IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1999: NO. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.
(On behalf of itself and all other shareholders of Avicola Villalobos S.A. and on behalf of Avicola Villalobos S.A.)

Plaintiff

- and -

LEAMINGTON REINSURANCE COMPANY LTD.

First Defendant

- and -

AVICOLA VILLALOBOS S.A.

Second Defendant

REASONS FOR DECISION
(STRIKE-OUT, PARTICULARS, & DISCOVERY APPLICATIONS)

Date of Decision: June 25-26, 2007
Date of Reasons: July 3, 2007

Mr. Narinder Hargun, Conyers Dill & Pearman, for the Plaintiff
Mr. David Kessaram, Cox Hallett Wilkinson, for the Second Defendant

BACKGROUND

1. In my Ruling of February 10, 2006[1], I described the history of the present actions as follows:

> "*1. On March 26, 1999, the Plaintiff issued a Generally Indorsed Writ of Summons in Civil Jurisdiction 1999: 108 against the Defendants herein. The claim was a derivative proprietary claim against the First Defendant on behalf of the Second Defendant, who was joined to meet the procedural requirements under Bermuda law in relation to derivative claims brought by a shareholder on behalf of the company whose shares the Plaintiff holds.*
>
> *2. On the day the Writ was issued, Mitchell J granted a Mareva injunction. The First Defendant ("Leamington") provided discovery on April 28, 1999. The Plaintiff ("Lisa") applied ex parte for leave to serve the Second Defendant ("Avicola") out of the jurisdiction on May 14, 1999, but did not obtain such leave until Simmons J's Order was granted on December 23, 1999. In the meantime, Leamington had both applied to set aside the*

[1] On the trial of a preliminary issue and the Plaintiff's application for leave to re-amend its Statement of Claim.

Mareva injunction on October 15, 1999, and obtained directions in relation to its application from Wade-Miller J on November 4, 1999.

3. *On January 26, 2000, Leamington applied to strike-out the action, with directions being ordered by Storr AJ on February 10, 2000. On March 22, 2000, Lisa filed its Statement of Claim, and on July 31, 2000 applied ex parte to renew its Writ. The renewal order was granted that day by Simmons J, but Avicola applied to set aside that Order on July 31, 2001. Directions were given by Meerabux J on February 1, 2001. Lisa sought to sidestep a potentially fatal attack on action 1999: 108 by issuing a similar Generally Indorsed Writ in Civil Jurisdiction 2001: 79 on March 2, 2001, in which fresh action both Defendants in due course entered appearances. On March 26, 2001, Lisa applied for leave to serve Avicola outside the jurisdiction, which application was granted by Mitchell J on April 5, 2001. On April 9, 2001, Lisa applied to consolidate both actions.*

4. *This fancy legal footwork bore fruit when on June 7, 2001, Mitchell J set aside the ex parte writ renewal order on Leamington's application, but also granted Lisa's consolidation application. On November 8, 2001, Ward CJ granted Lisa's June 25, 2001 application for leave to amend its Statement of Claim. On February 15, 2002, Leamington filed its Amended Defence and Avicola its Defence. One year and nine months later, after filing a Notice of Intention to Proceed on October 3, 2003, Lisa applied on November 20, 2003 for Further and Better Particulars of Leamington's Amended Defence. I granted this application on December 4, 2003, and the relevant particulars were given on January 2, 2004. It was only after these numerous initial interlocutory skirmishes, that battle was joined on the issues which presently fall for determination.*

5. *On September 3, 2004, the Defendants applied for the trial of two preliminary issues, and after ordering directions on September 23, 2004, Ground CJ granted the application on December 2, 2004. On February 17, 2005, Lisa applied for leave to re-amend its Statement of Claim, again with a view to fending off a potentially lethal attack on its claim by the Defendants. And on April 6, 2005, Wade-Miller J ordered, inter alia, that both applications should be heard together.*

6. *The three parties, musketeer-like, have moved their legal sword-play from one battleground to the next, with various interlocutory applications being heard over nearly seven years by eight different first instance judges. None of the interlocutory applications to date appear to have given rise to either a considered judgment nor any appeal. The above summary does not include related proceedings which have taken place in the British Virgin Islands, Florida and (it seems[2]) Guatemala as well. The Defendants assert that they have been more proactive than the Plaintiff in this litigation, and invite the Court, in addition to other arguments, to have regard to the law of limitation and the doctrine of laches, or delay.*"

[2] The Defendants' Counsel suggested that Lisa had filed over 100 suits against Avicola and related entities in Guatemala; proceedings in the other two jurisdictions were directly referred to in evidence.

