mine)**

Striking out for failure to comply with Unless Orders

[28] In the recent ruling in **Robert Adams (A beneficiary of the Estate of Raymond Adams) v Gregory Cottis (As Executor of the Estate of Raymond Adams)** 2018/PRO/cpr/00035, a decision of this Court rendered about two weeks ago, (now under appeal), this Court gave some general case management powers and stated at paras [40] to [42]:

> **[40] The Court's powers of case management are set out in RSC O.31A. The Court has broad powers to deal with cases actively. The Court may make orders of its own initiative: O. 31A, r. 19. It may impose sanctions by reason of the failure of a party to comply with the rules, a practice direction or an order of the court: O.31A r. 24 and it may relieve a party from sanctions for failure to comply with any rule, order or direction.**
>
> **[41] Where there is a failure to comply with an "unless" order, the sanction specified in that order will take effect automatically. It is up to the party in default to apply for relief if he wishes to avoid the consequences of non-compliance which are otherwise inescapable: Marcan Shipping (London) Ltd v Kefalas [2007] 3 All ER 365.**

[42] In Barbados Rediffusion Services Ltd v Mirchandani CCJ Appeal Civil No. 1 of 2005, the CCJ dealt with the issue of the exercise of the discretion to strike out a pleading for breach of an unless order in Barbados (which had not at that time adopted the new Civil Procedure Rules). The Court reviewed a wide range of modern authorities and stated at paragraphs 44-45 and 47:

> **"[44] The discretion is a wide and flexible one, to be exercised "as justice requires". And it is quite impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case. A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party's case and so deny him a hearing on the merits, is an extreme step not to be taken lightly. In fact, this is a consideration which should be taken into account by the judge who is asked to make an unless order. He should not use the threat to strike out contained in such an order unless there is a real prospect that non-compliance with the order might warrant the imposition of such an extreme penalty.**
>
> **[45] Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the Court's orders….If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the Court, then that is a situation which calls for an order striking out that party's case and giving judgment against him. One way in which such a situation may come about, is if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents any lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive discovery.**
>
> **[47] With regard to the use of strike out orders as a response to disobedience of court orders, we respectfully disagree (as other courts have done) with the view of Millett J expressed in the *Logicrose* case, that such disobedience can never justify the**

> **making of a strike out order. We prefer the view expressed by Arden LJ in the *Stolzenberg* case that the fact that a fair trial is still possible, does not preclude a court from making a strike out order. We accept with some qualifications the principle expounded and applied in cases such as *Tolley v Morris, Hytec Information Systems v Coventry City Council* and *Re Jokai Tea Holdings Ltd,* that defiant and persistent refusal to comply with an order of the Court, can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the Court but as a necessary and to some extent symbolic response to a challenge of the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categoized as contumelious or contumacious". [Emphasis added]**

[29] In **Adams v Cottis**, this Court concluded that there were a litany of breaches of Orders of the Court. The Court found that (1) there was no good explanation for the failure to comply; (2) the failure to comply was intentional and (3) in the interests of the administration of justice, the Court should decline the grant of relief from sanctions from a failure to comply with an order of the Court in producing his List of Documents when he has a very capable legal team and his own administrative staff.

[30] In **Absa Bank**, Sawyer, P. went on to point out that a party's failure to comply with an unless order would only, prima facie, be deemed to be "intentional and contumelious" if the noncompliance occurred without explanation:

> **47 If the disobedience by the respondent to the "unless" order was without any explanation it would have been prima facie "intentional and contumelious" as Lord Diplock said in Tolley v Morris [1979] 1 WLR 592 at p. 603 -**
>
> > **"Disobedience to a peremptory order would generally amount to such 'contumelious' conduct as is referred to in Birkett v James [1978] AC 297 ..."**
>
> **48 As was said by Ward LJ in Hytec Ltd v Coventry City Council [1997] 1666 at p. 1672,**

"The modern exposition of the rules governing the dismissal of claims for non-compliance with peremptory or 'unless' orders is given by Sir Nicolas Browne-Wilkinson V-C in In Re Jokai Tea Holdings Ltd (Note) [1992] 1 WLR 1196 at p. 1202 - 1203.

'... In Samuels v Linzi Dresses Ltd [1981] QB 115 the court did not give any direct guidance as to the approach to the exercise of the court's discretion in cases where a claim or defence has been struck out by reason of a failure to comply with an 'unless' order beyond saying that such a discretion should be exercised 'cautiously'.

