

Flannery; J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 6 1984

JAMES F. DAVEY, Clerk

-----X
FLETCHER McDANIEL, et ux,
Plaintiffs,

v.
ARMSTRONG WORLD INDUSTRIES,
INC., et al.,
Defendants.
-----X

Civil Action No. 83-3520
Judge Flannery

MOTION OF DEFENDANT TURNER & NEWALL PLC
TO DISMISS FOR LACK OF PERSONAL JURISDICTION

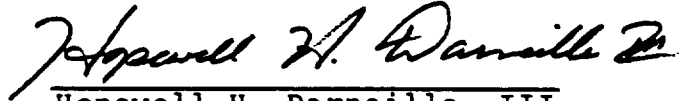
Defendant Turner & Newall PLC of Ashburton Road West, Trafford Park, Manchester M17 1RA, England, formerly Turner & Newall Ltd., on its own behalf and on behalf of Defendant J. W. Roberts Limited 1/ (collectively "T&N"), respectfully moves this honorable Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss Plaintiffs' Complaint as to T&N for lack of personal jurisdiction over T&N, insufficiency of process and insufficiency of service of process. In support of this Motion, Defendant T&N submits a copy of an Affidavit from

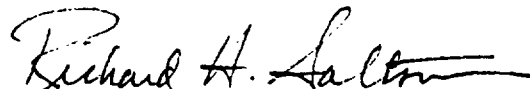
1/ In 1970 J. W. Roberts Limited was merged into TAC Construction Materials Ltd., a wholly owned subsidiary of Turner & Newall PLC, which has its head office at Trafford Park, Manchester, England.



John Mason Atkinson, which is attached as Exhibit A to the accompanying Memorandum of Points and Authorities.

Respectfully submitted,


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January 6, 1984

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion, proposed Order and accompanying Memorandum of Defendant Turner & Newall PLC to Dismiss for Lack of Personal Jurisdiction was served by delivering true and correct copies thereof by hand to James F. Green, Esquire, Peter T. Enslein, Esquire, Ashcraft & Gerel, 2000 L Street, N.W., Washington, D.C. 20036, attorneys for Plaintiffs, and by first-class mail, postage prepaid, to:

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MEMORANDUM IN SUPPORT OF MOTION OF
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DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendant Turner & Newall PLC, formerly Turner & Newall Ltd., on its own behalf and on behalf of Defendant J. W. Roberts Limited 1/ (collectively "T&N"), submits this Memorandum in support of its Motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' Complaint on the grounds of lack of personal jurisdiction, insufficiency of process and insufficiency of service of process.

This memorandum sets forth statutory and constitutional reasons why in personam jurisdiction over T&N is lacking. Point I

1/ In 1970 J. W. Roberts Limited was merged into TAC Construction Materials Ltd., a wholly owned subsidiary of Turner & Newall PLC, which has its head office at Trafford Park, Manchester, England.

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demonstrates that the District of Columbia "long-arm statute" provides no basis for the exercise of jurisdiction by this Court over these Defendants. Plaintiffs allege no facts that would support the application of the statute, and the affidavit of John Mason Atkinson (attached hereto as Exhibit A; hereinafter the "Atkinson Affidavit") negates the possibility that any jurisdictional basis exists. 2/ Point II shows that under the due process test of International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny, jurisdiction cannot be exercised consistent with the United States Constitution. Dismissal of the Complaint as to T&N therefore is required.

Factual Background

The Complaint contains conclusory allegations that Plaintiff was employed in the District of Columbia, that he was exposed to and injured by unnamed asbestos-containing products in the course of his employment, that these products were manufactured by unspecified "defendants," and that certain supposedly tortious acts or omissions of the defendants generally were the direct and proximate cause of Plaintiff's alleged injury. There is no mention in the Complaint of any act or omission by T&N or the use by the Plaintiff of any T&N product.

2/ The original of the Atkinson Affidavit, sworn to December 14, 1983 was filed with this Court on December 29, 1983, in support of a similar Motion to Dismiss filed by T&N in Quigley v. Armstrong World Industries, Inc., D.D.C. Civil Action No. 83-2989, which is pending before Judge Parker. The allegations in Quigley, supra, with respect to T&N are virtually identical to those in the instant case. A copy of the Complaint in Quigley is attached as Exhibit B hereto.

