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IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NOS. 2, 5, 10/92 AND 2, 9, 10, 12, 13, 15/93

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE HENRY, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A.

BETWEEN:
(1) CHRISTOS PANDELIS LEMOS (1st Plaintiff) Appellant
(2) PANDELIS CHRISTOS LEMOS 2nd Plaintiff
(3) MARIKA LEMOS (a minor) (by Kalliopi Lemos her mother and next-friend)

and

(1) COUTTS & CO. (CAYMAN) LIMITED
(2) COUTTS & CO. (TRUSTEES) A.G. (a company incorporated in the Principality of Liechtenstein)
(3) RYDAL INC. (a company incorporated in the Republic of Panama)
(4) SEATON TRUSTEES INC. (a company incorporated in the Turks and Caicos Islands)
(5) COUTTS & CO. (JERSEY) LIMITED (a company incorporated in Jersey)
(6) PARTHENON TRUSTEES S.A. (a company incorporated in the Republic of Panama)
(7) ASPASIA LEMOS
(8) MARIGO PATITSAS
(9) IOANNA SAMONAS Defendants/Respondents

(By Original Action)

AND BETWEEN
(1) COUTTS & CO. (CAYMAN) LIMITED
(2) COUTTS & CO. (TRUSTEES) A.G. (a company incorporated in the Principality of Liechtenstein)
(3) RYDAL INC. (a company incorporated in the Republic of Panama)
(4) SEATON TRUSTEES INC. (a company incorporated in the Turks and Caicos Islands)
(5) COUTTS & CO. (JERSEY) LIMITED (a company incorporated in Jersey)
(6) PARTHENON TRUSTEES S.A. (a company incorporated in the Republic of Panama) Appellants/Defendants

-and-

(1) CHRISTOS PANDELIS LEMOS Respondent/Plaintiffs
(2) GEORGE PANDELIS LEMOS Respondent/Defendant

(By Counterclaim)

/ .....

MR. JOHN MOWBRAY, Q.C., MR. JOHN STEVENS AND MR. ANGUS FOSTER FOR APPELLANT CHRISTOS LEMOS

MR. ROBERT WALKER, Q.C., AND MR. OLIVER WATLER FOR THE TRUSTEES/RESPONDENTS

MR. RAMON ALBERGA, Q.C., AND MR. CHARLES QUINN FOR GEORGE LEMOS

MR. GRAHAM RITCHIE FOR 7TH, 8TH AND 9TH DEFENDANTS.

JULY 26, 27, 28, 29, 30
AUGUST 2, 3, 4, 5, 6, 9, 1993

ZACCA, P. :

These several appeals have been consolidated and were heard together.

Mr. Graham Ritchie on behalf of the 7th, 8th and 9th defendants as appellants in the election and disclosure of documents summonses stated that these appellants will support and adopt the submissions of Mr. Walker on behalf of the Trustees.

The dispute arises as a result of a deed of settlement executed by Captain Pandelis Christos Lemos dated 5th January, 1984. It is called the Trofos Foundation and was set up in the Cayman Islands. Captain Lemos died in 1989. He left surviving him, his wife and four children; namely, Aspassia Lemos, Christos Pandelis Lemos, George Pandelis Lemos, Marigo Patitsas and Ioanna Samonas.

Captain Lemos transferred under the control of the Trustees his shipping business and the greater part of his liquid assets. The first six defendants in Cause 425/91 are past and present trustees of the Foundation. The seventh, eight and nineth defendants are the widow and two daughters of Captain Lemos.

The first Plaintiff in Cause 425/91 is the son of Captain Lemos and the second and third Plaintiffs are the first Plaintiff's children.

The fourth defendant Seaton Trustees Incorporation is controlled by Captain Lemos' son-in-law, Mr. Samonas and the sixth defendant, Parthenon Trustees S.A. is controlled by Mr. Katsadouris, the personal lawyer and friend of the late Captain Lemos.

On the 16th October, 1991 Christos Lemos and his two infant children, the Plaintiffs, commenced proceedings against the defendants in the Cayman Islands (Cause 425/91). In the Cayman Proceedings, the Plaintiffs, whilst not challenging the validity of the Foundation, does not admit to validity. They make serious allegations against the Trustees and are seeking remedies for Breach of Trust including the removal of the Trustees.

George Lemos who was later joined as a defendant by the Trustees, have brought no action in the Cayman Islands.

Christos and his brother George have however, each brought proceedings in Greece. These proceedings are described in the Plaintiffs' Statement of Claim (Cause 425/91) as follows :

> "In separate proceedings which have been commenced before the Court of First instance in Athens the First plaintiff and his brother Georgios Lemos seek judgments against the Defendants (among others) for minor percentages of the Lemos interest or their value, on the footing that the Foundation was a fictitious gift within Article 138 of the Greek Civil Code or a contract for the succession to a living person within Article 268 of that Code, or that it deprived that First Plaintiff and his brother of indefeasible rights of theirs under the Laws of Greece as two of the heirs of Captain Lemos. "

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Unlike the Cayman proceedings, the validity of the Foundation is being challenged in Greece.

George Lemos' proceedings in Greece have been brought separately and independently of his brother Christos.

Christos Lemos is therefore a Plaintiff in proceedings both in Greece and the Cayman Islands. George is however only a Plaintiff in the Greek proceedings. The issues raised in the Greek's proceedings are different from the issues raised in the Cayman proceedings.

These appeals concern interlocutory Orders made in Cause 425/91 and Cause 487/91.

Under the terms of the Foundation, Captain Lemos' widow and her four children are discretionary beneficiaries of Capital and Income. It is said that each of the beneficiaries has been receiving $1,000,000.00 annually from the income of the Foundation.

It appears that for sometime prior to his death, the relationship between Captain Lemos and his two sons was far from good.

It may be useful to look at some of the features of the Foundation which was established on 5th January, 1984 :

> "The Trustees are empowered to remove and add beneficiaries ;
>
> The Trustees have a wide power of appointment among the beneficiaries and to declare discretionary trusts of income among them with power to pay or apply capital to or for the advancement or benefit of any of them, and in default and subject to the aforesaid to declare a trust of Capital for the beneficiaries living on the day before the perpetuity date ;

/ .....

"The Trustees are required to keep accurate account of their trusteeship but the trust deed contains as Clause 10(ii) the following :

"It is hereby expressly provided that notwithstanding any rule of law or equity to the contrary no beneficiary shall be entitled to the production or inspection of such accounts :

(a) except with the consent of the settlor during his lifetime;

and

(b) after the death of the settlor if the trustees shall (in their absolute discretion) think fit; "

the Trustees are authorised to act as Bankers to the trust on the same terms as would be made with a customer. "

The deed of settlement provided very wide powers to the Trustees but were subject to control during the life time of Captain Lemos. The power of appointing, removing and replacing trustees was vested in Captain Lemos. It also reserved to Captain Lemos the power to request in writing that the trust fund be vested or re-vested in him and there was a power by deed to revoke or vary any of the trusts or powers.

In 1988 Captain Lemos sent to the Trustees a "Memorandum of Wishes" dated 4th January, 1988. In it is reflected the bad relationship which then existed between himself and his two sons.

The Memorandum of Wishes stated :

"1. As Settlor and Founder, I appreciate that this Memorandum has no legal and binding effect and it should not be taken as an attempt to fetter in any way the Trustees in the exercise of their discretionary powers, but I am sure you would be interested to have on record my views as to the objectives and future operations of the Foundation.

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"2. In the Deed I am the first-named and principal Beneficiary, I have powers to change the terms and provisions of the Deed in whole or in part and even to revoke the Deed completely and bring the Foundation to an end. I also have powers to remove all or any of the Trustees, and to appoint new ones in their place.

3. It follows that during my lifetime I would like to be treated as principal Beneficiary and Chief Investment Advisor, and no investments or distributions should be made from the Trust Funds without my consent. It is my wish that while I am alive the Trustees and the Foundation should play a passive and dormant role and generally be guided by me in the exercise of their powers and distributions.

4. If any member of my family, being a Beneficiary, ever attempts to

(i) attack the Foundation in any way or challenge any of its provisions

(ii) challenge its validity in any Court of Law anywhere in the world

(iii) institute or threaten to institute any legal action against the Foundation or the Trustees

(iv) dispute any exercise of the discretionary powers of the Trustees

(v) engage in any activity to desolve (sic) or terminate the Foundation

(vi) anticipate, alienate or assign their interest in the Foundation

then the Trustees are requested to remove any such Beneficiary, after due warning, from the discretionary class. Any litigation or legal action ever taken against the Foundation or the Trustees I would like defended vigourously in the Courts by the Trustees without regard to cost. In the event that either or both of my sons seek to attack the Trust, I wish their children to be immediately removed from the list of beneficiaries. However, this would have lasting effect only if litigation ensued. In the event that they subsequently ceased to challenge the arrangements, and no litigation was started, the Trustees shall at their discretion reinstate the children so removed ....

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> ..... After my death and when possible, I would like in due course at least two persons to be elected as trustees from my direct blood line, regardless of change of surnames by marriage. These persons should only be elected after severe and careful scrutiny and examination of their general ability, honour, integrity, reputation and trustworthiness .....
>
> I do not wish either of my two sons to occupy any post on this Trust or any other active role, because their behaviour, attitude and manner has proven that they are untrustworthy and incapable of managing my wealth with honour and faith according to our traditions. "

APPEAL 2/92

A summons dated 28th November, 1991 was taken out by the first four defendants asking for certain directions from the Court.

The summons asked for the following directions :

1. Directions whether the Applicants, the present Trustees of the Trofos Foundation, should or should not defend the action (Cause No. 425 of 1991) commenced against them by Christos Pandelis Lemos and others ("the Cayman action"), to the extent of opposing the plaintiffs' first and second Amended Summonses dated 23rd November, 1991.

2. Directions whether the Applicants should oppose the application by the plaintiffs in the Cayman action for the continuation of the ex parte injunctions made on the 16th October, 1991.

3. A direction that the Applicants be authorised to seek and obtain legal advice in connection with proceedings commenced against them and others by Christos Pandelis Lemos and George Pandelis Lemos in the Court of 1st instance in Athens ("the Greek actions").

4. Directions whether the Applicants should or should not defend the Greek actions.

5. Such further or other directions as the Court thinks fit.

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On the 22nd January, 1992, Malone, C.J. made the following order :

1. The Trustees of the Trofos Foundation are authorised at the expense of the trust fund to defend the action (Cause No. 425 of 1991) commenced against them by Christos Pandelis Lemos and others ("the Cayman action") to the extent of opposing the Plaintiffs' first and second amended summonses dated 22nd November, 1991.

2. The Trustees are authorised and directed to oppose at the expense of the trust fund the application by the Plaintiffs in the Cayman Action for the continuation of the ex parte injunctions made on the 16th October, 1991.

3. The Trustees are authorised, at the expense of the trust fund, to seek and obtain legal advice in connection with proceedings commenced against them and others by Christos Pandelis Lemos and George Pandelis Lemos in the Court of First Instance in Athens ("the Greek Actions").

4. Paragraph 4 of the Originating Summons is adjourned.

5. Costs of and incidental to this application be paid by Christos Pandelis Lemos and the other Plaintiffs in the Cayman Action.

APPEAL 5/92

On an application by way of Originating Summons dated 24th November, 1991, the following Order was made :

It is ordered and directed that :

(1) The Trustees of the Trofos Foundation be authorised at the expense of the Trust Fund to make applications to the First Instance Court of Athens in the actions commenced against them by both George Pandelis Lemos and Christos Lemos to the effect that a "notice of suit" be served on those beneficiaries of the Trofos Foundation who have not been joined in the said actions.

It is this part of the Order that is appealed against.

