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to file

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

CAUSE #389 OF 1992

BETWEEN:

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

Plaintiff

AND

(1) SHAIKH KAMAL ADHAM
(2) FAISAL SAUD AL FULAIJ
(3) GHAITH RASHAD PHARAON
(4) PHARAOH HOLDINGS LIMITED
(5) LHASA INVESTMENTS LIMITED
(6) FINANCE AND INVESTMENT INTERNATIONAL 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 and Ramon Alberga QC and Mr. Anthony Trace of counsel instructed by Myers & Alberga

HARRE C.J. **RULINGS**

The plaintiff in this matter is International Credit and Investment Company (Overseas) Ltd. ("ICIC").

I now have to deal with various summonses brought respectively

by the plaintiff and the fifth and seventh defendants, whom I shall refer to henceforth simply as "the defendants" collectively and individually as "Lhasa" and "Concorde".

1. **Plaintiff's summons seeking leave to re-amend the writ and amend the statement of claim.**

On the pleadings as they stand a company called Finance and Investment International Ltd ("FIIL") is the sixth defendant. The first relief which the plaintiff seeks by way of amendment is the removal of FIIL as a defendant and its addition as a plaintiff. The second is to introduce a prayer for a declaration that FIIL is the sole beneficial owner of the entire issued share capital of the Attock Oil Company Ltd. or alternatively a declaration as to the extent of that ownership.

In its application to add FIIL as a second plaintiff the plaintiff says that both the requirements of Rule 24 of the Grand Court (Civil Procedure) Rules are fulfilled. That is to say they claim that a right to relief exists in respect of or arising out of the same transaction or series of transactions and if the plaintiff and FIIL brought separate suits common questions of law or fact would arise.

In this action ICIC claims to be the sole beneficial owner of FIIL, and it is common ground that ICIC owns not less than 75% of FIIL. It is alleged that on 24th November 1991 88% of FIIL's

shareholding in AOC was wrongfully transferred to Lhasa and that shortly thereafter Lhasa wrongfully transferred those shares to Falcon Properties Ltd, a subsidiary of Concorde.

The question of which is the appropriate court for the resolution of the proposed claim is, of course, a matter for consideration in the exercise of the discretion to give leave to amend. The defendants argue that this court is not the appropriate forum, and that the proposed claim is merely a mirror image of an important claim in an action already begun in Pakistan. They say that one cannot decide where an action is to be tried without being clear what is to be tried. If authority is needed for a proposition founded on that simple good sense it is to be found in the words of Bingham L.J. in Re Harrods (Buenos Aires) Ltd. (1992) Ch. 72, 123. The defendants say that the real dispute about AOC is not about its shares but about who is entitled to control the business conducted through valuable AOC subsidiaries in Pakistan, and that the matter should be determined there. No doubt the control of those subsidiaries is the motive for the interest in the shares. But there are few disputes, if any, over shares of companies which own nothing and do nothing. But it cannot be doubted that there are a number of such disputes over shares in companies which conduct operations in many jurisdictions. It would, putting it at its lowest, be an exceptional case if a court were to go behind the shareholding and decide, in the light of the respective importance of those operations where that claim is to be determined. It may be that the determination of share ownership will in some cases determine all

other questions also. In others it may be but a step in a long road. But this case is easily distinguishable from Re Harrods (Buenos Aires) Ltd. In that case it was alleged that the affairs of a company incorporated in England whose business was conducted exclusively in Argentina, with its central management and control there, was being conducted in a manner unfairly prejudicial to a minority. It was about management, not the existing share ownership, and although relief was sought under the English Companies and Insolvency Legislation, it was held on consideration of all the relevant factors that in all the circumstances the Argentine court was that with which the dispute had the most real and substantial connection.

