IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No . HC 03 C 03301

2004 EWHC 390 (CH)

Thursday, 26th February, 2004

Before :

MR JUSTICE BLACKBURNE

BETWEEN:

(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

Defendants

MR M ROSEN QC and MR N TAGGART (instructed by Messrs Winward Fearon, 35 Bow Street, London WC2E 7AU) appeared on behalf of the Claimants

MR A HOCHHAUSER QC and MR A P D WALKER (instructed by Messrs Davies Arnold Cooper, 8-9 Bouverie Street, London EC4Y 8DD) appeared on behalf of the Defendant

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JUDGMENT
(As Approved by The Court)
Royal Courts of Justice

Strand
London, WC2A 2LL

MR JUSTICE BLACKBURNE:

1. On 5 December last, I made an ADR Order, substantially in the terms of Appendix 7 to the Admiralty and Commercial Court Guide, with a view to a mediation of certain disputes between the parties which had led to the current proceedings. The Order was made on the application of the defendant, Danovo Limited, notwithstanding the unwillingness of the claimants to agree to a mediation.

2. The background to that Order is succinctly set out in the short judgment which I delivered at the conclusion of counsels' submissions on that occasion, which I do not intend to repeat. Suffice it to say that the disputes concern Danovo's use of and activities in areas adjoining that part of the former County Hall which has been demised to it under a 20 year sub-underlease by the sixth claimant, Cadogan Leisure (Investments) Limited, which itself holds an underlease from the first five claimants, who for short have been collectively referred to as Shirayama.

3. Danovo, the moving spirit behind which is Mr Charles Saatchi, owns and runs the Saatchi Gallery in the area demised to it by the sub-underlease from Cadogan. The activities to which the claimants object and which they seek to restrain are associated with the operation of the Gallery.

4. Since making my Order on 5 December, Cadogan have brought forfeiture proceedings against Danovo . Those proceedings, which were commenced in the Lambeth County Court, have since been transferred to this Division of the High Court. That was on the footing that they are intimately connected with the action which was before me in December. That transfer occurred pursuant to an Order which I myself made on 22nd December.

5. Two questions arose at that earlier hearing. The first was whether there was jurisdiction to order a mediation where one party to the proposed mediation was opposed to the making of the Order. The second Order, if there was, was whether in the circumstances the Order should be made. For the reasons set out in the judgment on that occasion, I concluded that jurisdiction existed and, albeit with some hesitation, that the circumstances justified the making of the Order. I therefore made an Order with a view to mediation taking place by the middle of January. I did not in terms stay the claimants' action. Indeed, I framed my Order so that mediation could be completed before the hearing of an application in the proceedings by the claimants for a summary judgment under Part 24, which I was given to understand was due to come on sometime

towards the end of January.

6. A few days after I had made my Order, the parties agreed to adjourn the claimants' summary judgment application and began working towards a mediation which, by early January, was fixed by agreement to come on before Mr Philip Naughton QC, as Mediator, on Thursday, 22nd January.

7. Progress towards the mediation came to a halt however following receipt by Davies Arnold Cooper, Danovo's solicitors, on 16th January of a letter from Winward Fearon, the claimants' solicitors, indicating that a Mr Okamoto would not be attending the mediation but that a Mr Davies, a director of Cadogan, would be on behalf of Cadogan and that a Mr Clive Levontine, from Winward Fearon, would be on behalf of Shirayama . That letter so far as material said this: "Mr Okamoto is currently on urgent business in Japan and China and is unavailable to attend the mediation. At a board meeting of Cadogan held this morning very careful consideration was given to the conduct of the mediation. Mr Davies, a director of Cadogan, was authorised to attend the mediation on behalf of Cadogan with full authority to settle any matters in dispute between the parties within the parameters of the instructions and authority given to him by the board of directors. As you are aware, the vast majority of the matters in dispute are between Cadogan and Danovo, not between Shirayama and Danovo . In the absence of Mr Okamoto, Shirayama has given full authority to our Clive Levontine to settle any matters in dispute between Shirayama and Danovo within the parameters of the detailed instructions which have been given to him. Given that our Mr Levontine will be present in mediation not only as the solicitor to the claimants but also as the representative of Shirayama, it is thought prudent that Nick Taggart of counsel also attend. He has agreed to do so."