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APPEAL 10/92

On 18th September, 1992, the following Order was made :

It is ordered that :

(1) The Trustees be authorised and directed to defend the Greek proceedings at the expense of the Trust fund ;

(2) The Trustees are also authorised to pay the legal fees and expenses of all related Companies and individuals on the attached schedule in the event they are represented in the Greek proceedings jointly with the trustees.

APPEAL 2/93

On 4th February, 1993 the Judge of the Grand Court made an Order similar to the second Order made on 18th September, 1992 to the effect :

(1) The Trustees are authorised to pay the legal fees and expenses of all related Companies and individuals listed in the attached schedule in the event that they are represented in the proceedings before the First Instance Court of Athens jointly with the Trustees.

APPEAL 13/93

There are two issues on this appeal.

(1) Plaintiffs' application for a pre-emptive Order for costs ;

(2) Trustees' Election Summons being within the scope of the Beddoe Order.

An application by Summons dated 4th February, 1992 was made by the Plaintiffs for an order :

(1) That the applicants be paid their reasonable expenses incurred in connection with the legal proceedings, Grand Court Cause No. 425 of 1991 out of the funds reputed to be the subject to the Trusts of the settlement known as the Trofos Foundation. This summons was dismissed by Harre, C.J.

/ .....

The Election Summons brought by the Trustees was dismissed by Harre, C.J. He however ordered that the costs of the Trustees should be paid out of the Trust fund. In coming to this decision the learned Chief Justice stated in his reasons for judgment at page 3 :

> "With regard to the Trustees' costs I do regard the Trustees' action in bringing the election summons in relation to Christos and George as being within the scope of the Beddoe Order and so rule. "

The Appellants submitted that the Trustees' Respondents were engaged in hostile proceedings in which the Trustees were defending themselves and not the Trust. In such circumstances, costs should not be awarded out of the Trust fund.

The learned Chief Justice held that in seeking directions the Trustees were not protecting themselves in hostile litigation but were performing their duty in protecting the Trust. He found that this was an appropriate case for the Trustees at the expense of the Trust fund to obtain directions pursuant to paragraphs 1, 2 and 3 of the Summons.

In the case of re Beddoe [1893] 1 Ch. 547, Lindley, L.J. states at p. 557 :

> " But a trustee who, without the sanction of the Court commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances. If indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate. "

" I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt,costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery and with Turner v. Hancock (1), the latest decision on the subject.

But considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to show that the costs so incurred were properly incurred. "

In Re Spurling [1966] 1 All E.R. 745, Ungoed-Thomas, J. refers to the case of Turner v. Hancock [1882 20 C.L.D. 303] at p. 755 and quotes a passage from Sir George Jessell, M.R. where he states :

" It is not the course of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them.

This case establishes that, as a matter of contract between a trustee and the author of the trust, the trustee is entitled as between himself and the beneficiaries to receive out of the trust fund "proper costs incident to the execution of the trust" including the costs of litigation, and that this right can only be lost by misconduct. "

In National Anti-Vivisection Society Ltd. v. Duddington, The Times 23rd October, 1989, Mummery, J. at p. 3 states :

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" It is accepted on behalf of the plaintiff that the court has jurisdiction to make an order as to the ultimate incidence of costs in the proceedings ahead of the trial of the action. (Re Wedstock Realisations Limited, [1988] BCLC 354 at 358). This jurisdiction extends to the making of an order for payment of costs out of a fund which at the end of the day is found to belong beneficially to another person: for example, as in the case of the costs of trustees and other parties incurred in determining who is beneficially entitled to monies held by the trustees.

The question is, therefore, one of discretion. I have to decide whether this is an appropriate case for making an order now in terms which ensure that, win or lose, the defendants will be entitled to their costs out of the property in dispute. I am asked to do this before the facts of the case have been fully explored and before the relevant law has been fully argued.

That discretion has been exercised by the court most frequently in favour of trustees and executors. There is a well-established practice whereby a trustee, who has it in mind to bring or defend an action in respect of the trust property, can apply to the court for directions in order to secure his right to be indemnified out of the trust property for the costs already incurred and to be incurred by him in proceedings which are authorised by the court.

The court may order otherwise only on the ground that the trustee or personal representative has in substance acted for his own benefit rather than for the benefit of the fund. "

Again at pages 4 - 6, Mummery, J. states :

" The following factors have featured in the decided cases as relevant to the Courts jurisdiction to make pre-emptive costs orders :

(1) The Merits

(2) The likely order for cost at trial. Unless satisfied that it is likely that the court would, after trial, make an order that the costs in question should be paid out of the fund, it is not, in general right to make such an order before trial. (Re Wedstock Realisations [1988] BCLC 354, supra 359 D).

Thus, in the case of a trustee, court at trial will in general give effect to a trustee's right to indemnify out of the trust fund if he has acted properly for the benefit of the fund in the pursuit or defence of proceedings, even if he is ultimately unsuccessful.

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"The position is different, however, in the case of hostile litigation with rival claims to entitlement to the property. The normal order at trial in those cases is that costs should follow the event (Rules of the Supreme Court, Order 62, Rule 3(3)). This is hostile litigation. "

(3) The Justice of the case

A pre-emptive order should not be made if there is a real possibility of its operating unjustly. It may be unjust in a particular case for the claimant to the property in dispute to be placed in a position where, if he wins, the property held to be his is burdened with the payment of the costs of the unsuccessful party. This is a powerful consideration in a case where the persons who would benefit from the pre-emptive order are all adults and sui juris and are able to make up their own minds whether or not to resist the claim.

(See, for example, Re Evans [1985] 3 All ER 289 [1986] 1 WLR 101, at 106, supra at 107 E to F, per Nourse LJ). In this case the defendants are adult and sui juris, as are the other members of the alleged breakaway Bristol branch whom they represent. They are all able, with the benefit of professional advice, to make up their own minds and take their own decisions about the defence of the claim. They are permitted under the terms of the order of 16th March 1989 to use the funds in dispute to pay legal expenses properly and reasonably incurred in connection with the proceedings. If their defence is successful, the plaintiff will be ordered to pay the costs. If the defence is unsuccessful they may be personally liable to repay to the fund the sums which have been used for legal expenses.

In my judgment, it is unjust that the defendants should be guaranteed their costs out of the fund, whether they win or lose, particularly when I was informed by Mr. Rees Davies that the defendants are unwilling for the plaintiff to have the protection of a similar pre-emptive order for its costs. "

The Orders dated 22nd January, 1992; 26th March, 1992; 18th September, 1992 and 4th February, 1993, which relate to Appeals 2, 5, 10 of 1992 and 2 of 1993 may be considered together.

/ ....

Were these Orders made in the proper exercise of a discretion which the Judge undoubtedly has ? It is to be observed that not all of the beneficiaries are attacking the bona fides of the Trustees or the validity of the Foundation in the Greek action.

It is right and proper for Trustees to approach the Court for directions and permission to defend an action which is brought against the Foundation. The Plaintiffs in Cause 425/91 while not admitting the validity of the Foundation are challenging the validity of the Foundation in the Greek action.

In granting the above Orders, I would hold that the learned Chief Justice properly exercised his discretion in granting the Orders sought by the Trustees.

In the circumstances, I would dismiss Appeals 2, 5, 10 of 1992 and 2 of 1993.

In so far as Appeal 13/93 is concerned, there are two issues to be resolved. The Plaintiffs/Appellant are challenging the Order of Harre, C.J. whereby he dismissed their application for a pre-emptive Order for costs. They are also challenging the Order of Harre, C.J. whereby he ordered that the costs in the Election Summons should be paid out of the Trust fund.

In dismissing the Plaintiff/Appellants' application, the learned Chief Justice took into account the following :

1. This is not an action being pursued by a beneficiary on behalf of all of them. It is being actively opposed by some, others were minors and not separately represented when they were joined as plaintiffs, and there are charities and unborn who are not parties at all.

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2. The court has jurisdiction to make an order for costs to be awarded out of the fund after deciding the substantive issues. That would be the position if the outcome of the action was shown to be for the benefit of the fund - in this case, if it were established that the trustees should be removed or should make some recompense to the fund. At this stage of the action, the outcome of that highly controversial issue cannot be foreseen. Whether or not the plaintiffs are right in saying that they are ultimately bound to win in obtaining an order to account, the view to be taken by the court as to the matter of costs on this aspect is not one which I would wish to pre-empt at this stage.

3. This is not a situation where the plaintiffs are suing for disinterested reasons so that they cannot be expected in any event to take the risk of litigating at their own expense. Christos' Cayman and Greek actions, viewed together, make that clear in this case.

4. It is not necessary to make any pre-emptive order for costs in order to ensure that any interest which should be represented (as, for example, in pension fund or minority shareholder cases) is properly represented, and there is no evidence that any party will be driven from the judgment seat though lack of funds, enormous though the expenses of this litigation must be.

5. The argument that because "Beddoe type" orders have been made in relation to the trustee a pre-emptive order should also be made in favour of the plaintiffs is misconceived. If anything, the argument goes the other way.

The learned Chief Justice acknowledged that the Court in its discretion could make such an Order but held that in the circumstances of this case, he would not grant the Order. I can find no reason for interferring with the exercise of the Chief Justice's discretion.

It was submitted on behalf of the Plaintiffs/ Appellant, that the previous Beddoe Orders did not cover the summons for election. The previous directions given and Orders made were of a defensive nature.

The Order of the Chief Justice was made on the basis of his finding that the bringing of the Election Summons by the Trustees was within the scope of the Beddoe Order made on the 22nd January, 1992.

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Having examined the Order, I cannot find any scope for the bringing of any Summons. In my view, the bringing of an Election Summons cannot be said to be within the scope of the Beddoe Order made on the 22nd January, 1992. The Trustee ought to have made an application to the Court requesting directions as to the bringing of the Election Summons. I, therefore, find that the Chief Justice was in error in making the Order.

I would therefore allow the Appeal in part.

APPEALS 9 & 10/93

The defendants in Cause 425 of 1991 filed a counterclaim on January 31, 1991. As plaintiffs to the counterclaim, they named Christos Pandelis Lemos and George Pandelis Lemos as defendants.

The counterclaim sought :

(1) An order requiring Christos and George to elect between pursuing -

(i) their claims put forward in these proceedings on the basis that they are beneficiaries of the Trofos Foundation; and

(ii) their claims put forward in proceedings commenced by them (in their capacities as heirs of their late father's estate) in the Court of First Instance in Athens that the Trofos Foundation is void and illusory

such election to be made within 28 days by written notice to the Court and the Trustees (or with such other period and by such other means as the Court shall direct).

(2) An order that in accordance with such election either the claim in these proceedings be struck out or Christos and George be restrained until trial of this action or further order from continuing or taking any step in the said proceedings in Athens or from commencing, continuing or taking any step in any other proceedings relating wholly or partly to the Trofos Foundation and brought or to be brought in any Court in Greece.

/ .....

(3) A declaration that the Trustees can lawfully and properly (if they in their discretion think fit) exercise their powers under the Trofos Foundation to exclude Christos and/or George from any beneficial interest thereunder.

On the same date a Summons was taken out. The Summons was in the following terms :

"Let all Parties concerned attend before the Judge in Chambers at the Law Courts, George Town, Grand Cayman at 9.30 a.m. on the 3rd day of February, 1992 or so soon as thereafter as Counsel can be heard, upon an application by the plaintiffs to the counterclaim for an Order pursuant to GCR Rule 13(3) for leave to serve George Pandelis Lemos out of the jurisdiction. "

On the 7th February, 1992, Harre, J. (as he then was) made the following Order :

"UPON hearing Leading Counsel for the first six Defendants and Leading Counsel for the 7th to 9th Defendants upon the 1st to 6th Defendants' Summons dated the 31st January, 1992

AND UPON reading the court record

IT IS ORDERED THAT :

"1. The 1st to 6th Defendants do have leave to serve notice of their Counterclaim and all subsequent process out of the jurisdiction upon George Pandelis Lemos.

