Neutral Citation Number: [2024] EWHC 2999 (Ch)

Case No: BL-2024-001337

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/11/2024

Before :

MR JUSTICE MANN, SITTING IN RETIREMENT

- -

Between :

(1) CAPE INTERMEDIATE HOLDINGS LIMITED **(2) CAPE PLC (a company incorporated under the laws of Jersey)**	**Claimants**
- and -	
PETER D. PROTOPAPAS	**Defendant**

- -
- -

Mark Phillips KC, Derrick Dale KC, William Willson, Angus Groom and **Louise Merrett**
(instructed by **Signature Litigation**) for the **Claimants**
The Defendant was not present and was not represented

Hearing dates: 12th, 13th & 14th November 2024

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APPROVED JUDGMENT (subject to editorial corrections)

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Mr Justice Mann:

Introduction

1. This is an application for declaratory relief as to the status of a receiver, Mr Protopapas, appointed in the courts of South Carolina, USA, over (it is feared) the property and affairs of the first claimant Cape Intermediate Holdings Ltd - "CIHL" – an English company. I say "it is feared" because the proceedings in which the receiver was appointed describe the subject company differently (Cape plc), though it would seem that that is treated in the South Carolina proceedings as a misnomer for CIHL (the first claimant). There is also a claim for injunctions to restrain him from acting as agent of the company. The second claimant is, or was, joined because it has the same name as the subject company identified in South Carolina though it is incorporated in Jersey. I will call it "Cape Jersey".

2. This action was started via a Part 8 claim form issued on 9th September 2024. Permission to serve the defendant out of the jurisdiction was given by Master Brightwell in an order dated 11th September 2024 and he was duly served in accordance with that order. The matter was then put before Trower J on 9th October so that he could consider whether to order the urgent trial of this matter because of the potentially very serious effect of the appointment of the receiver on the business of the Cape group, of which the claimants form part. He duly made an order of that date, giving directions which resulted in this trial date. They included directions for the defendant to file evidence, but he did not do so and has not appeared (or acknowledged service). At this

trial the claimants seeks declaratory relief to the effect that the receiver has no powers to act on behalf of the claimants, and injunctions restraining him from purporting to act in this jurisdiction and worldwide. That is because, as will appear, it is said that the English courts will not recognise the judgment or order appointing him as a matter of jurisdiction because the claimants did not submit to the jurisdiction of the courts in South Carolina, and had no presence there which the English (and Jersey) courts will recognise as founding jurisdiction. English (and Jersey) corporate governance principles are said to leave the directors in charge of the whole of the business of the claimants. Those issues re-raise the matters that are said to have been decided as a matter of fact and law in *Adams v Cape Industries* [1990] 1 Ch 433, in which CIHL was the successful defendant under a former name. There are also questions of abuse of process which are said to arise. The Part 8 Claim form was supported by a large volume of evidence (necessarily so).

3. The judge appointing the receiver in South Carolina, and the judge who has overseen various interlocutory matters since then, is former Chief Justice Toal. I understand that she has retired from her role as Chief Justice, but the documents that I have seen demonstrate that she has retained the title of Chief Justice for judicial purposes and is still addressed in that way in the South Carolina courts, so I will adopt the same titling in this judgment.

4. Mr Mark Phillips KC led a large team of 5 counsel before me, of which Mr Derrick Dale KC also addressed me on various aspects.

The evidence in this application

5. The primary evidence in the case consisted of 2 witness statements of Mr Ran Oren, the sole director of CIHL, and a director of Cape Jersey, who told the story of this matter by reference to a large number of extensive documents and who gave evidence of the Cape group's business and of the risks that the activities of the receiver pose. There was also evidence from Mr Paul Brehony, a partner in Signature Litigation plc, solicitors for the claimants, who provided updating evidence as to the fast-moving picture presented by South Carolina proceedings. I saw no reason to doubt or to challenge anything that they said in their evidence.

6. I also received an expert's report from the Hon William W Wilkins, a retired Federal judge (former Chief Justice of the US Court of Appeals for the Fourth Circuit), who comes from South Carolina and who is qualified to express expert views on the law of that state. As will become apparent, he was almost immediately further embroiled in South Carolina when the receiver subpoenad him for a deposition and made an extensive demand for disclosure against him. The subpoena was subsequently withdrawn. Insofar as it is relevant to my findings, I accept his evidence of the effect of South Carolina law, though its relevance to the issues I have to decide is limited. As I say below, it is not part of my function to sit as some sort of appellate court from the South Carolina judge, and over-rule her decisions, so while the expert's report is occasionally helpful most of it was not particularly helpful in relation to the issues that I have to decide.

7. In addition to that material I also received, from time to time, other documents emanating from the South Carolina legal process which post-dated the formal evidence.

The corporate personalities relevant to this case

8. The Cape group is a group of companies formerly involved in asbestos mining and distribution. That particular activity has now ceased and the business of the group is described as being "the provision of critical industrial services focused on the energy and natural resources sectors". It employs 12,800 employees across 17 countries and in the year ended 31st August 2023 the group had a recorded revenue of £848.4m, and a profit of £62.6m. Cape Jersey now heads the group.

9. CIHL is an old company in the Cape group, incorporated in December 1893 under the name "The Cape Asbestos Company". It has at all times been involved in the mining and manufacture of asbestos until it started to curtail those activities when the associated health risks became more widely known. It started to close UK factories in the 1960s and 1970s. It was originally the Cape company which conducted all the business, but over time parts of its business were devolved to other companies in the group. The principal asbestos mining company in the group was Egnep Pty Ltd. In 1979 that company sold its mining operations in South Africa to a South African Company (Transvaal Consoidated Exploration Ltd), and ceased manufacturing asbestos products in the 1980s.

10. In 1961 CIHL essentially became a holding company. In May 1974 it changed its name to Cape Industries Ltd, and changed it again to Cape Industries plc when it re-registered as a public company. There was a further name change to Cape plc in July 1989, and in June 2011 it changed once more to Cape Intermediate Holdings plc. Finally it adopted its present name ("Limited" instead of "plc") on de-registration as a public company in December 2013. In this judgment I shall refer to CIHL by that acronym whatever its name might have been at any period under discussion.

11. Cape Jersey was formed in 2011. By virtue of a scheme of arrangement in that year it became the holding company of the Cape Group, and has remained so ever since. It was incorporated in Jersey but listed on the London Stock Exchange, with a tax residence in Jersey and Singapore. However, in 2017 its share capital was acquired by Altrad UK Ltd, an English company which is part of the Altrad group. That group is a very substantial group empoying over 60,000 employees worldwide. Its founder and President is Mr Mohed Altrad and its other main entity is Altrad Investment Authority SAS, incorporated in France. The business of the group is to provide industrial services principally for the energy, environment and construction sectors. It has since acquired further companies, including a group known as the Sparrows Group which provides services to off-shore installations. It is necessary to mention the Altrad group and the Sparrows companies because they have become enmeshed in the receiver's activities which lie at the heart of this case.

12. At the historical times material to this matter Cape group products were sold into the US. In October 1953 CIHL established North American Asbestos Corporation

("NAAC") as a directly and wholly owned subsidiary. It was incorporated in Illinois. That company was incorporated to assist in the marketing of asbestos in the US, to act as a liaison between Egnep (the miner referred to above) and another Cape company (Casap) on the one hand and US purchasers of asbestos on the other, and to purchase and re-sell asbestos into the US market on its own account. It is central to the claims in this action that it has been determined by an English court that the contracts for the supply of asbestos by the Cape Group were made by Egnep or Casap (another Cape company) on the Cape side and not NAAC; that NAAC was only an intermediary who would receive and pass on notifications of requirements for asbestos; that Egnep and Casap would make the shipping arrangements; and that NAAC itself would (where possible) purchase and supply and shortfalls which could not be supplied by Egnep.

13. From the early 1970s NAAC was the defendant in numerous product liability claims. It eventually ran out of insurance cover and was liquidated and then dissolved in 1978. It has never been restored. Neither CIHL nor Cape Jersey have in any sense been the successor in interest to NAAC. At this point it will be useful to note that in *Adams v Cape* it was held by the High Court (Scott J), upheld by the Court of Appeal, that the presence of NAAC and its relationship with CIHL did not give rise to the presence of CIHL in the US (with the result that default judgments obtained in the US could not be enforced here). That is one of the points lying at the heart of this application. It would not appear that it has been considered by, or even drawn to the attention of, the South Carolina court in its dealings in this matter.

Background - the Cape Compensation Scheme

14. By 2006 the Cape group was faced with the prospect of a large number of UK claims from individuals who had suffered from the effects of asbestos. Those claims were to some considerable extent latent (ie not apparent at the time) and potentially costly. There was also not sufficient insurance cover to provide for likely claims. There was a real but unquantifiable risk that they would result in insolvencies in the Cape group with claims becoming unsatisfied. In order to deal with this, and to even out the spreads of payments, the group proposed and got court sanction for a creditors' scheme of arrangement under section 425 of the Companies Act 1985. The scheme became operative and is still running. The full details do not matter. The following features of the scheme are significant for present purposes:

(a) It binds, and operates for the benefit of, persons who have a claim against Cape entities in respect of asbestos injuries sustained in the UK.

(b) It is not a cut-off scheme - that is to say it is not a scheme requiring claimants to make a claim before a certain date, after which they will be barred. There is no cut-off date for claimants under the scheme (other than limitation, where applicable).

(c) The scheme does limit claims or how or when claims can be made. They can be made and established in the usual way. What it does is limit recovery of any established claims.

(d) Recovery is not by the usual enforcement routes. Recovery has to be out of a given fund ring-fenced within a new subsidiary called Cape Claims Services Ltd (CCS).

(e) CCS was initially funded from various sources, but from 2008 there were, and continue to be, periodic reviews of the likely liabilities of the scheme and CIHL is obliged to top up the fund as a result of those reviews, subject to a limit set by reference to its cash resources which enables it, if necessary, to spread its top-up obligations.

(f) If the fund fell below a certain level then CCS would have the right to reduce payments until such time as the funds recovered.

(g) The purpose of the scheme was therefore not to reduce the liabilities to claimants, but to try to ensure that satisfaction of the liabilities was, if necessary, spread out over time so as to avoid insolvencies in the Cape group caused by large claims

having to be settled in a narrow timeframe.

(h) It was no part of the scheme to bar any creditor from claiming. Creditors within the scheme could establish their claims and recover out of the scheme funds. Creditors outside the scheme were entitled to seek to a remedy against the appropriate Cape company and then seek recovery from that company. The latter class would include US claimants claiming in respect of injuries if they thought they had a claim here. They could seek to establish their claims and, if successful, enforce in the normal way.

(i) In order to safeguard the scheme a special share was created and issued in both CCS and CIHL, with special voting rights designed to protect the scheme fund and make sure it was properly administered. Those shares were issued to Law Debenture Trust Corporation plc, who undertook that safeguarding duty.

15. The scheme was set up after a 4 day convening hearing at which Richards J heard various arguments about the operation of the scheme and its effect before deciding it was right to order meetings of creditors. It was approved by majorities which were never less than 93% in number of creditors and in value. It was overwhelmingly passed at the meetings and sanctioned by the court on 9th June 2006.

16. Since then the scheme has operated in accordance with the intended manner. CIHL has made provision of over £100m in its accounts for asbestos disease-related claims over 30 years. So far £60m of pay-outs have been made, and top-ups of about £45m have been made.

17. This description is provided because of certain misdescriptions in the receiver's court documents in South Carolina, and because of rather extraordinary joinder of Law

Debenture Trust Corporation plc to a new claim in South Carolina. I will come to these points in due course.

Adams v Cape and its relationship to this case, and the law on the recognition of foreign judgments

18. In *Adams v Cape*, CIHL under its then name of Cape Industries Ltd, was one of two defendants in an attempt by Mr Adams to enforce here a default judgment, obtained in the Federal Courts of Texas based on injuries said to have been caused by asbestos. That attempt failed because it fell foul of the principle of English private international law that the foreign court's judgment would only be recognised and enforced if the defendant is recognised, under English private international law principles, as having properly been the subject of the foreign court's jurisdiction. The principle has been summarised in *Dicey & Morris* on the Conflcits of Laws [&] edition at Rule 47:

> "RULE 47 - Subject to Rules 48 and 49, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> First Case - if the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. For a natural person this requires physical presence in the territory, and for a legal person it requires a fixed place of business in the territory.
>
> Second Case - If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

> Third Case - If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings."

19. The Second and Third cases are not relevant here. The First Case is. *Adams v Cape* considered how and to what extent CIHL was present (with the other company) in the United States in the light of that rule. Scott J considered the extensive evidence over the course of a trial which lasted for 35 days, and the matter was reconsidered by the Court of Appeal in an appeal which lasted for 18 days. Both courts came to the conclusion that CIHL was not relevantly present in the United States at the relevant time, and that CIHL did not submit to the jurisdiction, and the action was dismissed.

20. For present purposes the significance of that case is one which goes beyond its being authority for, and an instance of the application of, the principle of English private international law just stated. It is said to have an additional significance because the facts in that case, and the facts surrounding the appointment of the receiver in this case, are precisely the same and demonstrate flaws in the appointment of the receiver and what he has been doing. That is said to demonstrate that the receivership order should not recognised because CIHL was no more present in the jurisdiction at the date of the receivership order as it was at the dates relevant to *Adams v Cape*. It is also the foundation of an estoppel or abuse of process argument advanced by Mr Phillips to which I will come. The defendant, as receiver, has been launching claims in the US purportedly on behalf of CIHL which involve claims and assertions that are directly contrary to the factual case successfully advanced by CIHL in *Adams v Cape*. It is therefore necessary to consider the facts of that case and to have them in mind when

considering the acts of the receiver in South Carolina, and of those who would seem to have been prompted to make claims by what he has been doing.

21. The legal reasoning in *Adams v Cape* involves the consideration and application of how a corporate body is or is not present in the foreign territory. The issue in that case was whether a default judgment against CIHL in that case was enforceable in this jurisdiction. (I can ignore the other defendant, Capasco Ltd, for these purposes.) Scott J accepted that "a foreign court was entitled to take jurisdiction on a territorial basis" (p457G). He went on to cite The Earl of Selbourne LC in *Sirdar Gyrdyal Singh v Rajah of Faridkote* [1894] AC 679 at 683:

> "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist *458 as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g. under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates."

