Judgment 41/2004 **International Steel and Tube Industries Limited v. Masood – Royal Court (Civil action file 754) – 20 September, 2004**

Application for strike-out and/or dismissal, alternatively that proceedings be stayed – allegation of abuse of process – hearing date fixed for 23 September, 2004 – applicant's application that that date be vacated –application for strike-out to go ahead as fixed on 23 September, 2004

IN THE ROYAL COURT OF GUERNSEY

The 20th day of September, 2004 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

INTERNATIONAL STEEL AND TUBE INDUSTRIES LIMITED

Applicant

and

SOHAIL MASOOD

Respondent

Whereas on the 14th day of September, 2004, the Lieutenant Bailiff considered an application by the Respondent for the vacation of the hearing dates of 23rd September, 2004, 24th September, 2004, set aside for the consideration of the Respondent's application that these proceedings be struck-out and/or dismissed and Whereas the Lieutenant Bailiff heard thereon Advocates A.M. Ozanne and A.D. Laws, Counsel for the Applicant and Respondent respectively;

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

1) REFUSED the said application;

2) ORDERED the substantive application be heard on 23rd and 24th September, 2004;

3) RESERVED the question of costs.

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

Approved Text

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

INTERNATIONAL STEEL AND TUBE INDUSTRIES LIMITED

Applicant

and

SOHAIL MASOOD

Respondent

Judgment

1. The pleadings in this action having been closed by the filing of a substantive Defence (stated by Mr. Philip Barden of the Defendant's London solicitors in his letter of 9th September, 2004, to be 'very much a holding defence') on 16th April, 2004, the next step taken on behalf of the Defendant in this protracted pre-trial litigation was to file an Application on 18th May for an Order that the proceedings be struck out and/or dismissed on the grounds of an abuse of process of the Royal Court, and alternatively that they be stayed.

2. The Application is grounded on Mr. Barden's Affidavit of the same date, which contains detailed allegations of false statements and concealment of material facts in the Affidavit of Advocate Jason Morgan of 16th June 2003, upon which the application was subsequently granted by the Deputy Bailiff for leave to serve the Cause (as it then stood) outside the jurisdiction on 11th July, of that year. An application to discharge that Order was made by the Defendant through his Guernsey Advocates on 4th September, and dismissed by me in an *ex tempore* Ruling delivered on 21st October, 2003, the second one of that date.

3. Mr. Barden (henceforth 'PTB') also refers, in paragraphs 57 and 64 of the supporting Affidavit, to the reasons why Mr. Masood contemplated applying for an anti-suit injunction in London, which included potential abuse of this Court's process. A week later he corrected that which was, in essence, an error inasmuch as the wrong draft was handed to him for swearing. An average individual might assume that it would be prudent to read through the actual sworn copy prior to swearing it, but, at all events, it cannot be gainsaid that when appearing before the Deputy Bailiff a month earlier, on 20th April, 2004, Advocate Fullman stated definitively to the Court that an anti-suit injunction 'will be served this coming Friday 23rd April'.

4. Mr. Fullman added that if the anti-suit injunction was granted 'that will be the end of the proceedings in Guernsey'. When I tackled Advocate Ayres about this on the 7th May, as the result of such an application would obviously affect the Court's list, he responded that he had no instructions. Finally, having stated categorically in his second Affidavit, that his firm, Devonshires, was not instructed to file an anti suit injunction to restrain the Guernsey proceedings, in response to Advocate Ozanne's Affidavit of the 9th June, PTB then gave reasons why Mr. Masood had 'not yet issued' an application for an anti-suit injunction in London, giving the impression that the door was still ajar in this respect.

5. Reverting to the instant case, after those which were essentially directions hearings on the 28th May, the 9th, 15th and 25th June this year, the hearing of the Defendant's Application for a strike out or stay of the Guernsey action, as amended, was, on the last of these dates, set by consent for the 1st and 2nd September, over two months in advance. Meanwhile the Defendant, together with Newport Financial Holdings Ltd, and Newport West Financial Inc., who had begun proceedings in London in February of this year against Mr. Mohammed Zahoor, Istil Group Inc. and the Plaintiff herein, served their Particulars of Claim on Stephenson Harwood ('SH'), their

solicitors, on 13th May, 2004. In order to understand properly the reasons for the Defendant's Application to vacate the dates fixed for the hearing of his application for a strike out, stay or dismissal on the morning of the 23rd and a full day on the 24th September, it is necessary to trace the chronology of the London action. I therefore now refer to the solicitors' correspondence put in by both Advocates.

