

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

3

FSD 2 OF 2015 – NRLC

4 BETWEEN:

5

FELIX FISCHER

6

Plaintiff

7 AND:

8

(1) SANGO CAPITAL MANAGEMENT

9

(2) SANGO CIP LP

10

Defendants

11 In Chambers

12 Before the Hon Justice Nigel R.L. Clifford, QC

13 Thursday, 5th March 2015

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16 APPEARANCES: Mr. James Eldridge and Ms. Krista-Lynn Wight of Maples and
17 Calder for the Plaintiff

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19 Mr. Matthew Goucke and Mr. Chris Keefe of Walkers for the
20 Defendants

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22

RULING

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24 1. By summons in this action the Plaintiff seeks leave to discontinue the proceedings
25 pursuant to GCR O.21 r.3 and for an order that the Defendants pay his costs on the
26 standard basis.

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28 2. The action was brought by Originating Summons to obtain certain financial and
29 accounting documentation from the Defendants to which the Plaintiff was undoubtedly

1 contractually entitled. That documentation has since been provided and so there is no
2 need for the action to continue. Thus the Plaintiff contends that the action has achieved its
3 objective and been successful, so he should be entitled to his costs on discontinuance.

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5 3. It is contended by the Defendants, on the other hand, that these proceedings could have
6 been discontinued without leave of the Court, in accordance with GCR O.21 r.2, and had
7 that happened the Defendants would have been entitled to their costs occasioned by the
8 claim up to the notice of discontinuance pursuant to GCR O.62 r.5(2). And so, it is
9 submitted, that a rebuttable presumption arises that the Plaintiff should pay the
10 Defendants' costs on the standard basis; that it is for the Plaintiff to make out a case for
11 the presumption to be displaced for some good reason. It is submitted on behalf of the
12 Defendants that the Plaintiff cannot rebut the presumption and that in fact the proceedings
13 were unnecessary and premature. They contend that they have acted reasonably at all
14 times, whereas the Plaintiff has acted unreasonably.

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16 4. The Plaintiff could have discontinued the action without leave, but he has specifically
17 elected to apply under O.21 r.3 because he contends that in the circumstances he is
18 entitled to costs, rather than having to pay the Defendants' costs should he discontinue
19 without leave. Thus he asks for leave to discontinue so that the Court can exercise its
20 undoubted discretion as to costs. It is submitted on his behalf that, in the exercise of that
21 discretion, the Defendants should be ordered to pay his costs because in effect the action
22 has succeeded and so costs should follow the event in the usual way.

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24 5. I have been referred to various authorities on costs which largely turn on their own facts.
25 However, one is worth mentioning. There is English authority which provides some
26 relevant guidance. This is to the effect that, in a case of this kind, the question is whether
27 the proceedings were necessary to obtain the documents: *Reid v. The Capita Group plc*
28 [2005] EWHC 2448.

29
30 6. The Plaintiff relies on having sent the Defendants multiple letters before action over a
31 period of nearly 3 months which were not complied with. The Defendants were twice
32 warned of proceedings if the documents were not produced. However, only after the
33 action was commenced did the Defendants finally comply with their contractual

1 obligations and provide the balance of the documents still outstanding. So, it is submitted,
2 that the proceedings were necessary. Although the action is now being discontinued, it
3 cannot be said that this is a case where discontinuance equals defeat. As, rather, the action
4 has in effect achieved success, it is submitted that the Plaintiff should have his costs from
5 the Defendants.

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7 7. The relevant correspondence, to which I have been referred, started on 29 September
8 2014. On that date requests for documents, which the Plaintiff was entitled to be provided
9 with, were made through his attorneys Maples and Calder. The Defendants purported to
10 comply with these requests pursuant to letters dated 22 October 2014, providing certain
11 documents.

12

13 8. However, a number of documents remained outstanding. Therefore, in letters dated 3
14 November 2014, from Maples and Calder, particular documents were requested. And
15 there was a warning that failure to comply would leave little option but to commence
16 proceedings.

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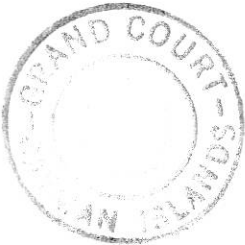
18 9. On 20 November 2014, there was a holding response from the Defendants' English
19 solicitors, Pinsent Masons, saying that they were currently compiling a substantive
20 response and would revert shortly. In fact nearly a month went by without there being
21 such a response. So, on 16 December 2014, Maples and Calder sent a chaser, seeking a
22 substantive response by 23 December 2014, with a further warning that absent the
23 production of the documents they were instructed to commence proceedings without
24 further notice.

