1994 **IN THE SUPREME COURT OF NOVA SCOTIA** S.H. No. 109629

[Cite as: Mitsui & Co. (Point Aconi) Ltd. and Jones Power Co. Ltd. , 2001 NSSC 178]

**BETWEEN:**

MITSUI & CO. (POINT ACONI) LTD.,
a body corporate

**PLAINTIFF**

**- and -**

JONES POWER CO. LIMITED, a body corporate, and
J.A. JONES CONSTRUCTION COMPANY, a body corporate

**DEFENDANTS**

1994 **IN THE SUPREME COURT OF NOVA SCOTIA** S.H. No. 109664

**BETWEEN:** JONES POWER CO. LIMITED

**PLAINTIFF**

**- and -**

MITSUI & CO. (POINT ACONI) LIMITED

**DEFENDANT**

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# DECISION

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**HEARD BEFORE:** The Honourable Justice Robert W. Wright in Chambers at Halifax, Nova Scotia on November 27, 2001

**ORAL DECISION:** November 30, 2001

**WRITTEN RELEASE OF DECISION:** December 5, 2001

**COUNSEL:** For Mitsui - David Miller, Q.C., Robert Grant, Q.C., and Arthur Barry

For Jones Power - George MacDonald, Q.C., John Rook, Q.C., and

Mark Gelowitz

Wright J. (Orally)

**INTRODUCTION**

[1] This is an application by Jones Power Co. Limited (now J.A. Jones of Georgia, Inc.) and J.A. Jones Construction Company for an Order permitting it to amend its pleadings in the two cross actions with which it is involved with Mitsui & Co. (Point Aconi) Ltd. over the construction of a power generating plant for Nova Scotia Power. For simplicity, I will hereafter refer to the parties as Jones and Mitsui respectively.

[2] This litigation began in the fall of 1994 and it has since endured a long and difficult history. An overview of that history can be found in the decision of the Nova Scotia Court of Appeal reported at (2000) 189 N.S.R. (2d) 1 and need not be repeated here. An overview of the subsequent history of the litigation can be read in the decision of the Court of Appeal from the recusal application released on July 11, 2001 and reported at (2001) NSCA 112.

[3] The former decision enunciated a ruling by the Court of Appeal on a preliminary issue that the MOU (Memorandum of Understanding) signed by the parties on July 28, 1992 was valid and legally binding on the parties. The stated purpose of the MOU was to eliminate current misunderstandings then existing relative to Jones' compensation under the construction contract in issue. Jones repudiated the MOU the day after it was signed and continued to maintain the position that it was not a valid and legally binding document until the Nova Scotia Court of Appeal ruled otherwise (leave to appeal to the Supreme Court of Canada was refused as well).

[4] Having lost that battle, Jones now brings this application under **Civil Procedure Rule** 15.01(c) which permits a party to amend any document in a proceeding at any time with leave of the court. I should add that Jones' Statement of Claim in the one action and its defence in the other are mirror images of each other and I will therefore simply refer to them collectively as Jones' pleadings.

[5] The main objective of the proposed amendments, which are staunchly opposed by Mitsui, is to set out Jones' claims in light of these recent judicial rulings that the MOU is valid and legally binding, and to add an assertion of estoppel arising from Mitsui's conduct. Jones submits that now that the validity of the MOU is an established fact, it is reasonable and appropriate that the pleadings be modified to reflect the factual realities of the case, for the benefit of the parties during the remaining discovery process and for the benefit of the court at trial.

**LEGAL TEST TO BE APPLIED**

[6] The test to be applied by the court in the exercise of its discretion in such an application is well established and was recently affirmed by the Nova Scotia Court of Appeal in *Global Petroleum Corp. v. Point Tupper Terminals Co.* (1998) 170 N.S.R. (2d) 367 in the following passage at page 370:

> The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs.

[7] Mitsui submits that the application of this test also requires consideration of whether the proposed amendment would result in an injustice to the other side. Its counsel refers to the following passage from the Court of Appeal decision in *Scott Maritimes Pulp Ltd. v. Goodrich (B.F.) Canada Ltd. et al.* (1977) 19 N.S.R. (2d) 181 (at p. 201):

> The overriding consideration in the exercise of discretion in granting or refusing an amendment is whether it can be made in the words of Lord Esher 'without injustice to the other side'. Will the parties here if the amendment be allowed be put in the same position for the purposes of justice that they were in when the plea of negligence now sought was not alleged?

