

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO: 35 and 36 of 1996

BETWEEN:

CHILE HOLDINGS (CAYMAN) LIMITED

Plaintiff

- (1) SGO DE CHILE HOTEL CORPORATION S.A.
- (2) CONTADORA ENTERPRISES S.A.
- (3) LAITH GHAITH PHARAON
- (4) JOHN VAN HUSAN WHITBECK
- (5) FARID DJOUHRI
- (6) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED (IN LIQUIDATION)
- (7) LAITH TRADING AND CONTRACTING COMPANY LIMITED

Defendants

AND

ARGENTINE HOLDINGS (CAYMAN) LIMITED

Plaintiff

And

- (1) BUENOS AIRES HOTEL CORPORATION SA
- (2) ARGENTINE TRADING HOLDINGS INC.
- (3) RHÔNE DEVELOPMENTS S.A.
- (4) LOIRE DEVELOPMENTS S.A
- (5) LAITH GHAITH PHARAON.
- (6) JOHN VAN HUSAN WHITBECK
- (7) FARID DJOUHRI
- (8) INTERNATIONAL CREDIT & INVESTMENT COMPANY (OVERSEAS) LIMITED (IN LIQUIDATION)

Defendant

REASONS

Appearances:

For the Plaintiffs: Mr Ewan McQuater instructed by Mr H Moses and Miss M Jafa of Messrs Hunter & Hunter, Attorneys. The Defendants were unrepresented after the withdrawal of Mr Levy.

The summonses before the Court

1. I have before me two summonses seeking summary judgment in two related actions, causes 35 and 36 of 1996:-
 - 1.1. In cause 35 the Plaintiff ("CHC") seeks summary judgment against the Second Defendant ("Contadora") and the Seventh Defendant ("LTCC").
 - 1.2. In cause 36 the Plaintiff ("AHC") seeks summary judgment against the Third Defendant ("Rhône") and the Fourth Defendant ("Loire").
2. CHC and AHC have already obtained summary judgment against other defendants to each of the actions. I refer in this regard to the judgment and reasons of Srneilie J dated March 25, 1997 in Cause 35 and his judgment dated February 20, 1997 and reasons dated March 24, 1997 in Cause 36. Summary judgment was not sought at that stage against Contadora, LTCC, Rhône and Loire because, despite efforts at service, they had not yet been served.
3. I am satisfied on the affidavit and other evidence before me that Contadora, LTCC, Rhône and Loire have now been duly served with these proceedings and

with the applications now before the Court, in accordance with this Court's orders.

4. In these reasons I shall deal first with a preliminary point relating to the application of O14, then with cause 36 followed by cause 35.

The application of GCR O14

5. On 20th March 1998 Rhône, Loire and Contadora made an unsuccessful challenge to the jurisdiction of this Court. Following that unsuccessful challenge to jurisdiction, Rhône, Loire, Contadora and LTCC have not acknowledged service. I am satisfied however that GCR O14 applies in this case, notwithstanding that these defendants have not acknowledged service. The reasons are set out by Smellie J in his reasons in cause 36 which he himself followed in his reasons in cause 35. Smellie J's reasons were plainly correct and I agree with them.

6. I can summarise those reasons as follows:-

6.1 O14 r1(1) permits an application for summary judgment to be made against a defendant where "...that defendant has given notice of intention to defend the action...". Rhône, Loire, Contadora and LTCC have not done so.

- 6.2 However O13 r6 so far as material provides as follows:-

"Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4 then, if any defendant fails to give notice of intention to defend the plaintiff may, after the prescribed time and, if that defendant has not

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acknowledged service... proceed with the action as if that defendant had given notice of intention to defend.”

6.3 The claims indorsed on the writ are not described in the rules mentioned (rules 1-4), which are confined to common law claims. AHC and CHC are therefore entitled to proceed to seek judgment on the merits as if Rhône, Loire, Contadora and LTCC had given notice of intention to defend.

Cause 36: the facts

7. I make the following findings of fact which are clearly made out in the the affidavits of the Sixth Defendant (“Whitbeck”) who has chosen to give evidence on behalf of the Plaintiffs in this cause and Mr Simon Charlton:-

7.1. **AHC’s incorporation:** AHC is a company incorporated in the Cayman Islands.

7.2. **AHC’s directors:** At the material time (ie November 17, 1992) the directors of AHC were Laith Pharaon (“Laith”), Whitbeck and Farod Djouhri (“Djouhri”).

7.3. **AHC’s assets:** The assets of AHC included the entire issued share capital of the following companies:-

7.3.1. The First Defendant (“BAHC”), which had a subsidiary in Argentina which owned the Buenos Aires Park Hyatt Hotel.

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7.3.2. The Second Defendant ("ATH"), which held interests in companies which in turn held interests in jobba plantations in Argentina.

