Judgment 21/2004 **Shamurin v. Base Metal Trading Limited, Zhivilo and Zhivilo – Royal Court (Civil action file 400) – 1 June, 2004**

Rule 48 of the Royal Court (Civil) Rules 1989 – applications for security for costs – previous order on 9 March, 2004 that security be lodged, the proceedings to be stayed in the meantime – present applications for orders that unless security be lodged by the date fixed, the claims against the defendants shall be struck out – unless orders granted. [See also Judgment 31/2004.]

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 1st day of June, 2004 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

Between

RUSLAN BORISOVICH SHAMURIN

Plaintiff

and

BASE METAL TRADING LIMITED

First Defendant

and

YURII YURIEVICH ZHIVILO

Second Defendant

and

MIKHAL ZHIVILO

Third Defendant

Whereas on the 20th May, 2004, the Lieutenant Bailiff considered applications by the Defendants in the terms attached hereto that unless the Plaintiff lodges the sums specified therein by 14th May, 2004, his claim against them shall be struck out and heard thereon Advocates G.S.K. Dawes, C.A. Tee and A.D. Laws, Counsel for the Plaintiff, first and second Defendants, and third Defendant respectively;

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED the Plaintiff:

1) to pay TWELVE THOUSAND ONE HUNDRED AND TWENTY FIVE POUNDS (£12,125) into Court, in respect of each Defendant by 5.00 p.m. on 29th June, 2004 and unless he does so the action shall stand dismissed as against each Defendant in respect of whom this part of the Order is not complied with by that time and date;
2) to provide security in the sum of FIFTEEN THOUSAND THREE HUNDRED AND SEVENTY FIVE POUNDS (£15,375) to each Defendant by 5.00 p.m. on 31st August, 2004 and unless he does so the action shall stand dismissed as against each Defendant in respect of whom this part of the Order is not complied with by that time and date, in respect of this part of the order only, with liberty to apply to each side.

S.M.D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN:

RUSLAN BORISOVICH SHAMURIN	the Plaintiff
V	
BASE METAL TRADING LIMITED	the First Defendant
and	
YURII YURIEVICH ZHIVILO	the Second Defendant
and	
MIKHAEL ZHIVILO	the Third Defendant

APPLICATION

The First Defendant and the Second Defendant whose address for service is 7 New Street in the parish of Saint Peter Port in the Guernsey hereby

APPLIES TO THE COURT

THAT

1. unless the Plaintiff lodges with the Court the sum of £55,000 in respect of Security for Costs for the First and Second Defendant, on or before 14th May 2004, the Plaintiff's claim against the First and Second Defendant be struck out;

2. such other directions as the Court deems fit;

3. costs.

Dated this 30th day of April 2004

CLARE TEE
Advocate

IN THE ROYAL COURT OF GUERNSEY

ORDINARY COURT

BETWEEN:-

RUSLAN BORISOVICH SHAMURIN — Plaintiff

V

BASE METAL TRADING LIMITED — First Defendant

and

YURII YURIEVICH ZHIVILO — Second Defendant

and

MIKHAEL ZHIVILO — Third Defendant

APPLICATION BY THIRD DEFENDANT

The Third Defendant whose address for service is 18 – 20 Smith Street in the parish of Saint Peter Port in the Guernsey

APPLIES TO THE COURT

1. For an Order that unless the Plaintiff lodges with the Court the sum of £27,000 in respect of security for costs for the Third Defendant, on or before the 14th day of May 2004, the Plaintiff's claim against the Third Defendant be struck out;

2. For such other or further directions / orders as the Court deems fit;

3. That the Plaintiff shall pay the Third Defendant's costs.

Dated this 6th day of May 2004

A D LAWS
ADVOCATE

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

RUSLAN BORISOVICH SHAMURIN……..…Plaintiff/
Respondent

And

(1)BASE METAL TRADING LIMITED }
(2)YURII YURIEVICH ZHIVILO }…....…….Defendants/
(3)MIKHAL ZHIVILO } Applicants

Judgment

1. After protracted delays, the reasons for which are summarised in my Ruling on the Adjournment Application of 6th August, 2003, the Defendants' Security for Costs Applications which were originally filed in November, 2001, and which were the subject of several amendments, the latest of which being lodged on 17th and 18th July, 2003, were eventually heard on 14th and 15th January this year. In my Judgment of 9th March I ordered that the Plaintiff should furnish Security in the sum of £27,500 in respect of each of the three Defendants by the 25th April, 2004. That was not in the form of an 'unless' Order (which the Defendants now seek) and, indeed, was not perfected because of the objection taken in Advocate Tee's letter of 12th March prior to the transmission of the Act of Court containing the formal expression of my decision.

