**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**Cause No.: FSD 239 of 2018 (RMJ)**

**IN CHAMBERS**

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| **BETWEEN:** | **KOSMOS CAPITAL PTY LTD** | **PLAINTIFF** |
| **AND:** | **TURIYA VENTURES LTD** | **DEFENDANT** |

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| **Appearances:** | **Mr. Andrew Woodcock and Mr. Paul Keeble of Hampson & Company for the Plaintiff/Applicant**<br>**Mr. Hamid Khanbhai of Campbells for the Defendant/Respondent** |
| **Before:** | **The Hon. Mr. Justice Robin McMillan** |
| **Heard in Court:** | **11 and 12 April 2019** |
| **Judgment Delivered:** | **29 May 2019** |


## HEADNOTE

*The relevance and application of paragraph 4 of the Financial Services Division Guide – The need to adduce an evidential basis for the existence of exceptional circumstances – The general exercise of the discretion of the Court and the need to treat interlocutory applications with a high degree of care.*

# JUDGMENT

## Introduction

1. In the course of an application by Turiya Ventures Ltd ("the Defendant") to set aside an *ex parte* Order of this Court dated 15 January 2019 in relation to disclosure of information and to dismiss an Amended Originating Summons by Kosmos Capital PTY Ltd ("the Plaintiff") seeking freezing and proprietary injunctions from this Court, a further application arose on the part of the Plaintiff after the Defendant's Counsel had already completed his lengthy and detailed submissions.

2. The application related to an attempt by the Plaintiff at that advanced point to adduce future evidence in support of its case.

3. I have considered very carefully the submissions of both counsel. I have considered the relevant materials placed before me, and I must express gratitude to the candour and care of both counsel in presenting their positions.

4. Ultimately, the matter comes down to the interpretation and application of the Users' Guide, which is the Financial Services Division Guide, and the very clear principles which apply in terms of these applications and their length. I am particularly concerned here with the timelines for lengthy interlocutory applications and at paragraph 4.2 it states:

> *"Lengthy applications usually involve a greater volume of evidence and other documents and more extensive and complex issues. They accordingly require a longer lead time for exchange of evidence and preparation and for reading by the Court."*

5. Paragraph 4.3 then states:

> *"4.3 Subject to the GCR and any PD and to any further or other directions by the Court, the timetable for lengthy applications shall be as follows:*

*(a) (i) evidence in support must be filed and served with the application;*

*(ii) evidence in answer (if any) must be filed and served within 21 thereafter;*

*(iii) all evidence in reply (if any) must be filed and served within 14 days thereafter.*

*(b) This timetable may be abridged or extended by agreement between the parties or abridged or extended by the Court, save that no evidence may be filed or served less than 5 clear business days before the hearing date without the leave of the Court. Such leave will only be granted in exceptional circumstances. If a party wishes to file and serve evidence less than 5 clear business days before the hearing date the Court may direct that [the hearing] be taken out of the list and re-listed for hearing on an appropriate future date. In that event the Court may, if it sees fit, make any consequential cost order(s) which it considers appropriate, including any wasted costs order(s)."*

6. We have in submissions been focusing on paragraph 4.3 (b) for some time, but the principle in paragraph 4.2 is, frankly, of equal importance, and if, as Mr Woodcock now states, the material in question is of great significance evidentially, and I am not, obviously, saying whether it is or it is not, but if that is his position then it was absolutely critical to the timely and efficacious presentation of his case that he respected, adopted and applied the principles in paragraph 4.3 (b) if he says that there is evidence of great significance to be adduced.

7. I am told that the evidence only crystallised a short period before the proposed Affidavit in question was sworn (Hammond 3) but, nonetheless, the Plaintiff has carriage of its own case and must be responsible for the steps which it takes or, indeed, does not take. Ultimately, I have to decide against this background whether exceptional circumstances have arisen whereby that general rule can be abrogated in this case or, at least, tempered.

8. The difficulty is, as we have discussed, that there is, in effect, a bar on late service. The general bar is that no evidence may be filed or served less than five clear business days before the hearing date without the leave of the Court, and that is the bar. Obviously, the Plaintiff did not abide by that and therefore the Plaintiff's only hope in these circumstances is whether exceptional circumstances have arisen whereby leave can, nonetheless, be granted.

9. In dealing with this matter, the Court should only act on evidential material or other agreed factual material, not in dispute, but some material at the very least whereby it can, if so appropriate, deduce that there are or, indeed, are not exceptional circumstances. That necessary foundation, unfortunately, has not been provided in the present case. Looking at it in abstract terms, I would not be able to see my way to granting leave because there is no acceptable proof, or no identifiable proof even, that exceptional circumstances have arisen.

10. The alternative proposition put forward by Mr Woodcock on behalf of the Plaintiff is that if the Court is of that particular view as expressed then it would be appropriate at this stage to grant an adjournment, subject to a costs regime, to enable the Plaintiff to deal with that situation, and hopefully to seek to satisfy the Court on a later occasion that exceptional circumstances have arisen.

11. Looking at the complexity of this case, and at the possible permutations of it if I were to grant such an adjournment, and I were then to rule that there were exceptional circumstances, I would be allowing matters to continue for a very extended period of time. As Mr Khanbhai, on behalf of the Defendant, has pointed out a far more manageable and efficacious alternative would be for the Plaintiff simply to abandon the present application and, indeed, to start again with its tackle fully in order. That is a

choice it has decided not to make and, of course, it is for it to make such choices as it considers appropriate in the circumstances, subject to the applicable principles of law.

12. I do not consider that an adjournment is in the interests of justice. We have spent a number of days reviewing and analyzing authorities, evidence and, indeed, legal submissions – all of them helpful and very frankly put forward by both counsel – but, once again, the Court is unable to see its way to granting an adjournment in respect of this particular point. If litigants fail to abide by the time limits then exceptional circumstances are required to be established and proved to the satisfaction of the Court. With great regret the Court has to conclude that there is no material at present from which exceptional circumstances could be deduced.

13. That is my decision.

14. The Court would only add that quite apart from the relevance and application of the Users' Guide, the Court would decline to admit the additional evidence in any event in the proper exercise of its discretion. To do otherwise would be highly disruptive and contrary to the interests of justice.

Rob McMillan

**THE HON. MR. JUSTICE McMILLAN**
**JUDGE OF THE GRAND COURT**