7.4. **The receivership of AHC:** On November 10, 1992 this Court appointed John Matthew as receiver and manager over all the assets and undertaking of AHC on the application of ICIC in cause 389 of 1992. That appointment was made until after judgment or further order with a view to protecting the assets of AHC from the jeopardy resulting from its then control. On May 31, 1995 (at the conclusion of the trial in cause 389) Schofield J continued the appointment of the receiver until further order. On January 26, 1996 Schofield J directed the receiver to take certain steps with a view to securing and collecting assets of AHC and also to commence this action.

7.5. **The directors' reaction to the receivership:** On November 17, 1992, as a reaction to learning of the appointment by this court of the receiver on November 10, 1992, Laith, Whitbeck and Djouhri as the directors of AHC met and purported to resolve to transfer away from AHC its assets referred to above. Initially they resolved that the shares of both AHC and ATH should be transferred to Loire, a Panamanian company which had been newly acquired by the New York attorneys to Ghaith Pharaon ("Pharaon"). Pharaon was the controller of AHC and had previously been the beneficial owner of all the shares in its immediate holding company. The following day it was decided to transfer the BAHC shares to Rhône instead of Loire. Rhône was similar in all respects to Loire. New

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resolutions were passed by the directors "transferring" the shares in BAHC to Rhône and backdating the resolution to the previous day.

7.6. **Rhône and Loire:** These are in similar control to the control of AHC prior to its receivership.

7.7. **The transfer:** The transfer was not a sale. There was no consideration for it. Its purpose was to attempt to put AHC's property beyond the control of this Court and to attempt to render judgment proof Pharaon and his companies. Whitbeck gave specific evidence to that effect.

7.8. **Execution receivers:** On November 14, 1997 on the application of the plaintiffs in cause 389 of 1992 Smellie J appointed joint execution receivers over the shares in AHC for the purpose of obtaining execution of the plaintiffs' judgments in that action. In relation to AHC the execution receivers have now replaced Mr Matthew, who had been appointed as preservation receiver over those shares.

8. I agree with Smellie J that it would be difficult to imagine a plainer case of fraudulent conduct.

Cause 36: the law

9. I find that the purported transfers were void and of no effect. In this regard I agree with Smellie J's findings as to the law in his written reasons in cause 36 dated 24th March 1997. It is to be noted that this judgment was never appealed.

I can summarise these reasons as follows:-

- 9.1. The capacity of a corporation to commit itself to a transaction is governed by the law of the place of its incorporation. In the case of AHC this is the law of the Cayman Islands: see the authorities cited by Smellie J in his reasons at p 16 lines 27-30. The power of the directors as the managing body to commit AHC to the relevant transfers was and is governed by Cayman law. I make a specific finding as to the applicability of Cayman law in this respect.
- 9.2. Once the receiver was appointed on November 10, 1992 over all the assets and undertaking of AHC the directors ceased to be the body able to commit AHC to any transaction involving the disposition of its property. The appropriate person was the receiver. See *Canadian Arab Financial Corp and Kilderkin Investments v Player*[1984] CILR 63.
- 9.3. The effect of the appointment of the receiver was therefore to destroy the power of the directors to commit AHC to a transaction such as the share transfers. Their authority was terminated.
- 9.4. There is a further reason why the purported transfers are void, ignoring the effect of the appointment of the receiver. Directors are obviously fiduciaries who are under a duty to act bona fide in the best interests of the company of which they are directors and only for a proper purpose. If the purpose of the directors was improper then their decision will be ineffective. See *Hogg v Cramhorn* [1967] Ch 254 and *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, PC.

- 9.5. These transactions were plainly a fraud on AHC of which the transferees had notice:-
- 9.5.1. Despite valuable assets being purportedly transferred, the transaction did not purport to be a sale in any understandable fashion. Rhône and Loire were not purchasers.
- 9.5.2. Rhône and Loire were in common control with AHC and had notice of the purpose of the transaction.
- 9.5.3. The transaction was not bona fide.
- 9.6. Although directors as agents of the company are clothed with a wide ostensible authority, such authority cannot extend to committing a fraud on the company. They can have neither actual nor ostensible authority to act in breach of their fiduciary duties eg by committing a fraud on the company. Rhône and Loire knew of the lack of authority of the directors of AHC because they knew that the transaction was a fraud. They could not rely on the directors having any wider ostensible authority, so no question of AHC being bound by agency principles could arise. The transfers are void and of no effect.
10. I note that AHC has an alternative argument to the effect that the transfers were voidable. Since I have found the transfers to be void, there is no need for me to make any finding in relation to this alternative argument, although I note that AHC has not abandoned such argument.