2. I now have for decision the Defendants' respective Applications of 30th April and 6th May, 2004, that unless the Plaintiff lodges the sums specified by the 14th May, 2004, his claim against each of them shall be struck out. The First and Second Defendants' present Applications are in contrast to their predecessors, which in each case prayed that all further proceedings should be stayed unless the security sought was provided. In the Third Defendant's case the applications have previously consistently been that the Plaintiff's action against him shall be stayed pending the provision of the security, and that if he should not provide it the action should be dismissed.

3. It is to be observed that under Rule 48(2) of the 1989 Rules two courses are open to the Court, namely, to order a stay until the security is provided and, if a deadline is set, as would necessarily be the case if an unless Order is given, to order that the proceedings in question shall be dismissed. There is no mention of striking out, which is more appropriate to an application under any of the limbs of Rule 36. There is, of course, all the difference between staying an action and dismissing it. A stay acts as a brake on, or suspends, the proceedings: a dismissal is usually an end of the case, subject to any appeal. As Lord Denning M.R. said in Cooper v. Williams [1963] 2 Q.B. 567 at page 581:

> "……..I am of the opinion that the effect of a stay is that it is not equivalent to a discontinuance, or to a judgment for the plaintiff or the defendants. It is a stay which can be and may be removed if proper grounds are shown."

4. It follows that the proceedings in question remain alive during the period of the stay, or until it is lifted. It follows, in turn, that, in respect of the First and Second Defendants, Mr. Shamurin is facing a different application from that which was filed on the 18th July, 2003, in that, in respect of those two Defendants, the sanction against not complying

with the Order now sought is a dismissal, or, if it does not come to the same thing, a strike out, rather than a suspension of the action, which would then still remain alive. In response to it, his Advocate has filed an Affidavit at a very late hour, which I assume in his favour has now been sworn.

5. The Affidavit is stated to be in opposition to the unless Orders now sought by the Defendants. In fact it seeks to vary my Order of the 9th March in two ways: first by releasing Base Metal from its obligation to lodge £82,000 in the High Court in London for security for the costs of its appeal against Tomlinson J.'s Judgment of 22nd October, 2003, as a *quid pro quo* for releasing him (Mr. Shamurin) from his obligation to pay a total of £82,500 as security for costs in this action, and secondly by postponing the deadline for any unless order that might be granted until two weeks from the projected judgment of the English Court of Appeal in the appeal now filed by Base Metal in London, or, as I understand the Affidavit, for three months therefrom, whichever is the longer.

6. In support of this contention Mr. Shamurin states in his Affidavit of 18th May that he now has difficulty in complying with the Order of 9th March due (1) to the additional expense he has incurred to his own lawyers in England 'concerning' the costs of the appeal filed by Base Metal, and (2) to being called upon to pay a further £150,000 by way of costs in the Leadenhall case, in respect of which I am informed that a bankruptcy petition against Mr. Shamurin is due for hearing on 9th June. These are, of course, distinct from his own legal expenses in that case, which, in answer to Mr. Hollander Q.C. in the London proceedings he estimated as between £70,000 and £75,000, of which the beneficent Mr. Myzin paid £40,000 and his other friends, including Keeton, £35,000. As to (1), although early in his submissions Advocate Dawes referred to the question of an appeal by Base Metal, for which Tomlinson J had given leave, this did not feature prominently in the arguments I heard in January in the main Security for Costs Applications. Neither was it advanced as a factor to be taken seriously into account at that stage.