2. On March 10, 2006, I resolved a preliminary issue in favour of the Defendants, but granted leave to amend to the Plaintiff in the following terms :

> "*137. The Plaintiff is granted leave to re-amend to assert those claims which I have found to be arguable, but not in the form of the draft RASC presently before the Court. The theory of direct liability on which the Plaintiff now relies should be incorporated into a further draft RASC to meet the concerns which I have sought to clearly identify above…*"

3. The Defendants appealed against this Ruling, and the Plaintiff cross-appealed against my decision that it had no standing to pursue a personal claim against the First Defendant, having heard extensive evidence on Guatemalan law. On November 22, 2006, the Court of Appeal dismissed the Defendants' appeal against my decision to permit the Plaintiff to amend its Statement of Claim, and allowed the Plaintiff's cross-appeal against my resolution of the preliminary issue in favour of the 1st Defendant. The Court of Appeal apparently took the view that since various claims against the 2nd Defendant were going to be tried, it was undesirable to decide the overlapping issue of the 1st Defendant's liability in isolation from the totality of the evidence to be adduced at trial against the 2nd Defendant.

4. The 2nd Defendant did not contend before me in March 2006, nor (seemingly) the Court of Appeal in November, 2006, that the amendments should be refused because the averments were liable to be struck-out on the grounds asserted in the strike-out applications it filed on June 14, 2007. The attempt to strike-out the Re-Amended Statement of Claim altogether was, save for one pleading complaint which could not have been previously raised, difficult to comprehend. The Re-Amended Statement of Claim ("RASC") was filed on March 15, 2006, so the 2nd Defendant had an adequate opportunity to contend before the Court of Appeal last November, that the amendments ought to have been refused because the proposed re-amended pleading was itself liable to be struck-out on abuse of process or other grounds. These points were not taken. It may have been reasonable for the 2nd Defendant to simply focus on dismissing the subsequently abandoned derivative claim, but these strike-out points, if serious, could have been advanced by the 1st Defendant at an early stage of the action. And if these issues only became relevant to Avicola when the personal claim was first asserted, it was first asserted in February 2005, when the application to re-amend was filed.

5. The second limb of the total strike-out application was, however, based on an averment only made in the Plaintiff's Reply to the Re-Amended Defence of the 1st Defence filed on February 22, 2007. But the Plaintiff voluntarily gave further and better particulars of this aspect of its case, with a view to meeting the 1st Defendant's complaints.

6. The partial strike-out application was, delaying tactics apart, no easier to comprehend. The complaint that three "background" frauds were not relevant to the Plaintiff's claim sought to strike-out portions of the RASC which had been pleaded from the outset in 1999. This point was not taken before me or the Court of Appeal, in 2006, let alone in the previous six years of the litigation. The paragraphs of the RASC attacked, 8-11 and 15(i),(iii), were pleaded in the original Statement of Claim served in 2000. At the very latest, this point ought to have been taken, assuming it to be serious, as part of the 2nd Defendant's opposition to the Plaintiff's application for leave to re-amend.

7. Although the 2nd Defendant consented to pre-trial directions on March 13, 2007, it was less surprising that its new separate attorneys, who came on the record on April 26, 2007, should raise a point which had not previously been taken by the Defendants' joint attorneys, less than two months after the point could first have been taken. The original case, from 1999 until February 2007, was that the operating companies in the Avicola group were subsidiaries of the 1st Defendant,

8. The third issue I was required to decide was whether the Plaintiff was entitled to obtain full disclosure in relation to the business operations of various companies in support of its case on the three "background" frauds. The 2nd Defendant complained, by way of alternative to its partial strike-out application, that the discovery requested was oppressive. The Plaintiff eventually agreed to adjourn its application in this regard, conceding that the request as formulated was oppressive.

9. The fourth issue I was required to decide was the 1st Defendant's application for further and better particulars of its case that the reinsurance policies issued by the 1st Defendant to operating affiliates of the 2nd Defendant. It was essentially agreed that the Plaintiff had not yet received and/or considered full discovery from the Defendants, and the Plaintiff undertook to advise the 2nd Defendant of whether it can supply the requested particulars without the need for a formal order, within 28 days.

10. On June 26, 2007, I resolved these issues as follows: (a) I dismissed the 1st Defendant's total strike-out application, (b) I dismissed the Defendant's partial strike-out application, (c) I granted the Plaintiff's application for discovery in part, and reserved the position on the need to give effect to a narrower version of the oppressive discovery request, and (d) I reserved the issue of whether the Plaintiff should be ordered to give further particulars in relation to the reinsurance policies, because the scope of any potential order was presently unclear.

