DATE: 20041202 DOCKET: C41575

## COURT OF APPEAL FOR ONTARIO

RE: OLYMPIA INTERNATIONAL HOLDINGS LIMITED And

**OLYMPIA OFFICE MACHINES LTD. (Plaintiffs/Respondents) – and – NASAQ CORPORATION and OLYMPIA BUSINESS** 

MACHINES CANADA LTD. (Defendants/Appellants)

BEFORE: SHARPE, GILLESE and ARMSTRONG JJ.A.

**COUNSEL:** Derrick M. Fulton

for the appellants

Jonathan Davis-Sydor for the respondents

**HEARD &** 

**ENDORSED:** November 26, 2004

On appeal from the order of Justice Donald R. Cameron dated February 20, 2004.

## APPEAL BOOK ENDORSEMENT

- [1] On the hearing of the appeal, Mr. Fulton appeared to request an adjournment. That request is denied. Counsel for the respondent warned Mr. Chapman repeatedly in writing from March 18, 2004 that a) Mr. Chapman could not appear as he had sworn an affidavit and b) that any request for an adjournment by a newly appointed counsel would be opposed. Despite those clear warnings, no steps were taken to retain counsel until the eve of this appeal. We see no reason to delay the disposition of the appeal.
- [2] Mr. Emms appeared and requested leave to argue the appeal and we grant him that leave
- [3] The appellant abandons the appeal against the order lifting the stay.
- [4] In our view, the record does not support the motion judge's finding that there was an agreement to abandon the OBM counter claim in consideration of forgiveness of costs. The respondent did not cross-examine Mr. Emms on his assertion that the counter claim was dropped through inadvertence.

- [5] However, the appellants did not and still have not provided a draft OBM counter-claim. We therefore cannot say that the motion judge erred in dismissing the motion to amend. We therefore dismiss the appeal, but without prejudice to a renewed motion on proper material to amend the counterclaim.
- [6] Costs to the respondent fixed at \$5000 inclusive of GST and disbursements payable forthwith.