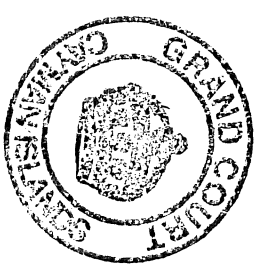


IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 389 OF 1992



BETWEEN (1) International Credit and Investment Company
(Overseas) Limited (In Liquidation)

(2) Finance and Investment International Limited

Plaintiffs

AND: (1) Shaikh Kamal Adham
(2) Faisal Saud Al Fulaij
(3) Ghairh Rashad Pharaon
(4) Pharaoh Holdings Limited
(5) Lhasa Investments limited
(7) Concorde International Trading S.A.

Defendants

Before the Hon. Mr. Justice Graham

Appearances:

Mr. Lawrence Cohen Q.C., Mr. Huw Moses and Miss Minakshi Jafa of
Hunter & Hunter for the plaintifff
Mr. Antonio Bueno Q.C. and Mr. Charles Quin of
Quin & Hampson, attorneys for the Receiver of Attock Cement Limited
Mr. Nicholas Lavender and Mr. Neville Levy of
Neville Levy & Associates for the 7th Defendant

JUDGMENT

The Summons before the Court

1. There is before the Court a Summons dated 15th May 1998 by which the plaintiffs seek to enforce by equitable execution certain judgments which they having obtained against Pharaoh Holdings Ltd. (“Pharaoh”), the fourth defendant. The property over which that execution is sought is shares in Attock Cement Limited (“ACL”), a company incorporated in the Cayman Islands. The shares in that company were registered in the name of Concorde International Trading, S.A. and are the property of Pharaoh. This is disputed by CITSA which has opposed this application, but is supported by the Receiver of ACL.

Despite the considerable volume of evidence before the Court, the parties are in complete agreement as to the material facts with the exception of two matters set out below. The Court has therefore been able to invite counsel for the plaintiffs and CITSA (and leading counsel for the Receiver of ACL) to set out in an agreed form those facts which are not in dispute on the evidence. The first part of this judgment which sets out the uncontentious facts is based upon the work of counsel.

Uncontentious Facts

2. Judgments

Schofield J (as he then was) tried this action in 1995 and held that Pharaoh was guilty of a conspiracy to defraud the plaintiffs by falsifying their accounting records. Damages were ordered to be assessed under a number of heads. To date, assessments have taken place in respect of two heads of damages which remain wholly unsatisfied:-

(a) On 22nd October 1996, Murphy J. assessed the damages under one head as \$2,133,503 plus interest. No party has appealed this judgment.

(b) on 15th August 1997, the Court of Appeal assessed the damages under another head as \$2, 158,626,583. At the request of CITSA, the Bahamian receiver of Pharaoh has issued an application for leave to appeal. An appeal does not of itself operate as a stay of judgment. Enforcement of the judgment has not been stayed.

3. Pharaoh

3.1 Pharaoh's last audited financial statements are for the year ended 31st December 1989. They were signed by Ghaith Rashad Pharaon ("Pharaon") on 6th August 1990 as "sole director and shareholder of Pharaoh". Pharaoh's Register of Directors and Officers records that he was indeed Pharaoh's sole director until 14th September 1991.

3.2 So far as Pharaoh's shareholders are concerned, Pharaoh's Register of Members records that on 11th September 1990, Pharaoh's shares were transferred to PHL Holdings Ltd. ("PHL"). PHL is another Bahamian company of which Pharaon was the sole director and shareholder. Declarations of Trust by Pharaon dated July 1990 record that he held his shares in PHL on trust for his wives and children on his death or incapacity subject to the proviso that he retain full voting rights in respect of the shares which he settled.



4. Pharaoh's Assets as at 27th February 1991

Pharaoh was the holding company which held shares in a large number of companies incorporated in many different jurisdictions. Details of these assets are contained in Pharaoh's Financial Statement for the year ended 31st December 1989. They included 100% of the issued shares of ACL, which are the subject of this application.

5. Transfer of Pharaoh's Assets as at 27th February 1991

In a short period of time around 27th February 1991, all or substantially all of Pharaoh's assets were purportedly transferred away from it to PHL. None of these transfers was a sale and no consideration was given for them. Amongst the assets purportedly transferred to PHL in this series of transfers was Pharaoh's holding of ACL shares. In the Register of Members of ACL it is recorded that Pharaoh transferred its holding to PHL on 27th February 1991.

6. CITSA

CITSA is a company incorporated in the Republic of Panama. On 14th May 1991, the Register of Members of ACL records that PHL purportedly transferred the entirety of the issued share capital of ACL to CITSA, its wholly owned subsidiary. Once again, this purported transaction was not a sale and no consideration was given for the transfer. CITSA remained the registered holder of the ACL shares until the registration in its place of John Matthew (as receiver) on 31st March 1995. Mr. Matthew had been appointed as receiver and manager of

certain property by order of this Court made on 10th November 1992. That property included the assets and undertaking of CITSA, so far as it was situate in the Cayman Islands which the shares of ACL were as a Cayman incorporated company. The registration of Mr. Matthew did not in any way alter the ownership of the ACL shares. It can for practical purposes be ignored.

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 intention of defrauding creditors (the plaintiff's contention), or
 - 2.2 as part of a bona fide corporate re-organisation 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 Pharaoh's children in the shares and reduce his wives' interest (CITSA's contention).
 - 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 Pharaoh as the sole director of Pharaoh had no power to effect the transfer under Bahamian law.

9. The Hearing on 22nd July 1998

On 22nd July 1998, the Court heard argument on this summons from leading counsel for the plaintiffs, counsel for CITSA and leading counsel for the receiver. The Court had previously been briefed on the matter by written arguments which had been submitted on behalf of the plaintiffs and on behalf of CITSA.

Issue 1:- The relevant law of the Commonwealth of the Bahamas

(a) I heard the evidence of two members of the Bahamas Bar on oath.