7. At the time of referring to Base Metal's appeal against Tomlinson J.'s judgment, Mr. Dawes led the Court through the respective sums which, according to him, had been incurred in respect of costs in the London proceedings, and wasted as a result of duplicating proceedings there which could have very well been brought by way of a counterclaim in this action. These are set out at paragraph 3 of Tomlinson J.'s costs Judgment and in mine at paragraph 59. It may well be that Mr. Shamurin's legal costs in repelling the intended appeal had not been quantified during the currency of the submissions on the Security for Costs Applications in March, but it nevertheless behoved Mr. Dawes to mention this contingent liability at that time.

8. Similarly, as regards (2) above, it is perfectly clear from paragraph 5 of Yuri's Affidavit of 25th June, 2003, and the transmission advice from Lloyds TSB's of 18th June, exhibited thereto, (which was during the currency of the hearing before Tomlinson J.) that the $ 252,928.65 paid to Holmans did not include the costs of the Leadenhall action, which still had to be assessed and paid by Mr. Shamurin or, as the case may be, his financial backers. I note in this connexion that the claim for the principal sum lent under the loan agreement of 6th November, 1997, (as to which Cresswell J. disbelieved Mr. Shamurin and found that the agreement was authentic and not fabricated) was a relatively modest $120,000, the remainder being made up by the interest due.

9. It follows from this that the contingent liability for his own costs in the Base Metal appeal and the actual liability for the unpaid costs of the Leadenhall proceedings should have been well present to the minds of Mr. Shamurin and his advisers at the time the instant Applications were argued in the Guernsey Court on the 14th and 15th January this year. I am consequently unsympathetic to Mr. Shamurin's claims in his Affidavit of 18th May that these are added factors which have arisen since the hearing which I should now take into account in

his favour as changed circumstances in order to reduce or other- wise ameliorate his liability to provide security for the Defendants' costs hereof.

10. In addition to the foregoing, however, Mr. Dawes has urged further factors which he submitted should be taken into account in the instant proceedings, namely

(A) That the parties were in correspondence, as I understood the position, in around June 2002, with a view to uniting both sets of proceedings. There was a conflict between Counsel as to whether the negotiations if such they were, were conducted in the course of the Case Management policy of the English Courts, or merely consisted of without prejudice correspondence.

(B) That I had laid the preponderance of the blame for the unsuccessful London proceedings at the door of Base Metal, and, in doing so I had analysed the reasoning of Tomlinson J. when he was dealing with the issue of why Base Metal had not counterclaimed in the Guernsey proceedings. Tomlinson J. had concluded that Base Metal's advisers had not adopted this course because of the challenge to the jurisdiction of the Guernsey Court, coupled with a submission that Russia, and not Guernsey was the appropriate *forum* in which this action should be tried. However, said Mr. Dawes, this was itself faulty inasmuch as Counsel for the First and Second Defendants had strongly submitted on 20th June, 2001, in support of their *Exceptions de Fonds* that Russia was the *forum* in which, for a number of reasons, justice would be better served if this action were tried there. Yet the Claim in the Southern District of New York in which Base Metal was the Second Plaintiff, as exhibited to Mr. Shepherd's Affidavit of 16th March, 2001, showed clearly that the case for Base Metal was that justice could not be obtained in Moscow due to:

'THE NOTORIOUSLY CORRUPT RUSSIAN LEGAL AND ECONOMIC SYSTEM'

In the result, Mr Dawes said, Base Metal had embarked on a cost-escalating expedition in London on a false premise, because the supposed barrier which 'would not have sat easily' with a counterclaim in Guernsey was itself dishonest.

11. Mr. Dawes concluded his submissions by suggesting an alternative course to the Court: namely that in view of the very similar amounts which had been ordered as security for costs in the London appeal and in this case, the amounts claimed for past and future costs in the Defendants' Bills should be separated, and the ends of justice would be met if the Court were to order that the past costs should be paid by 1st July, and the sums claimed in respect of future costs by a date not less than a fortnight after delivery of the Court of Appeal judgment.

