



**IN CHAMBERS**

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO. 271 of 1995 & 154 of 2002

BETWEEN:

**GRUPO TORRAS S.A.**

Plaintiff

AND:

- (1) BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LIMITED
- (2) WILLOW INVESTMENTS LIMITED
- (3) FASAB INVESTMENTS LIMITED
- (4) SCIROCCO LIMITED
- (5) BARBARA ALICE AL-SABAH
- (6) MISHAL ROGER AL-SABAH
- (7) IVENSOL CORPORATION NV
- (8) WYANDRA CORPORATION
- (9) SUNQUEST LIMITED
- (10) SHEIKH FAHAD MOHAMMED AL-SABAH
- (11) PICTET BANK & TRUST (CAYMAN) LIMITED
- (12) PICTET TRUSTEE COMPANY SA

Defendant

AND BETWEEN:

- (1) MISHAL ROGER AL-SABAH

Plaintiff by Counterclaim

AND:

- (1) GRUPO TORRAS SA
- (2) PICTET BANK & TRUST (CAYMAN) LIMITED
- (3) PICTET TRUSTEE COMPANY SA

Defendants by Counterclaim

Before Henderson, J.

Appearances: Mr. Graham Ritchie of CARD instructed Mr. Andrew Popplewell, Q.C. for Grupo Torras SA and the Trustee in Bankruptcy

Mr. Diarmad Murray of Walkers instructed Mr. Robert Hildyard, Q.C. for Barbara Alice Al-Sabah and Mishal Roger Al-Sabah

Mr. Nick Joseph of Hunter & Hunter for Comfort Trust.

Dates of Hearing: September 5<sup>th</sup>, 6<sup>th</sup>, and 10<sup>th</sup>, 2002.



## JUDGMENT

On March 15<sup>th</sup>, 2002 the Chief Justice of the Grand Court granted an order, at the request of the Supreme Court of the Commonwealth of the Bahamas, recognising the appointment of Mr. G.C. Culmer as the Trustee in Bankruptcy of the property of Sheikh Fahad Mohammed Al-Sabah. The order goes on to grant to Mr. Culmer all general law powers and the statutory powers accorded to a Trustee in Bankruptcy in this jurisdiction and, in particular, “the powers under section 107 of the Bankruptcy Law (1997 Revision).”

The major creditor in the bankruptcy is Grupo Torras SA, which commenced, in 1995, an action in the Cayman Islands against Sheikh Fahad Al-Sabah and others. Originally, the action advanced two claims of a proprietary nature against the defendant Bank of Butterfield International (Cayman) Limited, the trustee of a trust settled by Sheikh Fahad Al-Sabah. On January 17<sup>th</sup>, 2000 Grupo Torras obtained leave of this court to add a number of non-proprietary claims in relation to this trust. These claims seek to lift the veil of the trust and establish that the assets are held on a remedial constructive trust; alternatively, the claims (which have an air of novelty) argue that the trust is contrary to public policy and, in the exercise of its discretion as trustee, the bank should transfer the assets of the trust to Grupo Torras by way of a distribution.

### Relief Sought

In the present set of applications, Grupo Torras seeks leave to add Mr. Culmer as a co-plaintiff and leave to amend so as to discontinue one part of the claims advanced to date. These requests are not opposed. I grant that relief now.

The plaintiffs concede that the defendants are entitled to their costs thrown away as a result of this amendment, in any event of the cause. I award those costs now.

An argument was made, but not pressed, that these costs should be payable forthwith. I see no ground for departing from the usual rule that the costs occasioned by the amendment are to be payable after judgment on the entire claim, at which point they may be set off (if necessary) against any award of costs to the plaintiffs. I am also advised that the parties have now consented to an order for security for costs in favour of the defendants.

The defendants Barbara Alice Al-Sabah and Mishal Roger Al-Sabah, the wife and son of Sheikh Fahad Al-Sabah, seek a review of the Chief Justice's order, which was made ex parte. Grupo Torras and Mr. Culmer ask for leave to further amend the Statement of Claim to plead section 107 of the local Bankruptcy Law (1997 Revision), an avoidance provision. This latter amendment (which is opposed) raises issues which overlap those arising on the review of the ex parte order.