The reason for Plaintiffs' failure to plead specifically a factual basis to justify the exercise of jurisdiction over T&N is clear. There is no such basis. As plainly stated in the Atkinson Affidavit (¶¶ 13, 14), T&N knows of no sale of any of its products at any time to any company located in the District of Columbia. Accordingly, jurisdiction cannot be predicated on the basis of any acts of T&N in the District of Columbia supposedly giving rise to a cause of action. 3/

It is equally clear that there is no other constitutionally sufficient nexus between the jurisdiction and T&N. T&N is a foreign corporation, organized and existing under the laws of England. (Atkinson Affidavit ¶ 3.) It is not qualified to do business in the District of Columbia. (Id. ¶ 8.) T&N owns no real estate in the District of Columbia, nor does it lease any property in the District of Columbia, nor does it have any license or franchise within the District of Columbia. (Id. ¶ 9.) T&N has not advertised in the District of Columbia. (Id. ¶ 11.) There have been no contracts entered into by T&N in the District of Columbia, and no contract entered into by T&N is required to be performed, in whole or in part, in the District of Columbia. (Id. ¶ 10.) All of the books and records of T&N are maintained in England, and none are located in the District of Columbia. (Id. ¶ 6.) No sales

3/ The lack of any causal connection between any alleged act or omission of T&N and the Plaintiffs' alleged injuries is also, as a matter of law, a sufficient basis to dismiss the Complaint as to T&N on the merits. Restatement (Second) of Torts § 402A Comment c (1965); W. Prosser, Law of Torts, 671 (4th ed. 1971).

whatsoever have been made by T&N to any company located in the District of Columbia. (Id. ¶ 13.) T&N does not do business, nor does it solicit any business, in the District of Columbia. (Id. ¶ 14.) T&N engages in no conduct, persistent or occasional, in the District of Columbia. (Id. ¶ 14.) T&N derives no revenue from goods, services or any other activity in the District of Columbia. (Id. ¶ 14.)

The sole contact between T&N and the District of Columbia is that T&N has been named as a defendant in this and several similar Complaints. That is plainly insufficient to meet Plaintiffs' burden of establishing a valid basis for the exercise of jurisdiction by this Court.

ARGUMENT

This Court previously has granted a virtually identical Motion to Dismiss by T&N in Catrett v. Johns-Manville Sales Corp., D.D.C. Civ. Action No. 81-2732 (July 21, 1982) (Richey, J.), appeal pending, D.C. Cir. No. 83-1694. Plaintiffs have advanced no reason to depart from this ruling, a copy of which is attached hereto as Exhibit C.

Yet, even if the Court chooses to address the question ab initio, the same result must be reached. Two requirements confront a plaintiff attempting to prove that a foreign defendant is subject to the jurisdiction of a particular federal court: (i) pursuant to Rule 4(d)(7) of the Federal Rules of Civil Procedure, there must be a state, statute or rule covering the particular facts of the case, and (ii) the application of that statute or rule to the facts must

pass constitutional muster. Gatewood v. Fiat, S.p.A., 199 U.S. App. D.C. 238, 617 F.2d 820 (1980). As the Court of Appeals for this Circuit has stated:

"When considering the applicability of any long-arm statute to a particular fact situation courts invariably engage in a two prong analysis. It is necessary initially to determine whether the statute by its language would permit service of process on a non-resident defendant, and secondly whether service under the statute would nonetheless contravene the due process clause of the federal constitution."

Margoles v. Johns, 157 U.S. App. D.C. 209, 217, 483 F.2d 1212, 1220 (1973). Accord, Smith v. Lloyd's of London, 568 F.2d 1115, 1117 (5th Cir. 1978). In the instant case, neither requirement has been satisfied.

I. THE DISTRICT OF COLUMBIA LONG-ARM STATUTE PROVIDES NO BASIS FOR PLAINTIFFS' ASSERTION OF PERSONAL JURISDICTION OVER T&N.

The sole basis upon which Plaintiffs may attempt to assert jurisdiction over T&N is the District of Columbia "long-arm statute." That statute provides in pertinent part:

"(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's --

- (1) transacting any business in the District of Columbia;
- (2) contracting to supply services in the District of Columbia;
- (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him." D.C. Code § 13-423 (1973) (emphasis added).

