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

CAUSES #284 AND #286 OF 1991 and 389 of 1992

IN THE MATTER OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD.
INTERNATIONAL CREDIT AND INVESTMENT COMPANY
THE BANKS AND TRUST COMPANIES LAW and
COMPANIES LAW (REVISED)

For the applicant: Ewan McQuater QC instructed by Hunter & Hunter

For the respondent: Richard McCombe QC and Ramon Alberga QC instructed by Myres & Alberga: with them Mr. Edward Sibley of Berwin Leighton and Mr. Michael Alberga.

HARRE C J.

REASONS FOR RULING

Mr. John Van Husan Whitbeck has been a member in good standing of the New York Bar since 1973. Since July, 1980 he has been based in Paris and employed as General Counsel to Concorde International S.A.R.L, a French service company, and represents Chasa Investments Ltd. ("Chasa") and Concorde International SA ("Concorde") a Panamanian company. He also serves as Legal Adviser to a group of companies owned by the Pharaon family of Saudi Arabia, and serves in executive capacities certain of the companies to which I have referred. He attended for examination as a result of orders made by this Court on application made by the liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI") and International Credit and Investment Company Overseas Ltd. ("ICIC").

ICIC has also commenced proceedings by writ in which it claims against a number of defendants, including (1) Dr. Pharaon, ownerships of shares in a company called Finance and Investment International Limited ("FIIL") and other relief. Among the

reliefs granted by this Court was an order that certain defendants, including Lhasa, cause a director or other responsible officer to attend the court to be examined on oath as to their assets. Mr. Whitbeck also appeared in response to that order as an officer of Lhasa.

In the liquidation of both BCCI and ICIC it has been ordered that the Insolvency Rules 1986 of the English High Court apply unless there is inconsistency with the Laws of the Cayman Islands.

A list of proposed areas of questioning was provided on behalf of the liquidators to Mr. Whitbeck's representatives. Those which are relevant are the following:-

"4. The claims made by International Credit and Investment Company (Overseas) Limited ("ICIC") in the Grand Court of the Cayman Islands, cause No. 389 of 1992 ("the Cayman proceedings").

5. The defences served by Lhasa Investments Limited ("Lhasa") and by Concorde International Trading SA ("Concorde") in the Cayman proceedings.

6. The legal and beneficial ownership of the share capital of Finance and Investment International Limited ("FIIL"). Transfers of and dealings relating to those shares.

8. Lhasa, Concorde, Pharaoh Holdings Limited and Falcon Properties Limited, including but not limited to the ownership, management and control of those companies, their assets, their subsidiaries, their dealings with Bank of Credit and Commerce International and ICIC, Whitbeck's involvement in and dealings with those companies and the involvement of these companies in dealing with shares in FIIL and The Attock Oil Company Limited ("AOC").

10. The legal and beneficial ownership of the share capital of AOC. Transfers of and dealings relating to those shares.

13. The affidavit sworn by Whitbeck on 20th November, 1992 in proceedings in the Supreme Court of the Commonwealth of the Bahamas, Equity Side, reference no. 1992 No. 1315.

17. The claims of ICIC and FIIL in proceedings in the High Court of Justice, Chancery Division, action no. CH 1992 No. 8667 ("the English proceedings").

18. The claims made by ICIC in proceedings in the Commonwealth of the Bahamas in the Supreme Court, Equity Side, 1992 No. 1315 ("the Bahamian

proceedings").

19. Dealings with and related to the assets which are the subject of the Cayman proceedings, the English proceedings and the Bahamian proceedings.

20. The claims and assertions made by the Plaintiffs in proceedings in Pakistan before the Court of the Senior Civil Judge, Rawalpindi, Civil Suit No. 35/1993."

Objection is raised on behalf of Mr. Whitbeck to his being obliged to answer any questions if and insofar as they are intended to elicit answers relating to any litigation involving Dr. Pharaon, the Pharaon family, Lhasa, Concorde and certain other companies. Indeed it was submitted that the liquidators had given no reasons why the answers sought were reasonably required for the discharge of their functions and that this was fatal to their claim to question Mr. Whitbeck at all.