## Factual Background

Grupo Torras SA has, at all material times, been owned indirectly by the Kuwait Investment Office, which operates from London and manages the investments of the state of Kuwait. Sheikh Fahad Al-Sabah had a long career with the Kuwait Investment Office and was its Executive Chairman at the time of his departure in 1992.

After a lengthy trial before Mance, J, in the High Court of Justice (QBD-Commercial Court), Grupo Torras obtained judgment against Sheikh Fahad Al-Sabah in the amount of USD 716,846,263 arising from a series of fraudulent transactions between 1988 and 1992. On August 19<sup>th</sup>, 2002, my brother Panton granted recognition of Grupo Torras' judgment; as at that date, approximately USD 750,000,000 was owed under the judgment and in interest upon it.

After retirement, Sheikh Fahad Al-Sabah established his residence in the Bahamas. He also established a network of discretionary trusts, including the two which are the subject matter of these applications – the Eaglet Trust and the Comfort Trust.

The Eaglet Trust was established on February 14<sup>th</sup>, 1992 by a declaration of trust by Pictet Trustee SA (a Swiss company) and Pictet Bank and Trust (Cayman) Limited (a Cayman Islands company). The primary beneficiary is the defendant Mishal Al-Sabah. The Eaglet Trust was funded by a payment from Sheikh Fahad Al-Sabah of USD 5,000,000 from a Swiss account beneficially owned by him to an account in the name of Eaglet in the Geneva branch of Pictet about five days later. The assets of the trust were

approximately USD 7,400,000 at December 31<sup>st</sup>, 2000. The trust has at all material times been governed by the law of the Cayman Islands.

In 1986 Sheikh Fahad Al-Sabah established the Roger Trust, a trust governed by Bahamian law, with a trustee - the bank of New Providence Trust Company Limited – which was and is a Bahamian company. On September 29<sup>th</sup>, 1992 Sheikh Fahad Al-Sabah revoked the Roger Trust and had its assets (shares in the defendants Fasab Investments Limited, Scirocco Limited, Ivensol Corporation NV, Wyandra Corporation, and Sunquest Limited) transferred by way of appointment to himself. He then settled those assets upon a new trust – the Chester Trust – which was established the same day. On February 1<sup>st</sup>, 1993 Sheikh Fahad Al-Sabah transferred a residence in the Bahamas (“Fairview”) to the defendant Willow Investments Limited, to be held by it on the terms of the Comfort Trust.

The trustee of the Chester Trust was initially the Bank of New Providence Trust Company Limited. On December 30<sup>th</sup>, 1992 the trustee was changed to the Bank of Butterfield International (Cayman) Limited, a Cayman Islands company. Shortly afterwards, on February 12<sup>th</sup>, 1993, the Chester Trust was renamed the Comfort Trust and some of its terms were amended and restated.

During his lifetime, Sheikh Fahad Al-Sabah is the sole discretionary beneficiary of the Comfort Trust. Upon his death, any remaining trust property is to be divided between his wife and son and any other descendants as discretionary residual beneficiaries. The

Comfort Trust has been, at all times since its creation by amendment and restatement, a trust governed by Cayman Islands law and administered in Cayman by a Cayman trustee. In March, 2001, its assets were worth approximately USD 29,000,000. Its assets (held through the companies mentioned above) include the primary residence of Sheikh Fahad Al-Sabah and his family in the Bahamas, a yacht, an apartment in New York, various equities and other assets, and the proceeds of sale of the former family home.

Upon application by Grupo Torras, the Bahamian Supreme Court found Sheikh Fahad Al-Sabah to be bankrupt on June 29<sup>th</sup>, 2001. Under Bahamian law, the bankruptcy relates back to the date of completion of the relevant act of bankruptcy – February 6<sup>th</sup>, 2001.

