Hon Mr Justice Hare

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAYMAN ISLANDS CIVIL APPEAL No. 13 OF 1992

BEFORE THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE GEORGES, J.A.
THE HON. MR. JUSTICE KERR, J.A.

In the matter of
H of H. LIMITED

and

In the matter of
THE COMPANIES LAW REVISED

Ian Croxford, Ms. Cherry Bridges with him for the Appellants instructed by Ritch and Conolly

Raymond Alberga Q.C. Charles Quin with him for the Respondents instructed by Paget-Brown Quin and Hampson

JANUARY 18, 19, 20, 21, 22, 25, 26, 27, 28,
FEBRUARY 26, 1993

GEORGES JA.

This is an appeal from an order of the Chief Justice requiring Ms. Cherry Bridges (Ms. Bridges) an attorney in the firm of Ritch & Conolly, to attend before him on such date as may be fixed to be cross-examined on affidavits filed by her on April 10, 1992, April 22, 1992 and May 29, 1992. These affidavits had been filed in interlocutory proceedings taken during the course

of the hearing of preliminary applications relating to a petition for the winding up of a Cayman Islands exempted company - H of H Limited ("H of H").

The Petitioners are Patricio Zapata Gomez ("Patricio") and his sons, Cayo Zapata Navarro ("Cayo") and Carlo Zapata Navarro ("Paulo"). The respondent is Beaumont Enterprises Limited ("Beaumont") a company registered in the British Virgin Islands. It is wholly controlled by Claudio Zapata Gomez ("Claudio') a brother of Patricio. Bruce Campbell & Co. are the attorneys for the Petitioners. Beaumont is represented by Ritch & Conolly. Ms. Bridges is the associate in that firm principally engaged in the conduct of the litigation.

H of H is a holding company. It conducts no active business. It was formed in 1980 to hold shares owned by the father of Patricio and Claudio, Don Cayo, and members of his family (including Patricio and Claudio) in various manufacturing companies in the United States of America and in Europe - France, Spain and Portugal. Don Cayo had emigrated to Latin America from Spain in 1915. He had settled eventually in Mexico. There he had started with his brother, Nicholas, a business for the manufacture of screw caps and subsequently crown corks. This had expanded prodigiously and by the date of the incorporation of H & H the Zapata family owned factories in Mexico, Brazil, Venezuela, the United States of America and Europe for the manufacture of cans, screw tops and other such containers. They also owned

factories for the construction and design of the equipment used in the manufacture of such containers.

It was Don Cayo's wish that the shares held by him and his five children (there were three daughters) should be divided equally among the children although the control of the business should rest with his sons. H & H was so structured that 90% of the shares which carried a vote were equally divided between Claudio and Patricio. The remaining 10% was divided equally between the two daughters who survived Don Cayo. In effect once Patricio and Claudio agreed their decisions could be implemented. If they disagreed, the daughters, acting together, could decide which view should prevail. This arrangement did not last for long. Claudio and Patricio bought out their sisters' shares and divided equally between them their sisters' voting shares.

The structure of the group of companies the shares of which were held by H & H was somewhat complicated - a complication made necessary at least in part, by the desire to minimise the liability to tax.

Patricio directly and Claudio, through Beaumont each hold 50% of the shares of H & H. H & H owns 100% of Maycon, a Dutch Antilles company. Maycon owns 100% of the shares in 5 companies - all incorporated int he Dutch Antilles viz - Cayak Investments Co., Tiara Investment Co. Graceton, Eurogosa and Clabe Investment Co. Graceton owns 100% of the shares in Kilbura Holding, a Dutch Company. Eurogosa, Clarke and Maycon together

hold 100% of the shares of Esporfran, also a Dutch Company. All these companies, which may be called "the intermediate companies", do no active trading. They exist for tax reasons. Beneath these intermediate companies are the companies which actually do the manufacturing and have the potential for making profits.

Kilbura and Esporfran own 92.40% of the shares of Tapon France which manufactures in France. Kilbura and Esporfran each hold 50% of the shares of Tapon Corona Iberica which manufactures in Spain. Kilbura, Esporfran and Tapon Corona Iberica own 100% of the shares in Tapon Corona Rapide which also manufactures in Spain. Esporfran owns 100% of the shares in TMF Techserv Inc., a company in the United States of America, which owns 100% of the shares in Zapata Technologies Inc. and Zapata Industries Inc. which manufacture in the United States of America.

