IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 26 of 1998
Grand Court Cause No. 389 of 1992

BETWEEN:

(1) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED
(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED

Respondents/Plaintiffs

- and -

(1) SHEIKH KAMAL ADHAM
(2) FAISAL SAUD AL FULAIJ
(3) GHAITH RASHAD PHARAON
(4) PHARAOH HOLDINGS LIMITED
(5) LHASA INVESTMENTS LIMITED (In Liquidation)
(7) CONCORDE INTERNATIONAL TRADING S.A.

Appellants/Defendants

BEFORE: The Rt. Honourable Mr. Justice Edward Zacca, President
The Rt. Honourable Mr. Justice Telford Georges, Justice of Appeal
The Honourable Mr. Justice Ira Rowe, Justice of Appeal

Mr. Julian Malins, Q.C., Mr. Michael Scott and Mr. Neville Levy instructed by Mssrs. Neville W. Levy & Associates for the Appellant.
Mr. Lawrence Cohen, Q.C., Mr. Ewan McQuater and Mrs. Minakshi Jafa Bodden instructed by Mssrs. Hunter & Hunter for the Respondents.
Mr. Charles G. Quin instructed by Mssrs. Quin & Hampson for the Receiver of Attock Cement Limited.

August 4th, 5th, 6th 1999; December 10th 1999

JUDGMENT

GEORGES, J.A.

This is an appeal from an order made by Graham J. in the process of enforcing by way of equitable execution a judgment given by Murphy, J. in an assessment of damages which

followed upon the judgment given by Schofield, J. in cause No. 389/92. In that action Scholfield, J. had found Ghaith Rashad Pharaon (Pharaon), Pharaoh Holdings Limited (Pharaoh), Lhasa Investments Limited (Lhasa) and Concorde International Trading S.A. (CITSA) liable to International Credit and Investment Company (Overseas) Limited (ICIC) and Finance and Investment International Limited (FIIL) for damages for fraud and conspiracy.

Two conspiracies were alleged and found proved in cause No. 389/92. The first was a conspiracy to claim ownership of the shares of the Attock Oil Company (AOL). Dr. Pharaon's case was in essence that he had borrowed the purchase money for the shares from FIIL and had registered the shares in the name of FIIL as security for the loans. In the course of time he had repaid the loans so that the shares though registered in the name of FIIL were substantially his - 88% - with 12% belonging to two associates who had assisted him in making the purchase. AOL was an English company registered in England but carried on operations principally in Pakistan.

The second conspiracy was a conspiracy to falsify the accounts of ICIC and FIIL to make it appear that they were financially sound institutions when in fact a proper presentation of the accounts would almost certainly have resulted in the suspension of their licences. Having determined liability, Scholfield J. ordered that damages be assessed. There was no appeal from that judgement. Murphy, J. assessed damages under one of the heads in the sum of US $2,133,503.00. There was no appeal from that assessment. The Court of Appeal assessed damages under the other head in the sum of US $2,158,626,583.00. An appeal has been filed against that assessment but no stay of execution has been granted.

The plaintiffs sought equitable execution of these judgments and commenced proceedings by a summons dated 15 May, 1998 in cause No. 389/92. The draft order annexed to the summons contained recitals stating that the applicants ICIC and FIIL intended to show –

(1) that 100% of the share capital of Attock Cement Limited (ACL) had at all times since February 1991 been vested in Pharaoh as absolute owner thereof, and

(2) that by a Court order dated 10 November, 1992 Mr. John Matthew C.A. of George Town, Grand Cayman had been appointed Preservation Receiver of the shareholdings, assets and undertakings of ACL.

The summons prayed that the Preservation Receiver rectify the register of members of ACL by recording Pharaoh as the holder of 100% of the issued share capital of ACL and by deleting the entries made in or after 1991 which purported to transfer the shares of ACL to any other entity, including CITSA. Thereafter, the Preservation Receiver was to be discharged as receiver of the shareholdings and assets and undertaking of ACL. David Boddy and Oliver Jordan were then to be appointed Joint Execution Receivers and proceed to realise these assets in satisfaction of the judgments.

Graham, J. granted the orders sought and this appeal is from his decision. Several grounds of appeal were urged and although this is not the order in which they were argued it is convenient to deal first with the issue of the procedural correctness of the proceedings.

The ground for the rectification of the register of ACL was that the transfers of shares from Pharaoh to PHL Holdings Limited (PHL) and then to CITSA were void. The allegation was that

these transfers had been effected for the purpose of placing Pharaoh's assets beyond the reach of potential creditors. This necessarily involved fraud. Order 2, r. 5 of the Grand Court Rules provides that any claim by a plaintiff which is based on fraud should be begun by writ. Had the proceedings by way of equitable execution been begun by writ, the plaintiffs would have been required to file proper pleadings with adequate particulars. Full discovery could have been enforced.

It was argued that, by using the process of a summons in cause No. 389/92, the plaintiffs had evaded the requirements of this rule, the object of which was clearly to ensure procedural protection for defendants against whom such grave charges were being made.

Without in the least undermining the importance of the rule, it remains nonetheless a rule of court. As such, it is subject to O. 2, r. 1 which reads in part –

> "(1) Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein…
>
> (3) The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

The rule is stated in broad and positive language and should not be constrained by judicial interpretation. There may well be cases in which breach of O.5, r.2 (b) could clearly lead to

injustice. In such circumstances a Court could intervene to prevent this. In my view, this was not such a case.

The central issue being considered in cause No. 389/92 was the source of funds used to purchase the shares in the Attock Oil Company (AOC). Dr. Pharaon's case was that he borrowed money from FIIL which he had subsequently repaid. The case for FIIL was that the money was at all times its money. There had been no loan and no repayment of that loan. The conspiracy sprang from the manipulation of the books of FIIL to create apparent support for Dr. Pharaoh's claim. The evidence did, however, refer to the transfer of shares from Pharaoh in 1991 through intermediaries to CITSA. Among those shares were the shares in ACL. Mr. Whitbeck testified that ACL had been under the control of Dr. Pharaon since 1990 and that as director of CITSA, he was willing to transfer the shares to the Preservation Receiver.

The background of the fraud alleged had been explored in the course of the hearing of cause No. 389/92. As will be detailed, an official of Pharaoh had admitted on oath that, on the instructions of Dr. Pharaon, he had transferred the shares, among them the shares in ACL, from Pharaoh to place the assets of Pharaoh beyond the reach of a potential creditor. In those circumstances, the use of a summons in that action to initiate the process of equitable execution was not tainted by procedural unfairness likely to result in an injustice to the defendants. There is no need to have the summons set side and the process recommenced.

One issue deserves mention. The argument relating to the alleged procedural breach was raised by counsel for CITSA at the hearing before Graham, J. His written judgment makes no reference

to it whatsoever. Mr. Malins informs us that the judge did overrule the objection. No note of what he may have said then appears in the bundles placed before us. It is very much in the nature of a preliminary point and could very well have been dealt with orally at the close of the argument with no reference being made to it in the subsequent written judgement. I agree with Mr. Malins that the fact that the appellant continued thereafter to take part in the proceedings would not have amounted to a waiver of the alleged irregularity.

Mr. Malins urged emphatically that Graham, J. had been guilty of misconduct in the hearing of the summons. He levelled four charges at the judge.

(1) He interrupted Mr. Mortimer, the expert witness for the defendants in such a manner as to interfere with his giving of his evidence.
(2) He intimidated the witness by threatening to take steps to have disciplinary or indeed criminal proceedings taken against him.
(3) He interrupted counsel for the defendants in his cross-examination of Mr. Dunkley, the expert witness for the plaintiffs, in such a manner as to reduce its effectiveness.
(4) He indicated in the course of the hearing an attitude of bias and predisposition towards the case for the plaintiffs in contrast to the case for the defendants.