12. This proposal in itself creates some difficulty, in that the Revised Bills of Costs attached to the Applications are now ten months old. It may well be, therefore, that the division between past and future costs will move down the respective lists of items. However, for the purposes of this part of Mr. Dawes' submissions I will take £44,282.40 as the figure for past costs in the First and Second Defendants' combined Bill, and £51,269 as that for future costs. In the case of the Third Defendant I assume the line should be drawn under Item 7, namely the £3,340 claimed for preparation of all the interlocutory applications other than the Freezing Order (and before Item 8-taking proofs of witnesses).

13. The *quid pro quo* suggestion did not commend itself to Miss Tee. Moreover she submitted that if Base Metal's appeal succeeds it could well be that Mr Shamurin's claim in Guernsey would founder, let alone the fact that the parties to the two actions were not identical. She further said that the proposal to unite the two sets of proceedings had arisen in the course of the case management exercise whereby each side completes a questionnaire for

the purposes of a pre-trial review. In her submission, in view of Tomlinson. J's clear findings on this aspect, this matter was no longer relevant.

14. As regards Mr. Dawes' complaint that the Defendants had adopted a policy of harassing Mr. Shamurin with every conceivable interlocutory appli- cation as tactical manoeuvres to increase his difficulties and his costs, Miss Tee said that this suggestion lay ill in the mouth of Mr. Dawes in view of their 'knee-jerk reaction' to the original Security for Costs Applications in November, 2001, by filing the abortive Application for the Freezing Order by way of retaliation. Furthermore, said Miss Tee, what had happened to the Plaintiff's appeal re- garding the Freezing Order? Despite the strong draft grounds of appeal, this had never materialized although we were now nearly two years down the line.

15. I have already dealt with the respective contentions of Mr. Dawes and Miss Tee regarding the sequence of the events in the filing of these applications in my Ruling on the Freezing Order of 22nd August, 2002. In my judgment they were all so close in point of time that it is not possible to say that either side was the more reprehensible, or the more assiduous in promoting the interests of its clients, than the other. Moreover, as regards the Freezing Order, and the lack of haste in getting on with the intended appeal, it has to be said that matters could not be progressed for over six months due to the Beetle Holdings litigation.

16. On behalf of the Third Defendant, Advocate Laws very largely adopted Miss Tee's submissions. He strongly submitted that the time has now arrived at which Mr. Shamurin must be put to his election: whether to pay the security ordered or submit to his Cause being struck out. Moreover the deadline should clearly be set before the date of the London Appeal, and, if this is not done, there could well be prejudice to the Defendants, especially if the appeal succeeded. The prevarication and hedging had gone on for far too long, said Mr. Laws, and the deadline should be no longer than four weeks from the determination of the unless Applications.

17. Mr. Laws referred to the Plaintiff's pleas of poverty over the years, and criticised the phraseology of paragraphs 4 and 5 of his latest Affidavit. In effect, Mr. Laws is saying that the words 'I have had difficulty in complying with the order' meant either 'my backers have had difficulty' or 'I have had difficulty in persuading the funders to comply with the order'. This was, he said, exactly the situation which had led to the position of the backers being thrown into sharp relief. The fact that it had been established in cross-examination in both the Leadenhall and the London actions that they were funding Mr. Shamurin inevitably led to the consequence that Court should look beyond his claims that he had difficulty in complying with this Court's orders, and recognise the reality that the funders would determine whether or not this case continued.

18. Mr. Laws added that the Plaintiff's conduct all came down to his consistent failure to make proper disclosure of his financial affairs, as demonstrated over two years ago by Advocate Wessels' submission in his skeleton argument of 17th January, 2002:

> "20. In the absence of a full and frank affidavit from the Plaintiff disclosing the pre- cise amount of the funding he has obtained' [and] 'the source of that funding……the court is entitled to draw the obvious inference that the Plaintiff has adequate finances to meet any reasonable order for security for costs that the Court may make."