The petition, as originally filed on March 26, 1992, comprised 23 chapters and was nearly 200 pages long. The ground for asking for a winding up was that relations between Claudio and his sons on the one hand and Patricio and his sons on the other had completely broken down so that there was deadlock in the management of H & H, a company which was in reality a partnership.

Difficult issues arise to be determined on the version given by the petitioners in their petition and the affidavits in support filed by Patricio and Cayo and the conflicting version given by Claudio in his affidavit in response.

These issues could not be resolved on the hearing of the summons from which this appeal arises nor can they be determined on this appeal. Inferences which arise from these issues will have to be evaluated in the cross-appeal which raises the allegation of fraud. Some detailed consideration will have to be given to them then.

The Petition was served on Ritch & Conolly who were known to represent Claudio in the Cayman Islands. It was handed to Ms. Bridges who says that she made it clear at the time that she had no instructions to accept service. A copy was also sent to Beaumont in the British Virgin Islands.

Handed to Ms. Bridges with the petition was a letter from Bruce Campbell & Co. seeking undertakings from Beaumont through Claudio that until such time as a final order was made on the petition there would be no change in the structure of the group of companies, the shares of which were held directly or indirectly by H of H, that none of the companies would allot or issue or agree to allot or issue fresh capital and that none of the companies would dispose of any asset or enter into any transaction other than in the ordinary and proper course of business. A deadline of March 27, 1992 was fixed for compliance with that request.

There was no response from Ritch & Conolly by March 27, 1992 on the request. On March 31, 1992 Bruce Campbell & Co. filed a summons asking for the appointment of a provisional liquidator. That summons was heard on

April 1, 1992 by the Chief Justice and Messrs, Cleaver and Gee of the accounting firm of Ernst and Young of George Town, Grand Cayman were appointed joint provisional liquidators. They were empowered, among other things, to take possession of, collect and protect the assets of H of H and each subsidiary thereof, to protect the businesses of the manufacturing companies, to take possession of the books, documents and other records of H of H and to procure the observance of the matters on which undertakings had been sought.

On April 1, 1992 Ritch & Conolly wrote Bruce Campbell & Co. informing them that they were seeking instructions from their clients in respect of the undertakings being sought. The reaction of Bruce Campbell & Co. in a reply dated April 3, 1992 was sharp. They asserted that the attitude of Ritch & Conolly and their client was extraordinary. In the correspondence the deadline had been ignored and that had intensified their concern about the propriety of Claudio's intentions towards the H of H group.

On April 9, 1992 Ritch & Conolly replied that the appointment of the provisional liquidators had overtaken their earlier statement that they were seeking instructions from their client on the undertakings requested.

In a second letter of that same date Ritch & Conolly stated that the appointment of provisional liquidators at that time was completely unnecessary and that they anticipated being instructed to apply to have the order discharged.

This deadline given had been unrealistic as the giving of undertakings in any proceedings had to be given careful consideration. The order appointing the provisional liquidators had been served on Ritch & Conolly on the afternoon of April 8, 1992.

On April 10, 1992 Ritch & Conolly filed a summons seeking to abridge the time within which the respondent to the petition could file a summons to discharge the exparte order. This was supported by an affidavit sworn by Ms. Bridges. That is one of the important affidavits for the purposes of this appeal.

In this affidavit she reviewed the chronology of events and stated -

> "7. The issue of giving undertakings is an extremely important matter to which careful consideration should be given, particularly in the circumstances of this case where the corporate structure of the H of H Group is complicated."

She stated among matters to be considered the purchase of a valuable asset eg. a plane or a piece of property - would this be considered as being done "in the ordinary course of business". She expressed concern as to the likelihood of Patricio initiating law suits on the mere suspicion that one of the undertakings may have been broken.

