

IN THE COURT OF APPEAL  
UPON APPEAL FROM THE  
GRAND COURT OF THE CAYMAN ISLANDS

APPEAL NO. 2 OF 1997  
CAUSE NO. 389 OF 1992

BETWEEN:

(1) **INTERNATIONAL CREDIT AND INVESTMENT  
COMPANY (OVERSEAS) LIMITED (In Liquidation)**

(2) **FINANCE AND INVESTMENT INTERNATIONAL  
LIMITED**

APPELLANTS

AND:

(1) **GHAITH RASHAD PHARAON**

(2) **PHARAOH HOLDINGS LIMITED**

RESPONDENTS

Mr Lawrence Cohen Q.C. and  
Mr Huw Moses for the Appellants

### JUDGMENT

COLLETT J.A.

The Appellants, who are successful plaintiffs in an action for the tort of conspiracy against, inter alia, the present Respondents as defendants, appeal here against a preliminary ruling made by Murphy J. in the Grand Court in relation to assessment of damages under one of the heads of liability therefor, established earlier by a judgment of Schofield J. That ruling addresses the question of the proper methodology to be adopted in making the assessment of that head of damage.

The nature of the quantification exercise involved in the assessment is identified in the judgment of Schofield J. delivered on 1<sup>st</sup> June 1995 as being an “attempt to quantify the actual increased deficit from the date that ICIC [the 1<sup>st</sup> Appellant] would probably have been suspended from

operating until its actual closure in 1991". To perform this exercise Murphy J. had, therefore, first to discover from the evidence before him what was the probable date of the Appellant's suspension if the conspiracy had not been carried into effect and secondly the likely amount of deficit of the company at that date. He found that it would have probably been suspended on 30<sup>th</sup> June 1978 with a likely deficit of US\$37,161,485. These findings are not challenged in this appeal. The Judge then turned to a consideration of the assessment of the deficit existing at the actual suspension and closure of the Appellant's business in 1991 : it is in relation to this part that difficulty arose.

The Respondents neither appeared nor were they represented before Murphy J. at the hearing before him; nor indeed before us on appeal. Mr Cohen for the plaintiff urged the adoption of a particular methodology based upon the procedure adopted by Mr Carmen Genovese, an experienced Canadian liquidation accountant, who has assisted the liquidators of ICIC throughout this entire litigation. His methodology is detailed in his eighth affidavit. It was summarised in the algebraic formula  $D = P + O + C - A$ ; where D = the nett deficit of ICIC; P = the total debts proved in the liquidation; C = the total costs of the liquidation; O = the total monetary value of obligations falling to be discharged by the liquidators apart from P and C; and A = the total sum realised or to be realised from the assets of ICIC. That part of the suggested methodology was accepted by the Judge and we also agree that it is correct and appropriate in this case.

The difficulty which arose stems from the existence of a series of agreements collectively referred to as 'the pooling agreements' which were entered into by the liquidators of ICIC with the liquidators of sundry other corporate entities in the associated BCCI group as well as various

other governmental authorities and individuals worldwide. The pooling agreements of course all postdate the closure of ICIC on 5<sup>th</sup> July 1991, and indeed the participation of ICIC therein postdates the hearing before Schofield J. in 1996. The intent of those agreements clearly was to compromise and settle all the large number of claims and cross-claims to which the closure and liquidation of the BCCI entities as well as of ICIC had given rise and to circumvent the problems which falsification of the accounts and the co-mingling of assets of different entities had brought into play.

- Part of the overall settlement involved a mutual obligation of all the participating parties to pool their assets as was provided by clause 3.1 of the principal pooling agreement in the following terms:-

### **PART III REALISATION OF POOL PROPERTY**

3.1 Subject to provision being made for the matters set out in Clause 3.2 below, each of the ICIC Overseas Liquidators, the ICIC Holdings Liquidators, the ICIC Investments Liquidators and the ICIC Apex Liquidators shall use their best endeavors to realise ICIC Overseas Property, ICIC Holdings Property, ICIC Investments Property and ICIC Apex Property respectively and convert it into cash; and shall, unless otherwise requested by the Luxembourg Liquidators and the Cayman Liquidators, forthwith transmit to the Luxembourg Liquidators and the Cayman Liquidators all proceeds of the realisation of ICIC Overseas Property, ICIC Holdings Property, ICIC Investments Property and ICIC Apex Property which are now or may hereafter be or come within their hands.”

Counsel submitted and the Judge accepted that these pooling agreements ought not to be ignored but instead ought to be given full effect in quantifying ‘O’ – the obligations other than proved

debts and costs falling to be discharged by the liquidators of ICIC. Otherwise it was submitted and Mr Genovese in his eighth affidavit asserted, it would be well-nigh impossible to obtain an accurate figure for the nett deficit of the company as of 5<sup>th</sup> July 1991.

