Case No: 1997 Folio 1538

Neutral Citation Number: [2002] EWHC 1627 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th October 2002

Before:

THE HON MR JUSTICE MORISON

BETWEEN

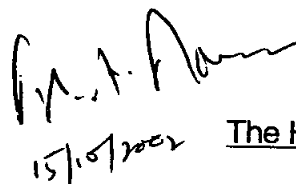
	SOMATRA LIMITED	**Claimants**
	- v -	
	SINCLAIR ROCHE & TEMPERLEY	**Defendants**
AND BETWEEN		
	SINCLAIR ROCHE & TEMPERLEY	**Claimants**
	- v -	
	(1) SOMATRA LIMITED **(2) ARABIAN BULK TRADE LIMITED** **(3) ABT INTERNATIONAL LIMITED**	**Defendants**

Mr C.Symons QC, Mr S.Rainey QC and Mr M Cannon (instructed by Messrs Herbert Smith for the Claimants)
Mr M.Cran QC, Mr S.Males QC, Miss R.Sabben-Clare & Mr D.Shapiro (instructed by Ince & Co for the Defendants)

Hearing Dates: 7th-8th October 2002

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



The Hon. Mr Justice Morison

Morison J

1. At the end of the hearing in December 2001, I reserved judgment. The judgment is in two parts: the first deals with liability of SRT to the Claimants and the second, in the form of an appendix, dealt with a question which did not, I thought, arise. The first part of the judgment was given in draft to the parties on about 16 July 2002. It is a substantial document, the length of a paper-back book, and took a long time to prepare. Not surprisingly Mr Cran QC was not able to deal with the judgment on 30 July 2002, when it was to be handed down. One of the problems was that he wished to make a number of applications relating to a stay of execution, some of which would have involved a review by the Court of Appeal. To avoid this potential disruption to the court list during the vacation, and having regard to the fact that the appendix had only recently been made available, and because of the non-availability of the whole of Mr Cran's team, I acceded to the suggestion that either 7 or 8 October 2002 should be set aside for all other matters relating to costs, permission to appeal and so on. In the event, the applications occupied the court for both days.

2. The first question which I must determine is the amount to which the Claimants are entitled, subject to SRT's set-off in respect of their fees. The issue arises from the fact that Mr Domingo sought, and I found obtained, authority from the insurers to settle the claim at US$ 45 millions, which was, in the round, referred to as 75% of the claim. When the case settled at 66 2/3rds% the actual sum of money involved was precisely calculated as US$39,825,000. Is the sum to be awarded the difference between US$45 million and the sum paid, resulting in a judgment of US$5,175,000 or a scaling up of what was received to a figure of 75%, £4,978,125? In my view the proper sum is what Mr Domingo had authority to settle at namely $45 millions, expressed for convenience as 75%. I say this because the documents show that that was the figure for which Mr Domingo was seeking approval from the following market. A different figure was not put to him. Mr Domingo's fax of 4 April 1994 to the market showed that settlement discussions had taken place at a umber of different levels, including his with Mr Alireza, and that as a result, despite all arguments, "the owners were not prepared to contemplate a settlement less than 75% of their claim." He then sought the views of the market on a settlement deal of US$45 million ["if

underwriters were to agree to a settlement at US$45 million"]. His document to the market of the same date requested Underwriters or representatives to whom the report was addressed, to advise him, personally, "of whether in all the circumstances they would agree to a US$45 million settlement with the owners .."It was his evidence, which I accepted, that the market gave their approval: "by the time the case settled I was confident that I had obtained a mandate from the underwriters to settle the case for up to 75%." Although the Arditti letters were produced to try and show that this evidence was not right, I was satisfied that Mr Domingo's explanation of dealing with specific senior people who gave their approval as convincing and compatible with the fact that settlement discussions were going on at different levels.

3. Subject to the set-off the judgment sum is US$5,175,000.

4. The next issue relates to the set-off in relation to SRT's unpaid fees. It is common ground that in the light of my judgment since the set-off will amount to a partial defence and since the amount of the set-off cannot be calculated until after a detailed assessment has been made of them. As clients, Somatra were entitled to have from SRT a detailed bill of costs [section 64 of the Solicitors Act] which was first provided on 20 February 1996. The bill is for a sum which is roughly equivalent to US$1 million. It would be unsatisfactory if payment to Somatra were delayed until after a costs judge has carried out a detailed assessment; and a payment on account would be appropriate. In round terms, and making full allowance for the costs claimed by SRT an interim payment of $4 million would be fair and proportionate.