6. Under the English CPR's the London defendants had 28 days to serve their defence. This was extended by consent (see Mr. Baker's letter of 9th September, paragraph 16) for another 28 days, theoretically giving SH until the 8th July. However, presumably under CPR 2.11, PTB agreed an extension to 28th July. This was not complied with and a time summons was issued which came on before Deputy Master Lloyd on 16th August. Immediately prior to the agreed hearing of 1st September this Court was apprised of that which had taken place before Master Lloyd, as contained in the letter from Mr. Rod Baker ('RB'), Miss Ozanne's instructing solicitor.

7. At this juncture it is appropriate to recall that the three plaintiffs in the London action featured as the first three plaintiffs in the Oregon action which had added the Newport entities as the second and third defendants by the first amended complaint of 7th April, 2003. The first and third defendants in the London action were the first two, out of seven, defendants named in the Oregon proceedings. On 22nd January, 2004, after a reasoned Ruling, I dismissed the Defendant's *Exceptions de fonds* filed on 28th August, 2003, in which he had claimed that the matters in contest in the present suit were the subject of a *lis alibi pendens* in the Oregon Court, and that Oregon was the *forum conveniens.*

8. On being served with the Particulars of the London Claim SH drew attention to alleged inconsistencies between the Schedule to the Claim Form and the Particulars, and especially took exception to that part of paragraph 115 of the latter, which states:

> "The Claimants seek declarations to the effect that:-
> ……..
> ……..
> " b. Mr. Masood was not validly removed from the Board of Directors of ISTIL Guernsey (or any other ISTIL company) in March 2003 or at any time thereafter, whether for cause or otherwise,……..…"

It is at once apparent that this prayer for relief is the direct opposite of the declaration sought by the Plaintiff in the instant suit and, if it stands, would arguably demonstrate an overlap, or link, between the two sets of proceedings.

9. From the outset of this phase of the battle between the parties, RB, who has charge of the case for ISTIL and Mr. Zahoor, made it clear in his letter of 14th May that his clients would resist any attempt to amend the Claim Form. PTB's riposte to this was, in effect, that no amendment would be necessary because of the terms of CPR. 16.2(5), which provides that the court may grant any remedy to which the claimant is entitled, even if that remedy is not specified in the Claim Form, and, accordingly, in the letter of 27th May he maintained:-

> "It is our client's case that every claim pleaded in the Particulars of Claim arises naturally out of the factual matrix that underpins the claims detailed on the Claim Form."

10. This drew an immediate response from RB who cited parts of C.P.R 16, and pointed out that if PTB's view was right it would enable a party to file his claim form, within a period of limitation, and then serve his particulars of claim and include in it matters that would otherwise be time-barred and thus defeat periods of limitation. This part of the argument was strongly relied on by Advocate Ozanne in resisting the present Application. She said it was incon- ceivable that the framers of the sub-Rule intended that one party could ambush another in that way. Hers, and RB's case in London, is, in essence, that their client(s) are entitled as of right to inspect all the originals of the documents referred to in the Particulars of Claim. Copies have been furnished,

but they have reason to suspect that one or more of the documents are forged. They cannot tell if this is so without seeing the originals.

11. Accordingly SH cannot, they say, file their London defence until inspection of the originals is given. PTB is quite willing to afford this, provided SH specify the questioned documents:

> "….so that there can be no suggestion that' [Mr. Zahoor] 'has made an allegation to fit the facts."

The parties are therefore deadlocked over two issues, namely whether the documents sought to be inspected should be particularised beforehand, and whether the Particulars of Claim can, or need to be, amended. The London claimants allege that Mr. Zahoor's allegations are a ploy to have the Guernsey Application heard before SH file their clients' defences in London. Hopefully the impasse will be resolved when an application for blanket inspection is to be heard by another Master on 5th October, subject to the possibility of its being vacated (see paragraph 27 *(infra)*).

12. Advocate Laws, on behalf of the Defendant, has maintained that the extensive correspondence produced before the Court only serves to demonstrate that there is a substantial conflict of opinion between professional men as to the true construction of the English Rules, and, as Advocate Fullman had suggested on 1st September, a more realistic date, say, in the middle or end of October should be set for the hearing of their Application. Otherwise this Court might be in the position of pre-empting the Master's decision in London, for it cannot be said at this stage, one way or the other, as to *whether* there is, or will be, a link or overlap between the two actions. If this is established affirmatively it will immeasurably strengthen Mr. Laws' case, for a stay, at the least, of the Guernsey proceedings.