2. The said George Lemos' time for entering an appearance be extended to 28 days. "

Pursuant to this Order, George Lemos was served with a Counterclaim. He thereafter obtained leave to enter a conditional appearance and to apply to set aside the Order made on the 7th February, 1992.

On 24th April, 1992, George Lemos applied by summons to set aside the Order made on the 7th February, 1992 and also to set aside the Counterclaim.

/ .....

On the 25th June, 1992, the learned Judge upheld the Order of 7th February, 1992 and dismissed the summons.

On appeal, it was submitted that this was not a proper case for service out of the jurisdiction, nor was it a proper case for the exercise of the discretion to grant leave for service out of the jurisdiction.

The learned trial Judge held that the appellant was a necessary and proper party as a defendant to the Counter-claim.

The appellant has had the benefit of Injunctions granted to the Plaintiffs and was the only beneficiary not before the Court. Paragraph 3 of the Counterclaim seeks a declaration which, if granted, could affect the appellant. It will be seen later that a summons requesting the appellant to elect between proceedings in Greece and Cayman was dismissed and paragraphs 1 and 2 of the Counterclaim struck out.

In my view the learned Judge was not in error in making the Order for service out of the jurisdiction. Having not struck out paragraph 3 of the Counterclaim, he was not in error when he dismissed the appellant's summons to set aside the Order made on 7th February, 1992.

APPEAL 12/93

The Plaintiff/Appellants sought by summons an Order for the Trustees to account (the Accounting Summons).

By Order dated 26th April, 1993 the learned Judge of the Grand Court dismissed the Accounting Summons. The application for an account was made under Rule 21 of the Grand Court (Civil Procedure) Rules which states as follows :

> "In any action in which the writ of summons has been indorsed for an account and the defendant does not appear, or appears and does not thereafter satisfy the Court that there is some preliminary question to be tried, the Court may make an Order for the proper accounts with all necessary directions and inquiries. "

The appellants contend that as beneficiaries, they are entitled to have accounts taken by the Court.

The Trustees contend that Harre, J. exercised his discretion correctly in dismissing the summons for accounting.

Mr. Walker for the Trustees informed the Court that there is now in existence audited financial statements of the Trusts and all its underlying companies for the period from the inception of the Trust down to 30th April, 1992. A conditional offer was made to disclose the audited assets of the plaintiffs' beneficiary. It was not to be used as an attack upon the validity of the Trust but could be used in a breach of trust action in the Cayman Court.

In my view this could meet the requirements of the Plaintiff for an account. I would therefore order that the audited financial statements of the Trust and its underlying companies be disclosed to the Plaintiff Christos Pandelis Lemos and his Attorneys-at-Law.

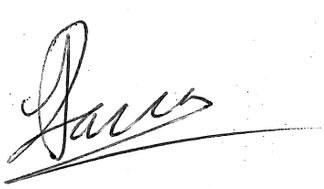
However, this should be conditional on an undertaking being given not to use the accounts outside of the Cayman Islands and specifically not to be used in the Greek action.

APPEAL 11/93

No submissions were made in respect of this appeal. I must therefore assume that it was not being pursued. In any event, I can see no merit in this appeal and it is therefore dismissed.

APPEAL 15/93

This appeal relates to a ruling of the Grand Court Judge dismissing the Election Summons and making an Order for disclosure of Documents. I have had the benefit of reading the draft Judgment of Kerr, J.A. I agree with the analysis of fact and law, the reasoning and conclusions in his Judgment. I would therefore dismiss the appeals against the Election and disclosure of Documents Orders.



HENRY, J.A.:

On January 5, 1984 Captain Pandelis Lemos, a wealthy Greek shipowner, established in the Cayman Islands a trust called the Trofos Foundation ("the trust"), the proper law of which was expressed to be that of the Cayman Islands. Captain Lemos died on December 3, 1989 domiciled in Greece, and on October 16, 1991 his eldest son Christos filed an action in the Cayman Islands which, without acknowledging the validity of the trust, alleges misconduct by the trustees and seeks an account by them, as well as their removal and replacement. In that action, Christos' two infant children, acting by their mother and next friend, are named as co-plaintiffs, and the claims made by the plaintiffs are in the guise of beneficiaries under the trust. The first six defendants are present and past trustees, and the last three defendants, joined in December 1991, are respectively the widow (who is also a past trustee) and daughters of Captain Lemos.

Pursuant to rule 21 of the Grand Court (Civil Procedure) Rules, a summons was filed in the action on November 21, 1991 seeking judicial accounting by the trustees, and on November 22, 1991 a disclosure summons was filed seeking inspection of named trust documents, as well as the accounts of companies over which the trustees had direct or indirect control.

On November 28, 1991 the trustees filed an originating summons seeking a Beddoe order in respect of the two summonses and directions from the Court that it was appropriate for them, at the expense of the trust, to seek advice in connection with a claim which had in the meanwhile been filed in Athens. That claim was similar to one filed in Athens by Christos' brother, George. According to the statement of claim filed in the Cayman Islands action, those claims

> "seek judgments against the Defendants (among others) for minor percentages of the Lemos interests or their value, on the footing that [the trust] was a fictitious gift within Article 138 of the Greek Civil Code or a contract for the succession to a living person within Article 268 of that Code, or that it deprived that First Plaintiff and his brother of indefeasible rights of theirs under the Laws of Greece as two of the

heirs of Captain Lemos."

On January 22, 1992 the then Chief Justice in a written judgment granted the trustees' applications. That judgment is the subject of one of the appeals by Christos Lemos now before us, as are subsequent orders on March 26, 1992 authorising the trustees to apply in the Greek proceedings for notice of suit to be given to them; on September 18, 1992 authorising the trustees to defend the Greek proceedings; on February 4, 1993 for payment from the trust of the costs of the trustees' associates in the Greek proceedings; and on April 26, 1993 for a pre-emptive order for costs. There is also a Respondents' notice to the appeal against the judgment of January 22, 1992.

On January 31, 1992 the trustees filed their defence to the Cayman Islands action, together with a counterclaim seeking an order for an election by Christos and George between their Cayman Islands claims and their Greek claims; and a declaration as to the validity of the trustees' powers under the trust to remove beneficiaries. On February 7, 1992 the trustees obtained leave to serve George Lemos out of the jurisdiction as a defendant to the counterclaim. An application by him to set aside that leave was refused on June 25, 1992. That refusal is the subject of one of the appeals by him now before us, as are orders made on January 21, 1993 permitting the trustees to retain attorneys on behalf of his children; and on April 26, 1993 refusing to set aside the counterclaim against him.

The trustees also filed summonses in the action seeking orders requiring Christos and George to elect between the claims advanced in the Cayman Islands action on the basis that they are beneficiaries of the trust, and the claims advanced in Greece on the basis that the trust is void and illusory.

In a comprehensive judgment dated April 26, 1993, the Chief Justice refused the summonses for judicial accounting and for election, but granted the application in the disclosure summons with the specific exception of

> "(a) the accounts of the trusteeship and all books, records and vouchers including, without limiting the generality of the

foregoing any balance sheets, income and expenditure accounts, ledgers or day books (however described) from which the said accounts are prepared."

That judgment is the subject of an appeal by Christos Lemos as regards the dismissal of the judicial accounting summons, and an appeal by the trustees as regards the disclosure summons and the election summons.

The appeals have all been consolidated and were heard together.

It is convenient to deal first with the Appellant, George Lemos. It was submitted on his behalf that he was not a necessary or proper party to the proceedings in Cayman, so that leave to serve on him notice of the counterclaim by the trustees ought not to have been granted, or at any rate such service ought to have been set aside when part of the counterclaim (seeking an order for election) was struck out. In answer to the trustees' appeal, it was submitted on his behalf that he had no claim in Cayman, so that it was inappropriate to require him to elect between such a claim and the claim which he is seeking to enforce in Greece.

The counterclaim by the trustees sought:

"(1) An order requiring Christos and George to elect between pursuing -
(i) their claims put forward in these proceedings on the basis that they are beneficiaries of the Trofos Foundation; and
(ii) their claims put forward in proceedings commenced by them in their capacities as heirs of their late father's estate in the Court of First Instance in Athens that the Trofos Foundation is void and illusory
such election to be made within 28 days by written notice to the Court and the Trustees (or within such other period and by such other means as the Court shall direct).

(2) An order that in accordance with such election either the claim in these proceedings be struck out or Christos and George be restrained until trial of this action or further order from continuing or taking any step in the said proceedings in Athens or from commencing, continuing or taking any step in any other proceedings relating wholly or partly to the Trofos Foundation and brought or to be brought in any Court in Greece.

(3) A declaration that the Trustees can lawfully and properly (if they in their discretion think fit) exercise their powers under the Trofos Foundation to exclude Christos and/or George from any beneficial interest thereunder.

(4) Further or other relief."

At the hearing before the judge, it was stated that the real object of the counterclaim was to compel Christos and George to elect between the Cayman Islands and the Greek proceedings. Counsel for the Appellant George submitted that this was not a cause of action, and that, accordingly, no leave ought to have been granted to serve the counterclaim; and that, in any event, having dismissed the trustees' summons seeking an order for George to elect, the judge ought to have struck out the entire counterclaim, rather than only paragraphs (1) and (2) of it.

Furthermore, it was submitted, even if paragraph (3) remained, George was not a necessary party to it, and notice could have been served on him pursuant to Order 15 Rule 13A of the United Kingdom Rules of the Supreme Court if it was desired that the declaration sought be binding on him. This rule, it was submitted, applied in the Cayman Islands by virtue of Sections 13(1) and 20(2) of the Grand Court Law, and Rule 62(2) of the Grand Court (Civil Procedure) Rules which respectively provide as follows:

"13(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to the provisions of this and any other laws of the Islands, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by

(a) Her Majesty's High Court of Justice; and

(b) the Divisional Courts of that Court, as constituted by the Supreme Court of Judicature (Consolidation) Act, 1925, and any Act of Parliament of the United Kingdom amending or replacing that Act."

"20(2) In any matter of practice or procedure for which no provision is made by this or any other Law or by any Rules, the practice and procedure in similar matters in the High Court in England

> shall apply so far as local circumstances permit and subject to any direction which the Court may give in any particular case."
>
> "62(2) Subject to subrule (1), the practice and procedure to be followed in any proceeding in the Grand Court shall be that provided for in the Judicature Law, the Evidence Law and these Rules:
>
> Provided that where, in relation to the whole or any part of any proceeding, there is no such provision the practice and procedure followed shall, subject to any directions of the Judge in that particular proceeding, accord as nearly as may be practicable with the practice and procedure in a like proceeding in the High Court of Justice in the United Kingdom."

As the footnote to Order 15 Rule 13A indicates, the rule gives effect to Section 47 of the United Kingdom Administration of Justice Act, 1985, which is designed to empower the High Court to make judgments in specified actions binding on persons who are not parties, and authorises the making of rules of court for that purpose. The Act does not vest jurisdiction in the High Court, but provides for the exercise of specified powers in relation to jurisdiction already vested - powers which, in the absence of that statutory authority, could not be exercised by the High Court. Since the Act does not vest jurisdiction, its provisions are not covered by Section 13(1) of the Grand Court Law.

At the same time, since the Act does not extend to the Cayman Islands, there is no statutory authority for the exercise by the Grand Court of the powers conferred by it on the High Court. Accordingly, the rules of court made by virtue of that statutory authority cannot, in my view, apply to the Grand Court. I do not, therefore, accept the submission that it was open to the trustees to serve notice on George Lemos pursuant to Order 15 Rule 13A of the United Kingdom Rules of the Supreme Court.

