

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 179/95

CICA NO. M5/95

BEFORE: THE RT. HON. MR. JUSTICE ZACCA P.C., O.J., PRESIDENT  
THE RT. HON. MR. JUSTICE TELFORD GEORGES P.C., J.A.  
THE HON. MR. JUSTICE J. KERR J.A.

BETWEEN: QAISER MANSOOR MALIK APPELLANT

V

- (1) CREDIT FINANCE CORPORATION LTD (In Liquidation)
- (2) BANK OF CREDIT AND COMERCE INTERNATIONAL  
(OVERSEAS) LIMITED (In Liquidation)
- (3) BCCI Holdings (Luxembourg) SA (In Liquidation)
- (4) BANK OF CREDIT AND COMMERCE  
INTERNATIONAL SA (In Liquidation)
- (5) INTERNATIONAL CREDIT AND INVESTMENT  
COMPANY (OVERSEAS) LIMITED (In Liquidation)
- (6) ICIC HOLDINGS LIMITED (In Liquidation)
- (7) ICIC INVESTMENTS LIMITED (In Liquidation)
- (8) ICIC APEX HOLDINGS LIMITED (In Liquidation)
- (9) MOHAMMED ALAN
- (10) SYED ZAHEER ABBAS RIZVI
- (11) KHAWER SIDDIQI
- (12) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
- (13) MOHAMMED RAFFRY

Mr. P. LaMontagne Q.C. with Mr. P. Broadhurst for the Appellant  
Mr. Richard Sheldon Q.C. with Mr. Nigel Clifford for the  
Respondents 1 to 8  
Ms. Cherry Bridges for Respondent 11  
Ms. Lisa Agard for Respondent 12  
Respondents 9,10 and 13 not represented

GEORGES, J.A.

September 13, 14 and December 11, 1996

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JUDGMENT

The motion from which this appeal arises has as its genesis the collapse of the banking and financial operation carried on by Bank of Credit and Commerce International SA Ltd. (BCCI SA). Provisional liquidators of that company were appointed by the High Court of Justice in London in July 1991 and a winding up order made in January 1992. The Grand Court in the Cayman Islands appointed receivers for BCCI (Overseas) and Credit Finance Corporation Limited (CFC) in July 1991 and made winding up orders in January 1992.

A consequence of these winding up orders was that a large number of employees of the entities which had been put into liquidation lost their jobs.

The companies had set up two trust funds for the benefit of members of staff - an ICCI Staff Benefit Fund and a Staff Benefit Trust for the benefit of individuals who from time to time were or had been directors or officers or ex-directors or ex-officers or employees of BCCI group. The assets of the Fund and the Trust consisted principally of shares in BCCI (Holdings), the holding company of the Group.

Investigations following the liquidations revealed that there were no assets in the Fund or in the Trust. Generally speaking, employees of the Group were not unionised. Informal associations of former

employees were formed to safeguard their interests by collecting information and taking such legal steps as could be taken to recoup the missing funds. Eventually a BCCI Campaign Committee (BCCICC) came into being to co-ordinate these efforts. The applicant/appellant, Qaiser Malik, was a leading figure in BCCIC.

Nine ex-employees, among them the applicant/appellant filed action No. 007615 of 1991 in the Chancery Division of the High Court claiming damages for breach of trust against the companies of the BCCI and ICIC group and two named defendants. The group of BCCI and ICIC companies filed Cause No. 179 of 1995 in the Grand Court of the Cayman Islands against Mohammed Alain and the Attorney General of the Cayman Islands claiming that the Staff Benefit Trust was void or unenforceable because inter alia it had always been intended to be used for an illegal purpose.

Meanwhile negotiations had been taking place between the liquidators and the principal shareholder of the BCCI and ICIC group who were important dignitaries in Abud Dhabi. The BCCICC was concerned with the outcome of these negotiations since that would affect the sum its members would ultimately receive.

