Judgment 58/2005 **International Steel and Tube Industries Limited v. Masood – Royal Court (Civil action file 907) – 4 November, 2005**

Application to strike out part of defences – principle to be applied – application dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 4th day of November, 2005 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 13th and 15th September and 7th and 12th October, 2005, the Lieutenant Bailiff considered an application by the Plaintiff company to strike-out certain paragraphs of the Defence and heard thereon Advocates M. G. A. Dunster and J. M. Wessels, Counsel for the Applicant and Respondent respectively,

The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and: -

1. DISMISSED the Plaintiff company's application;

2. 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 on Plaintiff's strike-out Application of 18th January 2005.

1. This Application on behalf of the Plaintiff Company to strike-out certain paragraphs in the Defence was lodged on 18th January, 2005. In order to set the matter in perspective I will briefly summarise the events which have led up to it.

2. The Amended Defence which is the subject of the Application was filed in this Court by Advocate Laws, then representing Mr. Masood, on 8th October last year, after the Defence Application to vacate the hearing dates for their prior application of the 18th May, 2004, to strike out the Cause or, alternatively, for an Order staying the proceedings pending the determination of an Application before the High Court in London, had been dismissed.

3. It appears that the Application envisaged was for a proposed anti-suit injunction in Case No. HC 04C01331 in the Chancery Division for in the sup-porting Affidavit of Mr. Philip Barden of 18th May, a partner in Mr. Laws' then instructing solicitors, sworn in the Guernsey proceedings, it is stated:

> "57…..Mr.Masood will say that if.…this honourable Court should hold that ISTIL's action should not be struck out, he would ask that the action be stayed pending the determination of his related application in the High Court in London for an injunct-ion restraining ISTIL from pursuing its application in Guernsey on the grounds that
>
> a. London is the more appropriate forum in which to resolve issues arising from Mr. Masood's employment by, and subsequent departure from, the ISTIL companies, and that
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> b. the continuation of the Guernsey action, in the circumstances described above, would be unconscionable.
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> 64. Finally, I should explain why Mr.Masood brings both this application and an app-lication for an anti-suit injunction in London. The reason is that his complaints against ISTIL offend not merely Mr.Masood himself, but (potentially) the Court as well."

4. However, the anti-suit application never materialised, for in his second Affidavit a week later Mr. Barden depones:

> "2. My first affidavit erroneously makes reference to an application for an anti-suit injunction having been made in the High Court in London and a statement having been filed in support of that'. These references……appeared……..due to a word processing error……..…I would wish to make it clear that my firm is not instructed to seek an anti suit injunction nor file any additional statement."

Accordingly on 15th June, 2004, an amendment sought by Mr. Laws deleting the reference to the London proceedings in part 2 of his Application was made.

5. The May, 2004, strike-out Application was on the ground that these proceedings were an abuse of the Royal Court's process under paragraph (d) of Rule 36 and, on 25th June was set for hearing on the 1st and 2nd September of that year and confirmed on the 2nd July. On the first of those dates, as the result of a joint letter filed on, 27th August and addressed to the Greffe the case was taken out for those days, and, on the same day, fixed for hearing on 23rd and 24th September.

6. On the 10th September, 2004, Advocate Fullman on behalf of Mr. Masood then applied for the substituted dates to be vacated on the grounds set out in Mr. Barden's letter to his firm of 9th September. This was, not surprisingly, opposed by Advocate Alison Ozanne, who then represented ISTIL, and the hearing of the application to adjourn proceeded on 14th September. In a reasoned Ruling handed down on 20th September I rejected the Defence application and ordered the hearing to proceed on the dates fixed. On 23rd September Mr.Fullman withdrew the Defence Application to strike out the Cause.

7. In opening his case on the Plaintiff's strike-out Application, which, for the reasons given on 11th April, 2005, is being heard separately from the Defendant's multiple applications of 1st February, Advocate Dunster, now representing ISTIL, traced the history of this case from its inception in July, 2003, and the passage of the various applications, especially that relating to *lis alibi pendens* in relation to the first Oregon Proceedings [U.S.Circuit Court of Oregon Case No 0211-11958] and submitted that despite the number of obstacles, procedural and otherwise, placed in the path of the Plaintiff his client's case was in essence very simple.

8. Mr. Dunster said that the Defendant could not get away from the fact that at the time of the Extraordinary General Meeting (the EGM) of the shareholders on 31st March, 2003, he was a director of ISTIL (notwithstanding that he purportedly resigned from the Board {from which he had already been removed} on 17th November of that year). There are three ways in which a director can cease to be a member of the Board of a Company, namely by resignation, expiry of his term as a director, or by being voted off the Board, as had happened in the instant case.

