

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Jean H. Toal  
Acting Circuit Court Judge

Supreme Court Case Nos. 2024-000916 and 2024-001499  
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs, ..... Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AIW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited ASCO, L.P.; Atlas Asbestos Co.; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas CT, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |             |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC, ..... | Defendants, |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|

of which

|                                          |            |
|------------------------------------------|------------|
| Asbestos Corporation Limited is the..... | Appellant, |
|------------------------------------------|------------|

and

|                                                                                                                                                            |                                          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
| Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,..... | Third-Party<br>Plaintiff/<br>Respondent, |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|

v.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                            |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle American US Holdings Inc.; Element Six US Corp.; Element Six Technologies US Corp.; Element Six Technologies (OR) Corp.; First Mode Holdings, Inc.; Platinum Guild International (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), LLC; Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd.; Cape Holdco Ltd.; The Law Debenture Corporation PLC; Cape Industrial Services Group Ltd.; Mohed Altrad; Altrad UK Ltd.; Cape UK Holdings Newco Ltd.; Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.; Altrad Investment Authority SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC, ..... | Third-Party<br>Defendants, |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|

of which

Mohed Altrad and Altrad Investment Authority SAS are the..... Appellants.

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WRIT OF CERTIORARI (VOLUME I)

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BL-2024-001337

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (CHD)**

Before Mr Justice Mann, sitting in retirement

**B E T W E E N:**

**(1) CAPE INTERMEDIATE HOLDINGS LIMITED**

**(2) CAPE PLC (a company incorporated under the laws of Jersey)**

**Claimants**

**- and -**

**PETER D. PROTOPAPAS**

**Defendant**

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**ORDER**

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**UPON THE CLAIM** of Cape Intermediate Holdings Limited (“**CIHL**”) and Cape plc (“**the Claimants**”) issued by Part 8 Claim Form on 6 September 2024

**AND UPON HEARING** Counsel for the Claimants, Mark Phillips KC, Derrick Dale KC, William Willson, Angus Groom and Louise Merrett

**AND UPON READING** the evidence, being the first witness statement of Ran Oren dated 6 September 2024 (“**Oren 1**”), the second witness statement of Ran Oren dated 8 November 2024 (“**Oren 2**”), the expert report of the Hon William W Wilkins dated 30 October 2024 (“**the Wilkins Report**”), the further expert report of the Hon William W Wilkins dated 11 November 2024 (“**the Supplemental Wilkins Report**”), the fifth witness statement of Paul Brehony dated 11 November 2024 (“**Brehony 5**”), the sixth witness statement of Paul Brehony dated 13 November 2024 (“**Brehony 6**”), and the seventh witness statement of Paul Brehony dated 21 November 2024 (“**Brehony 7**”)



**AND UPON** finding that the appointment of the Defendant as purported receiver of CIHL is not recognised by the laws of England and Wales (where CIHL is incorporated), because CIHL was not present in the state South Carolina at the date upon which the application for the appointment or the appointment was made and because CIHL has not submitted to the jurisdiction of that state

**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 CIHL (“**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 on behalf of CIHL in England and Wales or worldwide and has no power to or authority in respect of CIHL in England and Wales or worldwide to carry out the acts referred to in paragraph 6-10 below.
3. The rights and duties of the directors of CIHL remain unaffected by the appointment of Mr Protopapas as receiver of CIHL pursuant to the Receivership Order.
4. Mr Protopapas has and had no power or authority on behalf of CIHL to act for or to bind CIHL 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 on behalf of CIHL to issue or pursue third party claims including 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.
5. Mr Protopapas has and had no power or authority to accept service on behalf of CIHL in the claim brought in the South Carolina Court by a summons dated 11 November 2024 with claim number C/A NO. 2024-CP-40-06639 or any other legal proceedings issued against CIHL in the South Carolina Court or worldwide.

**AND IT IS ORDERED THAT:**

6. Mr Protopapas be restrained in England and Wales and worldwide from acting or purporting to act as agent or otherwise on behalf of CIHL pursuant to the Receivership Order.
7. Mr Protopapas be restrained in England and Wales and worldwide from appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of CIHL.
8. Mr Protopapas be restrained from acting or purporting to act on behalf of CIHL in the Park Claim and the Tibbs Claim (as defined in Oren 1).
9. Mr Protopapas be restrained from continuing to prosecute the 3P Complaint (as defined in Oren 1).
10. Mr Protopapas be restrained from purporting to act for CIHL in the claim brought in the South Carolina Court by a summons dated 11 November 2024 and with claim number C/A NO. 2024-CP-40-06639 or in any other legal proceedings issued against CIHL in the South Carolina Court or worldwide.

**Liberty to Apply**

11. The Claimants shall have liberty to apply for further or related relief.

**Costs**

12. The Claimants' costs be paid by the Defendant on the standard basis, to be a matter of detailed assessment if not agreed.
13. The Claimants shall have liberty to apply for an interim payment on account of costs.

**Service of this Order**

This order shall be served by the Claimants on the Defendant.

The court has provided a sealed copy of this order to the serving party, Signature Litigation LL, 138 Fetter Lane, London, EC4A 1BT.

22 November 2024



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)**  
**- and -**  
**PETER D. PROTOPAPAS**

**Claimants**

**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: 12<sup>th</sup>, 13<sup>th</sup> & 14<sup>th</sup> November 2024  
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**APPROVED JUDGMENT (subject to editorial corrections)**  
.....

**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 9<sup>th</sup> September 2024. Permission to serve the defendant out of the jurisdiction was given by Master Brightwell in an order dated 11<sup>th</sup> September 2024 and he was duly served in accordance with that order. The matter was then put before Trower J on 9<sup>th</sup> 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 subpoenaed 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 Consolidated 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 employing 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 Conflicts 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 be 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 Gyrdayal 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 domicile, 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, startlingly, 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.<sup>28</sup> 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.<sup>29</sup> 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 on behalf of CIHL 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 launched on 11<sup>th</sup> 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 be 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 28<sup>th</sup> 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 not control NAAC in any meaningful sense, and the participation of CPC was not 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, notwithstanding the specific authorisation of the appointing court. Goulding J summarised 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 in 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 without authority to do so 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, his 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 enjoined 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 enjoined 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 enjoined 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 enjoined 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 be 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 GIE 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.

|                                          |   |                                     |
|------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS        |
|                                          | ) |                                     |
| COUNTY OF RICHLAND                       | ) | FOR THE FIFTH JUDICIAL CIRCUIT      |
|                                          | ) |                                     |
| KEITH W. PARK, individually and as the   | ) | C/A No. 2021-CP-40-02727            |
| Personal Representative of the Estate of | ) |                                     |
| ISABELLA PARK,                           | ) | In Re:                              |
|                                          | ) | Asbestos Personal Injury Litigation |
| Plaintiffs,                              | ) | Coordinated Docket                  |
|                                          | ) |                                     |
| v.                                       | ) |                                     |
|                                          | ) | <b>MOTION TO CLARIFY ORDER</b>      |
| ARMSTRONG INTERNATIONAL, INC.,           | ) | <b>APPOINTING A RECEIVER FOR</b>    |
| et al.                                   | ) | <b>CAPE PLC</b>                     |
|                                          | ) |                                     |
| Defendants.                              | ) |                                     |

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Please take notice that Peter D. Protopapas, in his capacity as Receiver (the “Receiver”) for Cape PLC, now known as Cape Intermediate Holdings Ltd., as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) (“Cape”), acting by and through the undersigned counsel, will move as soon as may be heard for an order clarifying the Order Appointing a Receiver for Cape issued by this Court on March 17, 2023. Specifically, the Receiver seeks clarification that the Receiver’s Cape litigation to date all has been conducted within the appropriate scope of his appointment. In support of this motion, the Receiver would show the Court as follows:

1. By order dated March 17, 2023 (the “Appointment Order”), this Court appointed the Receiver pursuant to section 15-65-10(4)-(5) of the South Carolina Code and granted him the authority to “fully administer all assets of Cape . . . and take any and all steps necessary to protect the interests of Cape whatever they may be.”
2. The Receiver was appointed over Cape because Cape employs a strategy, as in this case, to reject any litigation and potential exposures for injuries caused in the

United States related to their distribution of deadly asbestos in the United States and as such refused to answer the above-captioned complaint.

3. In the fulfillment of his duties, on June 30, 2023, the Receiver initiated a third party action in the South Carolina Court of Common Pleas in *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (the “Third Party Action”), to adjudicate the parties responsible for Cape’s historical liabilities and the duties owed by those entities to Cape.
4. On September 1, 2023, Third-Party Defendants ESAB Corporation (“ESAB”) filed motions to dismiss the Receiver’s Third Party Action. Among the reasons ESAB argued the Third Party Action should be dismissed was that “The Receiver’s attempts to marshal assets located outside South Carolina exceed the scope of his authority.” Motion at 2.
5. Similarly, Mohed Altrad filed a Motion to Dissolve the Cape PLC Receivership the same day. In it, he argued that “The Order Appointing Receiver, based on its plain language and pursuant to South Carolina law, does not authorize the Receiver to file lawsuits on behalf of a foreign company against other foreign and out-of-state companies.” Motion at 9.
6. In an Order dated December 6, 2023, this Court entered an Order denying the Third Party Defendants’ Motions to Dismiss and Motions to Dissolve.
7. There have been fourteen (14) interlocutory notices of appeal filed by the third party defendants in *John A. Tibbs v. Asbestos Corporation Limited, et al.*, 2023-CP-40-01759 as well as a series of additional appeals to the Supreme Court launched in

September of 2024.<sup>1</sup> The latest three Petitions mark the continuation of these improper appeals. All of the interlocutory appeals that the appellate courts have considered have been dismissed. Those not yet considered, until recently, have been held in abeyance due to attempts to improperly remove this case.<sup>2</sup>

8. In addition to filing waves of meritless appeals and petitions for certiorari, the third party defendants have stated in no uncertain terms that they will not participate in the underlying case in any way, shape, or form, in a transparent attempt to avoid trial. *See* Ex. B (9/4/2024 letters from Vic Rawl and Todd Carroll). Not content with refusing to participate in the underlying case, the current owners of Cape (i.e., Mohed Altrad and Altrad Investment Authority S.A.S.) have now contrived yet another avenue to avoid the courts in the United States in an effort to further their avoidance of liabilities and exposures by pursuing an injunction against the

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<sup>1</sup> *See, e.g.*, Mohed Altrad and Altrad Investment Authority S.A.S. (Appellate Case Nos. 2003-002006 and 2024-001499), Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (Appellate Case Nos. 2003-002007 and 2024-001497), ESAB Corporation (Appellate Case Nos. 2003-002009 and 2024-001423), Charter Consolidated Ltd. (Appellate Case Nos. 2003-002010 and 2024-001423), and Central Mining & Investment Corporation Ltd. (Appellate Case No. 2003-002011 and 2024-001423).

<sup>2</sup> *See, e.g.*, Appellate Case Nos. 2023-002006, 2023-002007, 2023-002009, 2023-002010, and 2023-002011 (Orders, June 18, 2024 and July 1, 2024) (denying petition for rehearing from dismissal of initial appeals of order denying motion to dismiss and dissolve receivership); Appellate Case No. 2024-000524 (Order, May 3, 2024) (denying petition for rehearing from dismissal of second set of appeals of order granting the Receiver's motion to compel discovery responses); Appellate Case Nos. 2024-001063, 2024-001064, 2024-001065 (third set of notices of appeal of the circuit court's interlocutory orders awarding discovery sanctions). All appeals arising out of the *Tibbs* case were held in abeyance for over two months due to an improper removal of the *Tibbs* action to which Appellants consented. The United States District Court for the District of South Carolina remanded the case to the circuit court on August 13, 2024. *Tibbs v. 3M Co.*, No. 3:24-cv-3771-MGL, ECF No. 75 (D.S.C. Aug. 13, 2024). The level of coordination amongst the Third-Party Defendants cannot be overstated. *See also* September 3, 2024, Letter of Jonathan M. Robinson, Appellate Case No. 2024-001423 (in response to Appellants' unsuccessful attempt to delay their Petition for Writ of Certiorari).



Receiver in the United Kingdom. *See* Ex. C (8/30/24 Winston letter). Subsequently, on September 9, 2024, Cape Intermediate Holdings Limited and Cape plc instituted an action in the High Court of Justice Business and Property Courts of England and Wales seeking to enjoin Peter D. Protopapas from fulfilling his court-appointed duties and obligations charged by the Asbestos Docket Chief Judge, South Carolina Chief Justice Jean Hoefer Toal (Active Ret.) on March 16, 2023. These proceedings violate the Receivership Court's Order of Appointment, and the Barton doctrine, which was reaffirmed by the Fourth Circuit in another case involving this very Receiver in another receivership as well as some of the same counsel representing the Altrad defendants. *See Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351, 360 (4th Cir. 2024).

9. Despite failed efforts in our state and federal trial and appellate courts to overturn the Barton Doctrine and avoid the Receivership Court, on October 30, 2024, Altrad engaged an esteemed former member of the federal judiciary who left the court 16 years ago, and who has not participated in any litigation in the U.S. involving the Receiver, to opine, in an English court, not a U.S. court, on the propriety of the Receivership in the United States. Sadly, as has been the method of operations, it is obvious on the face of document which lists documents reviewed, Altrad failed to disclose to their expert the multiple appeals and opinions authored by sitting state and federal trial and appellate judges which have rejected Altrad's efforts to evade Receivership law in the United States.<sup>3</sup> *See* Hon William W. Wilkins expert report

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<sup>3</sup> The Altrad third party defendants' pursuit of ends over means was also illustrated in its recent filings at the Court of Appeals where they averred that the "Receiver purports to be a receiver over a Jersey company that has no assets in South Carolina, no judgments against it in South Carolina,



for Altrad in which he stated in relevant part, “when commencing any action that would seemingly otherwise be authorized, a state court appointed receiver would need to undertake care to avoid pursuing legal actions where prior encumbrances or adjudications would render such filings as improper, as such conduct would exceed both his court appointed authority, as circumscribed by controlling precedent, as well as the plain language of Rule 66, SCRCP.” Ex. A, Report of Hon. William Wilkins, at 6.

The Receiver contends that this Court rejected the Third Party Defendants’ arguments when it denied their motions in the December 6, 2023 Order. The Receiver therefore seeks clarification that, pursuant to SCRCP 66, the Receiver’s power and authority to fully administer all assets of Cape includes 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. The Receiver further seeks clarification that the Receiver’s litigation activity to date has been conducted within the scope of this Court’s Appointment Order.

WHEREFORE, the Receiver prays that this Court grant him an order clarifying the Appointment Order to establish that the Receiver’s litigation activity to date has been conducted within the scope of this Court’s Appointment Order. The Receiver further request such other relief

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no active claims against it in South Carolina, and that was never served with a shred of paper about any lawsuit in South Carolina,” and that the Altrad third party defendants “have no contact with South Carolina and are not subject to personal jurisdiction here.” (Appellate Case No. 2024-001063, September 5, 2024 Return to Motion to Dismiss at 3, 4.) However, one needs to look no further than the Altrad Owners Third-Party Defendants’ own website to find that these assertions are simply not true. See South Carolina contact information at [rmdksouthcarolinarentaladmins@altrad.com](mailto:rmdksouthcarolinarentaladmins@altrad.com) and “Other branches in USA” at 301 Webb Road Williamston, South Carolina, at [www.rmdkwikform.com/us/contact-us/](http://www.rmdkwikform.com/us/contact-us/); see also “Our History” at <https://www.altrad.com/en/our-history.html>. See Ex. D.

as the Court deems just and proper and reserves the right to supplement this motion with additional memoranda.

SMITH ROBINSON, LLC

*s/Jonathan M. Robinson*

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Shanon N. Peake

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803-254-5445

Attorneys for Receiver

November 1, 2024

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

KEITH W. PARK, individually and as the  
Personal Representative of the Estate of  
ISABELLA PARK,

Plaintiffs,

v.

ARMSTRONG INTERNATIONAL, INC.,  
*et al.*,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2021-CP-40-02727

In Re: Asbestos Personal Injury Litigation  
Coordinated Docket

**ORDER GRANTING RECEIVER'S  
MOTION TO CLARIFY ORDER  
APPOINTING A RECEIVER FOR  
CAPE PLC**

This matter comes before the Court by way of the Receiver for Cape PLC, now known as Cape Intermediate Holdings Ltd., as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("Cape") Motion to Clarify Order Appointing a Receiver for Cape, issued by this court on March 17, 2023. The Receiver's Motion is hereby GRANTED.

On June 30, 2023, the Receiver initiated a third party action in the South Carolina Court of Common Pleas in *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (the "Third Party Action"), to adjudicate the parties responsible for Cape's historical liabilities and the duties owed by those entities to Cape. Certain Third Party Defendants moved to dissolve the receivership and/or dismiss the Third Party Action on the grounds that the Receiver was not authorized to initiate such actions, and that the Receiver's attempts to marshal assets outside of South Carolina exceeded the scope of his authority. This Court denied those motions in an order dated December 6, 2023. Certain Third Party Defendants continue to disagree with South Carolina and Federal court rulings confirming the application of the Barton Doctrine and the authority of the Receiver and Receivership Court. *See Protopapas v. Zurich Am. Ins. Co.*, 2023 WL 2206640, at \*2 (D.S.C. Feb. 24, 2023) (Coggins, J.), *appeal dismissed sub nom., Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351 (4th Cir. 2024). *See, e.g., Pipe & Boiler Insulation, Inc. v. Cont'l Ins. Co. et al.*, No.

3:21-cv-03033-SAL, ECF No. 153, at 4–9 (D.S.C. Mar. 9, 2023) (remanding receivership matter because “the *Barton* doctrine prevents Defendants from removing this matter, filed by a Receiver, to federal court,” while also considering judicial economy in light of the fact that any “settlement agreement is not final until the *Receivership Court* approves the settlement”); *Protopapas v. Zurich Am. Ins. Co. et al.*, No. 3:21-cv-04086-DCC, ECF No. 180, at 4–6, 10 (D.S.C. Feb. 24, 2023) (remanding receivership case because “*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver,” such that allowing removal “would directly interfere with the exclusive jurisdiction of the receivership court over this dispute”); *see also S. Insulation, Inc. v. OneBeacon Ins. Grp., Ltd.*, No. 3:22-cv-01308-MGL, ECF No. 46, at 4–6 (D.S.C. Nov. 8, 2022) (remanding receivership case on other basis). *see also, e.g.*, Appellate Case Nos. 2023-002006, 2023-002007, 2023-002009, 2023-002010, and 2023-002011 (Orders, June 18, 2024 and July 1, 2024) (denying petition for rehearing from dismissal of initial appeals of order denying motion to dismiss and dissolve receivership); *Childers v. Davis Mechanical Contractors, et al.* No. 2024-000005 (S.C. Sup. Ct. Order dated March 27, 2024) (dismissing, in an order signed by all five justices, as not immediately appealable an order denying motions to dismiss and dissolve a receivership); *Welch v. Advance Auto Parts, et al.*, No. 2024-000337 (Ct. App. Order dated April 12, 2024) (dismissing as not immediately appealable an order denying appellants’ motions to dissolve a receivership and to dismiss, including on personal jurisdiction grounds, and an order denying appellants’ motions for protection from discovery); *Mitchell v. 3M Company, ABB Inc., et al.*, No. 2024-000341 (Ct. App. Order dated April 12, 2024) (same); *Link v. 3M Company, 4520 Corp., Inc., et al.*, No. 2024-000342 (Ct. App. Order dated April 12, 2024) (rejecting appellants’ contention that the circuit court’s order permitting the receiver to continue his duties during the pendency of the appeal is immediately appealable and dismissing the appeal), *Tibbs v. 3M Co.*, No. 3:24-cv-3771-MGL, ECF No. 75 (D.S.C. Aug. 13,

2024) (remanding the case to the circuit court on August 13, 2024 based on the Barton Doctrine).

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.

**IT IS SO ORDERED.**

***[JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW]***



Richland Common Pleas

**Case Caption:** Isabella Park , plaintiff, et al vs Armstrong International Inc ,  
defendant, et al

**Case Number:** 2021CP4002727

**Type:** Order/Other

So Ordered

Jean H. Toal

Electronically signed on 2024-11-05 15:16:27 page 4 of 4

|                                   |   |                                    |
|-----------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA           | ) | IN THE COURT OF COMMON PLEAS       |
|                                   | ) |                                    |
| COUNTY OF RICHLAND                | ) | FOR THE FIFTH JUDICIAL CIRCUIT     |
|                                   | ) |                                    |
| KEITH W. PARK, INDIVIDUALLY AND   | ) |                                    |
| AS THE PERSONAL                   | ) | Case No.: 2021-CP-40-02727         |
| REPRESENTATIVE OF THE ESTATE      | ) |                                    |
| OF ISABELLA PARK,                 | ) |                                    |
|                                   | ) |                                    |
| Plaintiff,                        | ) |                                    |
|                                   | ) |                                    |
| vs.                               | ) |                                    |
|                                   | ) | <u>THIRD-PARTY DEFENDANT LOCKE</u> |
| ARMSTRONG INTERNATIONAL, INC.,    | ) | <u>LORD LLP'S RULE 59 MOTION</u>   |
| <i>et al.</i> ,                   | ) |                                    |
|                                   | ) |                                    |
| Defendant,                        | ) |                                    |
|                                   | ) |                                    |
| CAPE, PLC, BY AND THROUGH ITS     | ) |                                    |
| DULY APPOINTED RECEIVER, PETER D. | ) |                                    |
| PROTOPAPAS,                       | ) |                                    |
|                                   | ) |                                    |
| Third-Party Plaintiff,            | ) |                                    |
|                                   | ) |                                    |
| vs.                               | ) |                                    |
|                                   | ) |                                    |
| LOCKE LORD, LLP,                  | ) |                                    |
|                                   | ) |                                    |
| Third-Party Defendant.            | ) |                                    |
|                                   | ) |                                    |

Pursuant to Rule 59(e), SCRCP, and subject to and without waiving its earlier filed objections to personal jurisdiction in South Carolina, Third-Party Defendant Locke Lord LLP moves the Court to reconsider and vacate its order purportedly “clarifying” the initial order unlawfully appointing a receiver, and renews its long-pending, still-unopposed request that the Court dismiss the putative third-party complaint against Locke Lord and, alternatively, discontinue the unlawful receivership appointment.

## **BACKGROUND**

On March 6, 2023—nine months after their counsel reported to the Court that this case was “fully resolved”—the Plaintiffs filed a motion to appoint a receiver over Cape PLC. The motion was allegedly brought pursuant to South Carolina Code § 15-65-10(4) and -10(5). Neither of these statutes are applicable to Cape PLC, a Jersey company that was formed in 2011 and that has nothing to do with the State of South Carolina—no business, no property, no judgments, no debts. Nor are these statutes applicable to Cape Intermediate Holdings Limited, a different U.K. company for which the Receiver also claims to be a receiver. It also has nothing to do with the State of South Carolina—no business, no property, no judgments, no debts.

What’s more, the putative basis for the Plaintiffs’ motion was a theory that “Cape” had historically used a company called North American Asbestos Corporation—NAAC—as a front for bringing asbestos into the United States while “engaging in a campaign of litigation avoidance.” (Motion to Appoint a Receiver Over Cape PLC at 4.)

This “theory” has been presented before and categorically rejected, as both a matter of fact and law, by both trial and appellate courts in the jurisdiction in which “Cape” was formed and operates. It was the subject of a multiweek trial that spanned from February through July 1988, and an additional multiweek appellate process from April through July 1989, and was fully discredited in an extensive, 140-page opinion from the Court of Appeal of the United Kingdom. *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA). A copy of the *Adams* opinion is attached. It fully rebuts each and every argument presented in the Plaintiffs’ motion to appoint a receiver, as well as the Receiver’s subsequent litigation activities aimed at Locke Lord and others, and it exposes the foundational misrepresentation of Plaintiffs and the Receiver regarding their “alter ego” theories and their suggestion that “Cape” has any potential liability in the United States.



Without a hearing, without taking evidence, without notice to Cape PLC, despite the case being “fully resolved” for nine months, and despite the Plaintiffs’ misrepresentations to the Court regarding NAAC and “Cape,” the Court granted the Plaintiffs’ motion and appointed a receiver over Cape PLC. The Court entered that order on March 17, 2023.

Less than a month later, the Receiver filed a purported third-party complaint against Locke Lord through which the Receiver claimed to own the attorney-client privilege as it relates to “Cape and its affiliates’ files.” (Compl. ¶ 10 (Apr. 12, 2023).) In August 2023, the Receiver amended the third-party complaint not only to demand access to privileged information to which he is not entitled, but also to demand “an accounting from [Locke Lord] for all money or property entrusted to [Locke Lord] during [Locke Lord’s] representation of Cape.” (Am. Compl. ¶ 44 (Aug. 9, 2023).)

On September 15, 2023, Locke Lord moved to dismiss the third-party complaint due to a lack of personal jurisdiction, as Locke Lord has no connection to South Carolina, and certainly no connection to the state with respect to the activities underlying this litigation.

**That motion is unopposed.**

Also on September 15, 2023, Locke Lord moved to discontinue the receivership, as it is unlawful as a matter of South Carolina state law and United States constitutional law. There are myriad deficiencies with the Receiver’s appointment, including *inter alia* (a) the court never had jurisdiction over the entity purportedly placed in receivership, making the appointment order void from the outset; (b) the entity in receivership was never served with an operative complaint in the *Park* case, making the appointment order void from the outset; (c) the entity in receivership was never served with the motion to appoint the receiver, in violation of South Carolina Code § 15-65-20; (d) the order appointing the Receiver was entered months after the *Park* case was “fully resolved,” by the Plaintiffs’ counsel’s own admission, and was done without a hearing; (e) there

are no judgments pending against Cape PLC (or any of its so-called “affiliates”), so there are no debts or liabilities at issue; (f) Cape PLC has no property in South Carolina, which is the only thing that a South Carolina state court can attempt to attach via a receivership; (g) the putative appointment of a receiver over out-of-state assets violates, at least, the Dormant and Foreign Commerce Clauses, the Takings Clause, the Excessive Fines Clause, the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause of the United States Constitution; (h) the putative appointment violates principles of international comity because it attempts to interfere with the preexisting exclusive jurisdiction of the U.K. courts, which exercises jurisdiction over the assets of the true successor-in-interest to Cape Asbestos Company Limited in 2006, as described in the Scheme of Arrangement, which is summarized in Note 32 of Cape PLC’s 2022 Annual Report; and (i) the order appointing the Receiver claimed that Cape PLC was “dissolved” and used this as a basis for the appointment, but that was demonstrably false.

**That motion is also unopposed.**

Also on September 15, 2023, Locke Lord filed a third motion—a motion to dismiss for lack of subject matter jurisdiction, for failure to state a claim, and for violating Rule 14 involving third-party practice. In that motion, Locke Lord explained that the Receiver had no standing to bring the claims he is alleging, and therefore the Court lacks subject matter jurisdiction to proceed with this case. It also explained that the Illinois statute of repose has long expired as to the claims the Receiver is alleging against Locke Lord and that the Receiver had failed to allege even the elements needed under South Carolina law to proceed with his claims against Locke Lord. And it explained that Rule 14, SCRCP, does not allow third-party practice without first-party liability, which does not exist and will not exist in this case that was long ago “fully resolved.”

**That motion is also unopposed.**

For fourteen months, Locke Lord’s trio of dispositive motions have been pending on the Court’s docket without any opposition at all from the Receiver. And that’s because there is no legitimate opposition to these arguments. There is no personal jurisdiction in South Carolina over Locke Lord; the receivership is void as a matter of law and should be discontinued at once; the third-party complaint fails for numerous reasons; and the basis of the Plaintiffs’ motion to appoint a receiver that set this whole situation in process has been summarily discredited by the *Adams* Court, as it directly held that there is simply no “alter ego” between NAAC and “Cape.”

It is indisputable that the Receiver knows this because it was told to him directly by the directors of Cape PLC and Cape Intermediate Holdings Limited. (*See* Ex. B, Letter from Winston & Strawn London to Protopapas (Aug. 30, 2024) (“However, in *Adams v. Cape*, the English Court of Appeal specifically found that CIHL was not present in the US jurisdiction via NAAC for the purposes of applying the common law test on the recognition of foreign judgments and that it had not otherwise submitted to the jurisdiction of the US Courts. That is the established legal position.”).)

And the Receiver had a forum to dispute the legitimacy of this position as well as the application of *Adams*—in a forum that actually has jurisdiction over those companies—but he declined to do so. (*See* Ex. C, Transcript of U.K. Proceedings at 34:15–21 (Oct. 9, 2024) (“So that’s what his response to this has been. When he was process served with the application, the process server signed a witness statement where it said, slightly dramatically, I suppose, that ‘Mr. Protopapas slammed the door in my face and told me not to come back, and that if I did he was going to be put me on trespassing notice.’”).)

Nevertheless, on November 1, 2024, the Receiver filed a motion styled “Motion to Clarify Order Appointing a Receiver for Cape PLC,” in which the Receiver asked the Court *in this case*

to approve *ex post facto* a series of actions the Receiver had taken *in other cases*. That is wholly improper. Yet, without a hearing and without even waiting the requisite ten days provided by Rule 6(d), SCRCP, the Court granted that motion on November 5, 2024—less than two business days after it was filed, and without giving any litigant (including Locke Lord) an opportunity to object or be heard on the motion. Without explanation, the November 5, 2024 Order declared that everything the Receiver has done “to date has been conducted within the scope of this Court’s Appointment Order.” (Order at 3 (Nov. 5, 2024).)