An agreement was reached between the liquidators and the Abu Dhabi interests. This had to be approved by the courts of Luxembourg. Approval was granted at first instance but reversed on appeal. A revised agreement again received approval at first instance, but again steps were being taken to lodge an appeal. BCCICC was involved in the

taking of these steps.

With these three sets of proceedings in train, the liquidators were negotiating with various representatives of the employees (whose interests were by no means identical) to resolved the issue of setting up some replacement for the plundered Staff Benefit Trust and Staff Benefit Fund.

In November 1995 such a settlement was reached. The employees had been represented by two firms of London solicitors, one of which, Manches, represented the applicant/appellant. A consequence of that agreement was the withdrawal of the appeal pending in the Luxembourg court.

On January 12, 1996 a summons for directions was set down for hearing in the Grand Court in action 179 of 1995 between the liquidators and the former employees. Orders were sought to ensure proper representation of diverse interest, to fix a date of hearing for the approval of the settlement and make provision for extensive advertisement to ensure that all interested partes were made aware of the date of the hearing and had access to the relevant documents. This summons was heard on March 28, 1996. Appropriate orders were made and a hearing date fixed for May 27, 1996.

On May 23, 1996 the applicant/appellant filed a summons in the Grand Court seeking in effect "salvage costs". This appeal follows from the dismissal of that summons. The bases on which it rested and the

particular remedies which it sought will be discussed subsequently.

For the liquidators, the essential conditions of settlement reached in November 1995 were -

- (1) The two sets of proceedings begun by the former employees in High Court in England would be withdrawn on the basis that each party would bear its own costs. It was, however, provided that -

"The liquidators will not object to an application being made to the Cayman Court that these costs be reimbursed on an indemnity basis as a first charge on the US\$50 million to be paid to the trustee under para 5 (a) (ii) of this letter."

- (2) The liquidator would discontinue their Cayman action (179 of 1995) on a similar basis.
- (3) The appellants would "irrevocably and unconditionally" withdraw the Luxembourg appeal against the approval of agreement between the Liquidators and the Abu Dhabi interests. The cross appeal would also be withdrawn.
- (4) Representation orders under the applicable rules would be sought in England and in the Caymans binding all beneficiaries under the BCCI Staff Benefit Trust and the ICIC Staff Benefit Trust "to the permanent discontinuance

of the intended and existing actions referred to above." They were also to release all claims they may have had arising from these Trusts.

In consideration of these discontinuances and withdrawals

- (1) a sum of US\$50 million would be paid to reputable and independent trustees on behalf of the BCCI Staff Benefit Trusts subject to the direction of the Cayman Court. This would be known as the "Hexagon Trust".

A sum of US\$20 million would be paid by a third party to a reputable independent trustee to be held by the trustee for the purpose of assisting in the repayment or other disposition or settlement of staff loans to employees or former employees. This would be known as the "Triangle Trust".

Despite this agreement, discontent persisted. On the date fixed for hearing, May 27, 1996, the parties asked for an adjournment to May 31, 1996. By that date a revised agreement had been reached. The essential conditions for the setting up of the Hexagon Trust and the Triangle Trust remained unchanged but provision was made that the Triangle Trust would be supplemented by a further US\$10 million to be paid into it by Hexagon Trust. The conditions for payment of money to claimants on the Triangle Trust were also elaborated. It was this revised agreement which came before the Cayman Court on May 31, 1996. By then the applicant/appellant's summons of May 23, 1996 had been

filed. Towards the close of the hearing Mr. Sheldon for the liquidators mentioned that application in which Mr. LaMontagne appeared for the applicant and asked that it be adjourned to the same day as the principal summons. Mr. LaMontagne joined in the application.