A reading of the transcript of the evidence of Mr. Mortimer does support a charge that the judge interrupted him frequently. He also made it plain that he was inclined not to accept his evidence. An affidavit setting out Mr. Mortimer's opinion had been put in evidence by the defendants.

The cross-examination began at p.42 of the transcript. By page 47 the judge states to him-

> "May I say, I am noting down here that at the moment a provisional feeling, provisional impression of evasive is being given. Now that may not be my final view, but do be warned Mr. Mortimer, I am watching you with great care."

At page 86 to 87 of the record the trial judge warns Mr. Mortimer that the evidence he was giving could be used against him in a possible trial for perjury. He warns him that he need not answer any further questions which may be put to him but any answers he gave may be given against him in a possible trial for perjury.

In the circumstances of this case I am not disposed to hold that frequent interruption and the issuing of the type of threats which were issued form a sufficient basis for holding that the trial was unfair. Mr. Mortimer was an experienced lawyer. The side for which he gave evidence was represented by an experienced junior practising at the English Bar. There was the necessary protection if the judge was being unfair. A reading of the evidence leaves me with the impression that despite the threats and the interruptions Mr. Mortimer held his ground.

In my view, there was certainly no basis for the threat of perjury. The opinions being expressed were opinions on issues of law. There was no misstating of relevant statutory provisions designed to mislead the judge. There may well have been faulty logic and interpretations which appeared to conflict with common sense. But not infrequently, the uninitiated have been driven to exclaim that "the law is an ass". I can find nothing in the record to support the view that Mr. Mortimer was not expressing his honest opinion, misguided though it may have been.

Having considered the record I do not find support for the criticism that the judge interrupted Mr. Lavender in his cross-examination of Mr. Dunkley in such a manner as to reduce its effectiveness. There were occasions on which the judge's intervention would appear to have been misguided. At page 13 of the record, for example, he objected to a question asked by Mr. Lavender as being "open ended". Mr. Lavender had drawn the witness attention to section 9(1) of the International Business Company Act and had asked what he understood by the phrase "protect the assets of the company". In his view, Mr. Lavender should have put to the witness what his case was on the issue and then sought his views on that.

The question was, in my view, quite proper. A lawyer called as an expert can quite properly be asked to state his interpretation of a phrase in a statute. The expert may well express an unwillingness to do so unless against a background of agreed facts. Putting one's case to a witness arises in a context of material facts, matters heard and observed by the witness. It is intended to give the witness an opportunity to accept them or deny them. This enables the judge to have as full a picture as possible when discussing the material facts. Although a finding or a question of foreign law is a question of fact it is in a different category. It involves a choice between conflicting opinions.

Indeed, in the course of the exchange, Mr. Cohen intervened to explain to the judge the objective which he thought Mr. Lavender was seeking to achieve by his line of cross-examination. In the end Mr. Lavender desisted. This incident appeared to me to be the worst example of the type of interference comprised in the complaint.

Inevitably the temperament of judges will vary widely. Some will be assertive, others more inclined to sit and listen. Counsel will, understandably, prefer the latter. Where the judge is assertive, counsel of experience like Mr. Lavender, should be quite able to insist politely but firmly on putting his client's case and to stand up to the judge in the interests of the client whom he represents.

There is also the complaint that the judge made quite clear his predisposition to the case of one party as opposed to the other – an indication of bias. I do not understand that there was any charge that the predisposition was in any way based on the identity or personality of the parties. It sprang from the fact that Mr. Mortimer's exposition of Bahamian law was open to the interpretation that it permitted fraud on creditors without recourse. In his evidence, Mr. Mortimer referred to more than once the importance of not confusing morality and law.

While accepting without reserve the test laid down in R. v. Gough [1973] A.C. 646, the circumstance of this case must be borne in mind. This was a trial by a judge in the Grand Court sitting alone. Any decision which he reached had to be written and reasoned. It could be subjected to close and analytical scrutiny. Unless the clear expression of the judge's predisposition to the plaintiffs in this case could be shown to have interfered with the full and proper presentation of the case for the defendants, I do not think it should be upset on the basis of bias which in this case essentially is procedural unfairness. It can be examined on its merits and supported or reversed. While the judge's conduct can be described as lacking balance, this did not reach the level of frustrating a fair presentation of the case for the defendants.

I turn now to an examination of the judge's conclusions on one of the central issues in this case – his findings on the applicable Bahamian law. It is common ground that these findings are findings of fact and must be based on the evidence led before the judge. An attractive presentation in the course of the argument of the view sought to be established by the expert must not be allowed to prevail if the basis of the presentation does not rest firmly on the evidence led.

The plaintiffs' case was that Pharaoh, the registered shareholder of the shares in ACL, had transferred the shares to PHL Holdings and from PHL Holdings to CITSA without the payment of any consideration. At the date of the transfer there was litigation pending which could result in a substantial judgment against Pharaoh on a guarantee which it had given to secure a loan advanced to finance the purchase of real property in the City of London. A fall in the real property market made the completion of the transaction quite unprofitable. There was default and a call for payment under the guarantee. While negotiations were pending, Dr. Pharaon, the sole shareholder and director of Pharaoh, authorised the transfer of the shares to strip Pharaoh of its assets and make it judgment proof. The strategy was that the claimants under the guarantee would discover that nothing could be extracted from Pharaoh in execution. Instead of pursuing a lengthy and expensive search for hidden assets on which to levy execution in satisfaction of any judgment they would obtain, they would accept a reasonably attractive sum offered in settlement though far below the judgment which could be entered. The strategy was successful.

The case for the defendants was that the transfer was not an exercise in asset stripping. It was a restructuring of Dr. Pharaon's assets geared to rearranging the beneficial interest held by the beneficial owners of the share in the company – Dr. Pharaon's two wives and his sons. The opportunity was taken to adopt new names for the companies as the existing names had become somewhat besmirched in the investigation of the collapse of ICIC and FIIL.

Mr. Dunkley, the plaintiff's expert, testified that under Bahamian law the transfers were void. They had been fraudulently made with the intent of cheating creditors. The relevant section was s. 9(1) of the International Business Company Act (IBC Act). This section made it unnecessary that directors should show that corporate benefit must arise from the exercise of their powers but the exercise of these powers must be bona fide. The powers cannot be used to perpetrate a fraud on the company.

Mr. Mortimer's view was that Pharaoh was not a creditor under the Act and that transactions under the Act could be challenged only by a creditor. In cross-examination by Mr. Bueno, representing the Receiver, he agreed that the Receiver now suing on behalf of Pharaoh was a creditor.

There was adequate evidence to support the finding of the trial judge that Mr. Dunkley had testified correctly regarding the law of the Commonwealth of the Bahamas.

It was argued that the trial judge ought not to have undertaken on this application to make findings on the law of the Bahamas. It was stated in argument that there were proceedings

before the Courts of the Bahamas in which precisely the same issue had arisen. It was submitted that the hearing of the instant summons should be adjourned pending the determination of the Courts of the Bahamas on the proper interpretation of the IBC and Fraudulent Dispositions Acts.

There was no indication as to a likely date when the proceedings in the Bahamas would be concluded. They were not under the control of the plaintiffs. It was not disputed that the Courts of the Cayman Islands had jurisdiction to determine this application for carrying out execution of a judgment delivered by them. The issue of a stay was purely one of discretion. I see no reason for interfering with the exercise of discretion by the trial judge in this case in determining the application.

There remains the issue as to whether the summons was properly tried as it was on the affidavits and on the record of the evidence of Mr. Whitbeck below with no cross-examination except of the expert witnesses on either side.

There was an agreed order for directions made on 12 June, 1998. It provided for the filing of affidavits on the issue of Bahamian law by an expert on behalf of both sides. The witnesses were to attend for cross-examination on 22 July, 1998. Any application by the Defendants under O. 24, r. 10 of the Grand Court Rules (which deals with discovery) was to be issued within seven days and to be made returnable for hearing on 15 July – 7 days prior to the date of hearing. There was a time estimate of two days for hearing. These directions appear to contemplate a full trial.