11. I ordered that the costs of all of these applications should be in the cause, on the grounds that both parties had achieved a measure of success. Because of the highly contentious history in this litigation, I indicated that I would give short reasons for these decisions.

THE STRIKE-OUT APPLICATIONS

12. Although the 2nd Defendant issued separate Summonses in respect of its partial and total strike-out applications, I treated these as a single composite application relying on distinct grounds.

13. In paragraph 6 of Mr. Kessaram's Skeleton Argument, it was contended that the RASC was liable to be struck-out in its entirety as an abuse of process on four grounds:

    (a) no reasonable cause of action was disclosed because there is no pleaded allegation that the 2nd Defendant itself paid any insurance premiums to Leamington;
    (b) the Plaintiff will be unable to establish at trial that the 2nd Defendant paid any such premiums;
    (c) the Plaintiff's claim is based on the same facts already tried in the nearly concluded litigation in Panama;
    (d) The claim is not being pursued for legitimate ends, as illustrated by the extensive disclosure sought in respect of "background" allegations.

14. All of these complaints seemed fairly obviously to represent an impermissible attempt by the 2nd Defendant to reargue points which were either (a) expressly or impliedly decided on the application to re-amend before this Court and the Court of Appeal in February and November 2006, or which (b) could and should have

been raised years ago. I had the distinct impression that the 2nd Defendant's recently instructed separate legal team were seeking, by their very recent arrival on the stage, to create the illusion that this 8 year old action had only just begun. An illusion which required the Court to regard the recent and distant history of this consolidated action as a mere figment of the imagination, and to henceforth manage the litigation as if, in Churchill's words, this was "*not the beginning of the end, but the end of the beginning.*"

15. This Court possesses the jurisdiction to strike-out an unsustainable claim at any time, but it is trite law that strike-out applications should be made at the earliest possible opportunity. I was unable to disregard the elaborate arguments of Guatemalan law which were advanced over a five day hearing some 18 months ago in support of the contention that the claims now contained in the RASC were not sustainable. It was difficult to attach much credulity to the total strike out application, based as it obviously was on facts and matters which took place over 5 years ago, and arguments which could have been advanced far more concisely and inexpensively 18 months ago, at the latest, and before either Defendant filed a Defence in 2002 at the earliest. If these various points which were now being advanced, five years after the facts and matters complained of occurred, were indeed so plain and obvious as to justify the exceptional remedy of striking out, why were these obvious arguments not raised on behalf of the Defendants as grounds for opposing the re-amendment application? It is equally trite law that a claim which is liable to be struck-out ought not to be allowed to be added by way of amendment. In summarising the law applicable to amendment applications, the Defendants' then joint counsel expressly submitted as follows:

> "*Amendments should not be allowed so as to introduce claims that are bad in law and bound to fail.*"[3]

16. I reject the submission that it was only after the Court of Appeal judgment in November 2006, that the need for Avicola to have active representation arose. The application to re-amend to assert a personal claim against Avicola was filed in February 2005, and not argued until January 2006. If separate counsel was desired to address the personal claim, it is difficult to comprehend why such counsel could not have been retained as soon as the personal claim was first raised. In fact, there is no reason why one firm could not represent both Defendants and argue that a derivative claim could not be maintained by Lisa on behalf of Avicola at all. Indeed, this is in fact what happened, with a Defence being filed on behalf of both Defendants by the same firm on February 15, 2002.

17. On December 2, 2004, the Chief Justice ordered that two preliminary issues be tried, one relating to the ability of Lisa to sue Leamington, and the other relating to the ability of Lisa to maintain a derivative claim on behalf of Avicola. Lisa elected to maintain, by way of its re-amendment application, a direct claim against Avicola in place of its original derivative claim on the 2nd Defendant's behalf. The 2nd Defendant was represented on this application, which was argued before me over a period of some five days, and positively opposed it. So the suggestion that the 2nd Defendant was only a passive participant in these proceedings until the Court of Appeal affirmed my granting leave to file the RASC, and therefore had no cause to make the strike-out applications it now makes (based on facts and matters which occurred between 1998 and 2001), is wholly misconceived.