8. Implicit in the letter was that neither a Mr Chauhan nor a Mr Caselton, who had earlier featured prominently in the conduct of Cadogan's affairs, would be in attendance.

9. Winward Fearon's letter, followed by a telephone conversation between Mr McIntosh, of Davies Arnold Cooper, and Mr Levontine, led to the following exchange of letters. First, a letter from Davies Arnold Cooper, dated 19th January:

> "We refer to our telephone conversation today between our Mr McIntosh and your Mr Levontine in which we expressed our surprise and disappointment on being informed in a letter dated 16 January and faxed to us late on Friday and only seen this morning that Mr Okamoto is unable to attend the mediation on Thursday. We have been proceeding on the basis that the mediation would be attended by those persons

necessary to it as identified, after argument, by Mr Justice Blackburne in ordering the mediation. He was aware of the willingness of Charles Saatchi and Nigel Hurst to attend on behalf of our clients as essential participants. In the transcript of his judgment (copy enclosed) which is currently with the judge for approval, the judge identified Mr Okamoto and yourself . . . . as representatives who ought to be present and also Mr Chauhan and Mr Caselton. It has been our understanding that your delay in coming back to us with the final choice of date for the mediation has been because of your need to ensure these individuals could attend. Bearing in mind the extent to which Mr Okamoto was involved in the negotiating of the lease and licences and subsequently we are firmly of the view that he is an essential participant to the mediation in order to make a successful outcome which resolves all differences more likely. We therefore invite you, in the light of Mr Okamoto being, as you say, currently on urgent business in Japan and China, to agree to an adjournment of Thursday to the earliest possible date convenient to Mr Okamoto and to the other essential participants and to ours . Please also confirm that but for the intervention of Mr Okamoto's urgent business in Japan and China he would have been attending this Thursday. We note from our telephone conversation that you have agreed to take instructions from Mr Okamoto as quickly as you can and we will await your response before replying to your letter."

10. The reply to that from Winward Fearon, dated 20th January, was as follows:

> "The learned judge did not order any individuals to attend the mediation. Our clients have designated the appropriate individuals and given them the appropriate authorities. Mr Okamoto is not willing to attend and our clients do not consider that his attendance is essential or would necessarily advance any settlement. Our clients' position in the mediation will not be affected by the identity of the representatives in attendance.
>
> In the circumstances, Danovo should now confirm that it will participate in the mediation on 22 January. Shirayama and Cadogan are ready, willing and able to do so and their representatives will be at your offices at 9 .30 am on that day. However, you should, of course notify us and Mr Naughton, QC beforehand if it be your client's intention to withdraw from the mediation.
>
> Our clients are of the view that by designating and authorising their representatives and confirming their willingness to attend at the mediation they are fully complying with the letter and

the spirit of the Court Order. If your client does not attend, then Shirayama and Cadogan reserve their position as to the breach of the Order by Danovo and the consequences that may follow.”

11. Believing that Mr Okamoto's participation was indeed essential if the mediation was to have any prospect of success, Danovo then caused the mediation, fixed for 22nd January, to be adjourned. It was adjourned pending the hearing of the two applications which are now before me and which were issued on 23rd January. The applications, the precise terms of which I will come to in a moment, seek Orders staying these proceedings until the conclusion of a mediation attended, among others and relevantly, by Mr Okamoto as a representative of the six claimants .