The relevant law in the Cayman Islands is to be found in s 126-7 of the Companies Law. They read as follows -

"Extraordinary Powers of Court

Power of Court to summon persons suspected of having property of company

126. (1) The Court may, after it has made an order for winding-up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may think capable of giving information concerning the trade, dealings, estate or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings or other documents in his custody or power relating to the company.

(2) If any person so summoned, after being tendered a reasonable sum of his expenses refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of his sitting, and allowed by it) the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless, where any person claims any lien on papers, deed, writings or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien.

Examination of parties by court

127. The Court may examine upon oath, either orally or upon written interrogatories, any person appearing or brought before it in manner aforesaid concerning the affairs, dealings, estate or effects of the company, and may reduce into writing or every such person, and require him to subscribe the same."

The equivalent modern English provisions are to be found in sections 236(2)(c) and 237 (4) of the Insolvency Act 1976. It is common ground that the English cases in which these provisions are considered are relevant to the issues in this case. They are - Morris & Ors v. Director of Serious Fraud Office and Ors (1993) 1AER 788; Re British & Commonwealth Holdings plc (Nos. 1 and 2) (1993) AC 426; Cloverbay Ltd. v. BCCI SA (1991) Ch. 90; Re Arrows Ltd. (No.2) BCLC 1176.

It was acknowledged, in particular, that if the Court is of the view that an exercise of discretion at this stage arises at all, then a "balancing exercise" in accordance with the principles set out in British and Commonwealth (No.2) is the right one to carry out.

However, the liquidators submit that the exercise of discretion only arises in relation to a decision as to whether the order should be made or set aside and that the order already made should stand unconditionally, there having been no application to set it aside. It is indeed true that the English cases to which I have referred arose in relation to such a decision. But that does not, in my judgment, preclude me from exercising any discretion in the circumstances of the present matter.

From the opposite standpoint the submission that I should not permit any questions at all was, I think, going too far also. Sections 126 and 127 of the Companies Law provide for extraordinary powers of the Court to summon and examine individuals. It must rest with the Court to decide at every stage how far that examination shall go, and ensure that it is conducted according to its wishes, even in a case where it has already been determined that a cause of action exists, and is to be pursued with or without the examination of Mr. Whitbeck.

I propose to deal with this matter as an exercise of

discretion in accordance with the balancing exercise to which I have referred.

Having come to that conclusion I must nevertheless clarify it by the following extensive reference to the speech by Lord Slynn of Hadley in Re British & Commonwealth Holdings plc (No 2) (1993) AC 426 at 438, where the principles which I seek to follow are set out.

> "In my opinion, although there may be some difference in the wording of these sections, the position under section 236 of the Insolvency Act 1986 is broadly the same as that under section 268 of the Companies Act 1948 as explained by Buckley J. in In re Rolls Razor Ltd. [1968] 3 All E.R. 698, 700, in a passage subsequently approved by the Court of Appeal in In re Esal (Commodities Ltd. [1989] B.C.L.C. 59, 64:
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> > "The powers conferred by section 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible, and I think, with as little expense as possible . . . to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim."
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> > ....
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> .. As Megarry J. said in In re Rolls Razor Ltd. (No.2) [1970] Ch. 576, 591-592:
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> > "The process under section 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are

> not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the the law of bankruptcy, can only described as being sui generis."

I am therefore of the opinion that the power of the court to make an order under section 236 is not limited to documents which can be said to be needed -

> "to reconstitute the state of the company's knowledge" even if that may be one of the purposes most clearly justifying the making of an order.
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> At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved on the one hand the reasonable requirements of the administrator to carry out his task on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned. The latter was stressed by Bowen L.J. in In re North Australia Territory Co., 45 Ch.87,93:
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> "That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information."

The applicant must satisfy the court that, after balancing all the relevant factors, there is proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements.