ICIC and FIIL are both incorporated in the Cayman Islands. So is Lhasa. AOC is incorporated in England, Concorde in Panama. The only connection with Pakistan is the fact that AOC has subsidiaries there. Control of FIIL has passed to the liquidators of ICIC who have given their consent to the addition of FIIL as a plaintiff. Neither FIIL, Lhasa nor Falcon are parties to the Pakistan proceedings and there is affidavit evidence that FIIL would not consent to be joined as a plaintiff in those proceedings. A multiplicity of proceedings is always to be regretted, and I accept that there may be difficulty in getting some witnesses to the Cayman Islands. I am satisfied nevertheless that FIIL should be an added plaintiff in any dispute relating to the ownership of the AOC shares and that there are issues for which, in my view, Cayman is clearly the more appropriate forum in relation to the ownership of those, as well as the FIIL shares, and conspiracy. The ownership of the AOC shares is already on the

pleadings in relation to the conspiracy issues. On those grounds I grant the relief sought by the plaintiff in paragraphs (i) to (iii) of its summons dated 25th November 1993.

I now turn to the contention of Concorde that the Court must be satisfied that the new claim to be added in respect of the AOC shares is one in respect of which the Court would grant leave to serve Concorde out of the jurisdiction, even though proceedings have already been validly served on it and it has submitted to the jurisdiction. I accept that Waterhouse v Reid (1938) 1 KB 743 stands for the proposition that I have to consider whether the new cause of action is one in respect of which leave to serve out of the jurisdiction can properly be given. On this the Court takes guidance from Order 11 rule 1 of the English Rules of the Supreme Court when applying Rule 13 (3) of the Grand Court (Civil Procedure) Rules. Rawson Trust Company Ltd v G.C.T.C. Ltd etc (1980-83) CILR 214. The issue between the parties is whether the proposed claim would fall within the guidance provided by English Order 11 rule 1 (i) (c) and, further or alternatively, whether this is a proper case for service of process outside the jurisdiction.

Order 11 Rule 1 (i) (c) reads as follows -

> "the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto".

Concorde argues that there is no issue between Lhasa, the defendant served within the Cayman Islands, ICIC and FIIL as to the beneficial ownership of the AOC shares which ought to be tried here

since as Lhasa makes no claim to the AOC shares no declaration as to that ownership should be sought against it. That argument, which is the basis of the proposition that Lhasa is merely a nominal defendant for the purpose of bringing in Concorde, does, I think, go beyond the bounds of what was said by Lord Dunedin in Russian Commercial & Industrial Bank v. British Bank for Foreign Trade (1921) 2 AC when he considered the effect of a long course of decisions in the Scottish Courts.

It was this -

> "The question must be a real and not a theoretical question; the person raising it must have a real reason to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.".

In agreeing that the discretion to grant a declaration should not be exercised save for good reason Viscount Kilmuir LC in Vine v National Dock Labour Board (1956) AC 488, 500 referred to those Scottish tests as being helpful.

With that in mind I need to look once again at the issues on the pleadings. In its defence Lhasa sets out a history relating to the shares in AOC up to 1980 and avers, in paragraph 34, that in the premises AOC was 85% (subsequently 88%) beneficially owned by Pharaon, the third defendant. The plaintiffs' claim, on the amended statement of claim, will be for alternative declarations against all the defendants, including Lhasa and Concorde, as to the beneficial ownership of the AOC shares. The plaintiffs' version of events

depends on allegations of conspiracy and knowing assistance in breach of fiduciary duty which are denied. That, in my view, is an ample and real reason for the plaintiff to raise the question and for the identification of Lhasa and Concorde as entities who have a true reason for opposing the declaration, even though Lhasa makes no claim to ownership of shares. Lhasa is not a nominal defendant only. The claims in conspiracy and knowing assistance in breach of fiduciary duty do demand that those involved at each stage of the alleged wrongdoing be parties to this action. Lhasa is a person duly served within the jurisdiction. Concorde is a proper party to the claim and leave is given to serve the amended pleadings on it in Panama.

What I have said so far addresses two of the grounds raised in one of the two summonses by the defendants dated 21st February 1994. There follows an allegation that the claims in the plaintiff's summons constitute a misuse of the relief granted by this court on 28th October 1992 and a prayer that that order be discharged or varied. Several reliefs were granted by the order, including leave to serve certain defendants other than Concorde out of the jurisdiction. Concorde was not at that time a party to the action. When the company was joined, leave to serve it out of the jurisdiction was granted. I detect no misuse of the order dated 28th October 1992, nor any reason for discharging or varying it at this late stage.