And he went on to observe:

> "It is the territorial basis of jurisdiction that the plaintiffs invoke in asserting that Cape, through N.A.A.C. or C.P.C., was present in Illinois." (p457)

22. Scott J also acknowledged the possibility of consent to jurisdiction as well.

23. In the Court of Appeal the position was summarised as follows:

> "Two points at least are clear. First, at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of a principle explained thus by Parke B. in *Williams v. Jones (1845) 13 M. & W. 628* , 633:
>
> > "where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced . . . "
>
> Blackburn J. stated and followed the same principle in delivering the judgment of himself and Mellor J. in *Godard v. Gray (1870) L.R. 6 Q.B. 139* , 147, and the judgment of the Court of Queen's Bench in *Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155* , 159. In the latter case he said, at p. 159:
>
> > "It is unnecessary to repeat again what we have already said in *Godard v. Gray* . We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B. in *Russell v. Smith (1842) 9 M. & W. 810* , 819, and again repeated by him in *Williams v. Jones, 13 M. & W. 629* , 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."
>
> Secondly, however, in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. As Lindley M.R. put it in *Pemberton v. Hughes [1899] 1 Ch. 781* , 791:
>
> > "There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained - i.e., over the subject matter or over the persons brought before them . . . But the jurisdiction which alone is important in these matters is the competence of the court in an international sense - i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country."

> Subsequent references in this section of this judgment to the competence of a foreign court are intended as references to its competence under our principles of private international law, which will by no means necessarily coincide with the rules applied by the foreign court itself as governing its own jurisdiction. As the decision in *Pemberton v. Hughes [1899] 1 Ch. 781* shows, our courts are generally not concerned with those rules." (pp513-514)

24. One of the issues in the case was whether CIHL was present in the US by an authorised representative (NAAC and CPC). As to that the Court of Appeal laid down the following principles and guidance at pp 530-531:

> "In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the "presence" of an overseas corporation.
>
> (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.
>
> (2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.
>
> (3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation

> makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.
>
> This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the judge, ante, p. 476B-C, was intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve "a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted:" *La Bourgogne [1899] P. 1* , 18, per Collins L.J."

25. The case of the claimant in *Adams* was that jurisdiction was established via one of three routes:

> "These three main submissions were substantially as follows: (1) Cape and Capasco were present and carrying on business in the United States *532 of America, namely, marketing and selling the Cape group's asbestos, through N.A.A.C. until May 1978, and through C.P.C. (or Associated Mineral Corporation ("A.M.C."), a Liechtenstein corporation) until June 1979 from a place of business in Illinois because N.A.A.C. and C.P.C. were the agents of Cape. (We will call this "the agency argument"). (2) Cape/Capasco and N.A.A.C. constituted a single commercial unit and for jurisdictional purposes, N.A.A.C.'s presence in Illinois therefore sufficed to constitute the presence of Cape/Capasco. Likewise, Cape/Capasco and C.P.C., which performed the same functions as those previously carried on by N.A.A.C., constituted a single economic unit, and C.P.C.'s presence in Illinois sufficed to

> constitute the presence of Cape/Capasco. (We will call this "the single economic unit argument"). (3) In relation to C.P.C./A.M.C., the corporate veil should be lifted so that C.P.C.'s and A.M.C.'s presence in the United States of America should be treated as the presence of Cape/Capasco. (We will call this argument, which does not extend to N.A.A.C., "the corporate veil" argument.)" (p532)

26. The three entities identified by their initials were entities relied on as establishing jurisdiction. I will elaborate later on in this judgment. For present purposes it should be noted that the three arguments advanced by the claimant (a) are all advanced, in various forms, by the receiver in the South Carolina proceedings (and by others who have commenced proceedings, presumably on the basis of the receiver's stance), and (b) were all comprehensively rejected by Scott J and the Court of Appeal on the facts and as a matter of law. While Mr Protopapas must have known this for some time, if not from the outset of his receivership, it is not apparent from the material available to the CIHL and Cape Jersey that this vital material has ever been drawn to the attention of Chief Justice Toal.

27. This decision is said to have a number of effects. At least one of them involves considering the extent to which the basis of the claims made in the South Carolina proceedings corresponds to the rejected case of Mr Adams in the *Adams* case, which requires a consideration of the facts of *Adams* in more depth. I shall postpone that to a separate section of this judgment. The significance of this section of this judgment is to establish clearly the basis on which English law, as a matter of private international law, will and will not recognise foreign judgments against corporations, and to foreshadow what is to come later.

28. Mr Dale, when he addressed me on this area of the law, was keen to point out that on the authorities it would seem that this court will consider an order of the foreign court made against someone who has not submitted to the jurisdiction to be a "nullity". He relied on the *Sirdar Gurdyal Singh* case, cited in *Adams* at p 516:

> "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity."

29. I am not sure that the concept of "absolute nullity" in "international law" adds much to a consideration of this case other than a perhaps unnecessary air of contention, but the force of the point is that the courts of this country will not give effect to such a judgment. The reasoning involves a determination that the foreign court is not a "court of competent jurisdiction" so far as the particular defendant is concerned because of the lack of personal or subject matter jurisdiction.

The facts relating to NAAC, CPC and AMC

30. The status of these three entities is central to the issues in this matter, and it is necessary to appreciate the findings of Scott J and the Court of Appeal about them. It was via these companies that the plaintiff in *Adams* sought to establish presence (and his other claims to found jurisdiction), and it was the rejection of this analysis on the basis of found facts that the claim and the appeal were lost. As will appear, the receiver is seeking to revisit, and indeed set at naught, many of these findings and the ultimate

jurisdiction decision, so it is necessary to elaborate more on them so that it can be seen to what extent the receiver's claims (and the new claims of others) correspond to actual findings and rejected findings.

31. The detail of the factual findings of Scott J appear from the detail of his judgment. In the Court of Appeal the significant findings about these entities and their relationship with CIHL as relied on by that court do not appear in the actual report of the case. The report at p 512 records that the Court of Appeal listed the relevant facts, but does not set them out. The diligence of the lawyers in the application before me has unearthed a transcript of what the court listed. It is extensive, but it is important by way of a cross-reference to allegations now made in South Carolina (to which it is largely contrary). Accordingly, and since it is not generally available (an in particular it would not otherwise be available to the receiver or the South Carolina court) I attach it as Appendix 1 to this judgment.

32. The key elements of those findings can be summarised as follows:

(i) Although NAAC was a subsidiary of the Cape group, it had its own business and traded on its own account, both as an intermediary for sales by Egnep and another subsidiary, and when making its own sales of asbestos. NAAC had no authority to enter into contracts on behalf of CIHL or any other company in the group. The judgment itself says it is "clear beyond argument" that NAAC was carrying on business of its own (p546).

(ii) When NAAC was liquidated and Continental Productions Corporation ("CPC") took over from NAAC, it was an independent company with an owner who fell to be treated as independent.

(iii) Such control as CIHL had over NAAC was "no more and no less than was to be expected in a group of companies such as the Cape Group" (Para 19). There was no evidence of control over commercial activities.

(iv) Mr Morgan (vice-president and then president of NAAC, and then principal behind CPC) was in charge of the operations of those company. NAAC had its own offices for which it paid the rent, and employed 4 people. Those offices were its offices, not CIHL's.

(v) Contracts for the supply of asbestos were made between Egnep or Casap on the one hand and the purchasing customer on the other.

(vi) NAAC had a separate identity and was not the 'alter ego of Cape" (para 22).

(vii) CPC leased its own offices which were in the same building as NAAC's offices but they were different offices and on a different floor.

(viii) CPC was an independently owned company carrying on its own business (para 35).

(ix) Importantly, the corporate form of the Cape group was not "form only". See para 36.

33. None of these facts (ie the facts in the whole summary) was successfully challenged in the Court of Appeal despite an attempted challenge (see p512 of the judgment), and the court based its conclusions on them.

34. Based on the facts that had been found the Court of Appeal rejected the "single economic argument", the second of the three submissions which were identified in the passage cited above. It was submitted as follows:

> "In support of the single commercial unit argument, Mr. Morison made a number of factual submissions to the following effect: the purpose of N.A.A.C.'s creation was that it might act as a medium through which goods of the Cape group might be sold. The purpose of the liquidation of N.A.A.C. was likewise to protect Cape. Any major policy decisions concerning N.A.A.C. were taken by Cape. Cape's control over N.A.A.C.

> did not depend on corporate form. It exercised the same degree of control both before and after the removal of the Cape directors from the N.A.A.C. board. The functions of N.A.A.C.'s directors were formal only. Dr. Gaze effectively controlled its activities. Cape represented N.A.A.C. to its customers as its office in the United States of America. In broad terms, it was submitted, Cape ran a single integrated mining division with little regard to corporate formalities as between members of the group in the way in which it carried on its business."

35. These arguments were all rejected at p 538 (to which reference should be made for detail), with the Court of Appeal holding that while certain policy limits were controlled by the group, the day to day running of NAAC was left to Mr Morgan, that the financial control that was exercised was no more than a parent company would exercise over the subsidiary and that there was no discretion in the court to ignore the distinction between the members of a group as a technical point. The same applied to CPC.

36. So far as the lifting of the corporate veil is concerned, the Court of Appeal considered whether:

> "the arrangements regarding NAAC, AMC and CPC made by Cape with the intentions which we have inferred constituted a facade such as to justify lifting the corporate veil so that CPC's and AMC's presence in the United States of America should be treated as the presence of Cape/Capasco for this reason if no other." (p542A-B).

The intentions referred to were:

> "to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for United States taxation or subject to the jurisdiction of the United States courts, whether state or federal, and the risk of any default judgment by such a court being held to be enforceable in this country." (p541F-H)

37. The court's conclusion was that the facts did not justify the inference of a facade and the piercing of the corporate veil (p544). This was despite the intentions which they had identified as to the purpose of the change from NAAC to CPC, which they held as a matter of law still did not entitle the court to lift the corporate veil. In particular it concluded:

> "As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr. Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of A.M.C. to which special considerations apply) to expect that the court would apply the principle of *Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22* in the ordinary way." (p544D-G)

38. Then the court turned to the agency argument, on the footing that NAAC must for all relevant purposes be regarded as a legal entity separate from CIHL (p545). It concluded that NAAC was carrying on business on its own account (p546D) and that CIHL (Cape) was not present in the US through NAAC at any material time (p547E). The same was true of CPC (p549(C).

39. There is one further important set of determinations arising out of those judgments, significant to the present case, which does not appear from the reports of the case available to the public. The Adams notice of appeal listed 25 findings of fact (some of

them multiple) which it was said Scott J should have made but did not make, and which were said to go to the main questions in the case. The Court of Appeal dealt with that part of the appellant's case in a separate Appendix to its judgment, again not published in the report. The Appendix runs to 40 pages and I will not reproduce it here. It can be appropriately summarised by saying it is a thorough consideration of each of the "facts" in question, and it either accepts them as being true but not affecting the decisions on the main points, or rejects them as being inconsistent with actual findings of Scott J of as being unsustainable on the evidence. Overall it shows the comprehensiveness of the case advanced by Mr Adams, the comprehensiveness of its consideration and the clarity and firmness of the rejection of that case. When put together with the first instance and appeal judgments, it effectively covers the same ground as the claims as to the effect of relationships and trade, made in South Carolina and firmly rejects them on the facts and the attempt to tie the claims to the US in terms of jurisdiction.

40. In the light of those clear findings of the English courts, and (just as importantly) the route to those findings, reached after very extensive hearings, it is now necessary to consider how they map on to the proceedings in South Carolina, for which purpose it is obviously necessary to consider those proceedings.

The South Carolina proceedings

41. In this and the following sections of this judgment I set out a narrative of the significant litigation steps that have been taken in South Carolina in this matter. I do not set out

every step, and I do not cover all the enormous amount of detail that arises out of that history. I confine myself to what I regard to be essential matters. Unfortunately even thus confined, the narrative is still long and fairly detailed.

The Park proceedings

42. The story starts with the issuing of a claim on 4th June 2021 by an Isabella Park ("the Park proceedings") against a large number of companies including "Cape plc" described as being sued "individually and as successor in interest to Cape Asbestos Company". She claimed to have asbestos-related injuries derived from her husband who worked with asbestos, for which the defendants are said to be liable in various ways, but the manner in which "Cape plc" is said to be liable is not stated. This document was not served on CIHL. On 17th November 2021 the claim was amended by adding (inter alia) CIHL as a party. By now the claim was being pursued by Mrs Park's son as her personal representative. It was claimed that this claim (summons) was served on CIHL. That is disputed by CIHL, but in any event CIHL did not respond to it and therefore did not submit to the jurisdiction in relation to this claim. It was further amended on 23rd December 2021 in a manner which did not involve any Cape entities. That amended version was not served in CIHL.

43. By an order of Chief Justice Toal dated 1st December 2021 this claim was listed for trial on 20th June 2022, but on 3rd June 2022 counsel sent to the court an email stating: "By way of update, the Park and Garren cases have both fully resolved." It is not apparent that CIHL knew what the resolution was, but whatever it was it did not involve CIHL. Accordingly, there was no trial and no judgment of the South Carolina court. The receiver has subsequently said that the email applied only to participating

defendants, but nothing more is known to CIHL than that. It is not known how the proceedings can be said to remain extant. No further steps were taken in relation to these proceedings, at least until the receivership application which is at the heart of this matter.

The receivership application and proceedings

44. On 6th March 2023 the plaintiff in the Park proceedings issued a receivership motion in the Park claim. Its opening words outline the basis of the application and set the tone for what happens thereafter, and I quote them in full:

> "Cape PLC is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.1) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company"), which were and are private companies organized and existing under the laws of the United Kingdom, with its principal place of business in England. At all times relevant, Cape was involved in all elements of the global asbestos industry, but in particular mining many thousands of tons of raw asbestos fiber in South Africa and then selling it to the most dominant manufacturers of asbestos-containing products in the United States—substantial quantities of which were used in South Carolina. Cape also concocted a scheme to avoid its legal responsibilities to persons injured from using those end products because, startingly, Cape deemed itself as having—in its own words—no "moral responsibility" to those end users. Rather than defending its conduct in front of juries in the United States, Cape decided to simply accept default judgments in asbestos lawsuits and ultimately flee the country, knowing that nearly all the Company's assets were in jurisdictions (namely, the U.K., South Africa, and Lichtenstein) where judgments in those lawsuits could not be enforced. Although Cape stiff-armed its creditors in the United States—namely, workers exposed to asbestos mined by Cape—and absconded to London and South Africa, certain of its insurance assets presumably remain. The appointment of a receiver to marshal Cape's assets and satisfy claims is therefore the appropriate remedy, as explained below."