9. He continued that if it had been established that the meeting was validly convened and properly held in accordance with the Companies Law 1994 then there could be no answer to the Plaintiff's strike out application. It is admitted in paragraph 3.a. of the Defence that a 'purported' Notice of Requisition had been issued on or about the 19th February, 2003. Mr. Dunster further submitted that all that the Plaintiff then had to do was to show that the requirements of sub-sections (1), (2) and (3) of Section 70 of the Law, in other words the mechanics of calling an E.G.M., were complied with. If, within the 21-day period (sub-section (4)) the directors failed to convene a meeting then the re- uisitionists (meaning the shareholders, since they were the members within the definition in Section 117) may themselves do so, as happened in the instant case.

10. It mattered not, said Mr. Dunster whether the material alleged in paragraphs d.ii. of the amended Defence, namely that there was an underlying purpose to the Notice of Requisition of 19th February 2003, was true or not, in the absence of any evidence showing that the E.G.M. was irregularly convened or improperly held. As to paragraph 3.e. the allegation that the Notice of Requisition was invalid as being in breach of the fiduciary duty of a director—because of the motives of personal advantage and retaliation by Mr. Zahoor (the relation between the averments in these two sub-paragraphs being indicated by the connecting words 'In the premises….' at the beginning of 3.e.) who is the controlling mind of Azot Ltd, which holds the overwhelming majority of the shares in ISTIL, against Mr. Masood, the Defendant, as alleged in d.ii.—that was misconceived [see paragraph 5 of his Skeleton

Argument of 18th January]. Mr. Dunster submitted, since the meeting had to be, and was, called by the shareholders and not by a director or directors, who had no rôle in the process of calling or convening the meeting, save, possibly that of omission in failing to comply with the initial requisition. It followed that there existed no fiduciary duty which a director could have in this respect.

11. If, however, the improper motives (leading to the breach of fiduciary duty) were being ascribed to a Mr. Zahoor as a shareholder, then what possible relevance could the motive of a shareholder have for the requisitioning, or the convening of the E.G.M.? On both counts then, the supposed fiduciary duty supposedly cast upon Mr. Zahoor, whether as a director or as a shareholder, could not possibly exist in law. As there could be no breach of a non-existent duty Mr. Dunster asked the Court to hold that this is a plain and obvious case for striking out, so far as these paragraphs are concerned, within the principles very clearly set out by Day. L.B. in I.F.S.Investments Ltd v. Manor Park (Guernsey) Ltd & Others [2004] 1st October at paragraphs 24 to 29 of the Judgment.

12. The first authority to which Mr. Dunster referred in support of his contention that a shareholder does not owe any fiduciary duty to the company in which they hold shares, notwithstanding that he or she may have a personal interest in the matter which is the subject of a resolution considered at a particular meeting, is North-West Transportation Company Ltd & J.H.Beatty v. Henry Beatty & Others [[1887] 12 App.Cas. 589. That was a decision of the Privy Council on an appeal from the Supreme Court of Canada which Mr. Dunster suggested is binding on this Court. The facts were that the first appellant Company possessed a fleet of steamers which plied on the navigable waters in or bordering Canada of which one, the *s.s Asia*, was lost in 1882.

13. It so happened that a steamer called the *United Empire* was in the course of being constructed for one of the directors, J.H.Beatty, and, at a dir- ectors' meeting of the 10th February 1883, a bye-law was passed providing for the purchase by the Company of the *United Empire* to replace the *s.s.Asia.* At a shareholders meeting of 16th February, the bye-law was adopted, J.H.Beatty having, together with two other recently appointed directors, a majority of the votes. One Henry Beatty then sued on behalf of himself and others to set aside the sale on the ground that J.H.Beatty was in a fiduciary position which barred him from participating and voting on a matter in which he was personally interested.

14. It was accepted throughout that there was no question of fraud, unfair dealing or collusion, and that the replacement of the lost vessel was essential for the proper and efficient carrying out of its business by the Company, and that the sale and purchase thus approved was in furtherance of this policy, and was beneficial to the Company. Nonetheless, the Court of first instance set aside the sale on the ground that 'the threefold character of J.H.Beatty as a director, shareholder and vendor involved a conflict between duty and interest' and that he had used his balance of power to the possible prejudice of other shareholders.

15. Mr. Dunster traced the passage of the case through the appellate Courts, which alternately reversed and upheld the decision of the trial Court. He
submitted that the decision of the Privy Council as the final court of appeal supported his contention that, as with any other article of property, the owner, provided he acts within the law, can deal with it as he likes. In this connexion Mr. Dunster relied upon the statement of general principle made in the judgment of the Judicial Committee, delivered by Sir Richard Baggallay, at page 593, namely:

> "Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently on the company, and every shareholder has a perfect right to vote upon any such question although he may

have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company."