25

26 10. There then came, on 19 December 2014, a response from Pinsent Masons which is at the
27 heart of the issues which now arise between the parties. The letter reads as follows:

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29 *"Maples and Calder*
30 *P.O. Box 309*
31 *Ugland House*
32 *Grand Cayman*
33 *KY1-1104*



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Cayman Islands
FAO: Mr James Eldridge

19 December 2014

Dear Sirs
Sango Capital Management ("SCM")
Sango CIP LP ("Sango CIP")
We refer to your letter dated 16 December 2014.

We note your request to receive copies of the documents sought by your client by Tuesday 23 December 2014.

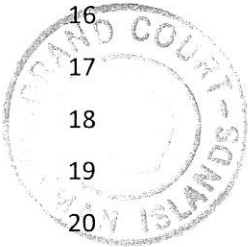
We confirm, in response, that this is not a deadline that our clients can reasonably meet.

Our clients are working to respond to your client's requests at the very first opportunity. However, as you and your client are aware, they are a small team with many competing priorities in particular at this time of the year. Some of the documents requested, including the 2015 SCM budget, need to be approved by the Board, which will naturally take some time.

Moreover, we confirm that our clients' offices are now closed for Christmas and will not reopen until the New Year.

Our clients hope to be able to respond substantively by 20 January 2015. In the interim, where your clients are able to access requested documents publically, they should do so, Requesting copies of publically available documents is clearly an unreasonable use of our clients' time and, therefore, cannot be construed as anything other than a tactical attempt to put an unnecessary administrative burden on our clients.

Our clients reserve their rights in respect of this matter in full, in particular bringing this letter (and all previous correspondence) to the attention of



1 *the Court, should an application seeking provision of the requested*
2 *documents be made and the issue of costs of that application come to be*
3 *decided.”*
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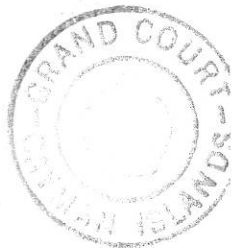
5 11. So, in summary, in its key parts the letter from the Defendants’ English solicitors said that
6 the deadline set could not reasonably be met; that their clients had a small team with
7 many competing priorities; that their clients’ offices were closed for Christmas and would
8 not reopen until the New Year; that it was the hope of their clients to be able to respond
9 substantively by 20 January 2015; but that their clients’ rights were reserved in full.

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11 12. It is contended on behalf of the Plaintiff that this was a wholly unsatisfactory response.
12 This is because the request for the documents dated back to September, so the Christmas
13 holidays should be no excuse, and there was only the expression of a “hope” of a
14 substantive response by 20 January 2015, subject to a full reservation of rights.

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16 13. In my view the response was certainly unsatisfactory for these reasons. Further this is all
17 the more so in the light of the Defendants’ own evidence now filed in these proceedings.
18 The First Affidavit of Charles Mwebeiha in paragraph 6(c) indicates that back on 2
19 October 2014, although legal advice was being sought, it was agreed by the Defendants
20 that the documents should be collated and provided to the Plaintiff. At some reasonable
21 time after this, and prior to the proceedings, the Defendants could have informed the
22 Plaintiff unequivocally that the documents (or the balance of the documents after those
23 provided on 22 October 2014) would be produced and that it was just a matter of time.
24 That this did not happen is the major problem for the Defendants on this application.

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26 14. It has been demonstrated to me that there were not even very many documents to be
27 produced. They could easily have been collated for this purpose in the time before the
28 Christmas holidays and the occurrence of the other practical problems, or competing
29 priorities, referred to in the evidence of Mr Mwebeiha.

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31 15. In fact on 20 January 2015, after the proceedings had been commenced, the outstanding
32 documents were provided. An issue raised about the provision of ongoing reports was
33 then resolved by 30 January 2015. Thereafter the summons for leave to discontinue was

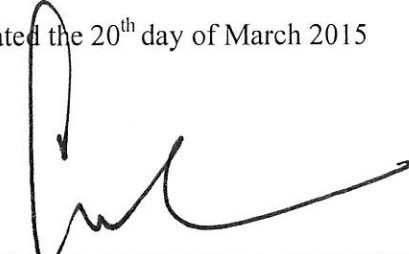


1 issued promptly on 4 February 2015. I am satisfied that there was no delay on the part of
2 the Plaintiff in this respect.

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4 16. In my view this litigation could have been avoided if the Defendants had provided the
5 documents in the time allowed or given an unequivocal undertaking to do so prior to the
6 issue of the proceedings. As they did not do so, it does not lie in their mouths, as they
7 now seek to say, that the action was a drastic step and unnecessary. The position rather is
8 that the action appears to have concentrated the minds, as proceedings often do, and the
9 Plaintiff achieved the desired result.

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11 17. In these circumstances the Plaintiff shall have leave to discontinue the action and the
12 Defendants shall pay the costs on the standard basis to be taxed if not agreed. There will
13 be an order accordingly.

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16 Dated the 20th day of March 2015

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The Hon. Justice Nigel R.L. Clifford, QC
JUDGE OF THE GRAND COURT