Both had sworn affidavits as to the law of the Bahamas which were wholly at odds one with the other. Accordingly, I ordered that they should appear before the Court to be cross-examined upon their evidence. The first witness was Phillip Christopher Dunkley and the second Lester James Mortimer Jr. Both had appeared, and continue to appear as counsel for the parties for whom they gave evidence in this

Court, in linked proceedings in the Bahamas. I expressed the view that that situation was, prima facie, unsatisfactory. Because of it, I had directed the presence of a shorthand writer, realizing that the degree of

difference between the two experts seemed to go well beyond a bona fide debate on the law. I warned myself as to the danger of relying on expert witnesses who were closely identified with the contending parties in this cause. I was careful to note not only what I was being told, but the manner in which I was being told it.

(b) Although Mr. Mortimer gave his evidence after that of Mr.

Dunkley, I propose to deal with the evidence of Mr. Mortimer first, for reasons which will soon become apparent. He confirmed his affidavit, dated the 12th June 1998; it contained a number of quite startling propositions. He told me that it was false to suggest that the transfer of all the issued shares in ACL to PHL (then transferred in turn to CITSA) were made with a view to defrauding creditors but were “part of a

corporate restructuring to enhancing the interest of Mr. Pharoan's children at the expense of his wives" (Mr. Pharoan is an Arab gentleman). He then told me, that in any event, such a disposition even, with a view to defrauding Pharoah, was valid under Section 9 (1) of the

International Business Company Act 1989 as -

"a disposition necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company."

I was also to have regard to Section 9 (1) (i) of the Section which permits action to -

"protect the assets of the company for the benefit of the company and its members and at the discretion of the directors for any person having a direct or indirect interest in the company".

He concluded, that as the disposition would have had the effect of preserving the assets of the company from creditors, it must have been for the benefit of the company and was therefore lawful! Subsection (2) of Section 9 was a transfer to trustees and thereby had no relevance as that was not the factual situation in this case. I note however, that the concept of transactions being set aside, if they were intended to defraud creditors, is firmly rooted in the laws of the Bahamas. This causes me little surprise! His conclusion was that such a transfer was valid and was not subject to a challenge as to its validity by the company. He drew attention to the provisions of Section 10 (1) of Act which provides:-

“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". In this context it is to be noted that ultra vires can be pleaded by a liquidator "in proceedings against an incumbent or former director claiming loss or damages by reason of such a transfer".

(c) Mr. Mortimer was cross-examined by Mr. Lawrence Cohen Q.C. on behalf of the first and second plaintiffs . The Court was driven to intervene on frequent occasions to remind Mr. Mortimer of the evidence

previously given. His modus operandi when his previous evidence was put to him, was to sit silently, failing to answer the question or to equivocate. I was obliged on such occasions, to remind Mr. Mortimer of the evidence which I had written down in my notebook, after which I asked Mr. Cohen to resume his questioning. I was obliged to warn Mr. Mortimer both as to his status as a lawyer and his duties to the Court. This happened on more than one occasion. When it was put to him by Mr. Cohen that he was, in effect, telling lies I felt obliged to give him a Judge's Rules Caution and a definition (later refined) of the law of perjury. On two occasions he prefaced his replies by comments such as "it is arguable that" or "I could submit that", thereby demonstrating his confusion, at the very least, as to the role of an expert witness as opposed to that of an advocate. Under polite, but relentless pressure

from Mr. Cohen Mr. Mortimer was forced to abandon almost every single opinion expressed in his affidavit. The one opinion he stuck to was his view that a transfer, with a view to defrauding creditors, was not void but only voidable. In any event, it could not be voidable at the option of the company from whom the assets had been transferred. He was then cross-examined by Mr. Antonio Bueno Q.C. on behalf of the Receiver. He was forced to abandon his claim that the liquidator could not maintain an action for the recovery of the assets, and to concede that the liquidator was duty bound to take action for recovery, on the factual basis that the dispositions in question were made with the intention of cheating creditors.

(d) I am bound to say that as a fellow lawyer, I was dismayed to witness the performance of Mr. Mortimer in the witness box. It is my sad duty to record the judgment of the Court that Mr. Mortimer was neither an objective nor an honest witness. In my judgment he came to this Court in an attempt to mislead it as to the effect of Bahamian Law on behalf of his long term client Mr. Pharaon. It is my intention to send a copy of this judgment to the appropriate authority in the Commonwealth of the Bahamas in due course.

(e) Mr. Dunkley's evidence, on the other hand, was that it was the duty of a company, subject to the 1989 Bahamas Act, to act in good faith with a view to the best interests of the company. Section 53 sets that out in specific terms. It was never in the best interests of a company nor

necessary for the attainment of its lawful objects to cheat creditors.

There was indeed a statutory provision banning such behaviour.

The objects of this company were expressly stated to be subject to the

Laws of the Bahamas. Section 9(2) did not justify the view expressed

by Mr. Mortimer in his affidavit, to that effect. Section 9(1) did not

permit the defrauding of creditors, Section 9(1) was expressly subject to

Section 53 of the Act requiring a director to act honestly and in good

faith with a view to the best interest of the company. Mr. Pharaon, as

sole director of Pharaoh had no power to act outside the lawful powers

of the company to enter into a dishonest scheme with a view to defraud

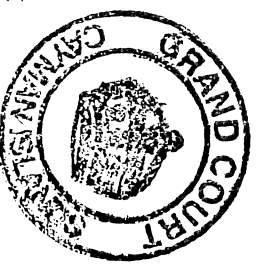
the creditors, and accordingly the purported disposition of the shares was

void ab initio.