12. To explain a little more the reason for this move it is necessary to refer, briefly, to some of the evidence which was before the court on the 5th December hearing and to remarks I made, both in the course of that hearing and in my judgment on that occasion . The evidence disclosed - indeed, this is not a matter of dispute between the parties - that Mr Okamoto played a very prominent role in the negotiation of the terms of Danovo's sub-underlease granted on 6 February 2003 . He was acting with Shirayama's full authority and enjoyed their full trust and confidence as borne out, among other matters, by a letter dated 29th October 2003 from the second claimant, written in the second claimant's capacity as Chairman of the first claimant and, as he puts it, "representative of the Shirayama family", including therefore, as I understand it, the third, fourth and fifth claimants. The evidence had also disclosed that Mr Chauhan and Mr Caselton had been active on behalf of Cadogan.

13 . Those undoubted facts led me to observe, in the course of argument on 5th December, that if there was to be a mediation it would be essential that Mr Okamoto be present. In paragraph 33 of my judgment I stated in connection with the mediation which I was ordering: "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 Levontine, 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."

14. It is also clear that, until they received Winward Fearon's letter of 16th January, Danovo had assumed, and Davies Arnold Cooper on Danovo's behalf had made this clear in correspondence with Winward Fearon without any dissent from Winward Fearon, that Messrs Okamoto, Chauhan and Caselton would be in attendance at the mediation. They had good grounds for so thinking, not least the skeleton argument on behalf of the claimants at the earlier December hearing, paragraph 15 of which it was submitted: "As to timing, a mediation before Christmas is not practical"; then 15 .1: "The first claimant's European representative, Mr Okamoto, is out of the country on business and will be for some time."

15. It was, as I mentioned, the disclosure in Winward Fearon's letter of 16 January, together with what Mr McIntosh, of Davies Arnold Cooper, considered, as a result of his telephone conversation with Mr Levontine on 19th January, to be a failure to give any good reason why the mediation could not simply be adjourned to a date when Mr Okamoto would be available, assuming he would be unavoidably absent on 22 January, that led to these two applications.

16. I need only, I think, refer to the relief sought on the application in the main proceedings as I shall call them. The Order sought on the application in the forfeiture action mirrors the relief sought in the main proceedings. That relief is an Order that:

> "...there be directions in relation to the Order for mediation made in this action on 5th December 2003 ; in particular, an order that all further proceedings in the Claimants' claims in this and (on completion of its transfer) in the related forfeiture action (in the process of being transferred from Lambeth County Court) be stayed until the conclusion of a mediation attended by representatives of the Claimants (including Mr Okamoto as one of those representatives) and by representatives of the Defendant (including Mr Charles Saatchi and Mr Nigel Hurst among those representatives), held pursuant to the Order dated 5th December 2003 ; together with any further order that the court thinks fit . . ."

and then there is a request for payment of costs.

17. Then the reason for this is said to be as follows:

> "The Claimants intend to proceed with mediation under the Order of 5th December 2003 without Mr Okamoto in attendance; but Mr Okamoto's attendance is essential for a meaningful mediation, as Mr Justice Blackburne acknowledged when making the Order."

18. Just as at the hearing on 5th December, two questions arise: first, whether I have jurisdiction to make the Order sought; second, if I have, whether I should exercise that jurisdiction by making the order sought or something like it.

19. Mr Rosen, QC, appearing with Mr Taggart for the claimants, described the order sought as "at the very extremity of the court's powers" and as without precedent. He did not quite go so far as to say that there was no jurisdiction to make the Order, although he submitted that CPR Part 1 concerned with the overriding objective could not provide it. His challenge to the Order sought was much more directed to what he submitted was the inappropriateness of the Order on the facts of this dispute, coupled with a submission that the Order would infringe the claimants' right to a fair trial under Article 6 of the Human Rights Convention .

20. Mr Hochhauser, QC, appearing with Mr Walker for Danovo, submitted that if the court had power to order a mediation against the opposition of one party, it must follow that it could and should have power to impose procedural sanctions on a party which failed, or threatened to fail, to attend the mediation through a representative possessing full authority "to react to all that occurs in the mediation and to settle the dispute", to ensure that that party gives proper effect to the Order. This extends, if necessary, he said, to determine who should attend.