The hearing proceeded in three stages –

(1) taking the evidence of the expert witnesses – which was essentially cross-examination on their affidavits;

(2) hearing of arguments on the question of the correctness of the procedure which had been used – that is the commencement of the proceedings by way of summons; and,

(3) hearing of arguments on the facts to decide whether on the evidence before the Court an issue had been raised which could be formulated for determination at a further hearing.

It is the appellant's contention that at that stage of the proceedings the trial judge could not have correctly decided that there was no such issue. To succeed in their application there was a burden on the respondents. A finding of fraud ought not to have been made purely on the basis of affidavit evidence. Accordingly, the judge was wrong in concluding that there was no issue to be formulated for determination at a further hearing.

The bases on which the trial judge rested his conclusion was the evidence of Mr. Whitbeck and correspondence exchanged between employees of Dr. Pharaon at or about the date of the making of the transfers.

Mr. Whitbeck was called as a witness for CITSA at the trial before Schofield, J.

His evidence has been extensively quoted in the judgment of Graham J. In effect, Pharaoh and its chairman, Dr. Pharaon, had been advised by leading silk in England that Pharaoh had no defence to a potential liability of eight million pounds under a deed of guarantee given by one of its officials as part of the financing of a real estate trading operation in London referred to as Citygate. At a meeting to discuss this advice, Mr. Whitbeck stated that Dr. Pharaon instructed him –

> "... to transfer all of Pharaoh's transferable assets ... up the chain of ownership to PHL Holdings so that we could honestly tell the beneficiary of the guarantee in the context of settlement negotiations that it would be better off to accept our settlement offer than to force Pharaoh into liquidation. Fortunately this approach was successful and an amicable settlement was reached pursuant to which two million pounds was paid to the beneficiary of the guarantee on behalf of Pharaoh in full and final settlement."

When pressed to concede that this transaction had been entered into with a view to cheating creditors, he replied –

> "As I hope you will appreciate Mr. Cohen, I have tried in these statements to be absolutely honest even on what is surely not a glorious page in the history of the Pharaoh group ... I could easily see that if it had come to the circumstance where there was a final judgment, if there had been a decision not to have the group pay the final judgment on behalf of Pharaoh and Pharaoh were put into liquidation, the aggrieved party would no doubt have argued that these transfers were void or voidable for the reasons you suggest, and that is why I was so greatly relieved personally that an amicable settlement was reached and we never got to that part."

Mr. Whitbeck went on to say that he was not proud that these instructions had been given and he could not say that he was proud he had carried them out but in his words – "I suppose as a man with a wife and four children one sometimes makes decisions of which one is not proud."

In the final analysis, he accepted that the transaction had the potential to be something that became dishonest. Mr. Whitbeck also suggested to Dr. Pharaoh that he might wish to create a new group identity under the "Concorde" name – hence CITSA. The occasion could also be

used "to increase the beneficial interest of his two sons in the group … while correspondingly reducing the beneficial interests of their mothers." Dr. Pharaoh's eldest son had recently become twenty-two and was ready for active involvement in the group's business.

In an affidavit filed in the Court, Dr. Pharaon stated that this restructuring was the reason for the transfers. Mr. Whitbeck's evidence places the emphasis in the reverse. Since the transfer would be taking place it was opportune to effect restructuring.

Dr. Pharaoh did not attend to give evidence at the trial of cause No. 389/1992. There was agreement that he would testify on a video link. These arrangements did not materialise. Alternative arrangements were made for taking his evidence by telephone. On the advice of his lawyers he declined. There was no indication that he was prepared to attend for cross-examination on the hearing of the summons.

It was argued that the respondents had no opportunity to cross-examine Mr. Whitbeck. The fact is that he was their witness at the hearing of cause No. 389/1992. They had put him forward as a witness of truth. The record shows that Mr. Sibley who then appeared for CITSA did not re-examine Mr. Whitbeck. There was no effort to put a gloss on his evidence in cross-examination.

In arriving at his conclusion, the trial judge drew an analogy between the situation before him – namely whether there was an issue to be tried - and the situation which arises normally on an Order 14 summons for summary judgment. Argument can often be misleading but, in my view,

it has not led to error in this case. The trial judge could properly have found that the explanation given by Dr. Pharaon in his affidavit which he had deliberately refused to support by attendance for cross-examination was inadequate to raise an issue in the face of Mr. Whitbeck's evidence and the contemporaneous correspondence.

In the result, the appeal should, in my view, be dismissed with costs.

ROWE, J.A.

This is an appeal against the Judgment of Graham J. entered on August 3, 1998.

THE BACKGROUND

The Appellant before the Court was Concorde International Trading SA (CITSA), a company incorporated in Panama. Pharaoh Holdings Limited (Pharaoh) the 4th Appellant/Defendant is a company incorporated in the Bahamas and was a holding company which held shares in a large number of companies, including 100% of the issued shares in Attock Cement Limited (ACL), a company incorporated in the Cayman Islands. At all material times, Ghaith Pharaon (Pharaon), the 3rd Appellant/Defendant, was the sole shareholder and director of Pharaoh. There was incorporated, in the Bahamas, another company, PHL Holdings Limited (PHL), a wholly owned subsidiary of Pharaoh, and of which Pharaon was the sole shareholder and director.

On or about February 27, 1991, all Pharaoh's assets, including its shareholding in ACL, were purportedly transferred to PHL, and no consideration was given for these transfers. On or about May 14, 1991, PHL purportedly transferred the entirety of the share capital of ACL to its wholly owned subsidiary CITSA. In none of these transfers was consideration given. Pharaon was at all material times the sole director and shareholder of Pharaoh and of PHL and was one of the directors of CITSA.

The substantive action Cause No. 389 of 1992 was tried by Schofield J. in 1995. He held that Pharaoh was guilty of conspiracy to defraud the Respondents to this appeal by falsifying their accounting records. The Court ordered that damages be assessed under a number of heads. Two such assessments of damages have already taken place. In the first assessment Murphy J. assessed damages at $2,133,503.00 plus interest. Later this Court assessed damages under another head of damages at $2,158,626,583.00. Both judgments have been wholly unsatisfied.

There are pending certain proceedings in the Bahamas in action No. 1315 of 1992. The Respondents/Plaintiffs are the Plaintiffs in the Bahamas action while the Defendants are Pharaoh, Mr. Pharaon and CITSA. The affidavits which have been referred to in the affidavit of Mr. Lester James Mortimer and which are enumerated later in this judgment were all filed in the Bahamas action. The issues in the Bahamas case are whether the transfer of the shares in a Bahamian company by Pharaoh to PHL which in turn transferred them to CITSA was void, voidable or valid.

The Respondents/Plaintiffs in the action before the Grand Court, by Summons dated May 15, 1998, sought to enforce by equitable execution the two judgments assessing damages (by Murphy J., and by the Court of Appeal) over the property of ACL, the Caymanian company. CITSA, in whose name the ACL shares are registered, contested the claim.

At the hearing of the Summons, Graham J. entered an order directing the Preservation Receiver to rectify the register of members of ACL by recording Pharaoh as the holder of 100% of the issued shares of ACL and by deleting entries in the ACL register of members since 1991 which purport to transfer any of the shares in ACL to CITSA. He further ordered that receivers by way of equitable execution be appointed over the shares in ACL to replace the Preservation Receiver and that the execution receivers change the board of ACL and take steps to convert the shares of ACL into cash to meet Judgment debts owed by Pharaoh to the Appellants/Respondents. Against the judgment and order of Graham J., the Appellant has filed and argued a series of grounds of appeal.

THE PROCEDURE BEFORE GRAHAM, J.

