IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No. HC 03 C 03301
2003 EWHC 3006 (CH)

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 5th December, 2003

Before:

MR JUSTICE BLACKBURNE

B E T W E E N:

(1) SHIRAYAMA SHOKUSAN COMPANY LIMITED
(2) TAKASHI SHIRAYAMA
(3) MIYAKO SHIRAYAMA
(4) AYAKO SHIRAYAMA
(5) YUICHI SHIRAYAMA
(6) CADOGAN LEISURE INVESTMENTS LIMITED

Claimants

- and -

DANOVO LIMITED

Defendant

J U D G M E N T
(As Approved by the Court)

Transcript from the stenograph notes of
John Larking Verbatim Reporters
91 Temple Chambers, 3-7 Temple Avenue
London EC4Y OHP.
Tel: 0207 404 7464 Fax: 0207 404 7443

1. MR JUSTICE BLACKBURNE: This is an unfortunate dispute between the long leasehold owners of County Hall, opposite the Palace of Westminster, and the owner and operator of the art gallery housed in a part of the first floor of that building, well known as the Saatchi Gallery.

2. The defendant, Danovo Limited, occupies under a 20 year sub-underlease from the sixth claimant, Cadogan Leisure (Investments) Limited, which itself holds under an underlease of part of the first floor from the first five claimants. Over and above Danovo's rights under its sub-underlease, it has or had various rights under various licence arrangements concerned with the display of art works and signage advertising the gallery outside the areas demised to it by the sub-underlease.

3. For reasons which I do not need to go into and which in any event are a matter of dispute, the parties have fallen out. This has led to these proceedings which started on 17th September in which the claimants seek injunctions to restrain various acts of trespass by Danovo, concerned with the display of signage and artwork and with the use of parts of County Hall outside Danovo's demise. They also claim damages.

4. Cadogan has recently served a notice under Section 146 of the Law of Property Act in relation to what it claims are breaches by Danovo of the terms of the profit-sharing rent formula contained in Danovo's sub-underlease. The alleged breaches arise, as I understand it, out of an initiative which Danovo has recently operated whereby entry tickets to the gallery are sold on the basis of two tickets for the price of one.

5. The issuing of proceedings has perhaps not surprisingly exacerbated relations. The situation has not been helped by accusations of dishonesty recently made by Mr Saatchi against certain persons who are associated with the claimants, in particular a person who represents the first five claimants in this country and also one or two others including a person who has responsibilities within Cadogan. These matters are unrelated to the particular issues which give rise to the proceedings. The accusations have resulted in threats of other proceedings and have led to a rise in the temperature in dealings between the two sides.

6. Danovo denies any breach of the terms of its sub-underlease. It counterclaims for relief to restrain interference with what is says are its rights concerned with signage displays and the like. It also counterclaims for damages including damages for misrepresentation. It seeks relief with a view to giving effect to what it says are proprietary estoppels and the like arising out of the parties' dealings. It also seeks rectification of the sub-underlease to enable a part of a corridor to be included in its demise.

7. For some time Danovo has been suggesting in

correspondence that there should be mediation of the various disputes. Those disputes concern the right to have the use of a particular corridor, access to a lavatory which is suitable for disabled persons' use, the continued occupation of what is known as Room 157 which was held subject to a five month sub-underlease which expired I think on 10th September; the use of one or more flag poles outside the premises on which, a I understand it, banners are advertising what is going inside this gallery; the placing of artwork in what are referred to as the ambulatory and lobby areas. Those are particular issues which have been identified in correspondence, although as is apparent from the correspondence there are wider disputes, including the operation of security arrangements.

8. The claimants take the view that their rights are perfectly clear. They say: "Well, we allege that Danovo is trespassing. Either it is or it is not". If it is, they say, there is no reason why Danovo should not be restrained. They say that there is nothing to be gained by mediation; they have no wish to bargain away what they say are their rights. To that end they have issued an application for summary judgment under Part 24 on the basis Danovo has no reasonable prospect of successfully defending their claims. As I understand it, that application is due to come on for hearing some time in late January.

9. Moreover, they say, given the accusations that have been made of dishonesty (and which have not been dropped) against certain key individuals on the claimants' side, there is the absence of that degree of trust which is necessary if any mediation, were it to take place, is to have any prospect of success.