21. He drew my attention to Australian authority in both South Australia and New South Wales, where the courts have a statutory power to order mediation with or without the consent of the parties to the proceedings concerned and where the courts have held that they have power as an incidence of the jurisdiction to order a mediation to direct the parties to attend. Thus, in **Rajski and Another v Tectran Corporation and Others** [2003] NSWSC 478, Mr Justice Palmer ordered the personal attendance at mediation sessions of a particular party, notwithstanding the opposition of that party having to do so.

22 . I accept that assuming, as I have earlier held, the court has jurisdiction to direct a mediation, notwithstanding the opposition of one of the parties to the proceedings in question, the court must equally have jurisdiction in order to render the mediation efficacious to order a party to be adequately represented at the mediation . Whether the court has jurisdiction to direct, whether by an Order directed at the named individual or, as here, by imposing a stay, a particular person to attend, especially where that person is not a party, I consider to be altogether more questionable.

23. The court does not ordinarily direct how a party should be represented in proceedings before it. Subject only when

appropriate to questions of rights of audience, that is a matter for the party in question. I find it difficult therefore to see on what basis a court can properly direct how a party to an out-of-court process, such as a mediation, should be represented. From my part, I would regard such an Order as an exorbitant exercise of jurisdiction and I would have refused to make the Order sought on that ground alone.

24. It is to be noted that although at the hearing on 5 December I referred, on my understanding of his past role on Shirayama's behalf, to the importance of Mr Okamoto's involvement in the mediation and to that of Messrs Chauhan and Caselton, I did not make my order conditional on their attendance. It would have been quite inappropriate in my judgment to have done so.

25. Questions of jurisdiction aside, I am not in any event persuaded that an Order directed to securing the attendance of Mr Okamoto at the mediation is something which, on the evidence before me, it would be proper to make.

26. One of the matters which has poisoned relations between the parties has been the making and, at any rate prior to 5th December last, the investigation by Mr Saatchi of serious allegations against Mr Okamoto, Mr Chauhan and others. That is referred to in paragraphs 37-43 of Mr Levontine's first witness statement. Allegations involving fraud and embezzlement have been strenuously denied. Solicitors then representing Danovo, not Davies Arnold Cooper, nevertheless made clear in correspondence that Mr Saatchi was arranging for the allegations "to be investigated fully by an independent organisation".

27. This was a matter to which I referred, albeit and in an effort not to inflame matters unnecessarily in only the most general terms and without naming names, in paragraph 5 of my judgment on 5th December. The allegations, the precise nature of which have never been fully explained, notwithstanding a request by Winward Fearon that each and every allegation be precisely specified, are so far as I am aware wholly unrelated to the issues in the two sets of proceedings now before me.

28. Although Mr Hochhauser made clear after I had given judgment on 5 December and in the light of the suggestion made by me in the course of that judgment, that the allegations should be put on one side, and accepting from Mr Saatchi, that since the hearing on 5th December no investigations into the allegations have taken place and no attempts have been made by Mr Saatchi to seek any further information about them, the fact remains that the allegations have never been formally withdrawn. It is evident, moreover, that the existence of these allegations continues to trouble those affected. At all events, I am not willing to dismiss as

unfounded claims in that evidence that they continue to do so. In fairness to Danovo and to Mr Saatchi in particular, it is right to point out that following the hearing on 5th December and prior to this hearing, Winward Fearon have not sought by correspondence a formal retraction of the allegations. Danovo and Mr Saatchi could perhaps be forgiven for thinking that in those circumstances Mr Hochhauser's remarks to me immediately after I had given my judgment on 5th December had laid the matter to rest.

29. However that may be, the fact that these allegations were made has affected the claimants' approach to the matter of their representation at the mediation. Their position, following the exchanges between the 16th and 20 January, now appears from the third witness statement of Mr Levontine signed on 4th February. After referring to the Order which I made on 5th December Mr Levontine says this:

> "For the reasons set out below, the Claimants, having given very careful consideration to the conduct of the mediation, believe that they are fully complying with the said Order; and they intend to take part in the mediation properly and in good faith."