### DISCUSSION

Locke Lord’s trio of dispositive motions have gone unopposed for fourteen months without any activity by the Court, but the Receiver’s attempt to justify his litigation activities in different cases through a “motion to clarify” in this case was granted in less than two business days without a hearing and without any opportunity to object. This is fundamentally unfair and not contemplated by the South Carolina Rules of Civil Procedure. *Cf.* Rule 6(d), SCRCP (at least ten days’ notice required for motions).

The Receiver’s conduct—whether in this case or others—should not be endorsed by the Court because the very appointment order from which he purports to draw his authority is void *ab initio*. Locke Lord has had a motion making that argument pending unopposed for over a year.<sup>1</sup>

Rather than blessing the Receiver’s conduct in other cases through a vague, unsubstantiated “motion to clarify” in this case, the Court should reconsider its November 5th Order, vacate it, and either dismiss Locke Lord from this matter for lack of personal jurisdiction or vacate the prior order appointing the Receiver in the first place and discontinue the receivership without delay.

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<sup>1</sup> Locke Lord has also had motions to dismiss it from this case due to the complete absence of personal jurisdiction, the absence of subject matter jurisdiction, the Receiver’s failure to state a claim, and the Receiver’s violation of Rule 14 pending unopposed for over a year.

The Receiver himself is estopped as a matter of law from taking a position contrary to that which the actual “Cape” successfully advanced on its own behalf in *Adams* nearly 35 years ago, and the entire “alter ego” and “veil-piercing” theory on which the receivership is based (and on which the claims alleged against Locke Lord are based) has already been thoroughly debunked after extensive trials and appeals in the *Adams* case. *See, e.g., Aaron v. Mahl*, 674 S.E.2d 482, 486 (S.C. 2009) (giving a preclusive effect to judgments rendered in California and Indiana to prevent re-litigating the same issue in South Carolina); *Carolina Renewal, Inc. v. S.C. DOT*, 684 S.E.2d 779, 782–83 (S.C. Ct. App. 2009) (enforcing collateral estoppel to prevent re-litigating an already-decided issue); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 475–76 (S.C. Ct. App. 2000) (plaintiff who had previously asserted that his daughter owned a corporation he had formed and transferred to her was judicially estopped from asserting that he was its sole owner in a subsequent action because such position was in “direct contravention to his assertions in the prior litigations”). The Court should not endorse this unlawful situation any longer.

### **CONCLUSION**

The Court should grant this motion, vacate its prior order granting the Receiver’s “motion to clarify,” dismiss Locke Lord from this matter for lack of personal jurisdiction, and discontinue the receivership.

*Signature Page Attached*

Respectfully submitted,

**WOMBLE BOND DICKINSON (US) LLP**

**TURNER PADGET GRAHAM & LANEY,  
P.A.**

/s/ M. Elizabeth O'Neill

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*Attorneys for Third-Party Defendant Locke Lord LLP*

November 15, 2024

**EXHIBIT A**  
**(Adams v. Cape**  
**Industries 1990**  
**Ch. 433)**

**PART 1 OF 4**

433

1 Ch.

S.I.B. v. Pantell S.A.

Sir Nicolas  
Browne-Wilkinson V.C.

A the jurisdiction of the Guernsey court. However, if the branch of Barclays Bank in Guernsey is holding moneys belonging to either of the defendants, the bank (being a bank locally resident in England) will, after service of the order, be required not to part with such moneys from the accounts held with the bank with their Guernsey branch.

B I should make it clear that, although I in fact decided this case on the basis that I have mentioned (namely on the basis of sections 3 and 6 of the Act of 1986), my researches overnight suggest that an alternative, and possibly clearer, route would be under section 57 of the Act, which deals specifically with advertisements, in relation to which section 61 confers on the Secretary of State (and therefore on the S.I.B.) powers which are very similar to those contained in section 6 of the Act, which I have considered.

Q Finally, I should point out that these orders do not in any way preclude customers of Pantell individually from enforcing their rights against any assets of Pantell: see sections 6(9) and 61(9) of the Act.

*Order accordingly.*

*Solicitors: Booth & Blackwell.*

D

S. W.

E

[COURT OF APPEAL]

F ADAMS AND OTHERS V. CAPE INDUSTRIES PLC. AND ANOTHER

[1984 A. No. 2597]

1988 Feb. 15, 16, 17, 18, 19, 24, 25, 26, 29;

Scott J.

March 1, 2, 3, 4, 7, 8, 9, 10, 11, 14,

15, 16, 17, 18, 21, 22, 23, 24, 25;

G April 11, 12, 13, 14, 18, 19;

June 17;

July 26;

1989 April 5, 6, 7, 10, 11, 13, 14, 17,

Slade, Mustill and

18, 20, 21, 24, 25, 27, 28;

Ralph Gibson L.JJ.

May 2, 3, 24;

July 27

H

*Conflict of Laws—Foreign judgment—Jurisdiction not to enforce English companies mining asbestos in South Africa—Marketing subsidiary of English parent company incorporated in Illinois—Subsidiary trading in asbestos but having no authority to bind English*

Ch. 1990-20



~~companies in contract—Claim against English companies arising from sale of English companies' asbestos for use in Texas settled by consent judgment in Texas—Whether submission to Texas court's jurisdiction—Further claims—Whether English companies having presence within jurisdiction—Default judgment given in Texas court against English companies—Damages assessed without evidence relating to individual plaintiffs—Whether contrary to natural justice—Whether default judgment enforceable~~

Until 1979 the first defendant, Cape, an English company, presided over a group of subsidiary companies engaged in the mining in South Africa, and marketing, of asbestos. The marketing subsidiary in the United States of America was a wholly owned subsidiary, N.A.A.C., incorporated in Illinois in 1953. The marketing subsidiary worldwide was the second defendant, Capasco, a wholly owned English company. Asbestos from the South African mines was sold for use in an asbestos factory at Owentown, Texas. In 1974, some 462 plaintiffs, mainly employees or ex-employees at the Owentown factory, brought actions in the United States Federal District Court at Tyler, Texas, for damages for personal injuries allegedly suffered as a result of exposure to asbestos dust ("the Tyler 1 actions"). The defendants included Cape, Capasco, N.A.A.C., the South African mining subsidiary and other parties including the United States Government. Those actions were settled in September 1977 for U.S.\$20m. of which Cape and its subsidiaries were to bear over \$5m. Cape and Capasco had entered motions protesting the jurisdiction of the Tyler court and had filed defences as to the merits which, inter alia, repeated the jurisdiction protests. The settlement of the Tyler 1 actions was recorded by a consent order made on 5 May 1978.

Between April 1978 and November 1979, a further 206 plaintiffs instituted actions in the Tyler court against the same defendants ("the Tyler 2 actions"). Cape and Capasco took no part in the Tyler 2 actions maintaining that that court lacked jurisdiction over them. They were prepared to let default judgments be entered against them but to resist their enforcement in England. Cape decided to put N.A.A.C. into liquidation and, as from 31 January 1978, N.A.A.C. ceased to carry on business. Cape promoted the incorporation of a new Illinois corporation, C.P.C., and a Liechtenstein entity, A.M.C. The shares in C.P.C. were held by M., the chief executive of N.A.A.C., and those in A.M.C. were held by a nominee on trust for a Cape subsidiary, C.I.O.L. Arrangements were made for C.P.C. to carry out much the same marketing function for the sale of Cape asbestos in the United States as had previously been carried out by A.M.C. Those arrangements continued until 1979 when Cape sold its asbestos mining and marketing subsidiaries. In 1983, 133 plaintiffs in the Tyler 2 actions settled their actions against the main United States defendants, including N.A.A.C. but excluding the United States Government. Later all the 206 plaintiffs in the Tyler 2 actions agreed to settle their actions against the United States Government on terms that they would obtain default judgments against Cape and Capasco and that the United States Government would finance the steps to be taken to enforce those judgments against Cape and Capasco in England. The Tyler court fixed 12 September 1983 as the date for the hearing of the default judgment applications.

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A Under the United States Federal Rules, since Cape and Capasco were in default, the pleaded allegations against them were, save in relation to damage, taken to be admitted. But no judicial hearing took place. On 12 September the judge signed a default judgment for over U.S.\$15m. The awards made to individual plaintiffs fell into a number of bands: 67 were awarded \$37,000, 31 \$60,000, 47 \$85,000 and 61 \$120,000. The judge directed that the total award should represent an average award of \$75,000 per plaintiff but it was the plaintiffs' counsel who selected the level of the bands and who identified the plaintiffs to be placed in each band in order to produce the directed average award. All those plaintiffs, but one, sought to enforce the default judgment against Cape and Capasco by the present proceedings. They contended that Cape and Capasco had submitted to the jurisdiction in the Tyler 1 actions, and that the submission to the jurisdiction in the Tyler 1 actions constituted a submission to the jurisdiction in the Tyler 2 actions or, alternatively, an agreement to submit to the jurisdiction in the Tyler 2 actions. Secondly, the plaintiffs contended that the Tyler court was entitled to take jurisdiction over Cape and Capasco by reason of their presence in Illinois when the Tyler 2 actions were commenced.

B Scott J. dismissed the actions holding, inter alia, that the jurisdiction of a foreign court over defendants could be established either on a territorial basis by showing that the defendants were present within the territory of the foreign court or on a consensual basis by showing that the defendants had consented to the foreign court exercising jurisdiction over them, that Cape and Capasco by participating in the application in the Tyler 1 actions to the judge to make the above application in May 1978 submitted to the jurisdiction of the Tyler court, but that the Tyler 1 actions and the Tyler 2 actions were distinct and separate actions so that submission to the jurisdiction in the Tyler 1 actions could not be regarded as a submission to the jurisdiction in the Tyler 2 actions, that as an agreement to submit to the jurisdiction of a foreign court might be evidenced either by the immediate agreement binding in right or by a unilateral representation of willingness to submit to the jurisdiction, but if such a representation was to be relied on, it should be clear and unequivocal and have been acted on by the plaintiff and that Cape and Capasco had been contracted to submit to the jurisdiction of the Tyler court by their representation of willingness to submit to the jurisdiction in the Tyler 1 actions; that the same principles applied to the question whether a corporation was present in the territory of a foreign court as applied to the question whether a corporation had a sufficient presence in England to enable service of a writ on the corporation to be effected by service on its agent in England; the presence of North A.C. and G.R. Co. in Illinois and the business carried on from their respective offices in Illinois did not constitute the presence of Cape or Capasco in Illinois; and that the procedure adopted by the judge in the Tyler court in giving the default judgment of 12 September 1985 offended against English principles of natural justice in that there had been no judicial assessment of the defendants' liability and the award of damages had been arbitrary, not based on evidence and not related to the individual entitlements of the various plaintiffs.

H On an appeal by the plaintiffs:—

On an appeal by the plaintiffs:—

*Held*, dismissing the appeal, (1) that an overseas trading corporation was likely to be treated by the English court as present within the jurisdiction of the courts of another country only where either such a corporation had established and maintained at its own expense in that other country a fixed place of business and had carried on from there its business for more than a minimal period of time through its servants or agents or through a representative; that in either of those two cases presence could only be established where the overseas corporation's business, whether together with the representative's own business or not, had been transacted at or from the fixed place and, in order to ascertain whether the representative had carried on the corporation's business or his own, it would be necessary to investigate his functions and his relationship with the overseas corporation (post, p. 530D-G).

*Okana & Co. Ltd. v. Forsbacka Jernverkets Aktiebolag* [1914] 1 K.B. 7155, C.A.; *Littauer Glove Corporation v. F. W. Millington* (1920) Ltd. (1928) 44 T.L.R. 746 and *Vogel v. R. and A. Kohnstamm Ltd.* [1973] Q.B. 133 applied.

*Quaere*. Whether residence without presence will suffice (post, p. 518C-D).

(2) That, on the facts, C.P.C. was an independently owned company and by the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C. Cape wanted sales of asbestos from its subsidiaries to continue in the United States but intended, by any lawful means which it was entitled to do, to reduce the appearance of its, or its subsidiaries', involvement there and to reduce the risk of its being held liable for United States taxation or subject to the jurisdiction of the United States courts, and that, accordingly, since it was not a mere facade concealing the true facts it was not appropriate to pierce the corporate veil; that furthermore, since it was accepted that N.A.A.C. was incorporated so as to assist in marketing and to be a marketing agent of the Cape group in the United States and, since a substantial part of its business at all material times was, in every sense, its own business, it did not act as an agent of the Cape group; that, in any event, since N.A.A.C. had no general authority to enter into contracts binding Cape or Capasco and third parties no such transactions were ever entered into by N.A.A.C.; and that, accordingly, the defendants were not present in the United States of America through N.A.A.C., C.P.C. or A.M.C. (post, pp. 541F-H, 544A-C, 544H-545B, G-546A, 547A-D, 549C-D).

(3) That, as a matter of principle, the onus fell on the plaintiff, who sought to enforce a judgment of a foreign court, to demonstrate the competence of that court and that it was only the judgment of the competent foreign court recognised as such by English law which would bind the defendant; that, if the onus fell on the defendants to disprove the competence of the Tyler court to give judgment against them, they had discharged that onus because they had shown that they were not present in the United States (post, p. 550E-F).

(4) That the method by which the Tyler court came to a decision as to the amount of the default judgment was contrary to the requirements of substantial justice contained in English law (post, p. 568F).

(5) That the failure of the defendants to apply to set aside the default judgment did not preclude them from relying on

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- A that breach of natural justice by way of defence to the present action to enforce that judgment, since the plaintiffs had failed to give prior notice to the defendants of the unusual course they were proposing to take, did not seek to dissuade the judge from adopting that method of assessment of damages and drew up and served a form of judgment which did not show the procedure adopted, and the effect on the defendants, although everything was done by the plaintiffs in good faith, was that they remained unaware of any basis for seeking relief from the Tyler court in respect of the defect in the judgment (post, p. 572B-E).
- B *Pemberton v. Hughes* [1899] 1 Ch. 781, C.A. and *Jacobson v. Frachon* (1928) 138 L.T. 386, C.A. applied.  
Decision of Scott J., post, p. 441G, affirmed.
- C The following cases are referred to in the judgment of the Court of Appeal:  
*Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295, C.A.  
*Albazer, The* [1977] A.C. 774; [1976] 3 W.L.R. 419; [1976] 3 All E.R. 129, H.L.(E.)  
*Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468, C.A.  
*Barodai (Mathanavee off) v. Wildastein* [1972] 2 Q.B. 283; [1972] 2 W.L.R. 1077; [1972] 2 All E.R. 689, C.A.
- D *Boys v. Chaplin* [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085, H.L.(E.)  
*Bulova Watch Co. Inc. v. K. Hattori & Co. Ltd.* (1981) 508 F. Supp. 1322.  
*Burnett v. Francis Industries Plc.* [1987] 1 W.L.R. 802; [1987] 2 All E.R. 323, C.A.  
*Canada Enterprises Corporation Ltd. v. MacNab Distilleries Ltd. (Note)* [1987] 1 W.L.R. 813, C.A.
- E *Carmick v. Hancock* (1895) 12 T.L.R. 59  
*Castrique v. Imrie* (1870) L.R. 44 H.L. 444, H.L.(E.)  
*Colt Industries Inc. v. Sarlie* [1966] 1 W.L.R. 440; [1966] 1 All E.R. 673, C.A.  
*Crawley v. Isaacs* (1867) 16 L.T. 529  
*D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852; [1976] 3 All E.R. 462, C.A.
- F *Dunlop Pneumatic Tyre Co. Ltd. v. Actien-gesellschaft für Motor- und Motorfahrzeugbau vorm. Cudell & Co.* [1902] 1 K.B. 342, C.A.  
*Emanuel v. Symon* [1908] 1 K.B. 302, C.A.  
*Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co. Ltd.* [1927] A.C. 95, H.L.(E.)  
*Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64  
*Firestone Tyre and Rubber Co. Ltd. v. Lawellin (Inspector of Taxes)* [1957] 1 W.L.R. 464; [1957] 1 All E.R. 561, H.L.(E.)
- G *General Steam Navigation Co. v. Gillblau* (1843) 11 M. & W. 837  
*Godard v. Gray* (1870) L.R. 6 Q.B. 139  
*Grant v. Anderson & Co.* [1892] 1 Q.B. 108, C.A.  
*Guaranty Trust Co. v. York* (1945) 326 U.S. 99  
*Haggis v. Comptoir d'Escompte de Paris* (1889) 23 Q.B.D. 519, C.A.
- H *Holdsworth (Harold) & Co. (Wakefield) Ltd. v. Caddies* [1955] 1 W.L.R. 352; [1955] 1 All E.R. 725, H.L.(Sc.)  
*Holstein, The* [1936] 2 All E.R. 1660  
*Istituto Chimioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities (Cases 6 and 7/73)* [1974] E.C.R. 223, E.C.J.

- Adams v. Cape Industries Plc. (C.A.)* [1990]
- Jabbour (F. & K.) v. Custodian of Israeli Absentee Property* [1954] 1 A  
W.L.R. 139; [1954] 1 All E.R. 145
- Jacobson v. Frachon* (1928) 138 L.T. 386, C.A.
- Jeannot v. Fuenst* (1909) 100 L.T. 816
- Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335; [1988] 3 W.L.R. 295, C.A.
- Jones v. Lipman* [1962] 1 W.L.R. 832; [1962] 1 All E.R. 442
- La Bourgogne* [1899] P. 1; sub nom. *Compagnie Générale Transatlantique v. v. Thomas Law & Co.* [1899] A.C. 431, H.L.(E.) B
- Lalandia, The* [1933] P. 56
- Littauer Glove Corporation v. F. W. Millington (1920) Ltd.* (1928) 44  
T.L.R. 746
- Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners* [1969]  
1 W.L.R. 1241; [1969] 3 All E.R. 855, C.A.
- Local Government Board v. Arlidge* [1915] A.C. 120, H.L.(E.)
- Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 Q.B. C  
173; [1961] 3 W.L.R. 1358; [1961] 3 All E.R. 495, C.A.
- Miller v. B.C. Turf Ltd.* (1969) 8 D.L.R. (3d) 383
- Mississippi Publishing Corporation v. Murphree* (1946) 326 U.S. 548
- Moore v. Mercator Enterprise Ltd.* (1978) 90 D.L.R. (3d) 590
- Newby v. Von Oppen & The Colt's Patent Firearms Manufacturing Co.*  
(1872) L.R. 7 Q.B. 293
- Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715, D  
C.A.
- Omni Capital International v. Raddolph Wolff & Co Ltd.* (1987) 108 S.Ct.  
404
- Pemberton v. Hughes* [1899] 1 Ch. 781, C.A.
- Princesses of the Nile, The* [1897] P. 188
- Revlon Inc. v. Cripps & Lee Ltd.* [1980] F.S.R. 85, C.A.
- Reynolds v. Fentim* (1846) 16 L.J. C.P. 15
- Robertson, The* (1937) 58 Ll. L.R. 159
- Robinson v. Fenner* [1913] 3 K.B. 835
- Rousillon v. Rousillon* (1880) 14 Ch.D. 351
- Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesell-  
schaft* [1911] 2 K.B. 516, C.A.
- Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22, H.L.(E.)
- Schibby v. Westenthalz* (1870) L.R. 6 Q.B. 155
- Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] A.C. 324;  
[1958] 3 W.L.R. 404; [1958] 3 All E.R. 56, H.L.(Ss) F
- Sfeir & Co. v. National Insurance Co. of New Zealand Ltd.* [1964] 1 Lloyd's  
Rep. 330
- Sindhu Gurdial Singh v. Rajah of Ferozkote* [1894] A.C. 670, P.C.
- South India Shipping Corporation Ltd. v. Export-Import Bank of Korea*  
[1985] 1 W.L.R. 585; [1985] 2 All E.R. 219, C.A.
- Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a  
Vapore del Lloyd Austriaco* (1914) 1 Ll. L.T. 97, C.A.
- Theodoros, The* [1977] 2 Lloyd's Rep. 428
- Vogel v. R. and A. Kohnstamm Ltd.* [1973] Q.B. 133; [1971] 3 W.L.R. 537;  
[1971] 2 All E.R. 1428
- Wallersteiner v. Mitis* [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217, C.A.
- Williams v. Jones* (1845) 13 M. & W. 628 H
- Woolfson v. Strathclyde Regional Council* [1978] S.L.T. 159
- World Harmony, The* [1967] P. 341; [1965] 2 W.L.R. 1275; [1965] 2 All  
E.R. 139
- XBank Ltd. v. G.* (1985) 82 L.S.G. 2016, C.A.

**A** The following additional cases were cited in argument in the Court of Appeal:

*Badcock v. Cumberland Gap Park Co.* [1893] 1 Ch. 362  
*Blohn v. Desser* [1962] 2 Q.B. 116; [1961] 3 W.L.R. 719; [1961] 3 All E.R. 1  
*Calvin's Case* (1608) 7 Co. Rep. 1a  
*Hercules v. Grand Trunk Pacific Railway Co.* [1912] 1 K.B. 222  
*Joyce v. Director of Public Prosecution* [1946] A.C. 347; H.L.(E.)

**B**

The following cases are referred to in the judgment of Scott J.:

*Albazerio, The* [1977] A.C. 774; [1976] 3 W.L.R. 419; [1976] 3 All E.R. 129; H.L.(E.)  
*Bank of Tokyo v. Karoon (Note)* [1987] A.C. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468; C.A.  
*Blohn v. Desser* [1962] 2 Q.B. 116; [1961] 3 W.L.R. 719; [1961] 3 All E.R. 1

**C**

*Boissiere & Co. v. Brockner & Co.* (1889) 6 T.L.R. 85  
*Dunlop Pneumatic Tyre Co. Ltd. v. Actien-Gesellschaft für Motor und Motorfahrzeugbau Vorm. Cudell & Co.* [1902] 1 K.B. 342; C.A.  
*Emanuel v. Symon* [1908] 1 K.B. 302; C.A.  
*Erle Railroad Co. v. Tompkins* (1938) 304 U.S. 64  
*Firestone Tyre and Rubber Co. Ltd. v. Lewellin* [1957] 1 W.L.R. 464; [1957] 1 All E.R. 361; H.L.(E.)

**D**

*Godard v. Gray* (1870) L.R. 6 Q.B. 139; D.C.  
*Holstein, The* [1936] 2 All E.R. 1660  
*Holstein, The* [1936] 2 All E.R. 1660  
*Istituto Chimioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities (Cases 6 and 7/73)* [1974] E.C.R. 225; E.C.J.  
*Jabbour & K. v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 130; [1954] 1 All E.R. 145  
*Jacobson v. Frachten* (1928) 138 L.T. 386; C.A.  
*La Bourgoigne* [1899] P. 1; C.A.  
*Lalandia, The* [1933] P. 56  
*Linauer Glove Corporation v. F. W. Millington (1920) Ltd.* (1928) 44 T.L.R. 746

**E**

*Ochsenheim v. Papelier* (1873) L.R. 8 Ch. App. 695  
*Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715; C.A.

**F**

*Pemberton v. Hughes* [1899] 1 Ch. 781; C.A.  
*Point Landing Inc. v. Omni Capital International Ltd.* (1986) 795 F.2d 415  
*Prima Paint Corporation v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395

**G**

*Princesse Clementine, The* [1897] P. 18  
*Rein v. Stein* (1892) 66 L.T. 469; C.A.  
*Robinson v. Fenner* [1913] 3 K.B. 835  
*Russell v. Smyth* (1842) 9 M. & W. 810  
*S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] Q.B. 279; [1978] 2 W.L.R. 1; [1978] 2 All E.R. 339; Parker J. and C.A.

**H**

*Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K.B. 316; C.A.  
*Schipsky v. Westenholz* (1870) L.R. 6 Q.B. 155  
*Shear & Co. v. National Insurance Co. of New Zealand Ltd.* [1964] 1 Lloyd's Rep. 330  
*Sindar Gurdial Singh v. The Rajah of Faridkot* [1894] A.C. 670; P.C.  
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- World Harmony, The* [1967] P. 341; [1965] 2 W.L.R. 1275; [1965] 2 All E.R. 139 B
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- Actieselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway Co.* [1912] 1 K.B. 222, C.A.
- Attorney-General for Alberta v. Cook* [1928] A.C. 444, P.C.
- Bank of Australasia v. Nilas* (1851) 166 Q.B. 717 C
- Béguelin Import Co. v. G. L. Import-Export S.A.* (1972) 11 C.M.L.R. 81, E.C.J.
- Bergmann v. Marsh* (1921) 91 L.J.K.B. 80
- Berliner Industriebank Aktiengesellschaft v. Jbsst* [1971] 2 Q.B. 463; [1971] 3 W.L.R. 61; [1971] 2 All E.R. 1513, C.A.
- Cassidagi v. Casdagli* [1999] 9 A.C.C. 145, H.L.(E.)
- Castrique v. Imrie* (1870) 11 L.R. 44, H.L.(E.) D
- Crawley v. Isaacs* (1867) 14 L.T. 529
- Deverall v. Grant Advertising Inc.* [1955] Ch. 111; [1954] 3 W.L.R. 688; [1954] 3 All E.R. 389, C.A.
- Elefanten Schuh GmbH v. Piere Jegenain* [1981] E.C.R. 1677, E.C.J.
- Europemballage Corporation and Continental Can Co. Inc. v. Commission of European Communities* (1973) 12 C.M.L.R. 199, E.C.J.
- Fender v. St. John-Mildmay* [1938] A.C. 1; [1937] 3 All E.R. 402, H.L.(E.) E
- Ferguson v. Mahon* (1839) 11 Ad. & El. 179
- Gatty (F.A.) and Gatty (P.V.) v. Attorney-General* [1951] P. 444
- Gray (orae. Formosa) v. Formosa* [1963] P. 259; [1962] 3 W.L.R. 1246; [1962] 3 All E.R. 419, C.A.
- Henderson v. Henderson* (1844) 6 Q.B. 288
- Houlditch v. Marquess of Donegal* (1834) 22 Cl. & Fin. 470
- Imperial Chemical Industries Ltd. v. Commission of European Communities* (1972) 11 C.M.L.R. 557, E.C.J. F
- Jeanot v. Fuerst* (1909) 25 T.L.R. 424
- Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335; [1988] 3 W.L.R. 295, C.A.
- Local Government Board v. Arlidge* [1915] A.C. 120, H.L.(E.)
- Macalpine v. Macalpine* [1958] P. 35; [1957] 3 W.L.R. 698; [1957] 3 All E.R. 134
- Meyer, In re* [1971] P. 298; [1971] 2 W.L.R. 401; [1971] 1 All E.R. 378
- Newby v. Von Oppen and the Colt's Patent Firearms Manufacturing Co.* (1872) L.R. 7 Q.B. 293 G
- Price v. Dewhurst* (1837) 8 Sim. 279
- Reg. v. Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] Q.B. 227; [1984] 2 W.L.R. 370; [1984] 2 All E.R. 27, C.A.
- Rousillon v. Rousillon* (1880) 14 Ch.D. 351
- Secretary of State for Foreign Affairs v. Charlesworth & Co.* [1901] 1 H.L. 116 A.C. 373, P.C.
- Smith, Stone and Knight Ltd. v. Birmingham Corporation* [1929] 4 All E.R. 116
- Syal v. Heyward* [1948] 2 K.B. 443; [1948] 2 All E.R. 576, C.A.

11 Ciba. *Adams v. Cape Industries Plc* (Q.A.A.)

- A *Thorn v. Registrar* [1940] D.L.R. 33433  
*Vadala v. Lawes* (1890) 2 Q.B.D. 310, 6 C.A.  
*Vervaeke (formerly Messina) v. Smith* [1983] 1 A.C. 145; [1982] 2 W.L.R. 835; [1982] 3 All E.R. 424, H.L.(E.)  
*Wah v. Attorney-General* (1932) 147 L.J. 382, H.L.(E.)  
*Wah v. Attorney-General* (1932) 147 L.J. 382, H.L.(E.)  
*Weiss, Biheller and Brooks Ltd. v. Farmer* [1923] 1 K.B. 226, C.A.

B ACTION

- By a writ and statement of claim dated 1 August 1984, the plaintiff, Jimmy Wayne Adams commenced an action against Cape Industries Plc. and its wholly owned subsidiary, Capasco Ltd., seeking to enforce a default judgment which had been awarded to him in the United States of America. In the statement of claim it was alleged that (1) on 21 April 1978, the plaintiff commenced an action against the defendants in the United States District Court for the Eastern District of Texas, Tyler Division, in the State of Texas in the United States of America; (2) the court was duly constituted and held in accordance with the laws of the state and had jurisdiction in that behalf; (3) on 12 September 1983 the court gave judgment in favour of the plaintiff for damages and assessed the damages to which the plaintiff was entitled in the sum of U.S.\$37,000 and ordered the defendants to pay the plaintiff forthwith the sum of \$37,000 and interest at the rate of 9 per cent, per annum from that date until payment. Payment was claimed accordingly, it being certified that at the appropriate rate \$37,000 amounted to £25,298.28.

- The writ was one of 205 claims to enforce the default judgment of the Tyler court in consolidated actions by plaintiffs with similar claims in respect of personal injuries alleged to have been caused by asbestos dust. The defendants denied that the Tyler court had, for the purposes of English law, jurisdiction over them.