(f) Despite the abandonment by Mr. Mortimer of the whole of his evidence it was submitted to me by Mr. Lavender, who appeared for CITSA that I should consider the effect of Section 10(1) of the Act as it states that “no disposition is invalid by reason only of the fact that it was ultra vires the company”. Mr. Dunkley had sought to rely on Section 53 of the Act quoting it as reading “honestly and bona fide and in the best interest of the company. The word “and” does not appear in the Act. It is said that the insertion of the word “and” meant that Mr. Dunkley misunderstood its provisions. To my mind the importation of the word “and” makes no difference at all. It was submitted that Mr. Pharoan had ostensible authority to effect these transfers and the lack of vires to do so on the basis of Section 10(1) was not of itself to invalidate the transfer. The answer to Mr. Lavender’s submission is quite simple; if it

is found that this was indeed a dishonest scheme, and that Mr. Pharoan had embarked upon it with a view to defrauding creditors then even on the view of his own expert witness, when cross-examined, such a transfer would be unlawful. Mr. Lavender's argument is circuitous and I specifically reject it. I remind myself that foreign law must be proved as a fact on the balance of probabilities. With that in mind, I reject the entirety of Mr. Mortimer's evidence, for the reasons given, and accept that of Mr. Dunkley, having again reminded myself that he acted for the plaintiffs in this case in the Bahamas litigation. I record that he gave his evidence in a straightforward and logical manner. He appeared to me to be an honest man and I accept his evidence in full. My findings of fact as to Bahamian Law are therefore as follows:-

- (a) The directors of this Bahamian company had a duty to act honestly and in good faith with a view to its best interests.



- (b) It could never be part of the company's best interest to cheat a creditor.
- (c) It was not necessary nor conducive to be attainment of the company's objects for it to seek to cheat creditors.
- (d) Cheating creditors was prohibited in the Bahamas on the 27th February 1991 and before that by the old Statute of Queen Elizabeth I.
- (e) As an activity prohibited by Bahamian Law cheating creditors was outside the lawful objects of the company.
- (f) Section 9(2) of the Act did not apply to this case because no transfer of assets to trustees had ever taken place.
- (h) Section 9(1) does not permit a company to cheat its creditors. Section 9(1) does not permit a company to do an act outside its objects.
- (i) Section 9(1) is to be construed as subject to Section 53 of the same Act which requires a director to act honestly and in good faith with a view to the best interest of the company.

(j) The liquidator of the company itself may, and indeed must, sue to recover assets which have wrongfully been removed from it even if it is in favour of a shareholder.

(k) Mr. Pharoan, the director of Pharaoh, had no power to enter into the dishonest scheme with the intention of defrauding creditors, nor had he actual or ostensible authority to execute a transfer in favour of PHL and CITSA

Issue 2:-

Is the intent to defraud creditors proved?

(A) The assertion that the purported transfer by Pharaoh of the assets on 27th February 1991 was void in law is made by the first and second plaintiffs. In effect they are seeking to prove fraud. In the judgment of the House of Lords in *Re H. Minors [1996] A.C. p. 563 Lord Nichols of Birkenhead* has set out the appropriate approach of the Court as to the standard of proof in civil cases where very serious allegations are made. The case itself was a child abuse case, in which the allegations made amounted to crimes. His speech laid down that where serious allegations are made that did not mean that the standard of proof was higher than upon the balance of probabilities. What the Court had to keep in mind was “the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities in deciding whether, on balance the event has occurred. The more improbable the event the stronger must be the evidence that it did occur, before finding on the balance of probability that its occurrence has been

established. It is with that direction in mind and the general proposition that when an allegation of fraud is made the Court must require clear evidence of it, that I must determine whether the admitted steps taken by Mr. Pharaon, Mr. Witbeck et al amounted to a general dishonest scheme to defraud creditors. Mr. Pharaon has sworn an affidavit in this suit in which he sets out what he claimed to be his distinguished history, his honesty, and his claim that the transactions were a legitimate corporate restructuring plan in favour of his children and in particular his sons rather than his wives. That affidavit was sworn in Damascus, Syria. Mr. Pharaon has not chosen to come to this Court to be cross-examined upon it. Accordingly I can only look at its contents in the light of all the other evidence available to this Court. I, of course appreciate, that on the basis of the evidence Mr. Witbeck has given, it is not safe for Mr. Pharaon to travel outside the Arab world for fear of his arrest and possible trial in the United States of America for alleged massive fraud.

(B) At the hearing of the action in 1995 Mr. John Van Husan Witbeck gave evidence before Schofield J. On oath he adopted his statement dated 5th February 1995. He was called to give evidence on behalf of CITSA, which company was represented by Mr. Ramon Alberga Q.C. and Mr. Sibley. He told the Court that in March of 1991, a demand had been made for payment pursuant to a deed of guarantee which had been executed by Mr. Zavahir in his capacity as an officer of Pharaoh. This was in favour of a British real estate development company in connection with a trading operation. Mr. Zavahir had advised Mr. Witbeck that he thought he had sold on this property at a profit two years

before, and that he understood from his solicitors that the deed of guarantee had been extinguished by that sale. Mr Pharaon, the Chairman of Pharaoh had told Mr. Witbeck that he had no “recollection” of authorising Mr. Zavahir to sign any such deed of guarantee and did not feel “morally bound” to pay out on the guarantee. Mr. Pharaon and Mr. Witbeck had received legal advice that even if Mr. Zavahir had not been specifically authorised to execute the deed of guarantee on behalf of Pharaoh; he clearly had apparent authority to do so and, accordingly, Pharaoh had no defence to a potential liability in the region of thirteen million pounds Sterling. In those circumstances Mr. Witbeck was instructed by Mr. Pharaon to transfer all of Pharaoh’s transferable assets up the chain of ownership to PHL Holdings Limited so that he could “honestly” tell the holder of the guarantee, in the context of settlement negotiations, that they would be better off to accept their settlement offer rather than to force them into liquidation!

“Fortunately that approach was successful and an amicable settlement was reached pursuant to which two million pounds sterling was paid to the beneficiary of the guarantee on behalf of Pharaoh in full and final settlement.”