45. The next heading in the motion is: "Cape Establishes American Presence and Operations through NAAC". It describes NAAC's functions and describes it as "essentially a one-man operation" which sold Cape products "in coordination with the global Cape network". It goes on to say that "Cape Asbestos went through tortured machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a mere division or instrumentality under Cape's domination and control." CPC's creation and appointment as "commission agent" was intended to eliminate or reduce exposure to US litigation." It ends by saying:

> "For the foregoing reasons, the appointment of a receiver for Cape for all purposes, including, but not limited to, marshaling available assets of Cape and its subsidiaries, successors, and assigns, is appropriate."

And then seeks the appointment of Mr Protopapas as receiver.

46. The jurisdiction invoked, according to the Motion, was that given by the South Carolina Code para 15-65-10(4) and (5), which state respectively:

> "A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> … (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations ….

> A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> … (5) In such other cases as are provided by law or may be in accordance with the existing practice …."

47. The following should be noted at this stage:

(i) The fundamental factual basis for appointing the receiver was the fact that "Cape" was operating through NAAC and CPC in the US, without any reference to the detailed findings of the English courts.

(ii) What was sought was an order marshalling the assets of "Cape and its subsidiaries, successors and assigns" (my emphasis). It was not sought merely in relation to Cape's assets.

(iii) The Cape defendant was described thus: "Cape PLC is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.1) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company"), which were and are private companies organized and existing under the laws of the United Kingdom, with its principal place of business in England." At the time "Cape plc" was Cape Jersey. This document did not describe CIHL. Cape Jersey was not served with this motion. A footnote in the Motion states that it was sent by DHL to an address in England, which was not the registered address of Cape Jersey.

48. The receivership order which was sought was made on 16th March 2023. It was made without a hearing and there is no judgment giving reasons for its being made, though the order itself records briefly the basis on which it was made and the two statutory provisions said to be applicable (the two provisions just identified). It is an order which gives extremely wide powers, which cannot fairly be summarised, and since its width is important the full terms of the order minus one short irrelevant part appear in Appendix 2 to this judgment.

49. Mr Phillips challenged the basis on which the order was made on the basis that Cape Jersey (which at this stage is the presumed target) had not forfeited its charter, had not been dissolved and had not failed to answer the Park case (it was "fully resolved" - see above). However, I do not sit as some sort of appellate court in relation to that order, and whatever its merits or demerits it stands as an order of the Court of South Carolina.

50. It is, however, right and pertinent to observe the following:

(a) It would seem to have no territorial limits, or at least no express territorial limits.

(b) The receiver has been appointed "in this case". Mr Oren questioned whether that gives authority to commence third party proceedings in another case (which is what has happened).

(c) The appointment was made "to protect the interests of Cape whatever they may be" (see the first paragraph of the order appointing him). Mr Phillips makes the point that it would seem the receiver has done exactly the opposite.

The Tibbs claim

51. The next relevant event was the commencement of proceedings by a Mr and Mrs Tibbs ("the Tibbs claim"). This was launched on 5th April 2023 and, like the Parks claim, was made against a large number of companies as an asbestosis claim including "Cape plc". CIHL was not and never has been named as a defendant. The claim alleged that each defendant had transacted business in South Carolina and was liable for damages flowing from its own tortious conduct and of the conduct of an "alternate entity". In the case of "Cape plc" that was said to be "Cape Asbestos Company Ltd, that is to say CIHL "and its subsidiaries and global affiliates". Cape plc is again described as a company incorporated in the United Kingdom, and it is said to have imported and

supplied asbestos products. The claim is said to arise out of that company's business activities in the state of South Carolina.

52. This claim was not served on Cape Jersey in Jersey or on CIHL in England. According to what was said in court in later proceedings, it has been dismissed by consent, the consents being those of the Tibbs and of Mr Protopapas as receiver of "Cape plc". This seems to have been confirmed by an email dated 8th April 2024 from counsel for the Tibbs sent to the court in which it is said that the remaining defendants are a single specified company (not a Cape company). The dismissal agreement was apparently dated 12th June 2023 but it has not been seen by CIHL. It has been said to contain an agreement to "toll" the statute of limitations, by which CIHL understands it has been agreed that limitation would not be raised in any future claim.

53. After that agreement, whatever it was, was reached, a Defence was put in in those proceedings dated 29th June 2023. It expresses itself as having been put in by "Defendant Cape plc as the successor in interest to Cape Industries Ltd (f/k/a Cape Asbestos Company Ltd) ("Cape"), by and through its Receiver Peter D Protopapas and contains a "general denial" in the following terms:

> "1. To the extent that it is not inconsistent with the allegations of the Third Party Complaint, Cape hereby denies each and every allegation contained in the Amended Complaint."

At that date (29th June) the relevant Third Party proceedings had not been launched - the relevant documents bear the next day (30th June) as their date. As will appear, the

Defence would not seem to be much of a defence at all because the Third Party proceedings propound liability- they do not deny it. It is necessary to understand the Third Party proceedings to understand that.

The Third Party proceedings

54. Despite the apparent determination of the Tibbs/Cape claim, on 30th June 2023 the receiver initiated Third Party proceedings on behalf of "Cape plc", within the Tibbs claim, against a number of companies, including a number of Cape group companies , and Anglo American plc and a number of De Beers companies. The Cape related companies included Altrad companies (the group that had acquired the Cape group in 2017), and the Sparrows entities that were brought within the group much more recently (despite its being hard to see how they can be held responsible for acts done before they were brought into the group). Mr Mohed Altrad, founder of the Altrad group, is also sued personally. In addition, and a little remarkably, Law Debenture Corporation plc is also a defendant. It will be remembered that its only connection to the Cape group or asbestos is that it holds shares in the Cape scheme company under the scheme of arrangement (CCS), and in CIHL, so that it can properly police the funding of the Cape scheme of arrangement - see above. The joinder of that company, if nothing else, demonstrates a somewhat wild approach to the selection of defendants.

55. The Cape and Altrad defendants (including the Sparrows group) are apparently sued on this basis:

> "Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape asbestos products. For example, Cape went through tortured

> machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination. And these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of not only Cape, but Cape's parent (Charter) and its other South African affiliates. See CAPE000141 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets)." (paragraph 119)

56. The relief claimed against all the third party defendants is summarised at the end of the summons as follows:

> "A. For the Court to exercise its equitable power and authority against the Third-Party Defendants as requested herein;
>
> B. For a full accounting of each of the Third-Party Defendants' records and other information related to the allegations herein, including the extent to which each of the Third-Party Defendants has financially benefited from the liability-avoidance scheme; and
>
> C. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law."

57. According to earlier paragraphs, the apparent purpose is to get all the defendants to disgorge an unspecified, but obviously huge, sum of money via constructive trust, unjust enrichment and corporate veil-piercing remedies. The tone is set by the opening paragraph:

> "This lawsuit seeks to finally hold accountable three groups of Third-Party Defendants (including their predecessors in interest) who are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina, and which caused or materially contributed to thousands of deaths from mesothelioma or other asbestos-related disease, and billions of dollars of past, present, and calculable future damages. For decades, certain of these Third-Party Defendants created sham transactions to feign exits of the asbestos industry in the United States, leaving shells and an absence of insurance coverage to account for their massive liability exposure.

> And also for decades, they hid behind (or within) byzantine collectives of limited liability and other holding companies internationally, avoiding responsibility while continuing to reap the profits from the sales of asbestos and asbestos-containing products throughout the United States, including in South Carolina. In sum, these three groups of Third-Party Defendants have wreaked havoc in the United States, padded their already massive coffers with blood money on top of blood money, and amused themselves with the supposed ingenuity of their scheme to avoid any responsibility. This lawsuit begins their reckoning."

58. The early parts of the summons plead some history of the the Cape group's asbestos trade from early times to modern times, seeking to demonstrate the involvement of such companies as Anglo-American the de Beers companies. I do not need to develop that. Relevantly for present purposes, at section H of that summons there is a heading entitled "Cape created NAAC to Facilitate Its Asbestos Scheme". At paragraph 72 it embarks on a description of "NAAC's Role at Cape" in terms which do not coincide with the findings in *Adams v Cape*. At paragraph 77 the management of NAAC is dealt with in simplistic, and therefore not wholly accurate, terms (especially when compared with the findings in *Adams v Cape)* and at paragraph 79 it is said that "NAAC's operations and decision-making were wholly dominated by Cape and its owners", which is seriously at odds with the English findings on all the evidence heard. It will be remembered that the finding was that the control exercised was consistent with the sort of control that a holding company would exercise over a subsidiary, and no more.

59. Section IV is headed: "Cape Implemented a Strategy to Evade Liability in the United States". It is pleaded at paragraph 89:

> "Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape asbestos products.28 For example, Cape went through tortured

> machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination.29 And these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of not only Cape, but Cape's parent (Charter) and its other South African affiliates. See CAPE000141 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets)."

60. This is quite contrary to the findings of the English court, which recognised that the overall strategy was to reduce the connection with the United States, but that that was successfully achieved in law and on the facts by the way that NAAC (and later CPC, which is described in the Third Party Complaint as a "ruse") operated. Space and time do not permit the citation of the whole of the way the case is put against "Cape", and for present purpose I can adopt as accurate the summary of the allegations appearing in Mr Oren's first witness statement:

(1) Cape's historic operations involved a complex scheme to sell millions and millions of dollars of asbestos – knowing with certainty that it would kill and maim tens of thousands of Americans – while, at the same time, developing and executing a ploy to escape any legal or financial responsibility to the people harmed by intentionally depleting its US-based subsidiary of attachable assets (paragraph 41).

(2) Cape and its affiliated domestic and foreign entities got extraordinarily wealthy off the suffering and deaths of tens of thousands, and then cheated the system to escape responsibility for its and their tortious misconduct (paragraph 41).

(3) Cape established NAAC in 1953 and designed NAAC to operate as Cape's wholly controlled instrument for the purpose of expediting and facilitating the movement of asbestos from South African mines into the US (paragraphs 70, 72).

(4) At the direction of the amalgamated Cape/Oppenheimer network, Cape and

NAAC implemented a conscious pattern of product distribution of asbestos nationally resulting in NAAC selling asbestos to customers in the US (paragraph 75).

(5) NAAC's operations and decision-making were dominated by Cape and its owners, with NAAC not permitted to borrow money without Cape's approval and being forced to pay dividends to Cape, thereby depleting the assets reachable by NAAC's creditors in the US (paragraph 79).

(6) Cape's products caused individuals (including residents of South Carolina) to be exposed to asbestos and suffer bodily injury, which has resulted in myriad suits against Cape ("Asbestos Suits") including the Tibbs Claim (paragraph 74).

(7) Because of Cape's domination of NAAC, and as part of the liability-avoidance scheme, Cape directed NAAC to buy wholly inadequate insurance coverage to address its massive future products-liability exposure (paragraph 80).

(8) Cape led efforts in the US and internationally to hide the risks of asbestos (paragraphs 81-88).

(9) Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape's asbestos products (paragraphs 89-93)

(10) Cape liquidated NAAC, siphoning any remaining assets out of the US to Cape Industries Overseas Ltd in an effort to reduce the assets available to creditors but at the same time Cape contemplated ways to continue the flow of asbestos to US customers and asbestos profits out of the US (paragraphs 94-98).

(11) Although Cape had entered into certain agreements to address bodily harm caused, including the 2006 Scheme of Arrangement with former employees in the UK, Cape had done nothing about its massive unpaid responsibility for the death and illness caused by its asbestos products in South Carolina and elsewhere in the US (paragraph 114).

61. The following significant matters emerge from that analysis:

(a) Part of the purpose of the Third Party Complaint is to demonstrate that "Cape", which it now appears is intended to mean CIHL, retained a real presence in the United States

(b) That is sought to be achieved by demonstrating that NAAC and CPC were disguised Cape entities which were in reality closely controlled by "Cape".

(c) The case advanced is directly contrary to the case on which CIHL succeeded in Cape v Adams.

(d) As will appear, Mr Protopapas now accepts, and probably avers, that references to "Cape plc" are mistaken and that the intended company, in terms of the receivership order and Third Party Complaint (and later documents) was intended to be a reference to CIHL. Mr Phillips was apparently not minded to challenge that - certainly his application to me was not heavily based on that. That being the case, the effect of the Third Party Complaint is to advance a case <u>on behalf of CIHL</u> which is directly contrary to the case on which it fought and succeeded in *Cape v Adams* and which is directly contrary to CIHL's interests, because it unpicks and undoes all the matters that were established in its favour in *Cape v Adams.* The duly constituted board of Cape does not wish that to happen.

62. It is necessary to consider the interaction between those proceedings and the Defence in the Tibbs claim, referred to above. When the matters relied on in the Third Party Complaint are read against the Defence, it can be seen that the Defence is no real defence at all, because it would seem to admit all relevant matters as against CIHL (assuming that to be the relevant defendant in the Tibbs claim). It basically sells the pass on issues of liability, responsibility and presence, quite contrary to the findings in the English proceedings. As counsel for CIHL submitted, it is hard to see how a receiver charged with protecting the interests of CIHL could put in such a defence, and

that point is something prayed in aid by CIHL in making submissions as to whether this court should intervene by granting the declaratory and injunctive relief sought.

Steps taken by the Third Party defendants and matters arising

63. The Altrad (including Sparrows) defendants then launched a number of motions against those proceedings, all of which failed. They included challenges to the jurisdiction on the basis of lack of subject matter and personal jurisdiction and challenges to the appointment of the receiver. In an Opposition Memorandum the receiver vigorously resisted all challenges to his appointment and acts. At Part III Section A he said:

> "Altrad misreads the Appointment Order in asserting that pursuant to its "plain language," as well as South Carolina law, the Receivership's authority is limited to seeking derivative relief and liability connected to the Park Lawsuit—and not the Tibbs Lawsuit—and that the Receivership improperly goes beyond the territorial jurisdiction of South Carolina."

