Judgment 31/2004 **Shamurin v. Base Metal Trading Limited, Zhivilo and Zhivilo – Royal Court (Civil Action File 400) – 1 July, 2004**

Security for costs – "unless orders" made on 1 June, 2004 – Plaintiff's application for extension of time and leave to appeal – inadequate information from the Plaintiff – applications dismissed. [See also Judgment 21/2004]

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 1st day of July, 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 30th June, 2004, the Lieutenant Bailiff considered applications by the Plaintiff in the terms attached hereto for

1) extending the time set in the Unless Orders made by him on the 1st June, 2004;

2) varying the security so ordered;

3) for leave to appeal the said order;

and heard thereon Advocates G.K. Dawes, C.A. Tee and R.I.C.E. Harris Counsel for the Plaintiff, the first and second Defendants, and the third Defendant respectively;

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

1. DISMISSED the said applications.

2. UPHELD the said order of 1st June, 2004 and DISMISSED the said action.

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

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IN THE ROYAL COURT OF GUERNSEY

BETWEEN:

RUSLAN B SHAMURIN

Plaintiff

-v-

BASE METAL TRADING LIMITED

First Defendant

YURII YURIEVICH ZHIVILO

Second Defendant

MIKHAL ZHIVILO

Third Defendant

RUSLAN BORISOVICH SHAMURIN (the Plaintiff) whose address for service is 1 Le Marchant Street, in the parish of Saint Peter Port, in the Island of Guernsey:

APPLIES TO THE COURT

for an order pursuant to RCCR and/or the inherent powers of the Court as follows:

1 That leave to make the application be given;

2 That time for complying with Lieutenant Bailiff Hancox's judgment dated 1st June 2004 whereby £12,125 security for costs for each of the three defendants was to be paid into Court by 5pm 29th June 2004 be extended;

3 Alternatively that the amount of security be varied on the grounds that the Plaintiff's circumstances have changed in that he no longer has a funder;

alternatively, and to the extent necessary:

4 Leave to appeal from the said judgment.

Dated this 28th day of June 2004.

GORDON DAWES
Advocate for the Plaintiff

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IN THE COURT OF APPEAL
CIVIL DIVISION

BETWEEN:

RUSLAN BORISOVICH SHAMURIN

Plaintiff

-v-

(1) BASE METAL TRADING LIMITED

(2) YURII YURIEVICH ZHIVILO

(3) MIKHAL ZHIVILO

Defendants

The Plaintiff, whose address for service is 1 Le Marchant Street, in the parish of Saint Peter Port, in the Island of Guernsey:

APPLIES TO THE COURT

for the following orders:

1 to the extent that it may be necessary, leave to appeal from the interlocutory judgment of Lieutenant Bailiff Hancox dated 1st June 2004 concerning the Defendants' applications for security for costs on the grounds set out in the attached draft notice of appeal;

2 an extension of time in which to bring this appeal, again insofar as such may prove necessary;

3 that the costs of this application be provided for.

Dated this 28th day of June 2004.

GORDON DAWES
Advocate for the Plaintiff

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Approved Text

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

RUSLAN BORISOVICH SHAMURIN……..…Plaintiff/ Applicant

And

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

Judgment

1. There is now before me a hybrid Application for extending the time set in the Unless Order I made on the 1st June (not the 1st January) 2004, for varying the security so ordered and for Leave to Appeal against the Order. For good measure Advocate Dawes, who has appeared on all the recent hearings in this protracted case on behalf of Mr. Shamurin, has added a precautionary Notice of Appeal to the Court of Appeal in case the Application to this Court for such leave is refused.

2. The Unless Order of the 1st June was preceded by a lengthy Ruling on the substantive Applications by each of the Defendants for Security for Costs, all of which had been outstanding for a long period of time, and which was delivered on the 9th March this year. That Ruling was largely ineffectual because no Act of Court was drawn up timeously, which was, in turn, partly due to a trivial dispute as to the wording of Paragraph 76 of that Ruling.

3. The Unless Order specified that the Plaintiff must provide the following Security for the costs of the Defendants:

£12,125 into Court for each of the three Defendants by 5 p.m on 29th June.
£15,375 for each of the three Defendants by 5 p.m on 31st August

otherwise the action should stand dismissed. I gave liberty to apply in respect of the second instalment but not in respect of the first. At that time I drew attention to the form of an Unless Order appearing at page 762 of the White Book. The Orders themselves do not appear to have been extracted.

4. Mr. Dawes mounts his Applications in this way. The Plaintiff's circumstances have changed in the meantime in that, as is shown by paragraph 6 of his supporting Affidavit, his funder, or funders, have withdrawn their financial backing as from 25th June, 2004. Consequently he is now impecunious and cannot meet the Orders of the Royal Court. Mr. Dawes continued by expanding the familiar theme that a great deal of Mr. Shamurin's present impoverishment is due to the tactics of the Defendants. The main complaint in this respect is that Base Metal sued in London when they could very well have brought their case by way of Counterclaim in the Guernsey proceedings, and thus avoid a great deal of duplication of the costs, both Mr Shamurin's and overall.