- The facts are stated in the judgments of Scott J. and the Court of Appeal.

- T. R. A. Morison Q.C. and Charles Haddon for the plaintiffs.  
 Sir Godfray Le Quesne Q.C., Jonathan Playford Q.C., Adrian Brunner and George Alliot for the defendants.

*Cur. adv. vult.*

- 17 June 1988. Scott J. read the following judgment. The judgment I am about to give is nearly but not quite my complete judgment. After reserving judgment on Tuesday 19 April my judicial duties required me to sit in the North of England until the end of May. A consequence has been that preparation of my judgment in this important case has been unavoidably delayed. Representations have been made to me on behalf of Cape Industries Plc. to the effect that if the result of the case remains uncertain beyond this week, serious financial damage may ensue to the company and to its shareholders. I need not elaborate on the nature of the fears but will say that they did not seem to me to be without substance.

I would think it unacceptable in principle that litigants or those connected with them should be brought to suffer financial loss by a



judge's delay in preparing a reserved judgment, if that result can be avoided. Since the outcome of this case is now clear in my mind and it is only the expression of that outcome that is incomplete, the result can, I think, be avoided. I have proposed to both sides that I should deliver now my judgment to the extent that it is complete—~~something~~ over three-quarters is in fact complete—and express, in summary form, my conclusions on the issues to be covered by that part of my judgment that is not yet complete.

The defendants have pressed me to take that course. The plaintiffs have asked that I should hold my hand until my complete judgment is ready for delivery. I have decided, however, that I ought to proceed in the manner I have indicated. I do not think any injustice will be occasioned thereby to the plaintiffs or anyone connected with them.

I will make clear the point at which my definitive judgment ends, What I say thereafter will not form part of my definitive judgment but will be an indication in summary terms of what will be contained in the final part of my judgment when it is complete. I will reconvene the court in due course for the delivery of that final part. The delay will, I trust, be a short one. The order to be made consequent upon my judgment will not be drawn up until the final part has been delivered. So time for appeal will not start running. I will deal with costs at that stage.

I have before me 205 consolidated actions. In each action the defendants are Cape Industries Plc. ("Cape") and Capasco Ltd. ("Capasco"). Each of the plaintiffs is a person or the personal representative of a person in whose favour a damages award was made on 12 September 1983 in the United States District Court for the Eastern District of Texas, Tyler Division, in the State of Texas, United States of America. I shall refer to this federal district court as the "Tyler court."

The judgment of 12 September 1983 was a default judgment given by Judge Steger, a federal district judge, sitting in the Tyler court. The judgment, after setting out a number of findings of fact and conclusions of law, concluded:

"By virtue of defaulting defendants' acts and omissions of negligence and breaches of warranty, this court finds that defaulting defendants are liable jointly and severally to each plaintiff listed in appendix A for the amounts of money indicated for each plaintiff. It is therefore ordered and adjudged by the court that plaintiffs recover from defendants, jointly and severally, \$15,654,000 and further that such judgment shall run with 9 per cent. interest per annum from the date hereof until paid . . . ."

The awards made to the individual plaintiffs as set out in appendix A to the judgment fell into a number of bands. 67 plaintiffs were awarded \$37,000, 31 plaintiffs were awarded \$60,000, 47 plaintiffs were awarded \$85,000 and 61 plaintiffs were awarded \$120,000. There were thus 206 awards in all. The surviving plaintiffs and the personal representatives of all but one of the plaintiffs who have died since 12 September 1983 have brought actions in this country for payment of the damages and interest ordered to be paid by the judgment of 12 September 1983. The cause of

A action asserted and sued on in each action is the judgment of the Tyler court. These are the consolidated actions before me.

B A judgment of a foreign court can be enforced by action in this country only if the jurisdiction of the foreign court to have given the judgment is recognised by the law of this country. The jurisdiction of the Tyler court over Cape and Capasco is in issue in these actions. It is well settled also that a foreign judgment given by a court of competent jurisdiction will not be enforced in this country if the judgment can be shown to have been obtained by fraud or if its enforcement would offend natural justice or public policy. These defences are relied on by Cape and Capasco. So the actions and the defences thereto raise a number of issues both of fact and of law and I must, in order to enable the issues to be comprehensible, start by briefly relating the history that has led to these actions. When I have done so I will endeavour to describe the issues that arise for decision.

### *History*

D Cape until 1979 presided over a group of subsidiary companies engaged in the mining and marketing of asbestos. On 29 June 1979 the mining and marketing companies were sold by Cape to a South African company, Transvaal Consolidated Exploration Co. Ltd. It was, however, the mining and marketing of the asbestos in the period before the 1979 sale that gave rise to the litigation against Cape that culminated in the 12 September 1983 default judgment. The mines from which the asbestos came were situated in South Africa. The mining companies, the most important of which for present purposes was Egnep Pty. Ltd. ("Egnep"), were South African companies. Egnep mined amosite asbestos. 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 2 December 1975 the shares in Casap were held by Cape.

F One of the important markets for sale of the asbestos produced by the South African mines was the United State of America. On 14 October 1953, Cape had caused to be incorporated in Illinois a company called North American Asbestos Corporation ("N.A.A.C."). The shares in N.A.A.C. were held by Cape. The function of N.A.A.C. which I shall have to examine in more detail later, was to assist in the marketing of the asbestos in the United States of America. N.A.A.C. acted as a liaison between the United States purchasers of the asbestos and the seller, either Egnep or Casap. N.A.A.C. also purchased asbestos on its own account and sold the asbestos in the U.S. market. In the later 1950s Capasco, an English company, was incorporated. Its shares were and still are held by Cape. Capasco, formerly called Cape Asbestos Fibres Ltd., was responsible for the marketing world wide of Cape's asbestos and asbestos products. But the prior existence of N.A.A.C. had the result that marketing in the United States of America was left in the main to N.A.A.C.

H In 1975 an organisational change took place. Cape International & Overseas Ltd. ("C.I.O.L.") was incorporated. C.I.O.L. was an English company and its shares were held by Cape. The shares in Casap and the

shares in N.A.A.C. were transferred to C.I.O.L. But the manner in which Capasco, N.A.A.C., and Casap and the mining companies carried on business and managed their affairs was not materially altered by the insertion of C.I.O.L. between Cape, on the one hand, and Casap and N.A.A.C. on the other hand. The sale to Transvaal Consolidated Exploration Co. Ltd. in 1979 took the form of a sale of the shares in C.I.O.L. So, to rehearse the corporate structure, Cape was the parent company; N.A.A.C. was the marketing subsidiary for the United States of America; Capasco was the marketing subsidiary world wide; Casap was the subsidiary which owned the mining companies and Egnep owned the asbestos mines from which came the amosite asbestos which was sold into the United States of America.

One of the main customers in the United States for Egnep's amosite asbestos was Pittsburg Corning Corporation ("P.C.C."). In 1962, P.C.C. purchased from Union Asbestos and Rubber Corporation ("Unarco") an asbestos factory at Owentown in Texas. Unarco had been a customer for Egnep's amosite asbestos. After its purchase of the Owentown factory in 1962 P.C.C. became a customer. Egnep's amosite asbestos was purchased by P.C.C. and used in the factory for 10 years from 1962 until 1972 when the factory was closed.

Awareness of the potential long-term damage capable of being caused by asbestos dust to those exposed to it reached the point in the mid-1970s in the United States of America at which personal injuries actions began on a large scale to be instituted. Many of those who had worked or were working in the Owentown factory and those who lived in the neighbourhood of the factory commenced actions in the period 1974 to 1979. An accurate estimate is difficult to make but from what I have heard in the course of this action it seems that over that period some 2,000 to 3,000 plaintiffs issued proceedings based upon allegations of injury caused by exposure to asbestos dust emanating from the Owentown factory. There were several defendants to the actions. Unarco and P.C.C., the successive owners of the factory, were defendants. The corporate shareholders of P.C.C., namely P.P.G. Industries Inc. ("P.P.G.") and Corning Glassworks Inc., were joined as defendants on the basis that each had taken sufficient part in management decisions regarding the use of asbestos at the Owentown factory to subject itself to tortious liability arising from that use. N.A.A.C., Cape and Egnep became defendants.

Liability was alleged on the ground that they had been responsible for the supply of the amosite asbestos used in the Owentown factory and, notwithstanding knowledge of its dangers, had failed to warn against those dangers. In addition, the United States itself became a defendant in some of the actions and a third party defendant in others. So did the union to which most of the Owentown factory workers belonged, the Oil Chemical and Atomic Workers International Union. Not all these defendants were residents of Texas. Moreover, the defendants included the United States of America itself. So the actions were brought not in a Texas state court but in a federal court under its diversity of citizenship jurisdiction; which I will later endeavour to explain.

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A The first action was commenced in the Tyler court on 2 January 1974. There were some seven plaintiffs. The action was framed as a "class" action with the plaintiffs purporting to sue "on behalf of themselves and all others similarly situated." This was the "Yandle" action. On 17 January 1974 a second action was commenced in the Tyler court, the "Kay" action. Both actions were assigned to Judge Steger. On 25 February 1974 Cape filed a motion in the Yandle action to quash service on the ground of lack of jurisdiction. On 26 March 1974 Cape filed a similar motion in the Kay action. On 10 April 1974 Egnep did likewise. In 1976 Capasco became a defendant and filed similar motions.

B On 31 July 1974, by which time it must have been apparent that hundreds of claimants alleging injury caused by the amosite asbestos used in the Owentown factory were queueing up in the wings, a conference took place between Judge Steger and counsel for the parties in the two actions. It was decided that the Rules for Complex and Multi-District Litigation would be followed. I shall have to describe these more fully later. For the moment, it suffices to say that they are rules set out in the *Manual for Complex Litigation for use with Federal Practice and Procedure*, the authors of which are Professor Charles Wright and Professor Arthur Miller. The latter gave evidence before me. The rules, widely used in federal courts, represent in substance management techniques for the efficient management and conduct of complex civil litigation.

C One of the first procedural questions which needed to be decided was whether or not the actions would proceed as "class" actions. A hearing on this issue took place on 17 December 1974. On 31 December 1974 Judge Steger ruled that the actions should not have "class" action status. His judgment contains a useful summary of the litigation and the issues therein. In the penultimate paragraph of his judgment, Judge Steger said:

F "The court is of the opinion that the superior method for adjudication of this case is to continue to allow intervention freely for those who wish to join and to maintain firm control over this litigation by utilising the tools set forth in the *Manual for Complex and Multi District Litigation*. It is therefore ordered that the plaintiffs' motion for class action status be and the same is hereby in all things denied ..."

G I must explain the reference to "intervention." Under rule 24 of the Federal Rules of Civil Procedure, a person may, with leave of the court, intervene in an action and become a party thereto if the "applicant's claim or defence and the main action have a question of law or fact in common." Following Judge Steger's order of 31 December 1974 a large number of claimants intervened in the Yandle and Kay actions. On 31 December 1974 a third action was commenced in the Tyler court, the "McNeece" action. The United States of America was the only defendant. The three actions I have mentioned (the Yandle action, the Kay action and the McNeece action) have become known compendiously as Tyler 1. I shall so refer to them.

I have already referred to the motions based upon an alleged lack of jurisdiction. Those motions were not dealt with until 19 April 1977. In the meantime, Cape and Capasco took a number of procedural steps in or in connection with the actions. The effect of these steps is one of the issues before me.

On 19 August 1977 Judge Steger dismissed the motions. He gave no written judgment or reasons. The dismissal was not, however, final. It did not bar Cape and Capasco from taking the same jurisdiction point at trial. In substance, the dismissal was, I think, no more than a decision that the point was not so obvious as to warrant a summary dismissal of Cape and Capasco from the action, and that the point should be left for final decision at trial.

Following the dismissal of the motions, Cape and Capasco filed answers in the Yandle action and the Kay action. They pleaded to the merits of the claims while nonetheless maintaining their jurisdiction objection. By this time, mid-1977, the process of intervention had swelled the number of claimants for damages in the Tyler actions to well over 400. The number was, moreover, still increasing. On 15 July 1977 Judge Steger set 12 September 1977 as the trial date for the three Tyler actions.

One of the most striking features of the Tyler litigation, to English eyes at least, is the personal involvement of Judge Steger in the negotiations for a settlement between the claimants and the defendants. It is a fair inference from the evidence before me that the judge set 12 September 1977 as the trial date in order to concentrate the minds of all parties on the need for a settlement and without any real expectation that an effective trial would commence on that date.

When, on 12 September 1977, the actions were called on, the defendants applied for an adjournment on the ground that they were not yet ready for trial. Judge Steger, without ruling on the application, sent the parties away to negotiate. It is interesting to recall the evidence of Mr. Richard Bernays, counsel for N.A.A.C. He said:

"Judge Steger then asked the marshall to show us all—and we were quite an aggregation—into his conference room in his chambers, and he was completing the call of his docket and said he would join us shortly, which he did. There were a number of us round a very large conference table and the judge finally appeared and directed us to stay there and work until we had settled the cases. He gave us orders that nobody was to leave Tyler, that we could set our own hours of work, come and go as we pleased with that one restriction, that nobody was to leave Tyler without his permission, and he ordered us to stay and work as long as was required to get these cases settled—period."

The negotiations continued in Tyler for some three days. The judge played a broking role, putting pressure on the plaintiffs' counsel to reduce the demands they were making and putting pressure on the defendants' counsel to make offers he regarded as realistic. Sometimes it was the judge himself who communicated the offers and counter-offers to the other side. After the initial three days, counsel were permitted by

A the judge to leave Tyler in order to confer with their clients and to obtain fresh instructions. They returned to Tyler about a week later and a further three days of negotiations took place. Final negotiations at which agreement was reached took place over the period 28 September to 30 September 1977. The agreed settlement figure was \$20m.

B One of the difficulties which had apparently stood in the way of settlement had been the ever increasing number of plaintiffs. Accordingly on 28 September, after I think agreement in principle on the \$20m. figure had been reached, Judge Steger announced that no further intervention in any of the Tyler 1 actions would be permitted. There were then 462 plaintiffs. No more would be added. A formal order to that effect was in due course made on 16 December 1977 and was expressed to be "nunc pro tunc as of 28 September 1977."

C The burden of providing the \$20m. was shared among the defendants in agreed proportions. A sum of \$5.2m. was to be contributed by N.A.A.C., Cape and Egnep; \$8.05m. by P.C.C. and its shareholders; \$1m. by Unarco; and \$5.75m. by the United States Government. The \$20m. was intended to settle all claims of the existing 462 plaintiffs.

D Notwithstanding that effective agreement was reached in the negotiations on 28, 29 and 30 September 1977, the final judgment disposing of the Tyler 1 actions was not given until 5 May 1978. The judgment provided:

E "all parties agreed to waive a jury herein and submit all matters to the court without the intervention of a jury, whereupon all parties made it know to the court that all matters in controversy between them and each of them had been settled by an agreement made in open court which agreement has been transcribed, and the court finds from the evidence that said agreement is fair, reasonable, just, and to the best interests of plaintiffs herein, including the minor plaintiffs, and that said agreement should be in all things approved, it is therefore, ordered, adjudged and decreed by the court that the compromise settlement agreement evidenced by the record of proceedings made herein on 28, 29 and 30 September 1977, and 15 February 1978, be and the same is hereby in all things approved. It is accordingly ordered, adjudged and decreed by the court that the plaintiffs and intervenor, and each of them, take nothing by reason of these suits and said causes are hereby dismissed with prejudice."

G Judge Steger's oral direction given on 28 September 1977, confirmed by the written order of 16 December 1977, had prevented any further interventions in the Tyler 1 actions. New actions had, therefore, been commenced by claimants who would, no doubt, have otherwise intervened in the Tyler 1 actions. These new actions are referred to as the Tyler 2 actions. They, too, were assigned to Judge Steger. There are eight actions in all. The first was commenced on 19 April 1978. The last was commenced on 19 November 1979. Intervention by other claimants into one or other of the Tyler 2 actions took place on an even greater scale than had been the case with the Tyler 1 actions. Cape, Egnep and N.A.A.C. were defendants in each of the eight Tyler 2 actions. But Capasco was a defendant in only three of them, namely those identified



by the numbers 78-102, 78-104, and 79-114. P.C.G., P.P.G., Corning Glass and O.C.A.W. were defendants in all actions. The United States Government was a defendant in some of the actions and a third party defendant in others. A

On 28 December 1981 an important procedural order was made by Judge Steger. The order commences with this explanatory passage:

"There are several issues in these massive tort actions which should be addressed in order that the court may exercise more control over the proceedings as this litigation progresses. First, the defendants have filed motions in which they contend that the claims of many of the plaintiffs are premature because no injury has yet been suffered by the party allegedly exposed to asbestos. Second, it appears that a pretrial statement of damages would improve the court's ability to take a more active role in managing the progress of these actions." B C

The operative part of the order provided:

"It is ordered that each plaintiff asserting a claim for money/damages in this action shall provide the information requested by the court on or before 1 February 1982. The answers shall be based on personal knowledge and attested to under penalty of perjury. Every person providing the information requested has an obligation to exercise good faith in disclosing all material facts that are relied on in asserting the respective claims. Non-responsive or evasive answers will not be permitted. Counsel shall assist in preparing the responses when appropriate. This case has been pending for several years and there has been ample time for counsel to evaluate the claims of their clients. D E

"For the present time, a plaintiff whose deposition has previously been taken in this action, need not provide the requested information. However, the court urges counsel for the plaintiffs to carefully examine and analyze the claims asserted by every individual they purport to represent to determine whether the claims asserted are premature or frivolous. If so, counsel should take whatever action necessary to protect the rights of their clients. F

"In the event a plaintiff determines that the claim he or she is asserting has been filed prematurely, he or she may file a motion to voluntarily dismiss under rule 41(a)(2) of the Federal Rules of Civil Procedure. Unless good cause to the contrary is demonstrated, the court will grant said motions and dismiss the claims without prejudice. G

"In the event a plaintiff fails to provide the requested information within the time allowed, his or her claim will be subject to dismissal without prejudice in accordance with the provisions contained in rule 37(b)(2) and rule 41(b) of the Federal Rules of Civil Procedure."

Under headings "Preliminary information," "Has the cause of action accrued," and "Pre-trial statement of damages" the information to be supplied was specified. H

As a result of the order of 28 December 1981 and the response, or lack of response, thereto by the respective plaintiffs, a large number

A thereof had their claims summarily dismissed "without prejudice." The number of plaintiffs left in the Tyler 2 actions was 206 or thereabouts. It may be assumed that each of the 206 had responded to the order of 28 December 1981 by alleging some physical condition that was at least capable of having been caused by exposure to asbestos dust and was capable of constituting an injury.

B Cape, Capasco and Egnep took no part in any of the Tyler 2 actions. This was a deliberate tactical decision. It appears from the evidence I have seen and heard that the senior officers of Cape regarded the Tyler 1 actions, initially at least, as of little more than nuisance value. They could not understand how tortious liability to the Owentown workers could be visited upon the Cape companies simply on the ground that Cape subsidiary companies had mined the asbestos and sold it into the United States of America. It may be that they underestimated the breadth of the net of tortious product liability as applied in the United States of America. They also, it seems, expected to succeed on their jurisdiction objection, either at the interlocutory stage or, later, at trial. But the Tyler 1 settlement negotiations and the pressure for a settlement exerted by Judge Steger shattered any previous complacency. If the other defendants had stood firm, Cape would, I think, have preferred to go to trial and to have endeavoured to win on the jurisdiction point. But if all the other defendants were to settle, Cape would be left as the only defendant in potentially big and expensive jury trials. So they agreed to participate in the Tyler 1 settlement at a group cost of \$5.2m.

E After the settlement had been concluded the future did not look attractive to Cape. It was known, or at least feared, that there were hundreds more claimants waiting to step forward and press claims. The \$5.2m. contribution to the \$20m. settlement had been borne as to \$4.1m. by N.A.A.C.'s insurers. But the insurance cover was, apparently, virtually exhausted. Cape had no assets in the United States of America save for the shares in N.A.A.C. held by C.I.O.L. The N.A.A.C. shares were, by reason of the number of outstanding asbestos related claims, assets of no value. So the decision was taken by the senior management of Cape that Cape, Capasco and Egnep would take no step at all in any of the Tyler 2 actions. They were prepared to allow default judgments to be obtained. There were no United States assets against which any judgments could be enforced and they were prepared to defend actions brought in England to enforce any judgments on the ground that under English law, the United States courts had no jurisdiction over Cape, Capasco or Egnep. The decision to take no step in the Tyler 2 actions was necessary in order to avoid anything being done that might be represented as a submission to the jurisdiction of the Tyler court. In addition it was decided to put N.A.A.C. into liquidation.

These decisions were taken at a meeting of the board of Cape Industries held on 1 November 1977. The minutes of the meeting record:

H "The managing director stated that, having regard to the opinion of Mr. J. Fox-Andrews Q.C., it was proposed in respect of any future United States claims not to contest the proceedings in the American courts and to accept the risk of a default judgment being given



against the company in the United States of America, it being considered most unlikely that such a judgment would be enforced by an English court. . . . Reference was made to a proposed re-organisation of the group's asbestos selling arrangements, particularly in the United States of America, which in future would be more closely controlled from South Africa. As part of this re-organisation it is proposed that North American Asbestos Corporation should be wound up."

The minutes do not so state but there can really be no doubt but that the decision to wind up N.A.A.C. was taken in order to try and avoid the danger of an argument that under English law Cape's interest in N.A.A.C.'s United States business sufficed to give the Tyler court jurisdiction over Cape.

It was not, however, desired that the United States of America, as a market for Cape's asbestos, should be abandoned. The liquidation of N.A.A.C. was accompanied by the devising and implementation of alternative marketing arrangements. First, a Liechtenstein corporation, Associated Mineral Corporation ("A.M.C."), was formed, the bearer shares in which were held by Dr. Ritter, a Liechtenstein lawyer, as fiduciary for C.I.I.L. All sales of Cape's asbestos into the United States of America were to be sales by A.M.C. The second step involved the creation of a new United States marketing entity. The president of N.A.A.C. for the past four years or so had been a Mr. Morgan. On 12 December 1977 a new Illinois corporation, Continental Productions Corporation ("C.P.C.") was formed. The shares in C.P.C. were held by Mr. Morgan. Under an agreement dated 5 June 1978 made between C.P.C. and A.M.C. it was agreed that C.P.C. would act as agent for A.M.C. in the U.S.A. for the purpose of the sale of asbestos. C.P.C. was to be remunerated on a commission basis but had no authority to contract on behalf of its principal, A.M.C., or any other Cape company. It was to act as a link between A.M.C. and the United States purchasers in connection with shipping arrangements, insurance and the like.

As from 31 January 1978, N.A.A.C. 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. N.A.A.C. executed articles of dissolution on 18 May 1978. The relationship between N.A.A.C., C.P.C., A.M.C. and the Cape companies is a matter on which a good deal turns and to which I shall have to return in more detail. My intention for the moment is simply to give an outline of events. Through the medium of A.M.C. and with the assistance of C.P.C., Egnep's amosite asbestos continued to be sold into the U.S. until the sale in 1979 to Transvaal Consolidated Exploration Co. Ltd. What happened thereafter I do not know.

I must return to the Tyler 2 actions. Between 1981 and 1982, it will be recalled, the number of plaintiffs had been thinned down to about 206. On 3 November 1982 Judge Steger fixed 2 February 1983 as the trial date. Shortly before the hearing date, settlement negotiations took place. On 24 January 1983 there was a meeting between defence counsel. The purpose was to discuss the forthcoming trial. The possibility

A of settlement of the Tyler 2 actions was also discussed. No one on behalf of Cape, Capasco or Egnep was present. They were taking no part in the proceedings. No one for Unarco was present. Unarco had entered into bankruptcy proceedings and, as I understand it, the actions against it had consequently been stayed. But the other defendants, including N.A.A.C. were represented. When discussion of a possible settlement began, counsel for the United States made clear that the United States would not agree to make any payment by way of settlement. A policy decision had apparently been taken by the Justice Department that the industry and not the taxpayer should bear the cost of compensating claimants for asbestos related disease.

B On the following day another conference took place. On this occasion the plaintiffs' counsel, too, were present. So was the judge, who seems to have played a part comparable to that which he played in the 1978 settlement of the Tyler 1 actions. It is important to record that the plaintiffs represented at this conference did not include those plaintiffs, for convenience called "the Unarco plaintiffs," who had worked at the Owentown factory during its ownership by Unarco pre-1962 but not during its ownership by P.C.C. post-1962. The Unarco plaintiffs obviously had no claim against P.C.C. or its shareholders. So they were not represented in the settlement negotiations that took place on 25 January 1983 and thereafter. The plaintiffs represented at these negotiations numbered 133.

C Offers were made on behalf of the plaintiffs. Offers were made by the defendants. It is a feature of the negotiations that the plaintiffs' demands were presented in the form of an average figure per plaintiff. Initially, a sum of \$40,000 per plaintiff was sought. This, given 133 plaintiffs, would have led to a settlement figure of \$5.32m. The defendants offered a total sum of only \$619,000. So there was a wide gap between the two sides. In the course of the day, the plaintiffs' figure came down and the defendants' figure went up. Judge Steger was closely involved in the negotiations, discussing quantum sometimes with plaintiffs' counsel, sometimes with all counsel together. He made plain that he thought the plaintiffs were asking for too much and that the defendants were not offering enough. He was instrumental in bringing the plaintiffs down to an average of \$10,000 per plaintiff, a total of \$1.33m.

F This figure was within reach of a figure that defendants' counsel would have been prepared to accept. But they lacked authority from their clients to go that high. So the negotiations were adjourned to 2 February 1983. The lead counsel for the plaintiffs in these negotiations was Mr. Blake Bailey. He occupied this position not because he represented more plaintiffs than anyone else, but simply because he had been appointed by Judge Steger to be liaison counsel on behalf of the plaintiffs. In the course of the discussions on 25 January Mr. Bailey raised the question of the possible liability of the United States Government. The United States had indicated an unwillingness to agree to make any payment to the plaintiffs. But Mr. Bailey, apparently after discussions with Judge Steger, thought there was a good chance that a judgment against the United States Government could be obtained, at

least on the third party claims, if not on the plaintiffs' direct claims. Mr. Bailey conceived the idea that the terms of settlement might keep alive, for the benefit of the plaintiffs, the third party claims of the settling defendants against the United States Government.

On 2 February 1983 the parties met once more. Agreement was reached on a settlement at an average of \$10,000 per plaintiff, a total of \$1.33m. This figure was that which on 25 January Judge Steger had told Mr. Bailey that the plaintiffs should accept and had told the defendants that they should offer. As between the settling defendants, the \$1.33m. was to be provided as to \$900,000 by P.C.C. and P.P.G., \$130,000 by Corning Glass, \$50,000 by O.C.A.W. and \$250,000 by N.A.A.C. On payment of these sums the settling defendants were to be released from all claims by the 133 plaintiffs.

In addition, however, Mr. Bailey put to the defendants' counsel, and obtained their agreement to, a device intended to give the plaintiffs the chance of additional recovery against the United States Government. The device was this: the settlement figure would be expressed in the intended settlement agreement not as \$1.33m. but instead as \$6.65m., an average of \$50,000 per plaintiff. The defendants would be obliged to pay only \$1.33m. The balance of \$5.32m. (\$40,000 per plaintiff) would be payable only if and to the extent that the defendants' third party claims against the United States succeeded. The prosecution of those claims in the names of the defendants was to be the responsibility of the plaintiffs' counsel, no costs in respect thereof falling on any of the defendants. The \$6.65m. was a figure proposed by Mr. Bailey. It was not a figure which mattered at all to the defendants since their obligation to pay was limited to the \$1.33m. They did not bargain about the amount. They simply agreed to Mr. Bailey's proposal which would cost them nothing. Mr. Bailey told me that the figure was based upon what he thought might be awarded against the United States at the suit of the settling defendants. How it could have been supposed that the liability of the United States under the third party claims could exceed the \$1.33m. that the settling defendants, the third party claimants, had agreed to pay the plaintiffs, defeats me. But there it is. I shall have to return to the implications of this device later.

Terms having been reached between plaintiffs and settling defendants, the agreement was announced to Judge Steger in open court on the same day, 2 February 1983. There is a transcript of what was said. Judge Steger approved the settlement. He certainly knew of the true settlement figure of \$1.33m. Indeed, the \$10,000 average had been suggested and recommended by him. Whether he had any knowledge of the \$6.65m. figure is an important matter to which I must return.

On 8 April 1983 Judge Steger fixed 20 June 1983 as the trial date for the outstanding Tyler 2 claims against the United States. In addition to the third party claims, a few of the plaintiffs had direct claims against the United States. The lead counsel for the United States in the Tyler 2 actions was Peter Nowinski. He and Mr. Bailey met and discussed the possibility of settlement. Mr. Nowinski again made clear that the United States Government thought that the industry, not the taxpayers, should bear the burden of compensation for asbestos related injury. Mr. Bailey



A then suggested an agreement under which, in settlement of the claims against the United States, the United States would agree to bear the costs of enforcement of default judgments against, Cape, Capasco and Egnep. Agreement on these lines was reached. A compromise agreement dated 15 June 1983 was signed. Paragraphs 3 and 4 thereof provided:

B "Plaintiffs or third-party plaintiffs, or both, will promptly make due application to the Texas court for judgment against the Cape companies, or any of them, for damages suffered as a result of exposure to asbestos at or from the Texas plant. Such application shall not be presented to the Texas court without the prior approval of the United States of America, both as to form and content, which approval shall not be unreasonably withheld.

