

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
)
)

COUNTY OF RICHLAND

) FOR THE FIFTH JUDICIAL CIRCUIT
)
)

**MICHAEL DAVID LINK, and
SANDRA STRICKLAND LINK,**

) **C/A NO. 2022-CP-40-05543**
)
)

Plaintiffs,

) *In Re:*
) Asbestos Personal Injury Litigation
) Coordinated Docket
)
)

v.

3M COMPANY, et al.

Defendants.

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Mar 25 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
)
)

COUNTY OF RICHLAND

) FOR THE FIFTH JUDICIAL CIRCUIT
)
)

**HEATHER DONAGHY, as Executor of
the Estate of SHIRLEY SMILEY
POTTER, Deceased**

) **C/A NO. 2023-CP-40-03108**
)
)

Plaintiffs,

) *In Re:*
) Asbestos Personal Injury Litigation
) Coordinated Docket
)
)

v.

4520 CORP, INC., et al.

Defendants.

**ORDER ON PLAINTIFFS' AND RECEIVER'S MOTION FOR SANCTIONS AND
CONTEMPT AGAINST RESOLUTE MANAGEMENT AND CERTAIN
UNDERWRITERS OF LLOYD'S OF LONDON**

Before the Court is the Receiver's and Plaintiffs' Motions for Sanctions and an Order of Contempt against Resolute Management, Inc. ("Resolute") and Certain Underwriters of Lloyds of London and Certain London Market Insurers (collectively "Lloyds" and together with Resolute, the "ACL Insurers").¹

BACKGROUND

Asbestos Corporation Ltd. ("ACL"), a Canadian company, was a supplier of raw asbestos fiber and other asbestos items. ACL has, at every turn, refused to obey the orders of this Court. It appears to this Court that ACL has been willfully disregarding the American judicial system despite the unequivocal fact that it sold asbestos containing materials to the United States, including South Carolina, which injured and allegedly caused the death of many citizens of this country and state. Michael Link and Shirley Potter, the Plaintiffs in the above captioned action, are both alleged to have developed mesothelioma as a result of being exposed to the ACL asbestos at various industrial facilities throughout South Carolina, including, but not limited to Celanese in Rock Hill.

ACL despite this court's ruling denying its personal jurisdiction motion and several orders ordering the defendant to participate in discovery, refused to participate in this or any other

¹ While it appears that the ACL Insurers are presently the entities currently responsible for insuring ACL, this defined term is not intended to suggest that they are the only insurers.

litigation before this Court. As a result, this Court struck ACL's answer in another case and subsequently appointed Peter Protopapas as the receiver over the insurance assets of ACL and placed him in charge of the defense of ACL in asbestos matters. ACL has thwarted the Receiver's efforts at every turn, including by preventing accessing insurance information and insisting that ACL control its defense.

During the Receiver's investigation of the insurance assets, the Receiver determined that there is (or was) approximately one billion dollars (\$1,000,000,000) of insurance coverage available to ACL and that ACL had refused to tender these and other asbestos claims to its various insurance carriers. After further investigation, the Receiver has determined that Lloyd's are the carriers currently duty bound to defend and indemnify the ACL at this time. The Lloyd's policies are administered in this case by Resolute Management, a third-party administrator.

This Court issued an order on February 23, 2024 ordering the parties to mediation and ordering that each carrier for ACL appear with full authority² to resolve these matters. That same order directed the Lloyd's and other carriers, to cooperate with the Receiver.

David Breslau, Esquire, in house counsel for Resolute, appeared at mediation with no authority to resolve the Link and Potter claims. The affidavit submitted by Mr. Breslau confirms that he was present in a representative capacity for Lloyd's and thus, under our ADR rules as set forth below, Resolute is also subject to the jurisdiction of this Court.

Resolute and Lloyd's take the position that this Court's order appointing a Receiver is void and of no effect and that ACL remains the only entity with the authority to require Resolute or

² Full settlement authority is defined as "in the case of an insurance carrier, an individual who is empowered with the decision to offer a settlement sum up to the existing demand of the Plaintiff or the policy limits of coverage, whichever is less." See Order of Chief Justice Jean Toal, Re: Multi-Week Trial Docket for the Ninth, Fourteenth and Fifteenth Judicial Circuits, June 26, 2008.

Lloyd's to act. Mr. Breslau is an attorney licensed to practice in New Jersey. Moreover, Resolute takes the position that it is not an insurance carrier, nor an agent for Lloyd's and thus was not obligated to do anything at mediation despite appearing on behalf of Lloyd's and others. Suffice it to say that Resolute cannot have it both ways. Either it is the representative of Lloyd's and other carriers and it disobeyed this Court's order or it is not and Lloyd's and other carriers disobeyed this Courts' order by refusing to attend the mediation. Either way, such conduct is impermissible and these positions flout this Court's order and continue to impede the Receiver in carrying out his duties.

This Court held a hearing on the instant motion on March 13, 2024. At that hearing Patrick Hofer appeared for Lloyd's. No appearance was entered for Resolute. At the hearing Lloyd's continued to assert that this Court's orders were void and Lloyd's is not obligated to follow them. The Court disagrees and finds that sanctions are appropriate as is a contempt order.