She then offered undertakings in these terms -

> "(1) There will be no change in the structure of the H of H Group (meaning the group of companies of which H of H is the 'top holding company') or in the ownership of any of the shares in the issued share capital of any company in the H of H Group,

> except for nominal shares that are or may be customary or required under local laws and customs for local managers, officers of (sic) directors.
>
> (2) except as set forth in No.1 above, no such company will allot or issue (or agree to allot or issue) any fresh share capital; and
>
> (3) no such company will dispose of any material asset or will enter into any material transaction other than in the ordinary course of business."

Annexed to Ms. Bridges' affidavit was a memorandum from Jeremiah Mulligan dealing with "Phone Call from Patricio's representative". Jeremiah T. Mulligan is a partner in the Law Firm of Curtis Mallet-Prevost, Colt and Mosle ("Curtis Mallet"). They appear to be Claudio's principal legal advisers. In the conduct of the defence of the petition Ritch & Conolly received instructions from Curtis Mallet.

The memorandum is dated April 9, 1992. It recounts efforts by representatives of Ernst and Young, the firm of accountants to which the provisional liquidators belonged, to take control on behalf of the provisional liquidators of the operations of Zapata Technologies Inc. at Hazelton, Pennsylvania and Zapata Industries Inc. at Muskogee, Oklahoma. Mr. Mulligan stated that these efforts to interfere with the operation of the manufacturing companies were calculated to and if allowed would cause serious damage to their business. Ms. Bridges appears to have appended it to her

affidavit to illustrate the expenses which the liquidators were incurring and the dire consequences of their actions.

This affidavit though filed in the proceedings were never read before the Chief Justice. At the hearing of the application on April 13, 1992 to abridge the return date the Chief Justice refused to grant the abridgement and directed that the summons be heard on April 27, 1992.

While she was in New York on April 15, 1992 at the offices of Curtis Mallet to discuss generally the matter of the petition when she learnt from Mr. Moscato, an associate of that firm from whom she had generally received her instructions that there had been a Restructuring of the shareholding of the manufacturing companies comprised within the H of H Group. Brief details of the mechanics of this Restructuring will be considered later. It is, however, common ground that if it is effective for the purpose for which it was devised, then these companies would be insulated from the control of H of H as far as their operations were concerned. A consequence of the Restructuring would be that Beaumont, as a director of H of H, would be unable to give the undertakings held out by Ms. Bridges in her affidavit of April 10, 1992 since Beaumont would have no control over the appointment of persons to the Board of Directors of the manufacturing companies.

She was aware that on April 15, 1992 Curtis Mallet had written the Delaware attorneys acting for the Provisional Liquidators putting them on

notice of the changes. She herself wrote Truman Bodden & Company on April 16, 1992 informing them that the steps they proposed to take to secure control of Tapon Corona Iberica were "inappropriate." This letter was not copied to Bruce Campbell & Co.

April 16, 1992 was Maundy Thursday. The Easter week-end followed. The next working day was April 21, 1992. She had scheduled filing an affidavit on April 22, 1992 to be used at the hearing of her summons on April 27, 1992 for the variation of the order appointing the provisional liquidators or for their discharge. Her view was that that affidavit would afford an opportunity to inform the Court of the Restructuring which had taken place.

The basis of the summons for the discharge of the order appointing the provisional liquidator was that the petitioners had failed in their exparte application to disclose all material facts. Ms. Bridge's affidavit of April 22, 1992 deals primarily with events relating to that aspect of the matter.

Paragraph 4 read in part -

> "It is apparent from the correspondence that there have been certain structural changes in the H of H Group of Companies. The structural changes are explained in a memo prepared by Jeremiah Mulligan, a corporate lawyer and partner in the firm Curtis Mallet Prevost, Colt and Mosle, which is now produced to me marked "CJB -8".

She annexed that second memorandum by Mr. Mulligan to her affidavit because she had herself not fully grasped the mechanics of the Restructuring. It was complex and she was unfamiliar with the nature of some of the transactions.

Bruce Campbell & Co. by letter dated April 24, 1992 sought further particulars of the Restructuring outlined in the Mulligan memorandum and copies of all documents by which it had purportedly been effected. On April 27, 1992 the Chief Justice on the applications of the petitioners made an order for the production of the Restructuring documents. On May 1st, 1992 Ritch & Conolly sent to Bruce Campbell & Co. copies of documents relating to the current ownership structure of the following companies - the United States of America companies, Tapon Carona Iberica S.A. and Tapon France. Also supplied was a copy of a deed of transfer effecting the transfer of the Kilbura shares from Graceton N.V. to a trust called the Turner Trust.