16. In reversing the Supreme Court of Canada, which had restored the trial Court's order, the Privy Council said at page 601:

"The judges of the Supreme Court appear to have regarded the exercise by the defendant J.H.Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law: their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice……..in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection."

17. I consider this decision is of particular interest in the context of Mr. Dunster's argument, inasmuch as on the preceding page Sir Richard Baggallay recognised the importance of the question they were deciding, and contrasted the fiduciary duties owed by trustees to their beneficiaries by saying:

"…on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, *if they also stood in some fiduciary relationship to the company*."

In the passage which I have italicised the Privy Council appears to reject the notion that shareholders, as a class, have fiduciary duties towards the company of which they are members.

18. The contrasting position between the directors of a company and its shareholders is expressed even more clearly by Walton J. in Mr. Dunster's second authority, Northern Counties Securities Ltd v. Jackson & Steeple Ltd [1974] 1 W.L.R 1133, The issue was whether the defendant company had broken a prior undertaking to the Court to obtain a Stock Exchange quotation for, and permission to deal in, certain shares in respect of which an option had been given to the plaintiffs for the issue of those shares to them. Brightman J. had earlier ordered that the agreement conferring the option on the plaintiffs should be specifically enforced.

19. An extraordinary general meeting was convened to table a resol- ution which would effect the issue and allotment of the shares, the Stock Exchange having made it a condition that that this should be approved by the shareholders. It was also required that the notices convening the meeting should be accompanied by a circular in effect recommending that the shareholders should vote for the resolution. In fact, leading counsel having advised that the undertaking given by the company to the Court did not bind the shareholders, the circular contained the opposite advice to the shareholders, and pointed out that if the resolution were passed the cost to the company of the assets acquired would be £330,873, but if it were defeated the cost would be only £183,873.

20. At page 1144 of the Report Walton J. having pointed out that while the acts of the shareholders in passing a particular resolution binds the company, their acts are not the acts *of the company.* He continued in the passage which appears at paragraph 6 of Mr. Dunster's Skeleton Argument:

"I think that, in a nutshell, the distinction is this: when a director votes as a director for or against any particular resolution in a director's meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution *he is a person owing no fiduciary duty to the company and who is exercising his own right of property, to vote as he thinks fit.* The fact that the result of the

> voting at the meeting……will bind the company cannot affect the position that, in voting, he is voting simply in exercise of his own property rights."

What, then, if the shareholder who thus votes is also a director? Walton J. covers this at page 1146F:

> "A director who has fulfilled his duty as a director of a company by causing it to comply with an undertaking binding upon it is nevertheless free, as an individual shareholder, to enjoy the same unfettered and unrestricted right of voting at general meetings of the members of the company as he would have if he were not also a director."

21. This brings me to the third authority cited by Mr. Dunster, Humes Ltd v. Unity APA Ltd and APA Life Assurance Co Ltd [1987] V.R.467 SC (Vic). Mr. Dunster relied on the first and second holdings in the headnote to that case, from which he submitted that it can be deduced that provided the shareholders do not go outside the resolution contained in the requisition then they are presumed to act in good faith.

22. Advocate Wessels on behalf of the Defendant relied on this case as an authority in his favour, inasmuch as he submitted that it is perfectly clear from the judgment of Beach J. that he accepted the submission made on behalf of Humes Ltd. that the right of a shareholder to convene a meeting must be exer-cised *bona fide* and with regard to the interests of the company as a whole, and that the shareholder does not so act if his object is something other than the passing of the resolutions contained in the requisition.

23. What had happened in Humes v. Unity was that Unity had made a takeover bid for Humes. It was a minority shareholder. On 10th September, 1986, it served a requisition on Humes to call a general meeting at which it was proposed to remove the existing directors. That resolution was put to the assembly at Humes' annual general meeting of 7th November and defeated. Unity therefore served another requisition on Humes to similar effect, except that
only 8 directors were named instead of 10 as previously. Humes sought an injunction to restrain the second meeting. Beach J. put the issue with which he was faced thus (page 471):

> "The question for me to determine is whether or not Unity APA's purpose in requis-itioning the general meeting is to have the resolutions it proposes placed before the meeting and passed, or whether its objective is something other than that."

He had earlier cited a passage from the old case of Aleyn v. Belchier [1875] 28 E.R 634, in which Lord Northington said at page 637:

> "No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void."