C "Upon satisfaction of the promises made in clauses 1, 2 and 3 above and upon entry of judgment or judgments against the Cape companies, or any of them, the United States agrees diligently to cause to be taken or assist in taking of such appropriate action as may be reasonably required to enforce or attempt to enforce such judgment or judgments in the United Kingdom of Great Britain or the Union of South Africa, or in such other countries as may be appropriate against the judgment debtors, their predecessors, successors, assigns or other appropriate entities."

E The stage was therefore set for applications for default judgments against Cape, Capasco and Egnep, none of which had taken any part in the Tyler 2 actions and each of which therefore was in default in filing an answer to the plaintiffs' pleadings. The purpose of obtaining these default judgments was that they should be enforced in England. It is not surprising, therefore, that the application should have been preceded by consultations between Mr. Bailey, Mr. Nowinski and Messrs. Oppenheimers, solicitors for the plaintiffs. The advice given by Oppenheimers is protected by privilege, but it is not hard to infer that it dealt with the English law on enforcement of foreign judgments.

F The application for the default judgment and the judgment itself were drafted by Mr. Bailey. Various preliminary drafts are in evidence and there is some difficulty in following the development of the original draft to the final version. Mr. Bailey testified to consultations both with Mr. Nowinski and with Judge Steger on the matter. Cape and Capasco were informed by notice that the application for the default judgment would be heard on 12 September 1983. This notice was not strictly required under the relevant Federal Rules of Procedure but, I expect, was given ex abundanti cautela on the advice of the plaintiffs' English lawyers.

G A hearing of the application, or at least some judicial adjudication thereon, was necessary in order that the unliquidated damages claims of the respective plaintiffs should be quantified. The documents in support of the application were lodged with Judge Steger on 12 September 1983 and sought for each plaintiff one or other of four levels of damages, \$150,000, \$115,000, \$85,000 and \$60,000. The sum allocated to each plaintiff was designed to produce an average of \$120,000 per plaintiff. On 12 September 1983 Judge Steger was sitting not in Tyler but in

Marshall, Texas. The documents handed in on 12 September 1983 included medical records relating to each of the 206 plaintiffs. In relation to a few of the plaintiffs there were doctors' reports. With the records and reports relating to each plaintiff was a summary. Each summary gave the name and age of the plaintiff, a short statement of the plaintiff's exposure to asbestos dust, the name of the person or organisation by whom the plaintiff had been medically examined and a short statement of the result of the examination. The summaries had been prepared by the plaintiffs' respective attorneys.

The default judgment itself was signed by Judge Steger and dated 12 September 1983. It was presumably signed on that day. It was certainly signed earlier than 14 September 1983 since on that date the judgment was formally recorded on the court docket sheets relating to the Tyler 2 actions. At some point, perhaps in the afternoon of 12 September, Mr. Bailey was informed on the telephone by Judge Steger's law clerk that the judge was not prepared to give judgment for an average of \$120,000 per plaintiff but was prepared to give judgment for an average of \$75,000 per plaintiff. It was left to Mr. Bailey and Mr. Charles Clark, counsel for some 181 of the plaintiffs, to re-work the details in the appendix to the judgment so as to produce an average award of \$75,000. They did so by reducing the four levels of damages to \$115,000, \$85,000, \$60,000 and \$37,000. Thus the directed average of \$75,000 was produced. The re-worked appendix was handed in at the Tyler courthouse and was annexed to the signed judgment. All this must have taken place earlier than 14 September and before Judge Steger signed the judgment. No hearing as such had taken place. No witness had given evidence, orally or by affidavit. The extent to which Judge Steger looked at, or could have looked at, the medical records and reports is in doubt. I will return to this later. The propriety of the judge dealing with the assessment of damages without any evidence, in the strict sense, is also in issue. It is not necessary for me at this stage to do more than outline the manner in which the default judgment came to be produced.

The actions before me were commenced by specially endorsed writs most of which were issued on 1 August 1984. Each statement of claim pleaded the Tyler 2 action in which the plaintiff had been a party, asserted that the Tyler court had had jurisdiction to deal with the action, pleaded the default judgment of 12 September 1983, and claimed the amount allocated by that judgment to the plaintiff with interest thereon.

#### *The issues*

The plaintiffs cannot enforce the default judgment by action in this country unless, by the standards of English law, the Tyler court was entitled to take jurisdiction over Cape and Capaseo. The plaintiffs rely on three alternative grounds. First, the plaintiffs contend that Cape and Capaseo voluntarily appeared in the proceedings in the Tyler court. This contention requires some explanation since it is common ground that Cape and Capaseo took no part at all in the Tyler 2 actions. The plaintiffs rely, however, on the steps taken by Cape and Capaseo in the Tyler 1 actions and on the relationship between the Tyler 1 actions and the Tyler 2 actions. The first step in the argument is that Cape and

- A Capasco voluntarily appeared in the Tyler 1 actions. Cape and Capasco deny this. They contend that each step they took in the actions was taken subject to the protest to the jurisdiction they had made at the outset and that, notwithstanding the interlocutory dismissal of their motions, jurisdiction remained a live issue for the trial. In the circumstances they contend that nothing was done in the Tyler 1 actions that could constitute a voluntary appearance or submission to the jurisdiction. The plaintiffs' second step in the argument is their assertion that the Tyler 1 actions and Tyler 2 actions represent "one litigation unit" so that a voluntary appearance or submission to the jurisdiction in any of the actions was sufficient to give the Tyler court jurisdiction over Cape and Capasco in all the actions. This somewhat startling proposition is based upon the alleged effect of bringing Owentown asbestos related litigation under the umbrella of the Rules for Complex and Multi District Litigation.

- B Second, the plaintiffs contend that even if they are wrong on their first point, nonetheless Cape and Capasco must be taken to have agreed to submit to the jurisdiction of the Tyler court in the Tyler 2 actions. The plaintiffs rely on the inferences which it is contended must be drawn from the various steps taken by Cape and Capasco in the Tyler 1 actions. Cape and Capasco deny that those steps can be represented as their agreement to submit to the jurisdiction in other actions.

- D Third, the plaintiffs contend that the Tyler court was entitled to take jurisdiction over Cape and Capasco by reason of their presence in Illinois either in January 1974, when the Tyler 1 actions commenced or in April 1978 to November 1979, the period over which the Tyler 2 actions were commenced. This contention raises issues both of law and fact. For the fact of presence, the plaintiffs rely on N.A.A.C.'s Illinois presence up to its dissolution in 1978 and on C.P.C.'s Illinois presence from 31 January 1978 up to the sale to Transvaal Consolidated in June 1979. It is contended that the relationship between each of these companies and Cape and Capasco justifies treating their presence in Illinois as, for jurisdiction purposes, the presence of Cape and Capasco. This contention is in issue. It is also in issue whether, under English law, presence in Illinois is sufficient to give jurisdiction to a federal district court sitting in Texas on a tort claim governed by the law of Texas. The last of the Tyler 2 actions was commenced in November 1979, some months after the sale to Transvaal Consolidated. But, if the plaintiffs' presence in Illinois is sound so far as the earlier Tyler 2 actions are concerned, the plaintiffs rely on the "one litigation unit" argument for the purpose of bringing the last action under the same umbrella.

- E Finally, the plaintiffs have a comity or reciprocity ground. It is pleaded in the further and better particulars of the statement of claim that, if the situation had been in reverse, the English courts would have assumed jurisdiction and that the English courts should therefore recognise the jurisdiction of the Tyler court. Mr. Morison, however, in opening the plaintiffs' case gave me the welcome news that he would not be relying before me on this fourth ground. There is apparently clear authority, binding at least on courts of first instance, that comity or



reciprocity is an inadequate ground for enforcement in England of the judgment of a foreign court.

Cape and Capasco deny that the Tyler court had, for the purposes of English law, jurisdiction over them on any of the three grounds relied on by the plaintiffs. Cape and Capasco have, however, additional defences. They allege that the default judgment is impeachable and unenforceable, first upon the ground that it was obtained by the fraud of Mr. Bailey, second that it was obtained in circumstances opposed to natural justice; and, finally, that to enforce it would be contrary to public policy. Broadly the same particulars are relied on in support of each of the three grounds. It is alleged that the default judgment, as drafted by Mr. Bailey and signed by Judge Steger, contained to the knowledge of Mr. Bailey a number of mis-statements of fact. It is alleged that, to Mr. Bailey's knowledge, the procedure employed for quantification of the plaintiffs' damages did not represent a judicial determination or assessment thereof. It is alleged that Mr. Bailey induced the judge to award more than he would otherwise have awarded by misrepresenting that the February 1983 settlement between the 133 plaintiffs and the settling defendants had been agreed at an average figure of \$50,000 per plaintiff, rather than the true figure of \$10,000 per plaintiff. It is alleged that the damages awarded by the default judgment were to Mr. Bailey's knowledge, arbitrary, exorbitant and manifestly unjust. There are additional allegations, but I have mentioned the principal ones. These allegations are all denied and have been bitterly contested. Apart from the issues of fact raised by these allegations they raise also issues of law as to the criteria that must be satisfied if an otherwise enforceable foreign judgment is to be rejected on grounds of fraud, natural justice or public policy.

In summary, therefore, there are the following issues with which I must deal. (1) Did Cape and Capasco voluntarily appear or submit to the jurisdiction in the Tyler 1 actions? (2) If so, did they thereby submit to the jurisdiction in the Tyler 2 actions? (3) Alternatively, did they thereby agree to submit to the jurisdiction in the Tyler 2 actions? (4) Did the presence of N.A.A.C. in Illinois represent the presence of Cape and Capasco in Illinois for jurisdiction purposes? (5) Did the presence of C.P.C. in Illinois represent the presence of Cape and Capasco in Illinois for jurisdiction purposes? (6) Did the presence in Illinois of Cape and Capasco entitle the Tyler court to take jurisdiction over Cape and Capasco in the Tyler 2 actions? (7) Is the default judgment impeachable on any of the fraud, natural justice and public policy grounds pleaded by Cape and Capasco?

I will take these issues in turn, but it is worth first emphasising that each falls to be decided in accordance with English law. Questions as to whether certain acts represent a submission to the jurisdiction of the Tyler court must be decided by reference to English law. It may be that English law will answer certain questions by applying the law of Texas or United States federal law, as the case may be, but that will be because English law requires that approach. My task is to try and identify the rule of English law that applies to each question and then to apply that rule.

A I can conveniently start by identifying the basis on which English courts will enforce the in personam judgments of foreign courts. In *Russell v. Smyth* (1842) 9 M. & W. 810, 818, Lord Abinger C.B. said: "Foreign judgments are enforced in these courts because the parties liable are bound in duty to satisfy them." Parke B. expressed the same principle, at p. 819: "Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." In *Godard v. Gray* (1870) L.R. 6 Q.B. 139, 148-149, Blackburn J. said:

B "But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated 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." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had no jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained . . . ."

F In *Schibsby v. Westenholtz* (1870) L.R. 6 Q.B. 155 judgment was delivered on the same day as the judgment in *Godard v. Gray*, L.R. 6 Q.B. 139. The same judge, Blackburn J., repeated the principle stated in *Godard v. Gray*, and added, at p. 159, that "anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Q The "obligation to pay" to which Blackburn J. referred in *Godard v. Gray*, may, under English law, arise in two ways. First, it is accepted that a foreign court is entitled to take jurisdiction on a territorial basis. "All jurisdiction is properly territorial" said the Earl of Selbourne L.C. in *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 683. He expanded the proposition thus:

H "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 domicile, it may exist



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."

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.

The alternative basis of jurisdiction, where in personam money judgments are concerned, is that of consent. Prima facie, a foreign court does not, in the eyes of English law, have jurisdiction over an absent foreigner. But if the foreigner consents to the court exercising jurisdiction over him, the position is different. The element of consent is clearly present if the foreigner, as plaintiff, commences proceedings in the foreign court. It is also present if the foreigner, as defendant, makes a voluntary appearance without protest in the foreign court. In either case there is a submission by the foreigner to the jurisdiction of the foreign court that, in the eyes of English law, may give rise to an "obligation to pay." Further, whether or not a defendant takes any part in an action in a foreign court, he may have contractually bound himself to accept the jurisdiction of the foreign court. Accordingly, the jurisdiction of a foreign court over a defendant may be established, on a consensual basis, either by the defendant's participation in the proceedings or by the defendant's agreement to submit to the jurisdiction. This consensual basis is relied on by the plaintiffs both in its voluntary submission argument and in its contention that there was an agreement by Cape and Capasco to submit.

It is important, to my mind, to keep clear and distinct the two alternative bases upon which the jurisdiction of a foreign court over a defendant may be established. Jurisdiction on the ground of presence in the foreign country is based on territoriality. Consent on the part of the defendant is not necessary and is irrelevant. On the other hand, jurisdiction on the ground of voluntary submission or of an agreement to submit is based upon consent. An actual consent is, in principle, necessary. The over-riding consideration, however, relevant to each of the issues with which I must deal is whether the default judgment in the Tyler 2 actions created an "obligation to pay" which, under English law, the defendants are bound to discharge.

#### *Issue 1*

The principle that a foreign court has jurisdiction to give an in personam judgment if the judgment debtor, the defendant in the foreign court, submitted to the jurisdiction of the foreign court, is well settled in English law. Application of this principle presents no difficulty if the defendant took no part at all in the proceedings, nor if the defendant simply appeared therein and fought the case on its merits. Difficulty arises where the defendant has objected to the jurisdiction of the foreign

A court and, while maintaining that objection, has taken part in the proceedings. The difficulty has, in part, been remedied by Parliament. Section 33(1) of the Civil Jurisdiction and Judgments Act 1982 provides:

B "For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely (a) to contest the jurisdiction of the court; (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

Problems, obviously, still remain, particularly in cases where the steps taken by the defendant in the foreign proceedings were taken not only for the purpose of contesting the jurisdiction but also for the purpose of preparing for a trial on the merits. Some authority suggests that in such cases the defendant will be regarded as having submitted to the jurisdiction of the foreign court: see e.g. *Boissière & Co. v. Brockner & Co.* (1889) 6 T.L.R. 85. But in *Williams & Glyn's Bank Plc. v. Astro Dinamico Compania Naviera S.A.* [1984] 1 W.L.R. 438 the House of Lords approved a dictum of Cave J. in *Rein v. Stein* (1892) 66 L.T. 469, 471 that

E "in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all."

It is time I identified the various steps taken by Cape and Capasco in the Tyler 1 actions which bear upon this issue.

P (i) The first step taken by each was to file a motion challenging the jurisdiction of the Tyler court. Cape did so on 25 February 1974 in the Yandle action and on 28 March 1974 in the Kay action. I am not clear on what date Capasco filed its motion in the Yandle action. The operative part of each motion declared that the applicant was

G "specially appearing . . . for the sole and only purpose of making this motion to assert lack of jurisdiction of this Honorable Court over its person and for said purpose only moves this Honorable Court to set aside and quash the supposed service of summons upon this defendant . . ."

H (ii) On 31 July 1974 Judge Steger called the conference of counsel at which it was agreed that the Rules for Complex and Multi-District Litigation would be followed. Mr. Richard Bernays, who acted as counsel for Cape and Capasco until 14 September 1977, attended the conference.

(iii) On 26 September 1974 another conference of counsel took place. It was agreed that there would be limited discovery for the

purpose of dealing with the question whether the Yandle and Kay actions should proceed as "class" actions. Cape and Capasco were represented at this conference. A

(iv) On 7 November 1974 Cape answered written interrogatories which had been filed by the plaintiffs.

(v) On 29 November 1974 Cape filed a brief on the "class" action question. The brief was expressed to be subject to Cape's objection to the jurisdiction. In the brief Cape opposed "class" action status for the Yandle and Kay actions. B

(vi) On 17 December 1974 the hearing on the "class" action issue took place. Cape was represented at the hearing. On 31 December 1974 Judge Steger denied "class" action status for the two actions.

(vii) On 4 June 1975 the deposition of Mr. Godfrey Higham was taken in London. This was part of the pre-trial discovery normal under the procedure of American courts. Mr. Higham gave the deposition as a witness on behalf of Cape. Mr. Bernays, Cape's counsel, took part in the taking of the deposition. Subsequently, depositions were taken from other Cape witnesses and from a Mr. Buckley on behalf of P.C.C. with counsel for Cape in attendance. C

(viii) On 19 April 1977 Cape's and Capasco's motions on the jurisdiction question were dismissed by Judge Steger. The jurisdiction objection remained alive, however, as an objection to be taken, finally, at trial. I have already commented that Judge Steger did not purport to deal definitively with the jurisdiction point. He cut short Mr. Bernay's submissions on behalf of Cape and gave no reasons for his decision. An appeal by Cape was theoretically possible, but only theoretically. First, Judge Steger would have had to be persuaded to certify the point as suitable for an immediate interlocutory appeal. Second, the United States Court of Appeals for the Fifth Circuit would have had to be persuaded to give leave for the appeal to proceed. I was satisfied by the evidence I heard from Mr. Bernays and Mr. Brin, both of whom were Texan attorneys with wide experience in the federal courts, that the prospects of getting an appeal heard would have been practically nil. Both Judge Steger and the United States Court of Appeals would have left the jurisdiction point to be taken at trial and, if necessary, to be appealed thereafter. D E F

(ix) On 6 May 1977 Cape and Capasco sought and obtained an extension of time to answer interrogatories. They answered the interrogatories on 17 June 1977.

(x) On 23 May 1977 Cape and Capasco filed answers in the two actions. The answers commenced with this paragraph "These defendants and each of them still insist that this Honorable Court does not have jurisdiction over the person of said defendants." The answers proceeded to plead to the merits of the case. In addition, and in the same document, Cape and Capasco made cross-claims against the other defendants claiming an indemnity against or contribution towards any sum they might be adjudged liable to pay the plaintiffs. The pleading ended with a demand for a jury trial. G H

(xi) On the same day, 23 May 1977, Cape and Capasco filed written material opposing the plaintiffs' motion to be permitted to use depositions taken in previous asbestos cases.



A (xii) The date of trial was fixed for 12 September 1977. Cape and Capasco were represented in court on that day by Mr. Bernays; he also represented N.A.A.C. Mr. Bernays joined in the application for an adjournment. Thereafter Mr. Bernays represented only N.A.A.C. and Mr. Millwid participated on Cape and Capasco's behalf in the settlement negotiations which took place. The negotiations took place not simply in the face of the judge but at the insistence of the judge.

B (xiii) Settlement terms were agreed. Cape and Capasco were represented before Judge Steger on 5 May 1978 when the consent was made. The order dismissed with prejudice both the plaintiffs' actions and the defendants' cross-claims.

C These were the steps taken in the Tyler 1 actions by Cape and Capasco. Did they, taken cumulatively, represent a submission by Cape and Capasco to the jurisdiction of the Tyler court in the Tyler 1 actions? Mr. Morison, for the plaintiffs, has submitted that they did. He relies, particularly, on the consent order. He is, in my view, right to do so. The various steps taken prior to the settlement negotiations on 23 September 1977 were all, either expressly or implicitly, accompanied by a re-assertion of the jurisdiction objection. I am satisfied that none of the steps taken would, under the law governing the Tyler court, have been regarded as a submission by Cape and Capasco to the jurisdiction or as a waiver of the jurisdiction objection. If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not, in my view, to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must, in my view, be assessed in the context of the foreign proceedings.

E But the consent order is another matter. It represented a clear exercise by the Tyler court of jurisdiction over the Tyler 1 actions. Cape and Capasco participated in inviting Judge Steger to make the order. If any of the Tyler 1 plaintiffs sought to sue Cape in England on the causes of action sued on in Tyler 1, Cape would be entitled to rely on the consent order of 5 May 1978 as a bar to the action. The order extinguished the causes of action against Cape that the Tyler 1 plaintiffs had been asserting. So, in my judgment, the conclusion is inescapable that by participating in the application to Judge Steger to make the consent order of 5 May 1978 Cape and Capasco recognised the jurisdiction of the Tyler court to deal with, and dispose of, the claims made against them in the Tyler 1 actions and waived the jurisdiction objection that was then still on foot.

## Issue 2

H Did the submission to the jurisdiction in the Tyler 1 actions represent also a submission to the jurisdiction in the Tyler 2 actions? The plaintiffs contend that Cape and Capasco, by accepting the court's jurisdiction in the Tyler 1 actions, submitted to the jurisdiction of the court in the Tyler 2 actions. This contention is, in my opinion, for a number of reasons, unsustainable.

First and foremost, the basis of the contention is, in my judgment, unsound. The argument advanced by Mr. Morison was that the Tyler 1 actions and the Tyler 2 actions were to be regarded as "one unit of litigation." This followed, it was suggested, from Judge Steger's decision to apply to the litigation the Rules for Complex and Multi-District Litigation. But these rules represent no more than management techniques designed to facilitate the handling of complex cases. They have, in themselves, no direct procedural effect. The adoption of the rules by Judge Steger on 31 July 1974 did not have the consequence that discovery in Tyler 1 could be automatically used in Tyler 2. On the contrary, specific orders to that effect were later necessary. It did not have the effect that pleadings from plaintiffs and defendants in Tyler 2 were unnecessary. It did not have the effect that defendants' appearances in Tyler 1 sufficed as appearances in Tyler 2. It did not have the effect that the dismissal "with prejudice" of the Tyler 1 actions barred the commencement of the Tyler 2 actions. It did not have any procedural effect whatsoever in the Tyler 2 actions, save that the Tyler 2 actions, like the Tyler 1 actions, became subjected for management purposes to the Rules for Complex and Multi-District Litigation.

The proposition that because of the adoption of the "Complex Rules" Cape's participation in the Tyler 1 actions can be treated as it had been participation in the Tyler 2 actions is, in my view, a fanciful one with no substance to it, either in American law or in English law. Support for the proposition was given in evidence by Professor Miller, a professor of law at Harvard University and co-author of the *Manual for Complex and Multi-District Litigation*. Professor Miller is a highly distinguished academic lawyer but in his evidence that all the Owentown asbestos related litigation had become "one unit of litigation" he did not give me the impression that he was testifying on a matter of current procedural or substantive law applicable to United States federal courts. Rather he seemed to me to be flying an academically attractive kite. In so far as there was a conflict between the evidence of Professor Miller and that of Mr. Brin and Mr. Bernays, I far preferred, on this point at least, the evidence of Mr. Brin and Mr. Bernays. I am satisfied that under the law applicable to United States federal courts the Tyler 2 actions were new actions separate and distinct from the Tyler 1 actions.

Second, the "one unit of litigation" theory, when used to translate a submission to the jurisdiction in Tyler 1 into a submission to the jurisdiction in Tyler 2, ignores the essential basis of English law concerning submissions to the jurisdiction. Where steps taken in proceedings are being examined in the context of an alleged submission to the jurisdiction, what is being sought is evidence of consent on the part of the defendant to the exercise by the court of jurisdiction over him. Until the settlement negotiations in September 1977 the jurisdiction objection which Cape and Capasco had taken was being maintained. I have already expressed the view that the pre-settlement procedural steps taken by Cape and Capasco in Tyler 1 could not, in the context of the federal procedure applicable in the Tyler court, be regarded as a waiver of the jurisdiction objection. But even if that is wrong, those steps could not possibly be regarded as evidencing Cape's and Capasco's consent to

- A jurisdiction being exercised over them in future actions not yet started. Nor could Cape's participation in the application to Tyler 1 for a consent order, under which the existing actions against Cape were to be dismissed "with prejudice," be regarded as evidencing that consent. Any other conclusion would, in my view, be grossly unfair to Cape and would divorce a submission to the jurisdiction from the bedrock of consent that ought to underlie it. Accordingly, in my judgment, there was no submission to the jurisdiction by Cape or Capasco in the Tyler 2 actions.

### Issue 3

- Did the steps taken by Cape and Capasco in the Tyler 1 actions represent their agreement to submit to the jurisdiction in the Tyler 2 actions? The rule that an agreement by a party to submit to the jurisdiction of a foreign court will, under English law, justify the foreign court in taking jurisdiction over that party (see *Dicey & Morris' Conflict of Laws*, 11th ed. (1987), pp. 444-445) is another example of the consensual basis whereby a party may, under English law, come under an obligation to obey a judgment of a foreign court. Consent may be evidenced by a term in a contract. A term expressly providing for disputes to be referred to the foreign court is the most obvious and common example. A unilateral statement by a party that he would accept the jurisdiction of a foreign court is an alternative means by which an agreement to submit might be constituted. But, here, caution is in my view needed. A contract containing a foreign court submission clause is one thing. A party to such a contract is prima facie bound by its terms. But a unilateral statement of willingness to accept the jurisdiction of a foreign court does not, of itself, have any obvious binding effect. It ought, in my view, like any other non-contractual statement of future intention, to be capable of being withdrawn, at any rate until acted upon.

- In the present case, the "agreement to submit" that is relied on is not contractual. Nor can any unequivocal statement of willingness to submit be identified. The plaintiffs' contention is that Cape and Capasco, by participating in the Tyler 1 actions, impliedly agreed to submit to the jurisdiction in the Tyler 2 actions. The steps relied on are the same steps as were relied on as evidencing Cape and Capasco's submission to the jurisdiction in the Tyler 2 action. I have already detailed them, and need not do so again. The plaintiffs' argument, as initially advanced by Mr. Morison, was based upon implied agreement. The use of the verb "agree" in this formulation of the argument is, however, misleading. It was not contended that Cape or Capasco had entered into any contract with any of the plaintiffs. Rather it was contended that Cape and Capasco, by their conduct in the Tyler 1 actions, had represented that they would similarly participate in future asbestos related actions brought in the Tyler court by other Owentown plaintiffs, and, in that sense, had impliedly agreed to submit to the jurisdiction.

So, it seems to me, two questions arise. First, can the conduct of Cape and Capasco in Tyler 1 be fairly regarded as a representation that they would accept the jurisdiction of the court in the Tyler 2 actions?



Second, is a representation by conduct of the sort contended for a sufficient basis, in English law, to justify the taking by a foreign court of jurisdiction?

The first question is one of fact. Mr. Morison relied heavily on the circumstances that under the directions for intervention given by Judge Steger in Tyler 1, any Owentown claimant could, until intervention was stopped on 23 September 1977, have become a plaintiff in Tyler 1. Intervention was stopped in order to facilitate a settlement of the claims of the then plaintiffs and in the expectation that claimants who had not yet intervened would become plaintiffs in new actions. All parties to Tyler 1, including the judge as well as Cape and Capasco, had that expectation. All parties contemplated that Cape and Capasco would be among the defendants in the new actions. I agree with Mr. Morison that all of this is borne out by the evidence. I accept also that counsel acting for the Tyler 1 plaintiffs, counsel acting for the non-Cape defendants and Judge Steger would, if they addressed their minds to the matter, which they did not, have assumed that Cape and Capasco would be participating in the new actions as they had done in the Tyler 1 actions. Nonetheless, in my judgment, Cape's and Capasco's conduct in Tyler 1 cannot fairly be regarded as a representation by them that they would be participating in Tyler 2. Nothing they did in Tyler 1 justified any observer in making assumptions about what they would do in or about the expected new actions. If they had been asked their intentions and had given a false or misleading answer, the position might have been different. But, as it was, they were, in my judgment, entitled to chest their cards, to keep their options open and to leave others who were minded to speculate about the future to do so at their own risk.

There is a further point to be made on the facts. To whom was the alleged representation made? Who acted on it? Who relied on it to his detriment? No answer to any of these questions has been given by the pleadings, by the evidence or by the arguments addressed to me. In particular none of the Tyler 2 plaintiffs has pleaded or has claimed, or, on the evidence, could claim, to have refrained from intervening in Tyler 1 in reliance on a representation by Cape that it would submit to the jurisdiction in Tyler 2, or to have joined Cape as a defendant in Tyler 2 in that reliance, or in any other way to have acted on such a representation.

The second question requires some reference to authority. In both *Cheshire and North's Private International Law*, 11th ed. (1987), p. 344 and in *Dicey & Morris' Conflict of Laws*, vol. 1, p. 446, the view is expressed that an agreement to submit must be express and cannot be implied. Cape and Capasco certainly did not expressly agree to submit to the jurisdiction in the Tyler 2 actions.

Mr. Morison referred me to *Blohn v. Desser* [1962] 2 Q.B. 116 in which Diplock J., in an ex tempore judgment, considered the requirements of an agreement to submit to the jurisdiction. The defendant had been a sleeping partner in a firm carrying on business in Vienna, and her name, together with the names of the other partners, was registered on the commercial register in Vienna. The defendant was resident in England; took no part in the business and received no



A income from it. But she remained, in Austrian law, a partner, and her name was on the register in Vienna. The plaintiff obtained judgment in the commercial court of Vienna against the partnership firm. The defendant took no part in the proceedings. The plaintiff sued the defendant in England on the Austrian judgment. Diplock J. said, at p. 123:

B "It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied. It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made—that is to say, the public—to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent."

D Diplock J. went on, however, to hold that the foreign judgment against the firm was an insufficient basis for enforcement of the judgment debt against the defendant personally. So the plaintiff's action failed and the remarks I have cited are only obiter. Nonetheless, Mr. Morison naturally relies on them. There are, however, two authorities which cast doubt on the dicta from *Blohn v. Desser* on which Mr. Morison relies.

