

JERSEY / JUDGMENT

# Publicis Graphics -v- Assad

## [2011] JRC 099 (16 May 2011)

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### judgment

the commissioner: 1. The Representor seeks its costs on an indemnity basis arising out of the orders made ex parte by the Court on 29 th March, 2011. The reasons for the Court granting those orders are set out in the Court's judgment dated 26 th April, 2011, (JRC 089). The Respondent, Mr Assad, appears through Mr Lincoln and resists the application. This judgment needs to be read in conjunction with that of the Court of 26 th April, 2011, and I adopt the same definitions. 2. In his affidavit sworn on 28 th April, 2011, Mr Assad deposes that he never refused to transfer the shares he held as nominee and would undoubtedly have done so. There was no need, he says, for the intervention of the Court. 3. His affidavit recites that on receipt of the order of the Court from Carey Olsen he took advice from his French lawyers who had the conduct of the arbitration proceedings and who in turn instructed Mourant Ozannes. Their instructions were to seek a postponement of the deadline for execution of the documents and the costs hearing in order to allow Mr Assad time to give full instructions and to be advised. The request for an extension of time was refused. He decided on advice to transfer the shares he held as nominee by executing the requisite form but he continued to decline to execute the written resolution appointing new directors and removing himself and his associate as directors. That was signed by the Viscount pursuant to the order of the Court. He also on advice executed a written director's resolution registering the transfer of the shares. 4. Mr Lincoln was critical of the Representor for proceeding directly to an ex parte application without giving Mr Assad prior formal notice. If such notice had been given, he submitted that on the evidence of Mr Assad's affidavit, there would have been no need for the proceedings as he would have complied with the transfer of the shares, if not the resolution appointing and removing directors. He was also critical of the Representor for failing to disclose to the Court a memorandum of understanding dated 31 st March, 1999, between the shareholders in the Representor under Clause 6 of which it was provided that the boards of "the companies" would reflect the 60/40 split so that the 40% shareholders (Mr Assad and his associate) would be entitled to two directors, and Publicis Group SA (through its subsidiary) to three directors. The request of 14 th March, 2011, (see paragraph 7 of the Court's judgment of 26 th April 2011) Rep of Publicis Graphics

[2011] JRC 089 that he sign a resolution seeking the removal of himself and his associate was in breach of his rights; hence his refusal to sign that resolution. 5. In paragraph 8 of his affidavit, Mr Assad states that the board of the Representor resolved on 28 th October, 2010, to appoint three new directors to Publicis Graphics Jersey in addition to himself and his associate, thus bringing the board into line with the policy set out in the memorandum of understanding. He voted in favour of that resolution. Yet he gives no satisfactory explanation for his refusal to implement that decision and specifically his refusal to comply with the request of 22 nd February, 2011, that he do so, nor to explain his response of 2 nd March, 2011, that he had been advised "by consultants" not to do so "until the whole situation gets clearer and solved" (see again paragraph 7 of the Court's judgment of 26 th April, 2011. 6. Furthermore, Mr Assad fails in his affidavit to address at all his failure to respond to let alone comply with the requests of 10 th and 14 th March, 2011, that he transfer the shares he held as nominee. 7. Mr MacRae pointed out that, as conceded by Mr Lincoln, the memorandum of understanding was not an easy document to understand. The words " the companies " are not defined and there is no reference in the document to Publicis Graphics Jersey. The fact that for the following eleven years Mr Assad and his associate remained the only directors of Publicis Graphics Jersey was evidence that the memorandum of understanding had no application to it. The memorandum of understanding was not therefore relevant and there was no obligation to disclose it. 8. In paragraph 8 of his affidavit, Mr Assad asserts that there is no distinction between the dispute between the shareholders in the Representor, which is subject to arbitration, and his obligations as a nominee shareholder, which are the subject of the Jersey proceedings. Mr Lincoln went further and submitted that Mr Assad's obligations under the declaration of trust were subject to his personal rights as a shareholder in the Representor. I reject that submission. The declaration of trust would have to have contained very clear wording to permit Mr Assad's obligations as trustee to be over-ridden by his personal interests as shareholder in the Representor, if such an open position of conflict was workable. 9. There is a clear distinction between Mr Assad's personal rights as a shareholder in the Representor and his obligations as trustee under the declaration of trust and it is his failure to acknowledge that distinction that underlies his failure as trustee to act as directed. It is trite law that unless authorised a trustee must not allow any conflict to arise between his personal interests and his duties as trustee. As bare trustee of the shares for the Representor, he was under a duty to act as directed and he failed to do so. The alleged infringement of his own personal rights as shareholder in the Representor provides no justification for his failing to do so. 10. I conclude that there has been no failure to disclose on the part of the Representor. Furthermore whilst I acknowledge that ordinarily potential plaintiffs should give notice to potential defendants before issuing proceedings, I am satisfied that in the circumstances of this case, as outlined in the affidavit of Mr Pinder of 24 th March, 2011, the respondent was justified in proceeding *ex parte* . 11. I have been referred to the principles applicable to a court's discretion as to costs as set out in *Watkins-v-Egglishaw* 2002/1 and the award of costs on an indemnity basis confirmed and applied recently by the Court of Appeal in *P-S-v-C*

[2010] JCA 225 . The Courts must and will hold trustees to account for breaches of their duties and the breaches in this case were flagrant and inexcusable, justifying an award of costs on an indemnity basis. 12. I accordingly order Mr Assad to pay the Representor's costs of and incidental to the representation on an indemnity basis. Authorities Rep of Publicis Graphics

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