5. In normal circumstances interest would run on a judgment from the date when liability arose, namely April 1994. However, I accept Mr Cran's submission that the Court may take into account the date when the Defendants reasonably knew there was ging to be a claim; and the court should make a deduction from the interest period in respect of any part where the Claimants had been dragging their feet. On this basis, it seems to me that until November 1994 SRT can legitimately argue that they may have been unaware that they were going to be sued. There is evidence of a discussion about the possibility of a claim when Mr Leach, the then senior partner, and Mr Atkinson flew to Jeddah in the summer of 1994 and met with the Claimants. I

specifically have placed no reliance on these discussions, when reaching my conclusions on liability, partly because the discussions had been recorded without the knowledge and consent of SRT, and to take them into account against SRT's interests would have been unfair. Further, there was one point which Mr Leach spoke about which might have assisted SRT but again, I was unsure about its accuracy and felt it best to omit it from my mind. These were events which took place in the spirit of compromise, after the case was over and unhappiness was being expressed about SRT's bill. Mr Cran characterised the way Somatra behaved after the settlement and before proceedings as "deplorable". I do not agree with that adjective; he overstates the position. I regard the concealed tape recording of conversations as unacceptable but, because of the lack of trust, not entirely unexpected. I do not think it right to say that SRT were aware of the potentiality of proceedings until November 1994 at the earliest. In my judgment it would be fair to SRT to say that interest on the interim payment sum, and thereafter any further amount found due after the detailed taxation, should start to run from January 1 1995.

6. The rate of interest on the judgment sum, and payment on account was also in dispute. It seems to me, on the evidence before me, that interest should run at the rate of 1% over US prime, that being the commercial rate of interest in relation to US dollar sums. The evidence shows that commercial organisations quite commonly borrow at that rate or at prime plus 2%. That should be the rate from 1 January 1995 to 30 July 2002 and thereafter at the judgment rate.

7. In relation to costs, Mr Symons QC asked for indemnity costs on the issue of liability [that is, not including the portion of the trial dealing with what was called the original action to which the appendix relates]. The basis of his application was that the way SRT chose to conduct their case was not simply to defend their case on negligence but to go much further: ridiculing their former clients in their opening and thereafter, accusing Mr Alireza and Mr Domingo of dishonesty and the former of being childish, accusing Mr Hamilton of improper conduct, running a case which his own clients must have known to be false in relation to the instructions to Professor Bull and the invitation to the meeting with Mr Steel QC; seeking to blame their former clients for what happened and more generally arguing every point ad nauseam. Mr Cran QC

submits that he was entitled to challenge the good faith of both Mr Alireza and Mr Domingo since that was an important part of his clients' defence on the issue of causation and loss; he also points out that SRT succeeded on a number of the allegations made against them.

8. The principles on which an order for indemnity costs may be made are well known [see CPR 44.3]. There is, I think, a difference between fighting a case firmly and properly and fighting a case on the basis of a wholesale attack on the integrity of the defendants' former clients, without justification. It is a feature of this case that two people in a well known and respected firm of solicitors gave unreliable evidence to support their firm's defence. Indeed, in part their evidence was incredible and I draw attention in particular to paragraphs 95, 97 -99, 206, 227-8, 238, 257 of the Judgment.. This is a case where during their retainer and thereafter during this litigation the solicitors have made a wholesale attack on their former clients' integrity, and the integrity of their US attorney, without justification. Their position is that the Court of Appeal will inevitably conclude that Mr Alireza has been mendacious in his evidence. This method of fighting the case [the conduct of the case] was unreasonable, I think, and totally uncalled for, and makes it one where an order for indemnity costs is appropriate. The case could have been contested on a quite different basis, which maintained proper respect for their former clients. It seems to me that I cannot separate out the issues on which SRT succeeded: the whole case was part of a piece and the order for costs should reflect that, and for this reason, and because of the very nature of the defence, I refuse to split the liability issue and award costs to SRT of those issues on which they won. In truth, they lost the action comprehensively. I therefore direct that Somatra's costs of the liability issues as between SRT and Somatra should be on an indemnity basis. I reject Mr Cran's suggestion that Somatra conducted themselves deplorably after the settlement or that that should cause me to reject an indemnity basis.

9. Although it was SRT who indicated, in interlocutory proceedings, that there would have to be a virtual re-run of the whole original action, I think that there was nothing in particular about the way the re-run was dealt with on both sides which would justify any other order for costs than a standard basis.