Also on or about May 1st, 1992 the petitioners received a copy of an affidavit sworn by Mr. Mulligan explaining the restructuring.

On May 5, 1992 Bruce Campbell & Co. wrote to Ritch & Conolly drawing their attention to Myers v. Elman [1940] AC 282 - the leading English authority on the duties owed to the English Court by solicitors as officers of the Court. There was set out a quotation from Lord Maugham at page 294 that

> "A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owed it to be the Court to put the matter right at the earliest date if he continues to act as the Solicitor upon the record."

The letter noted that Bruce Campbell & Co. did not accept that the matter had been "put right" by the affidavit of April 22, 1992 with the Mulligan memorandum annexed. There was a warning that if Ms. Bridges did not fulfil her duties to the Court as had been outlined in the letter they would have no choice but to make "an appropriate application" to the Chief Justice.

Further correspondence was exchanged which need not be reviewed. On May 28, 1992 Mrs. Bridges filed a further affidavit. In that affidavit she stated, as has already been mentioned that she had first heard of the Restructuring on April 15, 1992. She reviewed the steps she had taken thereafter.

She accepted and acknowledged that her affidavit of April 10, 1992 and in particular her offer of the undertakings suggested that there had been no material alteration in the structure of the H of H Group of Companies. With the knowledge she now had of the existing structure she should not have offered the undertakings because Beaumont did not have the power to procure compliance with them. She apologised for any errors and omissions on her

part which had led to the filing of that affidavit which might have misled the Court.

At all material times she had taken instructions in the proceedings from Curtis Mallet who acted on behalf of Beaumont and were her firm's professional clients. Instructions would come from Mr. Moscato, an associate and Mr. Mulligan, a partner. Her understanding was that Mr. Moscato who informed her of the Restructuring had not himself learnt of it until the day before.

She stated that on the day she was preparing the affidavit of April 10, 1992 she did seek instructions from Mr. Moscato as to what companies fell within the ambit of the proposed undertaking and more generally as to the accuracy of the structure described in Chapter D of the Petition. She could not recall whether she had or had not received these instructions before swearing to the affidavit. She had received late on April 8, 1992 the order for the appointment of the Provisional Liquidators and she was filing as a matter of urgency a summons seeking an abridgement of time for an early return date to ask for a variation of that order. In the rush she may have missed the fact that she had not received a response, or, if she did notice it, she had failed to attach importance to it. She indicated willingness to file an affidavit by Mr. Mulligan, a copy of which had already been served on the Petitioners.

The knowledge of the Restructuring resulted in a substantial amendment of the petition. Chapters W, X, and Y were added describing the events since the filing of the original petition. The falsity of the affidavit of April 10, 1992 was analysed and the concealment of the Restructuring was set out in detail. So far as there were documents available the nature of the Restructuring was examined and its effect on the Petitioner's shareholding in H of H evaluated. It was pleaded that in securing the Restructuring and concealing it Claudio had acted dishonestly and unscrupulously misleading the Petitioners and attempting to mislead the Court. Claudio had acted also in breach of fiduciary duty as a director of H of H. It was also stated that in acting in the various ways in which they had Claudio, Mr. Lauer, Mr. Mulligan and other representatives of Curtis Mallet had committed criminal contempts of the Court.

The amended petition was filed on June 12, 1992. In subsequent correspondence Bruce Campbell & Co. made clear that they did not think that the corrective affidavits filed by Ritch & Conolly had gone far enough to satisfy the duty prescribed in Myers v. Elman (supra). On July 27, 1992 the Petitioners filed a summons asking for three orders - the first was an order that Ms. Bridges attend for cross-examination on her affidavits of April 10, 1992 and May 28, 1992. This was sought pursuant to the Civil Evidence Rules, Rule 4(3) and/or Order 38 rule 2 and/or under the inherent jurisdiction of the Court. The cross-examination was to be with particular reference to the

reasons why and the circumstances in which her affidavit of April 10, 1992 came to contain statements which were false and misleading and how the Mulligan Memorandum CJB 3 came to be annexed to it.