(A) Application by the Fifth and Seventh Defendants for Striking Out

There was a further summons dated 21st February 1994, the substance of which was for the following -

(1) An order that Parts IV, V and VI of the Statement of Claim herein be struck out on the grounds that

(a) they disclose no cause of action against the said Defendants or either of them and/or

(b) they may prejudice, embarrass or delay the fair trial of this cause and/or

(c) they are an abuse of the process of the Court;

(b) Further or alternatively, Application by the Seventh Defendant for the following -

(2) An Order that the Statement of Claim (or such part or parts thereof) as to the Court seems fit be struck out on the grounds that

(a) it discloses no cause of action against the said defendant, and/or

(b) it may prejudice, embarrass or delay the fair trial of this cause

(c) it is an abuse of the process of the court.

Parts IV and V of the statement of claim are those in which the allegations of conspiracy and knowing assistance in breach of fiduciary duty appear. Part VI is an "avoidance of doubt" provision. The following guidance is from the speech of Lord Mackay of Clashfern

in Williams & Humbert v W&H. Trade Marks (1986) 1 AC 368 at 441

> " If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord. 18. r. 19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that the striking out will obviate the necessity for a trial or will so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while.".

Also pertinent are the observations of Lord Bridge of Harwich in Lonrho plc v Fayed (1992) AC at pp 469-70. I did decline to proceed with the argument and refused leave to appeal against that decision. It was obvious that prolonged and serious argument was indeed in prospect and on the basis of what I had already heard I did not consider it likely that any part of the pleading would be struck out against those defendants or that in any event the trial would be substantially cut down or simplified. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. Moreover, defences had been served by both defendants on 30th September 1993 and they thereafter delivered a request for particulars, served their own particulars and gave discovery. An application to strike out should always be made promptly and the lateness of this summons reinforced the conclusion that it should not be heard. It is not the "11th hour" but it is at this stage prejudicial to the speedy disposition of this matter which, whatever

the outcome, must be in the interest of the body of creditors in the liquidation of ICIC.

G. E. Harre
Chief Justice

24th June 1994.

I was able to review these rulings in draft with the parties' representatives and arrive at certain directions consequent upon them which are reflected in the order dated 24th June filed on the 11th July. At that time I was reminded that I should also I should refer to the matter of negative declarations.

In consolidated Cayman actions 205 and 236 of 1992 Schofield J considered the topic of declarations in situations involving possible conflicts of jurisdictions. In The Volvox Hollandia (1988) Lloyds Rep 361 at 371 Kerr LJ warned that claims for such declarations particularly negative declarations must be viewed with great caution, since they obviously lend themselves to improper attempts at forum shopping. Many decades earlier Pickford LJ had in Guaranty Trust Company of New York v Hannay & Co. (1915) 2 KB 536 at pp 564-5 said the following:

> "I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it is brought ... but taking the larger view that I do of the effect or Order XXV Rule 5 [-which deals with the grant of declarations-] I am not prepared to say it is beyond the power of the Court in a very exceptional case to make such a declaration, and

that the fact of its being asked for a purpose which the Court does not approve does not take away the power to make it, but only gives reason to refuse it.".

While finding that there was jurisdiction to grant a declaration of non liability, the court left open the question whether such a declaration should be made when the plaintiff was a defendant in foreign proceedings in which a positive claim arising out of the same dispute was made against him. Nevertheless, the court inclined against the view that a claim for a negative declaration should be used as an indirect means of avoiding or influencing foreign proceedings.

An English court has already made orders in relation to the ownership of the AOC shares. I do not regard it as an abuse of process of the court to seek by way of pleading to have these matters put fully in issue before it, and to rely on that. While I do not wish to stray into matters which will arise at trial I take into account the nature of the declarations sought. They seem to me to be different in nature to a negative declaration to the effect that a person is not liable in an existing or prospective action.

In my judgment the form of the pleading is not tainted by the kind of mischief against which their Lordships set their faces in the cases to which I have just referred.

G. E. Harre
Chief Justice

1st August 1994.