18. In light of oral argument, the following three principal strike-out points fell for determination. Firstly, the RASC was liable to be struck-out because the Plaintiff's entire claim depended in law on facts which were not pleaded and could not be proved: that the 2nd Defendant had directly paid premiums to Leamington, the 1st Defendant. The Plaintiff's initial claim was a derivative claim

[3] Ruling dated February 10, 2006, paragraph 55.

on behalf of the 2nd Defendant, so it is to some extent understandable that the 2nd Defendant would not have addressed its mind to the premium issue until the personal claim was first formulated on the application to re-amend, which was argued in January, 2006. However, this application was filed on or about February 17, 2005. And paragraph 1 of the prayer for relief in the March 22, 2000 Statement of Claim, which was not in this respect affected by the application to re-amend, had always sought the following relief:

> " *A declaration that all monies received by the 1st Defendant from Avicola and its subsidiary companies either directly or indirectly through the fronting insurance companies in payment of fictitious and/or fraudulent insurance premiums are held…by the 1st Defendant as trustee for Avicola and/or Lisa.*"

19. It was not contended on the application for leave to re-amend in January, 2006, that that the Plaintiff's reformulated claim was unsustainable because no premiums were in fact paid by the 2nd Defendant. This point was in fact taken by the 2nd Defendant in its Amended Defence filed on May 25, 2006, most stridently in paragraph 14:

> "*Avicola, however, repeats that it is not among the companies that Leamington reinsures and accordingly Avicola did not pay any premium in respect of the Leamington reinsurance programme.*"

20. Avicola did not make this plea reserving its right to strike-out the Plaintiff's claim on the grounds that it was plain and obvious that the entire claim was unsustainable because it was fundamentally based on the premise that Avicola was insured by Leamington. This is not to suggest that the absence of such a reservation of rights is dispositive. Nor was this point, seemingly, taken in the Court of Appeal in November, 2006. This is most likely because it is difficult to see how the Plaintiff's claim can sensibly be construed in this manner. The essential conspiracy alleged is that monies, which should have been distributed by Avicola to Lisa as one of its shareholders, were diverted to Leamington by means of fictitious insurance policies. This claim would only be unsustainable if Lisa could not prove that the monies in question ought to have been distributed by Avicola. Which member of the Avicola Group paid the premiums is simply not fundamental to the Plaintiff's pleaded case.

21. This first complaint, in my judgment, obviously fell far short of the cogency required to justify striking-out, and appeared to be devoid of merit in any event. The fact that the point was taken so late only served to highlight how tenuous an argument it was, and this ground provided no proper basis for this Court exercising its exceptional discretionary jurisdiction to strike-out the Plaintiff's claim.

22. The second important ground of attack had considerable force, and probably could not have been raised earlier than the date of the filing on February 23, 2007 of the Plaintiff's February 22, 2007 Amended Reply to the Second Defendant's Re-Amended Defence. In paragraph 5 of the original Statement of Claim, the Plaintiff alleged that the 2nd Defendant was the parent company of various operating companies. This allegation was denied by the 2nd Defendant in its original Defence dated August 22, 2000. In the Plaintiff's Reply filed in February this year, it was admitted that the 2nd Defendant was not the parent of the operating subsidiaries.

23. Mr. Kessaram advanced the cogent argument that it was impossible to properly know what the Plaintiff's real claim was, based on a limited plea made for the first time by way of Reply. The claim as pleaded and particularised in the RASC was based on the thesis that monies which Avicola's operating subsidiaries could and should have distributed up the corporate chain to the 1st Defendant were improperly diverted through fictitious policies. On what factual or legal basis was it now alleged that, even though the operating companies were not subsidiaries,

> "*With respect to paragraph 6 of the Re-amended Defence Lisa accepts that the operating companies are not strictly speaking subsidiaries of Avicola Villabos S.A. under Guatemalan law. However, for purposes of reporting and the payment of distribution to shareholders of Avicola the income of all the operating companies is consolidated and is treated and distributed as group income. Furthermore, at the videotaped meeting on the 20 August 1998 the controllers represented to Juan Guillermo that they would be providing to him all the relevant financial information of all the operating companies.*"

24. On the morning of the second day of the hearing, as a result of strong indications the previous day that the Court considered this pleading to be inadequately particularised, Mr. Hargun tendered voluntary particulars which I considered adequately answered the pleading complaints. There seemed to me to be no serious basis for contending that the Plaintiff should not be permitted to particularise this aspect of its case, in response to a complaint that it was inadequately particularised. It is true that the Plaintiff only recently formally admitted the true legal status of the operating companies within the structure of the corporate group of which the 2nd Defendant seemingly plays a central part. But the 2nd Defendant was or ought to have been aware from the beginning of these actions of the true position, which it could have demonstrated through serving the relevant corporate documents, perhaps under a cover of a Notice to Admit Facts. At any time after the application to re-amend the Statement of Claim was filed in February 2005 seeking to assert a direct personal claim against the 2nd Defendant, Avicola could have contended that the proposed claim was unsustainable or embarrassing because the operating companies were not in fact its subsidiaries.

