

TRACKING CHART OF FINDINGS IN ADAMS V CAPE & COMPARISON TO TIBBS THIRD-PARTY COMPLAINT

Facts Alleged by Receiver (purportedly on behalf of CIHL/Cape PLC) ¹	Third-Party Complaint [& Proposed Am. Third-Party Complaint] ² Reference	Determinations of primary fact by Scott J in the court of first instance [see Ex. A-2, “Statement of Primary Facts”] ³	Statement of Primary Facts Reference [Ex. A-2]	“Schedule of Facts which ought to have been determined” [see Ex. A-3, “Schedule of Appealed Factual Findings”] ⁴	Determinations of fact in the Appendix to the Judgment in Adams v Cape [see Ex. A-4, “Appendix”] ⁵	Appendix Reference [Ex. A-4]	Determinations of fact by the Court of Appeal in Adams v Cape [see Ex. A-1, “Adams Judgment”]	Adams Judgment Reference [Ex. A-1]
<u>(1) Sale by Cape and use of asbestos in the States</u>								
“Third Party Defendants ... are responsible for the <u>sale and use of asbestos</u> or asbestos-containing products throughout the United States, including South Carolina...”	TPC “Introductory Statement” (p.10); TPC ¶ 140	“Cape until 1979 presided over a group of subsidiary companies engaged in the mining and marketing of asbestos. On 29 th June 1979 their interest in asbestos ended when their subsidiary companies were sold by Cape...”	Primary Facts ¶ 1	“[Schedule of Appealed Facts] 2. Egnep did not have a sales organization of its own.”	“[Schedule of Appealed Facts] 2. The defendants did not dispute that Egnep had no sales organization which solicited business, but they contended that, on the evidence, it clearly had officers and servants who handled the fulfilling of orders and the handling of shipping and invoicing, and financial matters relating thereto.”	Page 1	“Between 1953 and 1978 when it was dissolved, another subsidiary of Cape, NAAC assisted in the marketing of asbestos of the Cape Group in the United States. The plaintiffs’ contention was that the defendants had been responsible for the supply of asbestos fibres directly or indirectly...”	505H-506A ⁶
“At all times ...Cape was deeply involved in all elements of the global asbestos industry ...selling asbestos [fiber] to scores of manufacturers of asbestos-containing products in the United States.”	TPC ¶ 40			“[Schedule of Appealed Facts] 1. Cape was incorporated in 1893 to take over blue asbestos mining operations in the Orange river valley and thereafter it expanded its blue mining division and in 1925 acquired a number of amosite asbestos mines in the Transvaal including the mines at Penge.”	“[Schedule of Appealed Facts] 1. This was not disputed by the defendants.”	Page 1	“[The Plaintiff’s] main submissions were substantially as follows: (1) <u>Cape and Capasco were present and carrying on business in the United States of America</u> , namely, marketing and selling the Cape group’s asbestos, through NAAC until May 1978, and through CPC (or [AMC] ...until June 1979 from a place of business in Illinois because NAAC and CPC were the agents of Cape ... “the agency argument”. (2) Cape/Capasco and NAAC constituted a <u>single commercial unit</u> and for jurisdictional purposes, NAAC’s presence in Illinois therefore sufficed to constitute the presence of Cape/Capasco. Likewise, Cape/Capasco and CPC, which performed the same functions as those previously carried on by NAAC, constituted a <u>single economic unit</u> , and CPC’s presence in Illinois sufficed to	531H-532C

¹ Cape PLC v. Anglo American PLC, et al., C/A No. 2023-CP-40-01759, Court of Common Pleas for the Fifth Judicial Circuit, State of South Carolina, County of Richland.

² Paragraph and page references to the Third-Party Complaint, filed June 30, 2023, (“TPC”) and Proposed Amended Third-Party Complaint, which the Receiver has asked for permission to file (“Proposed Am. TPC”), are the same unless otherwise indicated.

³ The 37 primary facts by Scott J were considered by the Court of Appeal in Jimmy Wayne Adams & Others v. Cape Industries Plc & Capasco Limited [1990] Ch. 433 (“Adams v. Cape”). See Ex. A-2, pages 15–25). This statement of primary facts is unreported.

⁴ This proposed “Schedule of facts which ought to have been determined” is contained in the Amended Notice of Appeal in Adams v Cape (filed by the plaintiffs as non-prevailing parties in the court of first instance). See Ex. A-3.

⁵ The Appendix to the judgment in Adams v Cape deals seriatim with the allegations of fact made in the 25 paragraphs of the “Schedule of facts which ought to have been found” included in the plaintiffs’ Amended Notice of Appeal. See Ex. A-4. It too is unreported.

⁶ These are page and accompanying paragraph (as indicated in the margins) references.

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							constitute the presence of Cape/Capasco... “the single economic unit argument”. (3) In relation to CPC/AMC, the corporate veil should be <u>lifted</u> so that CPC’s and AMC’s presence in the United States of America should be treated as the presence of Cape/Capasco... “the corporate veil argument”. (emphasis added)	
<u>(1)(a) Cape operated NAAC and through NAAC</u>								
“[O]n October 14 1953, Cape established [NAAC] ...the two decades until 1976 – the period when Cape operated NAAC to provide raw asbestos [fiber] to customers in the United States, the company’s most important market.”	TPC ¶ 70; see also TPC ¶ 140.e.–f., h.	“On 14 October 1953, Cape had caused to be incorporated in Illinois ...[NAAC]. ...The function of NAAC ... was to assist in the marketing of the asbestos in the US. NAAC acted as a liaison between the US purchasers of the asbestos and the seller, either Egnep or Casap...marketing in the US was left in the main to NAAC.”	Primary Facts ¶¶ 3 & 5 <i>See also</i> Ex. A-1, at 443F-H	“[Schedule of Appealed Facts] 3. NAAC was incorporated in the State of Illinois in October 1953 as the “medium” by which Cape carried on its business of marketing and selling asbestos in the USA. From 1970 NAAC’s president was Max Meyer, a lawyer, a partner in Cape’s attorneys in the USA who ostensibly ran NAAC from his law offices. Morgan joined NAAC on December 1 1970 having been interviewed in London by Gaze and took over as President on July 1 1974 when Meyer became its vice president. <u>It was virtually a one man organization</u> in the sense that Morgan himself was the only person who had customer contact.”	“[Schedule of Appealed Facts] 3. It was agreed that NAAC was incorporated in 1953...That evidence does not by itself show anything inconsistent with Scott J’s finding set out in paragraph 14 of the primary facts section.” “As the person immediately in charge of the day to day work of NAAC, Mr Morgan succeeded a Mr Cryor. From the phrase “ostensibly ran NAAC from his law offices” nothing more can be derived than that Mr Meyer held the position of President or Managing director of NAAC from his law offices. There is nothing to show that he held himself out as running NAAC from his law offices. The person in day to day charge of the business done by NAAC was firstly Mr Cryor and then Mr Morgan.”	Page 2	“[Scott J] found as facts...that the...offices were NAAC’s offices and that NAAC had no authority to contract on behalf of Cape or Capasco or any other company in the Cape group.”	527F-G
“Cape designed NAAC to operate as Cape’s wholly controlled instrumentality for the “purpose of expediting and facilitating the movement” of asbestos from South African mines into the United States.”	TPC ¶ 72	“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.”	Primary Facts ¶ 4	“[Schedule of Appealed Facts] 6. NAAC did not deal and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco.”	“[Schedule of Appealed Facts] 6. It seems clear that NAAC did deal directly with Egnep in the sense that the contracts of sale were made in which Egnep and NAAC were principals but that, as a matter of Group policy, which Cape could enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense	Page 6	“There is no presumption that the subsidiary is the parent company’s alter ego...If a company chooses to arrange the affairs of its group in such a way that the business carried out in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so.”	537B-C 532E