The second was an order pursuant to Order 24 rule 12 that Beaumont Enterprises produce to the Court all documents in their possession which were relevant to the reasons why Ms. Bridges' said affidavit came to have the Mulligan memorandum attached.

The third was for an order under the inherent jurisdiction of the Court that Ritch & Conolly produce all documents in their possession relevant to the matter mentioned in relation to the second order sought.

The Chief Justice made each of the three orders sought and granted to the Petitioners the costs of the summons. Against these orders this appeal has been lodged. The Respondents for their part have filed a notice asking that the decision of the Chief Justice be affirmed on grounds other than those relied on by the Chief Justice.

The notice stated that the Chief Justice should have found that there was sufficient prima facie evidence to indicate fraud and underhand dealings on the part of the Appellants/Respondents - a finding which would have destroyed any claim of legal professional privilege.

The central issue in the arguments in the Court below and in this Court was the application of the principle in Myers v. Elmn to the facts of this case. It

was common ground that that case had defined authoritatively the duty to be discharged by a solicitor in England who had innocently placed before the court an affidavit which that solicitor later discovered contained material that was not true. It is also agreed that the duty of a Cayman solicitor to the Grand Court is the same. Lord Maugham stated at pp.293 -

> "But suppose that, before the action comes on for trial, facts came to the knowledge of the solicitor, which show clearly that the original affidavit [of documents] by his client as defendant was untrue and that important documents were omitted from it, what then is the duty of the solicitor? I cannot doubt that his duty to the plaintiff and to the Court, is to inform his client that he, the solicitor, must inform the plaintiff's solicitor of the omitted documents, and if this course is not assented to he must cease to act for the client. He cannot honestly contemplate the plaintiff failing in the action owing to his clients false affidavit. That would, in effect, be to connive in a fraud and to defeat the ends of justice. A solicitor who has innocently put on file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record."

Lord Wright echoed the same theme at p. 316 quoting the trial judge, Singleton J. -

> "His [the solicitor's] duty was to see that it [the banking account] was disclosed and if the client persisted in his refusal the solicitor ought to have declined to act further for him. A solicitor is an officer of the Court and owes a duty to the Court, he is a helper in the administration of justice."

The exposition of the principle in Myers v. Elman (supra) did not arise in the course of interlocutory proceedings. The case against Mr. Elman's clients had already been concluded and judgment had been given against them. The plaintiff then asked for an order that Mr. Elman pay the costs of the proceedings. The trial judge, Singleton J, then held a five day inquiry into the circumstances in which misleading affidavits of documents had been filed. It was an appeal from his decision which led to an examination of the nature of the duty and of the jurisdiction.

The jurisdiction is penal. Lord Atkin stated at page 302 -

> "From time immemorial judges have exercised over solicitors using that phase in its now extended form, a disciplinary jurisdiction in cases of misconduct.. At time the misconduct is associated with the conduct of litigation proceedings in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties by which the course of justice is either prevented or delayed .... If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense the solicitor on the record will be held responsible and will be administered or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case."

Lord Wright examines the jurisdiction at page 318 -

> "But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes it may be of both. The ground of

> such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed.
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> .... It was a summary jurisdiction in which the intervention of the judge was invoked at the conclusion of the case, either by motion in the Chancery court or by a motion or application for a rule in the Courts of Common Law."

In the context in which Viscount Maugham used the phrase "put the matter right" it is reasonable to conclude that he meant ensuring that the correct facts were before the Court so that there could be little risk of injustice arising from a decision being reached on inaccurate information.

Even though the matter may be put right in the sense above stated, an issue could still arise as to whether the placing of the false or defective material before the Court was due to the professional misconduct of a solicitor acting for one of the parties. This could then be the subject matter for the exercise of the jurisdiction analysed by Lord Atkin and Lord Wright. The duty to ensure that the Court is not misled would have been satisfied. The conduct of the case could then continue free from the likelihood of error. Determining responsibility for the presentation of the false information may yet remain, the subject matter of a further investigation under the well established jurisdiction explained by Lord Atkin and Lord Porter.

The two issues - the duty to the Court to correct any misleading evidence which may have been placed before it and the punishment of any misconduct on the part of the solicitor in permitting such material to be paced before the Court - can and should be kept separate. Once the misinformation is corrected the substantive litigation can properly proceed.