The Summons were filed on May 15, 1998. Graham J. held a scheduling conference on June 12, 1998 to devise orders and directions to determine how the parties should proceed on the Summons. Counsel for the Plaintiffs, for CITSA and for the Receiver of ACL were heard. The Order of the Court recited that it was made "Upon the parties having agreed terms and conditions". The Order provided for each party to be at liberty to file an affidavit from an attorney expert in Bahamian law and for that attorney to attend and be cross-examined on July

22, 1999. The parties were directed to file Skeleton Arguments and a list of authorities by July 15, 1998.

When the matter came on to be heard the parties provided to the Court a set of uncontested facts and a set of disputed facts. The uncontested facts are summarized at the beginning of this judgment. The disputed facts were set out in this manner:

> "8. Disputed Facts.
> There are only two matters of material fact which are in dispute between the plaintiffs and CITSA. They are as follows:
>
> 8.1 What is the relevant law of the Bahamas on the transfers?
> 8.2 Was the transfer of ACL's shares on 27th February 1991 made:
>
> 2.1 dishonestly, as part of a dishonest scheme entered with the intention of defrauding creditors (the plaintiff's contention), or
>
> 2.2 as part of a bona fide corporate re-organization the purpose of which was to place Pharaoh's assets under a new holding company called Concorde and to increase the indirect beneficial interest of Pharaon's children in the shares and reduce their wives' interest (CITSA's contention), or
>
> 2.3 If the transfer of ACL's shares on 27th February 1991 was made as part of a dishonest scheme entered with the intention of defrauding creditors, was it ineffective on the grounds that Pharaon as the sole director of Pharaoh had no power to effect the transfer under Bahamian law."

It is unclear at what point these "Uncontested and Disputed Facts" were provided to the Court. They were not ordered at the scheduling conference on June 12, 1998 and they are not referred to in the record of the proceedings on July 22, 1998. It appears from that record, however, that the Court was addressed after the expert witnesses had been cross-examined but no record of what transpired then forms part of the record.

For the convenience of the two expert witnesses who had come to the Grand Court from the Bahamas, by agreement of counsel, Graham J. heard the cross-examination of the witnesses prior to submission by the Appellant's counsel on a preliminary point. Again the record of proceedings on July 22, 1998 does not show what was the preliminary point and what, if any, was the ruling thereon.

Graham J. was provided with an Affidavit from Mr. Lester James Mortimer, expert in Bahamian law, on the part of CITSA, in which he exhibited a bundle of correspondence which included the following:

(a) An Affidavit of Farid Djourhi sworn to on 2nd April, 1998;

(b) The Affidavit of John Arthur Ross Williams sworn to on the 20th April,1998;

(c) The Affidavit of Mr. Pharaon sworn to on 21st April, 1998, pages 619-624;

(d) The second Affidavit of John Van Husan Whitbeck sworn to on 29th April, 1998, pages 669-691;

(e) The second Affidavit of George Clifford Culmer sworn to on 24th April, 1998, pages 692-735;

(f) The seventh Affidavit of Mr. Charlton sworn to on 28th April, 1998, pages 746-792;

(g) The second Affidavit of Mr. Williams sworn to on 29th April, 1998, pages 793-798.

In addition the learned trial judge had before him the Statement of Mr. Whitbeck dated February 8, 1995 and the cross-examination of Mr. Whitbeck on March 28 through March 30, 1995 in Cause No. 389 of 1992. In his judgment, the learned trial judge stated that there was a

considerable volume of evidence before him and he referred specifically to the affidavits of Mr. Pharaon, Mr. Djourhi, Mr. Williams and Mr. Zavahir.

THE GROUNDS OF APPEAL

CITSA filed notice and grounds of appeal in which 13 separate grounds were identified. Before us, Mr. Malins presented his arguments under four broad grounds and submitted that on any one of these grounds the appeal ought to be allowed, although with different consequences. These grounds may be conveniently set out below:

(1) The conduct of the proceedings below was such as to deprive CITSA of a fair hearing and/or alternatively such as to display bias, so that in all the circumstances this Court should conclude that there was a real danger that CITSA was not given a fair hearing or that the Judge had predetermined the case. If that ground succeeded, the result would be that the Court should set aside the judgment of Graham, J. and remit the case for hearing before another judge.

(2) The legal process which the Respondents/Plaintiffs adopted and which the Court approved was flawed and improper, with the result that the appeal should be allowed and the Plaintiffs' Summons should be dismissed without creating a *res judicata* issue as to the validity of the transfer of the ACL shares.

(3) The Court below ought to have stayed proceedings in the Grand Court to await the decision of the case in the Bahamas on whether the transfer of shares to PHL was valid or not.

If this ground of appeal succeeded the result would be that the appeal would be allowed, the judgment set aside and the case sent for trial before another judge.

(4) If CITSA was wrong on grounds 1-3, it was submitted that the Court ought to allow the appeal on the merits. An application had been made to the Grand Court on the basis that the decision of Graham J. was interlocutory and the Court held that it was a final judgment. If the appeal is allowed on the merits, the Court would be asked to dismiss the Summons and a *res judicata* situation would arise as to the validity of the share transfers.

DISCUSSION

GROUND 1 It was expressly agreed between the parties that each would file an affidavit from an expert on Bahamian law and that each expert would attend court to be cross-examined on his affidavit. At issue was whether under Bahamian law the share transfer from Pharaoh to PHL in February 1991 was void, voidable or valid. The International Business Companies Act, 1989 of The Bahamas, (IBCA), came into effect on January 11, 1990. In section 9(1) it is provided, inter alia, that:

> "Subject to any limitations in its Memorandum or Articles, this Act or any other law for the time being in force in the Bahamas, a company incorporated under this Act has the power, irrespective of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company, including the power to do the following:
> (i) protect the assets of the company for the benefit of the company, its creditors and its members, and at the discretion of the directors, for any person having a direct or indirect interest in the company."

Section 9(2) enables the directors of an IBCA company to transfer property to persons on trust. This section is made for the purposes of section 9(1)(i) and the power must be exercised subject to the law of fraudulent preference, and the law as to dispositions made with intent to defraud creditors.

Section 10(1) of the IBCA provides in part, that:

> "No act of a company incorporated under this Act and no transfer of real or personal property by or to a company so incorporated is invalid by reason only of the fact that the company was without capacity or power to perform the act or to transfer or receive the property, but the lack of capacity or power may be pleaded in the following cases:-".

The two sets of cases set out in the Section relate to proceedings by a member against the company and in proceedings by the company.

Section 53 of the IBCA provides:

> "Every director, officer, agent and liquidator of a company incorporated under this Act, in performing his functions shall act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".

There is one other statutory provision which must be mentioned at this time. It is the Fraudulent Dispositions Act of 1991. In section 4(1), the Act provides that:

> "Subject to the provisions of this Act, every disposition of property made with an intention to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced". And Section 4(3) goes on to provide that: "No action or proceeding shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition".

And section 4(3) goes on to provide that:

> "No action or proceeding shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition."

Lester James Mortimer was selected by the Appellant as its expert in Bahamian law. Philip Christopher Dunkley was selected as the expert in Bahamian law by the Respondents. Both Mr. Mortimer and Mr. Dunkley were legal representatives of the parties on whose behalf they appeared as experts and represented the parties in the Bahamian action. Graham, J. correctly criticized the selection of these particular persons as the expert witnesses.

At paragraph 7 of Mr. Mortimer's Affidavit, he expressed the opinion that:

> "As to the issue of Bahamian law which arises on this application, in my opinion even if the transfer by Pharaoh was, as the Plaintiffs allege, made with the intent of defrauding Pharaoh's creditors, this did not render the transfer void or voidable at the instance of Pharaoh".

It is this opinion of Mr. Mortimer which was the focus of all the cross-examination which was directed to him.

The trial judge had taken the opportunity to pre-read the affidavits of Mr. Mortimer and Mr. Dunkley. He observed the differences in the approach and in the opinions expressed by each expert witness and he ordered that a court reporter take a shorthand note of the cross-examination of these expert witnesses. The record discloses that Graham J. had formed a clear presumptive view that the affidavit evidence of Mr. Dunkley should be preferred to that of Mr. Mortimer. This became apparent within three minutes of the commencement of the cross-examination of Mr. Dunkley by Mr. Lavender, then counsel for the Appellants. Mr.