[8] I take the effect of the two foregoing passages to mean that injustice to the other side is not to be enumerated as a third branch of the test but rather treated as an overriding consideration inherent in the court's analysis of whether the applicant is acting in bad faith in some manner or whether the other party will suffer prejudice which cannot be compensated in costs. That is to say, injustice lies whenever a party will suffer prejudice from an amendment which cannot be compensated in costs.

[9] The appellate decisions in this province make it clear that the burden in the application of this test lies on the party opposing the amendment. I am cognizant of the decision of Davison, J. in *Gillis Construction v. Nova Scotia Power Corp.* (1988) 86 N.S.R. (2d) 167 which stands for the proposition that when it is clear that the amendment is one of fact and involves issues of credibility and there has been substantial delay, a presumption of prejudice arises which must be rebutted by the party seeking the amendment. Justice Davison further noted that the extent of the delay that would be required before such a presumption would arise would depend on the facts on any given case. He considered that a delay of 12 years in the circumstances before him, which did entail issues of fact and credibility, would result in an injustice if the proposed amendment were granted and he refused it.

[10] In the circumstances of the case at bar, which I am about to review in greater detail, I am not lead to the conclusion that the burden which ordinarily applies should be displaced. That is to say, the burden remains on Mitsui in this application to prove bad faith or prejudice that cannot be compensated in costs.

[11] In any event, Mitsui submits that in the application of the relevant test, it is important that the court take a hard look at the context in which the application is made, having regard to the extensive pre-trial proceedings which have taken place thus far and the approach taken to the litigation by the parties respectively. Mitsui points out that the distinguishing feature of this case, which appears to have no parallel in any other reported cases, is the deliberateness of Jones in repudiating the MOU and completely ignoring its validity throughout the entire course of the proceedings up until the Court of Appeal made its rulings above recited. On the contrary, Mitsui's position throughout has been premised on the validity of the MOU as legally binding upon both parties. It has pleaded this position from the inception of this litigation and maintained it throughout all the pre-trial procedures which have taken place to date, including the preparation of its expert reports. Counsel for Mitsui urge that is important to keep these entrenched cross positions in mind when reviewing the pre-trial steps that have evolved up to this point, a review which I will now undertake.

## CONTEXT OF THE APPLICATION

[12] Soon after this litigation was commenced in 1994, Justice Gruchy was appointed case management judge. He was succeeded in that capacity in 1997 by Justice Peter Richard who was also appointed to be the trial judge. With most, if not all, discovery of lay witnesses having taken place at various times during 1997 (approximately 160 days in all), directions were given at a case management meeting held in the fall of 1997 that expert reports were to be filed by both parties by May 15, 1998. Mitsui accordingly filed a report prepared by Deloitte Touche which was premised on the validity of the MOU. Jones, up to this point, had advanced its claims based on the original December 1993 Claim for Compensation (the so-called "Revay Report"). In compliance with the case management directive, it then filed in the Spring of 1998 what it considered to be its first true expert report known as the Revay Stanley Report. This new report advanced a new analysis of Jones' claim which differed from the original Revay report upon which the Statement of Claim was based. Counsel for Jones points out that his client had always made it known that such a new report would eventually be forthcoming that might be significantly different from that upon which the Statement of Claim was based. Neither report, however, addressed the possibility of the validity of the MOU.

[13] After examining this report, Mitsui applied to have it declared inadmissible on the grounds that it did not comply with the Civil Procedure Rules. At a hearing which took place on June 30, 1998, counsel for Mitsui successfully argued that the

Revay Stanley Report was not responsive to or descriptive of the claim as set out in the Statement of Claim. Justice Richard found that in large part, the Revay Stanley Report when juxtaposed against the Statement of Claim was unintelligible. In the result, he ordered that the report in the form in which it was written was not admissible and that the report had to be modified or else replaced by a new one.