There was never any question that Mr. LaMontagne's summons could only be heard after the principal summons had been determined. In the principal summons the plaintiffs in the Cayman Action 179 of 1995 sought the court's approval of the agreement reached between them and the various groups of employees who were represented by the defendants including the BCCICC. They also sought approval of the Trust deeds which had been prepared in the implementation of the agreements and orders to make effective the conditions on which they had agreed and to make available the funds for setting up the Hexagon Trust and the Triangle Trust. Paragraphs 2 and 3 of the summons filed by the applicant/appellant prayed -

2. "That should the plaintiff's application be granted.
  - (a) a provision be contained in the deed or instrument [funding the Hexagon Trust] to the effect that the trustee thereunder shall be authorised to pay to the claimants who can satisfy the trustee that they have performed work or provided services for the benefit of former employees of one or more of the second, third and fourth plaintiff generally.
    - (i) in relation to proceedings pending before the High Court of Justice in London, England concerning the ICIC and BCCI Staff Benefits Trust
    - (ii) and/or before the District Court and/or before the Court of Appeal of Luxembourg relating to the approval of agreements intervened in February 1992 and/or in July 1994 between the liquidators of one or more of the plaintiffs herein and the government

of Abu Dhabi.

(iii) and/or in relation to the settlement of the said proceedings in England and of the proceedings before the Court of Appeal of Luxembourg relating the aforesaid agreement intervened in July, 1994. then reasonable expenses and where warranted, sums commensurate with their aforementioned work and the value of their aforementioned services to the extent that the same have not been paid including without limiting the generality of the foregoing, professional fees and expenses not now provided for in the proposed said deed or instrument and the expenses of travelling and living abroad;

(b) .....

3. Further and in the alternative THAT in such an event the trustee of the trust described in paragraph (2) hereof be directed to pay to such potential claimants such fees and expenses as are described in the said paragraph upon such terms and under such conditions as the honourable court may see fit."

By that date that application came in for hearing, the deeds setting up the Hexagon Trust and the Triangle Trust had already been finalised. There could be no purpose in pursuing the claim in paragraph 2(a) that a provision should be inserted in the Hexagon Trust to provide for the payments sought. Mr. LaMontagne abandoned that claim and concentrated the claim in paragraph 3.

The basis of the claim which was made, it would appear, on behalf of himself and other members of BCCICC was that they had devoted the bulk of their time since the liquidation to matters concerning the former trusts. They had instructed solicitors and engaged the services of other professionals undertaking the responsibility for paying their fees. They were engaged in this work on a daily basis and often at week ends as well. Visits to the United Arab Emirates, Pakistan, Hong Kong, Bangladesh and the United States of America had had to be made to tap sources of information. It was that sustained effort in

pursuing the legal remedy on behalf of the former employees which had forced the settlement resulting in the setting up of the new trusts from which all the employees had benefit. That was the "salvage" operation and the costs of it should be paid from the fund which came into being as a result.

At a hearing on June 28, 1996, Harre CJ made the orders sought with regard to the approval of the terms of the agreement reached and the draft deeds setting up the trusts. Mr. LaMontagne was not present when these orders were made. He had been there earlier but when it had become clear that resolution of the last minute hitches which had arisen would leave no time for the hearing of his application he had been released for the afternoon by Harre CJ. After the principal orders had been made, the applicant/appellant's summons was adjourned to a date to be fixed.

One of the terms of the order made by Harre CJ was that -

"all further proceedings in this action be stayed with liberty to apply to remove the stay in case the terms of compromise do not become unconditional and further with liberty to apply for the purpose of carrying the terms set forth in the Schedule hereto into effect."

It became clear that problems were likely to arise at the hearing of Mr. Malik's summons. On July 2, 1996 his solicitors wrote the Clerk of Court recounting the events of June 28, 1996 and Mr. LaMontagne's release. This letter continued -

"Senior counsel found out late Friday

afternoon that the court had made an order on the plaintiffs above application which had the effect of ending the matter. Our client's application could only have been brought and could only be heard and determined in a pending matter. We understood throughout that the court would hear it. This may no longer be possible. It may well be that the order of the court is not perfected and that it will not be until such time as our client's action is heard and determined."