24. It is certainly true that Beach J. accepted the argument put forward by counsel for the Company, Humes Ltd, which is reflected in the second holding in the headnote to which Mr. Dunster referred. It is also true that the statutory provision being considered, section 241 of the Companies (Victoria) Code contained similar, though not identical, provisions, permitting the members to call a meeting if the directors had not complied with a requisition therefor within 21 days. As in this case the requisionists' objective was the removal of directors, although unlike this case they were minority shareholders.

25. With very great respect I say that I have been most impressed by the reasoning and conclusions of Beach J. in Humes v. Unity. I accept that the passages to which Mr. Wessels referred at page 470 of the Report supports the third holding in the headnote, which states that the power of a minority shareholder to convene a general meeting can only be exercised in a manner which has regard to the interests of the company as a whole. I

apprehend, therefore, that that principle (that is to say to ascertain whether that which was done was done in the interests of the company as a whole) must be kept clearly in mind throughout in the present case.

26. The same principle applies, in my view, *a fortiori* to a similar exercise by a majority shareholder, which, as appears from paragraph 7 of the Complaint dated 28th December, 2004, and paragraph 58 of the Answer and Second Counterclaim dated 14th March, 2005, in the second proceedings, case number 0412-13133—respectively forming an exhibit to the Witness Statement filed in the London action (I am adopting the abbreviations used in my Judgment of 20th September, 2004) of Mr. Simon A. Scott, corporate lawyer for ISTIL, in Hong Kong, dated 7th April, 2005, which is, in turn, part of Exhibit PTB 6 to Mr Barden (PTB's) Affidavit of 28th June, 2005, and Exhibit SB1b to Mr. Berman's Affidavit of the 17th May, 2005—Mr. Zahoor had become by the time the E.G.M was convened.

27. However, in Humes v. Unity Beach J. went on to say that, while he realised that the calling of the further meeting would cause inconvenience and expense to the shareholders and directors of Humes Ltd, he was not satisfied in the instant case that the shareholders' purpose in calling the further meeting was other than the passing of the resolutions contained in the requisition. He then referred to an earlier authority namely, Adams & Others v. Adhesives Proprietary Ltd [1932] 32 S.R (NSW)398, the headnote of which states that requisitionists must exercise a proper discretion when convening extraordinary general meetings, and that the Court would restrain them if it appeared that the intended result was to deprive many of the shareholders of their right to vote. Beach J. then distinguished that case from the one he was considering because there the minority shareholder had assumed the powers of directors. This, as he said, was not the situation in Humes v. Unity.

28. Returning to the present case, Mr. Wessels submitted on behalf of the Defendant and Respondent to the present Application, Mr. Masood, first that this strike-out application was far too late. He pointed out that the Amended Defence was allowed in by consent, or, at least, without objection, and a Replique filed on 1st November. The proper time to have taken the points on which Mr. Dunster now relies was at the time of filing or within a reasonable time thereafter Yet what did the Plaintiff do? Within a fortnight of filing the Defences it pleaded specifically to the paragraphs 3 d. and e.; paragraphs 5 f.; 6; 9 and 10; admitted paragraph 7 and traversed paragraph 8. Moreover, the present Application was not made until well into 2005. Allowing for the change-over in Advocate's firms (which, of course, had already occurred in relation to the Defendant) Mr.Wessels maintained that the Plaintiff could not now be heard to say that the paragraphs to which it had pleaded should be struck out.

29. Secondly, and this is an important aspect of Mr. Wessels' case, the Affidavit of Mr. Berman sworn on 17th May, 2005, traces the history of Mr. Masood's employment with ISTIL and exhibits the Answer of Mr. Masood and the other two defendants in those which I may refer to as the second Oregon proceedings. Mr. Wessels said that the case thereby presented is inconsistent in material respects with that put forward by Mr. Zahoor and Istil Group Incorporated and ISTIL in the London action.

30. The pleadings in the second Oregon case trace the background to the alleged illicit purpose for which Mr. Zahoor gained control of ISTIL in March, 2003, to which Mr. Wessels referred in his argument. I refer in particular to paragraphs 10 to 12 of the Answer, which summarise the findings of the Audit Committee which had been appointed to investigate both of the individual parties' activities regarding alleged misuse of ISTIL's corporate funds and their respective expense accounts. According to this account of the Report, Mr.Masood was exonerated, but 'numerous instances of misconduct and misappropriation of funds' by Mr. Zahoor were detailed therein. They resulted in the dismissal

of Mr. Zahoor as an officer of ISTIL and of the commencement of litigation by ISTIL against him and his Cyprus company, Reventox Ltd, in Delaware and London.