Mr. Culmer was appointed Trustee in Bankruptcy on July 30<sup>th</sup>, 2001 at the first meeting of creditors. Grupo Torras' proof of debt dated July 30<sup>th</sup>, 2001 was for USD 717,000,000 (approximately) with interest at about USD 148,000 per day.

In response to an ex parte application by the Bahamian Trustee in Bankruptcy, the Bahamian Supreme Court ordered on February 14<sup>th</sup>, 2002 that letters of request issue to this court requesting the recognition in this jurisdiction of the appointment of Mr. Culmer. It also asked this court to grant him all general law powers and the statutory powers accorded to a trustee in bankruptcy in the Cayman Islands and, in particular, the powers granted by section 107 of the Bankruptcy Law (1997 Revision). The order of the Chief Justice on March 15<sup>th</sup>, 2002 granted these requests. Although the application was made ex parte, the Chief Justice also provided detailed reasons for judgment.

By calling in aid section 107 of the Bankruptcy Law, the Trustee in Bankruptcy seeks to set aside the transfers of property made for the purpose of settling assets upon the Eaglet and Comfort Trusts. Section 107 provides:

“Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage, in right of his wife, shall, if a provisional order in bankruptcy, or an absolute order in bankruptcy in cases where no provisional order is made, takes effect against the settlor within two years after the date of the settlement, be void against the Trustee and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the Trustee unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof.”

The law of the Bahamas contains its own avoidance provision, which is in these terms:

“Any settlement of property made by a trader not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor become bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader, in

consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this Act.

“Settlement” shall, for the purposes of this section, include any conveyance or transfer of property.” (Bankruptcy Act, 1987, c. 59, s. 71) (underlining added)

Use of this provision would require proof that Sheikh Fahad Al-Sabah was, at the relevant time, a “trader”. At the time when the indebtedness to Grupo Torras was incurred by him, he was employed as the Executive Chairman of the Kuwait Investment Authority, a large institutional investment house engaged in investment banking and asset management activities. He was also a director and Chairman of Grupo Torras, a holding company for a number of Spanish companies.

Grupo Torras and Mr. Culmer claim that the activities of these entities, coupled with the Sheikh’s position, show that he was “obviously” a “trader” within the meaning of the Bahamian avoidance provision. Notwithstanding that claim, Mr. Culmer has made no attempt to utilise section 71 of the Bahamian Law to void the transactions. That seemingly contradictory position has given rise to the argument of the beneficiaries that Mr. Culmer’s request for the powers accorded to a trustee in bankruptcy in this jurisdiction and, in particular, the power granted under the local avoidance provision, is an exercise in forum shopping.

## Issues

This application requires resolution of the following issues:-

1. Does the Grand Court have jurisdiction to grant assistance to a foreign trustee in bankruptcy in response to letters of request from a foreign court?
2. Should this court set aside its own ex parte order because it was obtained on the basis of material non-disclosure?
3. Should the claim be amended to permit an attack on the impugned settlements under section 107 of the local Bankruptcy Law?

## Jurisdiction to Grant Assistance

Grupo Torras and Mr. Culmer have identified three possible sources of jurisdiction enabling the Grand Court to assist the Bahamian Court: section 156 of the local Bankruptcy Law; section 122 of the Imperial Bankruptcy Act, 1914; and the inherent jurisdiction of the court. The power to assist need only be found in one of these three places.

Although I arrive at the same result as the Chief Justice, my analysis and conclusion as to the proper construction of s. 156 differs from his. I, of course, have had the benefit of arguments which were not addressed to him on the ex parte application.

Section 156 of the Bankruptcy Law, which was enacted in 1964 and relied upon by Smellie, CJ for the necessary jurisdiction, reads:

“All the Courts in bankruptcy and the officers of such Courts shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order the like jurisdiction which the Court that made the request as well as the Court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.”