The language underscored above is dispositive. For there to be jurisdiction under the District of Columbia long-arm statute, the cause of action alleged must arise out of the purported basis for jurisdiction. Because T&N made no sales to companies in the District of Columbia and because T&N has not engaged in any business activity in the District of Columbia (see generally the Atkinson Affidavit), it is impossible for the present cause of action to have arisen out of any contract, tort or business activity of T&N in the District of Columbia. Quite simply, there was no such activity, and Plaintiffs' general allegations that suggest otherwise are unsupported and unsupportable.

The very silence of the Complaint on this issue confirms such conclusion. The Complaint contains no specific allegation to support jurisdiction over T&N. No mention is made of T&N activity in the District of Columbia, let alone that purposeful conduct required by District of Columbia law. Plaintiffs do not allege that claimant used any particular product of T&N at any time in any place. Instead, in an attempt to substitute

verbiage for fact, Plaintiffs merely recite general allegations concerning use in the District of Columbia of products of "the defendants."

These conclusory statements are plainly insufficient to carry Plaintiffs' burden of proof on the jurisdictional issue. The burden of proving jurisdictional facts rests upon Plaintiffs, see Security Bank, N.A. v. Tauber, 347 F. Supp. 511 (D.D.C. 1972), and when allegations of jurisdiction are challenged, as they are here, the proponent of jurisdiction "must support them by competent proof." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Such proof is conspicuously absent here.

Even were Plaintiffs able to identify a T&N product to which Plaintiff was exposed, jurisdiction over T&N in the District of Columbia could not be sustained. The long-arm statute requires, in addition to tortious injury in the District of Columbia, certain other contacts between the foreign defendant and the District of Columbia. D.C. Code § 13-423(a)(4). The statement of the Court in Aiken v. Lustine Chevrolet, Inc., 392 F. Supp. 883, 886 (D.D.C. 1975), applies here as well:

"The record is absolutely devoid of any showing that [defendant] . . . had any contacts whatsoever with the District of Columbia. In these circumstances, there is no basis for this Court to assert personal jurisdiction over [the] defendant"

Like the Aiken case, none of the required contacts is present here. The Atkinson Affidavit establishes that T&N does not do business in, nor does it solicit any business in, the Dis-

trict of Columbia. (¶ 14.) T&N engages in no conduct whatsoever, either persistent or occasional, in the District of Columbia. (Id.) No revenue is derived by T&N from the sale of goods, supply of services or any other activity in the District of Columbia. In the absence of such contacts, Plaintiffs' attempt to hale T&N before this Court must fail. 4/

II. IN ANY EVENT, THERE ARE NOT SUFFICIENT "MINIMUM CONTACTS" AMONG T&N, THE LITIGATION AND THE FORUM TO SUPPORT THE CONSTITUTIONAL ASSERTION OF JURISDICTION.

The United States Supreme Court has recently considered for the first time in a products liability case the due process "minimum contacts" test governing a state court's exercise of personal jurisdiction. 5/ In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the Court rejected an Oklahoma court's assertion of jurisdiction over the New York dealer and the New York regional distributor of an automobile which had been taken into Oklahoma by the plaintiff and there involved in an

4/ Because the long-arm statute does not authorize the exercise of jurisdiction over T&N in this case, service of process by mail (utilized by Plaintiffs here) is not authorized by D.C. Code § 13-424 and § 13-431 (1973). Cornwell v. C.I.T. Corp. of New York, 373 F. Supp. 661, 663 (D.D.C. 1974). Accordingly, service must be quashed.

5/ If this Court should decide that the District of Columbia statutory provisions are not intended to be applied to the particular facts of this case, then it need not reach the constitutional issue. However, if this Court finds it necessary to consider the constitutional question, the facts before this Court make it clear that T&N does not have constitutionally adequate "minimum contacts" with the District of Columbia to justify the assertion of jurisdiction over T&N.

accident. In reaching its result, the Supreme Court stated that the Due Process Clause serves two related but independent purposes:

"It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Id., 444 U.S. at 292.