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					NAAC was not permitted to deal with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC’s dealings with Casap.”		“It is indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities.”	
“To facilitate this, NAAC had both marketing and distribution roles:	TPC ¶ 72							
(i) serving as Cape’s sales agency in the United States, with sole authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines; and		<p>“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 US customer would, through NAAC, notify Casap or Egnep of the quantity required and the time for delivery... 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.”</p> <p>“In respect of these transactions NAAC contracted, both in purchasing the asbestos and in selling on to the US customers, as principal. ... NAAC also, it seems from the evidence, from time to time purchased asbestos from Egnep or Casap and sold on to US customers. These purchases and sales it transacted as principal.” (emphasis added)</p>	Primary Facts ¶ 14 <i>See also</i> Ex. A-1, at 473A-C.	<p>“[Schedule of Appealed Facts] 4. NAAC’s involvement in the sale of Cape’s asbestos took two forms:-</p> <p>Sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from CASAP...</p> <p>Organising and arranging the completion of contracts between customers and Egnep. NAAC received a commission from CASAP.”</p>	<p>“[Schedule of Appealed Facts] 4. The true position appears on the evidence to be that, as the judge found, NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. In so far as the asbestos originated from Egnep’s mines there is no ground for supposing that Egnep, by its own officers and servants, did not make and record the sales either direct to customers in the USA, including NAAC, or to another subsidiary, in particular Capasco or Casap, from which NAAC on occasions purchased.”</p>	Pages 4 & 5	“It seems clear that NAAC, as principal, made direct purchases of raw asbestos from Egnep...it made similar purchases from Casap.” (emphasis added)	537F-G
		“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	Primary Facts ¶¶ 15–17.	“[Schedule of Appealed Facts] 9. When corresponding with US customers Cape referred to NAAC as “our Chicago office” and NAAC referred to Cape as “our London office”. NAAC held itself out to a	“[Schedule of Appealed Facts] 9]. NAAC was performing, and holding itself out to PCC as performing, the role in the Cape Group which Scott J. held was part of its function: i.e. as intermediary in respect of sales by Egnep to US customers and as the channel of communication	Pages 13 & 16	“In the face of these facts, now unchallenged, it is in our judgment clear beyond argument that NAAC was carrying on business of its own. The only question is whether, in performing the functions which it performed on behalf of Cape/Capasco, it was carrying on its own business or their business.	546D-G/H

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		<p>contracted as principal both in purchasing and in selling.”</p> <p>“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 organization of the group and Cape’s agent in the US.”</p>		<p>large US customer as being part of the Cape selling organization.”</p> <p>“[Schedule of Appealed Facts] 8. It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler.”</p>	<p>between customers, such as PCC and Capasco or Casap.” (emphasis added)</p> <p>“[Schedule of Appealed Facts 8]. The picture derived from the evidence relied on under (8) (i) to (iv) is, again, as it seems to us, in accordance with Scott J’s conclusions as to how the subsidiaries of Cape operated, i.e. with each one carrying out its own function.”</p>		<p>What, then, were these functions? ... <u>its functions were to assist in the marketing of asbestos in the United States of America upon sales by Egnep and Casap and generally to assist and encourage sales in the United States of America of asbestos of the Cape group.</u> It acted as the channel of communication between Cape/Capasco and United States customers...It organised and arranged the performance between United States customers and Egnep. <u>It had a co-ordinating role, particularly in arranging delivery.</u> The United States customer would specify to NAAC from time to time when it desired delivery to be made. This information would be conveyed through NAAC to Casap and Egnep. Shipping arrangements and delivery dates would be arranged by Casap or Egnep and communicated to the United States customers via NAAC. NAAC would receive documents and pass them on to the customers. It also received requests and complaints which it would normally pass on to Capasco. Generally it assisted in “nursing” the group’s customers for asbestos and ensuring they were satisfied. For its services NAAC was remunerated by way of a commission paid to it by Casap on sales effected by Egnep or Casap.” (emphasis added)</p>	
		<p>“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. Further, for storing asbestos which it has purchased, whether from US Government stocks or from Egnep or Casap, NAAC rented in its own name and paid for warehousing facilities.”</p>	<p>Primary Facts ¶¶ 15–17</p>	<p>“[Schedule of Appealed Facts] 5. NAAC as a sideline imported asbestos goods from Japan which it sold to its textile industry.”</p>	<p>“[Schedule of Appealed Facts 5]. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial...That submission, to the effect that such sales were not trivial having regard to the turnover of NAAC, appears upon all the evidence to be correct.”</p>	<p>Page 5</p>		