Lavender was trying to ascertain from Mr. Dunkley the limitations on the powers of the company under Section 9(1) of the IBCA. Mr. Dunkley answered the question without any problem, but the Judge asked the question: "Would that include cheating wives?" The Court went on to ask two more questions which would have the effect of defeating the purpose of Mr. Lavender's cross-examination on the limitations, if any, to Section 9(2).

When Mr. Lavender attempted to ask the expert witness a perfectly legitimate question as to what he understood the phrase " to protect the assets of the company" to mean, the Court interrupted Mr. Lavender and lectured him in the presence of the witness which he cross-examining. And as Mr. Lavender tried to develop a point as to whether bona fides is tested by whether or not it is in the interest of the company, the learned judge commented that the proposition of Mr. Lavender sounded like “legal garbage in any civilised jurisdiction". A comment of that nature must rattle any counsel even one with nerves of steel and the good manners of Emily Post.

An entirely different picture was presented when Mr. Mortimer came to be cross-examined by Mr. Cohen. Not once did the learned trial judge interrupt Mr. Cohen to suggest that a question was wide of the mark or repetitive or not reflecting what the witness had said previously. Two minutes after Mr. Cohen commenced his cross-examination of Mr. Mortimer, the witness began to respond that there could be a distinction between what is morally dishonest and what is illegal. The learned trial judge cut him short and admonished him to remember who he was and what he was and where he was and to answer counsel's questions. Four minutes later Mr.

Cohen was still probing Mr. Mortimer on this distinction between "dishonesty and unlawful" when the Court intervened and said:

> "Mr. Mortimer, you are being cross-examined. You will answer the questions that counsel put to you unless I rule that they are improper. Now Mr. Cohen will you repeat your question and will you - may I say, I am noting down here that at the moment a provisional feeling, provisional impression of evasive is being given. Now that may not be my final view, but do be warned, Mr. Mortimer, I am watching you with great care".

At this point Mr. Cohen had not indicated in any way by a repeat of his question that he was being impeded in his cross-examination by the manner in which Mr. Mortimer was responding to his questions. Mr. Mortimer was asked if section 9(2) of the IBCA could have no application to the circumstances of the case and he began to respond by saying, " It may not, but I ..." The Judge cut off the witness, warned him to be careful, to remember who he was and to remember where he was. At one point on the record the Court stated that Mr. Mortimer had made an admission "under pressure from the Court". At still another point, the Court warned Mr. Mortimer to be careful and issued a threat to submit a copy of the proceedings to the Chief Justice of the Bahamas so that disciplinary action could be contemplated against Mr. Mortimer.

The cross-examination reached a point where Mr. Mortimer was being asked to state that since he had admitted that the bases for his opinion were wrong, then his opinion must also be wrong. Mr. Mortimer did not accept that proposition, upon which the Court again warned Mr. Mortimer of the "disastrous consequences" which could befall him if he continued to respond in that vein. Mr. Cohen stated that he was going to ask Mr. Mortimer some questions to suggest that Mr. Mortimer was being dishonest. Thereupon the Judge embarked upon a perjury warning. The witness sought an opportunity to take legal advice. Before the Court recessed,

Mr. Cohen made it plain to the Judge that he did not have an interest in chasing Mr. Mortimer personally. The Judge said he had a public duty to perform and he had to caution the witness in a proper way before he was cross-examined as to dishonesty in his opinion.

The court recessed and on its resumption the Judge refined the definition of perjury which he had given to Mr. Mortimer earlier in the day. The cross-examination continued for another 44 minutes, including the period in which Mr. Mortimer was cross-examined by Mr. Bueno, counsel for the Receiver of ACL.

Immediately as Mr. Lavender announced that he did not wish to re-examine Mr. Mortimer, the learned trial Judge began to give a ruling as to his decision on the issue of Bahamian law. Mr. Cohen would have none of it. He got to his feet before the Judge could over commit himself and reminded the Court that the parties had not had the opportunity to address the Court. There were issues other than that relating to Bahamian law which had to be presented and decided, including the preliminary point which had been reserved at the commencement of the hearing. The very agile intercept from Mr. Cohen, gave the parties an opportunity to continue the proceedings and to the eventual judgment by Graham, J. on August 3, 1998. The Judge included a report to the Chief Justice of the Bahamas on the conduct of Mr. Mortimer as a part of his judgment.

The learned trial judge had been caught up in the presentation of the case in an inappropriate way. He was not prepared to accept that Mr. Mortimer could honestly hold the opinions which he expressed in his affidavit and in the course of cross-examination. The trial Judge expressed

some contempt for the notion that anyone could honestly hold an opinion that there could be a distinction between morality and illegality. The trial judge was generous in his lectures to Mr. Lavender on proper cross-examination, yet from time to time when he entered the arena and cross-examined Mr. Mortimer on issues as to whether an unlawful act would inevitably cause a share transfer to be void, Mr. Cohen simply did not embrace that line of cross-examination, and picked up on a less rigid approach.

In R. v. Stephenson, (1974) 22 W. I. R. the Jamaican Court of Appeal considered and applied the decision of Lawton, L. J. in R. v. Hulsi and Purvis, (1974) 58 Cr. App. E. 382. There, Lawton, L. J. said:

> "Counsel who appear in English Courts have to be robust. They must be prepared to take the knocks and misfortunes of advocacy and one of the difficulties they must learn to cope with is the judge who is not entirely fair to them. But it is another matter when unfairness to counsel has had bad effect upon the accused. These constant criticisms of Mr. Parrish may well have led the jury to think that the appellant's counsel was in some way behaving in a tricky manner, the object of which was to mislead them.
>
> "If Mr. Parrish's complaints about the judge had stopped there, the appellant's case in this court would not have been very strong, but a much more serious matter must now be considered. It is a fundamental principle of an English trial that, if an accused gives evidence, he must be allowed to do so without being badgered and interrupted. Judges should remember that most people go into the witness-box, whether they be witnesses for the Crown or the defence in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find almost as soon as they get into the witness box and are starting to tell their story, that the judge of all people is intervening in a hostile way, then human nature being what it is, they are liable to become confused and not do as well as they would have done had they not been badgered and interrupted".

Although Hulsi and Purvis was a criminal case, it shows such common sense, and preserves the dignity of the trial process in any kind of court, that the teaching of Lawton, L. J. on hostile

interventions by judges should rise to the table of first principles for all judicial officers in all kinds of adversarial litigation.

Mr. Malins submitted that there was a real danger of bias on the part of the trial judge and in the circumstances the appeal should be allowed and a new trial ordered. In R. v. Gough, (1993) A. C. 647, the House of Lords stated the principle to be applied where an allegation of bias is made in a case. For his part Lord Goff stated that it was both possible and desirable that the same test should be applicable in all cases of bias whether concerned with justices or members of other inferior tribunals or with jurors, or with arbitrators. He said that the test should be stated in terms of real danger rather than the test of real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. The Court should ascertain the relevant circumstances and then:

> "ask itself, whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him."- page 670.

A mass of affidavit evidence had been provided to Graham, J. and as I have said earlier, he had pre-read those affidavits and had taken provisional views of the evidence. There had been no proposal before him to call for cross-examination the witnesses whose affidavits had been placed before him other than those of the two expert witnesses. As a consequence he could have made fairly firm provisional views based on those affidavits, subject only to be persuaded otherwise by the submissions of counsel. This is an unusual circumstance and must be taken into consideration in determining whether there was a real danger of bias on the part of the judge. At the time when Graham J. was hearing the case, the evidence as to the efforts at

judgment proofing had all come from sources connected to Pharaoh and CITSA and on this evidence he could have formed provisional views unfavourable to CITSA.