In fact the order was not immediately perfected and that was the position when an application was made to the High Court in London on July 8, 1996 for orders staying the English proceedings and approving the agreements and the Deeds of Trust. The orders were granted on the understanding that the Grand Court had made a similar order on the Cayman action although that order had not yet been sealed. The Vice-Chancellor treated the matter on the basis that a final order had been made.

Mr. Malik's application came on for hearing in the Grand Court on July 26, 1996.

On behalf of the liquidators Mr. Sheldon raised four preliminary objections to Mr. Malik's application -

- (1) The Grand Court had made final orders in action 179 of 1995 giving effect to the agreed terms of settlement and that should be an end of the matter. The orders should be sealed forthwith.

- (2) The remedies being sought by Mr. Malik in his application were plainly a breach of the November 1995 Heads of Agreement and the May 1996 variation to which he was a party and to which he had agreed.
  
- (3) No matter how presented, Mr. Malik's application sought to have the Grand Court alter the terms of the Settlement Agreement. The Court had no such jurisdiction.
  
- (4) The application was premature. The trustee of the Hexagon Trust should be a party to any such application dealing with disbursement of the funds of the Trust. A trustee had yet to be appointed.

He urged that granting the application would place the Agreed Settlement in jeopardy. The order made by the Vice-Chancellor in the High Court had been on the basis that the order made by the Grand Court was a final order.

Provision had been made in the agreement for payment of costs of certain proceedings from the trust fund but what was being sought went further. It included remuneration for time spent. Substantially, counsel appearing for the defendants who represented various groups of employees endorsed Mr. Sheldon's objection. So did counsel appearing for the Attorney General.

In response to these objections, Mr. LaMontagne recounted the sequence

of events leading to the making of the orders while he was absent. The fact was that his application had always been pending, and had the orders not been made on a Friday, with Mr. Sheldon leaving shortly afterwards for London, the hearing would merely have continued on the day following to determine Mr. Malik's application.

He stressed that he was merely seeking a decision "in principle" that the salvage costs were payable. It would bind the trustee once he was appointed. The fact that there was no trustee was not crucial. The trustee having accepted office, would assume his duties subject to that direction in principle. He placed great emphasis on Order 15 r 6 which stated -

"No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party, and the Court may, in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The mere absence of the trustee as a party should not lead to the dismissal of the application.

While Mr. LaMontagne did not wish to be positive on the issue, he urged that he had cogent reasons on an analysis of the case law to infer that it was possible to conclude that if Mr. Malik's application was not heard in the proceedings under which the trusts were being set up, there would be no jurisdiction to hear it at all. As he understood the principle, a claimant who came to a court of equity asking for equitable benefits could have it ordered as a condition of

his receiving these benefits that he should reimburse the expenses of persons whose efforts had made the procurement of these benefits possible. Once the benefits had been received, an order for reimbursement of expenses could not be made. It was a matter of timing.

At the close of the arguments Harre CJ delivered an oral ruling that the Agreement was a final agreement and that his order of June 28, 1996 should be perfected as soon as possible. He saw no reason why "salvage costs" could not be claimed in separate proceedings once the Hexagon Trust had been established. He dismissed the summons on the grounds raised in the preliminary points taken by Mr. Sheldon, Mr. Todd, Ms Bridges and Ms Agard. Mr. LaMontagne applied for leave to appeal. Mr. Sheldon opposed the application. Harre CJ refused the application.

A motion before the Court of Appeal for the grant of leave to appeal was duly filed on August 12, 1996. It was filed ex parte. Arrangements were, however, made for service on the other parties involved. In the course of this hearing there appeared to be some uncertainty as to whether this Court had ordered that the hearing of the application for leave should be treated as the hearing of the appeal. The court itself has no doubt on this matter and the hearing at this special sitting has proceeded on the basis that the application for leave be treated as the hearing of the appeal. It was the case that no grounds of appeal had been filed as would have been done for a full hearing. The issues raised were narrow and no party

has been prejudiced.