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(ii) ensuring the proper distribution of asbestos products from Africa “all the way through to the customer’s plant...”		“Shipping arrangements and delivery date would be arranged by Casap or Egnep and passed to the US customer through NAAC.”	Primary Facts ¶ 14	“[Schedule of Appealed Facts] 6. NAAC did not deal, and was not permitted to deal with Egnep or Casap but had to go through Cape and Capasco.”	“[Schedule of Appealed Facts 6]. “NAAC’s orders for asbestos from Egnep were placed through Capasco. Egnep then shipped the asbestos to NAAC.”	Page 6		
“In coordination with, and at the direction of, the ... Cape... network, NAAC sold millions and millions of dollars of asbestos ...NAAC’s own records show that Cape sold asbestos to companies in South Carolina”	TPC ¶ 73	“These were the two main forms of business carried on by NAAC. First, it acted as intermediary in respect of contracts between the US customers and Egnep. ... Secondly, NAAC sold asbestos to US customers in order from time to time to supplement sales from Egnep.”	Primary Facts ¶ 15 <i>See also</i> Ex. A-1, at 472H-473A	“[Schedule of Appealed Facts] 4. Sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from CASAP... represented, in terms of tonnage, about 25% of NAAC’s business.”	“[Schedule of Appealed Facts 4]. The true position appears on the evidence to be that, as the judge found, NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. In so far as the asbestos originated from Egnep’s mines there is no ground for supposing that Egnep, by its own officers and servants, did not make and record the sales either direct to customers in the USA, including NAAC, or to another subsidiary, in particular Capasco or Casap, from which NAAC on occasions purchased.”	Page 2		
“Cape and NAAC implemented a “conscious pattern of product distribution [of asbestos] nationally...”	TPC ¶ 75	“NAAC’s dominant business purpose was to assist and encourage sales in the US of asbestos mined by the Cape subsidiaries.”	Primary Facts ¶ 14 <i>See also</i> Ex. A-1, at 472E	“[Schedule of Appealed Facts] 3. NAAC was incorporated ...as the ‘medium’ by which Cape carried on its business of marketing and selling asbestos in the USA.”	“[Schedule of Appealed Facts] 3. That evidence does not by itself show anything inconsistent with Scott J’s finding set out in paragraph 14 of the primary facts section.”	Page 5	<i>See</i> above in relation to sale of asbestos by NAAC	
“Cape deliberately and purposefully availed itself entirely of the United States market for asbestos [fiber]...”	TPC ¶ 76	<i>See</i> above		“[Schedule of Appealed Facts] 5. NAAC as a sideline imported asbestos goods from Japan which it sold to its textile industry.”	“[Schedule of Appealed Facts 5]. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial...That submission, to the effect that such sales were not trivial having regard to the turnover of NAAC, appears upon all the evidence to be correct.”		<i>See</i> above in relation to sale of asbestos by NAAC	
<u>1(b) Management of NAAC</u>								
“NAAC ...was essentially a one-man operation...”	TPC ¶ 77	“As to control over commercial activities: there was no evidence that Cape or Capasco exercised such control over commercial activities of NAAC as was exercised in respect of its corporate activities. Mr Morgan was in executive control of its	Primary Facts ¶ 20	“[Schedule of Appealed Facts] 3. [...] It was virtually a one man organization in the sense that Morgan himself was the only person who had customer contact.” “[Schedule of Appealed Facts] 11. Gaze, who was at all material	“[Schedule of Appealed Facts 3]. Mr Morgan had an important and long-serving assistant, Mrs Holtze. She had started with NAAC in 1953 as assistant to Mr Cryor. She became secretary of NAAC and assistant treasurer and remained	Page 3 <i>See also</i> page 13	“As to the relationship between Cape and NAAC, it is of the very nature of a parent company-subsidary relationship that the parent company is in a position, if it wishes, to exercise overall control of the general policy of the subsidiary. The plaintiffs however submitted that	538A-E

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		<p>business...The business carried on by NAAC was its own business”.</p> <p>“Mr Morgan was...in charge. He had however, an important assistant, a Mrs Holtze. In addition, there were two or three other office staff.”</p>	<p>See also Ex. A-1, at 472D-E</p>	<p>times a director of CASAP, the Chairman of Capasco and until July 1975 a director of NAAC, was in overall control of the selling and distribution of Cape’s asbestos. After Cape had, because of the asbestos litigation, ceased to have any directors on the Board of NAAC, Dr Gaze nevertheless continued to run NAAC. Mr Morgan’s authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Meyer or Gaze.”</p>	<p>with NAAC until its dissolution. Mrs Holtze contacted customers with regard to documentation and shipping...She also communicated with customers if there was a shortfall in their requirements from Egnep and arranged supply from the US Government’s stocks.”</p> <p>“[Schedule of Appealed Facts 11]. There is nothing in this evidence inconsistent with or of significant addition to the findings of Scott J as to the role of Capasco or of NAAC within the Cape Group.”</p> <p>“Scott J held that “Mr Morgan was in executive control of NAAC’s conduct of its business...Dr Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC’s business, namely purchase and sale of textiles...Nor did Dr Gaze, or any representative of Cape “run NAAC” with reference to the internal affairs of NAAC.”</p>	<p>See also pages 18–19</p>	<p>Cape’s control extended to the day-to-day running of NAAC.... [The Plaintiffs] challenged the finding of fact made by Scott J that “Mr Morgan was in executive control of NAAC’s conduct of its business....” Our conclusion shortly stated, is that the finding was justified by the evidence. A degree of overall supervision and to some extent control was exercised by Cape over NAAC as is common in the case of any parent-subsidiary relationship ...In particular, Cape would indicate to NAAC the maximum level of expenditure it should incur and would supervise the level of expenses incurred by Mr Morgan. Mr Morgan knew that he had to defer in carrying out the business activities of NAAC to the policy requirements of Cape as the controlling shareholders of NAAC. Within these policy limits, such as Cape’s requirements that NAAC’s orders for asbestos for sale by NAAC in the United States of America be placed through Capasco on behalf of Egnep and Casap, the day to day running of NAAC was left to him.”</p>	

		<p>“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 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 staff of some 4 people. Mr Morgan was in charge.”</p>	<p>Primary Facts ¶ 13</p>	<p>“[Schedule of Appealed Facts] 3. [...] It was virtually a one man organization in the sense that Morgan himself was the only person who had customer contact.”</p>	<p>“[Schedule of Appealed Facts 3]. The person in day to day charge of the business done by NAAC was firstly Mr Cryor and then Mr Morgan.”</p> <p>“Mr Morgan was, however, as submitted for the defendants, “head hunted” in the USA where he lived; the job was advertised in the USA: Mr Morgan was interviewed on two occasions by Mr Meyer in America and then once in London by Dr Gaze. His appointment was effected by Mr Meyer, then President of NAAC, in Illinois.”</p>	<p>Pages 2 & 3</p>		
<p>“All key decisions ... including with respect to the fulfilment of specific purchase orders, were closely coordinated with and <u>directed by other Cape entities, or made by a board comprised of Cape executives</u> and lawyers...”</p>	<p>TPC ¶ 77</p>	<p>“Contracts with US customers for the supply of asbestos were entered into by Egnep or Casap – I am not clear which and it does not matter. The contracts tended to be long term but did not usually specify the quantity of asbestos to be sold. The practice was for the US customer to specify from time to time the quantity of asbestos it wished to purchase and the time when it desired delivery to be made. This information would be conveyed via NAAC to Casap and Egnep. Whether the information went directly from NAAC to Casap and Egnep or whether it went via Capasco is not clear. Shipping arrangements and delivery dates would be arranged by Casap or Egnep and communicated to the US customer via NAAC. The vagaries of production in the mines had the consequence that Egnep was not always able to provide the US customer with the full amount of asbestos that had been ordered. When a shortfall between the customers’ requirements and Egnep’s delivery capacity emerged, NAAC would endeavor to fill the gap by purchasing asbestos from US Government stocks and selling the asbestos to the US customers.”</p>	<p>Primary Facts ¶¶ 14, 15 & 19</p> <p><i>See also</i> Ex. A-1, at 472E-H</p>	<p>“[Schedule of Appealed Facts] 3. [...] It was virtually a one man organization in the sense that Morgan himself was the only person who had customer contact.”</p> <p>“[On Schedule of Appealed Facts] 6, NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco.”</p> <p>“[Schedule of Appealed Facts] 7. Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed.”</p>	<p>“[Schedule of Appealed Facts 3]. The person in day to day charge of the business done by NAAC was firstly Mr Cryor and then Mr Morgan.”</p> <p>“[Schedule of Appealed Facts 6]. It seems clear that NAAC did deal directly with Egnep in the sense that the contracts of sale were made in which Egnep and NAAC were principals but that, as a matter of Group policy, which Cape could enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense NAAC was not permitted to deal with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC’s dealings with Casap.”</p> <p>“[Schedule of Appealed Facts 7]. ...The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for coordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions.”</p>	<p>Pages 3 & 6</p> <p><i>See also</i> pages 37–38</p>	<p>“There is no challenge to the Judge’s findings that (a) the corporate financial control exercised by Cape over NAAC in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be expected in a group of companies such as the Cape group... ; (b) 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.”</p>	<p>538E-F</p>
<p>“NAAC’s operations and decision making were <u>wholly dominated by Cape</u> ...How dominated was NAAC? The company could not</p>	<p>TPC ¶ 79</p>	<p>“There is also evidence, as perhaps might be expected, that the <u>corporate, as opposed to commercial activities of NAAC were controlled by Cape</u> as to the dividend that NAAC was to declare....and subject to compliance</p>	<p>Primary Facts ¶¶ 19 & 20</p> <p><i>See also</i> Ex. A-1, at 473H-474C</p>	<p>“[Schedule of Appealed Facts] 12. Cape decided on the salaries of the staff and made the senior appointments.”</p> <p>“[Schedule of Appealed Facts] 13. Cape effectively decided what</p>	<p>“[Schedule of Appealed Facts 12]. The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr Morgan was placing his suggestions before</p>	<p><i>See</i> pages 21–22.</p>	<p>“There is no challenge to the Judge’s findings that (a) the corporate financial control exercised by Cape over NAAC in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be</p>	<p>538E-F</p> <p><i>See also</i> Ex. A-2, Primary Facts ¶ 21</p>