In what follows he asserts his general rights to more or less anything, and although in an early paragraph he cites the part of the order which justify his "su[ing] and defend[ing] in his own name as receiver of the corporation in all courts of this State", at the end of the Section he avers:

> "There is no jurisdictional limit on that [ie his general] authority."

It would seem from that, and his robust attitude generally, that he probably takes the view that his acts are not confined to acts and assets within the state of South Carolina. That is of great and understandable concern to CIHL.

64. In the next section the document turns to deal with comity arguments, and in that context the receiver rebuts the idea that the receivership interferes with the jurisdiction of the Jersey courts over its own entities. He there says: "No filing has ever referenced the Jersey-formed Cape holding company, until Altrad first raised that red herring as an argument to dissolve the Receivership." That is one of the bases for the belief that references to "Cape plc" in the earlier documents was not intended as a reference to Cape Jersey. Later in the same document the receiver avers that the appointment of the receiver was over "the correct Cape entity: Cape plc n/k/a Cape Intermediate Holdings Ltd, f/k/a Cape Asbestos Company Ltd at its founding in 1893", and treats the references to Cape plc in the appointment as being a misnomer which is immaterial. It is more a matter for the South Carolina courts to decide whether it was a misnomer which can effectively be ignored, but if it was then it is one which has been perpetuated because later documents still use the name "Cape plc" when (presumably) CIHL should be referenced and even though the receiver apparently now knows that.

65. On 6th December 2023 Chief Justice Toal made an order which is also in the nature of a judgment (running to 74 pages) dismissing the Third Party motions to dissolve the receivership and motions to dismiss for lack of personal jurisdiction. This order was apparently drafted by the receiver's counsel at the invitation of the court, which no doubt explains the now familiar pitch of the wording.

66. The order held " Cape plc …, ie the Cape entity for which the Receiver has been appointed" was properly served with the First Amended Complaint in the Park action." The order accepts that Cape Jersey was formed too recently to be liable for the claims made and says that:

> "It therefore strains credulity for Third-Party Defendants to premise their ineffective service argument on a foundational assumption the Park Plaintiffs meant to sue a different entity, and one that had "nothing to do with" the underlying claims."

So that "red herring" argument was dismissed. This would seem to confirm that CIHL is formally treated as the target of the receivership order as far as the South Carolina court is concerned.

67. The order then goes on to confirm that the receivership order should stand. It rejected arguments to the effect that a judgment had not been obtained first, and found that Subsection 5 of the relevant part of the South Carolina code did not require such a judgment. It would therefore seem that the court affirmed the judgment on the second of the statutory bases referred to above. The court held:

> "Subsection (5) does not require entry of default or much less entry of a judgment; instead, it authorizes the Court to appoint a receiver "either in or out of court . . . [i]n such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code." In turn, appointment of a Receiver over Cape was proper under subsection (5) based on evidence of Cape's long-running, intentional scheme to evade its tort creditors by refusing to appear in the United States, including in South Carolina. Subsection (5) reflects an "old practice" of equity and "important principle of law" to correct injustice which is particularly applicable to Cape given its efforts "to defeat [its] creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts." … [authorities cited] ... Because Cape set its numerous tort creditors, including the Park Plaintiffs, "at arm's length by refusing . . . to take any interest in the satisfaction of their

> claims," there was a "prima facie case . . . warranting the appointment of a receiver." Id. at 180. Accordingly, these so-called procedural prerequisites to which Third-Party Defendants point and then claim were violated are simply more red herrings; those processes are irrelevant to the grounds on which the Receiver for Cape was appointed."

The court went on:

> "Specifically, this Court finds it has jurisdiction over Cape as a "a person who acted directly or by an agent as to a cause of action arising from" Cape's and NAAC's (i) "causing tortious injury or death in this State by an act or omission outside this State..."

68. The appointment was also confirmed on this basis:

> "Accordingly, independent of Cape's own connection with this State (including facilitating the sale and distribution of Cape asbestos from South African mines to locations in South Carolina), the allegations regarding Cape's effective domination of NAAC, including pursuant to alter ego, veil-piercing, and/or business-enterprise doctrines, as well as the allegation that NAAC acted as Cape's agent, separately provide a proper basis to exercise personal jurisdiction over Cape".

So it is apparent that the juridical basis on which the receiver's appointment was confirmed was that which was rejected, factually and juridically, in *Cape v Adams*.

69. On 15th December Chief Justice Toal issued an order denying motions to dismiss by the Third Party defendants. I do not need to dwell on that.

70. The various Third Parties then sought to appeal, and their appeals were countered by a motion to dismiss made by the receiver. The long and the short of that particular skirmish is that the appeals were dismissed, though Mr Oren's understanding is that they were dismissed for procedural rather than substantive reasons. His understanding, as appears in his second witness statement, is that the appeals were dismissed because they were interlocutory in nature and the appellants would be entitled to a merits-based appeal once final judgment has been delivered on the trial by Chief Justice Toal. Having been shown the orders I am not sure that that is what they say, and that procedural position looks somewhat odd to English eyes because it would seem that the appeals go to something fundamental to the right of the receiver to have a trial in the first place, but that is what Mr Oren says and if that is the position in the courts of South Carolina they those courts are obviously entitled to formulate their own procedural scheme for appeals.

71. Further skirmishing took place, most of which does not matter here, but one element is worthy of note. On 3rd April 2024 the receiver filed a motion for adverse inference" and "motion for sanctions" as against the Altrad defendants. The latter was based on a complaint that those defendants (who had not submitted to the jurisdiction in South Carolina) have not participated in a discovery procedure. The Motion for sanctions asked for an order that the court should:

> "…infer as to Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC., that each is the alter ego of Cape, or otherwise liable as a matter of veil piercing, including with respect to Cape's ongoing liability-avoidance scheme, and have been unjustly enriched due to Cape's liability-avoidance scheme".

72. Similar adverse inferences were sought as against other Third Party defendants based on corporate veil piercing and unjust enrichment. Orders as sought were granted by Chief Justice Toal on 13th May 2024. That order contained a number of inferences which would be drawn against the Third Party defendants, summarised as follows:

> "…the Court draws the adverse inference that each of the Altrad Third-Party Defendants was at relevant times the alter ego of Cape, requiring piercing of the corporate veil. Likewise, each of the Altrad Third-Party Defendants is responsible for or has benefited unjustly from Cape's liability-avoidance scheme."

73. Those inferences were said to be subject to "evidentiary challenge by [the defendants] should these recalcitrant Third-Party Defendants elect to participate in these proceedings as they are required to do by our rules and the orders of this Court".

74. As Mr Oren pointed out, those Third Party defendants are now faced with the position of having to submit to the jurisdiction to defend those inferences, or not submit and risk having judgment granted against them in respect of those inferences. Having said that, I consider that on analysis those defendants are in the same position as any person who knows of proceedings in another jurisdiction and chooses not to submit voluntarily to the jurisdiction.

75. That order was subject to various appeal processes, the last of which is still outstanding.

76. There were attempts to have this matter removed to a Federal Court. Those attempts failed and I need say no more about them. There is now an outstanding writ of certiorari in relation to those appeals. I say nothing about that either, not least because that is all that is said about it in the evidence before me.

Other acts of the receiver

77. Other litigation demonstrates the vigour with which the receiver is going about his role. On 12th April 2023 he issued a third party summons against Lord Locke LLP, a Delaware corporation who were formerly attorneys to NAAC. His summons apparently explained that he was the receiver of Cape plc "and its affiliate North American Asbestos Corporation" and was tasked with marshalling the assets of Cape and its affiliates. He claimed to control the attorney-client privilege of Cape and its affiliates and sought disclosure of NAAC files and financial records. He sought to broaden the scope of his claim by amendment on 8th August 2024 claiming a violation of Lord Locke's duties to the "Plaintiff". This is said to demonstrate the excessive lengths to which Mr Protopapas will go in pursuit of what he conceives to be his rights and duties. It does tend to demonstrate that the receiver does not regard his powers as being confined to South Carolina.

78. I will not list all the further applications that have taken place in South Carolina, and content myself with noting that at hearing on 24th September 2024 the Third Party trial was rescheduled from the beginning of December to the 3rd to 7th February 2025. As

will appear, it would seem that the receiver is now seeking to short-circuit that re-listing.

79. On 30th August 2024 a letter before action was sent to the receiver by Winston & Strawn LLP on behalf of the claimants in these proceedings. That firm is a US and English firm of solicitors. It was a perfectly proper letter before action inviting Mr Protopapas to agree to an order which provided for the declarations and injunctions which are sought in this application - making it clear that he had no authority to act for CIHL or Cape Jersey and providing for his being restrained from so acting (in short). It set out in a reasoned fashion what the basis of the claim was, as one would expect. Alternatively it invited him to accept service so that any dispute could be determined by this court.

80. The receiver responded in a letter of 5th September by denying that he was amenable to the jurisdiction here because his appointment and related matters could only be challenged in the courts of South Carolina under the "Barton doctrine" and he was obliged to carry out the functions with which he had been entrusted. His letter went beyond arguing, however. He revealed that he had issued proceedings against Winston & Strawn:

> "Your letter solicits me to violate South Carolina law and is akin to extortion. Respectfully, I refuse to allow your tortious threats to guide my legal and ethical duties imposed on me as a court-appointed receiver. As a result, I am left with no choice but to sue your firm. Attached you will find a recently filed declaratory judgement action against Winston & Strawn, LLP. I anticipate filing a Rule to Show Cause against your firm requiring your firm to explain its conduct to the Receivership

> Court. A sensible solution to this issue is for you to withdraw the Letter and undertake to not seek any relief in the English Courts or any other court than that seized of the jurisdiction in South Carolina and I will withdraw the Complaint and Rule to Show Cause."

81. The motion in the South Carolina court (dated 5th September 2023) refers to "intimidation" of the receiver as a court officer in the conduct of his duties.

82. Again, this is said, with justification, to show the aggressive propensities of the receiver. To English eyes at least, to commence proceedings against solicitors who bona fide advance a case on behalf of their client on the basis that it is "extortion" is, to put it mildly, completely misplaced. His ultimatum that the solicitors withdraw a letter sent on behalf of a client, or face being sued personally, makes a demand that the solicitors could not properly comply with because of their duties to their clients. It is surprising that a lawyer (which Mr Protopapas is) would not appreciate that. As a result of these acts those solicitors felt they had to withdraw from these proceedings and fresh solicitors (English) have been appointed to act for CIHL and Cape Jersey.

83. The receiver's attempts to see off those who act for or assist the claimants have not stopped there. As I have indicated above, the claimants filed expert evidence from Judge Wilkins. It sets out, entirely properly, what he said was the proper effect of South Carolina law on various issues said to go to the appointment and powers of a receiver appointed under South Carolina law and to estoppel. It plainly did not venture further than that, and did not relate itself to the merits of the disputes in this matter. It was served on 31st October 2024. On 5th November the receiver issued a subpoena for a deposition, and made extensive demands for disclosure on the judge. That conduct looks intimidatory. Whether or not that is right, the judge thought it right to provide

(apparently unbidden) a short further "report" saying that he did not intend to express a view as to whether and to what extent the law in his report applied to any case anywhere in the world, and that his involvement in such matters is now hereby concluded". When one reads the report properly one can see that that is plainly the case - he did not trespass into the area of saying how it should have been applied in the present matter. After he provided that supplemental report the subpoena was withdrawn. It would seem that was issued on a false premise as to what the effect and purpose of the report was; or that the receiver has achieved an intended result in bringing the role of the expert to an end..

84. Having been served with the application to expedite the present proceedings, the receiver sought to head off the trial by seeking his own form of anti-suit injunction. He applied to the South Carolina court (Chief Justice Toal again) for an order against the Altrad defendants "to terminate their improper action pending before the High Court of Justice of England and Wales seeking to enjoin the Receiver from performing his Court-ordered duties." Chief Justice Toal declined to accede to that application.

More recent developments

85. Returning to the litigation activities of the receiver in relation to the main litigation, there have been further significant developments beyond those identified above.

86. On 1st November 2024 (ie after service of these proceedings on the receiver) he filed a "Motion to Clarify the Appointment Order". It sought confirmation that all his litigation activity to date had been conducted within the scope of the receivership order. The result was an order which ended thus:

> "Recent events, including an expert report by retired jurist William W. Wilkins, warrant further clarification of the Appointment Order. This Order hereby clarifies that the Receiver's Order of Appointment entered on March 17, 2023, which is incorporated herein by reference, including all of the Receiver's duties and protections, extends to the right and obligation to administer any claims related to the actions or failure to act of any entity related to or responsible for Cape. This Order also clarifies that the Receiver's litigation activity to date has been conducted within the scope of this Court's Appointment Order."

87. On 8th November 2024, following service of Mr Oren's second updating witness statement, the receiver made an application for summary judgment against some of the Third Parties (the Altrad defendants and the "Charter" defendants) in the Third Party proceedings. This is despite the fact that he has a trial at the beginning of February - just 3 months away. Mr Dale suggested that it can be inferred that the receiver is very keen to get that summary judgment before a judgment in the present case. So far as relevant I would draw that inference. In the summons the receiver states that "And with the Charter and Altraad Third_Party Defendants' continued obstructionism, the evidence adduced by the Receiver is damning... [and] also completely un-rebutted, and further supported by the adverse inferences drawn by this Court as a result of their discovery misconduct." Mr Brehony comments that despite the 81 pages of submissions in support of the application, nowhere is there a mention of *Adams v Cape* and the findings in that case, which do indeed rebut his case.

88. Last in the catalogue of litigation in this case so far is a new set of proceedings launchedon 11th November 202 by some 80 claimants against "Cape plc, as successor-in-interest to Cape Industries Ltd (f/k/a Cape Asbestos Company Limited)" and others for damages and associated remedies against largely the same defendants as the Third Party proceedings, including Law Debenture. Mr Protopapas accepted service of these proceedings on behalf of "Cape plc" the next day. It is assumed that this is the usual "misnomer", and that the intended defendant is CIHL. That is certainly the receiver's view, because he has presumed to deal with this under his receivership. This claim came in overnight between the first and second days of the hearing of this trial. The solicitors for the claimants are the same solicitors as acted for the claimants in the Park and Tibbs claims, and indeed the Tibbs re-appear as claimants in this claim. It can be seen that significant parts of this document are literally cut-and-pasted from the Third Party summons or Complaint (see eg the paragraph and diagram at para 63 of the new claim). The whole thesis of this claim as to why CIHL is liable is the thesis of the Third Party summons, described above. If, as is to anticipated, the receiver puts in a Defence like his Defence in the Tibbs action, he will effectively be admitting these claims.

