

**JUDGMENT : MORISON.J** QBD Commercial Division : 12<sup>th</sup> December 2001.

I certify that this ruling represents the corrected text of my judgment and no further copies or transcriptions need be made of it.

### **Background**

- 1 The Defendants have made an application for leave to amend the defence. The proposed amendments with which I am concerned are to be found within subparagraphs A and B of paragraph 1. The purport of the amendment is that any causes of action which the Claimants may have had have been compromised through the auspices of a mediator, Mr Livingstone, whereby the Claimants gave up the present action in return for the Defendants giving up their action in the Isle of Man. This part of the Defendants' application for leave to amend was resisted. After argument, I refused the application to amend in relation to the paragraph referred to and I told the parties I would reduce my reasons to writing.
- 2 The underlying action which is said to have been compromised concerns the purchase and re-sale of a quantity of metal. It is the Claimants' case that the first defendant, who was at the time one of their directors, using the second defendant as his vehicle, diverted the benefit of the sale to himself, having wrongfully procured payment to the supplier to be made by the Claimants. Thus, it is said, the first defendant has effectively defrauded the Claimants and have left them with what might, at best, appear to be a worthless claim for the balance of the purchase price from the ultimate purchaser, assuming that the first defendant assigned to them the benefit of the sale contract. The Defendants say that they have been guilty of no wrong-doing and **that** the transaction took place with the full knowledge and consent of the principal **behind** the Claimants, Mr Al Tajir. There is no room for misunderstandings: one **or other** of the parties is telling lies and, but for the alleged compromise agreement, there will have to be a trial to determine that issue.
- 3 The grounds for the Claimant's opposition to the application for leave to amend to add the alleged compromise is put under two heads. In the first place it is submitted that the application to amend is supported by evidence which is 'implausible and incredible' and for that reason leave should be refused. Second, and in any event, even if it were believable, there is no credible case for suggesting that an effective compromise agreement between the parties was made. I accept both submissions. If there is no credible case being advanced by the amendment, either because of the quality of the evidence, or because, even if accepted, the evidence establishes no credible case in support of the allegation of settlement, then the application would fail. This is not an occasion for a detailed evaluation of whether at a trial the case would succeed or fail. If the amendment advanced a credible case then whatever the eventual outcome might be, and whatever view I took of the merits, the amendment would have to be allowed. This position was common ground between the parties.
- 4 Before turning to the detailed submissions, I say something about the factual background to this application. The Claimants are an Isle of Man company; the second defendant is a company registered in Dubai, of which the first defendant is a director and shareholder. The claim relates to the purchase and on-sale of a quantity of petroleum coke. The goods were bought from a company for about US\$3.5 millions and re-sold to an Iranian company known as Iralco for just under US\$4 millions. The Claimants say that they paid for the goods, that Iralco have, apparently, defaulted on payment of part of the purchase price and what the defendants have received should have been for their account.

### **The proceedings**

- 5 The proceedings were commenced in the Chancery Division, and, on the Claimants' application for summary judgment, Master Moncaster ordered the second defendant to pay into court by 3 December 1999 the sum of US\$886,116 and that, in default, there should be judgment against the second defendant for that amount. The parties were required to apply for a transfer of the case to the Commercial Court and in due course the action came before Steel J sitting in the Commercial Court on 27 January 2000. At that stage a third party, Mr Livingstone, who was known both to Mr Al Tajir and the first defendant, had agreed to act as a mediator and these proceedings were put

on hold. The parties agreed orders extending the second defendant's time for making the payment into court until the end of March 2000. The first defendant had commenced proceedings in the courts of the Isle of Man against an entity called International Development Corporation Limited, one of Mr Tajir's companies, and those proceedings were also put on hold.

- 6 It is the defendants' case that the mediation worked and both sets of proceedings were compromised on the basis that each action would be withdrawn. Accordingly, the defendants issued an application in this court towards the end of February 2001 for an order that the court should declare that

"This action has settled and therefore the claim be dismissed with no order as to costs on the claim but the Defendants' costs of this application."

They also asked for orders extending the time for the second defendant's to make the payment into court, as an alternative.

- 7 The matter came before Andrew Smith J on 4 May 2001 and he directed that the Defendants' application for leave to amend their pleading to allege that there had been a compromise should be set out with particularity and evidence exchanged in accordance with a timetable. He further directed that that application should be heard at the same time as the Claimants' application for judgment by reason of the second defendant's default in making the payment into court.

- 8 I heard the matter on Friday, 16 October 2001.

#### **The amendment and evidence in support**

- 9 The amendment being sought is in the following terms:

Each of the parties in this case

1A

- (2) Any causes of action were compromised by agreement between the parties in or about August 2000, on terms that each side would withdraw their respective actions against each other.

1B

- (1) invested Mr Ian Livingstone with the authority to compromise the various claims,  
(2) did so with the intention of creating a binding; agreement if possible;  
(3) agreed with Mr Livingstone that the disputes would be compromised on the terms set out in paragraph IA(2) above;

10. In support of the application, the Defendants' evidence is to be found in the third witness statement of the first defendant and in two statements of Mr Livingstone. The first defendant says that on 15 February 2000 Mr Livingstone sent him his findings and recommendations. Those recommendations are set out in a document prepared by Mr Livingstone and contains the following paragraph

"The foregoing, or whatever steps are actually agreed, would of course need to be incorporated in an agreement between the two parties confirming that with the steps stated neither party has any remaining complaint or grievance against the other."