<p>“borrow one dollar without [Cape’s] approval”</p>		<p>with Illinois law, the parent company was in a position to and did direct the level of the dividend. In addition, the financial controllers in London were consulted about the level of borrowing permitted by NAAC in each financial year. <u>This corporate financial control exercised by a parent company over its subsidiary is ... no more and no less than one would expect to find in a group of companies such as the Cape group.</u> There is, however, no evidence of any like control exercised by Cape and Capasco over the conduct by NAAC of its commercial activities.” (emphasis added)</p>		<p>NAAC was allowed to spend or borrow.”</p>	<p>the Board which included the Cape representatives.”</p> <p>“[Schedule of Appealed Facts 13]. Cape indicated to NAAC the maximum level of total expenditure which NAAC should incur and Cape considered such matters as the level of expenses incurred by Mr Morgan. But the defendants contended that, on the evidence, Cape did not interfere with day to day expenditure or with particular borrowings by NAAC provided the total expenditure and borrowings stayed within the limits laid down.”</p>		<p>expected in a group of companies such as the Cape group... ; (b) 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.”</p>	
<p>Cape’s domination also influenced and controlled NAAC’s risk management decision-making including its purchase of insurance...Cape directed NAAC to buy wholly inadequate insurance coverage...”</p>	<p>TPC ¶ 80</p>	<p>See above</p>		<p>“[Schedule of Appealed Facts] 11. After Cape had, because of the asbestos litigation, ceased to have any directors on Board of NAAC, Dr Gaze nevertheless continued to run NAAC.”</p>	<p>“[Schedule of Appealed Facts 11]. Nor did Dr Gaze, or any representative of Cape, “run NAAC” with reference the internal affairs of NAAC such as...NAAC’s arrangements for insurance.”</p>	<p>Page 19</p>	<p>See above</p>	
<p>“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... regarding how to minimize the liability exposure of... Cape...”</p>	<p>TPC ¶ 81</p>	<p>See above in relation to oversight</p>		<p>“[Schedule of Appealed Facts] 11. After Cape had, because of the asbestos litigation, ceased to have any directors on Board of NAAC, Dr Gaze nevertheless continued to run NAAC.”</p> <p>“[Schedule of Appealed Facts] 19. NAAC continued to trade at least until the end of April, from CPC’s offices to which its files were transferred.”</p> <p>“[Schedule of Appealed Facts] 20. The Respondents’ only purpose for the incorporation of CPC was a substitute company for the sale of the Respondents’ asbestos in the USA.”</p>	<p>“[Schedule of Appealed Facts 11]. Mr Morgan coordinated the overall purchases by NAAC through Dr Gaze. Mr Morgan understood Dr Gaze to have been the ultimate authority in connection with the sale of asbestos. NAAC’s dealings on a day to day basis were through Capasco and that company was directed by Dr Gaze.”</p> <p>“Mr Morgan knew that he had to defer, in carrying out the business activities of NAAC, to the policy requirements of Cape as the controlling shareholders of NAAC. Within those policy limits – such as the requirement that NAAC’s orders for asbestos for sale by NAAC in the USA be placed through Capasco on behalf of Egnep and Casap – the day to day running was left to him...Dr Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC’s business.”</p> <p>“[Schedule of Appealed Facts 19]. It was the intention of all concerned that NAAC’s functions in the US in respect of the sale of Cape’s</p>	<p>Page 17</p> <p>See also pages 34, 37–38</p>	<p>“There is no doubt that the services rendered by NAAC in acting as intermediary in respect of contracts between the United States customers and Egnep or Casap were active and important services which were of great assistance to Cape/Capasco in arranging the sales of their group’s asbestos in the United States of America. Nevertheless. For all the closeness of the relationship between Cape/Capasco and NAAC, strictly defined limits were imposed on the functions which NAAC were authorised to carry out as their representative.”</p>	<p>547B-C</p>

					Amosite asbestos would come to an end on 31 st January 1978.” “[Schedule of Appealed Facts 20]. It was not in dispute that <u>the only purpose which Cape had in supporting and in providing financial assistance for the incorporation of CPC, apart from any wish to assist the provision of continued employment for long serving servants of NAAC, was to bring into existence alternative marketing arrangements for asbestos in the USA.</u> ” (emphasis added)			
		“The “method of operation” and “the present responsibilities” of, in particular, Mr Morgan, did not permit either NAAC or Mr Morgan, its chief executive, to bind Cape, Capasco, Casap or Egnep, or any other of the Cape subsidiaries to any contract for the supply or sale of asbestos.”	Ex. A-1, at 473E-F	“[Schedule of Appealed Facts] 11. Mr Morgan’s authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Mr Meyer or Dr Gaze.”	“Schedule of Appealed Facts 11]. NAAC’s dealings on a day to day basis were through Capasco and that company was directed or managed by Dr Gaze.”	Page 17	“First, <u>NAAC had no general authority to bind Cape/Capasco</u> to any contractual obligation.” (emphasis added)	547C/D
		“As to control over corporate activities: the corporate, as opposed to commercial, activities of NAAC were controlled by Cape...Cape directed the level of dividend and the level of permitting 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.” “As to control over commercial activities: there was no evidence that Cape or Capasco exercised such control over commercial activities of NAAC as was exercised in respect of its corporate activities. Mr Morgan was in executive control of its business...The business carried on by NAAC was its own business”.	Primary Facts ¶¶ 19 & 20	“[Schedule of Appealed Facts] 11. Mr Morgan’s authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Mr Meyer or Dr Gaze.” “[Schedule of Appealed Facts] 8(ii). Officers of Cape and Capasco visited the USA and met with customers; and were visited in London by customers.”	“[Schedule of Appealed Facts 11]. NAAC’s dealings on a day to day basis were through Capasco and that company was directed or managed by Dr Gaze.” “Sir Godfrey submitted that upon all the evidence that answer of Mr Morgan was rightly rejected by Scott J as an accurate description of the relationship between Capasco, through Dr Gaze, and NAAC. Scott J held that “Mr Morgan was in executive control of NAAC’s conduct of its business.” “the day to day running of NAAC was left to [Mr Morgan].” “[Schedule of Appealed Facts 8]. Dr Gaze visited PCC and described in detail the manufacturing process, the character of the material and physical properties which could be obtained with the technology then existing...”	Pages 17–19 Page 18 Page 19 See also page 12	Secondly...there is no evidence that NAAC, whether with or without prior authority from Cape/Capasco, ever effected any transaction in such manner that Cape/Capasco thereby became subject to contractual obligations to any person.”	547C/D-D
				“[Schedule of Appealed Facts] 7. Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos...” “[Schedule of Appealed Facts] 8(iii). It was Cape rather than	“[Schedule of Appealed Facts 7]. By itself it seems to show each Cape subsidiary acting and being asked or directed to act in accordance with its proper role, within the transactions which were being carried out,	Pages 9 & 13	“[L]ooking at the facts of the case overall, our conclusion is ...that <u>the business carried on by NAAC was exclusively its own business, not the business of Cape or Capasco, and that Cape and Capasco were not present</u>	547E