31. According to paragraph 38 of the Amended Particulars of Claim in the London action dated 14th February, 2005, the shareholdings in ISTIL as at September, 2002, were Mr. Zahoor (through Azot) 49%; Thaiwin 36.7%; Mr. Zahoor's relatives and nominees 11.5% and Mr. Masood's nominee 2.8%. Thus until early 2003 Mr. Zahoor through his family company, Azot Ltd, and Thaiwin Asia Ltd, were the major hareholders in ISTIL. In March 2003 Mr. Zahoor ac- quired Thaiwin's shares and thus, as I said at paragraph 26, by the end of March 2003, became effectively the major shareholder in ISTIL. The Defendant's case is that Mr. Zahoor's objective in calling the EGM was to remove Mr. Masood as a director of ISTIL and thus enable Mr.Zahoor to use his direct and indirect voting strength in the Company to terminate the proceedings against him.

32. The steps taken by Mr. Zahoor, by which the EGM was called, said to be contrary to that which has been referred to as the Standstill Agreement, are detailed chronologically at paragraph i. i., ii. and iii. of the particulars to para- graph 55 of the London Amended Particulars of Claim. They were also related in the Affidavit of Advocate Jason Morgan of 28th May, 2003, in the section headed "The removal of Mr. Masood" which comprises paragraphs 42 to 51 of that Affidavit (later recast with variations in the last six paragraphs in Mr. Morgan's second Affidavit of 16th June, 2003) and includes the summary dismissal of Mr. Masood as an executive of ISTIL on 8th March, 2003.

33. It is noteworthy that the initial Requisition of 19th February and that of 14th March (which was under section 70(4) of the Companies Law) both of which are exhibited to Mr. Morgan's Affidavit, as are the minutes of the EGM, only one signature appears against all the five members of the Company as the requisitionists, namely Mr. Zahoor. Then again, according to the minutes of the EGM, four of the requisionists, and shareholders, were all represented by Mr. Zahoor, who acted as proxy for each of them (see the four Powers of Attorney, in respect of the individual shareholders at pages 147 to 150 of Exhibit JJLM). It is not clear from the minutes if the remaining member, Mr. Azur Rehman Qureshi, was represented by James Lagan, but it accords with Mr. Dunster's statement in opening his case that only two individuals were physically present at the EGM.

34. There can be no doubt that the resolution passed at the EGM—

> "That Mr Sohail Masood be removed from the Board of Directors of the Company with immediate effect"

matched exactly the proposed resolution specified in both the notices of requisition. Thus it can be argued that the letter of Beach J's judgment in Humes v. Unity APA was observed by the procedure adopted almost single-handedly by Mr. Zahoor in the instant case. But was the spirit of the judgment followed—a factor which I consider to be relevant in view of this passage from Ngurli v. McCann (*infra)* at page 438?:

> "But the powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose"

35. It seems to me that in the next passage that I will now cite from his judgment, Beach J. was also entering a *caveat* against adopting an entirely literal approach to this question, inasmuch as, notwithstanding that a resolution sub- sequently passed is identical to the one proposed, he clearly thought that once the capacity of the shareholders became merged with that of directors of the same company, their responsibilities changed, for he said, at page 471 lines 43 to 46:

> "But until such time as it does so' [meaning until Unity APA, *qua* shareholder, tables the further requisition if the directors do not comply with the first requisition by convening the general meeting] 'it is entitled to act in furtherance of its own interests, *provided that its requisition for the meeting is bona fide…."*

Just before, at lines 37 to 43 he had said:

> "But there His Honour' [meaning Harvey C.J. in Adams v. Adhesives] was considering the duties of the minority shareholders once they had assumed the power of the directors. That is not the situation in the present case. If Humes directors do not convene the appropriate meeting within the time stipulated and Unity…does, Unity *will then become a quasi-official of the company and thereafter be required to exercise the rights given to it in a manner which has regard to the interests of the company as a whole* .

36. In support of his submission that the need for the requisionists to be shown to have acted *bona fide* in convening the meeting which is in question is satisfied by demonstrating that the resolution passed was the same as that proposed in the respective notices, Mr. Dunster cited a passage from Beach J's judgment at page 472, as follows:

> "In my opinion this Court should be very reluctant to interfere with a minority shareholder's statutory right to requisition a general meeting. I consider it should only do so when it is clear that the purpose for calling the meeting is something other than the passing of the resolutions contained in the requisition. I am not satisfied that that is so in the present case."

Thus, said Mr. Dunster, it was clear beyond peradventure from the outset on 19th February that the object of convening the meeting was the removal of Mr. Masood from the Board of ISTIL. As he said at paragraph 8 of his Skeleton Argument, that is precisely what took place on the 31st March. It followed that the test of *bona fides* (which Mr. Dunster acknowledged as the correct test at the beginning of that paragraph) was met in the instant case.