... The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such a penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow ...'" (Emphasis mine)

49 Here Mr Seligman places much reliance on the fact that no explanation or no satisfactory explanation or excuse had been given by the respondent for disobedience of the "unless" order. In that regard. I bear in mind what Browne-Wilkinson V-C said at p. 1203 of In Re Jokai's Tea Holdings case -

"In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order; the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to such extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed." (Emphasis mine)

50 In the later case of Caribbean General Insurance Ltd v Frizzel Insurance Brokers Ltd (1994) 2 Lloyds Reports 32 at p. 37, Leggatt LJ having referred to the full passage from the Jokai case cited in part above, said -

> **"It is to be noted that the Vice Chancellor was specifically expecting that a defaulter would only escape the consequences of judgment given against him if he could demonstrate both that there was no intention to flout the order and that the failure to obey was due to extraneous circumstances."**

[31] After considering the precedents, Sawyer, P. held that the sanction that the Appellant's case be struck out for failure to comply with an unless order in the Supreme Court be vacated and the Appellant's case restored, mainly because the Court of Appeal found that the Appellant's noncompliance was **not** intentional and inexcusable:

> **53 In this case while not being astute to find excuses for the respondent's undoubted failure to comply with the 'unless' order I bear in mind that there is Mrs Gibson's statement, albeit unsupported by any objective evidence, that she, as lead counsel for the respondent, absented herself from The Bahamas just two days before the deadline for compliance with the "unless" order because of "a medical emergency of a personal female nature". I also note that the letter exhibited to her first affidavit stated that it was dictated by her. That is some evidence of there being no intention to disobey the "unless" order.**
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> **54 In the appellant's favour I bear in mind that there was an earlier failure to comply with the order of Marques J to file the amended statement of claim within 14 days from 22 June 1998.**
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> **55 In Costellow v Somerset County Council [1993] 1 WLR 256, Sir Thomas Bingham MR observed at p. 264 that the repeated or persistent failure to obey peremptory orders may amount to contumelious conduct. In this case one previous incident of the respondent's failure to obey a peremptory order of the court was mentioned. In my judgment that failure together with the failure to comply with the "unless" order would not amount to repeated or persistent failure to obey peremptory orders.**
>
> **56 Also in the appellant's favour I bear in mind the comment by Beldam LJ in the Frizzel case when he said -**
>
> > **"Final, peremptory or 'unless' orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case, and the failure of the party to comply with the order is inexcusable." (Emphasis mine)**
>
> **57 In this case the essential question is whether the failure of the respondent to deliver the further and better particulars was both**

> **intentional and inexcusable. I have already mentioned the explanation given by counsel for the respondent.**
>
> **58 The respondent being a legal entity rather than a human person can only act through its officers and agents. Here it is in liquidation and must depend on its counsel and attorney to deal with procedural and substantive legal issues. Counsel has given an explanation for the non-compliance which seems reasonable.**
>
> **59 While the respondent may not be said to be acting in a fiduciary capacity as the executor was in the case of Pereira v Beanlands [1966] 3 All ER 528, I think this court should be cautious in deciding whether to preclude the respondent from airing the substance of its claim in the trial court.**
>
> **60 This is a borderline case: if it were not for the fact that the respondent's counsel sought to contact counsel for the appellant before the time for compliance had expired and also shortly after the time expired, served the requested particulars, and also indicated that the disobedience was not intentional but was due to a medical emergency of a personal female nature, I would have allowed the appeal. In light of those facts however, and in fairness to the respondent who is represented by Mrs Gibson's chambers, I would dismiss the appellant's appeal**
>
> **61 I would make the costs of this appeal costs in the cause".**

The issue

[32] The key issue in this case is whether Sigma and Frank Forbes complied with the terms of the Unless Order which was made on 5 July 2019. Sigma and Frank Forbes asserted that the Unless Order was complied with and Belgravia and Bretton Woods argued that there was noncompliance with the Unless Order. The issue is therefore a narrow one.

Discussion

[33] Learned Counsel Mr. Rigby argued that the issue of striking out/dismissal sanction does not even arise for consideration because Sigma delivered up all of the records and documents in its possession. He next argued that Belgravia and Bretton Woods "hang their hat" on the fact that Counsel for Frank Forbes in a letter dated 9 May 2019 stated "*the documents are perhaps more voluminous than 20 filing cabinets and 90 bankers boxes".* Counsel submitted that the word "perhaps" in and of itself connotes that it is only a possibility and is not definitive. Secondly,

says Mr. Rigby, it was Counsel for Belgravia and Bretton Woods, Mr. Smith who first raised the possibility of there being 20 filing cabinets and 90 bankers boxes of documents and this may plausibly explain why Counsel for Frank Forbes enclosed the phrase in quotes in his reply. This is an unattractive argument since Counsel for Frank Forbes should not simply regurgitate what Mr. Smith expressed without concrete evidence.