				<p>NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler.”</p>	<p>having regard to the corporate structure of the Group...Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.”</p> <p>“[Schedule of Appealed Facts 8]. The picture derived from the evidence relied on under (8) (i) to (iv) is, again, as it seems to us, in accordance with Scott J’s conclusions as to how the subsidiaries of Cape operated, i.e. with each one carrying out its own function.”</p>		<p>within the United States of America.” (emphasis added)</p>	
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<u>(2) Sham transactions to feign exits.</u>							
<p>“For decades, certain of these Third Party Defendants created sham transactions to feign exits of the asbestos industry in the United States.”</p>	<p>TPC “Introductory Statement” (p.10)</p>					<p>See above: Scott J and the Court of Appeal’s findings are inconsistent with the allegation of the inter-company transactions being shams.</p> <p>See also below in respect of the purpose in making the arrangements for liquidation of NAAC and creation of AMC and CPC.</p>	
<p>“Cape’s historic operations involved a complex scheme to sell... while intentionally depleting its U.S.-based subsidiary of attachable assets. Executing on that scheme, Cape allowed default judgments against it in asbestos lawsuits across the United States and simply absconded, leaving no assets for recovery...”</p>	<p>TPC ¶ 41</p>					<p>“...we do not accept that 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 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.”</p>	<p>544D-E</p>

<u>(2)(a) Liquidation of NAAC</u>								
<p>“Ultimately, to avoid liability...Cape decided to liquidate NAAC, effective January 31, 1978.”</p>	<p>TPC ¶ 94</p>	<p>“<u>The arrangements for the dissolution of NAAC and the formation of AMC and CPC...</u>over the period November 1977 to February 1978 were <u>part of the composite arrangement</u> designed to enable Cape asbestos to continue to be sold into the USA while reducing, if not eliminating, the appearance of any involvement of Cape or its subsidiaries.”</p> <p>“... there can really be no doubt but that the decision to wind up NAAC was taken in order to try and avoid the danger of an argument that under English law Cape’s interest in NAAC’s US business sufficed to give the Tyler court jurisdiction over Cape.</p> <p>It was not however, desired that the US, as a market for Cape’s asbestos should be abandoned. The liquidation of NAAC was accompanied by the devising and implementation of alternative marketing arrangements.”</p>	<p>Primary Facts ¶ 24</p> <p>Ex. A-1, at 450B-C/D; <i>see also id.</i> at 478F-H</p> <p><i>See also</i> Primary Facts ¶¶ 8 & 9</p>	<p>“[Schedule of Appealed Facts] 14. From the start of the Tyler I proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America <u>without the risk of enforceable judgments against Cape.</u>”</p> <p>“[Schedule of Appealed Facts] 16. After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler I (April 1977), Cape then formulated a put into operation, as from February 2018, a four point plan:</p> <ul style="list-style-type: none"> (a) The dissolution of NAAC and the creation of a substitute organization; (b) The formation, at Cape’s expense, of a Lichtenstein Corporation (AMC) as an intermediary for invoicing purposes; (c) The formation of a new Illinois corporation (CPC) to be operated by Morgan and to be set up with Cape money; (d) No further appearances in any US asbestos litigation.” <p>“[Schedule of Appealed Facts] 17. In order to set up AMC and liquidate NAAC, Cape required control permission from the Bank of England...the plan was executed with secrecy.”</p>	<p>“[Schedule of Appealed Facts 14]. It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974.”</p> <p>“[Schedule of Appealed Facts 16]. There is nothing additional, so far as concerns primary fact.”</p> <p>“[Schedule of Appealed Facts 17]. It was, as the judge found, always the intention of Cape that asbestos produced by its subsidiaries should continue to be sold into the United States of America. The decision to liquidate NAAC was taken on 11th November 1977, as the judge found...The purpose of Cape, when Mr Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr Morgan, which would be operated by him, and through which some of NAAC’s trading functions would be performed.”</p>	<p>Pages 23–24</p>	<p>“As for Cape’s purpose in making the arrangements for the liquidation of NAAC and the creation of AMC and CPC, we think that the ...evidence ... sufficiently reveal[s] the substance of what the officers of Cape were doing and what they were trying to achieve. The allegation of impropriety was, in our view, rightly abandoned. The inference which we draw from all the evidence was that Cape’s intention was 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) <u>reducing by any lawful means available to it</u> 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 court being held to be enforceable in this country. Inference (a) was also made by the Judge. Inference (b) is our own.” (emphasis added)</p>	<p>541F-H</p>
		<p>“The decision to put NAAC into liquidation was a consequence of the experience of Cape in the Tyler I actions. It had become apparent to the senior management of Cape by, at latest, the summer of 1977 that actions in the US brought against Cape by plaintiffs complaining of injury caused by exposure to asbestos dust presented a very real problem.”</p>	<p>Ex. A-1, at 478A-B</p>	<p>“[Schedule of Appealed Facts] 14. From the start of the Tyler I proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America <u>without the risk of enforceable judgments against Cape.</u>”</p> <p>“[Schedule of Appealed Facts] 16. The dissolution of NAAC and</p>	<p>“[Schedule of Appealed Facts 14]. It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974.”</p> <p>“[Schedule of Appealed Facts 16]. There is nothing additional, so far as concerns primary fact.”</p>	<p>Pages 23–24</p>	<p><i>See</i> above in relation to the liquidation of NAAC</p>	