It was submitted on behalf of Mr. Whitbeck that, if the balancing exercise were to be carried out at all, it was unreasonable, unnecessary and oppressive for the questioning to be allowed, and this outweighed the requirements of the liquidators; that the liquidators should not be permitted to ask of Mr. Whitbeck questions relating to pending litigation which they would not be entitled to ask of defendants in such

litigation for whom Mr. Whitbeck acts as in-house legal adviser; that the case for interrogation of an officer or former officer of the company is usually stronger than against a third party; and that the interests of persons other than the examinee are relevant and to be considered by this Court in exercising its jurisdiction.

The last aspect of the matter was considered in Morris v. Director of Serious Fraud Office by Sir Donald Nicholls V-C. He said this -

> "This Court will take into account any prejudice the office-holder may suffer in carrying out his duties if an order for production of the documents is refused. Conversely, the Court will have regard to any prejudice the respondent may suffer if an order is made. When the documents whose production is sought belong to or relate to the affairs of a third party, in principle it must be right that the Court should also take into account any prejudice the third party may suffer if production is ordered. By a 'third party' I mean a person other than the person who has possession or control of the documents. Otherwise the position would be that a liquidator would be in a better position by bringing an application under S 236 against an agent or a third party. That cannot be right, and I see nothing in the legislative scheme of which S 236 is part which would lead to that conclusion. Under the section the Court has an unfettered discretion. There is no reason why the Court should have to wear blinkers when exercising this discretion and be unable to have regard to the interests of a third party who would be adversely affected by an order to produce documents."

That must apply at least equally to the giving of oral evidence. Indeed, the element of oppression there against those who are subject to the order is likely to be greater, for the reasons set out in the following passage from the judgment of Sir Nicholas Browne-Wilkinson V-C in Cloverbay Ltd. v. BCCI Ltd. (1991) Ch 90 at 103 -

> ".... Although [s.236 of the Insolvency Act 1986] treats the production of documents and the oral examination of witnesses together, an order for oral examination is much more likely to be oppressive than an order for the production of documents. An order for the production of documents involves only advancing the time of discovery if an action ensues: the liquidator is getting no more than any other litigant would get, save that he is getting it earlier. But oral

> examination provides the opportunity for pre-trial depositions which the liquidator would never otherwise be entitled to: the person examined has to answer on oath and his answers can both provide evidence in support of a subsequent claim brought by the liquidator and also form the basis of later cross-examination. In my judgment the greater risk of oppression when examination of witnesses is ordered calls for a more careful approach to such orders than to orders for the disclosure of documents."

I turn now to consider aspects of the other English cases which I have found helpful in coming to a decision. In Re Arrows Ltd Vinelott J. made an order for the examination of N, an individual who had already been charged with offences under the Theft Act 1968 even though in the course of that examination he might be compelled to answer self-incriminating questions the answers to which might be used at his trial. In making his order Vinelott J concluded that the importance of allowing the liquidators to complete their enquiries outweighed any element of unfairness or oppression towards N. But N was in substance the only shareholder as well as the chairman and managing Director of the company from which many millions of pounds were missing. The company was his alter ego. The liquidators took the view that the cooperation of N was essential to their task of safeguarding and recovering assets of the company. Furthermore, Vinelett J was clearly influenced by consideration of the special responsibilities in relation to shareholders funds and the integrity of the market which flow from the position which such persons have under the law.

The position of Mr. Whitbeck is very different to that of N. But Re Arrows Ltd. does show the wide scope of the discretion under s 236 of the Companies Act in England, against which even an accused person's right to silence is not inviolate.

How, then, should stand Mr. Whitbeck's duties of confidentiality owed to those he advises and the legal professional privilege to which they are entitled? It is oppressive, he says, and against all principles of the due administration of justice, to require a lawyer to an opponent in litigation to answer questions in such those matters

arise, and the courts have particularly been astute to protect the interests of those accused of fraud in the civil courts. Neither Mr. Whitbeck nor the companies for which he acts are officers or former officers of the companies in liquidation. In that connection I respectfully adopt the following passage from the judgment of Sir Nicolas Browne-Wilkinson V-C in Cloverbay Ltd. v. B C C I Ltd (1991) Ch 90 at 102-3.