13. Miss Ozanne, on the other hand said that her instructing solicitors had made it clear all along that there was no link between Guernsey and London so far as this litigation was concerned. The burden of showing that there was such a link rested squarely on Mr. Masood. If the London claimants sought to amend by including, in particular, paragraph 115.b, and thus establish common ground between the two cases, inasmuch as there would then be opposite averments *on the same issue*, namely whether Mr. Masood was validly removed from the Board, which was not the case at present (because the Particulars thereby went beyond the ambit of the Claim) any such amendment would be firmly resisted. Quite apart from that SH's intention is to issue a summons in the High Court to strike out those which they say are the offending paragraphs of the Particulars of Claim.

14. Before coming to the second head of Miss Ozanne's submissions I must refer to the events of 16th August. The terms of the Order made by Master Lloyd on that occasion are:

> "IT IS ORDERED
>
> 1. that the time for service of the Defence be extended to 4:00pm on 26th August 2004 but so that if the Defendants consent to the adjournment of an application in Guernsey commenced by International Steel and Tube Industries Ltd against Sohail Masood the time for service of the Defence be extended to 4:00pm on 15th September 2004
> 2. [Costs]"

RB explained in his letter of 31st August that because of the London defendants' difficulties, due in part to their Counsel being out of London, they could not complete their defence in time. As the price of being given further time, until 15th September, they had had no option but to agree to the hearing dates at the beginning of September in Guernsey being vacated. The bargain was thus struck and the hearing here was taken out of the list for 1st and 2nd September, and set, as I have said, for the 23rd and 24th September, subject to confirmation.

15. Thus, Miss Ozanne submitted, if I was against her on the fundamental issues, then, at the very least, the Defendant should be put to his election as to whether he and his co-claimants in London would permit inspection of all the original documents in issue in that case, in which event SH would be enabled to serve its clients' defence in London by 15th September, or, at the latest 22nd September, (the hearing on the Application to vacate the dates before me having been on the 14th). The main Application in Guernsey could then go ahead on the 23rd and 24th, or, alternatively be stood over by agreement, just as had happened in reverse before Master Lloyd on the 16th August. This course was also canvassed by RB in his e-mail of 8th September and his letter of 10th September--the boot, as it were, being on the other foot.

16. Of course I accept, as Master Lloyd did, that the Court should aim for the overriding, or overall, objective of achieving justice between the parties. However, whereas in London there are three parties on each side of the spectrum, and Master Lloyd was thus able to make an order which would affect two of those parties in another jurisdiction, this Court is in a different position, inasmuch as, if I were to accede to this suggestion, this Court would be in the position of being party to an arrangement affecting the parties not before it, namely the two Newport companies, Mr. Zahoor and ISTIL Group Inc. respectively. Accordingly, leaving aside any question as to the appropriateness or otherwise of taking into account matters in progress in another jurisdiction, I do not propose to put Mr. Masood to his election in this respect.

17. Both Advocates relied on the recent case of Phillips & Others v. Symes & Another [2002], which I must now consider. The copy of the Report which was handed in indicates that the decision was given on 1st May, 2001 by Neuberger J, and is to be found in the Weekly Law Reports for the year 2002 at page 853. When I turn to that report I find that that decision, between the same parties, was not given by Neuberger J. but by Hart J. on 9th July, 2001, and that the hearing took place before him from 16th to 22nd May, 2001. The decision given by Neuberger J. related to a proprietary freezing order granted by Rimer J. on 30th March, 2001, covering the furniture and antiques, works of art and jewellery in the possession or custody of Mr. Symes, and to an application by Mr. Symes for the unfreezing of assets sufficient to defray his legal costs.

18. The case before Hart J. was principally concerned with pro- ceedings in Greece and in England which commenced within three days of each other. The defendants applied to the Court to decline jurisdiction in favour of the Greek Court, or alternatively to stay the English proceedings under Articles 21 and 22 of the 1968 Brussels Convention, on the ground that both actions involved the same subject matter, namely the deceased's collection of valuable antiquities and works of art. For the reasons appearing in Hart. J's judgment the Court held that Article 16(2) conferred exclusive jurisdiction on the English Court in respect of claims relating to some of the antiquities and stayed the English proceedings in respect of the remainder.