E In *Sfeir Co. v. National Insurance Co. of New Zealand Ltd.* [1964] 1 Lloyd's Rep. 330, 340, Mocatta J. said of an alleged implied agreement to submit:

F "However, in considering whether conduct or oral or written agreements give rise to the implication, it is not in my judgment sufficient to reach the conclusion from the evidence that it would be reasonable to find the implied submission or agreement; the court must also conclude from the evidence that the implication is a necessary one."

G The facts and circumstances from which Diplock J. was prepared to imply an agreement to submit do not satisfy the criterion suggested by Mocatta J. It could not, I think, have been argued that the implication was a necessary one. In *Vogel v. R. and A. Kohnstamm Ltd.* [1973] Q.B. 133 Ashworth J. declined to follow the dicta from *Blohn v. Desser* [1962] 2 Q.B. 116 that I have cited and held that an agreement to submit to the jurisdiction of a foreign court must, to be effective, be express and that an implied agreement would be insufficient.

H I do not think Diplock J. was right in regarding it as settled law that an agreement to submit to the jurisdiction need not be expressed but could be implied. The leading text books suggest otherwise and there are dicta in two cases which suggest otherwise: see Lord Selborne in *Sirdar Gurdayal Singh v. Rajah of Faridkot* [1894] A.C. 670, 686, and Kennedy L.J. in *Emanuel v. Symon* [1908] 1 K.B. 302, 314. But,

accepting that an implied agreement to submit might suffice, nonetheless it is, in my judgment, a clear indication of consent to the exercise by the foreign court of jurisdiction that is required. I find it very difficult to accept that the defendant's name in the commercial register in Vienna was a clear indication of her consent to submit to the jurisdiction of the Austrian court. She had entered into no contract to submit, implied or otherwise, with anyone. The entry of her name in the register had, obviously, a commercial purpose. But it seems to me an unacceptably flimsy basis from which to imply that she was consenting to the exercise by the court in Vienna of jurisdiction over her.

Mr. Morison referred also to *S.A. Consortium General Textiles v. Sun and Sand Agencies Ltd.* [1978] Q.B. 279. One of the points discussed in the judgments in the Court of Appeal was the meaning to be attributed to the expression "agreed . . . to submit to the jurisdiction" in paragraph (iii) of section 4(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. Goff L.J. said, at p. 303: "It was argued that 'agreed' in paragraph (iii) means no more than consented. That is probably right . . ." Shaw L.J. said, at pp. 307-308:

"In this context it seems to me that 'agreed' must mean expressed willingness or consented to or acknowledged that he would accept the jurisdiction of the foreign court. It does not require that the judgment debtor must have bound himself contractually or in formal terms so to do."

Mr. Morison argued that the requirements for an agreement to submit at common law should be co-extensive with the requirements for an agreement to submit for the purposes of paragraph (iii). This may very well be a sound approach. But in the *Sun and Sand Agencies Ltd.* case the expression of willingness, the consent to accept the jurisdiction of the foreign court, had been signified to and had been acted upon by the plaintiffs.

If the alleged "consent" does not form part of a contractually enforceable agreement, it ought, in my view, to be treated not as an agreement—for it is not one—but as a representation. As with any representation it ought, in my view, to be of no legal effect if not acted upon or if withdrawn before being acted on. It ought, in my opinion, to follow that if proceedings in the foreign court were instituted and brought to judgment against the absent defendant without reliance on the representation of willingness to submit to the jurisdiction, or a fortiori, in ignorance of it, the representation could not subsequently be relied on by the plaintiff as a consensual basis for establishing the court's jurisdiction. Finally, in my view, if a non-contractual representation is to be relied on as establishing the court's jurisdiction, it must be a representation intended to be acted upon or, at least, be a representation that the plaintiff believed and had reasonable ground for believing was intended to be acted upon.

In my judgment, the steps taken by Cape and Capasco in the Tyler 1 actions do not indicate the consent of Cape and Capasco to accept the jurisdiction of the court in the Tyler 2 actions. Not only do these steps fail to constitute the necessary consent, I do not see how an inference of

- A consent is even faintly arguable. Nor is there any evidence that these steps were relied on by any of the plaintiffs. Moreover, many of the plaintiffs intervened in the Tyler 2 actions long after it must have become apparent that Cape and Capasco were taking no part therein. For all these reasons there was, in my judgment, no agreement to submit sufficient under English law to establish on a consensual basis the jurisdiction of the Tyler court to give the default judgment against Cape and Capasco.

*Issues 4 and 5*

- C The territorial basis of jurisdiction entitles a foreign court, in the eyes of English law, to exercise in personam jurisdiction over persons present in the country of the foreign court. Whether temporary presence is sufficient is a matter that does not arise in the present case. Presence is a clear enough concept when applied to individuals. It is otherwise with corporations that have no physical existence. Where is a corporation resident or present? In what circumstances will the territorial basis of jurisdiction permit jurisdiction to be exercised over a foreign corporation? The answers to these questions, at least where a trading company is concerned, depend upon the extent to which the company has a place of business in the relevant territory. In *Littauer Glove Corporation v. H.W. Millington (1920) Ltd.* (1928) 44 T.L.R. 746, 747, Salter J. said that "there must be some carrying on of business at a definite and, to some reasonable extent, permanent place," within the jurisdiction. The case was one in which an action had been brought in England on a money judgment given against an English company by a New York court. The action failed on the ground that the company, although transacting business in New York through the medium of an agent, was not in any sense resident in New York. In *La Bourgogne* [1899] P. 1 the question for decision was whether an English court was entitled to take jurisdiction over a French company. It was held that it was. The French company had acquired business premises in London and had installed in the premises a manager whose duties included the carrying on of the company's business. A. L. Smith L.J. expressed the question for the court, at p. 12:

"The question is whether the defendant company, at the date when this writ was served, was carrying on business in this country under such circumstances as would enable it to be said that it was resident in this country."

- G He concluded, on the facts, at p. 15:
- "the company came over here and took premises within the jurisdiction for the purpose of carrying on its business, and it put in M. Fanet as manager ... for the purpose of carrying on its business, though it may be in conjunction with his own business."
- H So the company was, he held, at p. 15: "carrying on business here in such a way as to constitute residence in this country." Collins L.J. agreed.

The critical feature in *La Bourgogne* was that the business premises in London at which the French company's business was transacted were



the French company's premises, cf. *The Princesse Clémentine* [1897] P. 118. The cases establish that jurisdiction on the territorial basis may be taken by an English court over a foreign company if the foreign company has business premises in England from which or at which its business is carried on. A striking example of this principle may be found in *Dunlop Pneumatic Tyre Co. Ltd. v. Actien-Gesellschaft für Motor- und Motorfahrzeugbau Vorm. Cudell & Co.* [1902] 1 K.B. 342 where a foreign corporation, manufacturer of motor cars abroad, hired a stand at a Crystal Palace exhibition and for a period of nine days exhibited a motor car on the stand. It was held by the Court of Appeal that service of a writ on the person in charge of the stand was good service on the foreign corporation. Sir Richard Henn Collins M.R. said, at p. 346:

"In order to see whether they were liable to be so served, it is necessary to consider whether, upon the facts, they can be said to have been resident in England when the service was effected."

He then referred to *La Bourgogne* [1899] P. 1 and said, at p. 347:

"There, a foreign company employed as their agent in this country a person who also acted as agent for two other companies, and transacted their business on the same premises; and we held that the defendants were through him carrying on business in such a way as to be resident within the jurisdiction. No such difficulty arises here as arose in that case. Here the defendants hired premises for their own exclusive use, and did not resort for their purposes to some person who was carrying on an independent business, but employed their own servant to conduct the business."

There are, however, cases where residence or presence of a foreign company in England has been held established notwithstanding that the foreign company did not itself own or lease any business premises in England. A feature of these cases has been that the foreign company had a resident English agent who had authority to contract on behalf of and thereby to bind the principal. In those circumstances the presence or residence in England of the agent has been treated as the presence or residence of the foreign company, the principal. In the *Dunlop* case [1902] 1 K.B. 342, 349, Romer L.J. said:

"The result of the authorities appears to me to be that, if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ."

In *Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K.B. 516 the defendant, a foreign company, employed a sole agent who had business premises at Fenchurch Street, London. From these premises he carried on the defendant company's business as well as his own business. He had general authority to enter into contracts in the defendant's name for the sale of the defendant's goods. Vaughan Williams, L.J. said, at pp. 522-523:

- A "The question is whether on these facts it is true to say that the defendants carried on their own business at their own place of business in London. It cannot reasonably be suggested that they must necessarily be lessees or tenants of the place of business, though if they were, that would be a cogent piece of evidence against them. I have no doubt myself that a foreign corporation can carry on business at a place in this country within the meaning of the rule, if, although the corporation is not the lessee of the place, it is in any sense its own place of business."
- B

Fletcher-Moulton L.J. cited the passage from Romer L.J.'s judgment in the *Dunlop* case [1902] 1 K.B. 342, 349, that I have cited and continued, at p. 524:

- C "The question before us therefore seems to me to be purely one of fact. We must look at all the evidence given by both parties and consider whether the plaintiffs have brought the case to such a point that it falls within the principle enunciated by Romer L.J. The question being one of fact, it is safer to decide it by looking at the things which are done rather than at the words which are used. For example, Blasius is called an agent. That may signify a variety of things. Let us see, therefore, what his position as agent of the defendants entitles him to do."
- D

Having reviewed the evidence, Fletcher-Moulton L.J. said, at p. 525:

- E "the result is that in my opinion a very strong case is made out . . . in . . . that the defendants do carry on business in England at Blasius' address by means of Blasius."

Farwell L.J. said, at p. 526:

- F "These facts are in my opinion sufficient to prove that the defendants do carry on their business in England. Then, do they carry it on at a fixed place in England? It is said that for this purpose it is necessary they should be the owners or tenants of the place where their business is alleged to be carried on. To my mind that proposition is quite untenable. That the foreign corporation must have a fixed place of business in this country is quite clear, but the particular tenure on which it occupies that fixed place is quite immaterial."

- G He concluded, at p. 527: "the evidence shows that the defendants do carry on their business at the office of their agent in Fenchurch Street."

- H The *Saccharin Corporation* case [1911] 2 K.B. 516 may be contrasted with *Okura & Co. Ltd. v. Forshack & Jeenweks Aktiebolag* [1914] 1 K.B. 715. Here, too, a foreign company employed sole agents in London. But these agents had no general authority to contract on behalf of their principal. Special authority had to be obtained in the case of each proposed contract. It was held by the Court of Appeal, distinguishing the *Saccharin Corporation* case [1911] 2 K.B. 516, that the foreign company was not carrying on business at the agents' office in London. Buckley L.J. expressed the problem in this way [1914] 1 K.B. 715 and 719: Buckley L.J. expressed the problem in this way [1914] 1 K.B. 715, 718-719:

"It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business'."

A

He said, at p. 721:

"The agents have never sold any steel manufactured by the defendants except as agents and in the manner indicated. They have no control over the way in which the defendants do their business and have no general authority from them with regard to making contracts. . . . These being the facts, 101, Leadenhall Street is really only an address from which business is from time to time offered to the foreign corporation; the question whether any particular business shall or shall not be done is determined by the foreign corporation in Sweden and not by any one in London. In my opinion the defendants are not 'here' by an alter ego who does business for them here, or who is competent to bind them in any way. They are not doing business here by a person but through a person. That person has to communicate with them, and the ultimate determination, resulting in a contract, is made not by the agents in London, but by the defendants in Sweden. It follows from this that one of the essential elements which must be present before a writ can be served in this country on the agent of a foreign corporation is lacking in this case."

B

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Phillimore L.J. said, at p. 724:

"The important distinction between the two cases is that in the *Saccharin Corporation* case [1911] 2 K.B. 516, the agent in London had authority to enter into contracts on behalf of the defendants without submitting the orders to them for their approval; whereas in the present case the agents have not that authority, their duty being merely to submit the orders to the defendants; and until they have signified their approval no contract can be entered into. In these circumstances it seems to me impossible to say that the position of the defendants is in any way analogous to that of a person residing or a firm carrying on business in this country."

E

F

The significance of the manner in which and place at which contracts with the foreign company, the principal, are made can be noticed also in *Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco* (1914) 111 L.T. 97 where it was held that the foreign company was carrying on business at its agent's London offices. Buckley L.J. treated the fact that contracts were made at the London offices as the critical factor. In *The World Harmony* [1967] P. 341 the foreign company was a Liberian shipping company which owned a ship, *World Harmony*. An independent English company in London acted as shipping agent and broker for the foreign company and, in effect, operated and controlled *World Harmony*. It was held by Hewson J. that the foreign company had a place of business in England through the English agent.

G

H



A In *The Lalandia* [1933] P. 56 on the other hand, the English agents did not make contracts for their foreign principal and it was held that the foreign principal was not carrying on business at the agent's London offices. To the same effect was *The Holstein* [1936] 2 All E.R. 1660 where Sir Boyd Merriman P. said, at p. 1664:

B "When . . . you find that the agency is merely selling the foreign corporation's contract, then the foreign corporation is not carrying on the business in this country."

In *F. & K. Jabbour v. Custodian of Israeli Absentee Property* [[1954]] 1 W.L.R. 139, 146, Pearson J. said:

C "A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval."

D Most of the authorities to which I have referred were dealing with the question whether a foreign corporation had a sufficient presence or residence in England to enable service of a writ on its agent in England to represent good service on the foreign corporation. That question turned upon the meaning to be attributed to sections of English statutes (e.g. section 412 of the Companies Act 1948) or of particular rules which prescribe the means by which service of process on corporations may be effected. The *Littauer Glove Corporation* case, 44 T.L.R. 746 and *Vogel v. R. and A. Kohnstamm Ltd.* [1973] Q.B. 133, on the other hand, were cases where the question was whether English common law would recognise the legitimacy of the jurisdiction taken by a foreign court. Both counsel before me have treated the statements of principle to be found in the authorities as applicable equally to both classes of cases. I am content to proceed on that footing although I confess to a feeling of a little unease. It does not seem to me self-evident that the statutory provisions which enable service of English process to be effected in England on foreign corporations represent, without any material variation, the principles of common law that determine whether a corporation is to be regarded as resident or present in a foreign country so as to permit the courts of that country to exercise jurisdiction over it. I will assume, however, that the statements of principle in the authorities do apply equally to both classes of case.

G The question in the present case is whether Cape and Capasco were, when the Tyler 2 actions were instituted, resident or present in Illinois. Reliance is placed by the plaintiffs on the activities and presence first of N.A.A.C. and later of C.P.C. at their respective Illinois offices at 150, North Wacker Drive, Chicago. I must describe the relevant facts and then endeavour to apply to those facts the principles established by the authorities to which I have referred. The object of doing so is to decide whether the United States federal court was entitled, on a territorial basis, to assume jurisdiction over Cape and Capasco in the Tyler 2 actions.



I have already described the corporate structure of the Cape group and the business activities of the various subsidiaries. Cape, the parent company, was incorporated in 1893. The amosite mines at Penge, in the Transvaal, were owned and worked by Egnep, a wholly owned subsidiary of Casap. The first Tyler 2 action, the Ray action, was commenced in April 1978. Since 1975 Casap had been a wholly owned subsidiary of C.I.O.L. which, in turn, was a wholly owned subsidiary of Cape. N.A.A.C. incorporated in 1953 as a wholly owned subsidiary of Cape, and from November 1975 a wholly owned subsidiary of C.I.O.L. was the marketing agent of the Cape group in the United States. Capasco, incorporated in 1958 or 1959, was a wholly owned subsidiary of Cape and was responsible for the supply, marketing and sales promotion throughout the world of Cape asbestos and asbestos products.

On 1 December 1970 Mr. Morgan, a United States citizen and a resident of Illinois, became vice-president of N.A.A.C. He became president on 1 July 1974, an office he retained until the dissolution of N.A.A.C. in 1978. At all times relevant to the Tyler actions, the vice-president of N.A.A.C. was a Mr. Meyer, an attorney and a partner in the firm Lord, Bissell & Brook of Chicago. Lord, Bissell & Brook were the United States attorneys for the Cape group of companies. N.A.A.C. had offices on the fifth floor of 150, North Wacker Drive, Chicago. N.A.A.C. was the lessee and the rent was paid by N.A.A.C. The office furniture and fittings were owned by N.A.A.C. N.A.A.C. maintained a staff of some four people. Mr. Morgan was, of course, in charge. He had, however, an important assistant, a Mrs. Holtze. In addition, there were two or three other office staff.

N.A.A.C.'s dominant business purpose was to assist and encourage sales in the United States of asbestos mined by the Cape subsidiaries, one of which was Egnep. Contracts with United States 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 United States 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 N.A.A.C. to Casap and Egnep. Whether the information went directly from N.A.A.C. 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 United States customer via N.A.A.C. The vagaries of production in the mines had the consequence that Egnep was not always able to provide the United States customer with the full amount of asbestos that had been ordered. When a shortfall between the customers' requirements and Egnep's delivery capacity emerged, N.A.A.C. would endeavour to fill the gap by purchasing asbestos from United States Government stocks and selling the asbestos to the United States customers.

These were the two main forms of business carried on by N.A.A.C. First, it acted as intermediary in respect of contracts between the United States customers and Egnep. For these services it received a commission from Casap. Secondly, N.A.A.C. sold asbestos to United States

A customers in order from time to time to supplement sales from Egnep. In respect of these transactions N.A.A.C. contracted, both in purchasing the asbestos and in selling on to the United States customers, as principal. In addition, N.A.A.C. carried on business in purchasing asbestos textiles, mainly from Japan, and selling the textiles in the United States. In transacting this business, N.A.A.C. acted as principal on its own account. N.A.A.C. also, it seems from the evidence, from time to time purchased asbestos from Egnep or Casap and sold on to United States customers. These purchases and sales it transacted as principal. For the purpose of storing asbestos which it had purchased, whether from United States Government stocks or from Egnep or Casap, N.A.A.C. rented warehousing facilities in the United States. These facilities were in N.A.A.C.'s name and were paid for by N.A.A.C.

C Prior to 11 July 1975 the board of directors of N.A.A.C. included two senior officers of Cape. Until 1974 a Mr. Dent, chief executive of Cape, was chairman of N.A.A.C. In 1979, however, Mr. Higham succeeded Mr. Dent as chief executive of Cape and succeeded also to the chairmanship of N.A.A.C. The other Cape director of N.A.A.C. was Dr. Gaze who was, at all material times, chairman of Capasco and an executive director of Cape. In July 1975 Mr. Higham and Dr. Gaze resigned from the board of N.A.A.C. This change was directly attributable to the involvement of Cape and Capasco in the Tyler 1 actions and was explained thus by Mr. Morgan in a deposition he gave in the Tyler 1 actions. The intention, he said, was

E "to dissociate the parent company as fully as possible from the operating companies . . . . It does not imply any change whatever in the method of operation or the present responsibilities of individuals concerned . . . ."

F The "method of operation" and "the present responsibilities" of, in particular, Mr. Morgan, did not permit either N.A.A.C. 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. It was suggested by Mr. Morison that Mr. Morgan's evidence given in depositions in the Tyler 1 actions showed that he considered he had authority to accept orders for asbestos to be supplied by Casap or one of the mining companies. I do not accept that the passage relied on justifies the suggestion. I think it clear from the evidence that N.A.A.C. and Mr. Morgan had no such authority.

G There is no doubt, on the other hand, that N.A.A.C. did constitute the channel of communication between United States customers, such as P.C.C., and Capasco or Casap. There is undoubtedly a sense in which N.A.A.C. 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 United States.

H There is also evidence, as perhaps might be expected, that the corporate, as opposed to commercial, activities of N.A.A.C. were controlled by Cape. Thus, each year an indication would come from Cape as to the dividend that N.A.A.C. was to declare. The correspondence reveals some argument and representations from Mr.

Morgan regarding the amount of the suggested dividend but, in the last resort, and subject to compliance 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 to N.A.A.C. in each financial year. This corporate financial control exercised by a parent company over its subsidiary is, in my view, no more and no less than one would expect to find in a group of companies such as the Cape group. There is, however, no evidence of any like control exercised by Cape and Capasco over the conduct by N.A.A.C. of its commercial activities. Mr. Morgan was in executive control of N.A.A.C.'s conduct of its business. Both Dr. Gaze and, to a lesser extent, Mr. Higham, visited the United States from time to time, discussed with United States customers their asbestos supply requirements and dealt with their complaints in that regard. They did so, not as directors of N.A.A.C. but as directors and representatives of Cape or Capasco.

Mr. Morison argued that if N.A.A.C.'s offices at 150, North Wacker Drive, Chicago, had been a branch office belonging to Cape, the business transacted at that office would have been well sufficient to justify the conclusion that Cape was present in Illinois for jurisdiction purposes. This submission has support from *South India Shipping Corporation Ltd. v. Export-Import Bank of Korea* [1985] 1 W.L.R. 585 and is, in my view, probably right. But it is equally pertinent to observe that if the offices had been those of an independent Illinois corporation, the nature of the business transacted thereat would not have justified the conclusion that Cape was present in Illinois. The offices were not Cape's branch office. Nor were they the offices of an independent Illinois corporation. They were the offices of N.A.A.C., a wholly owned subsidiary in the Cape group of companies.

Mr. Morison argued that, on the facts of this case, N.A.A.C. should be treated as Cape's alter ego in Illinois or, alternatively, that the corporate veil distinguishing N.A.A.C. from Cape should be lifted. There is no reasonable basis, in my view, for regarding N.A.A.C. as the alter ego of Cape. N.A.A.C. was an Illinois corporation, carrying on business in the United States from which it earned profits and on which it paid United States taxes. Its debtors were its debtors, not Cape's debtors. Its creditors were its creditors, not Cape's creditors. Cape was not taxed in the United Kingdom or in the United States on N.A.A.C.'s profits. The return to N.A.A.C.'s shareholders took the form of an annual dividend passed by a resolution of N.A.A.C.'s board of directors. The corporate forms applicable to N.A.A.C. as a separate legal entity were observed. N.A.A.C. made its own warehousing arrangements for the storage of 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 can bear a flexible meaning. But I do not think it is in the least apt to describe the relationship between N.A.A.C. and Cape.

The question whether the corporate veil should be lifted is more difficult. It is, I think, one which raises an issue of general importance. Is a parent company to be treated, for jurisdiction purposes, as resident



- A in a country in which its wholly owned subsidiary is resident and carries on business? Should the answer be dependent on whether the subsidiary's business is associated with and, in a group sense, a part of the business of the parent company?

- B Mr. Morison argued the point by concentrating on the economic unity of the asbestos trade carried on by the Cape group. N.A.A.C. was a non-autonomous part of the Cape group which, as a unit, was mining and marketing asbestos. So, he argued, N.A.A.C.'s presence and business activity at 150, North Wacker Drive should be regarded as the presence and business activity of Cape. He prayed in aid, by analogy, *Finastone Tyre and Rubber Co. Ltd. v. Lewellin* [1957] 1 W.L.R. 464 in which the House of Lords had upheld an assessment to tax on the footing that the business of a subsidiary was carried on as agent for its parent company and so was the business of its parent company. But that case was not one in which the corporate veil was lifted. It turned on the factual finding of agency. He referred also to E.E.C. cases in which the question for decision had been whether actions of a subsidiary could, for the purpose of article 86 of the E.E.C. Treaty, be attributed to the parent company. In *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities* (Cases 6 and 7/73) [1974] E.C.R. 223, 263, Advocate-General Warner said:

- E "neither article 85 nor article 86 anywhere refers to 'persons.' In both articles the relevant prohibitions are directed to 'undertakings,' a much wider and looser concept. This indeed is what one would expect, because it would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22—i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of conveyancing, of contracts and of liability for tort. But to export it blindly into branches of the law where it has little relevance, could, in my opinion, serve only to divorce the law from reality. Suppose, my Lords, that C.S.C. had traded in Italy through a branch office. There could have been no doubt then that it was amenable to the jurisdiction of the Commission and of this court. Could it have made any difference if C.S.C. has chosen to trade in Italy through a wholly owned subsidiary? The difference would have been one only of legal form, not of reality. Why then should it make any difference that it chose to trade in Italy through a subsidiary that it controlled by a 51 per cent, majority rather than by a 100 per cent, majority? What matters in this field, in my view, is control, not extent of beneficial ownership."

- H He said, at p. 264:

"It is, my Lords, with these considerations in mind that I approach the argument of C.S.C. in the present case. In my opinion those

considerations import at least: 1. that there is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience subsidiaries generally do so act; 2. that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of articles 85 and 86 of the E.E.C. Treaty . . ."

In my opinion, however, this approach is not suitable to a resolution of the question with which I am faced. The question in the present case is not whether the economic reality of the activities of the Cape group justifies the conclusion that Cape, the parent, was trading in the United States. Perhaps it was. But trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader: see the *Littauer Glove Compensation* case, 44 T.L.R. 746. The trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract.

Mr. Morison pointed out that the economic function being discharged by N.A.A.C. from its Illinois office served, in the context of the trading activities of the Cape group as a whole, the same function as could have been discharged by a branch office at the same address. Since in the latter case Cape would have been resident in Illinois, why should it not be held to be resident in the former case? In my opinion, however, this argument overlooks the nature of the fundamental question at issue. The fundamental question is whether the United States court was entitled, on territorial grounds, to take jurisdiction over Cape. Cape was entitled, if it wished, to organise its group activities so as to avoid being present in the United States of America. The group traded in the United States through subsidiaries, Egnep, Casap, N.A.A.C. and Capasco. Each discharged a function relevant to the group business in the United States, but N.A.A.C. was the only one with a United States office. If Cape had been an individual, it would not, in my view, have been arguable that in trading in such a fashion Cape had subjected itself to the territorial jurisdiction of the United States' courts. Why should Cape's corporate character justify any different conclusion?

The approach to be adopted to parent companies trading through subsidiaries was considered by Roskill L.J. in *The Albazero* [1977] A.C. 774. He said, at p. 807:

"each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law."

He referred to this principle as one of the "fundamental principles of English law long established." The decision of the Court of Appeal was reversed by the House of Lords, but nothing was said to detract from the principle referred to by Roskill L.J.

In *Bank of Tokyo Ltd. v. Karoon* [1987] A.C. 45, 53 Ackner L.J. said:

A "It is however quite fundamental to Mr. Hoffmann's submission, (and he readily accepts this) that the public policy on which he relied requires the court to overlook the corporate distinctions in law between B.T. and B.T.T.C. While accepting that B.T. and B.T.T.C. are separate legal entities, Mr. Hoffmann contends that from a practical point of view it makes no difference whether B.T.T.C. was a branch of B.T. or a subsidiary. He argues that if one looks at the substance of the matter, B.T. are being sued in New York on account of the evidence which they gave in their own defence in proceedings brought against them by Mr. Karoon in London. The protection of B.T.'s own interests required the giving of this information and accordingly B.T., which must in practice be treated as having this information in their possession, was not in breach of its implied obligation of secrecy: see *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461. The reality of the matter is that B.T.T.C. is not a branch of B.T. That is not the way in which B.T. has chosen to organise its business as a bank."

Robert Goff L.J. said, at p. 64:

D "Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."

E These statements of principle seem to me to be an answer to the submission that in the present case the separate corporate identity of N.A.A.C. should be ignored and that the corporate veil should be lifted. On the facts of this case neither Cape nor Capasco had an office in Illinois. The 150, North Wacker Drive offices were N.A.A.C.'s offices. N.A.A.C.'s business was its own business, not the business of Cape or of Capasco. N.A.A.C. had no authority to contract on behalf of Cape or Capasco or any other company in the Cape group. Accordingly, in my judgment, the presence of N.A.A.C. at 150, North Wacker Drive, Chicago, Illinois, did not constitute the presence in Illinois of Cape or of Capasco so as to subject them, on a territorial basis, to the jurisdiction of United States courts.

G On 1 November 1977 Cape resolved to place N.A.A.C. in liquidation and on 31 January 1978 a liquidating trust agreement for N.A.A.C. was signed. N.A.A.C. executed articles of dissolution on 18 May 1978 and a certificate of dissolution was issued on 19 May 1978. It was the intention of all concerned that N.A.A.C.'s functions in the United States in respect of the sale of Cape's amosite asbestos would come to an end on 31 January 1978. They did so. However, N.A.A.C. at that date was the owner of a quantity of asbestos held in United States warehouses. Over the period of 31 January to 18 May 1978 sales of this asbestos took place. These sales were not made in the course of N.A.A.C. carrying on business as a going concern. They were made for the purposes of the intended liquidation of N.A.A.C.



The decision to put N.A.A.C. into liquidation was a consequence of the experience of Cape in the Tyler 1 actions. It had become apparent to the senior management of Cape by, at latest, the summer of 1977 that actions in the United States brought against Cape by plaintiffs complaining of injury caused by exposure to asbestos dust presented a very real problem. This had, perhaps, become apparent a good deal earlier. It was in 1975 that Mr. Higham and Dr. Gaze had resigned from the board of N.A.A.C., a step taken in order to reduce the appearance of Cape involvement with N.A.A.C. But by 1977 Cape's motions on jurisdiction had been dismissed by Judge Steger and in September 1977 Cape had agreed to pay some \$5m. in order to dispose of the Tyler 1 actions. It was clear to all that a multitude of similar actions lay ahead. It was in these circumstances that the decision to liquidate N.A.A.C. was taken.