The submission continued by demonstrating that, in logic, the only way in which the actual 1991 deficit of ICIC could now be eliminated and creditors be paid a dividend of 100 cents in the dollar would be if its liquidators could recover from the Respondents as damages for conspiracy under this head of damage a sufficient amount when pooled to satisfy not only their domestic creditors but those of all the other entities of the BCCI group whose liquidators were parties to those agreements. This figure is of course equivalent to the nett deficiency of the entire Group and this has been accurately quantified by Mr Genovese at the impressive figure of US\$5,106,554,750. This is the figure urged upon us as the proper quantification of 'O' in the equation for the purposes of fixing the amount of these damages to be paid by the Respondents.

Clearly, the learned Judge was troubled by the direction in which the accountancy logic of this argument was leading him. "How do the plaintiffs justify on a legal basis, the assertion that the deficit of ICIC should be the deficit of the global liquidation?" he asked. "This is clearly not a consolidated liquidation, though the plaintiffs on this assessment would have me turn it into one de facto". He sought to escape by placing upon the wording of clause 3.1 a narrow and restricted interpretation, by confining the obligation upon ICIC to contribute to the pool only to the extent that assets have actually been recovered by its liquidators.

This approach suffers from numerous defects. The main one is that this is plainly not the ordinary meaning of the words used in the clause, "which are now or may hereafter be or come

within their hands". No such limitation of the obligation is there expressed. None can be implied because, so far from it being necessary to confer business efficacy upon the Agreement, such a limitation would be frustrative of the obvious intent of the parties by conferring unequal benefits as between creditors of ICIC and those of creditors of the BCCI entities also in liquidation. Counsel had little difficulty in demonstrating the illogicality of this approach and the inappropriate nature of the methodology which the Judge has attempted to substitute for that adopted by Mr Genovese in his eighth affidavit.

I have reached the conclusion that the learned Judge's reasoning and the order which he made cannot be supported. Does this mean that we are compelled by logic to revert to the methodology which is urged upon us by counsel? I think not, because that methodology in turn suffers from a fundamental defect, namely that it seeks to attribute to the Respondents a liability in tort for losses which, upon a true analysis, are the consequences of a novus actus interveniens.

The authorities which deal with the vexed subject of remoteness of damage in the law of tort are too numerous to cite here and not all of them are easy to reconcile. One proposition can, however, be confidently stated. It is that damage or loss which does not directly and naturally flow from the illegal conduct of a tortfeasor and which could not be within his reasonable contemplation at the time the tort was committed is not recoverable from that tortfeasor in an action.

Here the size of the actual deficit of ICIC as of 5<sup>th</sup> July 1991 is to a very great extent the direct and proximate consequence of its liquidators having entered into the Agreement of 14<sup>th</sup> May 1996 whereby they undertook to join the pool set up by the principal Pooling Agreement of 10<sup>th</sup>

November 1994. This is so even if the conspiracy is to be regarded as a causa sine qua non of the entire deficit of ICIC. The circumstances disclosed in evidence are not such that these Respondents could reasonably have foreseen, between 1977 and 1991, that such an event as the entering into of the Agreement would occur in the future as a result of their conspiracy to falsify the books. It follows that, to the extent that the size of ICIC's 1991 deficit is the direct consequence of performance of the pooling agreement obligations of its liquidators, the loss and damage cannot be attributed to their wrongdoing.

In the light of these conclusions the normal course would be for this court to vacate the order of the Judge below and remit the matter for further consideration by another Judge of the Grand Court. That course would inevitably be fraught with further delay and expense for those involved not only in ICIC's liquidation but also for those involved in other related liquidations. Counsel instead has asked us ourselves to apply the correct methodology if we can identify it and to quantify the result as damages under this head.

Fortunately, the material necessary to enable this court to undertake that task is to hand in the form of a ninth draft affidavit of Mr Genovese which was verified in oral testimony before Murphy J. Although it was not his preferred method of approach and not capable of producing an exact assessment of the damage, the deponent was able in paragraphs 16 to 19 of his ninth affidavit to construct an alternative methodology which produces "a minimum and approximate benchmark of the deficit of ICIC at July 1991". The figure at which he arrived by using this methodology is still a large one but it has been arrived at significantly by ignoring the effect upon the equation of the liquidators' obligations under the pooling agreements. This at a stroke eliminates the problem.

The Respondents are in no position to challenge the validity of this alternative methodology. *Armory v Delamirie* (1772) 93 ER 664 is longstanding authority for the proposition that, where the actions of a tortfeasor have rendered it impossible to arrive at an accurate assessment of damage, strong presumptions may be maintained against him in order to arrive at an estimation of its amount. The American cases of *Shapiro, Bernstein & Co. v Remington Records Inc* (1959) 265 F. 2d 263 and *Story Parchment Co. v Paterson Parchment Paper Co. et al* (a decision of the US Supreme Court) are also relevant illustrations of the modern application of this ancient principle of common law.

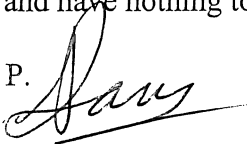
The figure arrived at by Mr Genovese applying the alternative methodology is US\$2,195,788,041. I would therefore allow the appeal with costs and substitute for the order made by Murphy J., a finding that the damages under this head to be paid by the Respondents is this figure less US\$37,161,458, namely US\$2,158,626,583.

COLLETT J.A.



I concur and have nothing to add.

ZACCA P.



I also concur.



KERR J.A.