> "In my judgment the case for making an order against an officer or former officer of the company will usually be stronger than it would be against a third party. Officers owe the company fiduciary duties and will often be in possession of information to which the company is entitled under the general law. Their special position as officers of the company is emphasised by section 235 of the Insolvency Act 1986 which imposes on them a statutory obligation to assist the liquidator or administrator. The enforcement of these duties owed by its officers to the company may require an order under section 236 of the Act of 1986 even though it exposes such officers to the risk of personal liability. No such considerations apply when an order is sought against a third party. He owes no duty to the company. In an otherwise proper case he may be required to disclose documents or answer questions so as to provide the liquidator with the information necessary to carry out his functions even though this may have unfortunate repercussions for him. But he owes no general duty to give such information (apart from an order under section 236) and if by giving the information he risks exposing himself to liability this involves an element of oppression. That is not to say that an order cannot or should not be made against a third party. But it should be borne in mind that the degree of possible oppression in greater in his case."

Against all this are to be weighed the reasonable requirements of the liquidators in carrying out their task. The public interest involved in that task of gathering in as expeditiously and cheaply as possible for the benefit of creditors what can be salvaged from the debris of the greatest banking collapse which the world has seen is obviously immense, and great weight should be given to the views of the liquidators as to what their reasonable requirements are. They have the detailsed knowledge of the affairs of the companies. On the other hand it cannot be said that the evidence by Mr. Whitbeck is fundamental to success in that task, or even fundamental to an assessment of whether or not there is a cause of action against defendants from whom assets may be recoverable. Claims in cause 389

of 1992 have already been actively pursued for over a year and it is quite by chance that the presence by Mr. Whitbeck in the Cayman Islands enabled the liquidators to persuade the Court that an order under s. 126 of the Companies Law should be served upon him. There is no reason to suppose that the claims will not be pursued with or without the assistance of Mr. Whitbeck.

It was the balancing of the considerations to which I have made reference which led to the order which I made on 7th December, 1993. As amended during the course of that day it was as follows -

> "The court will not examine Mr. Whitbeck on any matter touching or concerning pending litigation in which any of his clients is engaged, or any issue raised therein.
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> Without limiting the generality of that determination, he shall not be examined in areas number 4, 5, 13, 17, 18 and 20 of the areas of questioning submitted in relation to the present examination, nor insofar as information has come into his possession as an attorney acting for any client, numbers 6,8 and 10.
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> Mr. Whitbeck shall be entitled to object to any question on the ground of attorney-client confidentiality, and if necessary, the Court will consider whether any such objection shall be upheld.".

The purpose of that ruling was to exclude questions directly related to the claims and assertions in the proceedings named in areas of questioning numbers 4, 5, 13, 17, 18 and 20. Areas 6, 8, and 10 seemed and still seem to me to be so closely related to one or other of those matters as to be likely to give rise to attorney client privilege or at the very lowest a very high degree of attorney client confidentiality in the context of the litigation now in train.

I recognise that this puts areas 6, 8, and 10 in a category only narrowly if at all distinguishable from those areas in which express reference to proceedings is made, but that is what I intended. I was intending to draw the line wider than a strict definition of legal professional privilege. I recognize that this leaves grey areas because the line which an in-house lawyer who is also an executive treads is a narrow one in this respect. I find that is the best I can

do in formulating a general proposition without reference to specific questions. On the other hand, the more general matter of objection to any questions on the ground of attorney client confidentiality should be interpreted as referring to questions which would elicit answers subject to legal professional privilege.

This ruling reflects the importance which I attach to the safeguarding of a proper level of freedom for advisers on legal matters in performing their tasks in the international litigation which is now common in the Cayman islands and which may necessarily involve visits to the jurisdiction from time to time.

G. E. Harre
Chief Justice

2nd March 1994.