Insofar as paragraph (3) of the counterclaim is concerned, I respectfully agree with the trial judge that this is independent of the claim for an election. Rule 26 of the Grand Court Rules authorises the Court, even "without the application of any party...to order...the names of any parties added who ought to have been joined...as defendants". The declaration

sought in paragraph (3) of the counterclaim is one which may adversely affect the Appellant's rights under the trust. He is, therefore, in my view a proper defendant to the counterclaim, and I agree with the judge's decision refusing the application to set aside notice of the counterclaim on him.

As regards the question of election, I accept the submission of his counsel that the Appellant has no claim in the Cayman Islands. There is material in the affidavits before the trial judge from which it can be inferred that Christos' action in Cayman was brought with the knowledge and assistance of George, but I do not consider that this is sufficient to establish that the action was brought on his behalf. It may be that if George files a defence to the trustees' counterclaim in which he seeks to enforce his rights as a beneficiary of the trust, be can then be required to elect between that claim and his claim in Greece, but at this stage of the proceedings it does not appear to me that a question of election by him arises.

It is true that he benefits from the undertaking given by the trustees in the Cayman action on January 2, 1992 "not to consider exercising any of their discretionary powers without prior written notice to all the adult beneficiaries of the purported Trust Settlement known as the Trofos Foundation and not to exercise any such discretionary power for any reason in a manner adverse to the Plaintiffs or to the First Plaintiff's brother Georgios Pandelis Lemos or his children without a further prior written notice to all the said adult beneficiaries, the Court having determined that unless all such beneficiaries shall have previously given their written consent to such exercise the period of such notice shall be three months". There is, however, no clear indication that the undertaking was given as a result of an application made by him or on his behalf. I do not therefore consider that this affects his position insofar as the question of election is concerned.

I turn now to consider the question of election in relation to Christos. It is not in dispute that a party cannot approbate and reprobate or, as it is sometimes put, "blow hot and

cold". Mr. Mowbray has submitted that Christos is not blowing hot and cold, but is merely advancing claims in the alternative which he would ordinarily be permitted to do in civil proceedings.

It seems to me that where a party advances inconsistent claims in the alternative in the same proceedings, or in different proceedings in the same court, those proceedings are in the control of the court which can at the appropriate time take action to ensure that inconsistent rights are not granted. Where, however, inconsistent claims are advanced in different courts, neither of which is under the control of the other, prima facie those proceedings are vexatious, and the circumstances require an election by him as to which of the two rights he will seek to enforce by judicial proceedings.

In those circumstances, the court will in the exercise of its equitable jurisdiction intervene in one of three ways. The first requires the party to elect which right he will seek to enforce. The second imposes an election on him by way of injunction or a stay of proceedings. The third declares that the party has already elected or is deemed to have elected which right he will seek to enforce and is therefore estopped from seeking to enforce the other. It will be apparent that although the second and third remedies are coercive in nature, they are appropriate at different stages, the second being appropriate while both rights are being actively pursued, but neither has been established by judicial process, while the third is appropriate only when at least one of the rights has been established by judicial process and the party must be prevented from establishing or enjoying the other.

In the present case, it is necessary first to determine whether the claims advanced by Christos in Greece and in Cayman are inconsistent with each other. It is true that he has not in the Cayman Islands action admitted the validity of the trust. Nevertheless, he has sought to obtain in that action benefits in the guise of a beneficiary of the trust, and this in itself implies such an admission. It seems to me, therefore, to be

inconsistent with his claims in the Cayman Islands to advance in the Greek court claims which are based on assertions that the trust is in breach of Greek law and is either wholly or partly ineffective. In Douglas-Menzies v. Umphelby (1908) A.C. at p. 232, Lord Robertson states:

> "It is against equity that anyone should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing. If anyone has a right by law to take a share of a testator's estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits."

In Codrington v. Codrington L.R.7H.L. 854 at 861, Lord Cairns said:

> "By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate' and in our Courts more commonly the doctrine of 'election' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them. The authorities on this branch of the law are very fully referred to in the judgment given in this case by my noble and learned friend who was then Lord Chancellor (Lord Selborne) and they were considered not long since in this House in the case of Cooper v. Cooper (1874) L.R.7H.L.53."

These dicta were approved by Lord Atkinson in Pitman v. Crum Ewing (1911) A.C. at p. 228-229, and in my view apply to the circumstances of this case. Accordingly, Christos cannot claim as a beneficiary under the trust without renouncing every right inconsistent with its provisions. These inconsistent claims having been advanced in different courts, neither of which is under the control of the other, prima facie the proceedings are vexatious and the circumstances require an election by him.

Mr. Mowbray has submitted that it is premature at this stage to call on Christos for an election; that it is always open to him to postpone making his election until the rights between which he is required to elect have been established. It is, he submitted, unreasonable to require him to elect between two

rights at a time when neither has been established.

In support of these submissions, counsel cited Morel v. Westmoreland (1904) A.C. 11, Douglas-Menzies v. Umphelby (supra), Ker v. Wauchope 2 Ves. Jr. 366a, and Pitman v. Crum Ewing (supra). It seems to me, however, that these cases are concerned not so much with the appropriate time at which an election must be made as with the consequences which flow from the making of an election. In Scarf v. Jardine (1882) 7 A.C. 345, on which Mr. Mowbray also relied, Lord Blackburn at p. 360 stated:

> "The result of what is there said is that where there is a right to elect the party is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons."

There, however, His Lordship appears to have been dealing with the right to elect and the circumstances in which it may be lost, rather than, as here, the obligation to elect and the time when it arises. Indeed, a later passage in Lord Blackburn's judgment at p. 362 makes it plain not only that the party may not postpone his election until his right has been established by court proceedings, but that the institution of those proceedings may constitute an election. That passage is as follows:

> "I am not sure that taking a cheque from Rogers & Beech as payment was enough to make an election, because I think that in acting on the authority given by Scarf to Rogers to pay the debts for him and Scarf, Rogers might pay money by the new firm's cheque or otherwise as he pleased. But then the plaintiff goes on and issues a writ against Rogers & Beech - he sues Beech. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think its going to judgment or not going to judgment is material."

It may well be that by bringing his action in Cayman, Christos has manifested an intention to take under the trust and is therefore estopped from claiming in the Greek proceedings. But he has not in his pleadings admitted the validity of the trust, and in view of the ambivalent nature of those pleadings, the trustees are, in my opinion, entitled to require him to

elect. If he elects to pursue the proceedings in Greece, his claims in the Cayman Islands and the appeals arising therefrom will cease to be of relevance. In the event, however, that he elects to pursue the claims in the Cayman Islands, I proceed now to deal with those appeals.

In dealing with the application for a Beddoe order, the then Chief Justice expressed the following views:

> "As regards the reality of the Cayman action I am satisfied that the trustees have reasonable cause to think that the plaintiff's objective is to obtain information that may be of advantage to them in achieving their objective in the Greek actions, an objective which is not shared by all the beneficiaries and which if pursued here is unlikely to succeed. Accordingly I share Mr. Duckworth's view that to the trustees
>
> 'The plaintiffs are not beneficiaries who come to court to say we are unhappy about the administration of our trust. Nor are they beneficiaries asking the court to redress their grievances and appoint new trustees.'
>
> This is only how they appear to be. To the trustees the plaintiffs seek to take advantage of their position as beneficiaries. If they achieve their announced objective there will be no trust....To my mind those are circumstances which go to show that this is not a case of the trustees acting without bona fides. Their purpose in not disclosing the accounts is to avoid imperilling the foundation and causing trouble in the family. In seeking directions in the Cayman action the trustees are not doing so as trustees protecting themselves in hostile litigation but as trustees performing their duty of protecting the trust."

Mr. Mowbray has submitted that even if the Greek action succeeds the trust will continue to exist, and to this extent at least the premise of the Chief Justice's decision is incorrect. It seems to me that even if the trust continued to exist, the corpus of the trust would be in danger of being considerably reduced, and this is a contingency against which it would be the trustees' duty to guard. In circumstances in which Christos has studiously avoided acknowledging the validity of the trust, there is justification for the Chief Justice's view as to the true objective of the Cayman action and for his decision as to the

making of the Beddoe order.

For the same reason there would, I think, be justification for refusing the summons for judicial accounting and granting the application in the disclosure summonses to the limited extent to which it was in fact granted. Different considerations will apply if and when Christos elects to abandon the Greek proceedings and acknowledges the validity of the trust. Conditions would, however, have to be imposed to ensure that material and information disclosed are not made available to George in his Greek proceedings.

Since, as I have indicated, the Greek actions if they succeed may well have the effect of considerably reducing the corpus of the trust, it was appropriate for an order to be made for the trustees to defend those actions.

I would dismiss the appeal by George against the order authorising the trustees to retain lawyers on behalf of his children, since his interest would not, in my view, necessarily be the same as theirs.

In the event, I would dismiss all the appeals by Christos, dismiss the appeals by George, and allow the trustees' appeal in relation to the order as to election insofar as it applies to Christos, but dismiss it insofar as it applies to George. I would also dismiss the trustees' appeal against the order made on the disclosure summons.

KERR, J.A. :

In this family dispute, Greeks meet Greeks in sternly contested litigation in Grand Cayman and in Athens, Greece, over the validity, terms, disposition of funds, and the administration of the Trustees of a Foundation called the "Trofos Foundation" ("the Foundation"). This munificent Trust, of liquid assets of approximately $300 million, was set up in the Cayman Islands by Greek Shipping Magnate, Captain Charles Pandelis Christos Lemos ("the Captain"). In the Trust Deed, dated 5th January, 1984, it was expressly stated that the Foundation should be governed by the laws of the Cayman Islands.

The Captain died in December, 1989, domiciled in Greece. His immediate surviving family consists of the sons, Christos, the elder, and George ("the brothers") and his widow, Aspasia Lemos and his daughters, Mrs Marigo Patitsas and Mrs Ioanna Samonas ("the ladies").

The main Cause No. 425/91, was instituted by writ of summons filed in the Cayman Registry on 16th October, 1991. Christos is the principal plaintiff and the other two are his sons who are also beneficiaries under the Trust. The action was originally against the first six defendants who are past and present Trustees. It was based on serious allegations of breaches of trust, dishonesty, conflicts of interest and bias. The writ was endorsed for accounts. Simultaneously and in keeping with certain endorsements, an Ex Parte Interim Order in the nature of an injunction was sought and granted. It prohibited the Trustees from making any change in policy and was primarily aimed at maintaining the status quo in relation to the dispositions the Trustees had been making to the beneficiaries including those to the brothers. Subsequently, the interim order was duly succeeded by an interlocutory injunction similar in general terms and tenor.

Cause No. 487/91 is ancillary to the main cause and was instituted by the Trustees by originating summons on the 28th November, 1991, seeking Beddoe Orders and other directions relating to the main cause.

The continuance of the benefits, having been secured by injunction, Christos promptly instituted proceedings in Greece against the Trustees and a host of subsidiary companies, in the main challenging the validity of the trusts and the dispositions thereunder on the basis of Greek statutory provisions relating to the movable property of an intestate dying domiciled in Greece. A similar action was contemporaneously filed by George. The ladies, on their own volition, were added as defendants and have been consistently supportive of the Trustees in every important aspect of the litigation.

The trustees countered by filing a counterclaim against the brothers with intent:

(1) to ask for an Order that they be called upon to elect between the Cayman proceedings and the Greek Action; and

(2) to obtain a declaration that it would be right and proper to cut them off as beneficiaries in accordance with the "wishes" of the Captain.