[34] Mr. Rigby further argued that Mr. Smith is relying on evidence in the intended Affidavit of David Lawson wherein Mr. Lawson alleged that he was denied access to the filing cabinets in the personal offices of Frank Forbes but despite this he was "…able to discern…" that the cabinets contained documents related to Belgravia. According to Mr. Rigby, at its highest, this amounts to pure speculation and untested hearsay. I agree that Mr. Lawson is unable to state with any degree of precision and certainty what documents are in the filing cabinets in Frank Forbes or his sister's offices and whether they relate to Belgravia and Bretton Woods. Speculation has no place in a court of law.

[35] Mr. Rigby also argued that Mr. Smith asserts that the Delivery-Up Order was based on the contents in the 'Schedule As' section of the termination letter sent to Frank Forbes and Sigma. However, says Mr. Rigby, the referenced section in the termination letter rightly requests all records and documents "…in its possession or control…."

> **"We require that Management Company promptly deliver up to the Company all corporate and trust records, financial records and all other documents, papers and information <u>in possession or control</u> relating to the Company Group, and that the Management Company cooperate in its services as reasonably requested by the Company."**

[36] Mr. Rigby argued that Sigma has delivered up all the records and documents in its possession or control as ordered by the Court.

[37] Further, says Mr. Rigby, the Unless Order stated that *"the corporate and trust records, financial records and other documents and papers relating to Belgravia and affiliated persons, entities or trusts"* be delivered up, and **<u>not</u>** that *"20 filing*

cabinets and 90 bankers' boxes" of documents be delivered up. According to him, the Order also fails to specify the precise nature/description of the documents to be delivered and hence even the Lawson affidavit confirms that the document delivered related to Belgravia and Bretton Woods. Mr. Rigby relied on the case of **Morgans (a firm) v Needham** [1999] Lexis Citation 15.

[38] On the other hand, Mr. Smith forcefully argued that Counsel for Frank Forbes has already admitted unequivocally and in writing that the Relevant Documents comprise at least and "**perhaps more than 90 bankers boxes and 20 filing cabinets**". This Admission was made before the date of the Unless Order. He submitted that a standard filing cabinet has at least 3 drawers, with each drawer being roughly the same size as a small banker's box. This means that "20 filing cabinets" equate to **at least 60 banker's boxes' worth of material**. On the strength of the Admission, says Mr. Smith, **there has been a shortfall of at least 80 banker's boxes of material.** Thus, Sigma and Frank Forbes have not complied with the Unless Order. Mr. Smith further argued that the Admission was made by Counsel acting for Frank Forbes personally and it is therefore not proper for Sigma to dissociate itself or otherwise disavow Frank Forbes' Admission. This is not least because Sigma, by its own evidence, has already confirmed that is totally reliant upon Frank Forbes for instructions.

[39] Mr. Smith submitted that there has been a patent failure on the part of Frank Forbes/Sigma to deliver up all Relevant Documents. No satisfactory (or indeed any) explanation has been proffered for the obvious shortfall in documents. Mr. Smith argued that Sigma's conduct (including the multifarious incongruous positions which have been advanced by its counsel, without explanation) created a situation in which (but for the supervening Unless Order) strike out pursuant to the Court's inherent jurisdiction was *prima facie* appropriate because "it will not be possible to place reliance upon what has been disclosed as being either authentic or complete, without a long and expensive inquiry". In that regard he relied on the cases of **Arrow Nominees v Blackledge** [2000] 2 BCLC 167 per Chadwick LJ (at

paras [54] - [56]) and **Barbados Rediffusion Service Ltd v Mirchandani (No. 2)** [2007] 3 LRC 296 per De La Bastide P (at paras [44] – [46]).

[40] Counsel further argued that (without prejudice to the fact that the Delivery-Up Order and the Unless Order involve property rights and are ancillary but facilitative to the issue of discovery) these proceedings directly involve services alleged to have been provided by Frank Forbes and Sigma during a period of approximately 15 years, but yet still (and despite repeated suggestions to the contrary from the Bar table by Sigma's Counsel) Sigma has not given full discovery; for the entire period spanning 2001 to June 2015 the List of Document which has been filed by Sigma only reflects invoices (i.e. Statements of Account) **but not any** corporate and trust records, financial records, and other documents and papers.