In other words, by telling lies to the beneficiary of the guarantee the company “saved” eleven million pounds Sterling. This was a dishonest transaction in the judgment of this Court. PHL Holdings was at that time beneficially owned by Mr. Pharaon’s two wives, two sons and two daughters. The declaration of trust governing the shares of PHL Holdings were irrevocable and the percentage interest of the six

beneficiaries in that company could not be varied. However, if the assets held under PHL Holdings were transferred to another company, CITSA then the percentage interest of Mr. Pharaon's sons could be increased by five percent and the percentage interest of their mother decreased by similar amounts. It therefore seemed appropriate to Mr. Whitbeck to create a new holding structure and transfer all the shares in the manner set out in paragraph 5 of this judgment. It was rather like a deed of family arrangement. Mr. Witbeck went on to say that a year after the event ICIC sought to re-assert its claim to the beneficial ownership of the AOC shares, commencing simultaneous and substantially identical actions in the Bahamas, the Cayman Islands and England. Injunctions and declarations were sought in respect of the assets in England. In the English proceedings Mr. Justice Harman ruled that those transfers were void or voidable as no consideration was given for the transfers. Mr. Whitbeck then said that his understanding of the law of the Cayman Islands, which governs FILL and Lhasa, (both being Cayman Islands companies) that transfers of assets by Cayman Islands companies did not require any consideration and were perfectly valid in the absence of fraud or other legal misconduct. Such transfers would not of course prevent an alleged beneficial owner from seeking subsequently to establish in a Court of law a claim to beneficial ownership in the transferred assets; in this case the shares of AOC. Nothing in that statement conceded that the transfers which are the subject of this litigation was made to defraud creditors. It is silent on the point. Mr. Whitbeck recommend the scheme to Mr. Pharaon who told him to implement it.

Mr. Whitbeck was then cross-examined at some length by Mr. Lawrence Cohen Q.C. Mr. Cohen asked:-

Q: In early 1991 a demand was made for payment pursuant to a deed of guarantee which had been executed by Mr. Zavahir in his capacity of officer of Pharaoh in favour of the British Real Estate Development Company in connection with the London Real Estate Trading operation. Mr. Zavahir advised me that he thought he had sold his property investment at a profit two years earlier and had understood that his solicitors that at the deed of guarantee had been extinguished in connection with the unsale. Dr. Pharaon, Pharaoh's chairman advised me that he had not recollection of such deed of guarantee and did not feel morally bound to pay out on the guarantee. We received legal advice that even if Mr. Zavahir had not been specifically authorised to execute the deed of guarantee on behalf of Pharaoh he had apparent authority to do so, and accordingly, Pharaoh had no viable defence to a potential liability in the area of eight million.

The background is that Pharaoh has a legal liability of eight million is that not?

A: Yes, a potential legal liability.

Q: To which according to what you tell us here Pharaoh had no viable defence?

A: That is what we were advised by counsel. (Mr. Gavin Lightman
Q.C. now Lightman J.)

Q: Let us carry on and see what you did in those circumstances. "In these circumstances I was instructed that Pharaoh's transferable assets (which included the shares of Falcon) up the chain of ownership to PHL Holdings who we could honestly tell the beneficiary of the guarantee in the context of settlement negotiations that it would be better off financially to accept our settlement was reached pursuant to which two million was paid to the beneficiary of the guarantee on behalf of Pharaoh in full and final settlement?"

A: Yes.

Q: Mr. Whitbeck, are you not telling us there of a transaction which was entered into with a view to cheating a creditor of Pharaoh?

A: As I hope you will understand Mr. Cohen, I have tried in these statements to be as absolutely honest even on what is surely not a glorious part in the history of the Pharaoh group which was this problem that I have just described, and 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 that you suggest and that is why I was so greatly relieved

personally that an amicable settlement was reached and we never got to that point.

Q: Mr. Whitbeck, was this not a transaction which was entered with a view to cheating a creditor of Pharaoh?

A: I do not know whether we would have got to that point had we not settled, it would certainly have given the option of doing so potentially at some point in the future had a final decision been made to do so or an option to do what I think that we can all see is not something that anyone would have a right to be proud of.

Q: What I am interested in is two things. First of all, I am interested that Pharaoh finds himself desiring to go in for a scheme such as this - plainly he does, he tells you to, does he not?

A: I did not put it in the statement, because I am not entirely certain, but the idea may well have come from Mr. Farid Khouhri and been accepted rather than having been proposed by Dr. Pharaoh. The three of us were around a table in Dr. Pharaoh's office and this was the instruction that I came out of the room with at the time.

Q: And that instruction was one from Pharaoh?

A: It did not come from Pharaoh. I am simply saying that I am not certain that the idea was Dr. Pharaoh's.

Q: But it was an instruction that you, despite being an attorney, felt that you could comply with?

A: I did comply with it, yes.

Q: Mr. Witbeck, what I have to put to you is what you say in this paragraph itself is dishonest on your part.

A: What I have written is what honestly happened. If you say that it is dishonest on my part, so be it.

Q: Mr. Witbeck, do you regard this as being dishonest?

A: I am not proud that these instructions were given and I cannot say that I am proud of that. I am not proud that I carried them out but I suppose as a man with a wife and four children one sometimes makes difficult decisions of which one is not proud - in not fighting or arguing against this at the time.

Q: Looking back at what you have said, and looking back at this, you do accept, do you not that it was dishonest?

A: I would accept that it had the potential to be something that became dishonest. I still had the hope that we would settle. I had the hope that if we did not settle we would pay. Mr. Djouhri, I think was uncomfortable with making a suggestion to the other side that he was

honestly telling them that they would be better off to settle than to put it into liquidation, if that was not the case.

Q: Mr. Witbeck let us leave aside for a moment the honesty or otherwise of the scheme itself. Actually putting yourself into the position that you can go along in negotiations as you were proposing to do and escape from a liability on the basis that you had no assets is itself rather discreditable is it not?

A: It is nothing to be proud of.

Q: You do not I think challenge that at this stage the instructions were coming from Pharaon.

A: That is correct.

Q: If you just carry on in your statement in the next two paragraphs which follow 9 and 10 you tell us in paragraph 9 of a general restructuring of the non Saudi assets of the Pharon family which you suggested to Pharaon and “which he instructed me to implement.” The instructions for the implementation once again come from Pharaon, do they not?