89. In addition to that new litigation, other threats have manifested themselves. On 28th October 2024 the receiver filed a letter from Motley Rice LLC, a firm of attorneys specialising in mass tort cases, explaining that they acted for Pittsburgh Corning Trust which had paid thousands of victims of asbestos-related disease from product an "extremely large percentage" of which had emanated from CIHL. It put the receiver on notice of a claim. CIHL is concerned that the receiver will admit responsibility or purport to act but fail to defend properly, setting a dangerous precedent for the Cape Group. A further claim, assumed to be substantial, seems to be on the way from National Services Industries Inc.

A comparison of the basis of Adams v Cape and the appointment and acts of the receiver

90. The opposing nature of the detailed facts *Adams v Cape* on the one hand and the case mounted against, and then on behalf of, CIHL in South Carolina on the other, should be clearly apparent by now. It was exemplified by a schedule drawn up by Mr Phillips to assist me and which contrasts, in terms, and in columnar form, the allegations of the receiver and the findings of Scott J and the Court of Appeal. At the heart of the receiver's case in his Third Party proceedings, and underpinning his appointment, is the proposition that NAAC and CPC were essentially to be treated as being one with CIHL for the purposes of founding liability and getting into the rest of the group. That encapsulation is flat contrary to the findings of the courts in *Adams v Cape* when they found that they were not effectively one entity, there was no justification for piercing the corporate veil and that CIHL did not operate through NAAC or CPC. CIHL did <u>not</u> control NAAC in any meaningful sense, and the participation of CPC was <u>not</u> a ruse or a sham. The receiver (and the applicant for the receivership, who may well have been motivated and prompted by the receiver) simply ignores this and advances the opposite case.

The law - governing law, the recognition of foreign receiverships and recognition of the South Carolina receivership in this jurisdiction

91. For these purposes I shall deal with the position of CIHL. I deal with Cape Jersey's position in this application at the end of this judgment.

92. CIHL's case centres on the South Carolina receiver having no relevant authority to bind the company, or to act for it at all, in the circumstances which have happened. That involves a consideration of the circumstances in which the English courts will recognise a foreign receiver appointed by a foreign court.

93. Mr Phillips' starting point is the proposition that the law of the country of incorporation governs the capacity of a corporation to enter into transactions and all matters relevant to the internal governance of the corporation. He is right about that. The basic position is set out in Dicey and Morris on the Conflict of Laws (15th Edn) at what it describes as Rule 187(2):

> "All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

This principle will operate to determine who has authority to bind the company. However, this straightforward Rule does not take this matter much farther forward other than setting the scene for the next question, which is rather more important, which is whether and to what extent a foreign receiver such as Mr Protopapas will be recognised here.

94. On this point *Schemmer v Property Resources Ltd* [1975[1 Ch 273 provides the necessary guidance. In that case a US receiver sought to have himself appointed receiver in this jurisdiction over the assets here of a Bahamian company, PRL. He was specifically authorised to do that by an order of the appointing court (see p285D). PRL

challenged this attempt through the medium of challenging the permission to serve it out of the jurisdiction. The challenge succeeded on the footing that, as a matter of English law, PRL did not have sufficient connection with the foreign jurisdiction (the US) to justify recognition here, nothwithstanding the specific authorisation of the appointing court. Goulding J sumarised the position on the law and on the facts by saying:

> "I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction. Here I can find no sufficient connection. First, PRL was not made a defendant to the American proceedings, and there is no evidence that it has ever submitted to the federal jurisdiction. In that regard it is, in my judgment, not enough that certain subsidiary companies of PRL with assets in the United States of America have unsuccessfully contested the orders of the district court on the basis that it had no personal jurisdiction against them, and on other grounds. Secondly, PRL is not incorporated in the United States of America or any state or territory thereof, so that the principle tacitly applied in *Macaulay's case, 44 T.L.R. 99* , and more fully exemplified by *North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd. (1889) 61 L.T. 716* is of no direct relevance. Thirdly, there is no evidence that the courts of the Bahama Islands, where PRL is incorporated, would themselves recognise the American decree as affecting English assets. Fourthly, there is no evidence that PRL. itself has ever carried on business in the United States of America or that the seat of its central management and control has been located there. I express no view, one way or the other, on the materiality of those two circumstances." (my emphasis)

95. The critical part of that passage is the underlined part, though Goulding J's consideration of the factors which led him to conclude there was insufficient connection are also helpful. The fourth of those factors has parallels with the present case. It is

CIHL's case, on the footing of the lengthy consideration of the facts in *Adams v Cape*, that business was not carried on by CIHL in South Carolina at any material time.

Goulding J went on:

> "The situation relied on by the plaintiffs is that PRL is actively or passively concerned in a violation of the laws of a foreign country, and a court in that country has in consequence appointed a receiver of its assets. Under those circumstances (and in the absence of any other ground of foreign jurisdiction) the English court ought not, in my judgment, to regard the appointment as having any effect on assets outside the foreign court's territorial limits. A little imagination will show that any different rule might produce a multiplicity of claims, and confusing and unnecessary questions of competing priorities."

That passage has a resonance with the present case too. Extreme allegations have been made in South Carolina, but it is said that there is still no relevant jurisdictional link between CIHL and South Carolina. The last sentence of that passage is one of the factors that is invoked by the director of CIHL in seeking its relief.

96. The position is put thus in Lightman & Moss on The Law of Administrators & Receivers (6th Edn) :

> "30-32. The circumstances in which a receiver appointed by a foreign court may secure recognition of his powers in relation to English assets in England has not been authoritatively settled in the reported cases. However, it is clear that the principles are different from those which apply to determine the recognition of a receiver pursuant to a private appointment under foreign law. This difference arises because, in principle, when recognition of a receiver appointed by a foreign court is involved, the English court must satisfy itself that the foreign court was jurisdictionally competent to make the appointment according to the

> relevant principles of English private international law. Consequently, it becomes necessary to determine when English law will regard a foreign court as possessing such competence. Where such competence is established and there are no applicable general principles of conflict of laws precluding recognition, comity requires recognition to be afforded.
>
> 30-33. As a general principle, the foreign court will be regarded as jurisdictionally competent if there is a "sufficient connection between the company in respect of which the receiver is appointed ('the defendant') and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order" While this much may be accepted, it is not possible to state with complete certainty the circumstances in which such sufficient connection may exist."

97. Although the editors of that book suggest some uncertainty as to the principles, the general principle propounded by Goulding J in *Schemmer* should be applied, and I would in any event agree with it.

98. Applying the "sufficient connection" principle, it is quite clear that the South Carolina receivership would not, should not and could not be recognised here for all the reasons which led to the US judgment in *Adams v Cape* not being enforceable here. All the facts which led to the conclusion that CIHL did not have a presence in the US in that case mean that there is no sufficient connection for the purposes of recognition of the receivership. As a matter private international law, CIHL did not have a presence in South Carolina (or anywhere in the United States) at the time which was relevant in *Adams v Cape* and it has not had one since. Nothing in the facts alleged in any of the court documents relating to the receivership demonstrate a change in facts between then and now. They tend to ignore the facts as found at great length in *Cape v Adams*.

99. For the sake of completeness I should mention (as did Mr Phillips) that the Cross-Border Insolvency Regulation 2006 has no relevance here. There is no relevant "foreign proceeding" in South Carolina within the meaning of that Regulation, because the South Carolina proceedings are not a collective judicial or administrative proceeding within those Regulations. The receiver could no more get recognition of his office under those Regulations than he could under the general law set out above.

100. Of course, in the present case the receiver is not currently seeking recognition of his receivership in this jurisdiction, so this decision is not in the nature of an actual refusal of recognition. Rather, my is a decision at a higher level to the effect that the receivership is not capable of recognition in this jurisdiction with the consequence that the receiver's acts should not be recognised for English law purposes. This goes to the question of the relief that should be afforded to the claimant, which I deal with in a later section of this judgment. As will appear, the fact that the receiver is not seeking recognition in this jurisdiction does not mean that this judgment is pointless.

Estoppel

101. Mr Phillips sought to bolster his position by relying on the doctrine of estoppel. His argument was that a new development, or elaboration, of the law of estoppel means that the receiver should be estopped, or otherwise prevented, from adopting a contrary stance to that adopted by CIHL in *Adams v Cape*. He relied on a species of estoppel examined by the Court of Appeal in *LA Micro Group UK Ltd v LA Micro Group Inc*

[2022] 1 WLR 336. In that case the court had to consider the effect of a claimant's disavowal of an interest in a company in one set of proceedings when then that claimant asserted an interest in later proceedings. The court considered a version of estoppel by conduct which stopped short of issue estoppel (because there was no positive decision of the court on the point) and considered the application of another version. It was encapsulated in the following terms:

> "19. The possibility that an estoppel arises from the conduct of a party in litigation was recognised in *Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993* , where Viscount Radcliffe said at p 1018:
>
> > "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."
>
> …
>
> 22. The phrases used in these cases suggest that it is not every change of position by a party or a witness which will create this form of estoppel. In *Kok Hoong [1964] AC 993*, Viscount Radcliffe's formulation requires (a) that the party's stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance. In *Gandy* , Cotton LJ says that the earlier decision was in favour of the husband "on the ground that" the deed provided a continuing obligation. Bowen LJ said that the husband had succeeded "on the footing" of that construction of the deed. These phrases suggest that it must be apparent from the earlier judgment that the stance taken by the party was a reason for the judgment which he obtained, and that it would in all the circumstances be unjust to allow the party to resile from the stance taken earlier."

102. Mr Phillips was keen to point out that a similar rule applies in the US, as appears from the following citation in *LA Micro*:

103. Ginsburg J, giving the judgment of a unanimous court *New Hampshire v Maine (2001) 532 US 742*], approved an earlier statement in *Davis v Wakelee (1895) 156 US 680, 689*:

> "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

104. And Mr Phillips was keen to submit that the root of the doctrine was an abuse of the process:

> "24. The purpose of the rule was said to be to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties "from playing fast and loose with the court".

105. That point is said to be reinforced by the more recent case of *Malik v Malik* [2024] EWCA Civ 1323:

> "36 … Although Sir Christopher Floyd did not use the phrase, the form of estoppel by conduct in this issue can readily be seen as a species of abuse of process."

106. Mr Phillips seeks to invoke this principle by saying that the receiver is now seeking to adopt a different stance in relation to presence on behalf of CIHL from that which CIHL maintained (and won on) in *Adams v Cape*. That is said to contravene the above principles and to amount to an abuse of process which this court should stop.

107. Although the principle can be treated as beyond doubt, and although it would seem that the same doctrine applies in the US (this is apparent from *LA Micro* and from the report of Judge Wilkins which says that the doctrine applies in South Carolina) I do not see how this benefits CIHL in this application. It can be seen to apply in inter partes litigation where it can be invoked by the "victim" of the change of stance. It does not exist is some sort of vacuum or some generally applicable over-bearing estoppel presence. That is the same whether one regards it as a version of traditional estoppel or whether one regards it as based on abuse of process. There has to be sort of forum in which the point can be made to operate for the benefit of a party to litigation.

108. That does not apply in the present situation. CIHL is not being pursued in this litigation by a counter-party which is seeking to resile from its previous stance on which CIHL, as a litigation counterparty in that previous litigation, or the court, had previously relied. It is not seeking to depart from its own stance. It is complaining that a person <u>without authority to do so</u> is departing from its stance. That is not a question of estoppel. It is something else. Furthermore, there is no English process which is being abused by the maintenance of a stance contrary to *Adams v Cape*.

109. Mr Phillips relied very heavily on the abuse point as being one which met the point that there was no party to these proceedings who was seeking to resile from its previous stance, as though the court would somehow take the point by itself. While I would not go so far as to say that there are no circumstances in which the court would take the

point for itself in the face of a party which was not running it, it is hard to imagine them and the present case certainly does not present them.

110. One can test the matter in this way. Suppose that the receiver were contesting these proceedings and was seeking to deploy his South Carolina arguments in this jurisdiction. How would the estoppel work? CIHL would have to say that because it (not the receiver) had advanced a contrary case and won on it back in 1990, therefore the receiver is estopped from running the contrary case now. That simply does not work. There may be all sorts of other arguments to counter the receiver but this form of estoppel is not one of them. It may or may not be that the counterparties to litigation started by the receiver on the footing of his present arguments would have the benefit of a version of this estoppel, and it would be consistent with the report of Judge Wilkins that they would, but I say nothing about that. But it is clear to me that this form of estoppel does not assist Mr Phillips in this case.

Tortious claims

111. At paragraph 2-004 of the work, Bowstead on Agency 23rd Edition proposes that a person who purports to act for another without authority (to whom it attaches the somewhat tendentious label of "impostor") can be subject to an injunction to restrain him/her for so acting at the instance of the "principal". That obviously has to be right as a matter of principle. An instance of this occurring was *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 171 (Ch). The juridical basis of that remedy was not

articulated, but it is obvious that a legal wrong is committed, perhaps as a separate but as yet unarticulated tort. Mr Phillips submitted that *Brown v Boorman* (1844) 11 Cl & Finb 1; 8ER 1003 established that an agent acting in breach of duty is liable to the principal in both contract in tort, and that that is the starting point for finding a tortious duty owed by an "impostor". I am not quite convinced by that argument, because a duly appointed agent has at least assumed some duties. However, I do not think that that matters. It would be absurd to suppose that there is no remedy against Bowstead's "impostor", and the remedy must be founded on a liability in tort.

112. Because the receiver is purporting to act as agent of CIHL without authority recognised in English law, he commits this tort. Even if he does not (yet) seek to perform any acts within the jurisdiction, is conduct is causing, or will potentially cause, loss in this jurisdiction, for the reasons appearing in the next section.