37. It must therefore also follow (said Mr. Dunster) that sub-paragraphs d. i. and ii. and e. of paragraph 3, and the consequential averments in sub-paragraphs f. and g. of paragraph 5 of Les Defences of 15th October, 2004, should be struck out under Rule 36—see paragraphs 10 to 12 of his Skeleton Argument. Mr. Wessels, however, submitted that the foregoing was all part of the factual matrix of this case, the truth of which this Court was obliged to accept for the purpose of considering the instant Application. Moreover, and I consider this must not be overlooked, the substance of the allegations in this portion of the Defences is similar to that now pleaded at paragraph 55 i. of the Amended Particulars of Claim filed in the London action on 14th February, 2005, pursuant to the Order of Master Bragge, which are at issue in those proceedings.

38. It seems to me, from the authorities referred to by Beach J., and those connected therewith, that it is necessary for the Court to dig deeper into the events which occurred in early 2003 and to have regard to all the surrounding circumstances, rather than simply to ascertain that the meeting was regularly convened and to inquire into whether the resolution passed matched that of which notice was given in the requisition. At page 470 Beach J. cited this passage from the judgment of Evershed M.R. in Greenhalgh v. Arderne Cinemas [1950] 2 AER 1120 at page 1126E (cited at paragraph 43 of Mr. Wessels' Skeleton argument):

> "Certain things, I think, can be safely stated as emerging from the authorities. In the first place, it is now plain that '*bona fide* for the benefit of the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase 'the company as a whole,' does not (at any rate in a case such as the pre-

> sent) mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body. That is to say, you may take the case of an individual hypothetical member and ask whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."

39. It might be argued that those words were applicable to the special situation in that case, in which the articles did not permit shares to be sold to non-members without notice to the company, after which the shares would be offered to other members at a price fixed by the auditors. By means of a device, which included the passing of a special resolution at an extraordinary general meeting, followed by an ordinary resolution, the managing director contrived to circumvent the requirement and sell shares to a non-member without observing the prescribed conditions. A minority shareholder applied to the Court to impeach the transaction on the ground that the minority interests in the company had been sacrificed to those of the majority. The Court, however, held that while there had been grave indiscretion, there was no evidence that the minority shareholders were in a worse position than they would have been had the resolutions not been passed and it refused to impeach the special resolution.

40. I pause here to record that Mr. Dunster was at pains to point out that there had been no attempt, by Mr. Masood or anyone else, to complain of unfair prejudice regarding the convening of the EGM or the procedure, as evidenced by the minutes of the meeting and the record of the resolution passed (to remove Mr. Masood from the Board of Directors) at pages 150 and 151 of Exhibit JJLM to Mr. Morgan's Affidavit, and that there has at all times been a remedy available under section 75 of the Companies Law had Mr. Masood wished to employ it. If Mr. Masood was complaining of unfairness and oblique motives, as he does in those portions of the Defence which he seeks to strike out, why, emphasised Mr. Dunster, did he not invoke the provisions of Section 75, which are, as it were, ready made for such a situation?

41. It was in the context of the counterpart to section 75 in the English provision, namely section 459 of the Companies Act 1985 (as amended in Schedule 19 of the 1989 Act) that Lord Hoffmann enunciated the principles as to that which the courts would regard as unfairness (which Mr. Wessels described as 'powerful dicta') in O'Neill v. Phillips [1999] 1 WLR 1093 at page 1098 [TAB 9 in the Defendant's Bundle of Authorities]. This is set out *in extenso* in paragraph 36 of his Skeleton Argument of 1st February, 2005.

42. I do not need to analyse that passage because Lord Hoffmann's Speech was in relation to a statutory provision which was not invoked in the present case, save to draw attention to the parallel which he drew between the concept of unfairness and that adopted in In re Westbourne Galleries Ltd (also intituled Ebrahimi v.Westbourne Galleries Ltd—see paragraph 49 *(infra)*, in the leading Speech of Lord Wilberforce at page 379 (from which Foster J. read in Clemens v. Clemens, paragraph 45 *(infra)*) in relation to the concept of 'just and equitable' as a ground for winding up a company.

43. Returning to Greenhalgh v. Arderne Cinemas, I do not believe that Evershed M.R's words were confined to the type of situation that existed in that case for, as Mr. Wessels said, the principle that a power of any kind which has legal or financial implications must be used responsibly has existed for at least a century. In argument and at paragraph 40 of his Skeleton Argument, Mr. Wessels instanced the early case of Allen v. Gold Reefs of West Africa Ltd [1900] 1 Ch. 656, which was cited in Eastmanco (Kilner House Ltd) v.Greater London Council [1982] 1 WLR 2 and on which Mr. Wessels dwelt extensively, mainly for the purpose of emphasising the *ratio* of Ngurli v. McCann [1953] 90 C.L.R 426—a decision of the High Court of Australia on appeal from the Supreme Court of South Australia.