A: That is correct.

Q: Despite the fact as you would say, Pharaon did not own them.

A: That is correct.

Q: He controlled them.

A: Effectively, yes.

Q: And you tell us in the remainder of paragraph 9 that PHL did not seem to be a suitable name and you pick up, "I suggested to Dr. Pharaon that he might wish to create a new group corporate identity under the "Concorde" name and could use this occasion to increase the beneficial interests of his two sons in the group (the older son having recently become 22 and being made ready for active involvement in the group's businesses) while correspondingly reducing the beneficial interests of their respective mother. I believe that he consulted their mothers and that they approved of this change. Mr. Whitbeck again it is Pharon taking the decision, is it not?

A: It is.

Q: In the following paragraph, you tell us "PHL Holdings was at the time and still is beneficially owned by Dr. Pharaon's two wives (one of whom become an ex-wife during 1994) two sons and two daughters. The Declaration of Trust governing the shares of PHL are irrevocable and the percentage interests of the six beneficiaries in that company cannot be varied.: Just pause for a moment. We have a typical trust situation, an absolute irrevocable trust determining the percentage held by the beneficiaries of course, the trust assets are as they held by the trustee.

A: There were no trustees in this case.

Q: By whom was the trust exercised?

A: By whom?

Q Yes.

A: The shares were held subject to declarations of trust signed by Dr. Pharaon at the time of the incorporation of PHL Holdings, six separate documents saying that he was holding so many shares in each case for each of the said beneficiaries.

Q: So what we have is Pharaon being a shareholder in PHL Holdings and Pharaon declaring a trust over a certain number of shares.

A: Over all of the shares in favour of his six heirs.

Q: So each of them are entitled to the trust assets that being the shares in PHL and one would expect that is reflected by the ultimate assets of PHL.

A: You say “one would expect”, there is no restriction on the movements of the ultimate assets only on the movements of the shares of PHL Holding Limited.

Q: That is just what I would like to look at with you, because what you say in the next sentence, after telling us of this irrevocable trust with fixed proportions which cannot be varied is. "However, a similar effect could be achieved by transferring the assets held under PHL Holdings under a different holding structure with different ultimate beneficial shareholding percentages."

A: Yes.

Q: So what you are telling us of is PHL not selling its assets and getting consideration which, in turn, is held on the trusts, you are telling us about PHL giving away its assets to a new company, are you not?

A: Yes, ultimately held by the same beneficial shareholders but with slightly different percentages to which those whose percentages have diminished have consented.

Q: Including those under 21?

A: It was wives whose percentages were going down, and they are substantially over 21.

Q: Mr. Whitbeck, I have digressed a little from the main point that I was trying to make to you. We have seen Pharaon's reaction, have we not, to an 8 million claim, judgment proof the assets of Pharaoh that is right, is is not?

A: That is a valid perception. You could say that that is what he was doing, I suppose.

Q: Not that one could say that that is what he was doing, that is what you tell us he was doing.

A: He was giving himself the option of, as you would say, judgment proofing those assets. I do not know what was in his mind and what he would have done had there not, in fact, been amicable settlement. I have no way of knowing if he had made up his mind himself in that respect.

Q: But you as a legal adviser, indeed I think at that time you were one of the officers of Pharaoh as well, were you not?

A: Assistant secretary.

Q: You were prepared to go along with that scheme.

A: I did do the transfers that I was instructed to do.

Mr. Justice Schofield: Did you not feel that you ought to have stepped in and said, "I find this against all that I should be doing professionally?"

A: Did I not think that I should do that?

Q: Yes.

A: I was very uncomfortable with it but I was out of the room with that instruction and I did not go back into the room to fight that. It was the most - I think that I cannot recall something equally different in that sense of feeling that this could be something improper that I had been asked to do in all my years working for Dr. Pharaoh and his group.

Mr. Cohen: Mr. Whitbeck, I am sure that you will accept that, if this is Pharaoh's reaction to an 8 million claim against Pharaoh, a company with \$366 million worth of assets, it must be likely, must it not that his reaction to the potentially colossal claims about which we have been speaking earlier must be similar but probably more forceful?

A: I just do not know if I have anything useful to say to that. I hear what you are saying. I do not know what was in Dr. Pharaoh's mind at that time.

Q: I would like to move once again to show you a few documents on the subject of share ownership of Pharaoh. Mr. Whitbeck, I shall not show you once again what we have already seen, which is the implication that Pharaoh is the sole beneficial owner - we know that he was not the registered owner of the shares. So the only meaning that it seems to us that it can have is that he is the beneficial owner.

A: I think that is said sole director and sole shareholder".

Q: Yes. We know that he was not the sole registered shareholder, do we not?

A: At that time, yes, I think that it was PHL Holdings or Blue Bay, one or the other.

Q: Blue Bay, I think that we have looked at that once and I hope that we do not have to take you back to show you once again.

A: No I have no particular desire to go back to that.

Q: Mr. Whitbeck, I am interested at this point about what is in your mind. What you tell us the purpose is is to force it through or to try to get through a settlement on the basis and the creditor would be better off taking the sum offered than liquidating Pharaoh?

A: Yes, one generally tries in achieving a settlement to make the other side feel that settling is preferable to an all out war.

Q: And for that purpose what you did was to transfer assets away from Pharaoh?

A: That is correct.

Q: So when you came actually to settle with the creditor for 2m you achieved your purpose, did you not?

A: I think that could be said, yes.

Q: Mr. Whitbeck, your dishonest scheme was achieved, was it not?

A: As I just said you characterize it as dishonest, I said that is not something of which I am particularly proud. I do not think there was anything illegal done; I effectively stand by those distinctions such as they are.

Q: You do not regard cheating creditors as being dishonest?

A: I do not absolutely or perhaps at all accept that this is cheating creditors as opposed to simply trying to achieve the best possible settlement in a difficult situation which is mentioned in my statement Dr. Pharaon did not himself feel involved an obligation of which existence he was aware, of which he felt morally obligated as opposed to an error made by an employee in his view.