While emphasizing that the burden on the defendant was a primary concern, the Court made it clear that even if the defendant suffered no inconvenience the state forum lacked power to render a valid judgment in the absence of "minimum contacts." 6/

In Rush v. Savchuk, 444 U.S. 320 (1980), the companion case to World-Wide Volkswagen Corp., the Supreme Court upset the state court's assertion of quasi in rem jurisdiction on the ground that sufficient "minimum contacts" were not present. In doing so, the Court articulated more precisely the constitutional test by which a court's assertion of jurisdiction must be measured:

6/ There is no doubt that these are two independent considerations:

"Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. 294.

"In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" Rush v. Savchuk, supra, 444 U.S. at 327, quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977). 7/

In the instant case, there is a complete absence of any relationship among T&N, Plaintiffs' lawsuit and this forum. The facts as set forth in the Atkinson Affidavit demonstrate that there are no activities of T&N connected with the District of Columbia. Certainly, T&N's "conduct and connection with the forum State are [not] such that [T&N] should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. at 297. Given the complete lack of

7/ The Supreme Court held in Shaffer v. Heitner that all assertions of state court jurisdiction must be evaluated according to the standards of International Shoe and its progeny. The U.S. Court of Appeals for the Fifth Circuit has interpreted Shaffer v. Heitner to be a significant restriction on the expansive exercise of personal jurisdiction that was permitted in the past:

"More recently, in Shaffer v. Heitner, [433 U.S. 186 (1977)], the Supreme Court suggested that the liberal construction placed on the words 'traditional notions of fair play' in a due process context may be evolving into a more conservative one, requiring, perhaps, even more contacts than those present in McGee v. International Life Ins. Co., 355 U.S. 220 (1957)]." Smith v. Lloyd's of London, 568 F.2d 1115, 1118 n.7 (5th Cir. 1978).

To the extent the Fifth Circuit anticipated the tightening of the constitutional standard governing a state court's assertion of personal jurisdiction, its judgment was plainly borne out by World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk, supra. See World-Wide Volkswagen Corp., supra, 444 U.S. at 299-300 (Brennan, J., dissenting).

any activity by T&N in the District of Columbia and the absence of any connection between the Plaintiffs' alleged injuries and any conduct of T&N, the constitutional requirement for "minimum contacts" is not met.

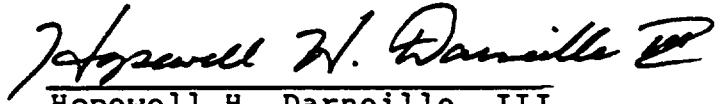
While it would be particularly expensive and burdensome for T&N, a United Kingdom corporation not doing business in the District of Columbia, to establish its lack of liability in this forum, in the final analysis the point at stake is even more fundamental:

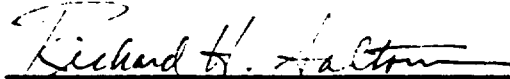
"[R]estrictions [on jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." Hanson v. Denckla, 357 U.S. 235, 251 (1958).

CONCLUSION

For the reasons set forth above, the Motion of Turner & Newall PLC to dismiss the Complaint as to itself, Turner & Newall, Ltd. and J. W. Roberts Limited, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, should be granted.

Respectfully submitted,


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----- x
JOSEPH ARTHUR QUIGLEY, JR. :

and :

ELIZABETH LEE QUIGLEY, :

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v. :

ARMSTRONG WORLD INDUSTRIES, INC. :
et al., :

Defendants. :
----- x

Civil Action No. 83-2989
Judge Parker

AFFIDAVIT OF JOHN MASON ATKINSON

I, John Mason Atkinson of Ashburton Road West, Trafford Park, Manchester, England, make oath and say as follows:

1. I am the Group Solicitor to the defendant Turner & Newall PLC and am authorised to make this affidavit on their behalf. I make this affidavit in support of the motion to dismiss the complaint in this action as against Turner & Newall PLC for lack of personal jurisdiction.

2. I joined Turner & Newall PLC in 1962 and in 1966 became Group Solicitor. Among my duties is the supervision and handling of claims against Turner & Newall PLC, including this suit brought in the District of Columbia for damage allegedly due to exposure to asbestos.

3. Turner & Newall PLC are a company organised and existing under the laws of England and with their head office at Ashburton Road West, Trafford Park, Manchester, England. Turner & Newall PLC own stock in a variety of subsidiary companies operating in the United Kingdom and throughout the world. Those operating in the United Kingdom are with certain exceptions constituted as branches of Turner & Newall PLC and for the purposes of this affidavit are treated as part of Turner & Newall PLC (hereinafter referred to as "T&N").

