

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. M5 of 1997
Grand Court Cause No. 389 of 1992

BETWEEN:

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

(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED

- and -

**(1) GHAITH RASHAD PHARAON
(2) PHARAOH HOLDINGS LIMITED**

Applicants

Respondents



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

Ewan McQuater and Minakshi Jafa Bodden instructed by Mssrs. Hunter & Hunter for International Credit and Investment Company (Overseas) Limited (In Liquidation) and Finance and Investment International Limited.

Julian Malins, Q.C. and Michael Scott, instructed by Mssrs. Neville W. Levy & Associates for PHL Holdings Limited.

No one appearing for Pharaoh Holdings Limited.

August 6th, 17th 1999

REASONS FOR DECISION

The application for determination in these motions flow from the judgment in an action heard by Schofield J. in 1995. There were seven defendants in that action among whom were the above named respondents, Ghaith Rashad Pharaon (Pharaon) and Pharaoh Holdings Limited (Pharaoh). The plaintiffs were International Credit and Investment Company (Overseas) Limited (ICIC) and Finance and Investment International Limited

(FIIL) – the applicants/appellants. Schofield J. found that Pharaoh and Pharaon (amongst others) had conspired to defraud ICIC and FIIL by falsifying its accounting records and statements in the period 1977 to 1991. Had the regulators been aware of the true state of affairs of these companies their licences would have been suspended well before the date when they were in fact suspended in 1991. ICIC and FIIL had, in consequence, suffered damage, the measure of that damage being the increased deficit incurred between the date when the suspension would likely have been ordered and the date when it was in fact ordered.

The assessment of these damages came before Murphy J. Neither Pharaoh nor Pharaon took part in that assessment. Indeed they had taken no part in the hearing of the original action before Schofield J. Murphy J. did not accept the methodology put forward by counsel for ICIC and FIIL as appropriate for the calculation of the damages to be awarded. He set out what he considered to be the proper methodology and ordered ICIC and FIIL to calculate the results which would follow from its application. These results with explanation and any assumptions made would be set forth in affidavits which would be filed and considered on the resumption of the hearing.

ICIC appealed against this ruling. The appeal came on for hearing before this Court which held that the approach by Murphy J was incorrect. It did not feel constrained to accept the methodology advanced by ICIC and FIIL at the first instance hearing. It explained what it considered to be the proper approach. Fortunately it found in the affidavits placed before it the material necessary for calculating the damages on the basis

of the principles which it considered properly applicable. Consequently, it allowed the appeal with costs and assessed damages in the sum of US \$2,158,626,583.00.

Within the period statutorily fixed Pharaoh filed a notice of motion seeking conditional leave to appeal against that judgement. Pharaoh is a company incorporated in the Bahamas. On 2 November 1992, the Supreme Court of the Bahamas had appointed an accountant, Mr. Clifford Culmer, as receiver of all its assets and undertakings. Instructions to file the notice of motion had been given by Mr. Culmer. He acted with despatch to ensure that the notice of motion was filed within the prescribed time but subsequently applied to the Supreme Court of the Bahamas for leave to pursue the appeal.

The application was heard by Evans Ag J. who, on 4 March 1999, refused leave on the basis that, even if the appeal was successfully prosecuted, it was not likely to result in any practical benefit to the Company which would nevertheless be unable to pay its creditors.

Understandably, Mr. Culmer did not challenge this ruling. An appeal was, however, filed by Concorde International Trading SA (CITSA), a defendant in the original action heard by Schofield J. CITSA is, like Pharaoh, an interrelated company under the control of PHL Holdings Limited (PHL) which is itself controlled by Pharaoh. The appeal to the Bahamian Court of Appeal was dismissed on the ground that CITSA had no locus.

Apart from the 1992 appointment referred to above, Mr. Culmer was also appointed Receiver by an order of Nathan J. on 20 April 1997. This was in Bahamian action 456 of 1996 by ICIC and FIIL to enforce a judgment for US\$ 2,582,965.00 plus interest obtained in consequence of an assessment of the damages under another head of claim found established by Schofield J. in the original judgement. On 27 May 1999 this appointment was confirmed by Nathan J. after an inter partes hearing following an application for its discharge filed by PHL. This order is currently being appealed.

It is against this background that ICIC and FIIL filed a motion for an order that Pharaoh's application for leave to appeal to the Privy Council be struck out as an abuse of the process of the court and/or on grounds of want of prosecution. There was an alternative application, that if leave was granted to pursue the appeal, such leave should only be on conditions specified in the motion.