[14] Following that hearing, Justice Richard wrote in his October 7, 1998 severance decision that he had become increasingly concerned that the sheer magnitude and complexity of the case was rendering it almost untriable. Because of the difficulties with the Revay Stanley Report, it was acknowledged that it would be impossible to meet the intended November trial dates which had been scheduled. That lead to a reconsideration of whether or not it would be appropriate to sever, for prior determination, the issue of the validity of the MOU and whether it was legally binding on the parties.

[15] An application for severance was ultimately made by Mitsui and contested by Jones. Jones continued to maintain its entrenched position that the MOU was not valid and legally binding and in the course of the severance application, gave no indication of ever changing its position, whether in the alternative or otherwise. Justice Richard granted the severance motion which was unsuccessfully appealed by Jones.

[16] In the meantime, in late October of 1998 Jones sought leave of the court to have further expert reports filed if necessary which would analyze the project and costs with the dates of the MOU as the focal point. Mitsui rightly inferred that Jones was contemplating the amendment of its pleadings so as to plead facts in support of its claim on an MOU valid basis. Mitsui further anticipated that Jones' intention in moving for such an amendment would be to enable it to submit a new or revised expert report on a MOU valid basis. It therefore opposed Jones' motion, which was not for leave to amend but for leave to enter expert evidence on an MOU valid basis.

[17] Justice Richard, in his November 2, 1998 decision, refused the motion where he could not envisage any substantial distinction between the validity of the MOU being ruled upon at the conclusion of a single trial or at a separate hearing. Jones had been prepared to go to trial, presenting its lay and expert witnesses and advancing its entire case, without any ruling in advance on the MOU's validity and without any evidence to support its claims on an MOU valid basis. It stood to have the same evidentiary problems regardless of the severance. This was also commented on by the Nova Scotia Court of Appeal in its dismissal of the severance appeal by a decision dated January 8, 1999.

[18] Another development which took place in the fall of 1998 was the negotiation of a

settlement between Jones and Sargent & Lundy, the design engineers who were then an adverse party to it in this litigation. The only detail of that settlement known to the court is that it placed restrictions on Mitsui's access to Sargent & Lundy witnesses and their experts (particulars of which are on the record).

[19] The next event of note was an application made by Jones to replace Mr. Revay as its expert after Justice Richard had commented on Mr. Revay's penchant for advocacy which might indicate a lack of independence. Justice Richard on October 7, 1999 granted the motion but required Jones to base its new expert report on the Statement of Claim that was then before the court. A new report prepared by Dawson Edwards was filed accordingly on June 1, 2000.

[20] To come full circle, the parties since late 1998 have been embroiled in litigating the severed issue of the validity of the MOU and the recusal of Justice Richard, both at the trial and appellate levels. They have also tried mediation without success. Counsel for Jones points out that because of this, the parties are in no different position today from what they would have been in had the amendments been applied for and granted three years ago.

[21] With the recusal of Justice Richard in the decision of the Court of Appeal dated July 11, 2001, I was appointed his successor as case management judge and this application now comes before me in Chambers in that capacity.

## SUMMARY OF THE POSITIONS OF THE PARTIES

[22] As stated earlier in this decision, the burden is on Mitsui to demonstrate that Jones is acting in bad faith in seeking leave to amend at this juncture of the proceedings or that, should the amendment be allowed, it will suffer prejudice which cannot be compensated in costs.

[23] Counsel for Mitsui rely predominantly on the exceptionally unique facts surrounding this application to displace the ordinarily low threshold that the courts normally apply on an amendment application. They submit that Jones' attempt to change its pleadings at this stage of the litigation to argue issues which they tactically avoided, after extensive pre-trial procedures have been conducted including the severance application which was premised on the pleadings then before the court, is an improper purpose and results in an obstruction to the process which constitutes bad faith. They say that if the amendments sought were permitted, it would undermine the severance proceedings taken as well as previous judicial rulings, notably Justice Richard's refusal on November 2, 1998 of Jones' request for leave to file a new expert report based on the premise that the MOU is valid. Such a result, it is urged, should not be countenanced by the court because it would create procedural unfairness to Mitsui and be tantamount to an abuse of process.