				the creation of a substitute organization”				
		“As from 31 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. NAAC executed articles of dissolution on 18 May 1978.”	Ex. A-1, at 450F-G	“[Schedule of Appealed Facts] 19. NAAC continued to trade at least until the end of April, from CPC’s offices to which its files were transferred.”	“[Schedule of Appealed Facts 19]. After 31 st January 1978...NAAC could no longer be regarded as carrying on Cape’s business; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings commenced on dates between 19 th April 1978 and 19 th November 1979.”	Pages 33 & 37	“...it is in our judgment clear beyond argument that NAAC was carrying on business of its own.”	541C-D
		“It was the intention of all concerned that NAAC’s functions in the US in respect of the sale of Cape’s amosite asbestos would come to an end on 31 January 1978. They did so.”	Ex. A-1, at 477G-H <i>See also</i> Primary Facts ¶ 11	“[Schedule of Appealed Facts] 19. NAAC continued to trade at least until the end of April, from CPC’s offices to which its files were transferred.”	“[Schedule of Appealed Facts 19]. ...Scott J appears to have concluded that, after 31 st January 1978 when 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”, NAAC could no longer be regarded as carrying on Cape’s business”. “It seems clear to us that Scott J was right in every respect on the primary facts. It was the intention that NAAC should cease trading on 31 January 1978 and NAAC did so cease so far as concerned all parts of its business save for the disposal of stock for the purposes of liquidation. The stock was disposed of for that purpose...CPC commenced trading on 1 st February 1978. All or most of NAAC’s files were transferred to CPC’ offices.”	Pages 33 & 37	“...it is in our judgment clear beyond argument that NAAC was carrying on business of its own.”	541C-D
“NAAC’s liquidation was central to Cape’s liability-avoidance strategy...”	TPC ¶ 97	“[The arrangement for dissolution of NAAC] was associated with the decision not to take 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. 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.”	Primary Facts ¶ 24	“[Schedule of Appealed Facts] 16. The dissolution of NAAC and the creation of a substitute organization... No further appearances in any US asbestos litigation.” “[Schedule of Appealed Facts] 17. ...the purpose for the formation of AMC and CPC. The plan was executed in secrecy.”	“[Schedule of Appealed Facts 16]. There is nothing additional, so far as concerns primary fact.” “[Schedule of Appealed Facts 17]. The objective under consideration was ...an attempt to limit NAAC’s and Cape’s exposure to future US litigation.”	Pages 23 & 24		

(2)(b) Creation of CPC								
<p>“Cape contemplated ways to continue the flow of asbestos to U.S. customers and asbestos profits out of the United States despite the formality of liquidating NAAC...To facilitate this ruse Gerry Morgan ...formed...CPC to act as a commission agent for the future sales of asbestos from South Africa in the United States...CPC received funding from Cape.”</p>	<p>TPC ¶¶ 98-99</p>	<p>“The president of NAAC for the past four years or so had been a Mr Morgan. On 12 December 1977 a new Illinois corporation CPC was formed. The shares in CPC were held by Mr Morgan. Under an agreement dated 5 June 1978 made between CPC and AMC it was agreed <u>CMC would act as agent for AMC in the US for the purpose of the sale of asbestos. CPC ...had no authority to contract on behalf of its principal AMC, or any other Cape company.</u>” (emphasis added)</p> <p>“Remuneration for CPC was to be by commission upon the cost of all asbestos sales by AMC in the territory.”</p>	<p>Ex. A-1, at 450D-F</p> <p>See also Primary Facts ¶¶ 10 & 29</p>	<p>“[Schedule of Appealed Facts] 16. The formation of a new Illinois Corporation (CPC) to be operated by Mr Morgan and to be set up with CPC money.”</p> <p>“[Schedule of Appealed Facts] 19. NAAC continued to trade at least until the end of April, from CPC’s offices to which its files were transferred.”</p> <p>“[Schedule of Appealed Facts] 20. The Respondents’ only purpose for the incorporation of CPC was a substitute company for the sale of the Respondents’ asbestos in the USA.”</p>	<p>“[Schedule of Appealed Facts 16]. The purpose of Cape, when Mr Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr Morgan, which would be operated by him, and through which some of NAAC’s trading functions would be performed.”</p> <p>“[Schedule of Appealed Facts 19]. It was the intention of all concerned that NAAC’s functions in the US in respect of the sale of Cape’s Amosite asbestos would come to an end on 31st January 1978.”</p> <p>“[Schedule of Appealed Facts 20]. It was not in dispute that <u>the only purpose which Cape had in supporting and in providing financial assistance for the incorporation of CPC, apart from any wish to assist the provision of continued employment for long serving servants of NAAC, was to bring into existence alternative marketing arrangements for asbestos in the USA.</u>” (emphasis added)</p>	<p>Pages 37–39</p>	<p>“[Scott J] found as facts ... CPC, like NAAC, had <u>no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract...</u> and the offices...were CPC’s own offices.” (emphasis added)</p> <p>“The shares in CPC were held by Mr Morgan. Under an agreement dated 5 June 1987 made between CPC and AMC it was agreed that CPC would act as agent for AMC in the USA for the purpose of the sale of asbestos. <u>CPC was to be remuneration on a commission basis but had no authority to contract on behalf of its principal, AMC, or any other Cape company.</u> It was to act as a link between AMC and the United States purchasers in connection with shipping arrangements, insurance and the like.” (emphasis added)</p> <p>“Sir Godfrey, however, was in our view plainly right in submitting that the agreement of Mr Morgan was required for the creation of the alternative marketing arrangements by means of a new independent Illinois company and that his agreement, when given, was real. Cape had obligations of a moral nature to Mr Morgan and to the long standing staff of NAAC. Cape also, for its own purposes, wanted Mr Morgan and Mrs Holtze to continue with the work previously done by them for NAAC.”</p>	<p>527G-H</p> <p>See also 450D-F</p> <p>See also 541C</p>
		<p>“CPC was incorporated on 12 December 1977. The shares were issued to Mr Morgan.”</p>	<p>Ex. A-1, at 479F</p>	<p>“[Schedule of Appealed Facts] 16. The formation of a new Illinois Corporation (CPC) to be operated by Mr Morgan and to be set up with CPC money.”</p>	<p>“[Schedule of Appealed Facts 16]. The purpose of Cape, when Mr Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr Morgan, which would be operated by him, and through which some of NAAC’s trading functions would be performed.”</p>	<p>Page 24</p>	<p>“Our reasons for rejecting the “single economic unit” argument in relation to NAAC apply a fortiori in relation to CPC, because CPC was not Cape’s subsidiary and its shares were held by Mr Morgan for his own benefit...CPC was <u>an independently owned company.</u>” (emphasis added)</p>	<p>539B-C</p>
		<p>“The documentary evidence I have seen has made clear that the senior management of Cape ... were very anxious that Cape’s connections with CPC and AMC should not become publicly known. Some of the letters and memoranda have a somewhat</p>	<p>Ex. A-1, at 479B-D</p>	<p>“[Schedule of Appealed Facts] 17. In order to set up AMC and liquidate NAAC, Cape required control permission from the Bank of England...the plan was executed with secrecy.”</p>	<p>Some of the “conspiratorial” letters and memoranda are set out in the Appendix at pages 23 to 32. See for example:</p> <p>“[Schedule of Appealed Facts 17]. Cape, he wrote, “may wish to do</p>	<p>Page 25</p>	<p>“Mr Morrison has taken us through the arrangements which led to the extinction of NAAC and the emergence of AMC and CPC ...It is true that, as the judge said, some of the letters and memorabilia have a “somewhat conspiratorial flavour to them.” ...It</p>	<p>540D-541A</p>