The arguments addressed to us were substantially the same as that advanced before Harre CJ. The merits of the application have not been addressed. The contention was that Mr. Malik's application could not now be heard as part of the proceedings in which they had been made.

This contention appears to be sound. The terms of the order made by Harre CJ staying all further proceedings in the matter precludes the making of the application. This term of the order was intended to give effect to the clause of the agreement of November 1, 1995 which was part of the final settlement of May 31, 1996 that there be a permanent discontinuance of the three actions then being pursued in the Luxembourg Court, in the High Court in London and in the Cayman Grand Court. The solicitors representing the group to which Mr. Malik belonged accepted the heads of agreement and consented to the order containing the term imposing the stay.

Mr. LaMontagne submits that it was well known that he filed his application for "salvage" costs when he agreed to the consent order and that there had been a clear understanding that the application would be heard after the order setting up the trusts had been made. The inference was accordingly clear that the stay could not apply to his application. In negotiations as complex and difficult as were the negotiations leading to the order, this should not have been left to mere inference. If that had been the intention it should have been contained in the order.

The problem as conceived by Mr. LaMontagne is that the law, as it now stands, does not permit Mr. Malik to make an application of the type which he has made except in the course of proceedings concerning the trust in respect of which the claim is made. The difficulties arise from his interpretation of a passage in Re Berkeley Applegate Ltd. [1988] 3 All.E.R. 71 at pp. 82-83.

"In my judgment counsel's submission for the first respondent are based on too narrow a view of the principles on which the court acts. It is true that the legal title to the mortgages and to the client account is not vested in the liquidator but remains in the company; but the investors still need the assistance of a court of equity to secure their rights. In this respect their position is different from that of the claimant in Falcke v Scottish Imperial Insurance Co. (1886) 34 Ch. D 234 at 251, where Bowen LJ said 'It is not even a case where the owner of the saved property requires the assistance of a Court of Equity ... to get the property back'. As a condition of giving effect to their equitable rights, the court has in my judgment a discretion to ensure that a proper allowance is made to the liquidator. His skill and labour may not have added directly to the value of the underlying assets in which the investors have equitable interests; but he has added to the estate in the sense of carrying out work which was necessary before the estate could be realised for the benefit of the investors. As was the case in Scott v Nesbitt (1808) 14 Ves 438, [1803-13] ALL.E.R. Rep 216, if the liquidator had not done this work it is inevitable that the work, or at all events a great deal of it, would have had to be done by someone else, and on an application to the court a receiver would have been appointed whose expenses and fees would necessarily have had to be borne by the trust assets. On the evidence before me, the beneficial interests of the investors could not have been established without some such

investigation as has been carried out by the liquidator.

The allowance of fair compensation to the liquidator is in my judgment a proper application of the rule that he who seeks equity must do equity. As Wigram V-C stated in Neesom v Clarkson (1845) 4 Hare 97 at 101, 67 ER 576 at 578:

'That ... is a rule of unquestionable justice, but which decides nothing in itself; for you must first inquire what are the equities which the Defendant must do, and what the Plaintiff ought to have.'

16 Halsbury's Laws (4th edn) para 1303, which in my judgment correctly states the law, comments:

"The rule means that a man who comes to seek aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked."

As Mr. LaMontagne analyses the position, the timing of an application for salvage costs must coincide with the exercise by the court of its equitable jurisdiction to grant to the beneficiary the remedies which he claims under the Trust which has benefitted from the efforts of the "salvor".