The problems that the English board faces

113. CIHL submits that what has happened in relation to this receivership has caused, or is likely to cause, real problems and difficulties and that this court should grant remedies to stop that. Those problems are as follows. These points proceed on the assumption, which I have found to be correct, that the receivership would not be and should not be recognised in English law. The receiver is therefore acting without authority. They arise from the evidence of Mr Oren and I summarise the main points here.

(a) The powers of the South Carolina receiver are very extensive. There is a risk of confusion as to who has the power to do what. There are potentially two centres of

power. This is the sort of point made by Goulding J in *Schemmer* to which I have already drawn attention. Absent a determination by the court, the director may find himself in difficulties in running the company's business with the receivership in the background. He claims, understandably, to be uncertain in areas such as signing off company accounts, executing documents, selling or buying assets and other commercial transactions.

(b) The appointment of a receiver over CIHL would be an event of default under the holding company's arrangements upon which £160m of the claimants' own inter-company financing depends.

(c) The allegations made by the receiver, purportedly on behalf of CIHL, are potentially damaging to the reputation of the claimants and their group.

(d) The allegations and admissions made by the receiver may lead to substantial new liability claims inside and outside South Carolina and worldwide.

(e) The receivership order seems to be not only over CIHL but also over its "subsidiaries and global affiliates". That presents the possibility that there will be intervention in other parts of the group. While the receiver has not yet sought to take action outside South Carolina, he seems to consider his appointment is capable of having worldwide effect, and it is quite possible that he will seem to implement that. In the letter before action the solicitors said that it was understood that he could act worldwide, and his responsive letter did not rebut that or give any indication that he would be limiting the pursuit of his receivership territoriality.

(f) The receiver's conduct gives rise to a fear that he will take unpredicted and unpredictable steps which could disrupt the affairs of the group.

(g) Suppliers and others may conceive that the receivership gives rise to a risk of insolvency in the group, which would be unjustified, unfair and potentially very damaging. For example, payment terms may be changed by suppliers to guard against the risk of insolvency, with a risk to cashflow projections.

(h) As a result of the uncertainties created by the receivership and the way in which the receiver has behaved, staff recruitment and retention may be more difficult.

(i) There is a potential adverse effect on the Cape scheme of arrangement described above. If what has happened in South Carolina has an adverse financial effect on CIHL (and the group) then its ability to fund the scheme could be adversely affected and this otherwise successful scheme might collapse.

114. I accept this evidence (and the other matters which are relied on by Mr Oren in his evidence). These risks are real and not fanciful, and the consequences of their eventuating are serious. The board is justified in being concerned about them and in wishing to have them removed if possible.

The strands so far

115. At this point it will be useful to draw together the strands of the factual narrative and legal analysis.

(a) A receiver has been appointed in South Carolina whose appointment would not, as a matter of English law, be recognised in this jurisdiction and ought not to be recognised by any jurisdiction which accepts that the management and affairs of CIHL ought to be exclusively in the hands of the English board.

(b) He is a receiver who has the benefit of extensive powers which are capable of causing serious and unjustified disruption to the affairs of CIHL (and the group of which it is part).

(c) He is a receiver one of whose functions is apparently to protect the interests of

CIHL over which he has been appointed. Yet he has demonstrated that he is not fulfilling that obligation, and is indeed apparently doing the opposite. He has made admissions in relation to asbestos claims, and advanced a positive case, which are positively damaging to the interests of CIHL. He has filed a defence in the Tibbs claim which is in reality no defence at all because it incorporates all the elements of the Third Party proceedings.

(d) There is plainly a risk, if not an inevitability, that the receiver will continue to act in that manner.

(e) There is nothing wrong with an office-holder acting with vigour to protect his office, and in carrying out his functions, but his attacks, or attempted attacks, on those who would seek to support or assist a challenge to his position, to English eyes, overstep the mark. I refer to the motion against solicitors/attorneys who wrote a perfectly justified letter before action, his attempt (which failed) to get CIHL's holding companies to stop the present English action, and his steps taken against the CIHL's expert in this case. It may be that those steps are all part of litigation tactics in US litigation, and I say nothing about that, but to English eyes (which are the eyes with which I view this matter) they smack of a very aggressive approach which is surprising. They give rise to a justifiable fear of unpredictability in his future steps.

(f) The receiver's whole litigation approach on presence in South Carolina (which, as I understand it, underpins his appointment) seems to ignore and indeed contradict the careful findings of two English courts. I accept that it might be said that the South Carolina court is not necessarily bound by those findings, but they are at least relevant and, as a person apparently charged with (inter alia) protecting the interests of CIHL, one would have thought he ought to propounding that decision, not setting it at naught.

(g) There is nothing to suggest that this decision was drawn to the attention of the South Carolina court. One would have thought it would be at least relevant to its determinations. I would not presume to say whether it would have made any difference to Chief Justice Toal's decisions. That is obviously a matter for her. But at the moment the apparent failure (if that is what there was) to draw attention to it is

a matter of serious concern.

116. Drawing these strands together, I consider that this is a case in which relief ought to be granted to protect the legitimate interests of CIHL. I therefore turn to that question.

The relief sought

117. There is one particular concern which arises out of the relief, and that is the extent to which it should extend to acts done within South Carolina and the extent to which the orders sought might offend against principles of comity.

118. The precise relief sought, in declaratory and injunctive terms, is as follows (I set it out to show the great width of the relief that is claimed):

> "IT IS DECLARED THAT
>
> 1. The receivership order of the Court of Common Pleas for the Fifth Judicial Circuit of the State of South Carolina, County of Richland ("the South Carolina Court") dated 16 March 2023 appointing Mr Peter Protopapas ("Mr Protopapas") as a receiver over the Claimants ("the Receivership Order") is not recognised and has no legal effect in England and Wales and worldwide.
>
> 2. Mr Protopapas has and had no power or authority to act as a receiver in relation to the Claimants in England and Wales or worldwide and has no power to or authority in respect of the Claimants in England and Wales or worldwide to carry out the acts referred to in paragraph 5-8 below; and his acts cannot be attributed to the Claimants, and/or the Claimants are not liable to accept his mandate/authority over them (or otherwise indemnify him for their failure/refusal to do so).

3. The rights and duties of the directors of the Claimants remain unaffected by the appointment of Mr Protopapas as receiver of the Claimants pursuant to the Receivership Order.

4. Mr Protopapas has and had no power or authority to act as the receiver of the Claimants in the South Carolina Court in respect of Park Claim and the Tibbs Claim (as defined in Oren 1) and has and had no power or authority to issue third party claims in the Tibbs Claim against any of the third party defendants in those proceedings ("the 3P Complaint"), including (i) Mohed Altrad (ii) Altrad Investment Authority SAS (iii) Altrad UK Ltd (iv) Cape UK Holdings Newco Ltd (v) Cape Industrial Services Group Ltd (vi) Cape Holdco Ltd (vii) Altrad Services Ltd (viii) Hawk Bidco (US) Inc (ix) ArranCo US LL (x) Sparrows Offshore LLC.

AND IT IS ORDERED THAT:

1. Mr Protopapas be injuncted in England and Wales and worldwide from acting or purporting to act as a receiver of the Claimants pursuant to the Receivership Order.

2. Mr Protopapas be injuncted in England and Wales and worldwide from 3. appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of the Claimants.

3. Mr Protopapas be injuncted from acting or purporting to act as a receiver of the Claimants in the Park Claim and the Tibbs Claim (as defined in Oren 1).

4. Mr Protopapas be injuncted from litigating as "Cape plc" or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere."

119. I am satisfied that in general terms CIHL should have the declarations sought. My attention was drawn to some of the authorities on the granting of negative declarations. The case of *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) (Cockerill J) contains a very useful consideration of the authorities and some guidance. The following points are relevant and helpful:

”66. The authorities certainly indicate that a court should be cautious when asked to grant negative declaratory relief because, while negative declarations can perform a positive role, they reverse the more usual roles of the parties and this can result in procedural complications and possible injustice to an unwilling defendant”.

I accept this, but it is of little weight in the striking circumstances of this case.

“68. There is however a distinction between caution (approved in the authorities) and reluctance (not approved in the modern authorities). “

I respectfully agree, and will exercise caution without reluctance.”

“78 …Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:

i) The touchstone is utility;

ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Limited, ZyXEL Communications A/S* [2019] EWCA Civ 1277 at [37]. “Justice” includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co., Ltd. v Abb Vie Biotechnology Limited* [2017] EWCA Civ 1; [2018] Bus LR 228 (“*Fujifilm*”) at [60];

iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls Royce v Unite the Union* at [2010] 1 WLR 318 at [120]. In answering that question, the Court should consider what other options are available

to resolve the issue;

v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:

a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: Zamir & Woolf at 4-036 & *Regina (Al Rawi) v Sec State Foreign & Commonwealth Affairs* [2008] QB 289 at 344.

b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls Royce* at [120].

c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as *"the missing element which makes a case hypothetical"*: see Zamir & Woolf at 4-59.

vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir and Woolf note that the latter *"can take different forms and can be lacking to differing degrees".* However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion."

120. This is a case where the law of England and Wales, where CIHL is incorporated, plainly will not recognise the receivership. It is also quite apparent that the receiver will not himself recognise that fact, and that he is pursuing his receivership vigorously and beyond what one would normally expect of a receiver. He has purported to make admissions, and to run a positive case, which is positively damaging to the legitimate interests of the company over whose assets he has been appointed, despite the fact that one of his obligations is to act in its proper interests. Instead he has been utilising his appointment as a vehicle which some of the Third Party defendants have aptly

described as a "crusade". All this is without the consent of the legitimately appointed board of CIHL and, for the reasons given above, is potentially and unjustifiably damaging to the legitimate interests of the company. The company is entitled to relief which will help protect it from the effects of that conduct, and that relief is a declaration.

121. Those factors mean that the declaration, albeit negative, will amply fulfil the first of Cockerill J's requirement, and the other factors she relies on as well. Thus:

(i) A negative declaration will definitely have utility. It will enable the board to know where it stands. Furthermore, and while declarations are usually intended to operate as between the parties and will not concern the wider world, in this case a negative declaration as to the effect (or lack of it) of the South Carolina receivership could well give public reassurance as to the ability of CIHL to continue to operate normally, and could well be useful to rebut any attempt of the receiver to operate worldwide and, in particular, to seek remedies from foreign courts. This touchstone is satisfied.

(ii) The declarations will serve a useful purpose, as just set out.

(iii) They will serve justice in acting as an appropriate restraint on the receiver in relation to the matters within its scope.

(iv) There is no other way of achieving those objectives, though (as will appear) they can usefully be granted along with injunctive relief. There is no guarantee that injunctive relief will be effective at all, or that injunctions will be as cogent so far as the outside world is concerned, though injunctions have their place.

(v) I do not see how confusion will be caused; the declarations address a real dispute between the parties and the issue behind them is certainly not hypothetical - it is very real.

122. I have not lost sight of the fact that one of the relevant factors propounded by the Court of Appeal in *Rolls Royce plc v Unite the Union* [2010] 1 WLR 318 at para 120 was:

> "(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court."

123. The receiver is not before the court, and he has not directly put his arguments before it. However, his case appears clearly enough from the court documents that he has filed in South Carolina, and he put his case in his answer to Winston & Strawn's letter before action. He invited them to ensure that his response was put before the English court (while, ironically, achieving their removal from the fray by suing them), and that letter, and its attachments and his complaint, were indeed before me and have been read by me. I am therefore well enough aware of what his case would be in relation to the issues underpinning the claims for a declaration.

124. One of the points that he takes is that the "Barton doctrine" requires that the permission of the court be obtained before suing a receiver in respect of his acts, and that therefore no action can be taken against him without the permission of the South Carolina court. Judge Wilkins has given his opinion on the extent of the application of the this doctrine, and his report is uncertain on the extent of its application. However, assuming it does apply in South Carolina, I consider that it does not stand in the way of the present proceedings because the present proceedings are governed by English law, and the whole premise of the proceedings is that the receiver has no recognition under English law. Accordingly, it does not recognise the office which would otherwise give him protection. It is therefore not a bar to the relief claimed against him in these proceedings.

125. The one question which remains to be addressed is as to whether the declarations should be limited to reflect the fact, or possibility, that the receiver's appointment and acts are apparently valid under South Carolina law because the receivership can be treated as being lawful under South Carolina law, where it is also recognised. Putting it another way, should there be some sort of carve-out for acts within South Carolina which the South Carolina courts would treat as being lawful and done under its own orders. I will return to this when I have considered the injunctions.

126. So far as the injunctions are concerned, I am satisfied that the company should have injunctions to restrain the receiver from holding himself out as having general authority to act on behalf of CIHL. There is an appreciable risk that the receiver will seek to exercise his powers worldwide even though the terms of the order appointing him do not expressly authorise it (nor do they expressly limit the powers). That fear has been expressed by CIHL and the receiver's vigorous activities to date do not suggest any self-imposed moderation is likely. I have also pointed out that he has not disclaimed a worldwide intent in his response to the letter before action. An English company ought, where it is appropriate, to be able to get injunctive relief to restrain a person from holding himself/herself out as an agent when unauthorised (under English law) especially where there is a risk of unlawful intervention in the company's affairs in this jurisdiction. Absent that last factor the court should be careful about granting injunctions against persons who are outside the jurisdiction and who have not voluntarily submitted to it, and whose feared acts are wholly outside the jurisdiction, because there is a risk that the grant will be in vain. However, that does not necessarily apply here and an injunction should be granted in something like the terms sought, though it is necessary to give particular consideration to whether it should be expressed to operate to restrain acts in South Carolina.

127. I add one small point in relation to worldwide relief. The clear view of Judge Wilkins is that the receivership has no extra-territorial application (ie outside the state of South Carolina). If and insofar the relief sought restrains or governs his acts outside that territory, it coincides with what the position should be anyway.

The question of a South Carolina carve-out

128. The question which causes most concern in relation to relief is whether it should be truly worldwide (which would include South Carolina) or whether it should be limited in the form of some form of acknowledgment that the receiver has actually been appointed under South Carolina law by a South Carolina court, and has effectively had some of his acts approved by that court. It has to be presumed for present purposes that his appointment is lawful and effective under South Carolina law whatever the law of England and Wales may say about recognition in this jurisdiction. He is an officer of the court operating under the sanction of the court pursuant to powers given to him by the court. In those circumstances should an English court be making the wide declarations that are sought in this case, and should it ordering injunctions restraining him from acting pursuant to orders?