In fact, there is no dispute between the parties that these settlement proposals were rejected by Mr Al Tajir. Accordingly, the issue was re-visited by Mr Livingstone who prepared further "recommendations and reasons therefor". The second proposal was not substantially different from the first, save that he indicated to Mr Al **Tajir that the** first defendant would, "if you wish" assign the right to recovery of the balance of the sale price outstanding from Iralco. In the penultimate paragraph of the second proposal Mr Livingstone said this:

"I realise this analysis is very similar to that in my opinion of 15 February 2000. However , I have not yet put it to [the first defendant] in this form. If you can tell me that you would find it or something very like it, generally acceptable I will prepare it in a form suitable for presentation to

both parties as a basis for progress. If not, 1 will be obliged to inform both parties that 1 am unable to proceed further."

11. The first defendant's evidence was that Mr Livingstone told him, in August 2000, that he had met with Mr Al Tajir in the South of France who indicated that he accepted the proposals and that Mr Living stone had asked Mr Al Tajir

"to confirm so that the lawyers could draw up the necessary papers .... Mr Livingstone told me that he would send a draft of the letter for my final approval .... I told Mr Livingstone that the letter was fine and I asked him why we needed to send a draft as there was an agreement. Mr Livingstone said he did so out of courtesy. I regarded the disputes as at an end."

12. The letter referred to in the first defendant's evidence is dated "August" and headed "draft". The relevant parts of the letter reads as follows:

Mr Al Tajir and Mr Sajjad have now confirmed to me that they are prepared to settle the existing dispute between them in accordance with my recommendations. namely by each withdrawing, their respective actions against each other and agreeing that neither has any claim against the other arising now or in the future from the various matters which are the subject of those respective actions or from any activity or business in which either has been involved with the other.

I would be grateful if you would now take appropriate instructions to conclude these matters as expeditiously as possible and kindly confirm to me when they are finalised."

13. Mr Livingstone's evidence is that Mr Al Tajir told him in the South of France that

"we should sort them [the disputes] out as recommended in my letter of 8 May. I asked Mr Al Tajir to confirm this as, although it was absolutely his decision, I appreciated he would wish to get his people on board if possible and I did not want to have any confusion with them in the settlement process. I wrote a letter addressed to both lawyers and sent it to [the first defendant]. I felt I did not need to send it to Mr Al Tajir because he told me he had agreed with my recommendations. He had also told me in Paris he would accept my findings.... The letter was not sent to the lawyers because I was waiting for Mr Al Tajir to confirm to me as requested. Nothing happened between August 2000' and January 2001. Although I did not hear from Mr Al Tajir, I believed there was a settlement .... In January I saw a copy of [the Claimants' solicitors] letter of 4 January 2001 ... I wrote to Mr Al Tajir on 8 January 2001 in which I set out my understanding of the position."

14. The solicitors' letter of 4 January 2001 says that "this matter has not been resolved" and that time has elapsed so that the Claimants now have a judgment against the second defendant and that payment was awaited. In his letter of 8 January, Mr Livingstone said that he had not sent out the draft letter to Mr Al Tajir

"as I did not want to give anyone the chance to say that I was hustling you"

He asserted that he believed "we had amicably resolved these disputes". Mr Livingstone sent a further letter to Mr Al Tajir dated 13 January in which he said:

"Accordingly, the mediation which 1 have been attempting at the invitation of both parties is now terminated and these disputes remain to be settled either through the courts concerned or by negotiation between the parties directly."

15. During the hearing before Andrew Smith J, counsel for the Claimants questioned the authenticity of the draft letter and in particular whether it pre-dated or ante dated the meeting with Mr Al Tajir on 24 August. In response to this point, Mr Livingstone said that he had prepared the draft before the meeting and faxed it to the first defendant and that he amended the draft and faxed the final draft to the first defendant on 23 August. In other words, it appears to be accepted that the letter did not follow the meeting but preceded it and as confirmatory evidence of an agreement it carries no weight, contrary to the way the case was originally put on the defendants'

behalf. Furthermore, from the documents provided the precise sequence of events relating to the draft letter still remains obscure and unexplained.

16. The documents show, I think, a clear intention that whatever was orally agreed would need to be reduced to a formal written agreement. The written document was not to be a mere formality. There were important details which required clarification and further agreement: for example, was the first defendant committed to assigning the benefit of the on-sale contract, were the parties really intending to compromise not just the existing litigation but also claims arising in the future "from any other activity or business in which either has been involved with the other" as stated in the draft August letter which is said to show that a compromise was reached. Further, Mr Livingstone is unable to say more than that Mr Al Tajir, at the meeting in August, said "we should sort them [the disputes] out as recommended in [the May letter]". That is not the language of the conclusion of an agreement binding in law and the letter to which the witness refers makes it quite clear that step 1 was to acknowledge that the proposals were generally acceptable and that thereafter Mr Livingstone would prepare a further document for presentation to both parties "as a basis for progress". It is of some significance, I think, that Mr Sajjad re-activated the Isle of Man proceedings in about March and, thus, arguably, has accepted Mr Al Tajir's repudiation [if such it was] of the settlement agreement, if such were concluded.
17. In short, on the material before me it is clear that the parties never reached a binding settlement agreement as alleged in the proposed amendments. This was a **mediation** which failed to produce a compromise and since the facts asserted in the amended pleading have no prospect of success it would not be right to grant leave to **amend**.