Although Mr. Lavender had not been given an easy passage while he was cross-examining Mr. Dunkley, he had a perfect right to rise to the protection of his own witness, Mr. Mortimer, when he was in the witness box. At no time during the proceedings did Mr. Lavender protest to the Judge that Mr. Mortimer was not being given a fair chance to answer questions. In R. v. Stephenson, supra, when the trial judge, dissatisfied with the manner in which defence counsel was cross-examining a witness, commented: "My patience is running out". Defence Counsel properly responded I am terribly sorry if that is the case M'Lord, but I stand here to do a duty, and I am sure M'Lord would appreciate that I must do that duty"- page 467.

Had Mr. Lavender given such a gentle reminder to the learned judge, the proceedings might have proceeded in a somewhat different manner.

After much agonising over this matter, I have come to the conclusion that the learned trial judge took the licence of robust conduct to the very edge, but that the circumstances in which he had read all the evidence except for the cross-examination of the expert witnesses, there was not the real danger of bias as contended for by the appellant. This ground of appeal therefore fails.

GROUND 2 The Appellant contends that this was a case in which the Respondents were alleging fraud and therefore the proceedings should have been commenced by Writ. It

was submitted that proceeding by way of Summons, which the Respondents adopted and which the Court approved, was a flawed and improper process as it enabled the Respondents to avoid pleadings, to engage in discovery and to produce witnesses for cross-examination. The Respondents say that the procedure adopted was the only appropriate one in the unique circumstances of this case, that it had the consent of the Appellants and that it was now much too late for the Appellants to challenge the procedure.

A Preservation Receiver had been appointed in the Cayman Islands over the property of ACL. The Respondents were alleging that the shares in ACL were the property of Pharaoh and sought by way of equitable execution, a declaration that the register of Pharaoh should reflect that it owned the ACL shares. Equitable execution is not like legal execution: it is equitable relief which the court gives because execution at law cannot be had. It is not execution but a substitute for execution. Re Shephard (1890) 43 Ch.D. 131, 137. There was no argument before us that the process in this case was not by way of equitable execution.

To obtain equitable execution the matter can be commenced by motion or by summons. As a matter of practice, the proceedings are commenced by summons. When the Summons came before Graham J. the parties agreed on the procedure to be followed and Graham J. entered an agreed Order. Thereafter the parties filed Affidavits and in the proceedings on July 22, 1998, the Appellant took full part in the proceedings. Non-compliance with the Rules of Civil Procedure, does not automatically lead to the invalidity of the process. Non-compliance is to be treated as an irregularity. O.2.r.1(3) of the Civil Procedure Code provides that the Court shall not set aside any proceedings on the ground that the proceedings should have been commenced

by other originating process and O.2.r.2(1) provides that the time to apply to set aside any proceedings for irregularity is, inter alia, before the party has taken any fresh step in the proceedings after becoming aware of the irregularity. The time at which the Appellant ought to have challenged the procedure adopted by the Respondent was when the matter came before Graham J. on June 15, 1998. At that time the Appellant did not request that witnesses other than the expert witnesses on Bahamian law attend to be cross-examined. The parties knew then that the Court would be considering the affidavits presented by the parties.

In this case the parties went further. They identified with particularity the matters which were in dispute between the parties. The Court was to decide whether the transfer of the ACL shares by Pharaoh was part of a dishonest scheme to cheat creditors or if it was part of a bona fide scheme of re-organisation of the company. The parties had the opportunity to say whether Mr. Whitbeck or any other witness should be called for cross-examination. This was not done. The matter was never raised by the Appellant on June 15, 1998.

The Courts have held that in cases where dishonesty is being alleged it should be clearly pleaded and properly proved. Claudius Ash, Sons & Co. Ltd. v. Invicta Manufacturing Co. Ltd., (1912) 29 RPC 465, was a case of infringement of a trade mark and passing off in which the allegation was made that the Defendants intended to deceive. Lord Loreburn L.C. in relation to the issue of intention to deceive said:

> "To any such charge there must be, however, two conditions. The first is that it ought to be pleaded explicitly so as to give the defendant an opportunity of rebutting the accusation of intent. The second is that it must be proved by evidence".

In this context Mr. Malins also referred to the decision of Harre, J. in the case of Johnson v. Johnson CILR 413, in which a Petitioner in divorce proceedings alleged in a summons to set aside certain leases, that they constituted fraudulent conveyances. The Judge in striking out that paragraph from the Petitioner's summons said that it was a case in which all the parties who are alleged not to have acted innocently were entitled to know precisely what was being alleged against them.

Both Mr. Malins and Mr. Cohen relied on the judgment of Lord Greene M.R., in In re Smith and Fawcett, Ltd. (1942) 1 Ch. 304. In this case the directors of a company had power to refuse to register a transfer of shares and it was being alleged in the action that the directors were refusing to register the shares for a dishonest purpose. Lord Greene said:

> "Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not mean that it is illegitimate in a proper case to draw inferences as to bona fides or mala fides in cases where there is on the face of the affidavit sufficient justification for doing so, but where the oath of the deponent is before the court, as it is here, and the only ground on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I decline to give to those suggestions, the weight which is desired".

This is a case in which there was a full trial before Schofield J. and in which Pharaoh was found to be guilty of fraud. All the evidence which related to the reasons for the transfer of the ACL shares from Pharaoh came from the contemporaneous correspondence of employees or attorneys of Pharaoh. Lord Greene did not say that in a proper case where the affidavits and relevant correspondence show that the deponent was engaged in a fraudulent scheme that the

court could not use affidavit evidence, without cross-examination before it could find fraud. Mr. Malins has argued that Mr. Whitbeck, although a witness for the Appellant at the trial of the substantive action, became a witness for the Respondent in these proceedings as it in his evidence, inter alia, that the Respondent relied to establish the allegation of fraud. On the reasoning of Lord Greene, it was not impermissible for the trial judge to consider Mr. Whitbeck's affidavit where there was nothing whatever doubtful about it. The Court also had before it the correspondence from Mr. Kelsey, a Surveyor and from Mr. Williams, an English Solicitor who represented Pharaoh. He was entitled to look at those documents and to draw inferences.

I agree with the submissions of Mr. Cohen that in the process of equitable execution, the proper procedure was to commence the proceedings in the action No. 389 of 1992. PHL to which the ACL shares had been originally transferred was not a necessary party to the proceedings. It had not given any consideration for its acquisition of the ACL shares from Pharaoh and having transferred the ACL shares to CITSA, PHL had no further interest in the ACL shares. Although there are Bahamian proceedings in which the Respondents are Plaintiffs, the Defendants are different and CITSA is not a party to those proceedings. In any event no point was taken before the trial judge that PHL ought to have been made a party to the proceedings and it is too late to take that point before this court. I therefore find no merit in this ground of appeal.

GROUND 3 The third ground argued by Mr. Malins was that the trial judge ought to have stayed the action in the Cayman Islands to await the outcome of the proceedings in the Bahamas. There was some confusion as to what had been the position of the Appellant at trial.

Mr. Cohen submits that Mr. Lavender who then appeared for the Appellant told the Court that this was not a *forum conveniens* case. In the Bahamas the Respondents have brought an action in Cause 1315 of 1992 against Pharaoh, Pharaon and CITSA as Defendants. This case asks that the register of Interredec Properties Ltd., a Bahamian company, be rectified on the ground that its shares were transferred by Pharaoh to PHL in February 1991 as part of a dishonest judgment proofing scheme. This case gives rise to the similar issues as those which are being litigated in this action.

Mr. Lavender argued at trial that since the issue of Bahamian law has to be determined in order to decide the validity of the 1991 transfers, the Cayman Court should await the decision in the Bahamas Supreme Court and then apply the law as stated by that Court to the instant case. The Respondents resisted the application for stay on the basis that ACL is not a party to the Bahamian action, the ACL shares do not fall to be determined in the Bahamas action, that in any event the Cayman Court would have to be asked to correct the register of the ACL shares as ACL is a Cayman Islands corporation and further that there was no imminence in a decision in the Bahamas action which had been part heard and adjourned for a long time. In the exercise of his discretion, the trial judge declined to adjourn the action.

