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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 389/92

BETWEEN:

(1) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD (In Liquidation)

(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED **Plaintiffs**

AND:

(1) SHAIKH KAMAL ADHAM
(2) FAISAL SAUD AL FULAIJ
(3) GHAITH RASHAD PHARAON
(4) PHARAOH HOLDINGS LIMITED
(5) LHASA INVESTMENTS LIMITED
(7) CONCORDE INTERNATIONAL TRADING SA

Defendants

For the plaintiffs: Charles Purle QC and Ewan McQuater of counsel instructed by Hunter & Hunter

For the defendants: Richard McCombe QC, Ramon Alberga QC and Anthony Trace of counsel instructed by Myers & Alberga

HARRE C.J. **RULING**

This is a summons by the Fifth and Seventh Defendants ("the defendants") for two alternative forms of relief. In the first place they ask for an order that a letter of request shall issue to the proper judicial authority in Saudi Arabia for the examination of the Third Defendant, Ghaith Rashad Pharaon ("Pharaon") in Saudi Arabia with the trial judge or other person determined by the court as special examiner. The alternative sought, which is preferred by the

defendants is an order that the evidence of Pharaon be taken in Saudi Arabia, as part of the trial itself. Under O 35 r 3 of the English Rules of the Supreme Court ("RSC"), which is followed in the practice here, the judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.

It is common ground that the evidence of Pharaon is of the greatest importance and that he will not risk extradition to the United States, where he is under indictment, by coming to the Cayman Islands or to any other place where a similar risk exists, and it is argued by the plaintiffs that as a matter of comity Pharaon should not be granted any indulgence by a Cayman Court because he is evading justice in a United States Court.

Moreover, although he is a defendant in the present proceedings, he has not entered an appearance and is not recognising this court's jurisdiction. That in itself, say the plaintiffs, should lead to the dismissal of the application, which seeks to give to Pharaon through the defendants, which they say he controls, the opportunity to give evidence contesting the plaintiff's claim without having the burden of the proceedings if he loses.

My view is that it is the prime duty of the Cayman Court to seek to do justice on the issues before it on the basis of all material evidence which it is able to have presented to it, irrespective of extraneous considerations relating to the personal position of Pharaon. It might be otherwise if Pharaon had left or was staying away from Cayman to escape being cross-examined, or to avoid or delay a trial; or if expense was a significant factor in relation to the amount at stake, which in this case is enormous; or if it were a plaintiff who had chosen his jurisdiction who wished to avoid giving evidence there; or where there was other sufficient evidence available. See Re Boyse, Crofton v. Crofton (1880) xx Ch D 760, Langen v. Tate (1880) xxiv Ch D 522 and the references in both cases to Berdan v. Greenwood an unreported case of 1880. But I am satisfied that Pharaon has

compelling reasons for not coming to the Cayman Islands which are unconnected with the present trial. That was also the situation in Re a Debtor (1978) 1 W.L.R. 1512, a case in which there were warrants out for the debtor's arrest in England and he sought an order that he be cross-examined in Spain on his affidavit filed in bankruptcy proceedings. It was held that the debtors predicament should not be given very great weight and should not be allowed to prejudice the interests of the petitioning creditor which required cross-examination of the debtor in England in view of the subjective nature of the question in issue. But the distinguishing feature of that case was that the possibility of cross-examination in Spain before the judge who would hear the bankruptcy proceedings did not arise.

All the cases which I have mentioned are distinguishable from the present matter where in my judgment the first point which I have to decide is whether in the interest of all parties there exists a procedure whereby in practical terms examination viva voce of Pharaon could take place before the trial judge himself in Saudi Arabia. It is to that, therefore, to which I turn.

First there is the question of jurisdiction. This calls for consideration of what the court would actually be doing if it sat, as part of the trial, to hear evidence outside the Cayman Islands. For that purpose I look first at two cases, one of a purely domestic nature and one with an international dimension. They are St. Edmundsbury & Ipswich Diocesan Board of Finance an another v. Clarke (1973) 1 Ch. 323 and Tito v.Waddell (1975).1 W.L.R. 1303. In the St. Edmundsbury case Megarry J found that the court had power to adjourn a trial to such place as the judge thought fit and was not confined to an adjournment only to those places which were authorised for sittings of the High Court. There was no question in that case of any sitting outside England. The main interest for present purposes in the case is the comparison which Megarry J makes between the taking of oral evidence in this way and a view of real evidence by a judge. He said this -

> "The process whereby a judge's perception of objects takes place on a view outside the court must, as it seems to me, form part of the trial; and if a judge may leave the court room to receive evidence of objects which cannot be carried before him, I do not see why he should not also, while away from the courtroom, receive evidence from a witness too ill to come to court, provided, of course, appropriate safeguards are observed."

From that point I can move to the international dimension of Tito v. Waddell. In that case Megarry J had to consider whether he should go to the Pacific in order to view Ocean Island. There are two passages in his judgment which are particularly important in the present matter. The first is this -

> "First there seems to be nothing to restrict the rules to cases in which the place or thing to be viewed lies within the jurisdiction; and no suggestion that there has been any such restriction has been made. I see no reason why the rule should not apply in cases in which equity, acting in personam, is concerned with land outside the jurisdiction."