Some aspects of this provision, which has not been the subject of judicial interpretation in the Cayman Islands, seem strikingly inappropriate. The Legislature of the Cayman Islands has never been competent to legislate with respect to courts elsewhere. On any construction of section 156, its jurisdictional reach can only be extended to the courts of this country. If the reference to “All the Courts in bankruptcy and the officers of such Courts” is read as a reference to all the courts of the world, or to all British courts, the provision is clearly inappropriate in a colonial statute. Moreover, the Cayman Islands have always had just one court of bankruptcy – the Grand Court. If the reference to “All the Courts in bankruptcy” is intended as a reference to domestic courts only, then it must be taken to refer to a judicial regime which has never existed historically in the Cayman Islands and which is most unlikely to exist in the foreseeable future.

What, then, is the true meaning of the section? This requires an examination of the legislative intent from which it springs.

Section 156 is identical in its wording to section 64 of the Jamaican Bankruptcy Law, 1871. It is an irresistible inference that the legislative draftsman in the Cayman Islands simply copied section 64 word for word. That, in turn, tends to suggest, although it does not demonstrate, that the intent of the Legislature of the Cayman Islands was to confer upon the Grand Court the same jurisdiction conferred earlier upon the Jamaican courts by section 64 of the Jamaican Law.

In Jamaica, there were a number of local courts exercising bankruptcy jurisdiction at the time of the enactment of section 64. The beneficiaries argue that the Jamaican provision was intended (appropriately) to have only domestic effect: it constitutes a mandate to those local courts to act in aid of each other. It was not necessary, they say, for the Jamaican Legislature to go farther and clothe the local courts with jurisdiction to render assistance to other British courts. That assistance was already provided for by section 74 of the Imperial Bankruptcy Act, 1869, which was Imperial legislation of direct application in the colony of Jamaica. Any attempt on the part of the Jamaican Legislature to restrict the application of s. 74 would be void for repugnancy (under section 2 of the Colonial Laws Validity Act, 1865) and Jamaican legislation which simply mirrors the terms of the Imperial statute would have been redundant. Thus, it is argued that the intention of the Jamaican Legislature in enacting section 64 was to provide only for assistance by one domestic court to another.

This analysis makes considerable sense with respect to the Jamaican provision but does not translate easily to the entirely different judicial regime in the Cayman Islands. There

was just one court here exercising bankruptcy jurisdiction. The beneficiaries' argument that the Cayman Islands Legislature was intending to provide for the future possibility that additional courts in bankruptcy would be established in the Cayman Islands is entirely farfetched. No one could have imagined that this small Island country, which had a population of a few thousand people in 1964, could ever have needed more than one bankruptcy court.

In my view, while it is clear that the legislative draftsman in the Cayman Islands copied the Jamaican provision, it cannot be inferred that the Legislature of the Cayman Islands enacted it with the same legislative intent as that underlying the Jamaican provision. The court hierarchy in the two colonies was too different for that.

The wording of section 156 also bears a strong resemblance to section 122 of the Imperial Bankruptcy Act, 1914 (the successor to s. 74 of the Imperial Act of 1869), which reads:

“The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.”

That statute has now been repealed in its entirety and has been replaced by the Insolvency Act 1985 (and 1986), an Act which has no force and effect in the Cayman Islands.

In 1964, s. 122 of the Imperial Act had direct effect in the Cayman Islands; that much is clear from the language of the section, which expresses an intent that it apply to “every British court ... having jurisdiction in bankruptcy or insolvency ...”.

The Cayman legislative draftsman must be presumed to have had a familiarity with section 122. It provides a legislative mandate to all British courts to act in aid of each other in bankruptcy matters. The wording of the Jamaican section is in similar terms, but extends the provision to “All the Courts in bankruptcy.” The draftsman could have based the Cayman section on either provision. In choosing to adopt the language of the Jamaican provision in 1964, the Cayman Legislature must be taken to have preferred it to section 122 of the Imperial Act, which, as I have noted, had direct application in the Cayman Islands and already contained a mandate to the Grand Court to act in aid of all British courts in bankruptcy or insolvency. Had the Legislature intended simply to reiterate and reinforce this more limited mandate in its own colonial Law, it would not have chosen the language it did.