129. This would seem to me to be a comity question. It is recognised that in the realm of anti-suit injunctions, the grant of an injunction is to some degree an interference with the process of another court. See eg the summary of Toulson LJ in *Deutsche Bank AG v Highland Crusader Partners* [2010] 1 WLR 1023 at paragraph 50. Questions of comity therefore arise. The interference in anti-suit injunction cases is more indirect than the interference which Cape's proposed remedies in this case would bring about,

especially so far as the injunctive relief is concerned, so the question of comity is certainly engaged. What is proposed in this case is relief which goes directly to the operation of an officer appointed by a foreign court, and whose acts (or some of them) have been approved by the court as being within his powers. The caution which needs to be exercised in the anti-suit injunction cases is therefore even more applicable in the present case.

130. Cape's first submission on this is that comity does not come into it. It is said that the receiver is operating under an order made by a court which was not a court of "competent jurisdiction" (as the traditional phrase goes - the word "competent" is used in the sense "recognised as valid", and not in any other judgmental sense). Counsel leant heavily on the use of the word "nullity" in the case cited above (paragraph 28) and suggested that it be followed to its logical conclusion, which was to disregard all that has happened in the South Carolina court, with the effect that comity can be disregarded.

131. I do not regard that as an appropriate approach to this case. While acknowledging the word "nullity" was used in prior authority, I do not consider that it should be taken to mean that the order can be disregarded for all purposes as though it were never made. I would not deal with comity issues on the footing that that is what it meant. I consider it to be more a figure of speech than an a definitive ruling as to the effect of the absence of jurisdiction to be followed relentlessly for all legal purposes. Accordingly, while the receivership order, and what flowed from it, would not achieve recognition in this jurisdiction, and some relief can and should be given on that footing, it is still necessary

to consider comity if the scope of the relief sought impacts more directly on foreign processes.

132. In anti-suit injunction proceedings the court gives due regard, and due deference, to the views of a foreign court as to whether proceedings should be allowed to continue there. In assessing how far this goes what is helpful is the judgment of Hoffmann J in *Barclays Bank v Homan* 1992] BCC 757. He referred to anti-suit injunctions and briefly alluded to their development:

> "In the last 20 years, however, there has been a shift in the attitude of the English court to foreign jurisdictions, exemplified by the development of the doctrine of forum non conveniens (starting with *The Atlantic Star [1974] AC 436*). Today the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. The principle, as Lord Scarman said in *Laker* (at p. 95) is that:
>
> > "(The) equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice." (emphasis added)
>
> In other words, there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court. So the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressive in the domestic sense, will not ordinarily in itself justify the grant of an injunction to restrain their prosecution in a foreign court. The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression: *Midland Bank plc v Laker Airways Ltd [1986] 1 QB 689* per Lawton LJ at p. 700.
>
> It is the exceptional cases in which justice requires the English court to intervene which cannot be categorised or restricted. But a theme common to certain recent decisions is that the foreign court is, judged by its own jurisprudence, likely to assert a jurisdiction so wide either as to persons or subject-matter that to English notions it appears contrary to accepted principles of international law. In such cases the English court has sometimes felt it necessary to intervene by injunction to

> protect a party from the injustice of having to litigate in a jurisdiction with which he had little, if any, connection, or in relation to subject-matter which had insufficient contact with that jurisdiction, or both. Since the foreign court is per hypothesi likely to accept jurisdiction, this is a decision which has to be made here if it is to be made at all. These are cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

133. If the case is strong enough, and if there is a sufficient connection with this jurisdiction, and there would be oppression and/or vexation in having to be the subject of foreign proceedings, then an anti-suit injunction will be granted despite the requirements of comity. Of significance is whether the lack of connection with the foreign jurisdiction is such that it would by unjust to require the applicant for the injunction to litigate there. As Toulson LJ said in *Deutsche Bank* (at para 56):

> "Hoffmann J recognised that exceptional cases cannot be categorised, but he instanced cases where a foreign court has by its own jurisprudence a long arm jurisdiction so extensive that to English notions it appears contrary to accepted principles of international law, and where the English court may feel it necessary to intervene by injunction to protect a party from the injustice of having to litigate in a jurisdiction with which he or the subject matter had little connection. There may also be cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by a need to protect British interests or to prevent what the English court regards as a violation of the principles of customary international law."

134. That was said in the context of an anti-suit injunction application, but it has underlying principles which might be said to be applicable here. The powers given to the receiver are apparently very long-arm and would be capable of being exercised worldwide, including this jurisdiction. He has not disavowed any intention so to use them. They are oppressive and have already been used to the disadvantage of CIHL. CIHL could seek to challenge them in South Carolina, but is, for very good reason, not willing to do acts which would, or might, amount to a submission to the jurisdiction when it

laboured long and hard 35 years ago to demonstrate that it was not subject to it. CIHL can be seen, as a matter of English law, to have no connection with South Carolina. Yet it has been subjected to an agency there which is being implemented in a manner which assumes a connection which does not exist based on a factual foundation which an English court has found to be false.

135. I do not consider that considerations of comity, which I fully respect, require this court to hold its hand so far as all activities outside South Carolina are concerned, and I have already indicated that I would be prepared to grant relief which has at least that effect. The much more difficult question is whether comity requires that relief stops at the border of the state, as it were. Mr Dale has urged on me that if I do not grant an injunction which covers South Carolina as well then any relief I grant would be toothless. I am not convinced it would be toothless, because the grant of declarations, and of injunctive relief operating outside South Carolina, would be likely to mitigate many of the adverse effects feared by Mr Oren. However, it would not deal with the central question of what the receiver is doing purportedly on behalf of CIHL in court proceedings. I have given the matter a great deal of careful consideration and have come to the conclusion that, at least so far as the conduct of proceedings is concerned, comity does not prevent my making an order which governs at least that activity. Under English law the receiver should not be in a position to conduct proceedings (and thereby prejudice CIHL with his admissions and claims). His continued conduct of the third party claims, with their apparent acceptance of wrongdoing on the part of CIHL and of jurisdiction over it, with the object of marshalling assets in some sort of less than complete insolvency proceedings, falls into the very limited category referred to by Hoffmann J (and echoed by Lord Goff in the House of Lords in *Airbus Industrie GIR v Patel* [1999] AC 119 at 140D) in which considerations of comity give way to the

protection of private international law and national interests. It is not possible to see how the threats posed by the receiver can otherwise be successfully dealt with.

136. I therefore consider that the relief granted should extend to relief which prevents the receiver, even in South Carolina, from acting or purporting to act for or on behalf of CIHL. The main target of that is his participation in legal proceedings purportedly brought or defended by the receiver. His other powers are rather ancillary and I have wondered whether to exempt those from any restraint (or declaration) so as to give some scope for comity, but on reflection I consider that would be illogical.

137. As I have said, I have given particularly careful consideration to how for the relief should go. The jurisdiction of the South Carolina court, is, of course, to be respected, and no disrespect is intended by the course that I have taken. I do not sit as some sort of appellate court from the decisions of Chief Justice Toal, and I would not presume to do so. She does, of course, exercise her jurisdiction in accordance with the laws of South Carolina, and is free to do so. I have not taken lightly the decision to restrain a receiver appointed by her. I fully appreciate that this decision brings about a clash between two court systems. However, it seems to me that the requirements of the law that I administer require and justify what I have decided to do.

The position of Cape Jersey

138. So far I have been considering the claim of CIHL. Cape Jersey is also a claimant. It was justified in making a similar claim because its name is the name that appeared on all the court documents, and by and large still does so. If there remained an argument for saying that the receivership order and the receivers activities were directed to, and purportedly done on behalf of, Cape Jersey then that company might well have a justifiable claim for similar relief to CIHL.

139. The position of Cape Jersey as a matter of law hardly figured in the skeleton argument of counsel, or in the evidence of Mr Oren. The skeleton invited me to proceed on the basis that Jersey law was the same as English law and to grant relief accordingly. Then shortly before finalising this judgment I received a witness statement from Mr Brehony exhibiting a short report of a Jersey lawyer addressing some of the points.

140. I have not had time to assimilate that late-advanced material properly, but consider that, at least at the moment, it is now not necessary to grant relief to Cape Jersey. The receiver has made it tolerably clear that he considers that the receivership covers CIHL and not Cape Jersey, and he has also said that Cape Jersey is not its target and he does not act for it (paragraph 64 above). The judge has also found that Cape Jersey is not the subject of the receivership – see paragraph 66 above. In those circumstances, and bearing in mind the absence of technical argument on the position of Cape Jersey, I do not think it necessary or appropriate to grant it relief, though it is understandable why it would have joined in these proceedings as a claimant in the first place. However, it will have liberty to apply should circumstances change and should it appear to be necessary for it to revive its claim for relief.

Conclusion

141. I therefore grant the declaratory and injunctive relief sought, subject to such adjustments as might fall to be made as a result of debate on the delivery of this judgment.

APPENDIX 1 – THE ADAMS v CAPE FACT SUMMARY IN THE COURT OF APPEAL

The facts on "presence" as found by Scott J.

We will now state in summary form the facts as found by the learned Judge on the "presence" issue. This summary will be taken from the judgment of Scott J. and, for the most part, in his words. Some references to pages of the transcript of the judgment and some comments and explanations will be added in brackets.

1. Cape until 1979 presided over a group of subsidiary companies engaged in the mining and marketing of asbestos. On 29th June 1979 their interest in asbestos ended when their subsidiary companies were sold by Cape to Transvaal Consolidated Exploration Co. Ltd. ("TCL"), a South African company. (J.4A).

2. The asbestos mines were in South Africa. The mining companies were South African. The most important of them was Egnep. The shares in Egnep and the other mining companies were held by Cape Asbestos South Africa (Pty) Ltd., ("Casap"), also a South African company. Prior to 2nd December 1975 the shares in Casap were held by Cape. (J.4D).

3. In 1953 Cape caused to be incorporated in Illinois the company called NAAC. (This is the company whose office in Chicago is said by the plaintiffs to have been the place of business in the USA at which, until May 1978, Cape and Capasco were present.) The shares in NAAC were held by Cape. The function of NAAC was to assist in the marketing of the asbestos in the USA upon sales by Egnep or Casap to purchasers there. (J.4F). NAAC was the marketing agent of the Cape Group in the USA.

4. NAAC did not at any time have authority to make contracts, in particular for the sale of asbestos, which would bind Cape or any other subsidiary of Cape. (J61).

5. On a date before 1960 Capasco, an English company, was incorporated. (J.4). Its shares had at all times been held by Cape. It was responsible for the supply, marketing and sales promotion throughout the world of Cape's asbestos or asbestos products but, since in 1960 NAAC was already at work, marketing in the USA was left in the main to NAAC. (J.5A).

6. In 1975 there was a change in the organisation of the Cape Group. Cape International and Overseas Ltd. ("CIOL"), an English company, was incorporated as a wholly owned subsidiary of Cape. The shares in Casap (the South African company which owned the shares in the mining subsidiaries) and the shares in NAAC (the marketing subsidiary in Illinois) were transferred to CIOL. This insertion of CIOL between Cape, on the one hand, and Casap and NAAC on the other, did not materially alter the way in which the subsidiaries carried on business and managed their affairs. The sale by Cape to TCL in June 1979 (see para 1 above) was effected by sale of the shares in CIOL. (J.5).
7. Before 1962 the Owentown factory was run by Unarco who were customers for Egnep's amosite asbestos. In 1962 PCC purchased-the factory and, until 1972 when the factory was closed, purchased asbestos supplied by Egnep and used it in the factory. (J.5).

8. When the settlement of the Tyler 1 proceedings was concluded in September 1977 Cape, as stated above, decided to take no part in the Tyler 2 proceedings. (J.16B). The further

decision was made at a Board meeting of Cape in November 1977 to reorganise the group's asbestos selling arrangements in the USA which would in future be more closely controlled from South Africa; and as part of this reorganisation, NAAC should be wound up. (J.16). Part of the reason for that decision was to counter an argument that under English law Cape's interest in NAAC's business sufficed to give the Tyler Court jurisdiction over Cape. (J.17).

9. Cape, however, did not intend to abandon the USA as a market for Cape's asbestos. To accompany the liquidation of NAAC, alternative marketing arrangements were made. Associated Mineral Corporation ("AMC"), a Lichtenstein corporation, was formed, the bearer shares in which were held by Dr. Ritter, a lawyer, on behalf of CIOL. All sales into the USA of Cape's asbestos were to be sales by AMC. (J.17).

10. A new marketing entity in the United States was on 12th December 1977 created, namely Continental Productions Corporation ("CPC"). CPC was not a subsidiary of Cape. The shares were held by Mr. Morgan, a US citizen and resident of Illinois, who had for four years been President of NAAC. By an agency agreement in writing dated 5th June 1978, between CPC and AMC (see para 28 below), CPC were to act as agent for AMC in the USA for the purpose of the sale of asbestos. CPC would be remunerated by commission but had no authority to contract on behalf of AMC or any other Cape company. CPC was to act as a link between AMC and the US purchasers in connection with shipping arrangements, insurance etc. (J.17).

11. As from 31st January 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets. (J.68E-H). (This finding is challenged by the plaintiffs. The cessation of NAAC's business occurred, it is said, on 18th May 1978. It is to be remembered that the Tyler 2 actions were commenced on dates between 19th April 1978 and 19th November 1979. If presence of Cape/Capasco could be proved through the office and actions of NAAC but not through the office and actions of CPC under the new marketing arrangements, the point could be of importance). NAAC executed articles of dissolution on 18th May 1978. (J.68).

12. Through the medium of AMC and with the assistance of CPC, Egnep's amosite asbestos continued to be sold into the US until the sale on 29th June 1979 to TCL by Cape of its interests in the subsidiaries: (J.18B) see para 1. above. In paragraphs 13 to 23 below we summarise the detailed findings of Scott J. as to the location, control and operations of NAAC as marketing agent for the Cape Group asbestos. These are to be compared with the location, control and operation of the alternative marketing arrangements provided by AMC and CPC after those arrangements came into existence on some date between 12th December 1977 when CPC was formed and 5th June 1978 when the agency agreement of that date between CPC and AMC was made. We summarise the findings of Scott J. as to the location, control and operations of CPC and AMC in paragraphs 24 to 37 below.