The rule to which Megarry J was referring was RSC Order 35 rule 8 (1) which provides that the judge by whom any cause or matter is tried may inspect any place or thing with respect of which any question arises in the cause or matter.

The second important passage from the judgment of Megarry J also concerns the juridical nature of a view. It is this -

> "At one time it was said that the function of a view was merely to enable the judge to follow the evidence. However, since Buckingham v. Daily News Ltd. (1956) 2 Q.B. 534 I do not think it can be said that the function of a view is thus restricted: and Tameshwar v. The Queen (1957) A.C. 476 reinforces this approach.
> Denning LJ put the matter succinctly in an

earlier case, Goold v. Evans & Co. (1951) 2 TLR 1189, when he said at page 1191: "Speaking for myself I think that a view is part of the evidence just as much as an exhibit. It is real evidence"; and it was this doctrine which was applied in Buckingham v. Daily News Limited. What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the courtroom. Just as a portable object may be brought into court and, being made an exhibit, becomes real evidence, so if the judge duly views the place or object which cannot be brought into court that place or object provides real evidence through the medium of the judge's eyes, ears, touch, tongue or, as in one recent case before me, his nose..... On this footing the tendering of real evidence no longer depends on the res being portable.

One result of a view having this nature is that the present application must be regarded not as a mere application by the plaintiffs for me to view Ocean Island in order that I may better understand the evidence, but as an application by the plaintiffs to tender certain evidence."

It was suggested on behalf of the plaintiffs that by hearing evidence in a place which lies outside the jurisdiction of this court the court would be snatching at an extraterritorial jurisdiction. But if a view outside the jurisdiction of Ocean Island was no less a part of the trial within the jurisdiction than if it had been held in a courtroom in England the question to be asked is whether in principle, and on the basis of the comparison between real and oral evidence made by Megarry J in St. Edmundsbury, the Cayman Court could, subject to proper arrangements being made, take oral evidence as part of the

trial outside the jurisdiction where a witness is found to be, for sufficient reason, not "portable". There is precedent for a trial judge sitting as an examiner (by which I mean no more than an indication that such an event occurred) in an order made by the Hon. Sir Joseph Cantley OBE sitting as a deputy judge of the High Court on a summons taken out by the solicitors for the plaintiffs in an action entitled Bank of Credit and Commerce International SA (Licensed Deposit Takers) v. Edward Aboody and another. The order provided that subject to certain matters agreed by the parties through counsel which included the appointment of agents in the Italian republic, and subject to any necessary consent of and any conditions imposed by the government of Italy Sir Joseph himself be appointed as special examiner for the examination, cross-examination and re-examination of Edward Aboody as a witness for the Second Defendant in Italy, with liberty to invite the attendance of the witness and the production of documents without the exercise of any compulsory powers. It was provided that otherwise such examination should be taken in accordance with English procedure.

Therein, I think lies the key to the difference between a view and the taking of evidence. A judge will not be exercising any kind of coercive jurisdiction in respect of a res viewed, whether it be an island outside the jurisdiction or a field or footpath within it. It is otherwise with a living witness, who may refuse to answer question or produce documents, insult or threaten the court, lie under oath and so on. How can a person purporting to act as a trial judge deal with any of this without power to impose any sanction, and how can be impose any sanction without ecxercising an extraterritorial jurisdiction? The plaintiffs say that they want to cross-examine Pharaon "up hill and down dale". I do not doubt it, and I cannot, on the evidence before me, envisage this being effectively done in Saudi Arabia without a trial judge purporting to exercise a jurisdiction which he does not have.

The evidence of Mr. Sibley on behalf of the defendants is that he believes that there would be no objection by the appropriate

authorities in Saudi Arabia to evidence being given at a suitable venue there, whether by examination process or as part of the trial. A number of reasons for a contrary view have been put forward by Mr. Farrington on behalf of the plaintiffs. He believes, having also taken local advice, that neither the taking of evidence on commission nor arranging a sitting of the Grand Court itself in Saudi Arabia are practical possibilities at all.

I do not feel that I can make any ruling in principle now of the kind which Megarry J made in Tito v. Waddell, with regard to Saudi Arabia. It is not simply a question of timing, logistics and costs. The most sensitive matters of religion, culture and diplomacy arise. In that regard it must not be forgotten that Cayman is a British Dependent Territory. The representatives of the parties must of necessity take up partisan positions. That is their job, but I do not think it is the best way of resolving this problem. I intend to take the matter up myself at Government level and adjourn this summons in the meantime to a date to be fixed on or before 1st November. The parties will be notified thorough the Clerk of Courts of any date before 1st November on which I may wish the summons to be restored. In the meantime I will simply say that if there is any way in which the problems can be resolved I am ready and willing to make such journey and spend such time as may be necessary to achieve the important objective of an effective examination and cross-examination of Pharaon. In that connection I ask the representatives of the applicants to let me know of any alternative venue to which he would be prepared to travel for this purpose.

17th August 1994

G.E. Harre
Chief Justice