9.8.94

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

CAUSE # 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 plaintiff: 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. **REASONS FOR RULING**

The plaintiffs describe the further amendments to the writ and statement of claim which they seek in their summons dated 12th July 1994 as a repackaging of causes of action based on the same bedrock of facts and consequential on the introduction of Finance and Investments International Ltd. ("FIIL") as a plaintiff.

The dispute as to the amendments is directed principally at those which appear in Parts iv - ix of the statement of claim. There is an assertion that there is a lack of particularity in these and that Parts viii and ix, which are concerned with dealings with the shares of the Attock Oil Company Ltd. ("AOC") and, in particular, alleged fraudulent disposition of those shares and substantial assets of Dr. Pharaon, the third defendant, flow from amendments allowed in my ruling of 24th June and should not be allowed pending the determination of the appeal against that ruling for which leave has already been given. They are, it is said "AOC" or "FIIL as plaintiff" matters which stand or fall with the amendments now under appeal. Objection is also taken to the inclusion of the Heads of Damage.

If the objections based on lack of particularity are well founded, the same may be said of aspects of the existing pleading. Indeed, answers have already been filed to a voluminous request for further and better particulars of these. It is, of course, a primary obligation of a party to state in its pleading all the "necessary particulars" of any claim, defence or other matter and the court may order particulars or further and better particulars to be served, and whenever a party is imputing fraud or mischief the facts must be stated with especial particularity and care.

In every pleading a certain amount of detail is necessary to ensure clearness and prevent surprise at the trial. But the surprise of which the defendants complain is of a different kind. It is the

receipt of what they describe as substantial amendments at this stage of the proceedings, after having asked for some four months what their nature would be. Even if the present trial fixture remains, there are three months left for preparation, although pleadings are not yet closed and the opportunity to seek further and better particulars, and of course discovery, remain. In my view, and taking a view of the amended pleading as a whole, there is sufficient particularity in it to fulfil its essential function which has been stated in the various ways set out in note 18/12/2 of the English Supreme Court Practice and to enable the next steps in the action to be taken without unfair embarrassment to the defendants.

I now turn to the point relating to the appeal. It is submitted that the appeal should go forward on the basis of the amendments already allowed and that the additional work and expense related to further amendments should not be incurred. But even on the unamended pleadings, there is issue with regard to beneficial ownership of the AOC shares and work preparatory to trial which will have to be done in any event, and indeed much must have already been done to found the defences. Preparation for trial should take place on the basis of the pleadings as they stand from time to time in the light of decisions of this court unless and until the Court of Appeal determines otherwise. To rule otherwise would incur not merely delay but substantial delay in the trial of this matter. On the stated position of each party, neither desires this. Whether on any footing the trial date of 1st November can stand falls to be determined on a separate summons.

I now turn to the arguments as to the pleading of damage. The Heads of Damage which the plaintiffs now seek to introduce into the statement of claim are the same as those set out in a letter dated 18th March 1994 from the plaintiffs' to the defendants' attorneys. This was in accordance with an undertaking given in relation to the order made at the hearings earlier that month that the issue of quantum of damages and compensation be dealt with separately. The consequential procedure, say the plaintiffs, will be similar to that followed in the Chancery Division in England and described as follows by Walton J in Rightside Properties Ltd v Gray (1975) 1 Ch. D 72 -

> "As I understand the position with regard to the calculation of damages in an action in the Chancery Division, the rule is that the plaintiff (or counterclaiming defendant) must show some damages arising to him from whatever it is he is complaining of. Thereupon, the damages will automatically be referred to an inquiry.".

The defendants' complaint here is really again, in part, lack of particularity. They say that they do not know the case which they have to meet in response to these Heads of Damage. It is, of course, well established that a plaintiff will not be allowed at trial to give evidence of special damage which is not claimed explicitly, either in his pleading or particulars. Special damage up to the date of trial must be pleaded and particularised, otherwise it cannot be recovered (Ilkiw v. Samuels (1963) 1WLR 991). A further objection taken is that

no head of damage for the legal expenses of investigating the plaintiff's claim up to the date of the issue of the writ should be allowable as damages but should be recoverable only as costs. See Ross v. Caunters,1 Ch 297 where Megarry V-C found that there was ample authority for saying that a succcessful plaintiff cannot obtain, inthe guise of damages, any costs which on a party and party taxation are disallowed by the taxing master. He made clear, however, that he was saying nothing about damages which fell outside the form in which they were claimed in the case, namely the legal expenses of investigating the claim up to the date of the writ. That apart, matters of costs recoverable are different here. This is a matter which is fit to go to trial, as indeed it did in England, for decision. It would be wrong for the matter to be dealt with at this stage of pleadings. On the more general point of the adequacy of the heads of damage as a whole, to require more now would, in my view, nullify the benefit which was intended to be achieved by the order for a split trial.

It is also argued that the pleaded conspiracy does not found the claim in damages for the whole or part of the amount of the deficit in the assets of ICIC which was in any event abandoned on the deletion of parts (b) and (c) of the sixth claim in the writ. The question of a right to restore an abandoned cause of action (leaving aside for the present purpose the question of whether in this case it has been abandoned at all) has been considered in the context of a limitation period (See Note 20/5-8/27 of the Supreme Court Practice). As I understand the position it can be done no less than any other amendment, subject to the principle that amendments which would

prejudice the rights of the opposite party existing at the date of the proposed amendment are not, as a rule, admissible. So the question is whether the particular addition to the statement of claim should be allowed. My view of this is that if there is an issue of estoppel here it is one for argument at the trial and not to be dealt with now at the stage of argument over amendment of pleading, and that particular amendment should be allowed. Throughout this whole matter I must take care to avoid taking as pleading points those which are in the nature of trial points. The functions of pleading need to be remembered. It may well be that arguments at trial may be advanced, and successfully, against the plaintiffs on the basis of causation, or otherwise. But that is not for now. The plaintiffs are entitled to plead now as they seek to do in relation to Heads of Damage, subject to quantification later. The court can, if it sees fit direct further pleading n that issue.

All in all I concluded on a review in some detail of the writ and statement of claim that the amendments sought by the plaintiff should be allowed.

9th August 1994

G.E. Harre

Chief Justice