10. SRT do not seek a separate order in relation to the costs of the counterclaim, but their success on the abatement issue should, it is submitted, be taken into account on the costs order I make more generally. As I have said, success on this issue, which took very little of the court's time, does not affect the general picture.

11. The next question is whether the Court should order a payment on account of costs pursuant to CPR 44.3(8). It seems to me that whether such an order is "normally" to be made, as suggested by Jacob J in *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138 at 153, a payment on account of costs in a case such as this is entirely appropriate. The costs in this case are massive. The Claimants' bill is of the order of £6.2 millions and they seek an order for payment on account of £3.1 million, or 50%. The figures are dealt with in the evidence of Mr Nahal. Details of the funding of the costs by the Claimants has been provided and it can be seen that the costs have been billed and paid on a monthly basis. The amount which Somatra seeks is somewhat less than Ince's costs of defending the action [£3.9 million].

12. CPR 44.3(6)(g) gives the court jurisdiction to award interest on costs from or until a certain date, including a date before judgment. Because I do not think this is a case for a 'split order' as to costs, on an issue based basis, I can see no reason in principle why I should not exercise my discretion in awarding interest on costs to reflect the commercial reality that the ABT Group have lost the use of the money which they otherwise would have been able to spend in earning yet more money. Interest on those costs, which are in pounds sterling, should run at the commercial rate of 1% over base rate. I reject the submission that the rate of interest should be the deposit rate because the sums recovered by Somatra were largely distributed to its shareholders. The normal rate should apply as in every commercial case. The order is that payment of £3.1 million be paid on account of costs, together with interest at 1% over base rate.

13. I turn now to the vexed question as to whether the original judgment contains adequate reasons for the conclusions. Very properly, SRT who think that it does not, have invited me to give reasons or further reasons as the case might be for my

conclusions. This is not an appropriate occasion for a judge to seek to try and justify his conclusions. Mr Cran QC makes a large number of criticisms of the judgment directed to the issues of causation and loss. I am prepared to say something further about four matters only, unless the Court of Appeal were to think otherwise. The question of leave to appeal will await Mr Cran QC's consideration of what I now say.

A. My findings in paragraphs 257 - 259 and paragraph 263 [on causation].

Mr Cran says that it is not possible to tell from the judgment the effect which each of the complaints made in this action had upon Mr Alireza's decision to settle the case. He says that if the decision to settle was caused by matters which were complained of but in respect of which I did not find any breach of duty, then causation would not have been made out. He also says that the settlement made was quite in line with the various advices which had been received.

Mr Alireza was carefully questioned about the reasons why he entered into the settlement. It was the thrust of the Defendant's case that he achieved at least as much as his advisers, including Mr Hamilton and Mr Stang Lund were recommending. I had the advantage of listening to the evidence of Mr Alireza and what he said appears from the following passage of his cross-examination:

"You met with Mr Arditti and Mr Farr on 7th April and you
deal with this in your witness statement and I am not
going to run through all the details with you. But if
you were expecting 75 per cent from Mr Domingo, it is an
obvious question, but why were you prepared to do
a deal
at 66 and two thirds with Mr Arditti?
A. I think, my Lord, this very much related to the fear
I had at that time. ^ I know that Mr Williams was
throwing around the figure of 30 per cent and I thought
this might get back to the market and in discussions that
I had with Mr Domingo would have disappeared and I

wanted to cut down my losses and close a deal then and there, and Mr Arditti gave me that opportunity.

Q. You knew that Mr Arditti did not speak for the whole market, he only spoke for his underwriters, but he thought, he told you, that he could get the whole market to agree. Now from your perspective, if you were thinking that you were going to get 75 per cent from Mr Domingo, why not hold out; you were expecting him back that day, why not hold out and see if he delivered?

A. I was not overly aware, my Lord, to the intricacies of the market. All I knew is Mr Arditti came to me under the pretext of a courtesy call. I felt he was an emissary of Mr Domingo and he was there to talk on behalf of the market, Mr Domingo or whoever, but he gave me the impression he is the man to settle and he was going to deliver and did for me later that afternoon on a handshake. ^.

Q. I just want to be quite clear about this. The reason why you say you did not wait for Mr Domingo who was due back to you the same day was because Mr Arditti was prepared to give you a deal on a handshake, is that it? I do not want to misunderstand what it is that you are saying.

MR JUSTICE MORISON: I think the previous answer is: "all I knew is Mr Arditti came to me under the pretext of a courtesy call. I felt he was an emissary on behalf of Mr Domingo."