25. Accordingly, in the exercise of my discretion, I declined to strike-out the claim on the grounds that it was inadequately particularised, and afforded the Plaintiff an opportunity to meet the relevant complaints by serving voluntary Further and Better Particulars. These particulars fundamentally allege that the profits of the group controlled by Avicola have always been dealt with in practice on a consolidated basis, without significant regard for the separate corporate identities of the members of the group.

26. The third important strike-out argument was the submission that the Pollos Vivos, Los Cedros and Ancona Frauds, pleaded in paragraphs 9-11 and 15(i), (iii) of the RASC, are irrelevant to the present proceedings. This complaint, ignoring the fact that paragraphs 9-11 are incorporated by reference into the Leamington Fraud by sub-paragraph (i) of the particulars under paragraph 15, was superficially appealing.

27. But on a careful reading of the pleading, the other frauds have always been an integral part of the Plaintiff's case. No adequate explanation was advanced as to why this point has only been taken some seven years after the original pleading was filed and after the 2nd Defendant consented, on March 13, 2007, to the present matter proceeding to trial. Avicola's Counsel sought to explain why this point was being taken for the first time now by reference to a concession made by the Plaintiff's attorneys to Avicola's previous attorneys that the non-Leamington frauds were only being relied upon as "background". The relevant communication was set out in an email dated March 8, 2006 from Mr. Hargun to Mr. Riihiluoma, which reads in material part as follows:

> "*…You have asked me to confirm that the Re-Amended Statement of Claim does not seek to recover damages arising out of the Pollos Vivos Fraud, the Los Cedros Fraud and the Ancona Fraud.*

> *I write to confirm that these frauds are pleaded by way of background and no claim for damages is made in respect of losses arising out of these frauds…"*

28. The Defendants as a result of this clarification agreed that the RASC complied with my Ruling of February 10, 2006, granting leave to re-amend. It is unclear why this clarification was necessary, because paragraph 15(i)'s reliance on the three "background" frauds was not affected by the application to re-amend at all, in the sense that the scope of reliance from the case pleaded in 2000 was unchanged. The only difference was that these other frauds were now relied upon in support of a direct claim against Avicola, rather than a derivative claim on behalf of Avicola. If it was plain and obvious that such reliance was wholly irrelevant to the Plaintiff's claim, as originally asserted or as reformulated in February 2005 prior to, and in March 2006 consequent upon, the application to re-amend, it is difficult to see why this point was not raised until extensive discovery was requested in March 2007.

29. The three "background" frauds have always been, on the face of the pleadings, part of the Plaintiff's case. The Plaintiff's case has been from the outset that (a) "off the books" profits have been laundered through fictitious reinsurance policies issued by Leamington, and (b) that this scheme has, in addition, been a device through which Lisa has been denied its fair share of Avicola profits, because only "on the books" profits have been distributed to it. The Defendant's submission that these aspects of the RASC should be struck-out on the grounds of irrelevance was wholly misconceived. This complaint suggests that a plaintiff's pleading can only properly allege facts and matters which directly give rise to a claim for relief. As Mr. Kessaram pointed out in his critique of the Amended Reply, allegations of fraud must be pleaded with particularity. A plaintiff must be entitled, particularly in a fraud case, to seek to prove the surrounding circumstances giving rise to his claim.

30. It appears to be the case that the Plaintiff did issue proceedings in the Florida Federal Court system, in respect of these same "background" frauds, proceedings in which both Defendants in this action and other affected parties were joined. These proceedings were dismissed on July 18, 2006 on *forum non conveniens* grounds in Florida, with Guatemala being held to be the appropriate forum. But these claims have not been pursued in Guatemala, and the 2nd Defendant has long since lost the right to complain that Bermuda is not an appropriate forum for the "background" frauds to be tried as against the Defendants to the present actions. The Defence filed on August 22, 2002 responded to paragraph 15(i) of the Statement of Claim, which adopts in support of the Leamington Fraud the three previously pleaded frauds, as follows: "*Paragraph 15(i) of the Statement of Claim is denied*." But, in any event, the Plaintiff is not seeking to try the other frauds in Bermuda, in the sense of seeking compensatory relief.

31. It remains to consider, in relation to these other frauds and generally, whether their inclusion in the present proceedings supports the complaint that the present litigation, when viewed in light of litigation elsewhere, is being carried on for no legitimate purpose, but merely to harass the 2nd Defendant into settling an unmeritorious claim on unfavourable terms.