Q: Going on further in the transcript, page 560 this time, I asked you the question yesterday of whether you regarded this as dishonest. Let us look and follow through. Let us start from line 5. I start there by asking you do you regard this as dishonest and your answer as you can see is that you are not proud that these instructions were given "and I cannot say that I am proud that I carried them out, but I suppose as a man with a wife and four children one sometimes makes difficult decisions which once is not proud in not fighting or arguing against this at the time." Mr.

Whitbeck is not really what you mean there is an answer to my question of "do you regard this as dishonest". Yes, I do regard it as dishonest, but I was in a difficult position because I had a wife and four children to feed and unless I went along with this I would lose my job?

A: I think that is a fair interpretation of what I said yesterday, yes

Q: Mr. whitbeck, losing your job in 1991 with Pharaon would have a serious affect on you, would it not?

A: I think that is clearly a true statement.

Q: We know Mr. Whitbeck, Pharaon and Pharaoh's reputation by that stage was severely tarnished?

A: Yes.

Q: You had been employed with him at that stage for about 12 years?

A: Yes.

Q: You must have perceived at that stge that the tarnishing of his reputation must have tarnished you somewhat in making it difficult to find alternative employment at that stage.

A: Yes.



Q: And, therefore, you certainly feel subject at that stage to the pressure to go along with Pharaon's wishes.

A: Yes.

Q: Despite them being dishonest?

A: I do not know if there is a distinction between unethical and dishonest. I think that dishonest tends to suggest more breaking the law. Certainly, unethical is the word that I would prefer I think.

Q: Mr. Whitbeck, we were looking there at 1991, we are in 1995 today, four years on. The degree of tarnishment of Pharaon. Pharaon and Pharaoh's interest generally is much greater today that it was in 1991, it it not?

A: I do not know if it is much greater. I think that it was pretty bad in 1991.

(C) I have set out at great length the verbatim transcript of Whitbeck's cross-examination. The corporate veil is lifted by Mr.

Whitbeck on the bizarre world of Mr. Pharaon and his associates. In my

judgment, what was going on was a series of dishonest schemes to defraud creditors. The transaction involving the property company, was but one example and the transaction in this case is another. I have to remind myself that Mr. Whitbeck, in his initial evidence, was trying to put himself in the best possible light. He knew, when he gave evidence in this matter that his status and future as a lawyer was severely in doubt. Accordingly, in his initial evidence he sought to obscure the reality of what was going on as much as he could. His cross-examination however, demonstrated, that he, on the instructions of Pharaon, carried out a series of dishonest schemes which in my judgment the parties well knew were dishonest at the time. Mr. Whitbeck is, of course, a person who has on my finding taken in part in clearly dishonest enterprises.

Accordingly, as he is in the position of an accomplice were this is a

criminal case, one must look at all the evidence for independent

confirmation of that which he has told the Court. When I use the word

“dishonest” I have in mind the definition given by Lord Lane in R v.

Ghosh [1982] 75 Cr. App. Rep. p154.

“That what was done was dishonest by the standards of

ordinary and decent people and that (the parties) must have

realised that what they were doing was dishonest by the

standard of ordinary and decent people.”

(D) I now approach the independent evidence which may or may not

tend to confirm the effect of his evidence. It is argued by CITSA that

one should have little regard to the evidence of Mr. Whitbeck, as the

concessions were rung from him in the course of prolonged cross-

examination. My finding is that in general, declarations against interest have more value that mere assertions of probity and good reputation which are not subject of cross-examination. I find that with the help of Mr. Cohen, Mr. Whitbeck was brought to admit in public that which he knew in his heart. I remind myself that a confession on oath in the strictly controlled atmosphere of a Court of law, with leading counsel representing his interest is very powerful evidence indeed.

I refer now to a letter to Mr. Williams, an English solicitor, acting on behalf of Pharaon on 20th March 1991.

(E) This letter was written to Mr. Kemsley a surveyor who was handling the negotiations to settle the action. It reads:-

“Having regard to the information they have been

able to obtain about Dr. Pharaon, I am sure the

receiver is optimistic about recovering the whole

of the guaranteed sum. It would appear that Mr.

Djourhi is now in charge of the damage prevention action

being taken within the group and this is obviously the

position to influence whatever policy is ultimately

pursued”.

(F) On the 14th June 1991 Mr. Williams wrote again to Mr. Kemsley

and copied the letter to Mr. Djhourri:-

“Pharaoh, as matters now stand appears to have a
guarantee liability of some \$13m.”



(G) On the 27th February 1991 Mr. Williams wrote to Mr. Whitbeck stating :-

“Farouk (a reference to Zavahir) was considering somewhat sketchedly your view of the impossibility for a judgment creditor to attack the assets of Pharaoh.

He mentioned the possibility of “hiving up” the assets of Pharaoh Holdings Limited to Dr. Phaoran personally which he opined would effectively move the assets out of the reach of the judgment creditor” .

“I would simply like to add to the plan of this sort, I think it should be discussed in full with Gavin Lightman so that he can have a clear picture of such a strategy

for this to be reflected in his approach to the preliminary hearing next month’.

(H) On the 5th March 1991 Mr. Hyatt of Mr. Williams’ firm wrote to Mr. Whitbeck referring to a conference with Mr. Gavin Lightman Q.C. including a copy of his notes of the meeting stating :-

“counsel are firmly of the view that we cannot present an arguable defence to the claim by Citygate. I appreciate that this is not very palatable advice but counsel take the view that Heathmount really has no alternative but to complete the contract (“this was a contract for specific performance of a sale of real property”).

(I) On 8th March 1991 Pharaoh’s solicitors wrote to Mr. Zavahir reminding him of leading counsel’s advice that Citygate would

undoubtedly claim summary judgment at the next hearing that being the

18th March 1991.