The Trust Deed contains a number of unusual terms and discretionary powers that seem to invite litigation and before dealing with the appeals it is convenient to refer to certain of these terms, the accompanying "memoranda of wishes" and certain relevant background facts and circumstances presented by either side.

The original trustees of "the Trofos Foundation" ("the Foundation") were RoyWest Trust Corporation (Cayman) Limited since renamed Coutts & Co. (Cayman) Ltd., RoyWest Trustee Corporation of Europe Aktiengesellschaft, since renamed Coutts & Co. (Trustees) A.G. and Rydal Trustees Inc. Now called Rydal Inc., the first three defendants in 425/91, and Captain Lemos's

wife Aspasia Lemos, now (at her own wish) the Seventh Defendant in 425/91. She ceased to be a trustee in 1984 and Coutts & Co. (Trustee) A.G. and Rydal Inc. retired in 1990 and the present Trustees are Coutts & Co. (Cayman) Limited (Coutts Cayman), Coutts & Co. (Jersey) Limited ("Coutts Jersey") Seaton Trustees Inc. ("Seaton") and Parthenon Trustees S.A. ("Parthenon"). Seaton Trustees is controlled by the Captain's son-in-law, Mr. Samonas and Parthenon by the Captain's personal lawyer, a long standing friend, Mr. Katsadouris.

Under the Trust Deed -

> "The trustees are empowered to remove and add beneficiaries;
>
> the trustees have a wide power of appointment among the beneficiaries and to declare discretionary trusts of income among them with power to pay or apply capital to or for the advancement or benefit of any of them, and in default and subject to the aforesaid to declare a trust of capital for the beneficiaries living on the day before the perpetuity date;
>
> the trustees are required to keep accurate accounts of their trusteeship but the Trust Deed contains as clause 10(ii) the following -
>
> > "It is hereby expressly provided that notwithstanding any rule of law or equity to the contrary no beneficiary shall be entiteld to the production or inspection of such accounts :
> >
> > (a) except with the consent of the settlor during his lifetime and
> >
> > (b) after the death of the settlor if the trustees shall (in their absolute discretion) think fit";
>
> the trustees are authorised to act as bankers to the trust on the same terms as would be made with a customer.
>
> EVERY discretion or power hereby or by law conferred on the Trustee shall be an absolute and uncontrolled discretion or power and no Trustee shall be held liable for any loss or damage accruing as a result of the Trustee concurring or refusing or failing to concur in an exercise of such discretion or power

The Beneficiaries shall mean and include all and any of the persons or classes or persons following namely:-

(a) The Settlor Captain Pandelis Christos Lemos

(b) Any wife or widow of the Settlor

(c) The children and remoter issue of the Settlor now in existence or born hereafter before the perpetuity date whether by any existing or future marriage

(d) The spouses widows and widowers of the Beneficiaries mentioned in (c) above

(e) Any persons or class of persons appointed by virtue of the Trustee's powers contained in Clause 2(ii) of this Deed."

The Deed expressly conferred on the Captain the power of appointing, removing and replacing the Trustees. It also reserved on him the power by written request to vest or revest the trust fund in himself and a power by deed to revoke or vary any of the trusts or powers.

Among the memoranda of wishes, that of the 4th Janaury, 1988, reflects the unhappy relationship between the Captain and his sons -

"1. As Settlor and Founder, I appreciate that this Memorandum has no legal and binding effect and it should not be taken as an attempt to fetter in any way the Trustees in the exercise of their discretionary powers, but I am sure you would be interested to have on record my views as to the objectives and future operations of the Foundation.

2. ----------

3. It follows that during my lifetime I would like to be treated as principal Beneficiary and Chief Investment Advisor, and no investments or distributions should be made from the Trust Funds without my consent. It is my wish that while I am alive the Trustees and the Foundation should play a passive and dormant role and generally be guided by me in the exercise of their powers and distributions.

4. If any member of my family, being a Beneficiary, ever attempts to

(i) attack the Foundation in any way or challenge any of its provisions

(ii) challenge its validity in any Court of Law anywhere in the world

(iii) institute or threaten to institute any legal action against the Foundation or the Trustees

(iv) dispute any exercise of the discretionary powers of the Trustees

(v) engage in any activity to deslove (sic) or terminate the Foundation

(vi) anticipate, alienate or assign their interest in the Foundation

then the Trustees are requested to remove any such Beneficiary, after due warning, from the discretionary class. Any litigation or legal action ever taken against the Foundation or the Trustees I would like defended vigorously in the Courts by the Trustees without regard to cost. In the event that either or both of my sons seek to attack the Trust, I wish their children to be immediately removed from the list of beneficiaries. However, this would have lasting effect only if litigation ensued. In the event that they subsequently ceased to challenge the arrangements, and no litigation was started, the Trustees shall at thier discretion reinstate the children so removed ...

... After my death and when possible, I would like in due course at least two persons to be elected as trustees from my <u>direct blood line</u>, regardless of change of surname by marriage. These persons should only be elected after severe and careful scrutiny and examination of their general ability, honour, integrity, reputation and trustworthiness..."

and of the relationship between himself and his sons wrote:-

"I do not wish either of my two sons to occupy any post on this Trust or any other active role, because their behaviour, attitude and manner has proven that they are untrustworthy and incapable of managing my wealth with honour and faith according to our traditions."

Christos was highly educated in the technical as well as the business aspect of the shipping business by service in the Naval Academy and on ocean liners and in offices in London. According to him he had been complimented by the Captain for his handling of important business transactions. He was not aware of the existence of the Trust during his father's lifetime. The tension between Captain Lemos and his sons was fomented by a Mr. Pipilis and other business associates of his father for personal reasons. In his affidavit there is a note of disappointment and dissatisfaction that the family business should be entrusted to comparative strangers rather than members of the immediate family.

The defendants do not accept his assertion that there was a reconciliation between father and sons prior to the Captain's death. Correspondence and conferences between Christos and the Trustees and representatives (legal and otherwise), on both sides, failed to arrive at a peaceful solution. Hence the resort to litigation.

Opening gambits, counter moves and preliminary manoeuvres, resulted in a number of interlocutory orders and it is from those orders that both sides have appealed, seeking review and reversal or modification of the terms of the orders.

On the basis of presentation, the appeals were conveniently consolidated and argued thus:

Cause 487/91 - Appeals by Christos
(Beddoe Orders and Directions)

Appeal No. 2/92

Order, dated 22nd January, 1992, granting trustees to defend Cayman proceedings and for legal advice in Greek proceedings.

Appeal No. 5/92

Order dated 26th March, 1992, authorising trustees at the expense of Trust Fund to make applications to the First Instance Court of Athens in the action

for "notice of suit" to be served on those beneficiaries who have not been found there.

Appeal No. 10 of 1992

Order dated 18th September, 1992 - Trustees to defend the Greek proceedings.

Appeal No. 2 of 1993

Order dated 4th February, 1993 - the costs of Trustees' Associates in the Greek proceedings from Trust Fund.

Appeal No. 13/93

1. Order dated 26th April, 1993 - indemnifying trustees in connection with all the summonses as agreed between the parties.

2. Order - dismissing Christos' application for pre-emptive order for costs from the Trust Fund.

Cause 425/91

Appeal No. 12/93

Appeal by Christos against dismissal of Accounting Summons - Order dated 26th April, 1993.

Appeal No. 9/93

Appeal by George against Order dated 25/6/92 - refusing to set aside Order for service out of jurisdiction.

Appeal No. 10/93 - by George -

Appeal against Order dated 26th April, 1993 - upholding paragraph 3 - Trustees of Counterclaim,

Appeal No. 11/93

Appeal against Order dated 21/1/93 - authorising trustees to retain lawyers on behalf of second generation beneficiaries.

Appeal No. 15/93

Appeal by Trustees -

(i) against Order for Disclosure; and

(ii) against refusing application seeking an Order against Christos and George to elect between the Cayman proceedings and Greek proceedings.

Since it is open to the Court of Appeal in interlocutory appeals to take an up-to-date view of the proceedings, I propose to deal with the appeals not in chronological order or even in the order of presentation, but will first deal with the position of George in the scheme of the litigation and then to the election question, as the determination of these questions will certainly have some relevance to the other appeals.

GEORGE'S APPEALS AGAINST THE ORDER FOR SERVICE ABROAD AND THE ORDER DISMISSING HIS SUMMONS TO DISCHARGE AND SET ASIDE THE COUNTERCLAIM AND ALL SUBSEQUENT PROCESS

The counterclaim against the brothers is the basis for the application for service abroad on George. Its operative part reads:-

"(1) An Order requiring Christos and George to elect between pursuing -

(i) thier claim put forward in these proceedings on the basis that they are beneficiaries under the Trofos Foundation; and

(ii) their claims put forward in proceedings commended by them (in their capacities as heir of their father's estate) in the Court of First Instance in Athens and the Trofos Foundation is void and illusory

such election to be made within 28 days by written notice to the Court and the Trustees (or within such other period and by such other means as the Court shall direct).

(2) An order that in accordance with such election either the claim in these proceedings be struck out or Christos and George be restrained until trial of this action or further order from continuing or taking any steps in the said proceedings in Athens or from commencing, condemning or taking any step in any other proceeding relating wholly or partly to the Trofos Foundation and brought or to be brought in any Court in Greece.

(3) A declaration that the Trustees can lawfully and properly (if they in their discretion think fit) exercise their powers under the Trofos Foundation to exclude Christos and/or George from any beneficial interest thereunder."

Although there was no specific affidavit to ground the application for service abroad, the learned Judge on the basis of the material before him in affidavits filed by and on behalf of the Trustees, granted an order for service abroad dated 7th February, 1992. Upon service being effected, conditional appearance was entered and a summons was duly filed on behalf of George seeking an order to discharge this Order and the Discharge and setting aside all other subsequent process out of the jurisdiction.

Harre, C.J., after closely contested inter-parties hearing, affirmed his order for service abroad and dismissed George's summons.

The arguments put forward by Counsel for the Trustees in opposing George's summons was included in the package in support of the election summonses against Christos and George, with Counsel for the Trustees admitting that the real purpose for adding George as a party to the proceedings, was to put him to his election.

The learned Judge refused the call for an election, striking out Clauses 1 and 2 of the counterclaim.

On appeal, Mr. Alberga submitted that in effect, the learned Judge erred in ordering service abroad in the curcumstances and was in further error in refusing to set aside the Ex Parte Order for service abroad. He adverted to correspondence

between the Attorneys for George and the Attorneys for the Trustees concerning George's disinterest in the Cayman proceedings. He submitted that Order II, Rule I, did not permit service out of the jurisdiction when the only reason for joining a party was entirely for the purpose of calling on him to elect between proceedings which he had in Greece and proceedings which he did not have in Cayman. Service out of jurisdiction is an exceptional measure and, accordingly, the Court must act with circumspection before obliging a foreigner, resident in another country, to submit to the jurisdiction here - Vitkovice Horni v. Korner [1951] A.C. 869. In the circumstances as a matter of law, it was clear that George could not be put to an election - Australian Commercial Research v. A.N.Z. McCaughan Merchant Bank Ltd. [1989] 3 A.E.R. 65. Since the real purpose for bringing George into the jurisdiction was bound to fail and did in fact fail, then the order for service abroad should be set aside and consequently the counterclaim against George should be struck out in its entirety. The real aim of the applicant having failed, he should not be retained as party to the Cayman proceedings on other grounds.