32. The principal bases on which the 2nd Defendant contends the present proceedings are an abuse of process are that (a) the failure to identify the policies alleged to be fraudulent is abusive, (b) Lisa's claim against Villamorey in Panama which is pending judgment is based on similar facts, and renders the present proceedings abusive; (c) the present proceedings are abusive because it has pursued various extra-judicial tactics aimed at asserting improper pressure on the 1st Defendant to settle on unfavourable terms, in circumstances where it is unable to plead a coherent case, as well as commencing "a myriad" of other proceedings.

33. The failure to provide particulars is a valid but premature complaint. The Plaintiff is still in the process of inspecting the Defendants' discovery and has agreed

within 28 days to indicate whether (and, presumably, if so to what extent) it will be able to provide voluntary further and better particulars. I have indicated my clear provisional view that further particulars should be given, and will make an appropriate order if required.

34. Avicola relies on cases such as *The Abidin Daver* [1984] 1 AC 398 at 411-412D and *House of Spring Gardens Ltd.-v-Waite* [1991] 2QB 241 at 254F-255, in support of its contention that the pursuit of similar claims against different parties abroad constitutes an abuse of the process of this Court. Counsel referred to these cases in his Skeleton Argument to suggest that the Court should regard the simultaneous pursuit by the Plaintiff of a similar claim in Panama against a different party as an abuse. But the passages relied upon make it clear that those cases involved two sets of proceedings between the same parties. Bearing in mind that the Plaintiff would have to give credit for any damages recovered in respect the same conspiracy abroad, and there is no suggestion that the Defendants in the present action would be bound by the Panamanian decision, this complaint has no solid foundation. In these circumstances, I need not resolve the dispute about the precise stage of the Panamanian proceedings. Further, it is wholly inconsistent with the spirit of the Overriding Objective to encourage litigants in substantial commercial cases to ride roughshod over case management directions without clear justification for disrupting a timetable which has been set.

35. The Panama proceedings were commenced in 1999, and the 2nd Defendant's own evidence suggests that it asserted claims based on the three "background" claims in this action, with references to Leamington, from the outset[4]. No satisfactory explanation is given as to why this complaint of abuse based on a multiplicity of proceedings is being advanced (a) seven years after the Statement of Claim was first filed in the earlier of present actions, and (b) after the 2nd Defendant entered a Consent Order on March 13, 2007, setting out agreed pre-trial directions. The way in which the present complaint is being raised itself borders on an abuse of process, and I would for these reasons decline to exercise my discretion in favour of striking-out, even if this ground had more merit than it does.

36. The multiplicity of foreign proceedings the Plaintiff has commenced in relation to the broad conspiracy complained of in these proceedings appears to be beyond dispute. In my view, it is not properly open to this Court to determine that foreign proceedings have been carried on in an abusive manner save by way of recognition of orders of a foreign court. In *OAO CT-Mobile and LV Finance Group Ltd.-v-IPOC Growth Fund international Ltd.* [2006] Bda LR 69 , I rejected a similar invitation to determine that foreign proceedings had been carried on in an abusive manner, observing: "*It is for the BVI courts to determine whether or not proceedings filed in that forum are abusive.*"[5]

37. There is no suggestion that any foreign proceedings commenced with respect to the broad commercial dispute which forms the basis of the present actions have been dismissed on their merits on abuse of process grounds. A Florida court, upheld on appeal, has seemingly held that the manner in which service was effected reflected bad faith on Lisa's part[6]. This complaint is dealt with further below.

38. To the extent that the Plaintiff may have used impermissible extra-judicial tactics to prosecute the proceedings before this Court, such tactics may be taken into account. The matters complained of are summarised in the 2nd Defendant's Skeleton Argument (paragraph 42), and supported by the First Escobar Affidavit. Ten matters are listed in the Skeleton Argument, nine of which appear to relate to proceedings abroad, or criminal misconduct in Guatemala, the tenth having no clear connection with any proceedings at all.

[4] Annette Escobar Affidavit, June 1, 2007, paragraphs 38-40.
[5] At paragraph 243.
[6] Escobar Affidavit, paragraph 48.

39. All of these matters are said to have occurred between 1999 and 2001. It is unclear that any of these tactics, assuming the complaints to be correct, were specifically used to create improper pressure with respect to the present proceedings. If they were clearly connected with these proceedings, this would potentially justify striking–out the present proceedings. The closest connection seems to me to be the threat, allegedly made on February 17, 1999 in Florida after certain Florida proceedings had been served, when the Plaintiff's principal apparently threatened to drop "bombs" on the Avicola Group, in the form of actions in various jurisdictions[7]. These proceedings were commenced on March 26, 1999. But for this threat to be relied upon, it would have to be suggested that the proceedings were an abuse from the outset. And there is no adequate explanation as to why the strike-out application complaining of this matter, and indeed the other pressure tactics complained of between 1999 and 2001, is only being made 6-8 years after the pressure complained of. These complaints could and should have been raised by Leamington and/or Avicola long before the preliminary issue was tried and the application to re-amend argued in February of 2006.