Mr. Penna was the main witness for Cape as to the circumstances in which N.A.A.C. was placed in liquidation and in which A.M.C. and C.P.C. were formed. He was, in the period 1975 to 1979, employed by Cape as its group solicitor. In 1982 he became company secretary, a position he held until 1985 when he left to take up other employment. He told me of meetings in Chicago and in London in November and December 1977 at which discussions took place between senior executives of the Cape group, including Mr. Morgan, and at which decisions were taken to place N.A.A.C. in liquidation and to form A.M.C. and C.P.C. as the corporate vehicles for the sale of Cape asbestos in the United States. Mr. Penna was inclined to suggest that the decision to place N.A.A.C. in liquidation and the decision by means of A.M.C. and C.P.C. to create a new sales framework for the United States were independent of one another. He also suggested that the idea of incorporating C.P.C., a new and independent Illinois corporation, to take over part of the selling function formerly discharged by N.A.A.C. came from Mr. Morgan who, in effect, offered Cape the services of his new company, C.P.C. This slant on the facts is one that I found myself unable to accept. I am satisfied from the evidence that the arrangements made regarding N.A.A.C., A.M.C. and C.P.C. were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the United States while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries.

The decision to put into effect this composite arrangement was associated with Cape's decision to take no part in any other asbestos related action brought against it in the United States, whether in Tyler, Texas, or elsewhere. Cape was prepared to let default judgments be taken against it or its subsidiaries. Cape had no assets in the United States apart from its shares in N.A.A.C., which, by reason of N.A.A.C.'s own contingent liability to plaintiffs in asbestos related actions, were worthless. Cape's intention and concern was to resist enforcement in England of any default judgments. Enforcement was intended to be resisted by contesting the legitimacy, under English common law, of the jurisdiction taken by the United States courts over foreign companies. A defence on these lines would require the trading connection between Cape and its subsidiaries and the United States to be kept to a

A minimum. Hence the need to liquidate N.A.A.C., Cape's United States subsidiary, and to allow at least some of N.A.A.C.'s trading functions to be assumed by an Illinois corporation that was not a subsidiary, i.e. C.P.C. If and to the extent that Mr. Penna's evidence suggests a different provenance or motive for the arrangements that were made, I do not accept it.

B But the question whether C.P.C.'s presence in Illinois can, for jurisdiction purposes, be treated as Cape's presence, must, in my view, be answered by considering the nature of the arrangements that were implemented, not the motive behind them. The documentary evidence I have seen has made clear that the senior management of Cape, including Mr. Penna, were very anxious that Cape's connections with C.P.C. and with A.M.C. should not become publicly known. Some of the letters and memoranda have a somewhat conspiratorial flavour to them. But this too, although interesting to notice, is not, in my opinion, relevant to the main question.

The new trading arrangements involved these features: (i) A.M.C., a Liechtenstein corporation, was incorporated by a Dr. Ritter, a well-known Liechtenstein lawyer. The bearer shares in A.M.C. were held by Dr. Ritter upon trust for C.I.O.L. The cost of incorporating A.M.C. was, I think, borne by Capasco. It was certainly borne within the Cape group. The intention was that all sales of Cape asbestos to United States customers would be made by A.M.C. The exact nature of the arrangements with Egnep and Casap whereby A.M.C. became the owner of the asbestos has not been disclosed by the evidence adduced before me. This is not surprising since the relevant documentation has, since the sale of C.I.O.L. and Casap to Transvaal Consolidated Exploration Co. Ltd., been under the control of Transvaal Consolidated. It seems clear, however, that A.M.C. was no more than a corporate name. It was described by Mr. Penna as "an invoicing company" with no employees of its own. I would expect to find, if all the relevant documents were available, that A.M.C. acted through employees or officers of either Casap or Egnep.

(ii) C.P.C. was incorporated on 12 December 1977. The shares were issued to Mr. Morgan. The lawyers acting in the incorporation were Lord, Bissell & Brook. There is no clear evidence as to who paid the costs of incorporation. I am prepared to assume that, directly or indirectly, the funds came from Cape or Capasco. This assumption does not lead to the conclusion that Cape or Capasco was the beneficial owner of the C.P.C. shares. It was an essential feature of the new trading arrangements that the new Illinois corporation would be an independent corporation outside the Cape group owned as well as managed by Mr. Morgan. There would not, in these circumstances, be any equity in the shares that Cape could claim as against Mr. Morgan. In my opinion, the C.P.C. shares were, in equity as well as in law, owned by Mr. Morgan.

(iii) An agency agreement dated June 1978 was entered into. The parties were A.M.C., C.P.C. and Mr. Morgan. This is an important agreement. Under paragraph 1, A.M.C. appointed C.P.C.:

480

Scott J.

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[1990]

"as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre (the product) in the United States of America, Canada and Mexico (hereinafter jointly called 'the territory') for a period of 10 years from 1 February 1978 to 31 January 1988 ..."

A

There was a proviso for termination on 12 months' notice. Paragraph 3 set out the duties of C.P.C. It provided:

"C.P.C. will carry out this appointment diligently exercising all reasonable care and skill and will without limiting the generality hereof (a) keep A.M.C. advised at regular intervals as to competitor products market conditions and other commercial matters of mutual interest; (b) perform such services as may be required to facilitate or expedite the delivery of products contracted to be sold by A.M.C. in the territory; (c) endeavour to seek out and promote prospective business on behalf of A.M.C. and forward to A.M.C. requests for supplies of products provided always that supplies shall only be at prices and upon terms and conditions determined by A.M.C."

B

C

Under paragraph 4, C.P.C. agreed to "use its best endeavours to promote the sale of the product on behalf of A.M.C. within the territory." Paragraph 4(d) provided inter alia:

D

"nothing herein shall be construed to give C.P.C. any authority to accept any orders to make any sales or to conclude any contracts on its behalf."

"Its behalf" in that context was a reference to A.M.C. Paragraph 5 coupled with paragraph 4(b) left C.P.C. free to sell material and products other than asbestos fibre and to involve itself in other commercial activities. Paragraph 6 required C.P.C.

E

"at its own cost and expense [to] provide proper office accommodation and staff for the purpose of running an efficient advice and consultancy bureau and will pay all expenses incurred in maintaining and operating the same."

F

Paragraph 7 provided for C.P.C. to be remunerated by a percentage commission based on the cost of all asbestos sales by A.M.C. in the territory. Paragraph 11 gave A.M.C. an option in certain circumstances to acquire the C.P.C. shares:

"C.M. shall in such event offer all shares owned by him in C.P.C. for sale to A.M.C. (or such nominee as it may appoint) at their net book value excluding goodwill ..."

G

Paragraph 12 contained an acknowledgement that beneficial ownership of the name "Continental Products Corporation" belonged to A.M.C.

I have endeavoured to give a broad indication of the contents of this agency agreement. C.P.C. commenced business on 1 February 1978—in order to dovetail with N.A.A.C.'s cesser of business on 31 January 1978—but there is no evidence that between 1 February and 5 June 1978, or for that matter thereafter, C.P.C. did any business inconsistent with the terms of the agency agreement. I conclude, therefore, that the

H



- A terms of the agreement are a reliable guide to the nature of the relationship between C.P.C. and A.M.C. and, hence between C.P.C. and Cape.
- (iv) C.P.C. leased offices on the 12th floor of 150, North Wacker Drive. N.A.A.C.'s offices had been on the fifth floor. A.M.C.'s employees became C.P.C.'s employees. A good deal, though not all, of the furniture and fittings in N.A.A.C.'s offices were removed to C.P.C.'s offices. C.P.C. took over N.A.A.C.'s telephone number.
- B (v) The financial agreements in connection with the commencement by C.P.C. of business are, on the evidence I have seen, somewhat obscure. It is clear that C.P.C. would have had an immediate need of funds. N.A.A.C.'s furniture and fittings had to be paid for. Rent had to be paid for the 12th floor offices at 150, North Wacker Drive. The salaries of the employees, all ex-N.A.A.C. employees, had to be paid. There were, no doubt, other outgoings as well. But commission under the agreement with A.M.C. would not be payable immediately. There is evidence that a sum of \$12,000 was paid to C.P.C. by N.A.A.C. In one of his depositions Mr. Morgan described this sum as made up of \$10,000 severance pay due to him from N.A.A.C. and paid at his request to C.P.C., and \$2,000 as C.P.C.'s charge for storing various files. It seems likely that this sum of \$12,000 was calculated to assist C.P.C. in meeting the cost of establishing itself at its new offices: see the letter of 23 November 1977, Mr. Morgan to Dr. Gaze, and Mr. Penna's memorandum of 2 December 1977. But, in addition, there is a mysterious sum of \$160,000 that was paid to C.P.C. on 4 January 1978. The Cape documents that reveal this payment show it to have been a payment from a bank account of Cape with Chase Manhattan Bank in London. Mr. Penna said that he thought it was a payment on account of future commission. He said he did not think it would have been a loan.
- E In the absence of any clear alternative explanation of the payment of this \$160,000 to C.P.C., I infer that it was intended to enable C.P.C. to meet its overheads until payment of commission began to come in.
- F Whether it was intended that the \$160,000 should be set off against future commission is not clear. This is no evidence one way or the other. I shall assume that it was not so intended and that it was a payment made by Cape to enable C.P.C. to set up in business and to perform the agency obligations expected of it. Acting as agent in connection with sales of Cape asbestos was not C.P.C.'s only business activity. In addition, it traded in asbestos textiles on its own account, buying and selling as principal.
- G The conclusions of fact that I have set out above are not consistent with the contents of an affidavit sworn by Mr. Morgan on 16 March 1988 and introduced into evidence under the Civil Evidence Act 1968. In paragraph 5 of his affidavit, Mr. Morgan deposes:
- H "Prior to 6 January 1978 I had negotiated with a representative of an entity known as Associated Minerals Corporation (hereinafter called 'A.M.C.'). I understood that this company was an independent South African trading company which distributed asbestos for sale in international commerce."

This evidence is, in my opinion, disingenuous and false. Negotiations regarding the new trading arrangements in which Mr. Morgan took part were negotiations, as he must have known, with Cape. I reject as false his evidence that he understood A.M.C. to be an independent South African trading company. I am satisfied that he knew very well it was a creature of Cape. It follows from the falsity of paragraph 5 that I am unable to place any reliance on the accuracy of the rest of the affidavit. The conclusions I have expressed about the \$160,000 derive from my opinion as to the probabilities inherent in the incorporation of C.P.C. and its commencement of business. They do not derive from Mr. Morgan's evidence.

C.P.C.'s conduct of its affairs was much the same as N.A.A.C.'s had been. It paid the rent for its offices and paid its employees. It received commission from A.M.C. as well as incurring expenditure and receiving payments in connection with its independent trading activities.

Does the manner in which C.P.C. was established and carried on business justify the conclusion that C.P.C.'s presence in Illinois can, for jurisdiction purposes, be treated as the residence or presence of Cape? In my judgment, the answer is "No." I do not think, on analysis, that the plaintiffs' case is any stronger than their case regarding N.A.A.C. If anything, I think the case is weaker. N.A.A.C. was at least a wholly owned subsidiary. C.P.C. even if incorporated and launched with Cape money, was, on my reading of the facts, an independently owned company. Like N.A.A.C., C.P.C. acted as agent for the purpose of facilitating the sale in the United States of Cape's asbestos. The seller of the asbestos in N.A.A.C.'s time was Egnep or Casap. The seller in C.P.C.'s time was, nominally, A.M.C. but, in reality, still, I think, Egnep or Casap. C.P.C., like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract. C.P.C. like N.A.A.C. carried on its own business from its own offices at 150, North Wacker Drive. The provision by Cape of the \$160,000 as a starting-up fund does not make the offices Cape's offices or the business Cape's business.

Mr. Morison made a number of points on the evidence regarding N.A.A.C. and C.P.C. with which I agree. He drew attention to the paucity of documents dealing with and revealing the true nature of the \$160,000 and commented that there must be officers or ex-officers of Cape who could have given evidence about this. I agree. He invited me to infer that the \$160,000 was a necessary payment to discharge the initial running expenses of C.P.C. I do so infer. He criticised Mr. Penna's evidence regarding A.M.C. and C.P.C. and pointed out that it was Mr. Penna who had co-ordinated the setting up of A.M.C. I think this criticism was well founded. But none of this is, in my opinion, critical. What is critical is what C.P.C. and N.A.A.C. actually did on behalf of Cape or Capasco. Each company, C.P.C. and N.A.A.C., assisted in the sale of Egnep's asbestos in the United States. That is not enough. Mr. Morison invited me to infer from, in particular, Mr. Penna's evidence that the corporate form of the Cape group was form only. I am not prepared to infer this. The evidence does not, in my view, justify it. Each corporate member of the Cape group had its own

A well-defined commercial function designed to serve the over-all 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.

Finally, Mr. Morison submitted that the onus was on Cape to establish that it was not resident in the United States and that I should hold that Cape had failed to discharge that onus. I am not satisfied that it is correct to say that the onus lies on Cape to establish that it was not resident in the United States. The position seems to me to be this. The plaintiffs sue Cape on a judgment given by a United States court. The judgment is an apparently regular one. Cape disputes jurisdiction on the ground that it is a foreign company with no place of business in the United States. The plaintiffs' answer is to assert that the presence in the United States of N.A.A.C. and C.P.C. is to be treated as Cape's presence. But each of N.A.A.C. and C.P.C. is in law an individual legal persona. A contention that the presence in the United States of either is to be treated as the presence of Cape requires, in my opinion, he who so contends to establish facts sufficient to support the contention. This, in my judgment, the plaintiffs have failed to do.

The plaintiffs' main case on "presence" was based upon the presence in the United States of N.A.A.C. and C.P.C. In his reply, Mr. Morison raised a third possibility. He suggested that A.M.C. may have been present in Illinois at the relevant time and that, whatever the position regarding N.A.A.C. and C.P.C., A.M.C. was, in effect, Cape. This suggestion was based on the evidence of Mr. Summerfield who testified that an inspection of 150, North Wacker Drive in August 1984 revealed a notice-board giving the names of both C.P.C. and A.M.C. as the occupants of the 12th floor offices. Whether this notice-board was in the same state in 1979 when the sale to Transvaal Consolidated Exploration Co. Ltd. took place is not known. There is an allegation in the pleadings that, when the Tyler 2 actions were commenced, A.M.C. was present at 150, North Wacker Drive and, if I understood Mr. Morison correctly, his submission was that since the onus was on Cape to satisfy me that it was not present in the United States, it was for Cape to establish that A.M.C. was not present in the United States at any material time. I do not accept this approach. There is no positive evidence to suggest that A.M.C. was an occupant of the 150, North Wacker Drive offices at the time the Tyler 2 actions were commenced.

I should also mention, in connection with Mr. Morison's wielding of the onus argument, a point made by him arising out of evidence given by Mr. Penna that there had at one time been an agency agreement between Cape and Capaseco under which all of Capaseco's business had been carried on by Capaseco as agent for Cape. In effect, Capaseco's business was Cape's business. This agreement had, said Mr. Penna, been terminated in the mid 1970s. He said that he had never seen any like agency agreement between Cape and N.A.A.C. and did not think there had been one, but that he could not exclude the possibility. Mr. Morison submitted that the burden lay on Cape to satisfy me that there was no agency agreement between Cape and N.A.A.C. comparable to that



between Cape and Capasco. I was so satisfied from, in particular, the form of N.A.A.C.'s annual accounts. These were drawn on the footing that N.A.A.C.'s business was its own business. There is nothing to suggest that the accounts were drawn on a false footing. The correspondence between N.A.A.C. and Cape concerning the amount of the annual dividend to be declared by N.A.A.C. is entirely consistent with the inferences to be drawn from the accounts. But, in any event, there is no positive evidence to suggest that there was ever an agency agreement between N.A.A.C. and Cape on the lines of that between Cape and Capasco to which Mr. Penna had referred.

In my judgment, therefore, neither the presence in Illinois of N.A.A.C. nor the presence in Illinois of C.P.C. can be represented, for jurisdiction purposes, as the presence in Illinois of Cape or Capasco. It follows that there was, in my judgment, no territorial basis that entitled the Tyler court, by English common law standards, to take jurisdiction over Cape or Capasco.

#### *Issue 6*

The question whether the residence or presence of Cape and Capasco in Illinois entitled the Federal Court of Tyler, Texas, to take jurisdiction over them does not, if my conclusions under 4 and 5 above are right, arise. But it is clear that this case is likely to go further, and I think, therefore, that I should deal with all the questions argued before me. For the purpose of this question I must assume that Cape and Capasco were present in Illinois when the Tyler 2 actions were commenced. I must start by describing, in outline, the nature, function and jurisdiction of a United States district court. To enable me to do so, I have had great assistance from the eminent United States jurists who have given evidence in this case.

Section 1 of article III (the judicial article) of the United States Constitution vests the judicial power of the United States in a Supreme Court and such inferior courts as Congress may from time to time establish. Federal circuit courts and federal district courts have been established by Congress pursuant to this power. The procedure to be observed by federal courts may be laid down either by Congress or the Supreme Court.

Judges of federal courts are appointed by the President of the United States and confirmed by the Senate. They are appointed for life and can be removed only by Congress. Their salaries and expenses are a charge on federal funds. They take oaths of allegiance to the United States Constitution. All this is in contrast to judges of state courts who are appointed by a state authority, are paid for by the state and take oaths of allegiance to the state. The federal court system is headed by the Supreme Court. Below the Supreme Court are the circuit courts, the courts of appeals. The United States is divided into 13 judicial circuits, each of which has a court of appeals. The Fifth Circuit includes Louisiana, Mississippi and Texas. Judges of the circuit courts of appeals are the circuit judges. The federal courts of first instance are the district courts. Each state is, according to its population, allocated a number of districts. Each district is allocated a number of judges. Texas has four

A districts, one of which is the eastern district. The eastern district of Texas comprises seven divisions, one of which is the Tyler Division and another of which is the Marshall Division. Judge Steger was a district judge of the eastern district of Texas. He sat both at Tyler and at Marshall, as well as at other venues in the eastern district.

B The subject matter jurisdiction of federal district courts established by Congress is set out in Chapter 85 of Title 28 of the United States Code, entitled "Judicial Code and Judiciary." Section 1331 entitled "Federal question," provides: "The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States." This is an exclusive jurisdiction. Actions of this character cannot be entertained by state courts unless specific statutory authorisation is given.

C Section 1332 is headed "Diversity of citizenship." Paragraph (a) of the section provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between (1) citizens of different states . . . ."

D Diversity jurisdiction, unlike federal question jurisdiction, is not an exclusive jurisdiction. An action involving diversity of citizenship which could have been brought in a federal district court can be commenced, if the plaintiff so elects, in a state court. Any defendant, however, may apply to the federal district court for the removal of the action, as of right, to the district court. But in the absence of any such application the case may be prosecuted to judgment in the state court.

E The necessity for Congress to have endowed federal district courts with federal question jurisdiction is, perhaps, obvious. Laws passed by Congress, treaties of the United States, the Constitution of the United States, may give rise to civil justiciable issues. Courts for the trial of such issues are necessary. Chapter 85 also gives district courts original jurisdiction over actions brought against foreign states (section 1330) or brought by or against the United States itself (section 1345 and 1346). In addition, original jurisdiction over a number of specified types of actions is given to district courts. These include admiralty and maritime cases (section 1333), bankruptcy cases (section 1334), patent cases (section 1338), civil rights cases (section 1343) and many others. The explanation for the jurisdiction given to the federal courts can in all these cases be found in the nature of the actions in question.

G Diversity of citizenship jurisdiction, however, has a different provenance from any of these. There is no obvious constitutional reason why diversity jurisdiction should have been conferred on federal courts. A breach of contract action between two citizens of the State of New York can be entertained by the courts of New York. So can an action in contract between a citizen of New York and a citizen of Illinois. The need to have provided in the latter case for federal district courts to have an overriding jurisdiction is not in the least obvious. The explanation for diversity jurisdiction given by the commentators and accepted by the witnesses before me is, broadly, that at the time of

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union there was not the same confidence as there would be today in the judicial qualities of state judges, and, in particular, in their impartiality when trying an action between a citizen of their own state and a citizen of another state. It was, so the explanation goes, thought necessary to provide defendants with an opportunity, when sued by a citizen of another state, to have the action heard in a federal court. Consistent with this explanation for the conferring of diversity jurisdiction on federal district courts is the opinion of some distinguished United States jurists that diversity jurisdiction has served its purpose and could with no disadvantage now be abolished.

It is inherent in diversity of citizenship jurisdiction that it is the identity of the parties, not the nature of the action, that confers jurisdiction on the district court.

A federal district court exercising its diversity of citizenship jurisdiction does not, save as to matters of procedure, apply federal law to the determination of the rights which are in issue. It applies state law. Thus, in the case of a contract governed by the law of Illinois, a breach of contract action may be brought by a citizen of Illinois against a citizen of Texas in a federal district court in Illinois; the law applied will be the law of Illinois. If there is a car accident in New York, the law of New York will determine the rights of any injured persons. That will be so whether an action for redress is brought in a New York state court or in a New York federal district court. That this is so was established by the seminal decision of the United States Supreme Court in *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64. Justice Brandeis said, at p. 78:

"Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In a later Supreme Court case, *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395, 404, Justice Fortas said:

"Since the decision in *Erie Railroad Co. v. Tompkins* . . . federal courts are bound in diversity cases to follow state rules of decision in matters which are 'substantive' rather than 'procedural,' or where the matter is 'outcome determinative.'"

The decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 is, I think, broadly accepted by U.S. jurists as resting

"on the principle that the federal government as a whole, including Congress and the federal courts, has no more authority than that given to it by the Constitution. This principle, which is inherent in the political theory underlying the very concept and structure of the federal government, is reinforced by the 10th Amendment, which reserves to the states or to the people those powers not delegated to the federal government by the Constitution": see *Federal Practice and Procedure* by Wright, Miller & Cooper, vol. 19, para. 4505.

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A Federal district courts sitting in diversity have, therefore, a dual character. In one sense they are national courts established and funded centrally; but they are applying state substantive law and, in that sense, may be regarded as state courts.

B In order to entertain an action, a federal district court must not only have subject matter jurisdiction but also in personam jurisdiction over the defendants in the suit. It is an important and somewhat curious feature of the manner in which federal district courts are established that, save in cases specially provided for by Congress or the Supreme Court, each district court exercises the in personam jurisdiction permitted by the law of the state in which it sits: see Federal Rules of Procedure, rule 4. Thus, if an action for personal injuries is commenced in New York against a defendant resident in California, the jurisdiction of the New York court over that defendant will depend upon the "long arm" statute of the state of New York. Each state has its own "long arm" statute serving, broadly, the purpose that R.S.C., Ord. 11 serves for our own jurisdiction. There is no separate federal "long arm" statute that Congress or the Supreme Court have enacted so as to confer special federal in personam jurisdiction on federal district courts. They must rely on the laws of the respective forum states. In *Point Landing Inc. v. Omni Capital International Ltd.* (1986) 795 F. 2d 415, 419, a decision of the Court of Appeals for the Fifth Circuit, it was held:

"Absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) permits a federal court to exercise jurisdiction over only those defendants who are subject to the jurisdiction of courts of the state in which the court sits."

E This rule applies not only when the court is sitting in diversity but also when it is dealing with a federal question case or indeed any other type of case in which it has original jurisdiction.

F Accordingly, whether a federal district court is exercising federal question jurisdiction or whether it is exercising diversity jurisdiction, its entitlement to take jurisdiction over a particular defendant depends on the "long arm" statute of the forum state. The jurisdiction objections taken by Cape in Tyler 1 were taken on the ground that the "long arm" statute of Texas did not entitle the federal district court at Tyler, Texas, to take jurisdiction over Cape.

G The effect of this rule and authority is that the Tyler court in the Tyler 2 actions was sitting in diversity, was applying to the causes of action Texas state law and relied for its in personam jurisdiction over Cape on the Texas "long arm" statute.

The question for me is whether presence in Illinois is, under English law, a sufficient foundation for jurisdiction to be taken by the federal district court sitting in Tyler, Texas.

H There is no doubt but that, for conflict of law purposes, each state within the United States is a "country" and that for many conflicts of law purposes the United States is not a "country." Each state, for example, has its own common law. The United States has no common law. A person may be domiciled in a state. Domicile in the United States as a whole is a meaningless concept. The proper law of a contract

or of a tort may be the law of a state, but cannot be the law of the United States as a whole. In *Dicey's & Morris's Conflict of Laws*, 11th ed. (1987), p. 26 there is this statement:

"Meaning of 'country.' This word has from long usage become almost a term of art among English-speaking writers on the conflict of laws, and it is vitally important to appreciate exactly what it means. It was defined by Dicey as 'the whole of a territory subject under one sovereign to one body of law.' He suggested that a better expression might be 'law district': but this phrase has never found much favour with English-speaking writers, who prefer the more familiar word 'country.' England, Scotland, Northern Ireland, the Isle of Man, Jersey, Guernsey, Alderney, Sark, each British colony, each of the American and the Australian states and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a state known to public international law."

As part of the discussion of the meaning of the word "state," the text contains this statement, at p. 27:

"A state may or may not coincide with a country in the sense of the conflict of laws. Unitary states like Sweden, the Netherlands and New Zealand, where the law is the same throughout the state, are 'countries' in this sense. But composite states like the United Kingdom, the United States, Australia and Canada are not."

I find it difficult to accept that for some private international law purposes the United States may not be a "country." Take the case of a federal district court hearing a federal anti-trust damages suit. The suit would be a federal question case, not a diversity case. The law being applied would be United States law, not state law. Professor Baade, giving evidence for the defendants, said that in a federal anti-trust case the "country" would be the United States. He accepted that this would be so even though the in personam jurisdiction of the court was determined by the forum state's "long arm" statute. This seems to me to correspond with reality. Federal anti-trust law is the product of United States statute, not state statute, and applies to the whole of the United States. It is the United States Congress that has established the federal courts in which anti-trust suits may be litigated. They are United States courts. The in personam jurisdiction that enables a defendant in an anti-trust suit to be brought before a federal district court sitting in Texas is dependent upon the Texas "long arm" statute but that is because Congress has not chosen to confer any specific federal in personam jurisdiction upon federal district courts. I did not understand it to be suggested that Congress could not, with constitutional propriety, do so if it so desired.

It was suggested that when sitting in federal question jurisdiction a federal district court was, on analysis, applying state law. The analysis was based upon the provisions in the United States Constitution that give federal legislation national efficacy. Federal legislation becomes, in effect, it was argued, state law. Accordingly a federal district court in a

A federal question case may be regarded as applying state substantive law just as a federal district court in a diversity case will be applying state substantive law.

This analysis is, in my opinion, little more than sophistry. The distinction between federal law derived from federal statute, on the one hand, and state law, whether derived from common law or state statute, on the other hand, seems to me a clear one. It must have seemed clear, too, to Congress in enacting paragraph 1331 of the United States Code which refers to "civil actions arising under the Constitution, laws or treaties of the United States." In my opinion, when a federal district court is dealing with a federal question case, it is applying federal substantive law, not state law.

Suppose then, in a federal question case, a defendant who did not appear or take any part in the case had a damages default judgment entered against him. If the federal district court was sitting in Texas and the defendant was resident in Illinois, would an English court decline to enforce the judgment against the defendant on the ground that the "country" of the court was Texas and the court, by the standards of English law, lacked jurisdiction over the defendant? I do not see any reason why it should do so. The court would be a United States court applying United States law. Why should not such a court in such a case command the obedience of a resident anywhere in the United States? I justify my reaction by relying on the fundamental principle underlying territoriality as a basis of jurisdiction. The sovereignty of the United States in its own territory is, of course, recognised by English law. The entitlement of the United States to establish in its territory courts in which issues arising under its laws may be adjudicated upon and disposed of is an attribute of its sovereignty. It is also an attribute of its sovereignty that the United States is entitled to invest its courts with jurisdiction over any persons resident in its territory. If Congress had chosen to establish a federal district court at Washington D.C. for the purpose of dealing with federal anti-trust cases, and with in personam jurisdiction over any persons resident in the United States, the proposition that, under English law, that jurisdiction was excessive, would, in my view, have been unarguable. Under English law a resident in Alaska would owe the same obligation of obedience to such a court as would a resident of Washington D.C. The "country" of the court would, unarguably, be the United States as a whole.