In his ruling, the learned Judge summarised the bases put forward in support of the counterclaim thus:

> "The counterclaim includes an allegation that Christos instituted and is conducting the action as a nominee of George, and that the Trustees are entitled to require Christos and George to elect between their claims in the Cayman Islands that they are beneficiaries of the Foundation established by their late father and their claim in Greece on the basis that the Foundation is void and illusory."

and George's affidavit in response:-

> "In his supporting affidavit George says that he has no connection with and has never been to the Cayman Islands and has never asked Christos to embark on proceedings or make any claim in Cayman on his behalf. He analyses the proceedings which has has brought in Greece and the differences between them and

> the proceedings brought there by Christos. He emphasizes that he has never asked Christos to obtain injunctions or act on his behalf in the Cayman proceedings, and he has no proceedings whatever (other than the summons to set aside the order giving him leave to serve notice of the counterclaim on him). He expresses surprise that the trustees, having elected to defend the Greek proceedings "should now be attempting to force me to elect between an action which I do not have in the Cayman Islands and one which I do have in Greece". He rejects with some vehemence observations and allegations made in an affidavit of Mr. Peter Stradling on behalf of the trustee defendants.
>
> George refuses to consent to the lifting of the injunctions to which I have just referred, saying that it is inappropriate for him either to consent or refuse, since he had no hand in obtaining them and cannot enforce them."

However, he rested his decision for retaining George as a defendant to Clause 3 of the counterclaim on the grounds that -

> "There was a host of affidavits setting out the factual basis on which the application was made and they had been considered by the Court through days of hearing. It was against the background of those very affidavits that I had to consider the affidavit of George, and draw reasonable inferences from the evidence on both sides. It is certainly right that the Court should be circumspect before obliging a person outside the jurisdiction to submit to that jurisdiction, with all the attendant inconvenience and expense which this involves, but, nevertheless, I came to the view that in reality George had benefited and sought to benefit from applications which have been made by his brother with his interest very much in mind or infact on his behalf. I do not think that it is necessary for me to refer to each instance or, indeed, to take samples of instances from the affidavits, which led me to that conclusion. They were carefully and comprehensively brought to my attention. George is a necessary and proper party as a defendant to the counterclaim."

NOtwithstanding his frank admission as to the ulterior purpose for applying to add George as a party to the proceedings, Mr. Jones, Attorney for the Trustees, as the Judge's notes reveal, was aware that before the question of election could arise, George would have to be first held a party to the Cayman proceedings; nor do I interpret Mr. Alberga to be challenging that proposition but urging that in the particular circumstances the foreseeable failure of the election

plea should be determinant of George being a party to the Cayman proceedings.

While Mr. Alberga's approach is understandable, I am of the view it was still open to the Judge, independently of the election question, to hold that George is a necessary party to the proceedings in Cayman and, in particular, as defendant to Clause 3 of the counterclaim on the basis that his presence will be necessary to enable the Court "effectively and completely to settle all questions involved in the matter" - Rule 26 of the Grand Court Rules.

George's interest in the Cayman proceedings as identified by the learned Judge, the benefits he continues to receive as a result of the interlocutory proceedings, that he is the only statutory heir under the Greek law who was not a party to the Cayman proceedings, and the manifest intent of Clause 3 of the counterclaim to eventually cut him out of the trusts, are factors that cumulatively would render it just and convenient to retain George as a party to the proceedings.

Mr. Alberga made two additional points. First, that a defendant cannot mount a counterclaim except where an action can be brought by original process and George was not a party to the original action - Birmingham Estates Co. v. Smith [1980] 13 Ch. D. 506.

While not challenging this general proposition, Mr. Jones for the trustees, submitted that had the third clause been struck out on this basis, he would then have immediately reinstituted the same cause by original proceedings. Accordingly, it would be not only inconclusive and at best a pyrrhic victory to strike out Clause 3 on this technical ground, which was not raised in the Court below, but there would be resultant expense, inconvenience and delay, without any manifest unfairness in retaining him as a defendant in the light of the findings that he is a necessary party and it is just and convenient that he be so added.

The other point is that it was not necessary to effect service abroad if the intention was that he should be bound by decisions in the Cayman Court. This could be effected by the service of a "Notice of Action to non-parties" under Order 15 , Rule 13A, of the English Rules, which would be applicable to the Cayman Islands in the absence of similar provisions by the enabling provisions of section 20(2) of the Grand Court Law and Rule 62(2) of the Grand (Civil Procudure) Rules.

Assuming for the purposes of argument that the Rule was applicable, it did no more than provide an alternative procedure but which, the applicant with "election" in view, would not be expected to adopt.

For these reasons I would dismiss this appeal by George and affirm the decision to retain him as a party to the Cayman Islands proceedings as defendant to Clause 3 of the counterclaim.

TRUSTEES APPEAL AGAINST DISMISSAL OF THE ELECTION SUMMONSES

The nature of the Greek proceedings was concisely described in the plaintiff's amended statement of claim thus:-

> "In separate proceedings in Greece which have been commenced before the Court of First Instance in Athens, the First Plaintiff and his brother Georgios Lemos seek judgments against the Defendants (among others) for minor percentages of the Lemos interests or their value, on the footing that the Foundation was a fictitious gift within Article 138 of the Greek Civil Code or a contract for the succession to a living person within Article 268 of that Code, or that it deprived that First Plaintiff or his brother of indefeasible rights of theirs under the laws of Greece as two of the heirs of Captain Lemos."

The election summonses dated 24th January and 21st February, 1992, respectively, call on Christos and George to elect between the claims put forward by Christos for himself and on behalf of

George in the Cayman proceedings on the basis that they are beneficiaries of the Foundation and the claims put forward by each of them in Greece.

After considering the arguments presented on both sides and a number of authorities cited, Harre, C.J., concluded thus:-

> "Attaching particular weight to the factors on each side which I have just gone through I concluded that the election summons in relation to Christos should fail."

From the arguments presented and the cases cited what I may call an "election situation" may be patent, i.e., manifest from the dispositions in the instrument as in Pitman v. Crum-Ewing [1911] A.C. 217. In such a case it would be open to an executor or trustee even without any action by an elector to seek directions and an order calling for an election by the party to whom the choice is open - as in Mengel's Wills Trusts [1962] 2 ALL ER 490. In these cases, the alternatives are often determined by the instrument (Will or Deed).

On the other hand, the "election situation" may be latent arising only on some conduct by the potential elector. The instant case it is argued, as in the majority of reported cases, falls under this category. The guiding principle for a court faced with application for an Order calling on a party to elect was stated with concise clarity by Lord Wilberforce in Johnson v. Agnew [1980] A.C. 398, thus:-

> "In my opinion, the argument based on irrevocable election, strongly pressed by the appellant's counsel in the present appeal, is unsound. Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity."

All are agreed that that is the right approach. The debate centred around the learned Judge's application of the principle to the circumstances of the instant case.

Mr. Walker, on behalf of the trustees, submitted that the basic principle is that the court will not permit a litigant to obtain an unfair advantage by adopting an inconsistent position of "blowing hot and cold". In that regard, reference was made to the statement of the relevant principle by Brown-Wilkinson, V.C., in Express Newspapers v. News Ltd. [1990] 3 ALL ER at p. 383-4:-

> " "What is sauce for the goose is sauce for the gander" has a rather narrow legal manifestation. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another; he must elect between them and, having elected to adopt one stance cannot thereafter be permitted to go back and adopt an inconsistent attitude."

In reply, Mr. Mowbray for Christos, reiterated his acceptance of the principle but contended it does not apply here because the claims are not inconsistent but complementary. Further, that a plaintiff may even have inconsistent alternative allegations in his pleadings and even inconsistent claims as long as in the end he does not enjoy inconsistent relief. He sought to support this by the analogy that in an action in the Grand Court a claim to set aside a trust entirely ab initio could quite properly be combined with an alternative claim as

a beneficiary to have the trust administered by the court, remove the trustees and make them account. If the first claim was to recover, not the whole of the trust, but only part of it, a claim to administer the trusts of the rest would not even be in the alternative, so judgment could properly be obtained and enforced on both claims.

In that regard it was submitted in reply that Christos, as an heir, claiming a fixed percentage, 18.75%, of the trust fund under the forced heirship rights of Greek Law and at the same time a continuing interest in all the remainder of the trust fund as a beneficiary is "blowing hot and cold".

On this question of "blowing hot and cold", Harre, C.J., in his judgment said:

> "The rule against blowing hot and cold is accepted by both sides. In the end each, it seemed to me, was bidding against the other in describing the evil consequences which would flow from the adoption of one course or the other in relation to the election issue. And that was in fact the most helpful course if it is right, as I conclude from the authorities that it is, that I should be simply seeking the answer which avoids vexation and oppression and arrives at a solution based on considerations of common sense and equity.
>
> One ground on which the plaintiffs rely in opposition to the election summons against Christos is that whatever happens in Greece there will still be a trust fund and the plaintiffs will be discretionary beneficiaries of the whole of what remains. It is not, they argue, as was Pitman v Crum-ewing (1911) A.C. a simultaneous claim both to share in an estate and to deplete it but a case where even if heirs at law recover a percentage of the estate in Creece all the plaintiffs will continue to be interested in all that remains."

Mr. Mowbray's analogy is forced; the differences between it and the instant case outweigh the similarities. In this case if Christos and George succeeded on the grounds set out in the Greek claim, Mr. Mowbray frankly conceded the same cause of action on the part of the ladies could have broken the trust and put an end to the beneficial rights, inter alia, of the

second generation beneficiaries including the co-plaintiffs in the main cause as the widow's share of 25% and the four children each - 18.75% - would exhaust the fund.

Indeed, it is this manifest conflict of interest between Christos and his co-plaintiffs' sons that moved the Court to order for them independent legal representation.

However, we were advised that according to Greek Law the trust could continue to be administered on the basis that the ladies' percentages remain in the fund.

Unlike the learned Judge, at first instance, I am not impressed by the analogy. It is generally agreed that to file an alternative claim attacking the trust, Christos could only do so as a personal representative with appropriate administrative instrument recognized by the Cayman Court. Surprisingly, he has obtained in the English Court letters of administration in his sole favour. Since in this the ladies have joint rights to administration in an application in Cayman, the stage would be set for a battle royal in which the ladies outnumber and outweigh the brothers. Apart from these impracticalities, it would be asking too much of the Cayman Court to entertain an action challenging the validity of a Cayman Trust, of which the proper law is Cayman Law, based on causes of action and seeking a remedy not only unrecognized by but contrary to the laws of Cayman and particularly the Trusts (Foreign Element) Law. Section 6 of that law provides:-

> "Without limiting the generality of the foregoing section, it is expressly declared that no trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that:-
>
> (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or

(b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests."

I am of the view that the causes of action and the remedy sought in the Greek proceedings would not be entertainable in the Courts here.

Both sides engaged in scholarly debate, in an endeavour to distinguish cases of election based on rights on the one hand and those based on remedies on the other, referring to such cases as Scott v. Jardine [1982] 7 A.C. 345 and Johnson v. Agnew [1980] A.C. 367.

Mr. Mowbray took a new line by skilfully using Scarf v. Jardine along with Ker v. Wauchope 1 BL 11, Pitman v. Crum-Ewing (supra), Morel v. Westmorland [1904] A.C. 11, Douglas-Menzies v. Umphelby [1908] A.C. 224 to illustrate and support his argument that the choice must be absolute between clear alternatives. In that regard, I have indicated that where the alternatives are determined by dispositions in the Deed or Will then the elector must take one or the other and the duty of the court is consequentially limited; and similarly, where the party has already elected by pursuing one course and is estopped from pursuing the other. The case of Douglas-Menzies v. Umphelby [1908] A.C. 224 is illustrative. The facts and decision are summarised in the headnote at p. 224:-

"By two testamentary instruments, called respectively a British will and an Australian will, a testator domiciled in Scotland made a complete disposal of his estates, British and Australian, directing that the British will should be construed and administered according to the law of Scotland, the Australian will according to the law of New South Wales. His widow, on his death without issue, obtained a

> decree of the Court of Session in Scotland establishing her legal right in name of jus relictae and terce, with consequential relief, the Court declining jurisdiction as against the Australian trustees. Under a summons issued in the Supreme Court of New South Wales by the respondent trustees of the Australian will, the widow claimed the beneficial dispositions in her favour contained therein; the Court decided in her favour, and an appeal therefrom was instituted by the above appellant, party thereto, who took beneficially under the Scottish will, but not under the Australian:-
>
> **Held,** that the two instruments formed one will containing a coherent scheme of intention, and that the widow, having elected to defeat the will in part, could not claim under it, and accordingly took no interest under the Australian will."

