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INDUSTRY NEWS

DCN vs Omnilab: destroying ICAA`s credibility

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Screen Hub

Wednesday 6 November, 2013



Every member of the board of the Independent Cinemas Association of Australia has been summoned to give evidence on behalf of Omnilab Media, and counsel for Digital Cinema Networks has set out to destroy their credibility as witnesses. Why are they making it easy for him?

The other question might be: Why has counsel for Omnilab allowed them to give evidence based on affidavits that contradict facts already established in the original trial, and upheld on appeal?

Suresh Senathirajah, appearing for DCN, has clearly stated his intention in argument to the court:

"I am going to have 10 people who are saying, swearing black and blue, we would never touch DCN with a pole... And I am never going to be able to get them to concede that what they say is untruthful or shouldn't be accepted. The only way of demonstrating to Your Honour is to show their credit on other matters – which bear on this topic – to make a submission at the end of the day, Your Honour, that you should not accept any of the evidence of the ICAA members on the point about where they would have or would not have gone with DCN. They clearly have an antipathy towards it, and when you look at all of the affidavits, they are singing all from one hymn page."

Nick Hayes, National Operations Manager for Dendy Cinemas was the first to experience the blowtorch of cross-examination:

At issue was whether Michael Smith was conducting the VPF negotiations in his own right on behalf of ICAA, or for DCN. Bear in mind that the court had already found that Smith had acted on behalf of DCN, and that had been upheld by a Full Bench on appeal. The judge who made that finding is Justice Michelle Gordon, the same judge presiding at this hearing, and to whom Hayes is giving evidence.

The letter in question was signed by President Keiran Dell and Vice President Benjamin Zeccola on behalf of the board.

Senathirajah: Can I ask you to look at this letter. In the fourth paragraph it says: As you know, the lead negotiator on behalf of ICAA to date has been Michael Smith of MGS Group and DCN. Do you see that is what is written?

Hayes: Yes.

Senathirajah: So not Michael Smith on his own. Michael Smith of MGS and DCN?

Hayes: In parentheses, yes.

Senathirajah: Yes?

Hayes: Yes.

Senathirajah: So your evidence a few minutes ago, was that you believed it was Michael Smith on his own?

Hayes: I believed it was Michael Smith in his capacity as MGS Group.

Senathirajah: And DCN?

Hayes: No.

Senathirajah: Why do you say no? It says DCN on that.

Hayes: The discussions that I had been involved in were always about Michael Smith.

Senathirajah: Then you told me it was just Michael Smith. Now you just said it was Michael Smith of MGS.

Hayes: I knew that Michael's private company was MGS.

Senathirajah: And you knew that Michael also had an interest in DCN, did you not?

Hayes: I knew that he had an interest in DCN, yes.

Senathirajah: So why wouldn't this be true?

Hayes: I'm not saying it is. I was just under the belief at the time that it was Michael Smith.

Senathirajah: So you recall, this is a letter being sent by ICAA [to the Hollywood studios]. You understand that, don't you?

Hayes: Yes. But it's not my signature on the letter.

Senathirajah: No. So that's the basis on which you are disavowing it, are you?

Hayes: No.

And so it goes, with that letter coming back to haunt Benjamin Zeccola, ICAA's Vice President, later in the day.

Senathirajah: OK. Could you please have a look at this email, Mr Zeccola?

Zeccola: Thank you.

Senathirajah: Would you mind quickly reading this email – and I should point out to you that you are not a recipient, but I'm going to suggest to you that you received a copy, or certainly that Mr [Mark] Sarfaty [former CEO of ICAA]

you received a copy, or certainly that Mr [Mark] Sarnaty [former CEO of ICAA] told you of its content?

Zeccola: I can see this document, yes.

Senathirajah: Yes. You've seen that before, haven't you?

Zeccola: Yes I have.

Senathirajah: And you see he says here – this is January, 2010, second dash point: Many of the studios insist that an integrator be involved. You've read all of the contracts, and many refer to the responsibilities of an integrator, so an integrator needs to be involved. Skipping down. MGS is a partner integration company of DCN. We trade as DCN and the deals have been negotiated with DCN as the integrator. And then the next sentence after the comma ...but since soon after starting DCN has been the party negotiating with the studios.