I have been discussing that which for present purposes is hypothetical. The Tyler court was sitting in diversity and was not dealing with a federal question case. But the arguments addressed to me by Sir Godfray Le Quesne on this issue have had at their core the proposition that the United States as a whole cannot be a "country" for private international law purposes nor, in particular, for the purpose of enforcement in England of a damages award made by a federal district court. I am unable to accept that proposition. In my judgment, where a federal district court is exercising federal question jurisdiction it is doing so as a court of the United States in circumstances in which the "country" of the court is, for English law purposes, the United States. I therefore decline to approach the question before me on the footing that



the United States cannot be a "country" for enforcement of foreign judgment purposes. A

The question before me is whether a federal district court sitting in diversity in a tort case is to be regarded, for enforcement purposes, as a court of the state in which it is sitting and whose law it is applying, or as a court of the United States which established it. There is no authority that provides an answer. A convenient starting point, however, is the judgment of Blackburn J. in *Schibsby v. Westenholtz*, L.R. 6 Q.B. 155. B  
He said, at p. 161—I have cited the passage before but I do so again:

"If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them." C

How is this statement of principle to be applied where one sovereign state has a number of different systems of law that apply in different parts of its territory? Sir Godfray suggested that the critical question to be asked was whether the defendant was present within the territorial jurisdiction of the court which had given the judgment. He reminded me of the statement by Lord Selborne L.C. in the *Rajah of Faridkote* case [1894] A.C. 670, 683, that "all jurisdiction is properly territorial." If the defendant was not within the territorial jurisdiction of the court concerned, then, said Sir Godfray, it would be immaterial that he might be resident in the jurisdiction of another court set up by the same sovereign power. I do not find difficulty in accepting these submissions, but they do not seem to me to point the way towards a solution to the main problem. The question whether Cape was present within the territorial jurisdiction of the federal district court at Tyler, Texas, is one which must be answered by reference to English international law. It is the attitude of English law to the territorial jurisdiction and competence of a federal district court that I am trying to discover. D

Sir Godfray submitted that the criterion to be applied in answering the question depended on the function of the district court. If the function of the court when sitting in diversity was the administration of justice in Texas, then it should be regarded as a state court with a territorial jurisdiction covering Texas. Unless its function was the administration of justice in the United States as a whole, it should not be regarded as a United States court with a territorial jurisdiction covering the whole of the United States. E

Sir Godfray then analysed the characteristics of a federal district court and submitted that they showed the court, when sitting in diversity, to be part of the system for the administration of justice in the state in which it sat. F

If Sir Godfray's approach is correct, I do not think his analysis or conclusions can be faulted. But I am not satisfied that his approach is correct. The question as to whether a foreign court has, in the eyes of H

A English law, jurisdiction over a defendant, may receive an affirmative answer if a sufficient territorial connection between the defendant and the court can be established. But the territorial basis of jurisdiction is dependent upon and cannot, in my opinion, be divorced from, the sovereignty of the "country" that has established the court in question. It is, I think, recognition of the sovereignty of a foreign country that leads to recognition of the entitlement of its courts to take jurisdiction over persons resident in its sovereign territory. I do not regard the United Kingdom with its constituent private international law "countries" as inconsistent with this thesis. It would be open to Parliament, if it so desired, to create a court structure for the whole of the United Kingdom for a specified class of case. I can see no reason of principle why foreign countries, with a private international law similar to ours, should decline to recognise the jurisdiction of such a court over persons resident anywhere in the United Kingdom. The United States is a sovereign power with a territory over which its sovereignty extends. It has established courts whose in personam jurisdiction, although subject to limits and derived from state statutes, is capable of extending to individuals anywhere in the United States.

B As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction.

E It follows that I agree with Mr. Morison that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of the authority of the court. Whatever the function of a federal district court in a diversity case, the source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction. If I had felt able to conclude that Cape and Capasco were, when the Tyler 2 actions were commenced, present in Illinois, I would have held that to be a sufficient basis, in English law, for the exercise by the Tyler court of jurisdiction over them.

F There is one final point I wish to make before leaving this issue. Cape and Capasco protested the jurisdiction in the Tyler 1 actions. They contended that the Texas "long arm" statute did not entitle the Tyler district court to exercise in personam jurisdiction over them. Their objections were overruled by Judge Steger at an interlocutory stage but were never the subject of a final ruling. The objections were not renewed in the Tyler 2 actions for the obvious reason that Cape and Capasco took no part therein. But it remains the contention of Cape and Capasco that, under the Texas "long arm" statute, the Tyler district court was not entitled to exercise in personam jurisdiction over them. In the course of argument before me, I thought for a time, wrongly, that the alleged absence of in personam jurisdiction of the Tyler court was being advanced as a reason why the English courts should not recognise

the jurisdiction exercised over Cape and Capasco by the Tyler court. Sir Godfray made plain to me, however, that I was under a misapprehension and that the contention that under the Texas "long arm" statute the Tyler court lacked in personam jurisdiction was not being relied on as a defence. Nonetheless, evidence was given by, in particular, Mr. Bernays and Mr. Hall as to the consequences under United States law if that had been so. Their evidence satisfied me that if a default judgment against a defendant who has taken no part in the proceedings is given by a federal district court in circumstances in which the court has erroneously assumed in personam jurisdiction over the defendant, the defendant can raise the error in collateral proceedings in order to resist the enforcement of the judgment against him. In the instant case, Cape, if it owned assets in California against which the plaintiffs sought to enforce the default judgment, could, if its jurisdiction contention were a good one, resist enforcement by establishing in collateral proceedings in California the lack of jurisdiction of the Tyler court.

Mr. Morison submitted, and I think Sir Godfray agreed, that a domestic lack of jurisdiction was not a ground upon which enforcement of a foreign judgment in England could be resisted. *Pemberton v. Hughes* [1899] 1 Ch. 781 was cited as authority: see especially *per* Sir Nathaniel Lindley M.R. at p. 790. But *Pemberton v. Hughes* was a case dealing with status, where special considerations apply.

I am not for a moment suggesting that the merits of a foreign judgment can be re-examined in enforcement proceedings in this country. But where enforcement of a foreign money judgment is sought, it seems to me odd and anomalous that English courts should give to the judgment an efficacy denied it by the courts of the forum. If, as I think, the United States as a whole is the "country" of a federal district court and if, within that country, collateral objection to the enforcement of a default judgment is possible, I do not see, in principle, why that same collateral objection should not be raised to resist enforcement of the judgment in England. I need not and do not propose to express a final opinion on this point since it does not arise as an issue in the present case. But the matter has been touched on in argument as well as in evidence and I would not wish this judgment to be taken as tacit support for the view that, provided by English law standards the foreign court was not claiming excessive jurisdiction, the judgment of the foreign court would be enforceable in England notwithstanding that under the law of the forum the court had lacked jurisdiction. My present view is to the contrary.

#### *Summary of issue 7*

It is at this point that the definitive part of my judgment comes to an end. I have still to deal with issue 7—fraud, natural justice and public policy. My conclusions and findings on this issue are, in summary, these:

(1) The allegations against Mr. Blake Bailey of dishonesty and of procuring the default judgment by fraud fail. (a) The several statements contained in the findings of fact in the default judgment that were based on the proposition that the Tyler 1 actions and the Tyler 2 actions could be treated as one composite unit of litigation were not untrue statements

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A of fact but were statements based upon a legal theory that Mr. Bailey, as counsel for the plaintiffs, was entitled to espouse in the interests of his clients. The theory was, in my view, misconceived but it was not, in my judgment, dishonest for Mr. Bailey to draft the default judgment on the basis of that legal theory, (b) Paragraph 11 of the findings of fact contains statements of fact that were, in my judgment, untrue in that the court did not review the medical records of any of the plaintiffs and did not make any determination in respect of any individual plaintiff of the amount of damages that would properly compensate that plaintiff for his or her medical treatment or pain and anguish or physical disability. But I do not find that in drafting the default judgment with paragraph 11 included therein or in submitting the draft to Judge Steger, Mr. Bailey was acting dishonestly, (c) Mr. Bailey did not, I find, dishonestly procure Judge Steger to award the damages sum of \$15,654,000 or to award an average of \$75,000 per plaintiff. The allegations of misrepresentation based on the contents of the conversations between Judge Steger and Mr. Bailey prior to 12 September 1983 fail, (d) Mr. Bailey did not, I find, mislead Judge Steger either in respect of the findings of fact in the default judgment or in respect of the quantum of damages awarded, (e) It was not dishonest for Mr. Bailey to procure Judge Steger to award the \$15,654,000 whether or not that level of award can be categorised as exorbitant or as arbitrary.

But: (2) the default judgment is not, in my judgment, a judgment that should be enforced in an English court. (a) No evidence of damage or injury to any of the plaintiffs, whether oral or in affidavit form, was placed before Judge Steger. (b) Medical records together with counsel's summary of each plaintiff's case were placed before the court on 12 September 1983 but the judgment was given before Judge Steger had had any sufficient opportunity to peruse them and, as I find, without him having done so. (c) The damages award was quantified either as a total figure to be divided among all the plaintiffs or on the basis of an average figure per plaintiff and, in either case, without any determination in respect of any individual plaintiff of the amount of damages that that plaintiff ought to recover from the defendants for the injuries he or she had received. (d) The classification of the plaintiffs into bands for damages purposes was carried out by the plaintiffs' counsel and did not represent any judicial assessment made by Judge Steger of the relative seriousness of the individual plaintiff's injuries. (e) In the circumstances, the individual awards of damages were arbitrary and did not follow upon a judicial determination of the quantum of damages that the individual plaintiffs were entitled to recover against the defendants.

For these reasons, expressed in summary form, the default judgment was obtained, in my judgment, in circumstances that, by the standards of English law, were contrary to natural justice.

H In my view, a judgment obtained in the circumstances revealed by the evidence of this case does not give rise to any obligation of obedience enforceable in any English court.

26 July. SCOTT J. read the following conclusion to his judgment:

*Issue 7: fraud, natural justice and public policy*

If my conclusion that, under English law, the Tyler court did not have jurisdiction over Cape and Capasco is right, the issue whether enforcement of the default judgment should be refused on the ground that it was procured by fraud, or that its enforcement would offend principles of natural justice or public policy, does not arise. But the defendants' case under this head has involved allegations of dishonesty against Mr. Blake Bailey. He, it is alleged, dishonestly procured the default judgment. Allegations made against a professional man of dishonesty in the course of his profession are allegations which, once made, must be dealt with. Any other course would not be fair to Mr. Bailey. For this reason, in particular, I must, notwithstanding my conclusions on the other points in this case, deal in some detail with the allegations of professional dishonesty made against Mr. Bailey. I propose first to relate the circumstances in which, on my reading of the evidence, the default judgment came to take the form it did. [His Lordship then examined in detail the evidence as to the manner in which the default judgment given by Judge Steger on 12 September 1983 came to be delivered, concluded that the allegations against Mr. Bailey of dishonesty and fraud based on the contents of the judgment failed, and continued:] The defence that the default judgment was procured by fraud, therefore, fails. That leaves the question whether, in the circumstances in which the judgment was obtained its enforcement in England can be resisted on natural justice or public policy grounds.

The circumstances in which the judgment was obtained involve these particular features, (i) The judgment was not based on evidence in the strict sense. There was none. Nor was it based on the unauthenticated medical records that Mr. Bailey and Mr. Clark had lodged on 12 September 1983. Judge Steger had not had time to peruse them. (ii) The medical material lodged by Mr. Bailey and Mr. Clark did not purport to establish that the medical condition of the respective plaintiffs had been caused by exposure to asbestos dust. Nor did the material deal with pain and suffering, present or future physical disability, past or future medical expenses or, indeed, any special damage of any kind. (iii) Judge Steger indicated his willingness to grant an average of \$75,000 per plaintiff. This was his only contribution to the amount of the damages award. The \$200,000-odd by which the total award of \$15,654,000 exceeded the \$75,000 average was simply the mathematical consequence of the appendix A amendments effected by Mr. Bailey and Mr. Clark. (iv) The provenance of the \$75,000 average is uncertain. It is likely that it derived from Judge Steger's knowledge of the statistics regarding the level of current settlements in asbestos-related suits. It is possible that it owed something to the arguments that Mr. Bailey addressed to the judge at their third meeting. It could not, in my view, have owed anything to the medical material lodged with the court on 12 September 1983. (v) The decision as to the category of damages into which each plaintiff should be placed was made by counsel, Mr. Bailey and Mr. Clark, not by Judge Steger. The decision as to the level of the four categories and their relationship to one another was made by counsel, not by Judge Steger. Judge Steger required the average award to be

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A reduced from \$120,000 to \$75,000. It was counsel, not the judge, who decided how that should be achieved. It was counsel, not the judge, who decided to shift two plaintiffs from the respective categories in which they had originally been placed into new categories. The judge was not told that this had been done and could not have known that it had been done, (vi) The features that I have mentioned justify, in my judgment, these conclusions. First, no judicial hearing, worthy of the name, at which quantum of damages was assessed took place. Second, B the attribution of specific damages to the individual plaintiffs was not the result of a judicial assessment of the individual entitlements of the respective plaintiffs. Third, the total sum of damages awarded was based on the judge's opinion as to what would represent an appropriate average award.

C The procedure adopted by Mr. Bailey and Judge Steger that led to the award of damages was not, in my judgment, in accordance with the requirements of the relevant federal rules. I base this conclusion on the evidence in particular of Mr. Hall and Mr. Bernays, but also on that of Mr. Brin and Mr. Davis, all of whom were critical of the procedure that had been adopted. Mr. Bailey and Mr. Patrick gave evidence to the effect that Judge Steger was not required to hold a judicial hearing for D the purpose of assessment of damages, was entitled to take into account unauthenticated medical reports, could inform himself by whatever means he chose of the significance of the plaintiffs' medical condition, did not require evidence causally connecting the plaintiffs' medical condition with the defendants' negligence, and did not require evidence of the plaintiffs' pain and suffering, medical expenses past and future, or E disability in order to award damages in respect of these items. In preferring the evidence to the contrary given by the defendants' witnesses, I am influenced by my own instinctive reaction as a judge in a common law jurisdiction. The United States is—with all respect to Louisiana and its civil law heritage—one of the great common law jurisdictions. The federal rules relating to default judgments and the federal rules of evidence seemed to me familiar. They embody in broad F substance rules of evidence and of procedure similar to those which apply in this country. The proposition that a judge assessing tortious damages where liability has been established against defendants in default can dispense with a judicial hearing or with the rules of evidence, or with the need of evidence, offends my understanding of the role and function of a judge in a common law jurisdiction. I found it easy to G accept the evidence of Mr. Bernays, Mr. Hall, Mr. Brin and Mr. Davis and to conclude therefrom that that proposition forms no part of United States law and procedure.

Whether it is relevant to find, as I do, that the procedure leading to the damages award of 12 September 1983 was not in accordance with the federal rules is another matter. It may be that it is not. But I would wish it to be clear that criticisms of that procedure are not criticisms of H the procedure prescribed by the federal rules. It has not been suggested on the defendants' side, and could not have been suggested, that the content of the federal rules relating to the manner in which default judgments can be obtained and to the procedure for an assessment of



damages are in any respect offensive to natural justice. Indeed, the contrary is the case. Those rules, like our own corresponding rules, are designed to enable justice to be done and, from a procedural point of view, are unimpeachable. Criticism in the present case has been directed to what actually happened. If Mr. Bailey had been correct in representing the procedure followed as being consistent with the federal rules, the criticism would have been a criticism also of the federal rules. But Mr. Bailey was not, in my judgment, correct. So that point of criticism does not arise.

I must now consider the criteria to be applied in order to decide whether or not a foreign judgment is impeachable on natural justice or public policy grounds. I should say at once that, in my judgment, natural justice and public policy cover, in the present case, the same ground. If the judgment of 12 September 1983 is objectionable on natural justice grounds, it is easy to conclude that it would be contrary to public policy to permit its enforcement in this country. If it is not objectionable on natural justice grounds, then, on the footing that no jurisdictional objection can be taken, I cannot see any public policy reason for not enforcing it.

Mr. Falconer submitted that since due notice of the default application had been given, no natural justice objection to the default judgment could be maintained. On the authorities, he submitted, the requirements of natural justice, at least in the context of enforcement of foreign judgments, amount to no more than that sufficient notice of the proceedings must be given, together with an opportunity for the defendant to have its case heard. He referred to the service on Cape and Capasco of the notice of the plaintiffs' application for a default judgment and submitted that the defendants' natural justice defence must, accordingly, fail.

There are, I agree, authorities which give some support to this approach. Thus in *Ochsenbein v. Papellier* (1873) L.R. 8 Ch. App. 695, 700, Mellish L.J. said:

"It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained."

In *Robinson v. Fenner* [1913] 3 K.B. 835, 842-843, Channell J. said:

"It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does. So far as I can see, all the instances given of what is 'contrary to natural justice' for the purpose of preventing a foreign judgment being sued on here are instances of injustice in the mode of arriving at the result, such as deciding against a man without hearing him or without having given him any notice or the like."

In *Jacobson v. Frachon* (1927) 138 L.T. 386, 390, Lord Hanworth M.R. referred to Channell J.'s judgment in *Robinson v. Fenner* [1913] 3 K.B. 835 and said:

A "... I am inclined to agree with the view that he presents there, that the question of natural justice is almost, if not entirely, comprised in considering whether there has been an opportunity of having had a hearing, and whether the procedure of the court has been in accordance with the instincts of justice whereby both parties are to be given a full opportunity of being heard."

B In my view, however, the references in the dicta to service of notice of the hearing and to an opportunity to be heard are references, by way of examples, to circumstances which will constitute a want of natural justice and are not to be taken as exhaustive.

C In *Schibsky v. Westenholz*, L.R. 6 Q.B. 155, 159, Blackburn J. referred to the obligation on a defendant to obey an order of a foreign court of competent jurisdiction but went on to say that "anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

In *Pemberton v. Hughes* [1899] 1 Ch. 781, 790-791, Lindley M.R. said: In *Pemberton v. Hughes* [1899] 1 Ch. 781, 790-791, Lindley M.R. said:

D "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court has jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

F That passage expresses, in my judgment, the fundamental criterion for the success of a natural justice objection to the enforcement of a foreign judgment. The proceedings in the foreign court must "offend against English views of substantial justice."

G Atkin L.J. in *Jacobson v. Frachon*, 138 L.T. 386 referred to *Pemberton v. Hughes* [1899] 1 Ch. 781 and to Lindley M.R.'s judgment and continued, at p. 392:

H "By that it is quite plain from the context that Lindley M.R. is dealing with proceedings offending against English views of substantial justice. He is not dealing with the merits of the case or the actual decision, because he goes on to say in the same case, at p. 792, 'A judgment of a foreign court having jurisdiction over the parties and subject matter—i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits.' It is plain that the Master of the Rolls is dealing only with the proceeding, because it is obvious if a court gives judgment on the merits for the plaintiff,

when it is plain it ought to have given judgment for the defendant, or vice versa, that is a judgment which offends against the English views of substantial justice. Nevertheless as the Master of the Rolls says, it cannot be impeached upon that ground, but it can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice. The Master of the Rolls seems to prefer, and I can quite understand the use of the expression, 'contrary to the principles of natural justice;' the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.

"Both those considerations appear to be essential if they are to be in accordance with natural justice. I think the expression of opinion of the late Professor Dicey in his great book on the *Conflict of Laws*, dealing with this subject matter is a little narrowly expressed. He says in rule 107 (4th ed., p. 444): 'A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice.' Then he says that is owing to want of due notice. 'But, in such a case, the court is generally not a court of competent jurisdiction.' It may be that the court is generally not a court of competent jurisdiction, but that seems to me by no means the whole of the rule. A court of competent jurisdiction, as I have said, may very well, either in accordance with its rules or in violation of them, refuse a substantial hearing to the party, and, if so, it appears to me that the judgment would be invalidated on the ground that it was contrary to natural justice for the reasons I have already to give. That gives quite free play for a variation between different countries and different jurisprudences of the method in which they shall hear the parties and the nature of the evidence to be given in the court. The case here depends upon whether or not the procedure of this foreign court did offend against our principles of substantial justice."

Despite Atkin L.J.'s particular reference to notice of the hearing being given to the litigant and to an opportunity for the litigant to present his case, he was not, in my view, purporting to limit natural justice objections to objections based on the absence of one or other of those features. He was limiting natural justice objections to objections based upon the procedure that had been adopted, but that, in my opinion, is the only limitation that can be spelled out of the judgment. The criterion expressed by Atkin L.J. in the last sentence of the passage I have cited, namely, whether "the procedure of this foreign court did offend against our principles of substantial justice," is a broad one.

In my judgment, therefore, I must consider the procedure which led to the 12 September 1983 default judgment and ask myself whether or not it offends against English principles of substantial justice.

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A I must start with the important circumstance that Cape and Capasco were in default and were thereby taken to have admitted the pleaded allegations made against them save in relation to damage. They had forfeited any entitlement to a hearing save on the issue of damages. There is no injustice in that. Second, Cape and Capasco were given notice of the plaintiffs' application for a default judgment. They were given notice that the application would be heard on 12 September 1983.

B Venue was not specified, but I do not think that omission can be regarded as material.

It is important, however, to notice the nature of the relief which the plaintiffs were proposing to seek. Their application, according to the document served on Cape and Capasco, was to

C "move the court to enter default judgment in favour of plaintiffs . . . and against defendants . . . and further, to hold hearing to determine the amount of relief entitled to plaintiffs."

This was notice to Cape and Capasco of a judicial hearing at which a judicial assessment of damages would take place.

D The effect of the notice given to Cape and Capasco cannot be divorced from the content of the federal rules regarding default judgments. Under the federal rules, as under our own rules, a judicial assessment of damages where a defendant is in default is only necessary if the claim is for an unliquidated sum: see federal rule 55(b). If the claim is "for a sum certain or for a sum which can by computation be made certain," the court clerk is required "upon request of the plaintiff and upon affidavit of the amount due [to] enter judgment for that amount . . . against the defendant." A default judgment on a claim for a liquidated sum can, therefore, be obtained without any judicial hearing or any judicial assessment of the amount of the claim. There is no injustice in that.

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The point can be taken further. It would be possible for procedural rules to provide, in the case of an unliquidated claim and a defendant in default, that the plaintiff be entitled, upon giving to the defendant a written estimate of the recoverable damages, to enter judgment for the amount of the estimate, unless within some specified time the defendant gave notice of intention to dispute the amount. In that way an unliquidated claim could lead to a judgment against a defendant in default without any judicial hearing and without any judicial assessment of the damages. The case is hypothetical, but I do not think that a judgment so obtained could be described as offending against English principles of substantial justice. The defendant would have received notice of the amount of the claim and would have been able to have disputed the quantum of damages and to have put the plaintiff to proof thereof if so advised.

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I conclude that neither the absence of a judicial hearing nor the absence of a judicial assessment of damages is per se a procedural feature that is objectionable. The context is all-important.

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In the present case, the context is provided by the federal rules. The federal rules make provision, in actions for unliquidated damages where the defendant is in default, for a judicial process in the course of which

evidence will be adduced and which will lead to due judicial consideration by the judge, in the light of the pleadings and of the evidence, of the amount of damages to which the plaintiff is entitled. A defendant in default in an action for unliquidated damages is entitled to expect that his liability to the plaintiff will be assessed by the judge in the light of evidence which the judge has considered and which, in the judge's opinion, justifies the award that is made.

The requirements of substantial justice in a particular case cannot, in my judgment, be divorced from the legitimate expectation of both the plaintiff and the defendant in the context of the procedural rules applicable to the case.

Moving from the general to the particular, the defendants in the present case, Cape and Capasco, were, in my view, entitled to expect that their liability to the plaintiffs would be assessed by Judge Steger at the hearing of which they had been given notice, in accordance with evidence laid before and considered by the judge and in accordance with the judge's assessment in the light of that evidence of the respective plaintiffs' entitlements in damages. That is not what happened. There was no consideration given by the judge to the medical material relating to the individual plaintiffs and to the individual plaintiffs' entitlements in the light of that medical material. If there had been, the judge would not simply have said that he would award an average of \$75,000 per plaintiff. Damages calculated on an average-per-plaintiff basis may make very good sense for the purposes of a settlement. The defendants who pay are not concerned as to how the total sum is divided up among the individual plaintiffs. But a judicial award so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs. Judge Steger's approach demonstrated, in my opinion, that he was not considering the individual cases and how much the respective individuals were entitled to recover against Cape and Capasco. The judge purported to award sums for pain and suffering, for medical expenses, for disability. But the judge's approach via an average sum per plaintiff demonstrated that he was not giving any consideration to these heads of damage in respect of plaintiffs individually.

Nor did Judge Steger have any material before him from which a judicial estimate of pain and suffering or of medical expenses could have been made. Nor did he, as opposed to counsel, determine the levels of the four categories of damages or select the plaintiffs to be placed in each of these categories. There was, in short, in my opinion, no judicial assessment of damages.

In my judgment, the procedure adopted by Judge Steger offended against English principles of substantial justice. The defendants were entitled to a judicial assessment of their liability. They did not have one. The award of damages was arbitrary in amount, not based on evidence and not related to the individual entitlements of the plaintiffs. Many of the features of the procedure to which I have drawn attention might, taken singly, have been insufficient to meet the yardstick of substantial injustice. Taken together, the criterion is, in my judgment, satisfied.

Mr. Falconer submitted that the procedural defects to which I have drawn attention could have been the basis for an attack on the judgment



- A in the federal courts, whether by way of collateral action to have the judgment set aside or by way of appeal. This may well be right, although by now I suspect that such an attack or appeal would be time-barred. Mr. Falconer then submitted that where the foreign courts themselves provide a procedural remedy, the English courts should not entertain the objection. He referred me to *Cheshire and North's Private International Law*, 11th ed. (1987), p. 378, where it is stated that "the defence will not succeed if the alleged unfairness consisted of something that might have been combatted and removed in the foreign action."
- B *Jacobson v. Fraxion*, 138 L.T. 386, is referred to in support of that proposition. But that case turned on the question whether the course of proceedings in the foreign court whereby the judgment was obtained offended English notions of substantial justice. It was held it did not.
- C The question whether, if the proceedings had offended, the defect would have been cured by the availability of an appeal procedure did not arise. As a matter of principle, in my opinion, Mr. Falconer's submission is unacceptable. If the procedure adopted by a foreign court offends English notions of substantial justice, whether or not the procedure be in accordance with the procedural rules of the foreign court, I cannot see any good reason why the resulting judgment should
- D be enforceable in England. It does not, in my view, create any obligation of obedience binding on the defendant that an English court should be required to recognise. So it is, in my judgment, with the default judgment of 12 September 1983. I do not accept that English law recognises any obligation on Cape or Capasco of obedience to a judgment so obtained, and I decline to enforce it.
- E It was argued, in addition, by Mr. Playford that the default judgment for \$15,654,000 was exorbitant in amount, that the sums awarded to the individual plaintiffs were in a like state and that the default judgment should on that account, too, be rejected as offending against English notions of substantial justice. Mr. Playford reminded me of Dr. Bidstrup's evidence that had sought to establish that many of the plaintiffs were, judged by the medical records, suffering from no lung
- F injuries at all. Mr. Falconer justifiably pointed out that a defence on the merits is not a ground for declining to enforce a foreign judgment and that a complaint based on the allegedly excessive amount of the award was an attempt to re-open the merits. Mr. Playford's point about the amount of the award is not, in my view, a separate ground of complaint but is part and parcel of the complaint that there was no judicial
- G assessment.
- H Judge Steger did not, in the present case, review the medical material relating to each individual plaintiff and then assess the damages to which that plaintiff was entitled. If he had done so and if he had awarded the same amounts as are contained in appendix A to the default judgment, Mr. Playford's complaint would, I agree, have represented an attempt to re-open the merits. I would then have had to decide whether there could ever come a point at which an English court would feel so outraged by the excessive amount of a damages award that a refusal to enforce the award would be justified and, if so, whether that point had been reached in the present case. On the facts of the present case, however, I

do not, in my view, have to answer those questions. The damages awarded to the individual plaintiffs were not assessed by reference to their respective individual circumstances. So the question whether by reference to those circumstances the damages awarded were outrageously excessive does not arise.

Nonetheless, Mr. Playford was, in my opinion, able to demonstrate, in relation to a number of plaintiffs and their respective medical records, inconsistencies in the levels of damages awarded to them. There were some in respect of whom it was difficult to accept that any real injury had been suffered at all. These examples served, in my view, to confirm that no consideration had been given to the individual deserts of the plaintiffs, to underline, in short, the arbitrariness of the awards, rather than to establish that the awards were exorbitant.

(vii) There are a few other minor matters that I should deal with, (1) The damages awarded to the plaintiffs in the action to which Capasco was not a party are not enforceable against Capasco. That is accepted. (2) There are some plaintiffs who were intervenors in one or other of the Tyler 2 actions but notice of whose intervention was never served on Cape or Capasco. Prima facie this failure represents a procedural defect of substance. Why should the default judgment in favour of these plaintiffs be enforced? Cape and Capasco were not in default and had no opportunity to file an answer to the pleadings. Mr. Falconer's answer was that since Cape and Capasco had for tactical reasons decided to take no part in the Tyler 2 actions, the failure to give notice of the interventions did not prejudice them. They would, in any event, have taken no steps to defend the claim. I accept Mr. Falconer's premise but not his conclusion. I agree that it is as certain as anything can be certain that, if served with notice of the interventions, Cape and Capasco would have done nothing. Nonetheless, notice to the defendants of the claims was, in my view, an essential preliminary to recognition of the default judgments. Substantial justice requires at least, and in all cases, that notice of the claims be given to the defendants. If that is not done, I do not think the resultant judgment is enforceable in this country. Accordingly, I would, on this ground also, have dismissed the actions of those plaintiffs in respect of whom notice of intervention was not served on the defendants. (3) Finally, it is accepted by Mr. Morison that, if, contrary to my view, the default judgment is enforceable in England, the defendants are entitled to set off against their liability thereunder the sums recovered by the plaintiffs in the 1983 settlement. Otherwise there would be double recovery. This point does not affect the Unarco plaintiffs.

I must conclude by expressing my indebtedness to counsel for their very great assistance in a case that has been for me of unprecedented interest both on the law and the facts and my regret that this final part of my judgment has been delayed.

*Action dismissed.  
Plaintiffs to pay four-fifths  
of defendants' costs.*

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1 Ch.

Adams v. Cape Industries Plc. (Ch.D.)

Scott J.