44. I do not find it necessary to relate the facts of Ngurli v. McCann: it is sufficient for the purpose to note that the Court cited that which it described as the 'classic passage' from the judgment of Lindley M.R. in Allen v. Gold Reefs at page 671, as follows:

> "Wide, however, as the language of s.50 is, the power conferred must, like all other powers,' [my emphasis] 'be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bonâ fide for the benefit of the company as a whole and it must not be exceeded."

45. That passage was also cited in another authority which formed an important plank in Mr. Wessel's argument, namely Clemens v. Clemens [1976] 1 AER 268 at page 281, and in which Baggallay's *dicta* in the North-West Transportation Company case, and those of Evershed M.R. in Greenhalgh v. Arderne Cinemas, were quoted by Foster J. In Clemens v. Clemens the plaintiff held 45% and her aunt 55% of the issued share capital in Clemens Bros Ltd., building contractors and shopfitters. The aunt was a director but the plaintiff was not. A scheme was proposed whereby a further 1,659 shares were to be created, all with voting rights. Each director except the aunt would receive 200 shares, and the balance of 850 were to be placed in trust for long service employees of the company. The appropriate resolutions implementing the scheme were, accordingly, carried.

46. The plaintiff protested against the scheme on the ground that it would dilute her shareholding but the aunt was adamant in her support for it. The plaintiff then sought a declaration that the resolutions were oppressive and should be set aside. In the course of his judgment, at page 281g, Foster J. posed the following question:

> "…did Miss Clemens,' [the aunt] 'when voting for the resolutions, honestly believe that those resolutions, when passed, would be for the benefit of the plaintiff?"

47. I regard the decision in Clemens v. Clemens as of value because Foster J. considered most of the authorities that were cited in the instant case (with the notable exception of Ngurli v. McCann). In particular he analysed the decision in North-West Transportation Company Ltd & J.H.Beatty v.Henry Beatty & Others (*supra)* in which the Privy Council, as the final appellate Court, had held that despite the interest of J.H.Beatty in the *s.s United Empire,* he had not been shown to have used his voting power improperly. No doubt that decision turned on the fact that the purchase of the replacement vessel was obviously, in all the circumstances, in the interests of the company as a whole.

48. In my judgment the appropriate question to be posed in the instant case when considering the Plaintiff's Application to strike out paragraphs 3.d. i., ii. and e., of the Defence of the 15th October, 2004, is as stated by Foster J., but in the sense in which that question was explained by Evershed M.R. in Greenhalgh v. Arderne Cinemas that is to say—is [the resolution] for the benefit of the corporators (a term used as synonymous with 'members'—see Walton J. in Northern Counties Securities Ltd v. Jackson & Steeple Ltd at page 1144D *(supra)*) as a general body, remembering that in Clemens v. Clemens the plaintiff was one of the corporators, and that in the instant case, the Defendant is one of the corporators? If the answer is affirmative, then it follows that the share- holder requisitioning the meeting, and voting for the resolution at the meeting thus convened, acts for the benefit of the company as a whole, and that if it is in the negative he or she is not acting for the benefit of the company as a whole.

49. For the conclusion which Foster J. reached in answering the question he posed in Clemens v. Clemens I turn to page 282 of the Report, where he cited the passage in Ebrahimi v.Westbourne Galleries Ltd [1972] 2 AER 492, to which I referred at paragraph 42, and from which I now reproduce an ex-tract, relating to the just and equitable provision for winding up in section 222 (f) of the Companies Act 1948. Lord Wilberforce said at page 379 (500 of the All England Report):

> "[The just and equitable provision] 'does, as equity always does, enable the court to sub-

ject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way"

50. Foster J. then applied the final phrase of that extract and said:

"……in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases…….That right is 'subject to…….equitable considerations which may make it unjust…..to exercise [it] in a particular way'." Are there then any such considerations in this case?

The last sentence contains a question I also have to ask myself in this case.

51. Finally, in dealing with the numerous authorities cited in this case, I return to Ngurli v. McCann, which was cited by Beach J. in Humes v. Unity as regards the exercise of a power. At page 438 of the Report the High Court of Australia cited this passage from the Speech of Lord Parker in the early case of Vatcher v. Paull [1915] A.C 372 at page 378:

"'The term fraud in connexion with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed disnonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

52. In view of the principles to be extracted from the authorities cited by both Counsel in this case, in my judgment the Defendant is entitled to include in his pleading the circumstances which he alleges show that the resolution passed on 31st March, 2003, and the events leading up to it, were, even if they did not amount to a fraud on a power in the Derry v. Peek ([1889] 14 App. Cas. 337) sense, nonetheless not in the interests, or for the benefit, of ISTIL or its members, or corporators—according to the meaning of that term in the Shorter Oxford English Dictionary—as a whole, within the passage cited from the judgment of Evershed M.R. in Greenhalgh v. Arderne Cinemas. In other words the averments in issue here are relevant to the equitable considerations to which Foster J. adverted in the passage I have set out in paragraph 50 above.