[41] In this regard, Mr. Rigby correctly, in my view, argued that the Delivery-Up Order was not an order for discovery but an order to aid the preservation of assets. The Court, at a Case Management Conference held on 16 October 2017, gave directions with respect to standard disclosure, exchange and inspection of documents. It should be noted that the parties have filed their List of Documents (Sigma's List of Documents was filed on 21 December 2017 and Belgravia/Bretton Woods' List of Documents was filed on 30 November 2017). It is my firm view that if Belgravia and Bretton Woods are of the opinion that there are documents which are in Sigma/Frank Forbes' possession which have not been disclosed, an application under RSC, O. 24 rr. 7 and 8 could be made; standard disclosure having already been given.

[42] Mr. Thompson who appeared as Counsel for Frank Forbes submitted that Belgravia and Bretton Woods cannot rely only on a portion of LCC letter but must also acknowledge that further in the letter, Counsel clearly indicated that Frank Forbes, while having made a tremendous recovery from a massive stroke, was observed as having "*moments of lucidity, followed almost immediately by a tangential amount of bewilderment*".

[43] Mr. Thompson contended that, in the letter, Counsel also acknowledged that there was an issue with Frank Forbes' fitness to testify and that while he seemed to understand what was asked of him and he was able to articulate a clear answer, there was a very real concern in relation to the continuing neurological effects that lingered from the stroke. In short, I understood Counsel as saying that Frank Forbes "*has his moments*".

[44] Further, Mr. Rigby contended that to allow Sigma's case to be dismissed because 70 boxes instead of 90 (sic) boxes were delivered, in the absence of some provable inventory list of documents which were not delivered, would be unsafe and would drive Sigma from its day in court. He also submitted that the delay in complying with the Delivery-Up Order was not contumacious or intentional but arose out of the fact that Frank Forbes suffered a massive stroke about 2 weeks prior to the making of the Order. Applying the reasoning in **Absa Bank** to the facts of the present case, the fact that Sigma took some 21 months does not necessarily mean that the noncompliance was contumacious because the delay was unintentional and inexcusable. Besides, Sigma kept the Court informed of Frank Forbes' medical condition and the reason(s) for the noncompliance of the Order. I agree.

[45] Mr. Rigby also submitted that there are other relevant factors that the Court ought to consider including the fact that had it not been for this application, this trial might have been concluded. He noted that there has already been standard disclosure of documents. Affidavits have already been filed by the parties which affidavits will stand as evidence in chief and affiants will be cross-examined on their affidavit evidence. I do not agree with Mr. Rigby since it was Sigma/Frank Forbes that caused the inordinate delay in this case. However, the delay could not have been avoided because of Frank Forbes' medical condition. In addition, there were no directions that the affidavits will stand as evidence-in-chief. In my opinion, this case was never ready for trial.

Conclusion

[46] With respect to Unless Orders, the law is clear.

- An Unless Order means what it says. If a party does not comply with it, the sanctions automatically follow: **C v Magnet Ltd** [2016] EWCA Civ 906;

- The sanction stipulated in an Unless Order "takes effect without the need for any further order if the party to who it is addressed fails to comply with it in any material respect": **Marcan Shipping (London) Ltd v Kefalas** [2007] 3 All ER 365 per Moore-Bick LJ at para 34 and;

- The terms of the Unless Order must be clear and precise: **Morgans (a firm) v Needham** (supra).

[47] As learned Counsel Mr. Smith argued, the Court must first ascertain what the Unless Order means (as it is only then that the Court may proceed to assess the actions and omissions of the alleged defaulting party). This is an exercise in interpretation and construction. Once this has been done, the Court must assess whether there has been material noncompliance triggering the sanction embodied in an Unless Order: **Marcan Shipping.**

[48] In the letter dated 9 May 2019, that is, prior to the date of the making of the Unless Order, Counsel for Frank Forbes wrote that the relevant documents comprise at least and "**perhaps more than 90 bankers boxes and 20 filing cabinets."** Learned Counsel Mr. Rigby focused on the word "perhaps" while in my opinion, the focus should be on the entire sentence which speak for itself. In addition, I find it incredulous that Counsel for Frank Forbes was simply repeating what Mr. Smith said without validating it.

[49] Furthermore, there has been conflicting statements from Counsel for Sigma about documents which Sigma has in its possession. As already stated, on 5 July 2019, Mr. Rigby advised the Court that the Relevant Documents had been destroyed and that "*these documents will not be any document upon which we will rely in the claim…these documents would not be the subject matter of the litigation*." Approximately two weeks later, a "*volte-face"* took place. No frank explanation was ever provided for that dramatic and abrupt "*volte-face*" leaving the Court and

Counsel to reasonably presume that Sigma and Frank Forbes are not being frank to the Court. Frank Forbes is certainly not as "frank" as his name connotes.