In my view, by adopting the broader language of the Jamaican Law (which no longer had force and effect in the Cayman Islands by 1964, for the reasons given by the Chief Justice in the Ruling under review), the Legislature signalled its intent – that the Grand Court act in aid of all courts elsewhere, and not just British courts, upon appropriate requests made

in bankruptcy matters. That is the only interpretation that breathes life into section 156. If the intent was to restrict the scope of section 156 to acting in aid of all British courts, I think the Legislature would have said so. It had the option of adopting that phrase from the language of section 122 but chose not to do so. On the other hand, to say, as the beneficiaries do, that section 156 of the Cayman Law is directed only at co-operation between domestic bankruptcy courts (just one of which existed), is to render the section meaningless.

As I have noted, the language of section 156 is difficult and obscure. The first sentence in the section is best viewed only as an imperfect expression of a legislative intent to render assistance to foreign courts. The second sentence, in my view, means this:

“An order of any court in bankruptcy seeking aid, together with a request to [the Grand Court], shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court that made the request, as well as [the Grand Court], could exercise in regard to similar matters within their respective jurisdictions.”

That finding is sufficient to dispose of the first issue. Like the Chief Justice, I conclude that the Grand Court may, under section 156 of the Bankruptcy Law, grant assistance to a foreign trustee in bankruptcy in response to letters of request from a foreign court.

The Chief Justice concluded that s. 122 of the Imperial Act of 1914 still has the force of law in the Cayman Islands. Although it was repealed in the United Kingdom, the section

was by the time of repeal already entrenched in the law of the Cayman Islands by virtue of s. 57(1) of the Cayman Islands Constitution.

In light of my conclusion about the scope of s. 156 of the Cayman Islands Bankruptcy Law, it is unnecessary to delve further into this issue. The Bankruptcy Law is a code of procedure which appears to have been intended to replace both the Bankruptcy Law of Jamaica (which had application in the Cayman Islands until 1959) and those provisions of the Imperial Act which applied here by necessary intendment. Section 156 is in broader terms than s. 122 and subsumes all of the power and jurisdiction granted by it. It is unnecessary to decide, on the present applications, whether, in the absence of s. 156 of the Cayman Islands Bankruptcy Law, section 122 of the Imperial Act is capable now of grounding an application for assistance in a foreign bankruptcy. I prefer to leave that question for decision in a case where the issue arises squarely and requires resolution.

I also heard argument on whether the inherent jurisdiction of the court would permit it to act upon letters of request in aid of a foreign trustee in bankruptcy. The Chief Justice concluded (at pages 12-14 of his judgment) that the general principles of comity permit the Grand Court to respond affirmatively to such a request. He found that all of the jurisdictional prerequisites have been satisfied. I agree with this conclusion, and have nothing to add to the reasons he gave for his decision.

The application to discharge the ex parte order due to lack of jurisdiction is dismissed.

### Non-disclosure

Since the order of Smellie, CJ was made ex parte, it can be discharged if it was obtained through non-disclosure of one or more material facts. The applicants had a duty to make full and fair disclosure of all the material facts which includes, for present purposes, disclosure of material aspects of foreign law (because foreign law is always a question of fact which must be proved by evidence).

Not every non-disclosure of a material fact will result in discharge of the order - the undisclosed fact must be “of sufficient materiality to justify or require immediate discharge of the order without examination of the merits”: **Brink’s Mat Ltd v. Elcombe [1988] 1 WLR 1350 (CA)**. Upon review, the court has discretion, notwithstanding material non-disclosure of a sufficient degree to justify discharge of the order, to continue the order or make a new order upon terms: **Brinks Mat**, (supra), page 1357. That discretion may be used in favour of the original applicant where discharge of the order would impose a penalty out of all proportion to the gravity of the non-disclosure.

The beneficiaries rely upon a number of undisclosed matters which they say are material.