Zeccola: Yes, I can see that sentence.

Senathirajah: So do you accept that DCN had ICAA support as the integrator negotiating for VPFs?

Zeccola: I think this... I think this issue was of concern because for me it was Mike of MGS Group, and when I heard about this I was shocked. I did not know that DCN had been represented in negotiations with the studios. I don't think, and if you're saying from this point on...

Following an objection from Alan Sullivan for Omnilab.

Senathirajah: Mr Zeccola, you knew from 16 March, 2009, that DCN was negotiating, correct?

Zeccola: I can't recall with any clarity that it was the 16th of – whatever that date was you just said – in 2009 that I knew that DCN was involved.

Senathirajah: This is despite the fact that you were there for the meeting. You've said you would have read the email. You won't accept a straightforward proposition like that?

Zeccola: Well, I suppose for me, I was looking at the, looking at the individuals, not the company name. I was, you know, for me it was Mike Smith, and I knew him as MGS.

Senathirajah: All right. You see, what then happened after 22 January was that – and you knew this – was that Mr Smith said to you "The negotiations will not continue unless I get a letter of support from ICAA for DCN". That's what you believe, isn't it?

Zeccola: Yes.

Senathirajah: That's what happened, isn't it, Mr Zeccola?

Zeccola: I think so, yes.

Senathirajah: That the board gave such a letter?

Zeccola: Yes.

Senathirajah: Yes. And this was a letter that you knew was going to the Hollywood studios?

Zeccola: I think so. Yes.

Senathirajah: Well, it had to be.

Zeccola: Yes, yes.

Senathirajah: So you wouldn't engage in misleading and deceptive conduct in writing such a letter, would you?

Zeccola: No.

Senathirajah: No. So it must be true, mustn't it, even on your version of events, that from the time that ICAA wrote that letter, it was supporting DCN conducting those negotiations?

Zeccola: I suppose so.

Her Honour: Do you want to tender that letter?

Senathirajah: Yes, I do, Your Honour, I do.

Of course, as Nick Hayes had pointed out, that letter had parentheses.

Keiran Dell, President of ICAA and CEO of Majestic Cinemas – and along with Benjamin Zeccola, another signatory to that letter of support, had another take on it.

While conceding that Michael Smith had told him that "he had to be able to use DCN's name" to continue the negotiations with the Hollywood studios, "we were assured that that was just a placeholder and that DCN was never intended to be the integrator".

"We put it [DCN's name] in brackets to separate it from MGS because I was not comfortable with that fact."

So what is going on here?

The letter of support is clear (with or without brackets) that ICAA knew that the studios believed that DCN, a digital integrator, was conducting the Virtual Print Fee negotiations. It might have been uncomfortable with that, but it knew. It is also knew that the studios required a digital integrator, and would not negotiate directly with the independent exhibitors.

In those circumstances, ICAA provided DCN with a letter of support to the studios.

That's pretty clear to any outside observer (and has been ruled on by the Federal Court and upheld on appeal).

And yet three board members (so far) of ICAA are prepared to swear not only that they didn't know, but also that it isn't true.

Which is an opinion – but questioning the judgement of a Federal Court Justice in her own court? It's not exactly making Suresh Senathirajah's job difficult. And Suresh Senathirajah's job is to discredit the evidence of the ICAA board members.

It is baffling because ICAA has nothing to gain from this hearing. It is not facing any financial penalties. With the ICAA-Cinedigm VPF scheme up and running, there are no operational outcomes for the organisation.

What is even more baffling is the question of why Omnilab's lawyers have allowed it to occur? They would have had input into the shaping of the ICAA board members' affidavits of evidence. They would have known that these

positions were inconsistent with the facts as determined by the Federal Court. They most certainly could have anticipated that DCN`s lawyers would follow this line of attack. They could, in short, have prevented this from occurring.

And didn`t.

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