Notwithstanding, I am not in any way convinced that the court cannot demand an election in an inchoate situation but must stand and await an estoppel.

We have been treated by Counsel on both sides to astute arguments attractively presented, ranging over the varied occasions on which a court has been called upon to order election and to a commendable disply of much learning on the subject but as Mr. Mowbray attractively puts it:

> "The justice of the case does not turn on abstract conceptual analysis of the theoretical bases of Christos' claims."

In my view, the moment Christos filed his action in Greece claiming a share to the assets of the Foundation, contrary to and not in accordance with the scheme or method of disposition in the Trust Deed, an "election situation" arose. Therefore, the pivotal question is whether or not on "simple considerations of common law and equity" Christos should now be called upon to elect between his proceedings in Cayman and those in Greece. To that end consideration should be given to whether their continued existence is vexatious or oppressive.

Of this the learned Chief Justice expressed his awareness in the passage quoted ante and to resolve the question he considered dicta from a number of cases. These cases, in the

main, deal with forum conveniens but I am of the view that the propositions and statement of principles in those cases are relevant because they deal with the similar ultimate question, namely, whether or not the court in exercise of its jurisdiction should preclude a party from maintaining or pursuing two actions on the same subject matter in two different jurisdictions; the real difference being that in forum conveniens cases, the court is asked to determine the jurisdiction in which the action is to be determined while in election cases, where election is ordered, the choice is left to the plaintiff.

In British Airways v. Laker [1985] A.C. 58 in illustrating the type of cases in which an applicant may seek an injunction restraining a plaintiff from continuing or commencing proceedings in a foreign court on a matter pending in an English Court, Lord Diplock said:

> "Of such defences, it is not difficult to point to a number of examples most of them equitable in historical origin, such as estoppel in pais (which is also a defence at common law), promissory estoppel, election, waiver, standing by, laches, blowing hot and cold - to all of which the generic description of conduct that is "unconscionable" in the eye of English law may be given."

and went on to quote with express approval Lord Scarman's statement in Castanho v. Brown et al [A.C. at p. 573:-

> "But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."

The careful approach of the court to restraining a plaintiff from pursuing his action in a foreign court was expressed by Lord Scarman in the British Airways case, in the following passage at p. 95, which was quoted by Harre, C.J., in his judgment:

> "I would emphasise that it states an approach and a principle which are of general application. The approach has to be cautious because an injunction restraining a person within the jurisdiction of the British court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however, disguised and indirect, an interference with the process of justice in that foreign court. Caution is needed even in a "forum conveniens" case, i.e. a case in which remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognised and enforceable by the foreign court.
>
> Nevertheless, even in the latter case, the power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a "wide and flexible" equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English Court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained".

Counsel for the trustees said that in his judgment, Harre, C.J., accepted and was aware of the principles and correct approach but contended that he erred in applying those principles to the facts.

First, that he erred in holding that Pitman v. Crum-Ewing was distinguishable from the instant case. I am also of the view that Pitman v. Crum-Ewing is distinguishable but on the basis that the election occasion being patent, is different and, consequently, different considerations apply.

Secondly, the Judge was wrong to attach significance to the discretionary nature of the trust. In that regard Harre, C.J., said:-

> "The plaintiffs are seeking the removal of the trustees for alleged breaches of trust, dishonesty, conflicts of interest and bias, which they say is confirmed by the way in which they have supported the ladies in these proceedings, particularly in relation to the implementation of the wishes of Captain Lemos. They say that while their action is proceeding in Greece they are, in the face of the situation which they allege, entitled to protect themselves in Cayman."

and later -

> "I do not think that the continued existence of the Foundation in Cayman can be said to be irrelevant. In my view, it is an important factor in assessing what is fair and equitable on the election issue. The Cayman trust is a discretionary trust. In relation to it the plaintiffs are at present protected by injunctions of this Court. On the outcome of the proceedings in Greece it will be a matter for this Court to decide what to do about these injunctions and, assuming that they are lifted, for the trustees to decide how to exercise their discretionary role. The danger of unjust enrichment for Christos in that situation is remote indeed. On the other hand there are allegations of serious misconduct against the trustees. It seems to me to be quite unjust to preclude the plaintiffs from pursuing these as the price of their action as heirs at law in Greece and equally unjust to ask them to forego their claims in Greece as the price of investigating the actions of the trustees."

Thirdly, that he attached too much weight to the allegations of breach of duty against the trustees.

Fourthly, the Judge was wrong to accept the submission on behalf of Christos that he could have joined in his main action in Cayman: (i) a claim to set aside the Foundation; and (ii) an alternative claim to remove the trustees.

On this I have already expressed an opinion in favour of the submissions on behalf of the trustees.

As regards the criticisms in (2) and (3) above, I am of the view that it was perfectly proper for the Judge to indulge in that sort of comparative analysis to determine whether or not in the present circumstances and from the nature

of the litigation in Cayman and in Greece, the plaintiff should be put to an election because the maintenance of both actions is "vexatious and oppressive" as explained by Bowen, L.J., in McHenry v. Lewis 32 Ch.D. 408:

> "I agree that it would be unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a cricle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances in each case.

It is true that in their annual disbursement to the brothers of $1,000,000.00 payable in quarterly instalments, the trustees up to the time of the actions had shown no discrimination or bias, but this rested entirely on the good-will and generosity of the trustees. Christos is a discretionary beneficiary and having filed his Cayman Action to maintainthe status quo and, in particular, the quarterly payments, it was necessary to obtain an interlocutory injunction. The trustees have countered by seeking a declaration that it would be right and proper to carry out the wishes of the settlor and cut him off as a beneficiary. The basis for this is that, as a beneficiary, he has dared to question their administration by an action in court. On the other hand, the action in Greece is for causes and remedy which I have already found are not entertainable in Cayman and based upon Greek Statute Law. Proverbially speaking, an Order for an election would demand a choice between the shadow and the bone.

Questions of Res Judicata and principles of judicial comity may later arise, but I am in agreement with the learned Chief Justice that at this stage Christos should not be put to an election.

George is in a much stronger position. The trustees seek to involve him on the basis that Christos is either his nominee or, that he is a "shadow party" in the proceedings in Cayman, in the sense that it is being conducted with his complicity and for his benefit - see Nanu Ofori Atta II v. Nana Abu Bonsra II [1958] A.C 95 and House of Spring Gardens v. Waite [1991] QB 241. Before us the submissions are more in support of a "shadow party"; understandably so, as to establish Christos being George's nominee would require more cogent and direct evidence. The trustees are relying on:-

(1) that George's claim in Greece is similar to Christos;

Mr. Alberga has endeavoured to show differences between Christos' action and George's by reference to particulars. In my view, these are of the pheripheral; the core of the action in each is similar. However, this has little or no probative worth. Each claim, apparently based on legal advice, is that the establishment of the trust and the dispositions under the trust are contrary to Greek Law.

(2) that Christos in his affidavit, deponed to George's support and interest in the Cayman proceedings.

In that regard, the rule of evidence is that such an opinion is George's only to the extent as George by word or conduct expressly or inferentially adopts it. To that end, we were adverted to his continued receipt of the regular payments under the interlocutory injunction. It is true that he is receiving this not insignificant benefit but he does so as being part of

the group and unsolicited by him. Accordingly, I see no obligation on him to refuse or take steps to exclude himself;

(3) that Harre, C.J., found him a "shadow party" when he said:

> "I came to the view that in reality George has benefited and sought to benefit from applications which have been made by his brother with his interest very much in mind or in fact on his behalf." (p.19)

and later (p. 29) :

> "He (George) is, it seems, far less indifferent to its benefits than he would previously have had the Court believe."

Mr. Alberga's reply was to the effect that these passages do not amount to a finding of a "shadow party" in George; alternatively, if they could be so interpreted, the evidence does not support such a finding.

Mr. Alberga is right on both counts. At page 19, the Judge had not yet come to specifically deal with the election summonses but was dealing with George's presence in the jurisdiction and it is in that context the passage should be interpreted and so interpreted means that it was right and proper for him to be a party to the proceedings and the statement at page 29 takes it no further. Indeed, it would be an unjustified finding of inconsistency in the Judge to interpret otherwise. In any event, the evidence on behalf of the trustees is far too equivocal to be capable of such a finding. Further, on the more positive side, George was brought, figuratively speaking, "screaming and kicking" to the Cayman jurisdiction. He was eventually retained as a defendant to the counterclaim for an important but limited purpose. He instituted no proceedings and sought no coercive orders in this jurisdiction. In relation to George, there was no case for an election.

Accordingly, I would dismiss the Trustees' appeal against the Orders dismissing the election summonses in relation to Christos and George.

CHRISTOS' APPEAL AGAINST THE ORDER DISMISSING HIS ACCOUNTING SUMMONS AND THE TRUSTEES' APPEAL AGAINST CERTAIN TERMS IN THE ORDERS MADE PURSUANT TO CHRISTOS' DISCLOSURE SUMMONS

Pursuant to these summonses, Harre, J (as he then was), made the following Orders:

1. The Accounting Summons is dismissed.

2. With respect to the Disclosure Summons, the Trustees are directed to allow the Plaintiffs, by their attorneys, to inspect and take copies of the following documents:

   (i) the Settlement and all other documents constituting or purporting to constitute the Trofos Foundation ("the Foundation");

   (ii) all appointments or purported appointments of new trustees of the Foundation;

   (iii) all appointments or purported appointments of new or further beneficiaries under the Foundation;

   (iv) all removals of past beneficiaries under the Foundation;

   (v) all other trust or fiduciary document of or connected with the Foundation except:-

      (a) the accounts of the trusteeship and all books, records, and vouchers including, without limiting the generality of the foregoing, any balance sheets, income and expenditure accounts, ledgers or day books (however described) from which the said accounts are prepared,

      (b) any correspondence passing amongst the Trustees or between any of them and anyone else for the time being comprised in the definition of "the Beneficiaries" in the Deed of Settlement, and

      (c) Any documents disclosing diliberation as to the exercise of any discretionary

> powers among any person within the said definition or disclosing the particular reasons for any such exercise or the material upon which any such reasons were or might have been based;
>
> (vi) the balance sheets and profit and loss accounts (including in each case all attached notes) of each company or other organisation or undertaking over which the Trustees have direct or indirect control as trustees of the Foundation."

The application for accounts was made under Rule 21 of the Grand Court (Civil Procedure) Rules, which reads:-

> "In any action in which the writ of summons has been indorsed for an account and the defendant does not appear, or appears and does not thereafter satisfy the Court that there is some preliminary question to be tried, the Court may make an order for the proper accounts with all necessary directions and inquiries."

It is the consistent stand on behalf of Christos that as a beneficiary he is absolutely entitled to have accounts taken by the court without undue delay and the accounts are needed by the plaintiffs to police the trustees' administration against which there are serious accusations - Morrice v. Bishop of Durham [1804] 9 Ves 399.