A. Yes, I was not aware they were at odds with each other at that time. It was Mr Domingo who suggested, my Lord, that I should see Mr Arditti.

MR JUSTICE MORISON: Mr Domingo.

A. He is the one who suggested I should see Mr Arditti.

MR CRAN: Did you ask him whether he was an emissary

from Mr Domingo.

A. I was not communicating with Mr Domingo at that time. Mr Mustafa was communicating.

Q. If you had wanted to you could have asked Mr Arditti for an hour or so so you could consult with anybody that you cared to consult with, including Mr Domingo, could you not?

A. In hindsight, my Lord, I think somehow we have all perfect vision, but at that moment I had to think on my feet and as I said, I had greet fears what further damage could be done to my case and I wanted to close a deal then and there. My options were limited and I had to think on my feet and decide in that direction.

Q. The reality, Mr Alireza, I suggest is this: that as a result of all the advice that you had received you would have taken a figure a lot less than 66 and two thirds and this was a magnificent and unexpected bonus for you and you leapt at it?

A. That is not true.

Q. It is far more than you were expecting?

A. That is not true, absolutely not. In fact, Mr Domingo was genuine at 75 per cent. He was working it and I had a clock that was running against me ^.

Q. You were happy with this settlement after it had been made, were you not?

A. Yes, my Lord, happy from the sense of tremendous relief I received at that time.

Q. But you were happy because you thought it was a good settlement in terms of its level?

A. Given the circumstances, my Lord, the trial to use the expression the trial I was put in and the stresses and all of these factors, one can expect a sense of relief, a sense of release from this extreme conditions that one

lived through.

Q. When the settlement was made did you tell any of your team that you were disappointed because you had been expecting 75 per cent?

A. I do not remember telling them, no.

Q. Did you not tell Mr Hamilton that you were happy with the settlement without qualification?

A. I do not remember the details whom I told I was happy or not happy.

Q. Did you not tell Mr Jennings that you were happy with the settlement without qualification, indeed, very happy I think he reports?

A. As I said, I was very happy from the point of view of being relieved of this nightmare.

Q. You never suggested to anyone, did you, that you thought that you could have got more if you had gone to trial or or held out for a settlement?

A. I think it was obvious, my Lord, that if one had a team captain that was of assistance to him during his difficult moments one would have achieved a much higher settlement ^.

Q. Could you answer my question: did you ever tell anyone that you were unhappy with the settlement --

A. I am sorry, I did not answer your question but I am trying to the relate if I told this to anybody at that time. I cannot remember if I did or not ^.

Q. What happened thereafter was that you firstly decided that Sinclairs should be, I do not know if punished is the right word, Mr Alireza, but that their fees should be questioned for the period of February 1994 onwards because of Mr Williams' behaviour; is that right?

A. I do not know, my Lord, if the word "punished" is the correct one, but in my mind if I had a house built by

a contractor and the roof fell on top, a roof fell down
from that house, and I had outstanding dues to him my
instinct would be not to pay him these dues until he
corrects the situation."

I accepted that evidence. It seemed to me obvious that the breaches which I had found were capable of being regarded as an effective cause of the settlement at less than 75%, even if there were other matters which would or might have influenced Mr Alireza's actions which did not amount to a breach of duty. It will be a rare case where a client has sound reason to distrust his legal advisers.

This was re-enforced by Mr Alireza's witness statement in which he said:

> "There is no doubt in my mind that I would have achieved a higher recovery if it had not been for SRT. Here I was with a total lack of support and I managed to negotiate a 66.6% settlement. Imagine what I could have done with my lawyers behind me. I salvaged what I could, but I was convinced and am still convinced that we could have achieved much more.
>
> If I had not lost confidence in SRT and so knew that I could take the case to trial if the underwriters did not settle at my level, there is no way I would have agreed to a settlement at 66.6% I would have been happy to take the case to court, and would have done so unless a very high settlement could be agreed. I would not have been desperate to do a deal with underwriters."

B. The meeting on 31 March 1994

Mr Cran QC says that the note made of this meeting shows that Mr Alireza and his team were quite prepared to settle for what they achieved. Again, the circumstances in which this meeting took place and was recorded, was dealt with in evidence by Mr Mustafa. He made it clear that the conversations which had been held with Mr Domingo were regarded by him and Mr Alireza as confidential and that it was not commercially sensible to mention them to other members of the team.

"Why he put that figure only he can answer.
What I do know is that he did not have any idea as to
the last figure that we had agreed with Mr Domingo.
I was not going to tell him here: sorry, you know, you
are way out, because the whole purpose was we wanted to
keep it secret, because we did not know where this whole
thing was heading. People were talking to each other
and we were scared. We were scared of our own shadow at
that time, you know."