		<p>conspiratorial flavour to them. But this too, although interesting to notice is not... relevant to the main question.”</p> <p>“The question, however, whether CPC’s presence in Illinois can, for the 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.”</p>	<p>See also Primary Facts ¶ 25</p>		<p>something to change the identity of NAAC in order to avoid exposing the company unnecessarily...”</p> <p>“In reality we will be merchenting the asbestos fibre using a Lichtenstein company to disguise Cape’s existence.”</p>		<p>was asserted that AMC and CPC together constituted a façade which concealed the real activities of Cape. We understand that to mean that the purpose of Cape was to conceal, as far as it lawfully could ...any connection of Cape with AMC or CPC...”</p> <p>“If and so far as the judge intended to say that the motive behind the new arrangements was irrelevant as a matter of law, we would respectfully differ from him. In our judgment, Mr Morrison submitted, whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant, and indeed this no doubt is the reason why the question of motive was examined extensively at the trial...Since, contrary to the judge’s view, we think motive is relevant in this context, we have thought it right to investigate these contentions in some detail in the appendix.”</p>	
		<p>“Directly or indirectly, the costs of incorporation were paid by Cape or Capasco. The shares in CPC, however, were owned independently by Mr Morgan both in equity and in law.”</p>	<p>Primary Facts ¶ 27</p>	<p>“[Schedule of Appealed Facts] 16. The formation of a new Illinois Corporation (CPC) to be operated by Mr Morgan and to be set up with CPC money.”</p> <p>“[Schedule of Appealed Facts] 20. The respondents’ only purpose for the incorporation of CPC was a substituted company for sale of the respondents’ asbestos in the USA.”</p>	<p>“[Schedule of Appealed Facts 16]. The purpose of Cape, when Mr Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr Morgan, which would be operated by him, and through which some of NAAC’s trading functions would be performed.”</p> <p>“[Schedule of Appealed Facts 20]. It was not in dispute that the only purpose which Cape had in supporting and in providing financial assistance for the incorporation of CPC, apart from any wish to assist the provision of continued employment for long serving servants of NAAC, was to bring into existence the alternative marketing arrangements for asbestos in the USA.”</p>	<p>Page 24</p> <p>See also page 38</p>	<p>“Nothing in the material ...causes us to doubt Scott J’s conclusion that the shares in CPC belonged both at law and in equity to Mr Morgan. It is clear Cape intended CPC to be in reality Mr Morgan’s company because that was part of their purpose. Such as it was, and dependent for almost all of its business on the Cape subsidiaries, CPC was Mr Morgan’s company. We therefore reject the challenge to the judge’s finding that CPC was an independently owned company.”</p>	<p>541D-F</p>
		<p>“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.”</p>	<p>Ex. A-1, at 482C</p>					

		<p>“Like NAAC, CPC acted as agent for the purpose of facilitating the sale in the US of Cape’s asbestos. The seller of the asbestos in NAAC’s time was Egnep or Casap. <u>The seller in CPC’s time was, nominally, AMC but, in reality, still...Egnep or Casap.</u> CPC, Like NAAC, had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract. CPC like NAAC carried on its own business from its own offices at 150, North Wacker Drive.” (emphasis added)</p>	<p>Ex. A-1, at 482D-E/F See also Primary Facts para 31 to 35.</p>	<p>“[Schedule of Appealed Facts] 23. CPC carried on business from the same address as NAAC with the same telephone number. It employed the same staff as had NAAC. It dealt with the same customers as had NAAC and CPC advised those customers that it was “business as usual.””</p>	<p>“[On Schedule of Appealed Facts 23]. Any factual issues under this heading are of no significance. CPC’s offices were on a different floor but in the same building as that in which NAAC had last had its office.”</p>	<p>Pages 38–40</p>	<p>“It is quite plain that at least a substantial part of CPC’s business was in every sense its own business. ...we see no sufficient grounds for disturbing the judge’s finding that <u>the business carried on by CPC was exclusively its own business</u> and that <u>Cape and Capasco were not present in the United States through CPC (or AMC) at any material time.</u>”</p>	<p>548G/H-549C.</p>
		<p>“What is critical is what CPC and NAAC actually did on behalf of Cape or Capasco. <u>Each company, CPC and NAAC, assisted in the sale of Egnep’s asbestos in the US.</u> That is not enough.” (emphasis added)</p>	<p>Ex. A-1, at 482G-H</p>				<p>See above</p>	

(2)(c) Creation of AMC								
<p>“CPC acted with South African mines to sell through....AMC associated with Cape...”</p>	<p>TPC ¶ 99</p>	<p>“AMC, a Liechtenstein corporation was incorporated by a Dr Ritter, a well-known Liechtenstein lawyer. The bearer shares in AMC were held by Dr Ritter upon trust for CIOL. ... The intention was that all sales of Cape asbestos to US customers would be made by AMC.”</p>	<p>Ex. A-1, at 479C-D/E <i>See also</i> Primary Facts ¶ 26</p>	<p>“[Schedule of Appealed Facts] 21. AMC was incorporated on January 25th 1978. Its nominal Director was Dr Ritter; it has an issued share capital of 50 x 1000 Swiss Franc shares.</p> <p>“[Schedule of Appealed Facts] 24. The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC’s account at the New York Branch of the Chase Manhattan Bank and transferred to AMC’s account at the London Branch of the Bank.”</p> <p>“[Schedule of Appealed Facts] 25. In the light of the facts referred to an[d] of the absence of any evidence to the contrary, the proper inference to be drawn from the evidence of Mr. Summerfield (namely that in August 1984 AMC’s name was given as one of the occupants of the offices at North Wacker Drive) was that AMC had their plate up in 1978/9.”</p>	<p>“[Schedule of Appealed Facts 21]. There was no issue upon any of these matters as is apparent from evidence and contentions already set out above.”</p> <p>“[Schedule of Appealed Facts 24]. CPC had <u>no authority to make contracts so as to bind AMC or any other member of the Cape Group</u> and did not in fact make any such contracts.” (emphasis added)</p> <p>“[Schedule of Appealed Facts 25]. There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices ... The conclusion of Scott J on this point was right. There was no evidence to suggest that AMC was an occupant of AMC’s offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979...It is, in our view, improbable, having regard to the purpose of Cape in assisting in the formation of CPC, as found by Scott J and considered above, and having regard to the evidence care taken by the officers of Cape/Capasco in matters of corporate form and function...”</p>	<p>Page 38</p>	<p>“In our judgment, ...the revelation of AMC as the creature of Cape does not suffice to enable the plaintiffs to show the presence of Cape/Capasco in the United States of America, since ...AMC was not in reality carrying on any business in the United States of America.”</p>	<p>543G</p>
		<p>“An agency agreement dated June 1978 was entered into. The parties were AMC, CPC and Mr Morgan. This is an important agreement...I conclude...that the terms of the agreement are a reliable guide to the nature of the relationship between CPC and AMC and, hence between CPC and Cape.”</p> <p>“By [the agency agreement] AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of US, Canada and Mexico for the period of 10 years from 1st February 1978 to 31st January 1988...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</p>	<p>Ex. A-1, at 479H-481A. <i>See also</i> Primary Facts ¶ 28</p>	<p>“[Schedule of Appealed Facts] 24. The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC’s account at the New York Branch of the Chase Manhattan Bank and transferred to AMC’s account at the London Branch of the Bank.”</p>	<p>“[Schedule of Appealed Facts 24]. CPC had <u>no authority to make contracts so as to bind AMC or any other member of the Cape Group</u> and did not in fact make any such contracts.” (emphasis added)</p>	<p>Page 39</p>	<p>“The interposition of AMC in the new arrangements made in 1978 cannot one way or the other affect the question whether Cape/Capasco were present in the United States of America thereafter. For all relevant purposes, as we have already indicated, we are prepared to treat Cape and AMC as one. The functions performed by CPC and its relationship with Cape through AMC are the relevant considerations or present purposes. Since Mr Morgan held all the shares in CPC beneficially, Cape had no control as a shareholder over the activities of CPC similar to the control which it had exercised over NAAC. Mr Morison did not dispute the judge’s finding that the terms of the agency agreement of 5 June 1978 were a reliable guide to the nature of the relationship between CPC and AMC and hence between CPC and Cape.</p>	<p>548E-G</p>