19. I am bound to say that I am unimpressed by the reasons now advanced by Mr. Shamurin and on his behalf that I should vary my Order of the 9th March. The liabilities in respect of Leadenhall's costs in those proceedings and his own legal costs in resisting the appeal which I have set out in (1) and (2) above do not in my view amount to new material which could not have been ascertained with reasonable diligence at the January hearing. Moreover Mr. Shamurin's lamentable record as regards credibility leads me to the view that I should regard his present claims that he cannot afford to meet the Orders made by this Court

with scepticism. I couple this view with the fact that Mr. Shamurin could not have supported the litigation in which he has been involved in London or in Guernsey without the funding of financial backers.

20. The view expressed in the last sentence is consistent not only with the evidence in both sets of High Court proceedings in London, but with Mr. Shamurin's repeated claims of impecuniosity to which I referred in particular in paragraphs 100 to 104 of the Ruling of 9th March. I therefore draw the inference that he continues to be so funded as, to use Mance L.J's words in Nasser v. United Bank of Kuwait [2002] 1 AER 401 at paragraph [64], an 'obvious reality' of which the Court should take notice. Nonetheless the views I have just expressed do not relieve me of the duty expressed by Lightman J. in the passage I set out at paragraph 97 of the March Ruling, to decide the single criterion now applicable:

> "…….what is just in the circumstances of the particular case."

I apprehend that this is a continuing duty so that if the circumstances surrounding the application, or those of the applicant or respondent have significantly and materially changed, in this instance since the initial order was made, then it is incumbent on the Court to take such factors into account and adjust the order accordingly.

21. I now address the remaining matters which arose during the sub- missions and which I have summarised at (A) and (B) above. First the supposed negotiations with regard to uniting these proceedings with the London action. These appear to have been inconclusive and Counsel disagreed as to whether they were truly negotiations in without prejudice correspondence, or were 'feelers' put out in the course of the case management process. On the material available it is impossible to say with any degree of certainty whether the Plaintiff was offered a genuine opportunity to combine the two actions, and thus save costs, what were the practical difficulties to which Mr. Dawes alluded and whether limitation considerations played a part. Accordingly I regard this as an entirely neutral matter favouring neither one side nor the other.

22. Turning to head (B), I have found this slightly more troublesome. While this Court was aware of the 'dishonest' basis for the *forum* challenge which was argued in June and July of 2001, it did not feature in the submissions made on these Applications in January of this year. Equally I suspect that the paragraphs 58 *et seq.* of the Complaint filed in the New York Southern District Court were not present to the mind of Tomlinson J. when he was canvassing the hypothetical question of whether Base Metal could or should have counter-claimed in Guernsey for a breach of agreement by Mr. Shamurin in failing to confine himself to hedging when entering into futures contracts on the company's behalf.

23. Even if this factor had been present to the Judge's mind it cannot be contended, in my view, that it would have made any difference to his conclusions, because he found that it was neither expressly provided nor was it implicit in the agreement on which Base Metal relied in their Particulars of Claim that the business of Base Metal would be confined to hedging. Moreover he held (para- graph 24) (a) that the law governing that agreement could not be other than Russian (b) (paragraph 20) that the Russian law of delict did not recognise a duty to exercise reasonable care and skill in the transaction of business (the breach of which had been alleged against Mr. Shamurin) and (c) that even if Russian law did recognise any of the ways in which Base Metal suggested that a claim could be brought against Mr. Shamurin, any such claim would have become time-barred by the end of 1997.

24. It is a reasonable conclusion from the foregoing that Tomlinson J. did not think, if the claim had been brought as a counterclaim by Base Metal in Guernsey, that it would have had any great prospect of success. In the result I do not consider that the matters I have classified above as heads (1) and (2), or as heads (A) and (B), constitute factors which should impel me at this stage to modify the totality of the amounts which I ordered the Plaintiff to

provide as security for costs to each of the Defendants in March of this year. This conclusion still leaves for consideration, as regards timing, that which is now just in all the circumstances of the case.

25. Had the draft Act of Court been perfected and gone within a day or two of the Judgment of the 9th March, then in default of compliance with the deadline of 25th April then set (which unfortunately was a Sunday), or the next working day, the Plaintiff would have had scant excuse for resisting an unless Order within a fortnight, as sought in the First and Second Defendants' Application. That this did not happen is due to the objection raised regarding the representation of the Zhivilos by Holmans. In this connexion I observe that the 14th May had already passed by the time the instant Applications came on for hearing.