5. I have already considered this aspect of the Plaintiff's submissions, in particular in paragraphs 68 to 71 of my 9th March Judgment, in which I extensively analysed Tomlinson J's reasoning in this respect in his Judgment of 22nd October last, and, to a lesser extent in my Ruling of the 1st June. I also said, at paragraph 86 and 87 of the former:

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> "86. In their Supplementary Skeleton Argument of 22nd July, 2003, the Plaintiff's Advocates say that the fact, as is now common ground, that he is receiving funding from third parties is irrelevant. I am unable to agree with this statement. As Tomlinson J. said at paragraph 2 of the main Judgment, the Plaintiff has obviously received generous backing. Apart from the Security he was required to provide in advance of the trial (as to which see for example paragraph 14 of his Affidavit of 7th January, 2002), by the conclusion of the case last November his total costs were over £800,000. To those must be added his costs of the current proceedings which, as I have said, will then approach £1 million.
>
> 87. In my judgment the considerable funding to which the Plaintiff now obviously has access alters the complexion of the case. From his state of impoverishment to which he has repeatedly referred he has been translated to a state in which he has, in one sense successfully, disposed of the London action, paid the judgment amount in Leadenhall, and continued the current action which in 1999 he said he could barely afford, and in relation to which he said, 2½ years later, that his circumstances had deteriorated further."

6. Mr. Dawes claimed that the Defendants' tactics in this case had been oppressive, and it was particularly so now to insist on the Security ordered when the Plaintiff's funding had disappeared. His client had explored the possibility of diverting funds earmarked for the London costs to Guernsey but found this to be impossible. He referred to Sir Lindsay Parkinson & Co Ltd [1973] 2 AER 273, in which, at pages 285-286 Lord Denning M.R indicated the necessity to guard against such an application being used oppressively, for example in order to stifle a claim, which would be the effect here if the Plaintiff's Applications for relief are refused.

7. In response to the submissions of Advocate Tee, for the First and Second Defendants, that the Affidavit was scanty and insufficient for the Court to attach any credence to the allegation that funding had been withdrawn from the Plaintiff, Mr. Dawes agreed there was no corroboration of it from an independent source, but argued that the mere fact that the Plaintiff could not comply with the Orders, when it would be easier and more in his interests to do so, provided some confirmation of its veracity. In particular Mr. Dawes said, he could have staved off a striking out by complying with the Order in respect of one only of the Defendants, thus providing security in a comparatively modest sum.

8. I said on June 1st that I was unimpressed by the reasons Mr. Shamurin then advanced as to why I should vary the Order of 9th March. At least two of the sets of costs relied on must have been known at the time of the January hearing and were not therefore new material. The matters referred to in his Affidavit of 29th June are equally unimpressive. The thread running through this case, at least from the beginning of 2002, has been that the Plaintiff has never come clean over his finances. The previous references to a shoestring and reliance on friends are mere assertions. As Tomlinson J. said when giving his Ruling of 23rd June relating to Mr. Hollander Q.C's attempts to ascertain the identities of the funders, other than Mr. Myzin:

> "I now have to rule on the question whether Mr. Hollander should be permitted to ask further questions of Mr. Shamurin in cross-examination, with a view to eliciting from him the identity of the person who is evidently funding his defence of these proceedings and indeed, it would appear, funding his prosecution of his proceedings in Guernsey against the company and the Zhivilos."

…….

7. Mr. Hollander points out that a really elementary calculation will lead swiftly to the conclusion that whoever is prepared to support Mr Shamurin in this way must so far have been prepared to make available to him something which must be approaching a seven figure sum, a seven figure sum in the sense of approaching £1 million, having regard to the estimate which one can make as to the costs which have been incurred,

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and indeed as to the extent of the Leadenhall judgment itself."

9. Tomlinson J. then went on to describe the funding as lavish. Is it to be said that this very considerable backing has now dried up—just at the time when the crunch comes as regards providing security? There has never been in this case a full and frank Affidavit from the Plaintiff disclosing the precise amount of funding that he has obtained, and the source of the funding. I pointed out to Advocate Harris, who has stepped into the breach on behalf of Mikhal for the purposes of the latest set of Applications, that Tomlinson J. had expressly disallowed questions as to the identity of the funders.

10. Mr. Harris' response was that the Judge was evidently concerned in not adding to the already extensive issues that he had to try, and that had he clearly expressed the view that such inquiry would not advance the Court's ability to resolve those issues. Mr. Harris said the position in the instant Applications is different. Here everything now hangs on the willingness or otherwise of the backers to continue funding the Plaintiff. Consequently the Affidavit was transparently inadequate and the Court should not accept the Plaintiff's bald statement that the funding had come to an end. It should probe the matter further.