19. However there was an area in which (to use a word frequently employed in the instant case) there was a degree of overlap between the two decisions, in that both Judges were seised of the issue of whether, and how much, of the frozen assets should be released for Mr. Symes' legal representation. Neuberger J. allowed a sum of £149,000 for his 'future' legal costs but ordered measures of protection for the claimants, as stated by Hart J. at page 878 c to d. Hart J. had no difficulty in affirming the first two of these measures, and, after giving reasons, also affirmed the third, which was the claimants' solicitors' right to have the bills of costs taxed after they had been incurred, instead of by way of advance approval.

20. In arriving at the same conclusion as Neuberger J regarding Mr. Symes' future legal expenses Hart J. dealt with the question of whether Mr.Symes should submit to cross-examination, and continued:

> "In coming to that conclusion, *I have well in mind the evidence and information which is before me and was not available to Neuberger J*."

My italics. The conclusion referred to was of course the one to vary the interlocutory injunction granted by Rimer J., but it is an indication that there was relevant material which was not available to Neuberger J. It is clear that the application under CPR's 31.14 and 31.15 arose after Neuberger J's decision on the legal expenses had been given and was, to that extent, subsidiary to it.

21. In order to understand fully the Orders made by Neuberger J. in relation to the inspection issue it is necessary to appreciate the context in which he made the remarks cited in PTB's letter of the 14th September. In compliance with the orders of the Court Mr. Symes had sworn a 130 paragraph affidavit which mentioned undisclosed documents which the claimant wanted to see. An earlier paragraph epitomises the opposing contentions in the instant case:

> "The first question to consider is whether the claimants have, as they contend, an absolute right to see these documents in seven days or, as the defendant contends, a qualified right."

The qualified right suggested would arise by virtue of CPR 3.1(2) which appears under the heading 'The Court's general powers of management' and is as follows:-

> "(2) Except where these Rules provide otherwise, the court may---
>
> ……..…….
>
> ……..
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

The overriding objective is stated in CPR Rule 1.1 as:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

22. The Judge said that the point was not entirely easy, but, as I read the part of his judgment which follows his reference to Rule 31 the inspection issue was to some extent left open because of the time factors then prevailing. The full context of the passage in question is as follows:-

> "……it seems to me, as a matter of fairness and common sense that, if a party refers to a document in any pleading or affidavit etc referred to in r 31.14, it would be quite wrong, save in the most unusual circumstance, for the other party not to have the right to see the document. The possibility of an unusual circumstance arising is dealt with, to my mind, by CPR 3.1(2) (m) and indeed the overriding objective generally. I think it is hard to conceive of circumstances where the court would allow a party to continue to refer to and therefore to rely on, a pleading or a document in an affidavit without having to disclose it. It may be appropriate to give to the party the option of expunging reference to the document so that he can avoid disclosing it. It may in an unusual case be right to permit him to continue to refer to the document and not to have to disclose it or permit inspection of it, but that would be a wholly exceptional case."

23. The Judge then said he thought it would be oppressive if he made the order today (meaning Tuesday, the 1st May, 2001). He thought the defendant should have the opportunity to persuade him that he should be released from having to produce the documents. Subject to such an application by the defendant he did not see why the matter (of inspection) should not be sorted out on the following day (2nd May) or Thursday (3rd May). It has to be remembered of course

that all this occurred in the context of the time-frame that the application for a strike out, or for a stay and variation of the injunction, was fixed for full hearing a fortnight later. The Judge was conscious of reaching an 'uncomfortable' con- clusion, and was concerned throughout of the necessity 'not to hold things up.'

24. The Report does not state whether further orders as to disclosure were made but, as I read his judgment, Neuberger J., did not definitively decide the inspection issue there and then on the 1st May, 2001, but, on balance, he thought that there should be disclosure of the class of documents referred to in paragraph 110 of the affidavit of Mr. Symes, subject to two *caveats* (i) if the defendant (the party by whom inspection was contemplated in that case) had been made to swear an affidavit and to refer to a document it might well be unfair to require him as a matter of right to produce that document and (ii) the overriding objective (as stated in CPR 1.1) could still be invoked and conse- quently (the defendant) should have the opportunity to apply that some or all of the documents concerned should be freed from the obligation to be disclosed.

25. So far as I can tell, neither of those two situations is present in the instant case, for there is no question of the London claimants being 'made' to serve the Particulars of Claim, and nor have they yet claimed that any of the documents sought should be freed from the obligation to give disclosure, although they have asserted (through PTB) that this is a wholly exceptional case. However, since the close of the hearing of this Application last Tuesday (14th September) and after most of this Ruling so far had been prepared in draft, the Court has been provided, through the Greffe, with a further flurry of correspondence passing between the Advocates and their instructing Solicitors. This falls into two categories.