Reliance was also placed on the practice in the English court under similar Rules to make an immediate Order for accounting unless the defendants raise an issue as to they being accounting parties.

The trustees in reply contend that an Order for accounting is decretionary and although there are situations in which an account would be ordered more or less as a matter of course, this is not such a situation.

In determining this fundamental issue, Harre, C.J., considered pertinent passages in Re Londonberry's Settlement [1965] Ch. 918 and O'Rourke v. Darbishire [1920] AL 581.

In the Londonberry case, the defendant, a beneficiary, sought of the trustees, inter alia, copies of the trustees'

meetings, documents prepared for these meetings, correspondence between the trustees, the appointers under the trust and the beneficiaries, and also between the settlor, one of the appointors and the trustees' solicitors. The trustees supplied copies of the appointments and of the annual trust accounts but took the view that in the interest of the family as a whole they ought not to disclose any of these other documents.

The trustees issued a summons seeking the determination of the nature and extent of their duties in respect of such disclosure.

Harman, L.J., in the Londonberry's case quoted the following observation of Lord Parmoor in O'Rourke v. Darbishire and of Lord Wrenbury in the same case:-

> "If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. A proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries."

Harman, L.J., then commented thus:-

> "General observations of this sort give very little guidance, for first they beg the question what are trust docuemnts, and secondly their lordships were not considering the point here that papers are asked for which bear on the question of the exercise of the trustees' discretion."

and after dealing specifically with particular documents in issue said:-

> "I would hold that even if documents of this type ought properly to be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure. If necessary, I hold that this principle overrides the ordinary rule. This is, in my judgment, no less in the true interest of the beneficiary than of the trustees. Again, if one of the trustees commits to paper his suggestions and circulates them among his co-trustees; or if inquiries are made in writing as to the circumstances of a member of the class; I decline to hold that such documents are trust documents the property of the beneficiaries. In my opinion such documents are not trust documents in the proper sense at all."

However, in the penultimate paragraph is the following useful obiter observation:

> "I should add that very different considerations apply when it comes to a question of discovery in an action where a beneficiary is impeaching the validity of the trustees' actions."

Dankwerts, L.J., was similarly critical of the generality or impreciseness of the term "trust documents" in the context in which it was used in O'Rourke v. Darbishire and with regard to practicalities said: (p. 935) :

> "It seems to me it would have been far better that the matter should have been left until an action were started by a beneficiary who claim to have a right to see particular documents and the court would fairly face the problem whether the particular documents were ones which the trustees were bound to disclose to a particular beneficiary."

and in dealing with the particular documents said:

> "It seems to me there must be cases in which documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desire to see them, and I think the point was a good one which was taken in the affidavit of Lord Nathan, that to disclose such documents might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same. It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner.

> Of course, if a case is made of lack of bona fides, that is an entirely different matter. In that case I agree it becomes necessary to examine exactly what has happened because that is in an action and not in a theoretical application for directions, as the present case appears to me to be. It appears to me that the documents are confidential and the trustees' duty would become impossible and the execution of the trust would become impossible if the trustees were bound to disclose to any beneficiary any information or other matters in regard to beneficiaries (sic) that they had received.
>
> For these reasons, therefore, it seems to me there must be a very restricted application of the observation that beneficiaries are entitled to see all the trust documents. The matter must be one which is subject to special circumstances and the right to disclosure cannot apply to all trust documents."

Lord Salmon's, L.J., contribution included the following: -

> "There is another possible approach to the present case. The category of trust documents has never been comprehensively defined. Nor could it be - certainly not by me. Trust documents do, however, have these characteristics in common: (1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them. If any parts of a document contain information which the beneficiaries are not entitled to know, I doubt whether such parts can truly be said to be integral parts of a trust document. Accordingly, any part of a document that lacked the second characteristic to which I have referred would automatically be excluded from the document in its character as a trust document."

However, in Re Cowin [1886] 33 Ch. at 179, another case of respectable antiquity, in making an order for production, North, J., expressed this qualification:

> "I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist."

In Butt v. Kelson [1952] Ch. 197 - it is enough to refer to the summary as set out in the headnote:

> "The defendants as trustees of a testator's will held 22,100 ordinary shares of a private limited company out of 22,852 shares which had been issued. The voting power was vested in the ordinary shareholders. Pursuant to powers conferred on them by the will of the testator, the defendants had appointed themselves to be sole directors of the company. The plaintiff, who was entitled under the testator's will to a life interest in a substantial portion of the testator's residuary estate, became dissatisfied with the manner in which the defendants had conducted the company's business and in this action claimed a declaration that he, as a person beneficially interested in the property subject to the trusts of the will, was entitled to inspect all documents which came into possession or power of the defendants by virtue of their position as directors of the company."
>
> Harman J. made the declaration for which the plaintiff asked.
>
> On appeal:-
>
> **Held** (1) that beneficiaries were not entitled to call on trustee directors to use their powers as directors as though such powers were held on trust for the beneficiaries; (2) that beneficiaries were entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which that position involved and that they could compel the trustee directors, if necessary, to use their votes as the beneficiaries or the court, if the beneficiaries themselves were not in agreement, thought proper even to the extent of altering the articles of association if the trust shares carried votes sufficient for that purpose; (3) that in the present case, if the plaintiff first specified the documents of the company which he wished to see, secondly made out a proper case for seeing them and thirdly was not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection, not because they could be compelled to do so as directors but in order to avoid an order compelling them to use their voting powers so as to bring about what the plaintiff desired to achieve."

The cases re Londonberry, Cowin, Butt v. Kelson lead me to conclude that although a beneficiary has a proprietary right to trust documents, it is by no means an absolute right; there may be documents or category of documents which it would be just and proper to exclude.

In that regard the documents excluded in the decided cases are illustrative but not exhaustive. Accordingly, I extract the general propositions that an order for account will be granted save in circumstances, e.g. where the document or category of documents is not relevant or evidentially essential to the beneficiary's case or where the probative value is minimal and considerably outweighed by prejudice to the other beneficiaries or to the proper administration of the trust.

If I am right in this approach, then only in exceptional circumstances would a blanket refusal of an application for accounts be justified in cases where a beneficiary makes serious allegations "impeaching the validity of the trustees' actions".

Now the grounds on which the Judge dismissed the accounting summons in the main may be summarised thus:

(1) that judicial accounting would be long and expensive and that it would not be just and convenient to make such an order;

(2) that because the trust involves very large commercial assets some degree of confidentiality is involved;

(3) that the order on the disclosure summons will furnish all that is necessary;

(4) that the summons is a "fishing exercise" - a ruse to obtain evidential material for the Greek action.

The first three grounds are but minor impedimenta that could have been resolved between the parties or by summons for directions under the umbrella of liberty to apply. In that regard, on behalf of Christos, the offer was tendered that even if an order for accounting was made, a properly up-to-date audited accounts verified by affidavit would be acceptable or in the alternative, a streamlined procedure could be adopted. On behalf of the trustees that they are ready, willing and able

to give such audited accounts providing there is an undertaking in terms similar to the undertaking given by the Attorneys for the co-plaintiffs, not to use the material so obtained in the Greek proceedings.

Thus, the real bone of contention rests on the allegation of insincerity of Christos in bringing the Cayman proceedings and that the summons for accounting is a fishing exercise to obtain evidence for the Greek action. In the affidavits on both sides there have been accusations in acrimonious language. However, at this stage, I am constrained to treat the issue of the plaintiff's bona fides in bringing the Cayman Action as a contested one and without any comments that would reveal an inclination either way. It is enough for the purpose of this appeal to say that the apprehension of the trustee that the material obtained by an order for judicial accounting is intended for use in the Greek proceedings is reasonable.

In that regard, Mr. Mowbray in affirming Christos' stand that the action in the Grand Court is genuine, adverted to allegations of mismanagement by the trustees, inter alia - (1) the trustees permitting Captain Lemos:

(i) to spend $574,000 of the trust fund on private expenses;

(ii) to use the trust property as his own;

and (2) their want of the requisite diligence in relation to fixed deposits.

However, he admitted that material and documents obtained on an order to account, if relevant, will certainly be used in the Greek proceedings and that the Greek procedures for discovery and disclosure being less liberal than the Cayman procedure documents obtained under the latter may not be otbainable under the former. Because of the beneficiary's proprietary right to the documents obtained on the accounting procedure, he would be free to use them as he wills.

Christos cannot have it both ways. Having brought his action in the Court in Greece, it is only just and fair that he should take that forum with its advantages and disadvantages. As I have already said, the right of the beneficiary to an Order for Accounts is not an absolute but a qualified right. Although the normal practice is to grant an Order for Accounts without conditions, this does not in any way impede the wide discretion conferred by Rule 21.

Accordingly, it would be within the discretion of the Court to make the Order for Accounts subject to an undertaking, on behalf of Christos not to use the material obtained thereunder in the Greek proceedings. From the overtures made by both sides, there is an implied agreement that a properly audited accounts would be sufficient. To demand now the more onerous and protracted judicial accounting would be contrary to the express acknowledgement that properly audited accounts would be acceptable.

In the circumstances, it would be just and fair to order accordingly subject to the undertaking indicated above with the usual liberty to both sides to apply.

The trustees, unhappy with the order on the Disclosure Summons and, in particular with paragraph 2(v), appealed on the following ground:

> "The Judge did not (either in the order or in his reasons therefor) define or give adequate or any guidance as to the meaning of the category of documents included in the expression "all other trust or fiduciary documents" or connected with the Trofos Foundation (which category with the exceptions set out in subparagraph (v) is referred to below as "residual trust documents")."

It was submitted, in effect, that the impreciseness there renders the order unworkable and embarrassing.

Despite arguments to the contrary, I am of the view that clarity would be obtainable under the paragraph 3 of the Order which reads:

> "The Plaintiffs and the Trustees shall have liberty to apply as to the working out of paragraph 2 of this Order".

Accordingly, I would dismiss the Trustees' appeal.

APPEAL NO. 11/93 BY GEORGE AGAINST THE ORDER OF 21ST JANUARY, 1993

The Order permitted the trustees at the expense of the trust fund to retain lawyers for the "second generation" beneficiaries. The children of George would be such beneficiaries.

The appeal sought an amendment to the Order to specifically confer on George the right to choose the lawyers or alternatively that he be appointed guardian at litem for his children. This is a surprising intervention for one who expressly denied any interest in the Cayman proceedings.

As no arguments were addressed to us on behalf of the appellant the inference is that it was not being pursued. In any event, a similar conflict of interest as moved the Court to grant independent legal representation to the co-plaintiffs in 425/91 would be applicable here. I am of the view that there is no merit in this appeal.

THE BEDDOE APPEALS

I have had the benefit of reading the Draft Judgment of the Honourable President. In it he has reviewed the arguments and considered the cases cited. I am in agreement with his reasoning and his conclusion that the appeals should be allowed to the extent set out in his judgment.

PRESIDENT:

The Order of the Court is as follows:

Appeals 2,5,10/92 and 2/93 are dismissed. Orders of the Court below are affirmed.

Appeal 13/93 is allowed. Order of the Court below is vacated.

Appeals 9 and 10/93 are dismissed. Order of the Court below is affirmed.

Appeal 11/93 is dismissed. Order of the Court below is affirmed.

Appeal 12/93 is allowed. Order of the Court below is vacated. By a majority, Order for audited accounts substituted,, subject to an undertaking by Plaintiff Christos Lemos and his attorneys not to use the accounts in any other proceedings or make it available for use by any other person in any other proceedings.

Appeal 15/93 is dismissed. Order of the Court below is affirmed. Trustees' appeal against the Order as to election is dismissed by a majority in relation to Christos, but unanimously in relation to George.

Trustees' appeal against the Order for disclosure of documents is dismissed unanimously.