40. The 2nd Defendant appears to want to have its cake and eat it too. Its explanation as to why its own strike-out application is not abusive is that until the Court of Appeal in November 2006 affirmed this Court's decision to accede to the Plaintiff's application for leave to amend, Avicola was merely a nominal Defendant[8]. If this is correct, and Avicola was not materially prejudiced by being a party to the proceedings until November 2006, it is difficult to see how the improper pressure applied by Lisa, between 1999-2001, can now be complained by Avicola as abusive at all. By its own account, the only true Bermuda Defendant was Leamington; if this is right, only Leamington would have the standing to complain that is was improperly pressured shortly before and after the present proceedings were commenced. But bearing in mind that Avicola did in fact take active steps to contest the derivative claim in its name on its merits, and did in fact oppose the application for leave to re-amend to assert personal claims against it, this highly artificial argument is contradicted by the incontestable record in this case. This analysis holds good for all of the abuse of process complaints based on events which occurred before the application for leave to re-amend was made, heard and/or granted.

41. In my view, there is no merit to the suggestion that the pressure complained of is indicative of the fact that the Plaintiff has no desire to pursue the present action to trial at all. The one improper pressure tactic that does have a direct connection with the present proceedings is the secretly recorded meeting in which the fraud was allegedly admitted on behalf of both Defendants. This recording was made in August 1998. The transcript suggests that it is arguable that the fraud the Plaintiff complains of was admitted. This alleged admission is pleaded in the RASC, and has been relied upon since the first Statement of Claim was filed on or about March 22, 2000. The covert way in which this evidence was obtained provides no or no clear basis for considering that the proceedings subsequently issued in reliance on the alleged admission are being pursued in an abusive manner. There is no credible suggestion that the Plaintiff does not believe in the merits of its case. The alleged admission, which is of course disputed, may well be the principal reason why no early strike-out application was made.

42. As mentioned above, the Escobar Affidavit (paragraph 48) does complain of one foreign legal act by Lisa which was held to have been in bad faith. This was merely service of foreign process, in Florida between 2000 and 2001. On Avicola's own analysis, at this juncture it was merely a nominal Defendant in Bermuda, so this pressure should not, in any event, be construed as being asserted as against Avicola for the purposes of the present actions. In any event, serving foreign process in an improper way abroad does not, on the facts of this case,

[7] Escobar Affidavit, paragraph 30.
[8] Skeleton Argument, paragraph 46 and Schedule.

constitute grounds for striking-out an arguable claim of fraud on abuse of process grounds.

43. In any event, in my view the excessive zeal with which the Plaintiff has apparently pursued its wider claim outside of Bermuda is at least equally consistent, in all the circumstances of the present case, with a sense of genuine grievance than it is with the pursuit for improper motives of a claim which is known to be unmeritorious. If any application appears to have been made for a collateral purpose, it is this aspect of the 2nd Defendant's own attempt to strike-out the Plaintiff's claim in its entirety based on stale grounds, having consented to the present case proceeding to trial. Avicola's protestations notwithstanding, there is no credible justification for such an application being made at the present time. Because the pleading complaints based on the Plaintiff's recent admission that the operating companies were not subsidiaries potentially undermined Lisa's entire claim, in my judgment no question of holding that the total strike-out application as a whole was liable to be summarily dismissed as an abuse of process arose.

44. It seemed obvious, in the course of the hearing, that the only substantive complaints the 2nd Defendant had raised were (a) the inadequately pleaded Reply, which the Plaintiff cured by giving voluntary Further and Better Particulars (b) the scope of discovery to be provided in relation to the "background frauds", and (c) the need for the Plaintiff to particularise its case on the fictitious insurance policies, which the Plaintiff undertook to seek to do.

THE SCOPE OF DISCOVERY RELATING TO THE "BACKGROUND FRAUDS"

45. The disclosure sought was, in my judgment, clearly relevant, and the suggestion that the Plaintiff had led the Defendants to believe that no discovery would be sought in relation to the "background" frauds is not supported by the evidence relied upon by the 2nd Defendant.