53. I am reinforced in this view by a further *dictum* of Lord Wilber- force in In re Westbourne Galleries Ltd, in which he said at page 380 B to D:

"My Lords, this is an expulsion case, and I must briefly justify the application of the just and equitable clause. The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the Board. Section 184 of the Companies Act 1948 confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove…….and quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides."

Thus Lord Wilberforce set out the legal position regarding any given situation. However, he continued, and this is the important aspect as regards this case:

"The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good

> faith or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved."

54. So there, Lord Wilberforce is recognising that strict legal rights will be observed in the normal case, but that if the impeaching party can show that he has been unfairly disadvantaged the door can remain open to him on equitable grounds. Equally, in the instant case, there was undoubtedly an antecedent standstill agreement. It may be that Mr. Masood can show that he was entitled to benefit under that agreement and that the events that took place in early 2003 breached that agreement so far as he was concerned: or, as Mr. Dunster submitted in paragraph 11 of his Skeleton Argument, he may not be able to do so. But that is a far cry from saying that he should be prevented from putting his case on this aspect by an order for striking it out.

55. In my judgment it would be relevant to allege that the state of affairs envisaged in paragraph 52 above is due to the motives alleged in paragraphs 3 d. and e. As part of the background, going to show the lack of *bona fides* by Mr. Zahoor, as the controlling shareholder at the material time, it is therefore also permissible to refer to the Standstill Agreement of 17th March, 2002, which is reproduced at page 70 of the exhibit JJLM to Mr. Morgan's Affidavit of 16th June, 2003, and this is done in paragraphs 5. f. and g. of the Defences. It is, of course, another thing to prove these allegations, but, as they stand, before the pleadings, or parts thereof, can be struck out the tests laid down by numerous authorities must be satisfied.

56. I start with Danckwerts L.J. in Wenlock v. Molony [1965] 1 WLR 1238 at page 1243 (and the same Lord Justice said in Nagle v. Fielden [1966] 2 QB 633 at page 648):

> "The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court."

In the same case Salmon L.J. made the celebrated statement that:

> "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable."

These passages were cited by the Court of Appeal in the more recent case of Drummond-Jackson v. British Medical Association [1970] 1 WLR 688 in which the majority view that the action should not be struck out prevailed. At page 695 of the Report in Drummond-Jackson Lord Pearson said:

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."

57. The *dicta* in these authorities related to the striking out of claims, but, as is almost superfluous to state, the same principles apply to matters alleged in a defence. In McDonald's Corporation v. Steel [1995] 3 AER 615 in related to a plea of justification put in by a defendant Neill L.J. said at page 623 letter f:

> "The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases. I have already set out the wide variety of evidence which a defendant may be able to rely upon at the trial. I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is *incapable* of being proved."

He then said:

> "I am satisfied that it is right to strike out passages in the defence or the particulars which can be described as 'incurably bad' because there will be no evidence to support them. Unless, however, the passages meet this test I consider the pleadings should be left until trial."

In my judgment these requirements are not satisfied as regards any of the sub-paragraphs 3. d. i. or ii or 3. e.; 5. f. or g.

58. Coming to paragraphs 6 to 10 of the Defences, I recognise that they relate to events which are said to have occurred after the EGM, either later that day or, at any rate, subsequently thereto. They are substantially repeated, with a few differences in the wording, in paragraph 55 i. iv. of the Amended Particulars of Claim filed in the London action, in which of course Mr. Masood is the first Claimant. They form Exhibit PTB 2 to PTB's Affidavit of 28th June, 2005, filed in these proceedings.

59. In my view the allegations in paragraphs 6 to 10 are justifiably described by Mr. Wessels as part of the factual matrix of the case put forward on behalf of the Defendant. They should be before the Court at trial so as to enable the Court and the Jurats to see the whole picture advanced by the Defence. As I have just said, it is another thing as to whether this version will be preferred, applying the normal standards of proof, as against that put forward by the Plaintiff.

60. For the reasons I have endeavoured to give, then, the Plaintiff's strike-out Application of the 18th January this year is dismissed. I will hear Counsel on the issue of costs if they so wish.

A.R.W.Hancox.
Lieutenant Bailiff
4th November 2005