They argue that no one alerted the Chief Justice to the “fact” that sections 156 and 107 of the Bankruptcy Law and Section 122 of the old Imperial Act could not be used to interfere with vested rights but only to enforce rights already established by order of the foreign court. They said that no one advised the Chief Justice of the jurisdictional

restrictions which they argue are implicit in Section 107. No one alerted the Chief Justice to the “fact” that, although the requested court should respond constructively to letters of request, it has a full discretion as to how any assistance should be rendered.

These are not facts, but matters of domestic law or, in some cases, mere arguments advanced by the beneficiaries. I do not say that an ex parte injunction can never be discharged because of a failure to make disclosure of material aspects of domestic law; the proper response to such non-disclosure, in some cases, will be the setting aside of the order. However, insofar as the non-disclosure I have just described was of questions of domestic law, it is law that would have been well known to the Chief Justice in any event. Insofar as the non-disclosure was of controversial positions the beneficiaries proposed to advance in argument, there is no merit in the submission that the result should be a discharge of the ex parte order. That the proposal to use a Cayman avoidance provision in a Bahamian bankruptcy to void transactions which occurred abroad is both novel and problematic would have been obvious to the Chief Justice. These are not omissions which support a discharge of the order.

It is also said that the Chief Justice was not told enough about the settlements into the trusts to allow him to appreciate how tenuous the link was between the Cayman Islands and the impugned transactions. The evidence before Smellie, CJ asserted that Sheikh Fahad Al-Sabah had received about USD 97,500,000, which was stolen from Grupo Torras, into his bank account in Switzerland referred to as the “G772 account”. The evidence stated that the Eaglet Trust was funded by a payment by Sheikh Fahad Al-Sabah

from the G772 account on February 19<sup>th</sup>, 1992 of USD 5,000,000 and that the transfer of funds was carried out in Switzerland. He was also told that the Eaglet Trust was established on February 14<sup>th</sup>, 1992 with a Cayman trustee and is governed by the laws of the Cayman Islands.

Smellie, CJ, was told that on February 1<sup>st</sup>, 1993 Sheikh Fahad Al-Sabah transferred his house known as "Fairview" in the Bahamas to Willow Investments Ltd., a company incorporated in the Bahamas, by way of settlement into the Comfort Trust. He was told that this Trust has a Cayman trustee. No mention was made of the fact that a portion of the assets of the Comfort Trust consisted of shares in corporations which had been transferred into that Trust while it was situated in the Bahamas. He was told, however, that assets of the Roger Trust had been transferred to the Chester Trust, which subsequently was restated and renamed the Comfort Trust. An exhibit to an affidavit placed before Smellie, CJ makes clear that the Chester Trust was a Bahamian trust.

This disclosure was sufficient to make it apparent to the Chief Justice that the settlements into the Eaglet and Comfort Trusts had little, if any, connection with the Cayman Islands. More could have been disclosed, but it would not have changed the thrust of the evidence on this point. I am not satisfied that the undisclosed facts were, in the context of the ex parte application, material.

The most significant non-disclosure has to do with the terms of the Bahamian avoidance provision quoted above. It can be used only if the trustee can prove that Sheikh Fahad

Al-Sabah was a “trader”. The trustee’s failure to invoke the provision in the Bahamas raises the spectre of forum shopping, a question that was material to the exercise by the Chief Justice of his discretion. That is a matter which should have been disclosed. The question, however, is the significance of the non-disclosure; was this fact sufficiently material to justify discharging the order now?

The Chief Justice was, of course, aware that the Mr. Culmer had been accorded in the Bahamas all of the powers normally available to a Bahamian trustee in bankruptcy. The Chief Justice can be assumed to have been aware that the Bankruptcy Law of the Bahamas contained avoidance provisions, as these are a common feature of British bankruptcy laws. The very nature of the application before him was enough to suggest that the Trustee in Bankruptcy was reluctant to invoke an avoidance provision in his own jurisdiction and preferred, instead, to rely upon the Cayman provision. Those facts are all that are necessary to bring the question of forum shopping to the foreground. It would have been better if the apparent unavailability of the Bahamian avoidance provision was brought clearly and expressly to the attention of the Chief Justice. However, I consider that he was not misled by any material non-disclosure into a failure to appreciate the important issues on the application. It is likely that he considered that the question of forum shopping in relation to the attempt to void the Eaglet and Comfort settlements was one that could be decided at later date; it was not a question that had to be determined before according recognition to Mr. Culmer and permitting him to bring the applications he seeks to make.