In this case, of course, the Court was not misled. Ms. Bridges' affidavit of April 10, 1992 with the Mulligan memorandum of April 9, 1992 attached was not used until the hearing of April 27, 1992. By then the affidavit of April 22, 1992 had already been filed disclosing the Restructuring. At that stage within the intent of the use of phrase by Viscount Maugham in Myers v. Elman the "matter" had been "put right".

Mr. Alberga forcefully contends that the duty ought not to be so narrowly defined as this might result in facts not being disclosed which would show that the solicitor was guilty of improper conduct in permitting the false information to be placed before the Court. An enquiry into how the false information came to be placed before the Court was necessary and making such information available was part of the duty. The trial judge accepted this argument. With respect, it seems misconceived. As I have indicated, the fact that the matter has been put right leaves untouched the power of the Court to punish its officers for misconduct. When all the facts have emerged in the substantive trial, it may well be clear that the punitive jurisdiction should be exercised with

respect to the solicitor. The enquiry can then take place as to the degree of culpability of the offending solicitor and the nature of the penalty which should be imposed.

Such an inquiry can be initiated by the judge acting on his own motion or on an application by some party to the matter to order that the solicitor be ordered to pay the costs personally.

Such facts in the Sibley Leisure case as have been made available do not appear controvert the arguments advanced by Mr. Croxford. Counsel, on the basis of instructions received on the telephone, had obtained from a judge an interlocutory injunction restraining receivers from taking certain action. On the return day, Counsel informed the judge that he was not proceeding with the application for continuing the injunction because certain of the facts that he had told the judge were not true. He apologised to the judge. Counsel for the receivers sought an inquiry as to damages and the cross-undertakings and an order for costs against the solicitors. The judge, it is noted, directed an inquiry into how the court came to be misled saying that there was a public interest element.

There is no indication that Myers v. Elman was mentioned or that the duty defined by Viscount Maugham had been considered. The judge was apparently concerned with the exercise of the punitive jurisdiction described in detail by Lord Wright and Lord Atkin and in relation to that it was necessary to discover

how the Court had come to be misled. Although steps in the receivership action may still have remained to be taken, the application for the interlocutory injunction had come to an end and the enquiry could proceed. There is no indication that this enquiry was being held for a purpose in any way connected with the substantive matter - the receivership action. It is clear in this case that the order for cross-examination of Ms. Bridges and the timing of the cross-examination are intended to affect the principal proceedings for the granting of the winding-up order.

In the Sibley Leisure case the Court had been misled. An interlocutory injunction had been granted, In this case the matter had been "put right" before any action had been taken. Ms. Bridges' affidavit of May 28, 1992 explained how the misleading affidavit had come to be sworn and filed. She had not been aware of the Restructuring until April 15, 1992. Two of the matters on which the Chief Justice thought that further information was needed were (1) why was the petitioner's understanding of the structuring of the companies accepted as accurate when that structuring no longer existed and (2) why the Mulligan memorandum was exhibited to the affidavit of April 10, 1992 and how it came to be exhibited on the record. Both these questions had been answered. Ms. Bridges accepted the structure set out in the petition as accurate because she had received no instructions to the contrary from Curtis Mallet until April 15, 1992. This fact is not challenged by the petitioners.

There is no charge of deception against her in this regard. It is accepted that she was an "innocent" tool. The Mulligan memorandum was exhibited to the affidavit of April 10, 1992 to illustrate the actions being taken by the Receivers, the expense that was being incurred and the damage that could be caused to the manufacturing companies as a result. It was clearly sent by Mr. Mulligan to support a summons asking that the order for the appointment of provisional liquidators be varied or discharged.

Ms. Bridges cannot give any evidence except on hearsay as to why Mr. Mulligan had not earlier revealed the Restructuring - the underlying basis of both questions. If the purpose of cross-examining Ms. Bridges was to obtain evidence of bad faith or gross carelessness on the part of Mr. Mulligan, then the punitive jurisdiction of the Court would have been misused for a collateral purpose. Mr. Mulligan is not an officer of the Court. If there was reason to think that either Mr. Mulligan or Claudio was in contempt, then appropriate steps should be taken against them.