30. Then a little further on:

> "The subject matter of the proceedings is predominantly between Cadogan Leisure Investments Limited ("Cadogan"), the Sixth Claimant, and the Defendant. The only issues in dispute between the First to Fifth Claimants (for shorthand "Shirayama") and the Defendant are issues of signage on the exterior of the relevant building (which are minor in comparison to the issues of signage within the building) and possibly some issues in relation to security which is under the ultimate control of Shirayama ."

31. Pausing there, I have to say that that slightly understates the importance of Shirayama's role. Thus, under Clause 3 .30, sub-clauses 9 and 10 of their underlease to Cadogan, Shirayama are closely involved in any activity which involves an alteration of rights.

32. Mr Levontine continues a little later:

> "Mr Okamoto, the main representative of the Shirayama family and the First Defendant in Europe, [I think that must mean first claimant] is unwilling to attend a mediation . This is partly because of the behaviour of Mr Saatchi of the Defendant and the fact that Mr Okamoto among others has been (and remains) subjected to collateral allegations of the

most serious nature, which have not been withdrawn. He believes that he has been and remains under covert investigation by private investigators whom Mr Saatchi has said he has appointed."

33. Pausing there, I, for my part, accept what Mr Saatchi has said in his witness statement, that since 5th December there have been no such investigations. Mr Levontine continues:

> "In the circumstances of this case, including Mr Saatchi's behaviour, Mr Okamoto does not feel able to treat personally in any way with Mr Saatchi and his associates. Mr Okamoto's feelings are known and understood by the Claimants. Whether or not he changes his opinions, the Claimants do not believe that it would be constructive to compel him to attend. It is not merely that the Claimants do not feel that Mr Okamoto should be compelled to treat with Mr Saatchi on their behalf in these circumstances ; it is also that they consider it more prudent to delegate to the mediation someone else who has the full authority of the Claimants to conduct the mediation, but who has not been personally accused of wrongdoing or is able to take a more detached view of the matter, without the pressure of previous personal dealings and these unpleasant and wholly unjustified allegations. I [says Mr Levontine] have full and detailed instructions from Shirayama of their position for the mediation (although as I say their part in this dispute is limited). I am confident that I am able to give effect to those instructions (despite the collateral allegations which may have apparently also made against me). Those instructions come from Takashi Shirayama, the Second Claimant and the head of the Shirayama family. I have been directly instructed by Mr Shirayama on behalf of the First to Fifth Claimants, appointing me as Shirayama's representative at the mediation. This appointment is irrespective of whether Mr Okamoto is willing to attend. In short, I am fully authorised to negotiate and indeed agree terms of settlement involving the First to Fifth Claimants, within certain parameters which have been fully discussed on the Claimants' side (in privileged circumstances) . I have represented Shirayama for more than 7 years and have extensive experience of assisting Shirayama in negotiation of its various property and other interests. Further, at my recommendation, Shirayama has requested that Nicholas Taggart of Counsel also attend the mediation to offer such independent advice and assistance to myself and to the representative of Cadogan, as he may see fit. This reflects that I am attending the mediation not only as the solicitor for the Claimants but also as the duly authorised representative of Shirayama. At Cadogan's board meeting on 16 January 2004, to consider the conduct of the mediation,

> the board resolved unanimously that Mr Davies represent Cadogan at the mediation. Mr Davies has been a director of the company since Summer 2002 and has attended most if not all of the board meetings since he was appointed. Mr Davies has authority to settle in the mediation if terms can be agreed with the Defendant within the parameter of his instructions from the board."

34. A little further on:

> "Thus both Shirayama and Cadogan have given full consideration to the conduct of the mediation and have ensured that they are represented at the mediation by myself and Mr Davies respectively, and that each of us has proper authority to settle within the parameters of our instructions. Notwithstanding the Defendant's misconduct, and the collateral allegations against the Claimants, the Claimants are willing to proceed to mediation in good faith. I should however make it clear that they have no intention of entertaining any re-negotiation of the essential commercial terms on which the Lease was granted and specifically have no intention of changing the basis on which rent is payable ."