							affairs in that manner and ...to expect that the court would apply the principle of <i>Saloman v Saloman</i> ...in the ordinary way.”	
“Siphoning funds from entities within that web, including Cape’s sole American subsidiary [NAAC], to maximize the financial return to Cape’s overseas owners, eliminate liabilities, and escape responsibility...”	TPC ¶ 43.d.	<i>See</i> above in relation to the management of NAAC.					<i>See</i> above in relation to the management of NAAC.	
“[NAAC] was routinely forced to withdraw cash to pay dividends to Cape, thereby minimizing NAAC’s available assets ...”	TPC ¶ 79	<i>See</i> above in relation to the management of NAAC.					<i>See</i> above in relation to the management of NAAC.	556D
“Cape directed a campaign of litigation avoidance by refusing to accept process or appear in any US proceedings.”	TPC ¶ 91	<i>See</i> above in relation to the alleged avoidance of liability.					The Court of Appeal upheld that default judgments from US courts were not enforceable.	556D

(5) Alter ego liability								
<p>“South Carolina [recognizes] the imposition of liability under an “alter ego” theory based on a factual assessment of several factors, including: (i) common ownership; (ii) financial dependence; (iii) the degree of selection of executive personnel and failure to observe corporate formalities; and (iv) the degree of control over marketing and operational policies.”</p>	<p>TPC ¶ 138</p>	<p>“Mr Morrison argued that ... NAAC should be treated as Cape’s alter ego in Illinois, alternatively, that the corporate veil distinguishing NAAC from Cape should be lifted. <u>There is no reasonable basis...for regarding NAAC as the alter ego of Cape.</u> NAAC was an Illinois corporation carrying on business in the US from which it earned profits and on which it paid US taxes. Its debtors were <i>its</i> debtors, not Cape’s debtors. Its creditors were <i>its</i> creditors, not Cape’s creditors. Cape was not taxed in the United Kingdom or in the US on NAAC’s profits. The return to 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 made its own warehousing arrangements for its own asbestos. It had its own pension scheme for its own employees. The expression “alter ego” when used to describe the relationship between a company and its shareholders is not a term of art and bear a flexible meaning. <u>But I don’t think it is in the least apt to describe the relationship between NAAC and Cape.</u>” (emphasis added)</p> <p>“NAAC had a separate identity and was not the “alter ego” of Cape.”</p>	<p>Ex. A-1, at 474E-H</p> <p><i>See also</i> Primary Facts ¶ 22</p>		<p>“[Schedule of Appealed Facts 25]. ...having regard to the evident care taken by the officers of Cape/Capasco in matters of corporate form and function...”</p>	<p>Page 40</p>	<p>“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.”</p>	<p>537E-F</p>
		<p>“Mr Morrison invited me to infer ... that the corporate form of the Cape group was form only. I am not prepared to do this. ... 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. But that does not constitute a reason why Cape, the parent company, should be treated as present and amenable to be sued in each country in which a subsidiary was present and carrying on business.”</p>	<p>Ex. A-1, at 482H-483B</p>	<p>“[Schedule of Appealed Facts] 7. Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos...”</p>	<p>“[Schedule of Appealed Facts 7]. By itself it seems to show each Cape subsidiary acting and being asked or directed to act in accordance with its proper role, within the transactions which were being carried out, having regard to the corporate structure of the Group...Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.”</p>	<p>Pages 9 & 10</p>	<p>“In our judgment we have no discretion to reject the distinction between the members of the group...”</p>	<p>538G</p>
(6) Veil Piercing liability								
<p>“South Carolina [recognizes] attaching liability to a shareholder</p>	<p>TPC ¶ 139</p>	<p>“These statements of principle...[are] an answer to the submission that...the separate</p>	<p>Ex. A-1, at 477E-F</p>				<p>“The relationship between Cape/Capasco and CPC is the crucial factor, since CPC was undoubtedly</p>	<p>543G/H-544B/C</p>

<p>through a two-part test involving, <u>first</u>, an eight factor analysis of the shareholder's relationship to the corporation and, <u>second</u>, proof of an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the equity owners."</p>		<p>corporate identity of NAAC should be ignored. And that the corporate veil should be lifted...neither Cape nor Capasco had an office in Illinois. The 150 North Whicker Drive offices were NAAC's offices. <u>NAAC's business was its own business, not the business of Cape or of Capasco.</u> NAAC had no authority to contract on behalf of Cape or Capasco or any other company in the Cape group..."</p> <p>Also, see above in relation to Alter ego liability.</p>	<p>See also Primary Facts ¶¶ 23 & 30</p>			<p>carrying on business in the United States of America. ... CPC was a company independently owned by Mr Morgan and...the shares therein belonged to him in law and in equity. These findings by themselves make it very difficult to contend that the operation of CPC involved a façade which entitles the court to pierce the corporate veil between CPC and Cape/Capasco and treat them all as one. Is the legal position altered by the facts that Cape's intention, in making the relevant arrangements..., was to enable sales of asbestos from the South African subsidiaries to be made while (a) reducing if not eliminating 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 and the risk of any default judgment by such a court being held to be enforceable in this country?</p> <p>We think not."</p>	
		<p>"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."</p>	<p>Primary Facts ¶ 36</p>			<p>"We reject the corporate veil argument."</p>	<p>544H</p>