10. Following a recent change of solicitors on the Danovo side, Danovo now applies for an Order substantially following Appendix 7 to the Admiralty and Commercial Costs Guide that the parties mediate their various disputes. It seeks an Order requiring the parties, first, by Tuesday of next week, to exchange lists of three neutral individuals who are available to conduct a mediation in the case on or before 23rd December. It seeks secondly, an Order on or before Wednesday 10th December 2003 that the parties shall in good faith endeavour to agree a neutral individual from the lists exchanged. Thirdly, it seeks an Order that, failing agreement between the parties as to the mediator by 4 pm on Wednesday 10th December, a mediator shall be chosen from a list of independent mediators available to conduct a mediation by 23rd December proposed by the Centre for Dispute Resolution, such mediator to be agreed by the parties on Friday, 12th December and, failing agreement, to be nominated and appointed by the ADR case manager of CEDR. Fourthly, the Order suggested requires the parties to take such serious steps as they may be advised to resolve their disputes by mediation before the appointed mediator by no later than 23rd December 2003, or later if that is not practicable and to complete the mediation by that date. Fifthly, if the case is not settled by

9th January, 2004, the parties are to inform the court by letter by 16th January what steps by way of mediation have been taken and without prejudice to matters of privilege, why such steps have failed. Sixthly, they seek an Order in relation to costs.

11. The particular dates in the suggested mediation Order are not, as it were, cast in stone. The broad purpose is to have a mediation before the hearing date of the Part 24 application.

12. The first question which arises is whether the court has jurisdiction to order a party, who is unwilling, to have a dispute mediated in the terms applied for. Mr Andrew Hochhauser QC who appears with Mr Andrew Walker on behalf of Danovo, making the application, says that I have such jurisdiction. Mr Nicholas Taggart appearing for the defendants says that I do not.

13. There is no doubt that courts have assumed such a jurisdiction. That is apparent from an unreported decision of Mrs Justice Arden, as she then was, in the case called **Guinle v. Kirreh, Kinstreet Limited v Balmargo Corporation Ltd**, judgment in which was given on 3rd August, 1999. A submission had been made that the court did not have such a jurisdiction. One party at any rate was not willing to undergo ADR. The court nevertheless directed ADR and did so in a form which has been largely followed in the draft Order attached to the application before me. Mrs Justice Arden took the view that Rule 1.1 of the Civil Procedure Rules, setting out the overriding objective, opened the way and that Appendix 7 to the Admiralty and Commercial Courts Guide provided the structure for such an Order.

14. Then there is the case of **Muman v. Nagasena** in the Court of Appeal reported in [2000] WLR 299. That was a dispute over the administration of a charity. The court took the view that mediation would help. Towards the end of his judgment, Lord Justice Mummery, at page 305, said this:

> "In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until (i) the Charity Commissioners have authorised the proceedings and counterclaim and (ii) all efforts have been made to secure a mediation of this dispute in the manner suggested."

15. He had earlier said that there existed a mediation service for charities which had been established by the Centre for Dispute Resolution, jointly with the National Council for Voluntary Organisations, under the umbrella of the Home Office and that the purpose of the scheme was to achieve by voluntary

action confidentially conducted, a healing process in which disputes within a charity can be resolved at a modest fee and without the use of funds which have been raised for charitable purposes. In suggesting the Order which he refers to in his judgment, he made it clear that a stay of proceedings until after an attempt had been made by both parties to resolve the dispute by mediation was quite separate from the requirement of authorisation under Section 33 of the Charities Act, 1993.

16. Those two cases plainly proceeded upon the basis that there is jurisdiction to make an ADR order even when one side is opposed to such relief.

17. Mr Taggart submits that both courts were wrong to make the Orders that they did and that they had no jurisdiction to do so. I take the view that the court does have jurisdiction to direct ADR even though one party may not be willing to have the dispute submitted to ADR.

18. Rule 1.1 of the Civil Procedure Rules sets out the overriding objective namely, dealing with cases justly.
By sub-rule (2), -

> Dealing with a case justly includes, so far as is practicable, among other matters,
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> (c) dealing with the case in ways which are proportionate -
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
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> By rule 1.4, paragraph 1:
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> The court must further the overriding objective by actively managing cases.
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> By paragraph 2 of that rule, active case management includes (inter alia) -
>
> (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use if such procedure;
>
> (f) helping the parties to settle the whole or part of the case;

19. I take the view that the exercise of those powers is

not confined simply to the case where the parties jointly wish to settle the whole or part of the case or to use alternative dispute resolution procedures. There is nothing binding on this court to the effect that there is no jurisdiction, to have recourse to those powers unless both parties are willing. I do not accept that the remarks of Mr Justice Lightman in **Hurst v. Leeming** to which my attention was drawn (in particular in paragraph 12) are to be taken as a statement that mediation can only be ordered where both parties are willing. Nor do I take the view that the remarks in paragraph 11 of the judgment of Lord Justice Tuckey in **Tarajan Overseas Limited v. Donald Lee Kaye** are to similar effect. I notice, moreover, that in **Cable & Wireless Plc v IBM United Kingdom Ltd** [2002] EWHC 2059 (11 October 2002) Colman J observed that the making of ADR orders was commonplace, (at any rate in the Commercial Court), even when one party objects to such an order and that, occasionally, such an order has been made even in the face of objections from both sides.

20. I, therefore, accept Mr Hochhauser's submission that there is jurisdiction to order ADR, notwithstanding that one side opposes the making of such an order.