Mr. Malins argued that Bahamian law is more appropriately decided by the Bahamian Court and if all things are equal, it is better for the issues to be tried in the state to whose law the transaction is subject. In Trendtex Trading v. Credit Suisse (1982) A.C. 679, the House of Lords held that where the proper law of the agreement was Swiss law, it was for the Swiss court to determine what effect the invalidity of the assignment under English law had on the

transaction as a whole and that on the facts there were matters on which the Swiss Courts were better qualified to decide than English Courts and the English action was stayed. I agree with Mr. Cohen that this case is not controlling in that the Bahamian court could not by its decision determine finally the question of the rectification of the share register of ACL. Neither do I think that the decision in Australian Commercial Research and Development Ltd. v. ANZ McCaughan Merchant Bank (1989) 3 ALL E.R. 65, assists the Appellants. In that case the Plaintiff had brought an action against the same defendant in both England and Queensland in respect of the same subject matter and the English Court ordered him to elect in which jurisdiction he wished to proceed and dismissed the English action as on the facts the appropriate forum was Queensland. Even if this was a forum case, the parties to the actions in the Bahamas and in the Cayman Islands are not the same and the subject matter of the claims is not the same. The exercise of discretion by the trial judge ought not to be disturbed and I so hold.

GROUND 4 Mr. Malins submitted that the Appeal should be allowed on the merits of the case. He relied on the provisions of Section 9(1)(i), 9(2) and section 10(1) of the IBCA for the proposition that under Bahamian law, a company registered under the IBCA can lawfully transfer property to anyone if the intention is to protect the assets of the company for the benefit of the company. He argued that Section 9(1) would be a useless provision if it was simply empowering the company to transfer assets to defeat unlawful claims. If the claim is unlawful, said Mr. Malins, it could not succeed in any event. Therefore, he submitted, in order to give efficacy to Section 9(1)(i) the company is given a power to protect its assets from lawful claims.

The battleground, as Mr. Malins termed it, in relation to Bahamian law was what did the experts say in relation to Bahamian law before the trial judge. Mr. Mortimer who provided an Affidavit and gave evidence for the Appellant, did not mention Section 10 of the IBCA in his Affidavit. His opinion on Bahamian law was summarised by him at paragraph 7 of his Affidavit when he said:

> "As to the issue of Bahamian law which arises on this application, in my opinion, even if the transfer by Pharaoh was, as the Plaintiffs allege, made with the intent of defrauding creditors, this did not render the transfer void or voidable at the instance of Pharaoh".

Section 9(1) of the IBCA, in its opening words, makes the section subject to the Memorandum or Articles of the corporation. As I said earlier, the pertinent part of the section provides:

> "9 (1). Subject to any limitations in its Memorandum or Articles, this Act or any other law for the time being in force in the Bahamas, a company incorporated under this Act, has the power of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company."

Our attention was therefore drawn to the Objects of Pharaoh as set out in its Memorandum. These objects were to engage in any business which was not prohibited under any law for-the time being in force in the Bahamas.

One question for the expert witnesses on Bahamian law was whether a scheme to cheat creditors was prohibited under Bahamian law. In his evidence before the trial judge Mr. Mortimer was not consistent as to his opinion on the issue. However, on at least three occasions he accepted the suggestion in cross-examination that Section 9(1)(i) of the IBCA could not lawfully be exercised to cheat creditors. On the other hand Mr. Dunkley, the expert witness

called by the Respondents, understood the issue to be whether Gaith Pharaon, as director of Pharaoh, owed duties to the company to act honestly and in good faith with a view to the best interests of Pharaoh and to exercise the care, skill and diligence that a reasonable prudent person would exercise in comparable circumstances when he transferred the shares in February 1991. He responded to that issue in his affidavit by stating that "the effect of Section 9(1) is to require the corporate powers of a Bahamian company to be exercised by its directors bona fide but there is now no requirement of corporate benefit arising from the exercise of the power".

In his Affidavit of May 5, 1998, Mr. Dunkley deposed that:

> "My opinion is that Ghaith Pharaon, as sole shareholder of Pharaoh, did not have the power under Bahamian law to transfer the shares in ACL to PHL in or around February 1991. As I understand the position the transferee PHL was under similar control to Pharaoh and was acquainted with all the material facts so that there could be no question of PHL being able to rely on the director of Pharaoh having any wider ostensible authority than his actual authority, given that the fraud was known to the transferee. The transfer is void and of no legal effect, as are any subsequent transfers. Accordingly the shares in ACL remain vested in Pharaoh as the owner of such shares".

He was cross-examined by Mr. Lavender but did not resile from any part of this opinion.

It has been submitted by the Respondents that Section 9 is expressly made subject to the provisions of the Act which means that it is subject to Section 53 thereof by virtue of which directors acting pursuant to Section 9 must act honestly and in good faith.

Mr. Cohen has told us that Mr. Lavender did not address the Court on the basis of Section 9(1) or 9(2) of the IBCA. In his written submissions he relied only on Section 10(1). Mr. Malins has submitted that pursuant to Section 10(1) of the IBCA the transfer could not be void and would

at best be voidable. That section, it is to be remembered, provided in part that no transfer of real or personal property by or to a company incorporated under the IBCA is invalid by reason only of the fact the company was without capacity or power to transfer the property but that the lack of capacity or power can be challenged by a member of the company or by the company itself under prescribed circumstances. The Appellant submitted that the Respondents are neither the company nor a member of the company and therefore they lack standing to challenge the transfers.

The answer provided by the Respondents to the argument on Section 10, is that the transfer of the ACL shares would not have been void if the only challenge was as to the power or capacity of the company to effect the transfer. However, what made the instant situation was that the transaction was done dishonestly and not bona fide. Those were issues which the trial judge had to consider and decide upon, having regard to the evidence of Mr. Dunkley and Mr. Mortimer, the experts on Bahamian law. That was the central issue of fact to be decided on the expert evidence.

Two other Bahamian Statutes were relied on by the Appellants before Graham J. and before us on appeal. They are the Fraudulent Dispositions Act 1991 which came into force on April 5, 1991 and the Fraudulent Gifts Act of 1571. Section 4 of the Fraudulent Gifts Act 1991 provides that:

> "4(1) Subject to the provisions of this Act every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor hereby prejudiced.
>
> "4(3) No action or proceedings shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition."

The Appellants say that this statute is applicable to this case and that the Respondents have tried to circumvent the section which had barred any claims by Respondents in 1993. Mr. Dunkley in his Affidavits said that the Act of 1991 could have no relevance to the issues in this case as it came into force after the transfer had taken place in February of 1991.

Of more importance was the relevance of the Fraudulent Gifts Act of 1571. That Act provided, inter alia, that transactions for the purpose of defrauding creditors were utterly void and of no effect as against creditors. Transactions caught by the Act were valid until challenged by a creditor and even then they would be set aside only to the extent necessary to satisfy the creditors. However, by virtue of the Fraudulent Dispositions Act of 1991, a challenge to a transaction under the Act of 1571 could only be made after 5th April 1991, if brought within 6 months of that date.

Mr. Dunkley, after discussing the irrelevance of the Fraudulent Dispositions Act of 1991, accepted that the Fraudulent Gifts Act could potentially apply to a transaction such as the transfer of the ACL shares in February 1991. He stated, however:

> "To the extent that the Fraudulent Gifts Acts do have any application, neither is an exhaustive code, and they do not therefore prevent any challenges to transfers or dispositions on the grounds outside the Act or the Fraudulent Gifts Act. In addition they do not render effective transfers by a person with a title which is either void or voidable outside the scope of this Act".