The response was an originating notice of motion dated 21 July 1999 asking that the motion for striking out by ICIC and FIIL be adjourned or refused. Alternatively, there was an application that PHL Holdings Ltd. (PHL) as sole shareholder of Pharaoh be granted conditional leave to appeal against the judgment of the Court of Appeal in the name of Pharaoh or in its own name. PHL had not been a party in the original action decided by Schofield J.

Having heard arguments on both motions, we refused to grant conditional leave to PHL to appeal against the judgement of this Court either in its own name or in the name of

Pharaoh. We struck out the original application by Pharaoh for leave to appeal on the ground of want of prosecution and ordered that it pay to ICIC and FIIL the costs of that application. We undertook to put our reasons in writing and we now do so.

The critical issues on the application to intervene by PHL are the principle on which such interventions would be permitted by persons who were not parties to the action from which leave is sought to file the appeal and the application of those principles to the facts of this case.

The principles are well settled. They were formulated by Persuad J.A. in Re R.E. Whitehead Exp. The Water Street Pawnbrokery, Ltd. (1968) 11W.I.R. 453 at p. 455 –

“When it is borne in mind that the jurisdiction enjoyed by the Privy Council in modern times – and for some time now – is really based on the inherent right of her Majesty to entertain and hear any appeal from Her Majesty’s subjects, then one is inclined to hold the view that whether or not an applicant was a party or not to the original litigation, if he is affected by an order of the court, and if he is aggrieved thereby, he should be allowed to approach Her Majesty in Council, praying for relief.

But appeals to the Privy Council are now regulated by rules the observance of which must strictly be insisted on Section 8 of the 1966 Order speaks of giving notice to “all other parties concerned”. This expression to my mind opens the door to let in parties other than the opposite party in the court below.”

It is contended that PHL, as the sole shareholder of Pharaoh, stands to lose the entire value of its shareholding if the judgment stands. On that basis, it is plainly affected by the judgment and should be granted leave to intervene. No significant distinction can be

drawn between the Regulations then governing appeals to the Privy Council in Guyana and the existing rules in the Cayman Islands.

It does not follow from the fact that PHL is the sole shareholder of Pharaoh that is affected by the judgment against Pharaoh. As has been noted, Evans Ag. J., before whom some evidence was led, declined to give the Receiver, Mr. Culmer, leave to proceed with the appeal on the ground that, even if the appeal was successful, it was not likely to result in any practical benefit to the Company which would still be unable to pay its creditors.

There was an attempt to persuade us to read opinions given by senior counsel in England predicting likely outcomes should the judgment of the Court be reviewed by the Judicial Committee of the Privy Council. That was not an exercise in which we were prepared to engage. PHL did not put before us any evidence to establish that, as the sole shareholder of Pharaoh, it would be affected in any way by the determination of the appeal should it be allowed to intervene. Accordingly, we refused leave to intervene.

An alternative remedy sought in that motion was the adjournment of the application by ICIC and FIIL to strike out the original motion for leave to appeal filed by the Receiver, Mr. Culmer. The basis for that remedy was that there was a reasonable likelihood that Mr. Culmer's tenure as Receiver could end in the near future. If that happened, the control of Pharaoh would revert to its original directors – essentially Pharaon- and the application would then proceed.

A number of scenarios were developed which do not need to be examined in detail. Each depended on the outcome of a pending appeal, the success for which was far from certain. The earliest date which could be given was that of an appeal listed for hearing before the Court of Appeal of the Bahamas in November. No definite date could be given on which the Receivership would come to an end. In the absence of such evidence we could see no reason, having regard to the history of the matter, to grant the adjournment sought.

Accordingly, we dismiss that application.

Finally, we considered the application by ICIC and FIIL to strike out the original application for the leave to appeal as an abuse of the power of the Court or on ground of want of prosecution.

We saw no grounds on which the striking out could succeed on the basis that it was an abuse of the process of the Court. As a Receiver, Mr. Culmer acted properly in filing the notice of motion to ensure that a possible appeal should not be barred as being out of time. Quite properly he also sought leave of the Supreme Court of the Bahamas (which had appointed him) to continue the appeal. This was denied.

He was criticised on the ground that he need not have sought leave. In any event, the fact that leave was refused vindicates his decision. He clearly accepts the judgment of

the court and does not wish to pursue the appeal. He did not appear at the hearing nor was he represented.

Accordingly, the original application for leave to appeal was struck out for want of prosecution.

Mr. McQuater did not ask for costs on the PHL application and we made no order. We ordered Pharaoh to pay the costs on the motion to strike out.

Zacca, P.

Georges, J.A.

Rowe, J.A.