LAW AND ANALYSIS

A. This Court's Orders are not void.

Lloyd's initially contends that this Court's orders vis-à-vis ACL are unconstitutional and thus void and of no effect. Lloyd's uses this unilateral position to justify its willful failure to comply with this Court's orders. In support of that position, Lloyd's cites this Court to *La Societe Francaise d'Epargnes et de Prevoyance Mut. V. Dist. Ct.*, 53 Cal 495, 550 (1879). In that California case, as opposed to the instant matter, the California court granted that receiver the power to "take charge of the affairs of the corporation", "to pay all legal claims", "to take possession of all assets" and to otherwise operate the corporation. *Id.* Moreover, in that case the orders were made ex parte as opposed to here, where ACL controlled its fate. The instant facts are far different than those confronting the California court in 1879.

This Court finds that the matter before the Court is much more similar to that which confronted the United States Seventh Circuit Court of Appeals in *Philips Med. Syst, Int'l, B.V. v. Bruetman*, 982 F.2d 211, 212 (7th Cir. 1992). In that case the Seventh Circuit Court of Appeals affirmed the district court decision to enter a default judgement against a defendant and then appoint a receiver following the entry of default because of the defendant's "utter disregard for such procedural niceties as showing up for depositions and obeying court orders to remain in the country. Here, ACL has willfully and intentionally flaunted this Court's orders., ACL's insurance assets, which are assets within the state of South Carolina,³ and the right to control the defense of ACL in the asbestos litigation are what have been placed into the hands of the Receiver. The Court rejects Lloyd's arguments regarding the constitutionality of this Court's orders.

B. Lloyds is Subject to the Jurisdiction of this Court

Lloyd's next contends that it is a non-party and thus cannot be subject to sanctions. Lloyd's is incorrect. The Court-Annexed ADR Rules: Rule 3: Actions Subject to ADR provides: "All civil actions filed in the circuit court...are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration..." Further, Rule 6: Duties of the Parties, Representatives and Attorneys provides:

³ *Sangamo Weston, Inc. v. National Sur. Corp.*, 307 S.C. 143 (1992).

(b) Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:

- (1) The mediator;
- (2) All individual parties...having full authority to settle the claim....;
- (3) The party's counsel of record, if any; and
- (4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

In order to ensure that parties and their representatives take seriously the importance of the ADR Rules, the rules provide for sanctions under the appropriate circumstances. Rule 10(b): Sanctions provides: "If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity any lawful sanctions, including, but not limited to, the payment of attorneys' fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b) SCRCF."

Resolute appeared at mediation as the representative of Lloyd's and others. During the hearing on this matter counsel for Lloyds confirmed the names of at least some of the underwriters who have insured ACL as well as the fact that the National Indemnity Company ("NICO"), a Berkshire Hathaway company, provides reinsurance for ACL. Neither Lloyd's nor Resolute appeared with any authority to resolve the case.⁴ The evidence submitted by the Receiver demonstrated that the reason that the ACL insurers had no authority is because they continue to disregard this Court's appointment of the Receiver as being in possession of ACL's insurance

⁴ Counsel for Lloyd's asserted that they never received a demand. Documents provided by the Receiver conclusively established that this assertion was inaccurate and that several settlement demands were made and communicated to Resolute as the third-party administrator for Lloyd's.

assets and the right to control the defense of ACL. In light of this Court's orders to the contrary, the position of the ACL insurers is sanctionable and their actions are in contempt of this Court's orders.

Contempt sanctions are appropriate when a party subject to a Court's order willfully fails to comply with that order. For the foregoing reasons, the Court finds Resolute and Lloyd's in contempt of this Court and imposes a daily contempt fine of fifty-thousand dollars (\$50,000) until Resolute and Lloyd's comply with this Court's order. Such a fine is an appropriate civil contempt finding. *See Poston v. Poston*, 331 S.C. 106 (1998) (discussing the difference between civil and criminal contempt and noting that fines fall within civil contempt provided that the offending actor is able to stop the fine by complying with the Court's order). This fine will continue to accrue until Lloyd's and Resolute comply with this Court's orders.

CONCLUSION

For the foregoing reasons this Court orders the following:

- (1) Beginning on the date of the entry of this Order, Resolute and Lloyd's are to pay into the registry of the Court fifty-thousand dollars (\$50,000) per day for each day that they are in violation of this Court's orders. The Receiver is ordered to advise the Court if and when compliance with this Court's orders is achieved; and
- (2) Lloyd's shall reimburse the Receiver the sixty-five thousand dollars (\$65,000) that the Receiver has advanced to defense counsel; and
- (3) No payments made pursuant to this order may be charged by any insurer against any remaining insurance limits; and

- (4) The funds set forth in (1) above are to be paid weekly and a notice of payment is to be filed with this Court. Failure to do so will result in this court entering a judgment against Resolute and Lloyd's, jointly and severally, for the amount due. Such judgments will continue to be entered on a weekly basis; and
- (5) An individual representative for each of the underwriters or reinsurers of Lloyds, who is not affiliated with Resolute, shall be present at all future proceedings in this matter, including but not limited to, court hearings, trial, and mediation. For the avoidance of doubt those entities include, but are not limited to, the National Indemnity Company, Scottish Lion Insurance Company Ltd., and Tenecom Ltd.
- (6) Strict compliance with this Order is expected.

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE FOLLOWS]



Richland Common Pleas

Case Caption: Heather Donaghy , plaintiff, et al vs 4520 Corp Inc , defendant, et al

Case Number: 2023CP4003108

Type: Order/Sanctions

So Ordered

Jean H. Toal

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