Once it is concluded that there was no basis for the order for the cross-examination of Ms. Bridges, the order for production against Ritch & Conolly under the inherent power of the court must fail. They are linked in the summons asking for the orders. Paragraph (3) of the Summons reads -

> "An Order under the inherent jurisdiction of the Court that the said Messrs Ritch and Conolly do produce to the learned Chief Justice ... all

> documents as are in their possession, custody or power and which are relevant to the reasons why and/or the circumstance in which the affidavit of the said Cherry Jane Bridges sworn herein on 10 April, 1992: -
>
> (a) come to contain statements which were false and misleading; and
>
> (b) came to have exhibited thereto (as part of "Exhibit CJB3") the said Memorandum dated 9 April, 1992."

The purpose of the production of the documents is to assist in making effective the cross-examination. If there is to be no cross-examination the basis for the production order no longer exists.

Against Beaumont, the respondent to the petition, the production order was sought not under the inherent power of the Court but by virtue of O.24, r. 12. This empowers the Court at any stage of the proceedings in any cause or matter to order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter. As in the case of the order sought under the inherent power the documents are stated to be "relevant to the reasons why and/or the circumstances in which" Mrs. Bridges' affidavit of April 10, 1992 came to contain statements which were false and misleading and came to have exhibited thereto the Mulligan memorandum of April 9, 1992.

That affidavit can be said to touch two distinct matters - the exercise of the Courts punitive jurisdiction over its officers and the allegation that there was a fraudulent conspiracy involving Claudio and members of the firm of Curtis Mallet in particular Mr. Mulligan and Mr. Moscato, to deprive Patricio of his rightful share in H of H. The second matter remains available even if it is concluded that the order for the cross-examination of Ms. Bridges is not sustainable. Production can be ordered on the basis of the relevance of the affidavit to the issue of fraud under O.24 r.12.

It is common ground that the petition does raise an issue of fraud. It is also predictable that some of the documents, production of which would be required under the order, may be material which would otherwise be privileged on the ground that it consisted of communications between client and attorney in the course of the preparation of the case.

Both parties also agree that a mere allegation of fraud would not be enough to justify a breach of legal professional privilege. A useful test has been formulated by Lord Wrenbury in O'Rourke v. Derbyshire [1920] A.C. 581 at p.633 -

> "If I may venture to express this in my own words I shall say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that prima facie a state of things exists which if not displaced at the trial, will support a charge of fraud. This may be done in various ways - admissions on the pleadings

> of facts which go to show fraud - affidavits in some interlocutory proceedings which go to show fraud - possibly even without admission or affidavit allegations of facts which,if not disputed or met by others fact, would lead a reasonable person to see, at any rate, a strong probability that there was fraud."

In Derby v. Meldon (No.7) [1990] 1 WLR 1156, Vinelott J discussed the authorities. He pointed out that there were many cases in which the Court in interlocutory proceedings had to strike a balance between the need to do justice to the plaintiff, on the one hand, and on the other, the extent to which interlocutory relief may result in an unjustified interference with the defendants property and his right to property. He concluded at p.1174 -

> "There is a continuous spectrum and it is impossible, as it were, to calibrate or express in any simple formula the strength of the case the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances ..."

The main plank relied on by the Petitioners to support the allegation of fraud is the Restructuring of the H of H Group of Companies carried out by Curtis Mallet on behalf of Claudio between August 1991 and March 1992. Additional support is said to have been given by the concealment of the Restructuring - a course which resulted a misleading affidavit being filed by Ms. Bridges on April 10, 1992. The concealment also resulted in a misleading affidavit being

filed by Mr. Ritch of Ritch & Conolly on September 5, 1991. This affidavit was used in Cause No.362 of 1991 to obtain a Mareva injunction against H of H, Patricio and his sons. If, however, the Restructuring itself could not be described as fraudulent, then the fact of its concealment would not make it so.

The details of the Restructuring are complicated. They were devised principally by Mr. Mulligan. In brief various trusts were set up which made it possible to separate voting rights in the shares in the manufacturing companies from beneficial ownership of the shares in those companies. The effect of the Restructuring was that Patricio and his sons would be unable through their ownership of 50% of the shares in H of H to exercise any control over appointments to the boards of directors of the manufacturing companies and thus be unable to interfere in any way with their day to day management. This was reserved to Claudio in whom was vested control of the trusts in which were vested the voting rights.