I was also asked to discharge the ex parte order made by Smellie, CJ on the ground of material non-disclosure in the ex parte application made to the Supreme Court of the Commonwealth of the Bahamas when it issued the letters of request. No authority was cited for the proposition that an ex parte order of this court could be set aside because of non-disclosure to a foreign court.

This argument has been advanced in the wrong forum. If the basis of the Bahamian order has been undermined through non-disclosure, that is a question for the Supreme Court in the Bahamas. The underlying goal of setting aside ex parte orders because of non-disclosure is to protect the integrity of the court's process. That is manifestly a question for the court whose process has been undermined. The beneficiaries, both of whom are resident in the Bahamas, are at liberty to advance the same argument there.

For these reasons, the application to discharge the ex parte order because of material non-disclosure is dismissed.

Should the Statement of Claim be Amended to Permit a Claim Under Section 107?

Grupo Torras and Mr. Culmer have asked for leave to amend the Statement of Claim to permit attacks upon the trust settlements under the Cayman avoidance provision. Section 107 of the Bankruptcy Law provides that certain voluntary settlements shall be "void against the trustee in bankruptcy". In this context, "void" means "voidable". The "trustee" referred to in section 107 would, in the ordinary case, be the local trustee in

bankruptcy. In the Cayman Islands, there is only one person who may hold this office – the Clerk of the Grand Court: Bankruptcy Law, section 12.

A declaration in favour of a trustee in bankruptcy is not automatic. The Trustee in Bankruptcy must apply to the Grand Court for a Declaration as to his entitlement under s. 107. It is well established that the relief is discretionary and the court will take account of equitable principles in exercising or withholding its jurisdiction: See **In Re Carter and Kenedine's Contract [1987] 1 Ch. 776**; and **In Re Hart, ex parte Green [1912] 3 KB 6**. Section 107 expresses no limitation regarding the location of the property or the circumstances of the impugned settlement. Any foreign elements which are present may be considered in the exercise of that discretion: **In re Paramount Airways [1993] Ch. 223 (English CA)**; **Springfield Acres v. Abacus (Hong Kong) [1994] 3 NZLR 502 (N.Z.)**.

The beneficiaries argue that section 156 of the Bankruptcy Law is essentially procedural, and not intended to permit the court here to make vesting orders or alter substantive rights. They say that the scope of the section is no broader than is necessary to enable the Grand Court to exercise its powers of enforcement here to assist a foreign court where the latter has, by virtue of its own domestic law, made an order vesting property in Cayman in a trustee in bankruptcy. The beneficiaries say that those few cases decided under section 122 of the Imperial Act (which was repealed in 1986) point in that direction, particularly **Re Osborn [1931-32] B & CR 189**; **Re Reilly [1942] IR 416A**; and **Hall v. Wolf [1908] 7 CLR 207**.

They say that the enactment of section 426 of the Insolvency Act, 1986 represented a sea change in the law which entitled a court in the United Kingdom, for the first time, to apply substantive provisions of its own insolvency law when acting in aid of a foreign court pursuant to a request. In **Hughes v. Hannover [1997] 1 BCLC 497**, the court noted that “the purpose of [section 456 (5)] is to extend the jurisdiction of the court.” In the course of its extensive exposition of the new provision, the Court of Appeal described the “hypothesis of jurisdiction” which provides the mechanism for applying the insolvency law of England in aid of a foreign insolvency. The Insolvency Act, 1986 has no force and effect in the Cayman Islands.