[50] In my considered opinion, Counsel for Frank Forbes should not make any such assertions which cannot be substantiated. Given the conflicting positions advanced by Sigma and/or Frank Forbes, it is my firm view that Sigma/Frank Forbes have much more documents in their possession than 70 bankers boxes.

[51] Notwithstanding, I agree with Mr. Rigby that the Unless Order should have been more precise and specific especially since, at the time it was made, the Admission was already disclosed to the Court and to Mr. Smith. In terms of precision of an Unless Order, I rely on the judicious words of Stuart-Smith LJ in **Morgans**. He stated (pages and paragraphs unnumbered) that:

> **"So far as the law is concerned, it has been recently considered in this court. But I can refer first of all to an older authority of *Abalian v Innous* [1936] 2 All ER 834, where at page 838 Lord Justice Green said this:**
>
> > **"Speaking for myself, I think that any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another party does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies – which would normally be the plaintiff – to be in no doubt whatsoever as to the steps which he is to take to avoid his action being dismissed. Looking at it in another way: where the defendant, in reliance on such order, goes to the court and asks it to say that, as a result of the order, the action stands dismissed and is no longer existent, he must be able to show first of all, that the language of the order is sufficiently precise, and, secondly, that the facts which the order contemplates have occurred."**
>
> **In the case of *Realkredit Danmark A/S v York Montague Limited*, The Times 1 February 1999, a Court of Appeal transcript 26 November 1998, the court was dealing with the question of non-compliance with an unless order for**

discovery. Lord Justice Tuckey, with whose judgment Lord Justice Morritt agreed, said this at page 8:

> **". . . before getting involved in the detail, if that is what I have to do, I should turn to the issue of principle which arises on this appeal which is: 'What is the test for establishing whether or not there has been compliance with an unless order of this kind?'**

Mr Elliot QC, on behalf of the lender, submits that where an unless order for discovery has been made and a list has been served it is not enough to show that the list is incomplete for whatever reason, provided it has been served in good faith. In the absence of bad faith, if the other party alleges that the list is incomplete, his remedy is to seek an order for an affidavit verifying the list or for specific discovery. An unless order should be certain from the point of view of the party required to comply with it. Any alleged non-compliance should be capable of being proved without the need to consider voluminous evidence or lengthy submissions".

[52] In the circumstances, I shall not strike out the Plaintiff's Writ and Statement of Claim because to do so may be regarded as draconian especially since the Unless Order was not precise and specific. However, Sigma and/or Frank Forbes must not "selectively and unilaterally determine" what they consider relevant and what to disclose. Relevance is an issue for the Court to determine if it becomes necessary.

[53] To end this long discourse, full and frank disclosure must now be made. I shall therefore make the following order:

> "1. **Unless the Plaintiff and the Third Party do by or before 5:00 PM on 30th January 2021 deliver up and/or transfer to the First and Second Defendants' attorneys, Messrs. Higgs & Johnson, Lyford Crescent, Lyford Cay, New Providence, The Bahamas, the 20 filing cabinets and 90 bankers boxes of corporate and trust records, financial records and other documents and papers relating to the First Defendant and affiliated persons, entities or trusts that were previously ordered and directed to be delivered up and/or transferred pursuant to the terms of the Order herein dated 16th October, 2017 and filed on 3rd November, 2017, the Plaintiff's claims pursuant to its Writ of Summons and Statement of Claim shall stand dismissed with Costs to the First and Second Defendants, to be taxed if not agreed;**

2. **In the event of non-compliance with the foregoing paragraph, the First and Second Defendants' claims and counterclaim as against the Plaintiff and the Third Party, respectively, shall be proceeded with should the First and Second Defendants so choose.**

3. **In the event that the Plaintiff and the Third Party are unable to produce those documents stipulated in paragraph [1] of this Order, the Plaintiff and the Third Party must swear, within fourteen (14) days hereof, an affidavit explaining whether the Relevant Documents as specified and/or described in Paragraph [1] have at any time been in their possession, custody or power but no longer are and they must detail when they parted with them and what has become of them.**

4. **The parties will address the Court on costs at the adjourned hearing.**

5. **There shall be a Further Case Management Conference on Thursday 18 February 2021 at 9.30 a.m. for one hour.**

Dated this 15th day of January, A.D., 2021

Indra H. Charles
Justice