11. After careful consideration I am satisfied Mr. Harris' submission is right. Tomlinson J. expressly gave as the considerations which weighed most heavily in disallowing the questioning by Mr. Hollander that Mr. Shamurin was the defendant in the London proceedings, rather than the person who initiated them (paragraphs 13 & 14), that he was obliged to defend himself and that, although that litigation could not be viewed in isolation, the funding for it was obtained after the resolution of the Leadenhall case, and well after Mr Shamurin had himself initiated criminal investigations in Russia as well as the proceedings in Guernsey. The London proceedings were of course concluded in his favour.

12. Here the boot is on the other foot. Mr. Shamurin has initiated these proceedings. His recurring plea has been that he is himself impecunious and can only continue to prosecute the case with the backing of his funders. It seems to me that the Court, and indeed the Defendants, are entitled to know more detail about the funding, when it commenced, the extent of it, who provided it and why it has come abruptly to an end. In my judgment the extreme paucity of any solid information on these lines in the latest Affidavit, as well as heretofore, is bound to lead to scepticism and to suspicion as to the genuineness of the assertions which Mr. Shamurin now makes.

13. Neither do I consider the current Applications for Security are being used oppressively. They were prudent steps which the Defendants' lawyers were well advised to take, and they were taken after the Defendants had filed their substantive Defences, and two of them were made before the subsequently unsuccessful application for the Freezing Order, which despite the strong grounds of appeal, has never been taken any further. Provided the amounts are fixed (as I endeavoured to do) so as to take into account realistically the position and circumstances of all the parties, especially that of the Plaintiff, then there are no grounds for saying that the Defendants are acting oppressively.

14. For the foregoing reasons I am not prepared to modify or vary my Order of the 1st June under Rule 53 (1). I do not need to enter into nice questions as to whether it matters that the deadline for the first sets of Security is affected by the fact that the Plaintiff's latest Applications were dated the day be- fore their expiry, though not received by the Court until the very day. I would recall in this connexion the words of Holroyd Pearce L.J. in Davies v. Elsby Bros. [1961] 1 WLR 170 to the effect that parties who leave the taking of a necessary step until the last moment often do so at their peril. He said at page 175:

> "There was no correspondence or bargaining to justify the delay. Moreover, the writ , when issued just within the statutory period of three years, was not served until the three hundred and sixty fourth day of the following year –that is to say

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> one day before it would finally expire. When plaintiffs delay in that way it becomes very difficult for actions to be properly tried. And if, having left the matter so late they get into technical difficulties (as this plaintiff did) they are liable to find that they have no opportunity to put the matter right."

15. There remains the question of whether I should give leave to appeal as is sought in paragraph 4 of the Plaintiff's Application of the 28th June. The guidelines as to when leave to appeal should be granted appear in the Practice Note at [1999] 1 AER 186 under the hand of Lord Woolf M.R (as he then was) and are as follows:

> "The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong. The burden on an appellant is a heavy one (many family cases do not qualify for leave for this reason). It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required."

In Dubai Bank Ltd v. Galadari & Others [1990] 1 Lloyd's Law Reports 120 at page 125 Dillon L.J. said:

> "These matters decided by the Judge' [meaning the submissions relating to non-disclosure of important facts and that there was a serious risk of dissipation of their assets by the Galadaris] 'in a very careful judgment of some 62 pages in which he goes through the evidence and the relevant authorities, are in my judgment, pre-eminently matters involving the exercise of the Judge's discretion. In those circumstances the function of this Court, on an appeal against a decision made by a Judge in the exercise of his judicial discretion, are very limited."

16. As Lord Diplock said in Garden Cottage Foods Ltd v. Milk Marketing Board [1984] AC 130 at page 137, an appellate Court will usually only interfere with the exercise of a Judge's discretion if his decision is:

> "…….so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached."

I have referred to Guernsey Court of Appeal decision No. 287, R.A.G.Sinclair v. C.A.H.Nicholson [2000] 27th September, but I do not consider the guidelines set out by Sumption J.A. are particularly in point here.

17. My decision of the 9th March, and more particularly that of 1st June, was essentially a matter of discretion. The draft Grounds of Appeal state that I had correctly stated my continuing duty of doing that which was just in the circumstances of the case (in accordance with the principles I had cited from Lightman J.) but had nevertheless departed from that duty in the manner described in heads (a) to (c) of Ground 1. All those matters were in fact considered. It was clearly a case of the exercise of judicial discretion and it is not suggested that it was aberrant. In these circumstances I consider this is a proper case for the refusal of leave to appeal under Section 15 (e) of the Court of Appeal (Guernsey) Law 1961 and I do so.

18. The Plaintiff's Applications are accordingly dismissed.

A.R.W.Hancox

Lieutenant Bailiff

1st July 2004

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