13. Mr. Morgan in December 1970 had been appointed Vice-President of NAAC. He was made President on 1st July 1974 and so continued until dissolution of NAAC in 1978. At all material times the Vice-President of NAAC was Mr. Meyer, an attorney and partner in the firm of Lord Bissell and Brook of Chicago. That firm acted for the Cape Group of companies as their US attorneys. NAAC had offices on the 5th Floor of 150 North Wacker Drive, Chicago. NAAC was the lessee; paid the rent; owned the office furniture and fittings;

and employed a staff of some 4 people. Mr. Morgan was in charge. (J.58). NAAC's dominant purpose was to assist and encourage sales in the US of asbestos mined by the Cape subsidiaries, of which one was Egnep. Contracts with US customers for the supply of asbestos were made by Egnep or Casap. The contracts tended to be long term without specification of the quantity. The US customer would, through NAAC, notify Casap or Egnep of the quantity required and the time for delivery. It was not clear to Scott J. whether the information went directly from NAAC to Casap and Egnep or whether it went via Capasco. Shipping arrangements and delivery date would be arranged by Casap or Egnep and passed to the US customer through NAAC. Egnep could not always provide the full amount of asbestos ordered. If that happened NAAC would, if it could, purchase asbestos from US Government stocks in order to supply it to the US customers. (J.59)

14. NAAC thus had two main forms of business which it carried on: first, as intermediary in respect of sales by Egnep to US customers in return for commission paid by Casap; and, secondly, so as to supplement sales from Egnep, sales of asbestos to US customers in which NAAC contracted as principal both in purchasing and in selling on. (J.59G).

15. In addition, NAAC also carried on business as principal on its own account in buying asbestos textiles, mainly from Japan, and selling the textiles to US customers; and, from time to time, in buying asbestos from Casap or Egnep for sale on to US customers. (J.60A). Further, for storing asbestos which it had purchased, whether from US Government stocks or from Egnep or Casap, NAAC rented in its own name and paid for warehousing facilities. (J.60C).

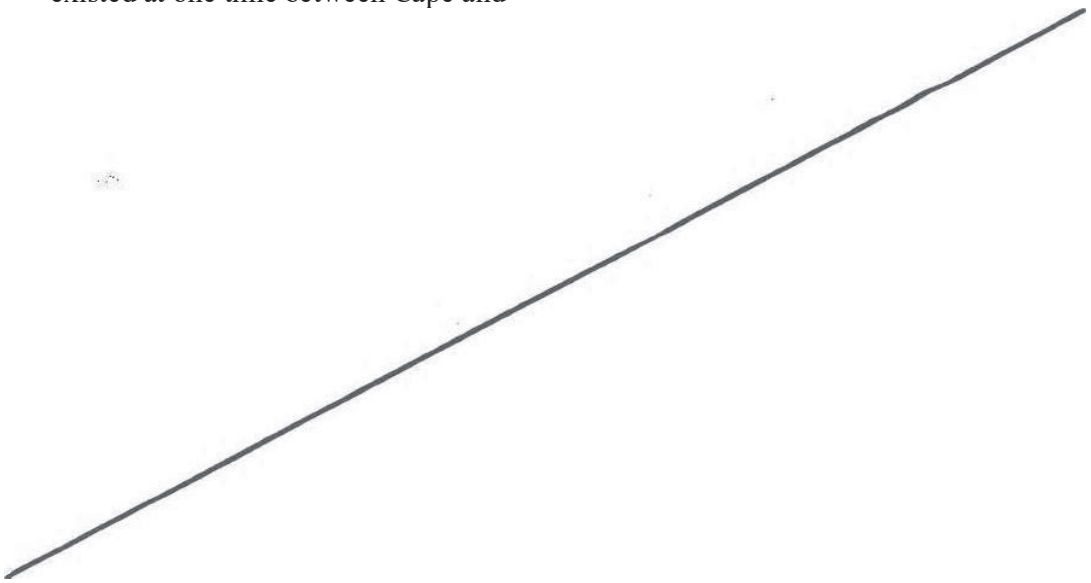
16. NAAC was the channel of communication between US customers, such as PCC, and Capasco or Casap. There was undoubtedly "a sense in which NAAC was, if the Cape Group of companies is viewed as a whole, part of the selling organisation of the group and Cape's agent in the US". (J.61C-D).

17. Directorships: prior to 11th July 1975 the Board of Directors of NAAC included two senior officers of Cape. Until 1974 Mr. Dent, Chief Executive of Cape, was Chairman of NAAC. In 1975, Mr. Higham succeeded Mr. Dent in both positions. The Other Cape director of NAAC was Dr. Gaze, Chief Scientist of the Group, Chairman of Capasco and an Executive Director of Cape. In July 1975, Mr Higham and Dr. Gaze resigned from the Board of NAAC. This change was, according to the deposition of Mr. Morgan in the Tyler 1 proceedings, attributable to the existence of the Tyler 1 proceedings and was made "to dissociate the parent company as fully as possible from the operating companies" but implied no "change whatever in the method of operation or the present responsibilities of individuals concerned."

18. As to control over corporate activities: the corporate, as opposed to commercial, activities of NAAC were controlled by Cape. Subject to compliance with Illinois law, and to some arguments or representations from Mr. Morgan, Cape directed the level of the dividend and the level of permitted borrowing. Such corporate financial control was no more and no less than was to be expected in a group of companies such as the Cape Group. (J.61).

19. As to control over commercial activities: there was no evidence that Cape or Capasco exercised such control over the commercial activities of NAAC as was exercised in respect of its corporate activities. Mr. Morgan was in executive control of its business. (J.62). (That finding is challenged by the plaintiffs). Dr. Gaze and Mr. Higham visited US customers from time to time to discuss their asbestos supply requirements and dealt with complaints. In so doing they acted as directors of Cape and Capasco and not as representatives of NAAC. (J.62). The business carried on by NAAC was its own business. (J.68). (That finding is also challenged).

20. There was no agency agreement between Cape and NAAC comparable to that which had existed at one time between Cape and



Capasco under which all of Capasco's business had been carried on by Capasco as agent for Cape so that, in effect, until termination of the agreement in the mid 1970s, Capasco's business had been Cape's business. The annual accounts of NAAC were drawn on the footing that NAAC's business was its own business and there was nothing to suggest that the accounts were drawn on a false footing: (J.79D-H).

21. NAAC had a separate identity and was not the "alter ego" of Cape. NAAC, an Illinois Corporation, carried on business in the USA; earned profits; and paid US taxes thereon. NAAC's creditor and debtors were its own and not Cape's. Cape was not taxed in the UK or in the USA on NAAC's profits. The return to Cape, as NAAC's shareholders, took the form of an annual dividend passed by a resolution of NAAC's Board of Directors. The corporate forms applicable to NAAC as a separate legal entity were observed. NAAC had its own pension scheme for its own employees. It made its own warehousing arrangements for the storage of its own asbestos. (J.62-63).

22. As to place of business, neither Cape nor Capasco had an office in Illinois. The offices at 150 North Wacker Drive were NAAC's offices. (J.68). (That finding is challenged).

23. The arrangements for the dissolution of NAAC and the formation of AMC and CPC (see paras 8 to 10 above) over the period November 1977 to February 1978 were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the USA while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries. (J.70C). This arrangement was associated with the decision to take no part in the Tyler 2 proceedings and to resist enforcement of any default judgments on the ground that the Tyler Court had no jurisdiction over Cape or its subsidiaries other than NAAC. The defence on those lines would require the trading connection between Cape and its subsidiaries on the one hand and the United States on the other to be kept to a minimum. Hence the need to liquidate NAAC, a Cape subsidiary, and to allow at least some of NAAC's trading functions to be assumed by an Illinois corporation which was not a Cape subsidiary, i.e. CPC. (J.70-71).

24. The senior management of Cape, including Mr. Penna, the Cape Group solicitor, were very anxious that Cape's connections with CPC and AMC should not become publicly known. Some of the letters and memoranda had a conspiratorial flavour to them. The question, however, whether CPC's presence in Illinois can, for purposes of jurisdiction under our law, be treated as Cape's presence must be answered by considering the nature of the arrangements implemented and not the motive behind them, and the "conspiratorial" references in the documents, although interesting, were in the Judge's view not relevant to the main question. (J.71).

25. As to the formation of AMC:- The cost of forming this Lichtenstein corporation, in which the bearer shares were held by Dr. Ritter on behalf of CIOL, was borne within the Cape Group. The intention was that all sales of Cape asbestos to US customers would be made by AMC. The exact nature of the arrangements between AMC and Egnep/Casap, whereby AMC became the owner of the asbestos so as to be able to resell it into the USA, was not disclosed in the evidence. That was not surprising since the relevant documentation had, since the sale of CIOL and Casap to TCL in 1979 been under the control of TCL but it was clear that AMC was no more than a corporate. name. It was an "invoicing company" with

no employees of its own and it probably acted through employees or officers of Casap or Egnep. (J.72A).

26. As to the formation of CPC: see pars 10 above: the lawyers who acted in the formation of CPC, in which corporation Mr. Morgan owned all the shares, were Lord Bissell and Brook, attorneys for Cape in the US. Directly or indirectly, the costs of incorporation were paid by Cape or Capasco. The shares in CPC, however, were owned independently by Mr. Morgan (J.76G) both in equity and in law. (J.72E).

27. The agency agreement of 5th June 1978 between AMC and CPC: see pare 10 above: Mr. Morgan was also a party to this agreement. By it AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of USA, Canada and Mexico for a period of 10 years from 1st February 1978 to 31st January 1988. There was a proviso for termination on 12 months' notice. The duties imposed on CPC were to carry out the appointment diligently and in particular
(a) to keep AMC advised... as to competitor products... and market conditions... (b) to... facilitate or expedite delivery of products contracted to be sold by AMC in the territory; (c) to seek out and promote prospective business on behalf of AMC and to forward to AMC requests for supplies of products provided always that supplies should only be at prices and upon terms and conditions determined by AMC. It was expressly provided that nothing in the agreement should be construed so as to give CPC any authority to accept any orders, to make any sales, or to conclude any contracts on behalf of AMC. CPC was left free to sell material and products other than asbestos fibre and to involve itself in other commercial activities. CPC was required to provide, maintain and operate at its own cost office accommodation and staff for running an efficient advice and consultancy bureau. Remuneration for CPC was to be by commission upon the cost of all asbestos sales by AMC in the territory. (J.72-73).

28. As to the goodwill of CPC:- the agency agreement provided in paragraph 11, under the heading "Pre-emption Rights", that in the event that Mr. Morgan should desire to cease management control of CPC, or to dispose of all of his share holding in CPC or such part as constituted majority control, or to dispose of any shares to a person, firm or company which was directly or indirectly engaged in the sale of asbestos fibre or the manufacture or sale of insulation materials; or in the event that CPC terminated this agreement for any reason or refused to agree to further renewal upon its expiry; or in the event that AMC terminated the agency agreement in the event of insolvency of either party or substantial breach of obligations; then Mr. Morgan should in such event offer all shares owned by him in CPC for sale to AMC at their net book value excluding goodwill. Beneficial ownership of the name "Continental Products Corporation" was provided to belong to AMC. (J.73G-H).

29. CPC commenced business on 1st February 1978 in order to fit in with the cesser of business of NAAC on 31st January 1978. The terms of the agency agreement were a reliable guide to the nature of the relationship between CPC and AMC and, hence, between CPC and Cape. (J.74B).

30. As to CPC's place of business:- CPC leased offices on the 12th Floor of 150 North Wacker Drive. NAAC's offices had been on the 5th Floor in the same building. Most of the furniture and fittings in NAAC's offices were removed to CPC's offices. CPC took over NAAC's telephone number: (J.74C).

31. As to the cost of CPC's commencement in business:- CPC had an immediate need for funds for rent, furniture, and payment of staff but commission under the agency agreement with AMC would not be payable immediately. The sum of $12,000 was paid by and on behalf of Cape to CPC to assist in meeting the cost of establishing itself. In addition a sum of £160,000 was paid to CPC on 4th January 1978 to enable CPC to set up in business and to perform the agency obligations expected of it: (J.74-75).

32. As to the business activities of CPC:- CPC acted as an agency in connection with sales of Cape asbestos and, in addition, it traded in asbestos textiles on its own account, buying and selling as principal. (J.75E). Like NAAC, CPC acted as "agent" for the purpose of facilitating the sale in the US of Cape's asbestos. In NAAC's time the seller was Egnep or Casap. The seller in CPC's time was, nominally, AMC but, in reality, still Egnep or Casap. Like NAAC, CPC had no authority to bind any Cape subsidiary to any contract. (J.76-77).

33. CPC's conduct of its affairs was much the same as NAAC's had been. It paid the rent for its offices and paid its employees. It received commission from AMC as well as incurring expenditure and receiving payments in connection with its independent trading activities. (J.76D-E).

34. CPC was an independently owned company (J.76G). CPC, like NAAC, carried on its own business from its own offices at 150 North Wacker Drive. (J.77B). (Both these findings are challenged).

35. Upon the evidence the corporate form of the Cape Group was not "form" only. Each corporate member of the Cape Group had its own well—defined commercial function designed to serve the overall commercial purpose of mining and marketing asbestos. (J.77F-H).

36. In August 1984, according to the evidence of Mr. Summerfield, a solicitor acting for the plaintiffs, there was at 150 North Wacker Drive a noticeboard giving the names of both CPC and AMC as the occupants of the offices on the 12th Floor. There was no evidence whether the board was there in 1979 when the sale of the subsidiaries was made by Cape to TCL: (see para 1 above). There was no evidence to suggest that AMC was an occupant of the offices at the time of the commencement of the Tyler 2 actions in the period 19th April 1978 to 19th November 1979. (J.78-79).

APPENDIX 2 – THE RECEIVERSHIP ORDER - POWERS

Plaintiffs have moved this Court to appoint a Receiver over Cape PLC, pursuant to S.C. Code §15-65-10(4)-(5). This Court finds that the application is meritorious under the applicable statute because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company") have dissolved and Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted. Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Cape as well as any claims related to the actions or failure to act of Cape's insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

[A provision related to managing insurers - not relevant here]

The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.