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4. The companies comprising T&N are:-

- (a) BIP Chemicals Limited with their head office at Oldbury, near Birmingham, England. Their principal products are thermosetting and thermoplastics materials and compounds, synthetic resins and reinforced translucent building sheets.
- (b) Engineering Components Limited with their head office at Slough, England. They own stock in several operating companies, the principal products of which are gaskets for automotive, petrochemical and industrial applications, automotive and industrial filtration products, cork and cork/rubber materials and products and bolt tensioning equipment.
- (c) Extrudex Products Limited with their head office at Newton Aycliffe, County Durham, England. Their principal product is PVC (polyvinylchloride) pipe.
- (d) Ferodo Limited and related companies with their head offices at Chapel-en-le-Frith, Buxton and Rochdale, England. Their principal products are brake linings, disc brake pads, clutch facings, railway disc brake pads and brake blocks, stairtreads and flooring products, automotive and agricultural V-belts, sintered metal friction products, friction retarders and metal pressings.
- (e) Storeys Decorative Products Limited with their head office at White Lund Industrial Estate, Morecambe, England. Their principal products are transfer printing and wallcoverings.
- (f) TAC Construction Materials Limited with their head office at Trafford Park, Manchester, England. Their principal products are materials for the construction and engineering industries, thermal insulation materials, fire protection materials, blocks, pipes, electrical insulation materials and sprayed mineral wool insulation.

(g) TBA Industrial Products Limited with their head office at Rochdale, England. Their principal products are asbestos textiles, packings, jointings, power transmission belting, PVC (polyvinylchloride) conveyor belting, reinforced plastics materials and PTFE (polytetrafluoroethylene) products.

(h) T-Glass Fibres Limited with their head office at Hindley Green, Wigan, England. Their principal products are glass fibre textiles and reinforcements.

(i) Turners Asbestos Fibres Limited with their head office at Manchester, England. Their principal activity is the brokering of asbestos fibre.

5. As a result of having received in the post a copy of the complaint in this action purportedly filed in the District of Columbia and asserting claims against T&N, I caused a search to be made of the books and records of T&N (including all of the companies listed in paragraph 4) to determine whether T&N has done business in the District of Columbia. The matters hereinafter stated are on the basis of that search and are true to the best of my knowledge, information and belief.

6. All the books and records of T&N are maintained in England. None of the books and records of T&N are located in the District of Columbia.

7. T&N are not qualified to do business in the District of Columbia.

8. T&N do not maintain an office, a telephone, a bank account or a brokerage account in the District of Columbia. T&N do not own real estate in the District of Columbia nor do they have any licence or franchise in the District of Columbia.

9. No officer, director or employee of T&N is employed or based in the District of Columbia.

10. There have been no contracts entered into by T&N in the District of Columbia. No contract entered into by T&N is required to be performed, in whole or in part, in the District of Columbia.

11. T&N have not advertised in the District of Columbia.

12. In addition, I gave instructions to the individuals responsible for sales in each of the companies listed in paragraph 4 of this affidavit to determine whether their records, maintained in the regular course of their business, contained any reference to any sales to any companies located in the District of Columbia.

13. It was reported to me by those to whom these instructions had been sent that none of the companies listed in paragraph 4 has any record of any sale at any time to any company located in the District of Columbia.

14. T&N does not do business in, nor does it solicit any business in the District of Columbia. T&N engages in no conduct, either persistent or occasional, in the District of Columbia; nor does it derive any revenue from the sale of goods, performance or services or any other activity in the District of Columbia.

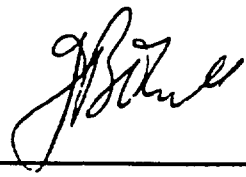
IN WITNESS WHEREOF, I have hereunto signed my name to the foregoing oath and affidavit. This the 14 day of December, 1983



JOHN MASON ATKINSON

On this 14th day of December 1983, John Mason Atkinson appeared before me, swore to and executed the foregoing instrument and duly acknowledged that he executed the same.





NOTARY PUBLIC, MANCHESTER