(J) On the 9th April 1991 Mr. Williams wrote to Mr. Djourni:-

“Of course I cannot comment on the defensive measures
which are planned to protect the assets of PHL in the event of

Citygate and the Bank endeavouring to enforce the PHL

guarantee. I wrote a note to John Whitbeck over the weekend

about certain problems which could arise in such a process, but

this is a matter for your Bahamian advisors”.

(K) On 4th April 1991 Mr. Kemsley the surveyor, who was handling

the negotiations wrote to Mr. Williams with a copy of it to Mr. Djourni:-

“Beyond the contract price should be acceptable...

This is of course linked to the business standing of

Dr. Pharaon, i.e. how vulnerable he may be to the receivers taking action against him...

We had assumed that it would be necessary to pay a further \$1 lm to the Receiver of City Gate in addition to the 1.7 million paid on exchange i.e. a total of 12.7 million.”

(L) On 9th April 1991 Mr. Williams wrote to Mr. Kemsley:-

“One assumes that they have made a fairly accurate stab at trying to assess the probability of recovering monies from Dr. Pharaon but quite obviously they are not aware of what I imagine to be the present “intense” activities to hide

PHL assets. I have been promoting your scheme to John Whitbeck and have drawn his attention to certain facts under Bahamian Company Law, if in fact PHL were divested his assets and the directors that company had to account to the whereabouts of those assets in the event of moves being taken by Citigate to wind up PHL.”



(M) On 1st May 1991 Mr. Kemsley wrote to Mr. Djourhi, with a copy to Mr. Williams that terms might be agreed on the basis of 12 million but it was clear that any offer of 10 to 10.5 million was not going to be entertained. On the 14 May 1991 Mr. Kemsley was suddenly instructed to withdraw from further negotiations.

(N) On the 16th May 1991 Mr. Williams wrote to Mr. Zavahir:-

“I have myself in the past alluded to the possibility of statutory penalties which could be incurred in relation to “damage limitation” exercise in the Bahamas. Unless, for example, Dr. Pharaon personal loans to Pharaoh exceed the net value of Pharaoh’s other assets. This may be one scenario.....

I do understand that Mr. Gavin Lightman Q.C. did very strongly recommend that your group should take the “purchase route” and highlighted the Company Law and perhaps criminal consequences of endeavouring to take what might amount to a “dissipation of assets” route. It is, as you know

the implications of this latter course of action which give me great cause for concern for the directors of Pharaoh which I understand may include Dr. Pharaon.”

(O) On 14th June 1991 Mr. Williams wrote to Mr. Kemsley with a copy to Mr. Djourhi:-

“Pharaoh who as matters now stand appear to have a guarantee liability of some 13 million.....

“two questions need to be asked. Firstly,

does Pharaoh have a settled policy to avoid any

payment under the terms of the guarantee and as

so been advised that its position is bullet-proof having

regard to the inaccessibility of its assets.....”

(P) There is an interesting gap in the correspondence from the 11th July 1991. On that day, an interim payment order was made against Pharaoh and on the 2nd September 1991 a letter from Richard S. Butler & Company accepted a settlement offer of 2 million (on a 13 million guarantee!). This is obviously suspicious in terms of chronology. In May 1991 Pharaoh was contemplating a settlement of 11.5 million in respect of a 13 million claim to which it had no defence. That was on the advice of very distinguished leading counsel. How did it come about that negotiations were abruptly terminated and the creditors subsequently, and for no apparent reason, accepted two million sterling?

In his affidavit, Mr. Williams, the solicitor, at paragraph 10 claims that most of his files were with Mr. Scott at the time when Mr. Scott sent copies of those files to Mr. Williams. Mr. Williams had copies of the

documents which are now exhibited to Mr. Culmer's affidavit at the time he swore his affidavit. The evidence of the correspondence corroborates entirely Whitbeck's evidence that this was indeed a dishonest judgement proofing scheme to avoid Pharaoh's undisputed liability to Citigate. It demonstrates that the evidence in Mr. Pharaoh's affidavit and that of Mr. Djouhri is untrue. Mr. Williams must have realized that if he was not acting unprofessionally he was, at the very least, on the cusp of such activity! His stated desire to contact Mr. Lightman again was akin to the donning of a fig leaf.

(Q) In my judgment this correspondence wholly confirms Mr. Whitbeck's evidence in a material series of particulars. This was a dishonest judgment proofing scheme, and nothing else, to avoid

Pharaoh's undisputed liability to City Gate. It demonstrates that the untested evidence now being put forward by Mr. Pharaon and Mr.

Djoughri et al is neither true nor reliable. It also shows that Mr. Williams

had only said that which he chose to say. He knew quite well that

Pharaoh's inability or ability to meet City Gate's claim was a very important matter and that he had taken part in discussions with the

surveyor and with Mr. Djoughri as to the "hiving up" of Pharaoh's assets

and possible solutions which would result in Pharaoh being able to

demonstrate, untruly, that it had no assets. He knew, that to quote his own letter, "damage prevention action" was being taken by the group

because of City Gate's claim and that Djoughri was in charge of such

efforts as an agent of Mr. Pharaon. He was concerned about the legality

of such an exercise, as indeed he should have been. The



correspondence, and significantly the gap in it at the relevant time, demonstrates the volte-face in respect of Pharaoh's attitude to an unanswerable claim. In the event, Mr. Pharaoh plainly stripped Pharaoh of its assets in order to avoid this claim. Citygate was told that Pharaoh had no assets, when Mr. Whitbeck says that he could "honestly" say that in negotiation it demonstrates Mr. Whitbeck's view as to honesty and dishonesty even before he was cross-examined by Mr. Cohen.

Before leaving the point, it is to be noted that a draft of his second affidavit was handed up in the proceedings in the Bahamas which included the following statement at paragraph 4:-

"I still believe that the contents of my first affidavit are true."

That averment did not appear in the sworn version. This was a wise deletion assuming that the law as to perjury in the Bahamas is similar to the English and Cayman model.