26. I take into account as a mitigating factor that the sanctions now sought in the event of non-compliance are more severe than before. I have considered whether the deadline should be postponed until after the result of Base Metal's appeal might reasonably be expected. I am tempted to recall that almost a year ago Advocate Ferbrache sought an adjournment of the hearing of the Revised Security for Costs Applications on the ground that the hearing of the London action had concluded after an eighteen day hearing on 4th July, 2003, and that, since Tomlinson J.'s delivery of his reserved Judgment was imminently expected, it would be a sterile exercise to carry on with the hearing, in view of the similarity of the parties and of the issues involved in the two actions.

27. In point of time that Judgment was not delivered until 22nd October, 2003, that is to say almost three months after the conclusion of the proceedings on the adjournment. The Plaintiff's suggestion that the deadline of any unless Order should be postponed until after the decision in the Appeal is, according to Miss Tee, merely a continuation of the Plaintiff's backers' 'wait and see' policy so that they can, as it were, keep the Guernsey pot simmering, while they make up their minds whether or not to continue the Plaintiff's funding.

28. In determining that which is just in all the circumstances of the case at this stage, and having, to that end, considered the opposing submissions carefully, I am quite satisfied that unless orders are now justified for the reasonable protection of the defendants. Reverting to the issue of timing, I am reluctant to postpone the date until after the determination of the intended appeal in London as this will undoubtedly result in considerable further delays which might well reduce or even negate the protection which I have adjudged the Defendants should now have.

29. I take this view because the complexity of the issues which Tomlinson J. had to decide is self-evident from his judgment. Leading Counsel were employed on both sides and it is likely they will continue to be instructed for the appeal. The complexity of the issues is likely to remain. True, there will be no witnesses, or it is highly unlikely that there will be. As to the duration of the hearing I only have one Affidavit on the subject. It says that the Appeal is set for some time between 19th and 25th July, but the number of days is not stated. It is virtually certain that the Appeal Court's judgment will be reserved. I cannot rule out the possibility that it will be delivered or handed down after the Long Vacation. That would take it into October.

30. Taking all these circumstances, some of which are admittedly speculative, into account, I consider it is just to divide the Bills of Costs, and recognising that they have not been updated, into those already incurred and those estimated for the future. As regards the First and Second Defendants the amount of the former, as at 18th July, 2003, which is the only material I have, is £44,282.40. As to the Third Defendant, the total of the items claimed from 1 to 7 inclusive, is £37,388. The total of these is £81,670. The total of all the three Defendants' Bills of Costs comes to £183,039. Rounding the first total up slightly it comes to 45% of the second. I therefore take 45% of the original figure I specified in my Ruling of 9th

March, namely £82,500 as between the three Defendants. That comes to £37,125, or £12,375 if spread equally between the three Defendants.

31. As regards timing, I consider the four week period asked for by Mr. Laws (albeit in respect of the total sum ordered) is just and reasonable as between the Plaintiff and each of the three Defendants. I therefore Order that the Plaintiff shall pay £12,125 into Court, in respect of each Defendant by 5 p.m on the 29th June, and unless he does so, the action shall stand dismissed as against each Defendant in respect of whom this part of the Order is not complied with by that time and date.

32. Turning finally to the balance of the amounts I ordered on 9th March, this comes to £15,375 in respect of each of these Defendants. As to timing, doing the best I can to arrive at a just solution, I order the Plaintiff to provide security in the sum of £15,375 to each Defendant by 5 p.m on 31st August, and unless he does so the action shall stand dismissed as against each Defendant in respect of whom this part of the Order is not complied with by that time and date. In respect of this part of the Order there shall be liberty to apply to each side, but there shall not be liberty to apply as regards the first instalment, which, as I said, is to be complied with by 5 p.m on 29th June. The correct form of an unless order can be found at page 762 of the text in the 1999 White Book.

A.R.W.Hancox.
Lieutenant Bailiff
1st June, 2004