There is an issue as to whether this Restructuring affected the value of Claudio's share in H of H. Affidavits have been filed by well qualified and experienced accountants in support of the contention that it did affect the value of these shares and in support of the contention that it did not. The de facto situation prior to the Restructuring was that Claudio controlled the day to day management of the manufacturing companies in the H of H Group and so long

as he and Patricio held equal shares in H of H that position could not be changed.

There had been a history in the recent past of growing mistrust and open dissension between the brothers Claudio and Patricio and their sons, a state of affairs which could adversely affect the management and the performance of the manufacturing companies should it be allowed to spread to them.

In that situation the directors of the manufacturing companies could understandably have adopted the position that the proper exercise of their fiduciary duties as directors required the putting into place of such defensive mechanism as could properly be erected to insulate the companies from the struggle for control between the brothers.

The implementation of the scheme took place in some secrecy. It would be remarkable if it was otherwise. There is no challenge to the assertion that whenever the implementation required the filing of various documents in public records this was done.

On the evidence as deployed at present, it cannot be said that from the mere fact of the Restructuring an inference of fraud resting on solid grounds can be drawn. The Chief Justice at the hearing of the application did not base any of his orders on the ground of fraud. Mr. Alberga filed a cross-notice asserting that the Chief Justice's conclusions could additionally be supported on the ground of fraud. I am of the view that at this stage it cannot be said that,

prima facie, a state of things exists which would support a change of fraud. Unless that can be shown legal professional privilege cannot be lifted.

Another ground on which the Chief Justice held that legal professional privilege could be lifted was that of waiver. In her affidavit of May 28, 1992 Ms. Bridges stated at the end of paragraph 2 -

> "In making this affidavit I am not authorised to, nor do I waive my client's privilege beyond the extent set out herein."

It is argued that this statement is an admission that the client has authorised the waiving of its professional privilege and that the affidavit contains material revealed in consequence of such wavier.

It is appropriate to begin by defining the circumstances in which the production of material for which legal professional privilege can be claimed may be regarded as a waiver of that privilege which can result in the enforced production of other related material.

In Nea Karteria Maritime Co. Ltd. v. Atlantic and Great Lakes Steamship Corpn and others No.2 [1981] Comm. L.R. 138 Mustill J. stated at p.139 -

> "I believe that the principle underlying the rule of practise exemplified by Bucknell v. British Transport Commission is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to

> be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

It must at all times be borne in mind that the privilege is that of the client, not that of the attorney. In so far as she had been authorised waive the privilege it was in the context of swearing an affidavit in purported fulfilment of her duty as an attorney to the court to "put the matter right" as regards a misleading affidavit which she had placed on the record. The client was not, in the language of Mustill J, deploying in court for the purposes of its case material otherwise privileged. As Mustill J noted in the course of discussing the facts of the Nea Karteria case, (supra) one must always bear in mind the issues in relation to which the material has been deployed. All the evidence on the record so far indicates that Claudio, who was, as the absolute owner of Beaumont, the effective respondent in the proceedings, played no part in the circumstances which led to information being withheld from Ms. Bridges. He would have been authorising the possible release of privilege material not for the purpose of his case but to facilitate Ms. Bridges. No principle of fairness could, therefore, arise to require production of additional material so as to ensure that the material revealed did not convey only a partial and potentially misleading picture. In the light of the conclusion which I have reached that the Myers v. Elman principle does not support an application for the cross-examination of Ms. Bridges on her affidavit, there can be no need to require

the production of additional material under the principle defined in the _Nea Karteria_ (supra). In making the order for further production under that principle the Chief Justice was proceeding on the basis that Ms. Bridges should be cross-examined.

For the above reasons I concurred in the decision announced shortly after the conclusion of the hearing that the appeal be allowed that the orders for cross-examination of Ms. Bridges and the production of documents by Beaumont and Ritch & Conolly be set aside and that the appellants (the respondents to the petition for winding up) shall have their costs of this application in this court and in the court below to be taxed if not agreed.