(R) I find that the deception and cheating of the Citigate guarantee holder was part and parcel of a general scheme to defraud creditors of Pharaoh and other companies controlled by Pharaoh. The scheme undertaken to defraud the 13 million sterling claim is dwarfed by the “family arrangement” scheme which was designed to defraud creditors on a much larger scale. As has already been set out in this judgment, the Cayman liability alone is US\$2,158,626,583! I dismiss the claim that those dispositions for no consideration were lawful. They were designed with one object in mind, to defraud lawful creditors. Is it seriously to be believed that Pharaoh would defraud Citigate in respect of

13 million sterling and not take similar measures in response to claims of incalculable size arising out of the BCCI collapse. The answer is a resounding no.

(S) What is the evidence put forward by CITSA to suggest that the dispositions were lawful or at least to create a triable issue before this



Court? The answer is in effect, nothing. Mr. Djourhi, Mr. Williams and Mr. Zawahir have demonstratively lied or attempted to mislead the Court about their involvement in the matter. The correspondence demonstrates it. Mr. Pharaon will not appear in the Court, Mr. Djourhi will not appear in this Court, Mr. Williams has not appeared in this Court, although he is in England rather than in Syria. Mr. Mortimer who appears to know a very great deal about the affairs of these companies in the Bahamas, told

me that Mr. Pharaon is an honest man. Against that, the established fact is that he is a fugitive from justice in the United States. During the proceedings in this Court, Schofield J made a finding that Pharaon had acted dishonestly in relation to a series of matters.; he had concocted evidence and forged a document. He has never appeared before this Court to be cross-examined on his various claims as to his honesty, his good faith and his reliability. Accordingly, his evidence is to be dismissed as unworthy of credit. It was never designed to be tested, and has not been. It was designed merely to confuse. In the event he has not confused the Court despite his best efforts.

2. The issue before the Court therefore is similar to the test as to whether summary judgment should be delivered; namely whether

CITSA has shown a triable defence. In this context the onus is on

CITSA to satisfy the Court that there is evidence which fairly or reasonably indicates the probability of CITSA having a real or bona fide defence and not merely that there is a faint possibility that there was such a defence. The mere assertion in an affidavit of an alleged series of facts is not of itself grounds for granting leave to defend. Vide

National Westminster Bank PLC v. Daniel [1994] 1 ALL.E.R. 159B-

160B and Banque De Paris v. De Naray [1984] 1 Lloyds Rep. 21 & 23.

It is my judgment that the evidence put forward by CITSA wholly fails that test. There is no possible defence to this action and I so find.

The consequences of my findings of fact are as follows:-

1. The transfer on the 27th February 1991 was ultra vires and void in law. It was made by a director who had no ostensible authority to do what he did.

2. The transfer to CITSA did not cure the matter as
 - (i) PHL had no title to transfer.
 - (ii) Even if it had a bare title it was at least voidable. CITSA was not a purchaser at all still less a bona fide purchaser without notice.

It is ordered and directed that:-

1. The Preservation Receiver do rectify the register of members of ACL in the following manner:-
 - 1.1. By recording the fourth defendant as the holder of 100% of this issued share capital of ACL.
 - 1.2 By deleting all entries made in or after early 1991 which purport to transfer any of the shares in ACL to entries other than the fourth defendant, including any entries which purport to transfer any of the shares in ACL to the seventh defendant.
2. The Preservation Receiver be discharged as receiver of the shareholdings in and assets and undertakings of ACL save that he shall submit a report to the Court but otherwise, for the avoidance of doubt, his appointment pursuant to the Order of this Court dated November 10, 1992 shall continue.
3. That David Boddy and Oliver G. Jordan both of Deloitte & Touche “the Joint Execution Receivers”) be appointed with immediate effect as Receivers by way of equitable execution

of the shares in ACL.

4. The Joint Execution Receivers do change the directors of ACL to such persons as they in their discretion shall see fit ("the New Directors"), the appointment of the New Directors being to facilitate the lawful execution of the Judgment Debts.
5. The Preservation Receiver do deliver or cause to be delivered to the New Directors any assets and undertakings of ACL which are in his control or which may, in the future, come into his possession or control including but without prejudice to the generality of this provision the shares in Attock Cement Pakistan Limited and documents of title and records relating to the same.
6. The Joint Execution Receivers and the New Directors do all such acts and things as may be necessary to ensure that the shares in ACL are converted into cash, whether by means of a sale or those shares or by means of procuring ACL to realise its assets and lawfully distribute them to the fourth defendant as its member whether by way of a winding-up, dividend or otherwise. Without prejudice to the generality of this provision the New Directors shall have all the powers of the boards or directors of ACL including power to bring, continue and defend legal proceedings in the names of ACL in this and other jurisdictions.
7. The manner and terms of the sale or other realisation or distribution referred in paragraph 6 above be within the discretion of the Joint Execution Receivers and the New Directors.
8. The Joint Execution Receivers do have liberty to apply to the Court for further directions relating to the sale, realisation or distribution referred to in paragraph 6 above.
9. The Joint Execution Receivers do have liberty to retain the Plaintiffs' legal advisers generally.
10. The Joint Execution Receivers do apply all monies coming into their hands pursuant to this Order in the following order and manner:-

- 10.1 In discharge of the costs, charges and expenses of the preservation Receiver or, to the extent that these have been paid by the first plaintiff, in reimbursing the first plaintiff in respect of them.
- 10.2 In discharge of their own costs, charges and expenses or, to the extent that these have been paid by the first plaintiff in respect of them.
- 10.3 In paying to the plaintiffs the amount of the judgment debts and the amount of any further judgment debts which the plaintiffs may obtain or have obtained against the fourth defendant in this action.
- 10.4 In paying the balance if any into Court.
11. The Preservation Receiver shall have liberty to apply.
12. The costs of the Preservation Receiver be paid by the plaintiffs.
13. The costs of this application be paid by the seventh defendant to the plaintiffs in any event and be added to the judgment debts and be recoverable in the same manner as the judgment debts pursuant to the terms of the order.



The Hon. Mr. Justice Graham
Judge

Dated 3rd August 1998