Graham J. rejected the evidence of Mr. Mortimer. He found expressly that the directors of a Bahamian IBCA company, pursuant to section 53 of the IBCA had a duty to act honestly and in good faith with a view to its best interests which did not include cheating creditors. He found as a fact that cheating creditors was prohibited in the Bahamas on February 27, 1991 and that

cheating creditors was an activity outside the lawful objects of Pharaoh. He found as a fact that Section 9 of the IBCA was inapplicable to the facts of the case because there had been no transfer to trustees, and the section did not permit the company to cheat its creditors nor did it permit the company to act outside of its objects. Although the process of cross-examination of the witnesses expert in Bahamian law which was intended to assist the trial judge in arriving at findings of fact on Bahamian law, left much to be desired due to the descent into the arena by the trial judge, the learned judge had before him a credible body of evidence, to which I have referred above, on which he could make the findings which he did as to Bahamian law.

The legal effect of the findings of fact as to Bahamian law made by the trial judge in this case is that a transfer of shares if made with the intent to cheat creditors is beyond the capacity of the company and is wholly void. As Browne-Wilkinson, L.J., said in Rolled Steel Ltd. v. British Steel Corp. (1986) 1 Ch. 246 at 303:

> "A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void."

If the transaction is within the capacity of the company, but done by the directors in excess or in abuse of the powers of the company, a third party who takes without notice of the irregularity, might be protected under the rule in Turquand's case. But if the transaction is beyond the capacity of the company, it is in any event a nullity and wholly void whether or not the third party had notice of the invalidity. See Rolled Steel Ltd., supra, p. 303 D-E. A transaction which was beyond the capacity of the company could not be ratified by all the shareholders of the company and moreso when the sole shareholder was the sole director of the company performing the invalid transaction and the sole shareholder and sole director of the

third party the beneficiary of the transaction. As Slade L.J. said in the Rolled Steel case at p. 295H-296A:

> "If, however, a person dealing with a company is on notice that the directors are exercising the relevant power for purposes other than the purposes of the company, he cannot rely on the ostensible authority of the directors and, on ordinary principles of agency, cannot hold the company to the transaction."

I accept as applicable law the submission of Mr. Cohen that Sections 9 and 10 of the IBCA do not oust English common law principles and that the dicta of Slade L.J., and Browne-Wilkinson L.J. expressed in Rolled Steel, supra, are applicable in this case.

THE EVIDENCE

One of the two issues identified by the parties for resolution by Graham J. was whether the transfer of the ACL shares from Pharaoh to PHL was done as part of a dishonest scheme entered into with the intention of defrauding creditors or as part of a bona fide corporate re-organisation for the purpose of increasing the interest of Pharaon's children and decreasing the interest of their wives. The challenge on appeal was that the method by which the evidence to determine this issue was obtained was wholly wrong. Mr. Malins submitted that this issue raised questions of fraud and as a consequence there ought to have been a Writ, followed by proper pleadings, discovery and a witness trial. In summary, Mr. Cohen argued that as this was a procedure for equitable execution of a judgment, the proper method was by summons and by affidavit evidence. Parties who wished to challenge the evidence presented on affidavit could call the witness for cross-examination.

Mr. Malins submitted that persons who gave evidence for the Appellants at the trial of the original action before Schofield J. and upon whose viva voce testimony as well as affidavits the Respondents seek to rely for the proof of fraud were in the proceedings before Graham J. witnesses for the Respondents and should have been available for cross-examination by the Appellants. The fatal flaw in that argument is that the parties did not stipulate for that method of proceeding at the Directions stage of the proceedings. They only stipulated for the cross-examination of the two Bahamian attorneys on the issue of Bahamian law. It is much too late to take that point at this stage.

The facts which were presented to Graham J. came exclusively from persons who were closely connected to Pharaoh in 1991 at about the time that Pharaoh transferred the ACL shares to PHL. Pharaoh had been advised by eminent English counsel that it had no defence to a claim for damages by a company called Citigate of some thirteen million pounds sterling, arising from a property deal which had gone sour and for which a guarantee had been given by Pharaoh. Mr. Whitbeck, an in-house attorney for Pharaoh, Mr. Williams an English solicitor who represented Pharaoh , Mr. Kemsley and Mr. Djourhi, agents of Pharaoh, developed a plan which would place Pharaoh's assets outside the reach of Citigate should it succeed in the pending litigation in England. All of Pharaoh's assets were transferred to FIIL and later to other companies, over which Pharaon retained control. There was significant correspondence between these parties as they developed the scheme which they termed "damage control" and which later became known as a "judgment proofing" scheme.

It is unnecessary to recount the facts because the challenge by Mr. Malins was not that on the evidence the Judge made unreasonable findings of fact, but rather that the procedure adopted was incurably flawed.

Graham J. adopted the summary judgment standard in assessing the evidence presented in the affidavits which were before him. That standard is established in Banque De Paris v. de Naray, (1984) 1 Lloyds Law Rep. 21 and National Westminister Bank plc v. Daniel et al, (1994) 1 All E. R. 156. The question which the judge must ask himself is whether there is a fair or reasonable probability of the defendant having a real or bona fide defence. If what the defendant says is not credible, there is no fair or reasonable probability of him setting up a defence. Mr. Whitbeck's evidence and the contemporaneous correspondence which passed between the professional agents of Pharaoh placed the matter beyond doubt that the purpose of the 1991 transfer of shares from Pharaoh to PHL had the overriding motive of placing those assets beyond the reach of Citigate. The conclusion of Graham J. that: "This was a dishonest judgment proofing scheme, and nothing else, to avoid Pharaoh's undisputed liability to Citygate. It demonstrates that the untested evidence now being put forward by Mr. Pharaon and Mr. Djourhi et al is neither true nor reliable." is fully supported by the evidence.

There is no burden on the Appellants to show that on the affidavits presented they had a reasonable probability of setting up a defence. However, in this case, the credible evidence was all one way. The activities of Mr. Williams, Mr. Djourhi and Mr. Whitbeck as appears from the correspondence passing between them contradict every assertion of good faith which they could later make and render such evidence incredible.

Mr. Malins did not raise any specific challenge to any of the Orders made by the trial judge, apart from the general challenge that the judgment and orders were wrong in law and should not be allowed to stand.

CONCLUSION

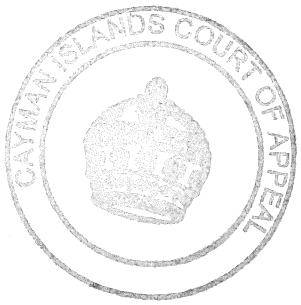
This was an unusual case. The Summons came on for hearing in what appears to have been an expedited manner. It is possible that extended time limits for preparation could have avoided some of the problems which were discussed on appeal. The action was properly commenced in the Cayman Islands the situs of the ACL Shares, and although the process of obtaining evidence on Bahamian law, was flawed, the findings of fact on Bahamian law appear to be unassailable. There was no consistent testimony from Mr. Mortimer to support his opinion as stated in his affidavit and in any event, his conclusion that the transfer of the ACL shares by Pharaoh to PHL couldnot be attacked at the instance of Pharaoh, did not seem to be relevant to the issues in the case. The summons was not brought by the Receiver of Pharaoh. They were brought by the Appellants, judgment creditors of Pharaoh. The procedure adopted for the hearing of the summons was the one devised by the parties and the Appellants cannot now seriously complain that they have been prejudiced thereby. The evidence that the transfer of the ACL shares in 1991 was a dishonest judgment proofing scheme, intended to cheat creditors was quite overwhelming and the Court was right, on the evidence of Mr. Dunkley, to conclude that such a scheme was wholly outside the capacity of Pharaoh and was void.

In my judgment therefore, the appeal should be dismissed with costs to the Respondents to be taxed if not agreed.

ZACCA, P.

I have had the advantage of reading in draft the judgment of Rowe, J.A. I agree with his reasons and conclusions. I would also dismiss the appeal.

Zacca, P.



Georges, J.A.

Rowe, J.A.