35. Then he has certain comments to make on the witness statement by Mr McIntosh of Davies Arnold Cooper. At paragraph 14 he continues:

> "I did not seek to 'play down' Mr Okamoto's importance. My clients have considered whether they wish Mr Okamoto to attend and have decided that they do not. It is not his importance that matters but the Claimants' decision as to whom they wish to conduct the mediation process for them. For the reasons I have given, my clients wish to attend at the mediation ordered represented by persons other than Mr Okamoto."

36. I have been addressed by both sides on what each speculates the motives of the other to be, in the case of Danovo in mounting these applications and in the case of the claimants in deciding, as it would appear all of a sudden to have been, that Mr Okamoto should not be in attendance. I prefer not to embark upon any such speculation. I am content to accept at face value what the solicitors on each side have stated. In the case of Danovo, I accept as genuine the concern that without Mr Okamoto's participation the mediation will not succeed and that, as it was put by Mr Hochhauser in his closing submissions, the declaration will be little more than "going through the motions". But I equally accept as genuine - at all events I have no credible basis for supposing otherwise - that for the reasons set out in Mr Levontine's third witness statement, Shirayama does not wish to

be represented by Mr Okamoto, but wishes instead to be represented by Mr Levontine and that Cadogan wishes to be represented by Mr Davies.

37. I see no reason for thinking that the claimants do not intend in good faith to participate in the mediation. Even if it were a matter for me - which I do not consider that it is - I see no reason why Shirayama should not choose to be represented by Mr Levontine, notwithstanding that he has been Shirayama's solicitor throughout their dealings with Danovo. I see no reason for questioning his statement that he has Shirayama's full and detailed instructions and authority to agree terms for a settlement. I see nothing which should arouse any suspicions or misgivings in his witness statement that his instructions are confined to certain parameters, as he puts it in paragraph 12.

38. I, therefore, decline to accede to these two applications. In my judgment, the sooner this mediation is re-convened the better. The present course of proceeding, as has become all too apparent as counsels' submissions have progressed, seems to me more likely to retard an out-of-court resolution than to promote it.

39. In view of my decision on jurisdiction and on the particular facts of this case, I need say very little about Mr Rosen's Human Rights Act point. To impose a stay on a claim pending mediation, thereby preventing the claimant from proceeding with his wish to have his claim resolved by the court's adjudication, brings into play a tension. On the one hand there is that party's right of access to the court for the adjudication of his claim, a concept which as Lord Justice Brooke observed at paragraph 42 of his judgment in **Woodhouse v Consignia Plc** [2002] 1 WLR 2558, has a particular resonance under Article 6 concerning the person's right to a fair trial. On the other hand there is the wider public interest in making the best use of the court's time and resources and in promoting the resolution of disputes by a consensual means, rather than by the adversarial processes inherent in a court adjudication, where such out-of-court resolution has a realistic prospect of achievement.

40. In the circumstances in which I made my Order on 5 December, where no stay was involved and where the Order was framed so as to avoid any interference with the progress of the claimants' proceedings, and in particular the pending Part 24 application if the mediation should fail, there was no question of any engagement of Article 6 . By contrast, the stay of proceedings sought by Danovo would potentially engage Article 6 since, by its terms, the Order would impose a stay of indefinite duration of both sets of proceedings. Absent an application by the claimants to be relieved of the stay, the stay could only be lifted if Mr

Okamoto, who is not a party, should choose to attend the mediation.

41. I have seen nothing in the evidence to indicate that any of the claimants could compel his attendance. Such an Order, if I had made it, could therefore have had the effect of denying to the claimants their right to a fair and public hearing within a reasonable time of their perfectly legitimate dispute with Danovo. I would have needed rather more than what was set out in paragraph 35 of Mr Hochhauser's skeleton argument to persuade me that it would have been correct to make such an Order.