26. First there is Counsel's note and RB's recollection expressed in an e-mail of that which transpired before Master Bragge on the 15th September. Both are agreed that the London Defendants were given a three week extension until 5th October to file their defence, and, after some controversy, that the Master did not make a finding as to the relevance of that defence to the current Guernsey application. Apart from taking cognisance of the undisputed extension, and not in any way impugning the accuracy of Counsel's note, it seems to me that it would be unsafe to take these matters into account in reaching my decision on whether or not to vacate the dates in Guernsey (a) without seeing the transcript of the Master's decision, which has been applied for, or (b) receiving further submissions on the material put in <u>after</u> the close of the hearing before me. In my view it is too late to take the latter course, for to do so would frustrate the very hearing the postponement of which is before me for decision.

27. Secondly, it seems from the e-mails of 16th and 17th September that, subsequent to Master Bragge's decision, Devonshires have disclosed some (but not all, according to RB's e-mail of 17th September) of the requested documents in return for the Defence being filed by SH by 22nd September. Once again there is a conflict as to whether the disclosure is sufficient. If it is the 5th October hearing would be vacated. In this context RB alleged that PTB's e-mail saying that the Defence would be filed by 22nd September was 'wholly premature'. There are clearly arguable contentions on each side, and it is to some extent speculative as to whether the 5th October hearing will take place and what the result will be. On the one hand it can be said, as RB and Mr. Laws maintain, that the developments I have just related should be a factor in deciding in favour of an adjournment of the 23/24th September hearing, together with the Master's comment that it can be advanced in this Court that the timing of the application, and the refusal of an adjournment would be unfortunate.

28. On the other hand the Plaintiff in Guernsey, through Miss Ozanne has complained throughout of the long delay and history of procrastination to which her clients have been subjected by fending off several applications most of which were unsuccessful, and I instance that to the Deputy Bailiff on 20th April, 2004. In this connexion as long ago as 25th July, 2003, the Deputy Bailiff said he was concerned to move the case forward. On 20th April, 2004, he said he was troubled by how long it had taken since the matter was first before the Court.

29. In view of the strong stand taken by each side in the London proceedings, it seems to me likely that the disputes between them will continue: if the correspondence now before me is anything to go by, the conflict between the parties, through their solicitors, is likely to increase rather than to decrease. While it has not reached the level it obviously had by the time it came before the Judge in the first Symes case, I am tempted to quote from Neuberger J.'s judgment as follows:

> "Both parties point to the correspondence to indicate an unreasonableness and aggressiveness on the part of the other party leading to excessive letters passing between them in increasingly intemperate terms. It may be inherent in the way the regime has been operated. It is conceivable that one party and its solicitors is to blame and the other is not. My suspicion is that the relationship and lack of trust between the two parties has infected their solicitors as sometimes happens."

30. In the light of the foregoing it seems to me to be right that I should decide this issue of the adjournment within the four corners of the submissions made to me on the 14th September, and on the material before me up to the time I embarked on that hearing, taking into account the passage of the proceedings that have taken place in the Royal Court.

31. Although there was an abortive application on the 28th May 2003, the real inception of these proceedings was the 11th July of that year when the Deputy Bailiff ordered service of the Cause (as it then was) outside the jurisdiction. There then followed several interlocutory applications and decisions
culminating in my two *ex tempore* Rulings of the 11th March, 2004, when Miss Ozanne was permitted to file her amended Cause. The London proceedings had been commenced a month earlier. True the Particulars of Claim were not filed until 13th May, but during the intervening period no application was made to strike out or stay these proceedings, and this did not happen until the 18th May. Instead there was the red herring of the supposed anti-suit injunction in England which came to naught.

32. True also Miss Ozanne has made a substantial amendment to the Cause, but as I said at the time, the Defendant here knew perfectly well that which was being claimed and in my view he can have suffered minimal prejudice. In my judgment the matter has dragged on for long enough, and, having regard to this, the submissions of both Advocate Laws and Advocate Ozanne, to that which has so far transpired in this case, and above, all to the overriding objective of dealing with the case justly, and with reasonable expedition, I am satisfied that the hearing of the Defendant's substantive Application should go ahead on the 23rd and 24th of this month, and I so order. I reserve the issue of costs.

A.R.W.Hancox
Lieutenant Bailiff
20th September 2004