21. Given there is jurisdiction, the next question is, therefore, whether I should exercise the jurisdiction to make such an order in the circumstances of this case. In support of the Order sought, Mr Hochhauser has drawn my attention to the following particular points:

22. First, the parties are, as he put it, in long-term relationships and will need to talk to each other and work together in future, possibly for many years. That is a reference to the fact that they are occupying the same building and that the defendant has a 20 year lease. That seems to me to be a point of some substance. I say that, notwithstanding that there exists a break clause which may be operated by the defendants some time in 2006 and notwithstanding that a notice under Section 146 has been served complaining of a breach of covenant.

23. Second, it is said that the parties, at any rate the sixth claimant and the defendant, have a shared interest in the success of the gallery as it stands, in particular, in the profit rent arrangements under the Danovo sub-underlease. Again, that seems to me to be a point of some substance.

24. Third, it is said that there are a range of issues dividing the parties which are not covered by the claimants' Part 24 application or more widely by the proceedings generally, including Danovo's counterclaim against the claimants. It is said that mediation will be able to deal with such wider matters in ways that further litigation cannot.

25. Fourth, it is said that there is nothing to be lost by mediation. If it works there is much to be gained. In contrast

litigation costs and expense will further damage relations.

26. Fifth, it is said there is a need to bring the parties together to take the heat out of the dispute. Litigation is likely to achieve the opposite. That seems to be in large part a repetition of the previous point.

27. Sixth, it is said - I think that this too is very much a repetition of an earlier point - that there is a very substantial saving of costs if mediation succeeds. Even the forthcoming Part 24 application will involve substantial costs.

28. For my part I see substance in several of those points, particularly the first and second points.

29. As against that, Mr Taggart says that given the allegations of dishonesty that have been made against certain individuals from within his clients, allegations moreover which have not been withdrawn, it is unrealistic to suppose that mediation stands any prospect of success. At the very least mediation needs some degree of trust if it is to work. He says that his clients have no wish to bargain away what they see as their clear rights. Over and above that, he says there are in any event practical problems about getting the responsible individuals, clothed with appropriate authority, to this country in good time to enable mediation to be undertaken and completed by say the middle of next month.

30. I have come to the view, I confess after some hesitation, that in all the circumstances it is worth attempting mediation. I am bound to say that a number of the disputes seem to me to be concerned with fairly small points. I do not doubt that they are important to the operation of the gallery but they do seem to me, from my reading of the correspondence, to be just the sort of differences where mediation could well prove beneficial.

31. Looking realistically, even in the medium term, the fact of the matter is that these parties are likely to have to continue to live together. In this regard I would be surprised if the outcome of the service of the Section 146 notice were to result in the forfeiture of the sub-underlease, bearing in mind -and I do not think that this is disputed - that very considerable monies have been spent by the Danovo in preparing for its gallery use the particular part of the floor it occupies and certain surrounding areas.

32. There is no doubt that the accusations made concerning conduct of various individuals on the claimants' side have not helped. It seems to me that, if mediation is to have any realistic prospect of success, and it is Danovo's particular wish that it should, those accusations, which do not go to the issues between the parties, should be put to one side. I can well understand the concern of the claimants that, faced with

those accusations, it is difficult to engender the sort of trust that is necessary if mediation is to work.

33. It will also be important that duly authorised representatives of the claimants are available. That I think means Mr Okamoto representing the first five claimants. He, as I understand it, is normally resident abroad, either in France or Switzerland. I would have thought that with a little bit of willingness and planning it is perfectly possible for Mr Okamoto to be present in this country on whatever the day is on which the mediation takes place. The solicitor, Mr Levantine, who has been representing the claimants throughout, is another person who should be present. He, as I understand it, will shortly depart for New Zealand for Christmas but will be back in this country in early January.

34. So far as the sixth claimant is concerned, the two particular individuals who would usually represent it are Mr Chauhan and Mr Caselton. There is no reason why they could not be available.

35. What I therefore propose to do is to make an Order in the terms of the draft Order sought, but substituting a slightly different timetable so that mediation takes place say in the second week of January. I do not at the moment think it is appropriate to make any order with regard to the costs of the mediation. If the mediation succeeds, no doubt costs will be included in whatever settlement results. If it fails, whether the costs should be borne by one side or the other or whether no order at all should be made, will depend on all of the circumstances.

36. I should just add, lest it be thought that I have overlooked the point, that I am conscious of the fact that what goes on in the mediation is privileged. I am not impressed by the argument that the making of an Order of this kind, with opposition by one side, risks breaching that privilege in any way. It seems to me the court is well able to distinguish if it has to concern itself with why mediation fails, with those matters which are privileged and which, therefore, should not be the subject of investigation and those matters which are not privileged, but I say no more about that. Nor do I consider that any Human Rights Act issue is engaged by the order that I am making.

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