[24] Counsel for Mitsui also assert that costs cannot compensate their client for the prejudice the amendments would cause. They summarize in their brief the key aspects of the prejudice that would result in the following bullet form:

- the undermining of the Severance and derailment of the trial process set for orderly completion of these proceedings.
- the undermining of the Order preventing MOU-valid expert evidence and of the Order granting leave for a replacement report which required Jones' expert to address the Statement of Claim which was before the Court.
- the need for rediscovery of witnesses
- the need to re-instruct experts
- the inevitable substantial further delay to a case which has been before the Court for over seven years and is not close to completion.
- the fading of witness' memories, particularly in light of the enormous amount of documentation, and the complexity of issues such as design, and schedule issues in the context of a design build power plant project.
- the restrictions on Mitsui access to S&L witnesses, and the fact that S&L before was a party and was conducting a vigorous defence to technical claims brought jointly and severally against Mitsui and in which Mitsui had a common defence interest.
- the denial of the benefit of the judicial rulings herein which Mitsui sought and received.

- the prospect that Mitsui will have to recall witnesses whose participation in these proceedings was complete.

[25] In his written submissions to the court, counsel for Jones articulates the essential points advanced by Jones in this application as follows:
(a) The proposed amendments achieve a number of objectives, providing greater detail and clarity of Jones's position for both Mitsui and the court. Important among these objectives is Jones's pleadings of its position on the effect of the MOU, now that the MOU has been conclusively found by the courts to be a valid and binding agreement. The MOU is not a new element in the litigation, since it has been pleaded by Mitsui from the outset.

(b) In the proposed amendments, Jones is not advancing "new claims". The factual underpinnings of the case are not changed by the amendments. Jones's claims for compensation are the same claims it has advanced since the beginning of the litigation, with respect to which Mitsui has already had extensive discovery.

(c) Jones is entitled to make these amendments unless Mitsui can establish with clear and convincing evidence that it would suffer prejudice that cannot be compensated in costs. Mitsui has failed to do so.

[26] In fleshing out those points in oral submissions, counsel for Jones emphasizes that the proposed amendments are not intended to add new types of claims but rather to plead the existence of the MOU, what Jones says that the MOU means, and the resulting effect on the quantum of its claims. That, it is argued, does not change the fundamental nature of Jones' claims which are, and continue to be, its claims for compensation for the extra work and impact costs attributable to the alleged late or incomplete design drawings for the project from the beginning to the end of the job.

[27] Counsel for Jones also points to the prejudice that would befall his client if the proposed amendments are not permitted, namely, that it would be inhibited from calling evidence at trial in support of its claims on a MOU valid footing. Jones asserts that it should now be permitted to plead its case based on the existing fact situation as determined by the Nova Scotia Court of Appeal and that it would create an absurdity for Jones to have to proceed to trial on a legal position that the Court of Appeal has now determined to have been incorrect. It is urged that this application should be granted to enable the parties to move forward to try the true remaining issues between them in this litigation.

## LEGAL ANALYSIS AND CONCLUSIONS

[28] Counsel for Jones readily acknowledge that prior to 1998, before there was a severance order or a judicial determination of the validity of the MOU, Jones had no intention of pleading that the MOU was valid, even in the alternative. That was a strategic decision which it was Jones' prerogative (and risk) to take for reasons best known to themselves. Jones' substantive position on the validity of the MOU has now been found by the Nova Scotia Courts to have been in error, an outcome sought and achieved by Mitsui. With that change in the landscape of the case, Jones now seeks the necessary amendments to reflect the factual reality that the MOU is valid and legally binding upon it.

[29] Jones' present attempt to amend its pleadings in the face of that reality does not connote bad faith in the ordinary sense of that term. The amendments sought to be made cannot be said to be motivated by an improper purpose such as delay or obstruction of the proceeding or to subvert the ends of justice. Notwithstanding the able and thorough submissions of counsel for Mitsui, neither am I satisfied that the amendments sought in principle would constitute an abuse of process. They will enable the parties to move forward on an even footing to the MOU interpretation phase of the trial proceedings with both parties being able to call evidence as to what the MOU means and how their respective claims on a MOU valid basis should be quantified. I recognize that this development was not contemplated in earlier judicial rulings in these proceedings but that does not in my view, in and of itself, preclude this application from being made on the factual realities that now exist.