This was a quite understandable position for him to take. As Mr Domingo explained there were various levels at which talks were going on. I was not prepared to conclude that this meeting threw doubt upon the evidence in relation to Mr Domingo and his discussions with Mr Mustafa and Mr Alireza. I can well understand the need for confidentiality at what must have been seen as a 'delicate moment' in the negotiation process. Revealing in advance what Mr Domingo's position was going to be might well have had serious adverse consequences.

C Mr Domingo's evidence.

I think Mr Cran's point is that my conclusion about the veracity of his evidence cannot stand. He makes a number of detailed points which he had made in his closing submissions. I am sorry if he feels the judgment does not do justice to his case. I cannot really properly add to what I have said in the Judgment save to emphasise that I was sceptical about this aspect of the case until Mr Domingo came to Court. He was a most impressive witness, and, right or wrong, I believed him and was of the view that the attempts to undermine his evidence through the Arditti letters misfired, because Mr Domingo dealt with the points put to him in cross-examination.

D Reasons for refusing to admit Professor Kruger's second supplementary report.
I omitted to give reasons due to an oversight. The omission seems, also, to have been overlooked by the parties on 30 July 2002. The issue is concerned with whether the

underwriters' agreement to a retrospective change of class was vitiated, as a matter of Norwegian Law, because of the alleged deliberate failure by Somatra to notify class of a crack in the 2 Starboard ballast tank in October 1990. Mr Cran QC objected to my altering the draft judgment. He said that had I bothered to look at his own skeleton argument I would have seen the error in the Claimants' submissions which led to the error. I would prefer to say that I preferred to follow the arguments of Mr Symons QC. He submitted that the judgment was final and not in draft despite the fact that the frontispiece had not been signed. On the first point, my understanding is that a draft judgment circulated in advance may be corrected where there is an obvious error, as here. I am not changing a conclusion. On the second point I should say that Mr Cran QC is a senior counsel and is well aware of the difference between a draft judgment yet to be handed down and a judgment which has been handed down. The point at issue between the Norwegian Law experts was as to the proper interpretation of section 33 of the Norwegian Formation of Contract Act. Section 33 enables parties to avoid agreements made on the grounds set out there. Did section 33 have any application short of fraud? During his cross-examination Professor kruger accepted that section 33 was a fraud section. No-one either in the original action or in this action suggested that Mr Nord was fraudulent. Having given his evidence and some considerable time later, Professor Kruger provided a further report which Mr Cran QC asked should be admitted in evidence. The basis on which this application was made was that Professor Kruger had been taken by surprise by the cross-examination on this point. Had the application been granted the trial would have been further extended. Mr Stang Lund was not immediately available. I refused the application essentially because it was simply too late to be receiving fresh material; it was not a point which, on my view of Mr Nord, had any bearing on liability; and the allegation of surprise was unconvincing.

14. I shall have to deal with the application for permission to appeal on Tuesday, but I can, I think usefully deal with SRT's application for a stay pending an appeal or an application to the Court of Appeal for permission. Somatra through Mr Alireza personally, has offered undertakings to the court which will properly protect SRT's position were an appeal to be successful. He is, in my judgment, a trustworthy man. He has, I think, a profound sense of honour; the personal attack on his integrity in

these proceedings visibly caused him considerable distress. He is a successful and wealthy man. He is prepared to give the court personal undertakings so as to secure the defendants's position in the event that either I give permission or refuse it and an application is made to the Court of Appeal and is granted by them. I have no difficulty in accepting such an undertaking. His ability to meet it if called upon to do so is not in question. The only question is whether he would take steps to evade the consequences of his undertaking by absenting himself from the court's jurisdiction. In my judgment such a course of action would be regarded by Mr Alireza as dishonourable, and for that reason alone he would not do so. But in addition, as a wealthy business man with international business connections and with some family attachment to this country, it is inconceivable that he would deliberately flout his obligations to the court. Whatever the outcome of the application for permission to appeal, I can see no good reason why Somatra should be deprived of the fruits of their judgment and interest [and part payment of their costs, with interest]. He will have the opportunity to make the money work in the meantime and SRT will suffer no prejudice as a result.

15. Mr Symons'QC asked me to indicate whether, had I granted the Defendants permission to appeal, I would also have granted him permission to cross-appeal to contend that the Claimants should have recovered the whole amount of their claim in the original action. I would have given him permission on that basis only.