The receivership order dated 10th November 1992

11. In their evidence in relation to their jurisdiction application Rhône and Loire have made a number of assertions in relation to the Court's order dated 10th November 1992 in cause 389 of 1992 by which Mr Matthew was appointed as receiver over AHC and CHC. They have asserted that the order does not cover AHC, that the inclusion of AHC in the schedule to the order was an error and have suggested that the subsidiaries of AHC (BAHC and ATH) are excluded from the order. I refer in this regard to paragraph 7 of Mr Levy's affidavit sworn on 29th January 1998.
12. These objections are misconceived. The construction of the order dated 10th November 1992 is plain. The shareholdings in, assets and undertakings of both AHC and CHC are included in the order. I am also satisfied that there was no material mistake in relation to the order which in any way affects its validity or substance.

Cause 35: the facts

13. I make the following findings of fact which are clearly proved in the affidavits of Whitbeck, Mr Charlton and Mr Charles Quin:-
 - 13.1. **CHC's incorporation:** CHC is a company incorporated in the Cayman Islands.
 - 13.2. **CHC's directors:** At the material time (July/August 1991) the directors of CHC were Whitbeck and Djouhri.

13.3. **CHC's assets:** The assets of CHC included the entire issued share capital of the First Defendant ("SCH") which had a subsidiary in Chile which owned the Santiago de Chile Park Hyatt Hotel.

13.4. **The purported transfer of CHC's assets:** In July/August 1991 the directors of CHC purportedly transferred the shares of SCH to Contadora , a Panamanian company under the same control (the directors were Pharaon, Whitbeck and Djouhri). The purported transfer was not a sale. There was no consideration for it and it was not effected in pursuance of any legitimate commercial purpose. There was no consideration of the interests of the creditors. Its purpose was to attempt to "prevent the underlying assets being seized in connection with various claims" (Whitbeck's affidavit dated October 9, 1996).

13.5. **Knowledge of Contadora:** By reason of the common control and directors, Contadora clearly knew all the material facts.

13.6. **The receivership of CHC:** On November 10, 1992 this court appointed John Matthew as receiver and manager over all the assets and undertaking of CHC on the application of ICIC in cause 389 of 1992. That appointment was made until after judgment or further order with a view to protecting the assets of CHC from the jeopardy resulting from its then control. On May 31, 1995 (at the conclusion of the trial in cause 389) Schofield J continued the appointment of the receiver until further order. On January 24, 1996 Schofield J directed the receiver to

take certain steps with a view to securing and collecting assets of CHC and also to commence this action.

13.7. Further judgment proofing scheme: In November 1994 Contadora purportedly transferred the SCH shares for a similar reason to LTCC. Laith Pharaon was the managing director of LTCC. Again the transaction was not a sale, there was no consideration and the purpose was judgment-proofing. This was a serious breach of the law and, in effect a contempt of this Court.

13.8. Execution receivers: On November 14, 1997 on the application of the plaintiffs in cause 389 Smellie J appointed joint execution receivers over the shares in CHC for the purpose of obtaining execution of the plaintiff's judgments in that action. In relation to CHC the execution receivers have now replaced Mr Matthew, who had been appointed as preservation receiver over those shares.

14. Once again I take the view that it would be difficult to imagine a plainer case of fraudulent conduct.

Cause 35: the law

15. The purported transfers were void and of no effect. The only material difference between AHC and CHC in this regard is that the court had not yet appointed a receiver over CHC at the time when its assets were stripped out. However the transfers were nevertheless void for the reasons I have set out above in relation to the powers of directors.

16. Once again I note that CHC has not abandoned its alternative argument to the effect that, if the transfers were not void, they were voidable. There is no need for me to make any finding in relation to such argument.

The admissibility of Whitbeck's evidence

17. I find that the evidence which has been given by Whitbeck is admissible on these applications for the reasons previously set out by Smellie J in his written reasons in cause 36 dated 24th March 1997.
18. Before the hearing of these matters Mr. Levy on behalf of the Second Defendant in cause 35 and the Third and Fourth Defendants in cause 36 applied for an adjournment pending their application for leave to appeal the decision on the jurisdiction point. That application was rejected by the Court.

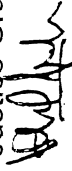
Actions in personam

19. From the evidence filed in relation to the jurisdiction applications I am aware that it is the intention of AHC and CHC to seek recognition and enforcement of my judgments on these applications in the Republic of Panama. I am also aware from such evidence that, when recognition or enforcement is sought in Panama, the Courts there may have to decide for the purposes of their Judicial Code whether my judgments have been rendered in the course of personal actions. Of course the question of what constitutes a personal action under Panamanian law is a matter for the Courts of Panama. However it may be of assistance to those Courts if I indicate that under the laws of the Cayman Islands, these actions are plainly personal actions, that is to say actions in personam.

No defence

20. For the reasons set out above I find that Contadora, LTCC, Rhône and Loire have no defence to the claims brought by AHC and CHC and I shall enter judgments against them accordingly.

The Honourable Mr Justice Graham



April 23 1998

Judge of the Grand Court