[30] The more troublesome issue is whether permitting the amendments sought at this stage of the proceedings, as complex as they are, would cause irreparable prejudice to Mitsui by putting it in an impaired position where it cannot defend the amended claims in the same manner it could have had they been presented in a timely manner. The key aspects of the prejudice asserted by Mitsui quoted earlier in this decision include the need for rediscovery of witnesses and re-instruction of experts, substantial further delay, fading of witnesses' memories and the restrictions since placed on access to Sargent & Lundy witnesses.

[31] Will the proposed amendments, if permitted, be prejudicial to Mitsui? Undoubtedly they will, although it is to be remembered that Mitsui has pleaded and conducted its case on a MOU valid basis right from the beginning and all pertinent witnesses on discovery thus far have been examined on the MOU document. Counsel for both parties also acknowledge that the amendments sought are not precipitated by the introduction of any new facts (apart, of course, from the judicial finding that the MOU is valid and legally binding).

[32] The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.

[33] The potential for prejudice with respect to future access to Sargent & Lundy witnesses is difficult for the court to gauge. However, it is to be noted that future access to these witnesses is not barred but rather restricted under the terms of the settlement agreement earlier referred to. Moreover, there is no evidence before me in this application which would suggest that Mitsui does not already have the material information it requires through its prior close cooperation with Sargent & Lundy in this litigation.

[34] All things considered, I am not satisfied that Mitsui has discharged the burden upon it to demonstrate that by these amendments, it will suffer prejudice that cannot be compensated in costs. Accordingly, and not without some misgivings, my decision is to allow the amendments sought by Jones, at least in principle.

[35] I say in principle because I am not prepared to permit the amendments to be made in the sweeping form in which they have been submitted for approval. Rather than following the usual practice of inserting and/or deleting specific provisions, and underlining them for ease of identification, the proposed

amended pleadings have been largely redrafted. Beside newly pleading the existence of the MOU and what Jones says it means, different wording and phraseology appears in several places as compared with the previous Statement of Claim amended pursuant to an order dated January 27, 1995.

[36] However well intentioned counsel for Jones may be in wanting to plead his client's position with greater clarity and precision, the approach adopted leaves Mitsui in a position of having to speculate as to the significance of these changes in wording and phraseology after the previous pleadings have been scrutinized throughout discovery and other pre-trial procedures. Examples cited by counsel for Mitsui are the proposed pleading of "further breaches of contract and tortious conduct" and "other S&L Services", which are unparticularized. I agree that allegations of such a general nature and other changes in wording extraneous to Jones' main objective in seeking the amendments should not now be permitted. Rather, Jones is to be confined to the usual practice of inserting (and deleting as necessary) specific provisions in its existing pleadings that set out its claims (including post MOU claims) in light of the judicial rulings made that the MOU is valid and legally binding. Such amendments are to be underlined for ease of identification in the usual way. That should help to ensure that further discovery of witnesses and any other pre-trial procedures in the offing will remain focused and contained as much as possible.

[37] There remains to be addressed the proposed amendment to add, in the alternative, a plea of estoppel in respect of Mitsui's alleged conduct and representations to Jones after July 28, 1992 that were inconsistent with the terms of the MOU. I am not prepared to permit such a generalized amendment without first having the benefit of the particulars of such alleged conduct and/or representations being made known as well, especially in light of the findings of the Court of Appeal in its August 23, 2000 decision (at pp. 22-23). If Jones still wishes to pursue this aspect of the proposed amendments, I will hear further submissions from the parties as may be necessary.

[38] In his oral submissions, counsel for Jones also indicated that the only new claim or cause of action contained in the proposed amendments was the plea of a duty of care owed by Mitsui, so that Jones' claims could be advanced concurrently in contract and in tort. I observe that such a plea is already contained in paragraph 10 of the Jones Statement of Claim amended on January 27, 1995 and therefore do not understand it to be in controversy on this application.

[39] At the close of delivering this oral decision, I will arrange with counsel a time frame to be given to Jones to prepare its amended pleadings in conformity with the principles which I have outlined. I will also schedule our next case management conference to address, among other things, any difficulties or disagreements which may arise in carrying out the directions given in this decision.

J.