In response, Grupo Torras contends that a close reading of the authorities leads to the conclusion that section 426 (5) of the Insolvency Act, 1986 represents no radical departure from the pre-existing law. It says that the plain language of section 156 of the Cayman Bankruptcy Law (and, equally, section 122 of the old Imperial Statute) permits the application of local substantive rules in appropriate cases. Grupo Torras argues that section 107 gives the Grand Court jurisdiction to make declarations as to the existing rights of a trustee in bankruptcy but does not operate so as to vest property rights in him. It says that, if the beneficiaries are right, the result is “an important and surprising lacuna” in the jurisdiction of the Grand Court concerning bankruptcies with an international dimension.

It must be remembered that these applications ask only for a review of an ex parte order and leave to amend the claim; the merits of the claim are not in issue. The effect of the order under review is to accord recognition to the Bahamian Trustee in Bankruptcy and permit him to advance a certain type of claim (under section 107) in this court. Smellie, CJ, did not purport to rule on the merits of the claim or the sufficiency of the Trustee's evidence. He was not asked to do so.

If the amendment is allowed, the court will consider evidence of events which took place after the particular transactions and settlements under attack. It will consider whether the order of the Bahamian Court took effect within two years of each of the impugned transactions. It may be called upon to consider whether there has been a subsequent transfer by a donee to a *bona fide* purchaser for value.

The discretionary nature of the relief available under section 107 is broad enough to allow this court to take into account foreign elements and consider whether there is a sufficient connecting factor with the Cayman Islands. Ultimately, this court can weigh the significance of the bankrupt's residence abroad (in the Bahamas) and the location and circumstances of the impugned transactions against the fact that the settlor chose trustees resident in the Cayman Islands for both trusts and elected to have each of the trust governed by Cayman Islands law.

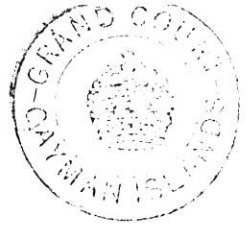
At this stage, the question is not whether Mr. Culmer is entitled to the declarations he will be seeking with regard to the impugned transactions. The question is whether there is

sufficient merit in his position to justify allowing him to go forward with his claim. Put another way, the question is whether he has a good arguable case. In my view, he does. There is sufficient merit in the position he seeks to advance to justify according him standing to make the claim. Whether he is ultimately successful will be decided after a full consideration of the evidence to be adduced and the arguments alluded to above, including the various factors relevant to the exercise of the court's discretion.

I should address briefly the question of forum shopping. Evidently, the Trustee in Bankruptcy prefers to invoke the Cayman avoidance provision rather than to seek relief under the roughly similar Bahamian provision. The latter would require proof that Sheik Fahad Al-Sabah was, at the date of the various settlements into the trusts, a "trader". That constraint is not present in the Cayman provision. The Trustee's strategy inevitably attracts the objection that he is engaged in an attempt to obtain an unjustified advantage by choosing his forum for litigation.

This question really turns upon the proper construction of s. 156. That provision allows the Grand Court to exercise its own jurisdiction or the jurisdiction which the Bahamian Supreme Court could exercise "in regard to similar matters within their respective jurisdictions". The very language of the section countenances some degree of forum shopping.

There is a question as to whether "the jurisdiction" referred to in s. 156 includes the granting of a declaration that an impugned transaction is void where the transaction took place abroad. If it does, it is no answer to say that the Trustee is shopping for a juridical



advantage, as the Legislature has recognized his right to do so. In any event, the unavailability of similar relief from the Bahamian Supreme Court is a factor which this court can and will consider when deciding to grant or withhold this discretionary remedy.

The allegation of forum shopping provides no basis for preventing a litigant from invoking a Cayman law which, in its plain language, invites a choice of forum.

For these reasons, I grant leave to add Mr. Culmer as a co-plaintiff and leave to the plaintiffs to amend their statement of claim in the manner requested.

Counsel may speak to the costs of this set of applications if they are unable to agree.

A. Henderson  
Judge of the Grand Court (Actg.)

8<sup>th</sup> November 2002

*Delivered on behalf of Henderson J.*

*[Handwritten signature]*  
CHIEF JUSTICE

*8<sup>th</sup> November 2002*