46. The only seriously contentious issue relating to the discovery which was potentially oppressive was whether the Court should rule at this stage that the discovery requested in relation the operating companies of the Avicola Group should not be sought at all, as the 2nd Defendant contended, or whether the Court should reserve this question as the Plaintiff contended, to be revisited later. I indicated that it was difficult to envisage circumstances in which all of the voluminous documents relating to the operations of the operating companies, whose off-the books profits are alleged to have been laundered through policies issued by Leamington, would ever be ordered.

47. I left open the option of revisiting this issue because I was satisfied that the documents sought were *prima facie* discoverable and I was unable to be sure that justice required a blanket ban on any discovery at all in that regard. Mr. Kessaram fell between two stools in contending that it was unnecessary for the "background frauds" to be proved at all yet declining to make any form of admission, which would make any such evidential enquiry redundant. His client's anxieties about the use to which the Plaintiff might put any admission, in other proceedings, did appear to have some basis, however. The authorities cited by Mr. Kessaram in the course of argument on the principles applicable to discovery appeared to be uncontroversial. Applying those cases to the facts of the present case, I was satisfied that the discovery requested in relation to the "background" frauds was:

    (a) relevant, applying the test of Brett LJ in the *Peruvian Guano* case (1882) 11 QBD 55 at 63 and *Martin and the Miles Martin Pen Coy. Ld.-v- Scrib* (1950) 67 RPC 127 at 131; but also

    (b) as formulated in paragraph 5 of Conyers Dill & Pearman's March 9, 2007 letter, <u>not</u> "*so material as to render discovery reasonable*" : *Kennedy-v-Dodson* [1895] 1 Ch 334 at 340, per Lindley LJ.

48. The Plaintiff must be entitled to advance the case, which it has essentially asserted from the outset, that the operating companies laundered "off the books" profits through Leamington, which distributed the profits through the Avicola Group in a way which deprived Lisa of its legitimate share of Group profits. It should be able to advance this case without carrying out an extensive forensic analysis of what the true profits of the operating companies were. The Plaintiff must, to succeed, demonstrate that a particular volume of premiums paid to Leamington were not genuine insurance premiums, and this should not necessarily require any comprehensive analysis of what Mr. Hargun described as the "feeder frauds" themselves. These were not necessarily all three frauds involving the operating companies, but principally the Pollos Vivos and the Los Cedros frauds.

49. I was unable to determine at this stage that it was just to preclude the possibility altogether of the 2nd Defendant being required to give even very limited discovery in relation to the operating companies. The parties are obliged to assist the Court to achieve the Overriding Objective under Order 1A of the Rules of the Supreme Court, and the Court's duties of case management include determining which issues require full investigation. The background frauds do not require full investigation, so the extensive discovery sought was clearly oppressive. The decision to leave open the possibility of the Plaintiff renewing its discovery application in this regard was in no sense intended to leave open the possibility of re-arguing the Plaintiff's application for wide-ranging discovery which it was bound to concede could not be justified in relation to subsidiary matters.

THE 2ND DEFENDANT'S REQUEST FOR FURTHER AND BETTER PARTICULARS OF THE ALLEGEDLY FICTITIOUS POLICIES

50. The complaint that the 2nd Defendant could not adequately prepare for trial without further particulars of which policies were alleged to be fictitious and why was well-founded. It was equally clear that the Plaintiff could not determine what particulars it was able to give- in other words, precisely how it was putting its case-until it had completed reviewing all the documents it was entitled to inspect as part of the discovery process. It was common ground that this process had not yet been completed. Mr. Hargun undertook to seek to determine, within 28 days, whether he could consent to giving voluntary particulars. The Defendant's application was accordingly adjourned, with liberty to restore. I indicated that it was clear that further particulars ought to be given by the Plaintiff. Accordingly, in the absence of agreement, the only issue that remains to be determined is the adequacy of whatever particulars (if any) the Plaintiff offers to supply.

COSTS

51. But for the Plaintiff's offer to give voluntary further and better particulars of its claim for damages in light of its recent concession that the operating companies were not subsidiaries of Avicola, Lisa's entire claim was liable to be struck out on the grounds that it was embarrassing because it was inadequately pleaded. It was unclear how it was alleged that it had suffered any loss at all. The 2nd Defendant also substantially established that the Plaintiff was required to furnish further and better particulars of its case on the fictitious policies, and that the discovery request as regards the "background" frauds was oppressive. On the other hand, the Plaintiff succeeded in dismissing the total and partial strike-out applications.

52. Looking at the result in the round, it seemed to me to be the appropriate course to order that the costs of all applications argued before me should be in the cause.

Dated this 3rd day of July, 2007

KAWALEY, J.