The use of the phrase "submit in such proceedings" is likely to be the source of Mr. LaMontagne's concern. In this case, however, the principal proceedings do not involve claims by persons coming to the court "to seek the aid of a court of equity". The plaintiffs, the

liquidators, have no such claim. The allegations are of breach of trust against the liquidators. Their defence essentially is that there never had been any trust. It had all been a show. The settlement requires the setting up of two new trustees, one of them the Hexagon Trust. After it has been constituted, the beneficiaries under that trust can claim entitlements under it and in the course of calculating their entitlements, account can be taken, if the principle is found applicable, of Mr. Malik's exertions and expenses in making the fund available.

In the formulation cited, the concern is not with "timing". It is with the formulation of the jurisprudential basis of the claim. If the claim can be made out there would seem to be no reason for disallowing it merely on the basis of its timing.

The application in Re Berkeley Applegate (supra) was made by an originating summons filed by the liquidator - see p. 72. It was not a summons or motion in any other proceeding. In Phipps v Boardman [1964] 2 ALL.E.R. 187 at p. 180 the action was begun by writ against the defendants as constructive trustees for certain declarations relating to the rights of the beneficiaries and for an account. The actual trustees were joined also as defendants though no remedy was claimed against them. The defence was that the defendants had not acted as agents in the transactions and had throughout acted on their own behalf with the knowledge and consent of the plaintiff. The defence failed. The account was ordered. In giving directions on the taking of the accounts, Wilberforce J ruled that account had to be taken of

the expenditure which was necessary to enable the profit to be realised and that there should be payment on a "liberal scale" for the "skill and labour" which had produced it. There was no issue of the timing of the defendant's claim. It does not appear that the defendants made any formal claim for example by way of counterclaim. The judge made a direction for guidance on the taking of accounts. No issue of timing arose.

In Guinness p.l.c. v Saunders [1990] 1 ALL.E.R. 652, the company sought by writ the return of L5.2 million paid to the defendant for his services in effecting a successful take-over bid. It applied for summary judgment on the ground that there was no defence. The appellant contended that summary judgment should not be entered. He contended that even if the agreement to pay him the sum he had received was unenforceable, he was entitled on a quantum meruit for payment for his work in effecting the take-over. The claim failed on the ground that such payment would be in breach of his fiduciary duty to the company as a director since a conflict of interest situation would arise. Again, while the claim was made in the course of proceedings as a defence there was no issue of "timing:."

That issue has not been exhaustively argued so that it is not possible to say that it is misconceived but it can be said that is not borne out by the cases cited in support.

Mr. Sheldon's contention that the application is premature seems also well based. Although the deed constituting the trust has been approved

and a trustee has been identified, as of the date of hearing the trustee had not yet been appointed nor had the funds yet been paid into the trust. The application sought to have the court give directions to a trustee who had not yet been appointed. Order 15 r 6 has no application to the facts of this case. It contemplates an action which is properly constituted in that there are parties before the court with issues to be decided between them. In such a situation the court will decide the issues between those parties and will not dismiss the action because parties who could have been joined have not been joined or because there was misjoinder. Here one of the principal parties, the trustee who is to be directed, cannot be before the court. The orders providing for representative defendants to represent groups of employees for purposes of settling the dispute between the liquidators and the employees may not be appropriate for dealing with the issues raised in Mr. Malik's application. Thus while the firm of Manches looked after the interests of Mr. Malik in relation to the principal action and the settlement reached in relation to it, Mr. Todd, who appeared at the hearing instructed by Manches, made clear that he was in no way associated with the application for salvage claims.

Mr. LaMontagne stressed that he was merely seeking an agreement in principle and contended there was support to be found in Phipps v Boardman (supra) and Bryan Applegate (supra). In those cases, all necessary parties were before the court and essentially directions were being given as to how accounts should be taken.

For these reasons at the close of the arguments we dismissed the appeal, affirmed the order of Harre CJ and ordered the applicant to pay the respondent's costs of the appeal.

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Judge of Appeal

I agree.

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President

I agree.

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Judge of Appeal