A *Solicitors: Herbert Oppenheimer Nathani & Vandyk; Davies Arnold & Cooper.*

APPEAL from Scott J.

B The plaintiffs appealed on the grounds, which were amended at the hearing, inter alia, that (1) the judge misdirected himself in law in holding (a) that the defendants were not present in the United States of America at the relevant dates and (b) that it would be contrary to natural justice for the judgment of the United States Federal Court of the Tyler District, Texas, dated 12 September 1983 to be enforced in this country; (2) at the trial, the plaintiffs contended that the defendants were present at 150, North Wacker Drive, Chicago, Illinois, from where asbestos mined in South Africa by the Cape group was marketed throughout the United States of America and that the defendants were present there (a) by their wholly owned subsidiary, North American Asbestos Corporation ("N.A.A.C."), (b) by a company called Continental Productions Corporation ("C.P.C."), which was set up to replace N.A.A.C. in such a way as to disguise the defendants' continued involvement in the marketing of the group's asbestos in the United States of America; (3) the judge failed to apply the correct test to determine whether the presence of a third party might constitute the presence of the defendant and instead he asked himself the fundamental question whether the United States court was entitled, on territorial grounds, to take jurisdiction over Cape; (4) the judge erred in law in rejecting the approach of the European Court to the question of jurisdiction where a parent outside the market set up a subsidiary within it; (5) the judge misdirected himself as to the burden of proof in holding that the plaintiffs had the burden of proving that Cape were present in the United States, whereas the burden was on the defendants to prove that the judgment of the federal court was not enforceable; (6) on the facts as found, in particular with regard to N.A.A.C. the judge ought to have held that the defendants were present through it, which was carrying on the group's business and not, in any real sense, its own business; (7) as to C.P.C. the judge wrongly concluded that it was an independently owned company and even if that conclusion were correct, C.P.C. was Cape's presence in the United States of America and the judge was wrong to conclude that C.P.C. and N.A.A.C. were carrying on their own business rather than the business of Cape; (8) the judge erred in law in his approach to the question whether it would be contrary to natural justice to enforce the judgment and having stated that "the fundamental criterion for the success of natural justice objection" was whether the proceedings offended "against English views of substantial justice," he wrongly concluded that that criterion permitted him to investigate and make findings in relation to (a) the procedural rules relevant to the entering of the judgment and (b) the circumstances in which the judgment was entered and then he applied that criterion, without qualification or limit, to the facts. The correct approach was to treat the boundaries of natural justice as a defence to the enforcement of a foreign judgment as confined to an examination of whether the defendant had had notice of the hearing or of the intention to enter

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judgment and a fair opportunity of presenting his case: *Jacobson v. Fracham* (1928) 138 L.T. 386, 392, *per* Atkin L.J. If the judge had applied the correct test he would have been bound to conclude that the natural justice defence failed and that a large part of the evidence on behalf of the defendants was irrelevant on that issue. Any defects in the manner in which the judgment was obtained or given were capable of being corrected on appeal or by application to the federal judge at the first instance.

By a respondent's notice under R.S.C., Ord. 59, r. 6(1)(b) the defendants gave notice of their intention of contending that the judgment should be affirmed on additional grounds, inter alia, that the judge misdirected himself in law in holding that if, contrary to his primary findings, the defendants were resident or present in Illinois, then such residence or presence was sufficient to give the Federal District Court for the Eastern District of Texas, Tyler Division ("the Tyler court") jurisdiction over the defendants recognisable according to English law. The question which had to be decided was whether at the time each suit was commenced the defendants were resident or present in the "country" of the Tyler court. The judge misdirected himself in holding (a) that the question had to be answered by investigating the source of the authority of the court, (b) that a resident of Illinois was, according to English private international law, subject by reason of that residence to the jurisdiction of the Tyler court and (c) that a resident anywhere in the United States was, according to English private international law, within the jurisdiction of the Tyler court and that the United States was one "country" or "law district." The Tyler court did not claim jurisdiction on the grounds of the defendants' residence in Illinois. No American court would regard a federal court sitting in one state as having jurisdiction over a defendant resident in another state on the ground that that defendant was resident within the United States. According to the judge's decision, English rules of private international law would regard as subject to the jurisdiction of the Tyler court many residents of the United States whom no American court would hold to be so subject.

*T. R. A. Morison Q.C.* and *Charles Fiddons* for the plaintiffs.  
*Sir Godfray Le Quesne Q.C.*, *Jonathan Playford Q.C.* and *Adrian Brunner* for the defendants.

The main submissions of counsel are dealt with in the judgment: see post, pp. 514E-F, 518E-H, 519E-F, 528A-D, F-529c, 530B-C, 532B-E, F-G, 535D-F, 536C-H, 537E-538B, G-539C, 540G-541D, 544D-545A, 549F-550c, 555B, F-557G, 561G-562D, 565D-H, 566D-E, 567E-F, 568H-569B, 570D.

*Cur. adv. vult.*

27 July 1989. The following judgment of the court was handed down.

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A SLADELL J.

## I Introduction

This is the judgment of the court, to which all its members have contributed, on an appeal by the plaintiffs in 205 consolidated actions. On 27 July 1988, Scott J. dismissed all their claims. The trial in the court below lasted some 35 days and the argument before this court extended over some 17 days. The case raises important points of law and some substantial issues of fact.

Having reserved judgment at the end of the argument on 3 May 1989, we subsequently came to the firm conclusion that the appeal must be dismissed and that in the particular circumstances of this case it was right that the parties should be informed of our decision at once, rather than having to wait for some more weeks before we were in a position to give the reasons for our decision. On 24 May we accordingly announced that the appeal would be dismissed and that we would give the reasons for our decision in writing at a later date, at which date the order dismissing the appeal would be drawn up. This we now do.

The plaintiffs in these proceedings are persons, or the personal representatives of persons, in whose favour awards of damages were made by the judgment, dated 12 September 1983, of Judge Steger, a United States Federal District Court judge, in the District Court for the Eastern District of Texas, United States of America ("the Tyler court"). The judgment was a default judgment against Cape Industries Plc. ("Cape") and Capasco Ltd. ("Capasco"), companies registered in England and the sole defendants in all the actions before this court. They had taken no part in the proceedings in which the judgment was made. The judgment was for the specific sums payable to individual plaintiffs set out in an appendix to the judgment: \$37,000 each for 67 plaintiffs; \$60,000 each for 31 plaintiffs; \$85,000 each for 47 plaintiffs and \$120,000 each for 61 plaintiffs. The total of the individual awards was \$15,654m. and the awards were directed to bear interest at 9 per cent. from judgment until payment.

The awards were made in respect of claims for damages for personal injuries and consequential loss allegedly suffered by each plaintiff as a result of exposure to asbestos fibres emitted from the premises of a primary asbestos insulation factory in Owentown, Smith County, Texas, which was operated from 1954 to 1962 by Unarco Industries Inc. ("Unarco") and from 1962 to 1972 by Pittsburgh Corning Corporation ("P.C.C."). The basis of liability of Cape and Capasco was alleged to be negligent acts and omissions and breaches of implied and express warranties.

The relationship of Cape and Capasco to the emission of asbestos fibres from the Owentown factory was, in summary, that Cape owned the shares in subsidiary companies in South Africa which had mined the asbestos and in its subsidiary Capasco. Capasco was concerned in organising the sale of asbestos, mined in South Africa, throughout the world to those who wished to use it in various industrial processes. Between 1953 and 1978 when it was dissolved, another subsidiary of Cape, North American Asbestos Corporation ("N.A.A.C.") assisted in the marketing of asbestos of the Cape group in the United States of America. The plaintiffs' contention was that the defendants had been



responsible for the supply of asbestos fibres directly or indirectly to Unarco and P.C.C. without giving proper warning of the dangers thereof. A

*Summary of the proceedings in the Tyler court*

Different sets of proceedings with reference to claims arising from the processing of asbestos in the Owentown factory had extended over many years. An account of what took place is unnecessary for a proper understanding of the course of the present proceedings. The first action was commenced in the Tyler court in January 1974 and was framed as a "class" action in which the plaintiffs sued "on behalf of themselves and all others similarly situated." A second action was commenced in the same month. They were assigned to Judge Steger. Cape was one of the defendants. Capasco was added as a defendant in 1976. Egnep (Proprietary) Ltd. ("Egnep"), a wholly owned South African subsidiary of Cape, engaged in mining asbestos, was also a defendant. All filed motions to quash service on the ground of lack of jurisdiction. B C

By July 1974 it was apparent that hundreds of claimants, alleging injury caused by the amosite asbestos used in the Owentown plant, were intending to pursue claims. Judge Steger in December 1974 ruled that the actions should not proceed as class actions; that they should be conducted under the federal "Rules for Complex and Multi-District Litigation;" and that intervention in the proceedings should be allowed freely for those claimants who wished to join. In consequence a large number of claimants were added. In December 1974 a third action with reference to asbestos from the Owentown plant was commenced in the Tyler court in which the only defendant was the United States of America. All these proceedings together have been known as the Tyler 1 proceedings. They were separate and distinct from the proceedings in which the plaintiffs, now before this court, obtained their judgment in September 1983. D E

The motions by Cape, Capasco and Egnep to dismiss the Tyler 1 proceedings as against them on the ground of lack of jurisdiction were dismissed by Judge Steger in August 1977. That dismissal was not final and it was open to the Cape companies to take the jurisdiction point at the trial of the action. They filed answers in which they pleaded to the merits of the claim while maintaining their objection to jurisdiction. F

The number of claimants in the Tyler 1 proceedings had by mid 1977 risen to more than 400 and was still increasing. Trial was set for 12 September 1977. The purpose of Judge Steger in fixing that date included that of causing the parties to consider settlement. On 12 September 1977 settlement discussions proceeded in which Judge Steger took part in a manner which would be unusual, if not impossible, in this country but which was effective and normal under the United States system of civil justice. By 28 September 1977 a settlement figure of \$20m. was agreed for all the claimants who then numbered 462. Upon agreement of the settlement figure it was ordered that as from 28 September 1977 no further intervention in any of the Tyler 1 actions would be permitted. G H

A The sum of \$20m. was provided by the defendants in agreed proportions: £552m. by N.A.A.C., Cape and Egnep; \$1m. by Unarco (who had operated the Owentown plant from 1954 to 1962); \$8.05m. by P.C.C. (who had operated the plant from 1962 to 1972) and its shareholders; and \$5.75m. by the United States Government. The settlement was recorded and approved in a final judgment in the Tyler 1 actions dated 5 May 1978. The reference to shareholders in P.C.C. is to  
 B Pittsburgh P.G. Industries Inc. ("P.P.G.") and to Corning Glassworks Inc. who had been joined as defendants on the basis that each had taken such part in the management decisions regarding the use of asbestos as to be liable for injuries arising from that use.

C Upon prohibition by the order of Judge Steger of further interventions in the Tyler 1 proceedings, new actions were commenced by claimants in what have been called the Tyler 2 proceedings. There were eight  
 D separate actions. They were assigned to Judge Steger. The first was commenced on 19 April 1978 and the last on 19 November 1979. There followed intervention by a very large number of claimants. Cape, Egnep and N.A.A.C. were defendants in all the actions. Capasco was a defendant in three only. P.C.C., P.P.G., Corning Glassworks Inc. and O.C.A.W., a trade union to which some claimants had belonged, were also defendants in all actions. The United States Government was a defendant in some actions and third party defendant in others.

E In December 1981 Judge Steger gave directions by which each claimant was required to provide specified information with reference to his claim "on personal knowledge and attested to under penalty of perjury." As a result of those directions, and of the response, or lack of response, thereto, a large number of claimants had their claims summarily  
 F dismissed "without prejudice." The number of plaintiffs left in the Tyler 2 actions was about 206. It is to be assumed that each of those remaining claimants had responded to the order of December 1981 by alleging some physical condition that was capable of having been caused by exposure to asbestos dust and of constituting an injury.

G Cape, Capasco and Egnep took the decision to play no part in any of the Tyler 2 actions. They had initially regarded the Tyler 1 actions as having little more than nuisance value. They could not understand how tortious liability to the Owentown workers could be imposed upon the Cape companies merely on the ground that Cape subsidiary companies had mined the asbestos and sold it into the United States of America. They had had expectations of success on their jurisdiction objection. They had, however, succumbed to the pressure for settlement. They were unwilling to be left as the only defendants in a large and expensive jury trial. Having joined in the settlement of the Tyler 1 actions they decided, since they had no assets in the United States of America, to take no part in the Tyler 2 proceedings; to allow default judgments to be obtained against them; and to defend any actions brought in this country for enforcement of any such judgment on the ground that, under the law of this country, the Tyler court had no jurisdiction over  
 H Cape, Capasco or Egnep with reference to the claims of the claimants.

*The settlement against some defendants of the Tyler 2 proceedings*

In circumstances which will be considered in more detail later in this judgment, the Tyler 2 proceedings were in February 1983 settled, as

against the effective defendants other than the Cape companies, for a sum of \$1.33m. The figure of \$1.33m. was based upon an average award of \$10,000 for each of 133 plaintiffs represented in the settlement negotiations. The sum of \$1.33m. was to be provided as to \$900,000 by P.C.C., the firm which had operated the Owentown factory from 1962 to 1972, and by P.P.G., one of the corporations owning shares in P.C.C.; \$130,000 by Corning Glassworks Inc., the other corporation holding shares in P.C.C.; \$150,000 by O.C.A.W., and \$250,000 by N.A.A.C. Such was the considered value of the claims, as it emerged from the settlement process between the judge and the parties, as against the parties which included those alleged to have had some direct concern in connection with the emission of asbestos particles at or from the Owentown factory. On payment of those sums the settling defendants were to be released from all claims by the 133 plaintiffs.

That settlement was complicated by a "device" devised by Mr. Bailey, who was the attorney negotiating the settlement on behalf of the claimants and which was intended, it was said, to give the claimants the chance of additional recovery against the United States. The form of this device, and the part which it was alleged to have played in the formulation of the terms of the default judgment against the Cape companies, was important to the allegations of fraud put forward against Mr. Bailey, which, as stated below, were rejected by Scott J. It is necessary to describe what happened to render intelligible some of the matters discussed later in this judgment. The device was described by Scott J., ante, p. 452C-F:

"The device was this: the settlement figure would be expressed in the intended settlement agreement not as \$1.33m. but instead as \$6.65m., an average of \$50,000 per plaintiff. The defendants would be obliged to pay only \$1.33m. The balance of \$5.32m. (\$40,000 per plaintiff) would be payable only if and to the extent that the defendants' third party claims against the United States succeeded. The prosecution of those claims in the names of the defendants was to be the responsibility of the plaintiffs' counsel, no cost in respect thereof falling on any of the defendants. The \$6.65m. was a figure proposed by Mr. Bailey. It was not a figure which mattered at all to the defendants since their obligation to pay was limited to the \$1.33m. They did not bargain about the amount. They simply agreed to Mr. Bailey's proposal which would cost them nothing. Mr. Bailey told me that the figure was based upon what he thought might be awarded against the United States at the suit of the settling defendants. How it could have been supposed that the liability of the United States under the third party claims could exceed the \$1.33m. that the settling defendants, the third party claimants, had agreed to pay the plaintiffs, defeats me."

On 2 February 1983 Judge Steger approved the settlement of the Tyler 2 proceedings as against the settling defendants, and that approval extended to the fairness and reasonableness of the settlement in the case of any minor claimants. The trial date for the outstanding Tyler 2 claims against the United States was fixed for 20 June 1983. Settlement was

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A discussed. An agreement of compromise dated 15 June 1983 was signed. The United States Government contributed nothing directly to the claimants but, in settlement of their claims against the United States, it was agreed that the United States would bear the costs of enforcement of default judgments against Cape, Capasco and Egnep in the United Kingdom or in South Africa. It is in performance of that promise that these proceedings have been pursued in this country.

B The default judgment in the Tyler court, upon which the present proceedings in this country are based, was, as stated above, signed on 12 September 1983. The nature of the process in which that judgment came to be signed will be examined in detail later in this judgment when the issue of natural justice is considered.

C *The consolidated actions in this country*

There is no statutory provision for the registration in this country of the judgments of the federal or state courts of the United States of America. The plaintiffs, therefore, took proceedings in this country seeking to recover the amount of their judgments from Cape and Capasco. The writ in the lead action of Mr. Jimmy Adams was issued on 1 August 1984 and claimed the amount of his separate award with interest. In law the claims of all the plaintiffs are based upon the principle of common law that, subject to certain qualifications, the judgment in personam of a foreign court of competent jurisdiction may be sued on in this country as creating a debt between the parties to it.

E It would have been open to the plaintiffs in the first place to sue the defendants in this country rather than the United States of America, provided that they could have shown that the acts complained of were actionable as a tort both under English law and the law of the place or places where they were committed: see *Boys v. Chaplin* [1971] A.C. 356. However, they chose to bring the proceedings in the United States of America and then to seek to enforce them in this country, where presumably the defendants are believed to have substantial assets.

F *The issues at the trial before Scott J. and his decision*

The circumstances in which our courts will recognise a foreign court as competent to give a judgment in personam capable of enforcement in this country are stated thus in *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 1, pp. 436-437, rule 37:

G *"First Case—If the judgment debtor was, at the time the proceedings were instituted, resident (or, perhaps, present) in the foreign country.*

*"Second Case—If the judgment debtor was plaintiff in, or counterclaimed, in the proceedings in the foreign court.*

H *"Third Case—If the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.*

*"Fourth Case—If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to*

submit to the jurisdiction of that court or of the courts of that country." A

At the trial the plaintiffs relied on three separate grounds for enforcement of the judgment of the Tyler court in England, namely: (i) that the defendants had voluntarily appeared in the proceedings in the Tyler court; (ii) that the defendants had, before the proceedings commenced, agreed to submit to the jurisdiction of the Tyler court; B (iii) that the defendants were resident in the United States of America at the time of the commencement of the plaintiffs' proceedings in the Tyler court. (A fourth pleaded ground, referred to as "comity or reciprocity," was not in the event relied on at the trial.)

Scott J. concluded that the Tyler court had been competent to give a judgment against Cape and Capasco on none of the three grounds relied on (*Dicey & Morris*' First, Third and Fourth Cases). The plaintiffs' claim, therefore, failed for this reason, if no other. C

However, the judge proceeded to consider certain additional points raised by the defendants by way of defence. The first point arose in this way. According to the case made for the plaintiffs, the presence (if any) of Cape and Capasco was in the State of Illinois where Cape's subsidiary, N.A.A.C. had its office in Chicago from 1953 to 1978 when it was wound up; and where in the same building from 1978 onwards Continental Products Corporation ("C.P.C."), also an Illinois corporation but not a subsidiary of Cape, carried out similar marketing functions in the United States of America for the sale of asbestos produced by Cape's South African subsidiaries. The plaintiffs did not contend that Cape or Capasco had been present in Texas. In these circumstances, the defendants contended that under English law presence in Illinois did not suffice to give the Tyler court (a federal district court sitting in Texas) jurisdiction to hear a claim in tort against the defendants governed by the law of Texas. This argument, which we will call "the country issue," Scott J. rejected. He said, ante, p. 491f, that if he had felt able to conclude that Cape and Capasco were present in Illinois when the Tyler 2 actions were commenced, he would have held that to be a sufficient basis in English law for the exercise by the Tyler court of jurisdiction over them. D E F

The defendants further contended that, even if any grounds of jurisdiction in the Tyler court had existed, yet the judgment should not be enforced because (i) the judgment had been obtained by the fraud of Mr. Blake Bailey, the attorney who had represented some of the plaintiffs before Judge Steger in the proceedings upon the making of the default judgment and who had drafted the terms in which the default judgment was finally expressed; and (ii) it would be contrary to the standards of natural justice required by our law; and contrary to the principles of public policy applied by our law; to enforce the judgment having regard to the circumstances in which, and the procedures by which, it came to be made. Scott J. considered these issues again on the assumption that, contrary to his conclusion, the plaintiffs had made out a ground for jurisdiction in the Tyler court over Cape and Capasco. He acquitted Mr. Bailey of having had any intention G H



- A to deceive and of having deceived anyone with reference to the terms and form of the judgment. The allegations that the judgment had been obtained by fraud accordingly failed. However, the defendants succeeded before Scott J. on the natural justice point. The judge found that the judgment was not such that it could be enforced in the courts of this country. The primary ground of that finding was that the procedure adopted in this particular case by the judge of the Tyler court offended
- B against the principles of substantial justice contained in our law.
- C Scott J. gave his judgment in two parts, which together covered 150 pages of transcript. On 17 June 1988 he announced that the claims of all the plaintiffs would be dismissed and he gave his reasons for rejecting each of the three grounds upon which the plaintiffs had claimed that their judgment in the Tyler court should be enforced in this country. He also stated in summary form his reasons for rejecting the allegations of fraud against Mr. Bailey and for upholding the contentions of Cape/Capasco on the natural justice issue. On 26 July 1988 he gave his full reasons with reference to the issues of fraud and natural justice. The plaintiffs have invited this court to take a different view on some parts of the facts in this case, and to apply principles of law which the judge considered to be inapplicable. Mr. Morison, however, began his
- D submissions by rightly acknowledging the great care expended in, and the great accuracy and clarity of, the judgment of the judge, to which we also pay tribute.

*The issues on this appeal*

- E On this appeal the plaintiffs do not seek to challenge those parts of Scott J.'s judgment by which he rejected their submissions based on the alleged voluntary appearance by the defendants in the Tyler court proceedings or their alleged agreement to submit to the jurisdiction of that court. The defendants do not challenge his rejection of their allegation of fraud against Mr. Bailey. The plaintiffs do, however, seek to challenge those parts of his judgment by which (a) he rejected their
- F submissions based on the alleged residence or presence of Cape and Capasco in the United States of America ("the presence issue"); (b) he accepted the defendants' submissions based on natural justice ("the natural justice issue").
- G As part of their answer to the plaintiffs' case on presence, the defendants have cross-appealed on what we have described as "the country issue."
- H To sum up, the three issues which have been argued on this appeal are (a) the presence issue; (b) the country issue; and (c) the natural justice issue. A decision on any one of these issues in favour of the defendants would strictly render a decision on the other two issues unnecessary. However, we think it right to deal fully with all three issues, not only out of deference to the excellent arguments which have been presented to us on both sides, but also because these issues are important and we suppose that the case could proceed to a higher court. Furthermore, at least the first two of the three issues are closely connected with one another.

II *The presence issue*

[Their Lordships referred to the depositions placed before Scott J. at the hearing, listed the facts found by the judge relevant to the presence issue, and continued:]

*The plaintiffs' challenge to Scott J.'s finding of facts relevant to the "presence" issue*

The plaintiffs' challenge to the judgment of Scott J. on the "presence" issue is based not so much on the findings of primary fact which were made, but on his supposed failure to find all the material facts and to draw the correct inferences and conclusions which should have been drawn from such facts. In their amended notice of appeal (which we gave leave to amend at the hearing) the plaintiffs included a "Schedule of facts which ought to have been found." This schedule included 25 paragraphs. For convenience we will set out and deal with the issues of fact raised by this schedule in an appendix to this judgment, which in our view would not need to be reported.\* We observe at this point that, having been taken through the evidence relating to such of these 25 paragraphs as are disputed, we think that the majority of them (though by no means all) are in broad terms borne out by the evidence. However, we do not think that those which are substantiated add very much to the strength of the plaintiffs' case on the presence issue or that they suffice to invalidate the ultimate conclusion of the judge on that issue.

On the basis of the findings of fact made by Scott J. and the further facts which they submit he ought to have found, the plaintiffs in their amended notice of appeal submit that he was wrong to conclude:

"(1) N.A.A.C.'s business was its own business and not the business of Cape or Capasco;

"(2) C.P.C. . . . was . . . an independently owned company and carried on its own business;

"(3) As from 31 January 1978 N.A.A.C. 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;

"(4) Mr. Morgan was in executive control of N.A.A.C.'s conduct of its business."

Two important inferences of fact made by the judge (numbers (1) and (2)) and two important findings of primary fact (numbers (3) and (4)) are thus challenged on this appeal. We shall consider contention (4) in the section of this judgment dealing with the "single economic unit" argument and in the appendix. We shall consider the contention that C.P.C. was "not an independently owned company" in the section dealing with the "corporate veil argument." We shall consider contention (3) and the contentions that N.A.A.C.'s business was not "its own business" and that C.P.C.'s business was not "its own business" in the section dealing with what we will call the "agency" argument.

\* *Reporter's Note:* The appendix has not been included in this report.

A Some leading authorities relevant to the present case

B Provision has been made by statute for the enforcement in this country of the judgments of the courts of Commonwealth and foreign countries in a number of different circumstances: see in particular section 9 of the Administration of Justice Act 1920; section 4 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgments Act 1982. However, none of these statutory provisions applies in the present case. We are concerned solely with the common law: *Dicey & Morris*, vol. 1, p. 436, "First Case."

C So far as appears from the many cases cited to us, neither this court nor the House of Lords has ever been called on to consider the principles which should guide an English court in deciding whether or not a foreign court was competent to assume jurisdiction over a corporation (as opposed to an individual) on a territorial basis; and we have seen only two decisions of courts of first instance in which these principles fell to be considered. We will begin by mentioning some of the leading cases relating to judgments given against individuals.

D 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:

E "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 . . ." (Emphasis added.)

F 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:

G "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."

H 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.

Under the plaintiffs' case as pleaded, the obligation of the defendants to obey the judgment of the Tyler court is said to arise because "the defendants were resident in the United States of America at the time the plaintiffs' proceedings were commenced in the Tyler court." The jurisdiction of the Tyler court is thus said to be founded on territorial factors.

Nearly 120 years ago in *Schibsby v. Westernholz*, L.R. 6 Q.B. 155, the "residence" of an individual in a foreign country at time of commencement of suit was recognised by the Court of Queen's Bench as conferring jurisdiction on the court of that country to give a judgment in personam against him. In that case the court declined to enforce a judgment of a French tribunal obtained in default of appearance against defendants who at the time when the suit was brought in France were neither subjects of nor resident in France. On these facts the court decided, at p. 163, "there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal." However, it regarded certain points as clear on principle, at p. 161:

"If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

In *Rousillon v. Rousillon* (1880) 14 Ch. D. 351, Fry J., after referring to *Schibsby v. Westernholz* and in enumerating the cases where the courts of this country regard the judgment of a foreign court as imposing on the defendant the duty to obey it, at p. 371, similarly referred to one such case as being "where he was resident in the foreign country when the action began."

In *Emanuel v. Symon* [1908] 1 K.B. 302, this court had to consider whether the fact of possessing property situate in Western Australia or

A the fact of entering into a contract of partnership in that country was sufficient to give a Western Australian court jurisdiction (in the private international law sense) over a British subject not resident in Western Australia at the start of the action, who had neither appeared to the process nor expressly agreed to submit to the jurisdiction of that court. This question was answered in the negative. Buckley L.J. said, at p. 309:

B "In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country where the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case."

C After referring to the principles established by, inter alia, *Godard v. Gray*, L.R. 6 Q.B. 139, and *Denbys v. Westenholz*, L.R. 6 Q.B. 155, Buckley L.J. observed, at p. 310:

D "In other words, the courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognised in this country and leads to judgment here also."

E In agreement with the rest of the court, he considered that the factors relied on by the plaintiff mentioned above did not suffice to impose a duty on the defendant to obey the Western Australian judgment which should be recognised in this country.

F We pause to observe that Buckley L.J.'s second, third, fourth and fifth cases mentioned in his statement broadly correspond with *Dicey & Morris*' respective four cases. It is doubtful whether the first case mentioned in his statement would still be held to give rise to jurisdiction: see *Dicey & Morris*, 11th ed., vol. 1, pp. 447-448, and the cases there cited. With this point we are not concerned.

G Residence will much more often than not import physical presence. On the facts of the four cases last mentioned, any distinction between residence and presence would have been irrelevant. However, the brief statements of principle contained in the judgments left at least three questions unanswered. First, does the temporary presence of a defendant in a foreign country render the court of that country competent (in the private international law sense) to assume jurisdiction over him? Secondly, what is the relevant time for the purpose of ascertaining such competence? Thirdly, what is to be regarded as the "country" in the case of a political country, such as the United States of America comprising different states which have different rules of law and legal procedure?

H We will have to revert to the third question in the section of this judgment dealing with the "country" issue; in the present section we will assume in favour of the plaintiffs that the United States of America,



rather than the state of Texas, is to be regarded as the relevant country, A  
As to the first and second questions, we think that the most helpful guidance is to be obtained from the decision of the Privy Council in *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, the decision of Lord Russell of Killowen in *Carnick v. Hancock* (1895) 12 T.L.R. 59 and the decision of the House of Lords in *Employers' Liability Assurance Corporation Ltd. v. Sedgwick Collins & Co. Ltd.* [1927] A.C. 95.

In the *Sirdar Gurdial Singh* case the Privy Council on an appeal B  
from the Chief Court of the Punjab considered the question whether the courts of British India ought to have enforced against the defendant two judgments obtained against him ex parte in the native state of Faridkote, which for this purpose fell to be regarded as foreign judgments. The defendant had ceased to reside in the state before the actions were brought, and though he had received notice of the proceedings, he had never appeared in either of them or otherwise submitted to the jurisdiction of the Faridkote court. The Privy Council held the judgments to be a nullity under international law. Lord Selborne, delivering their opinion, said, at pp. 683-684:

"Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of suit ('Actor sequitur forum rei'); which is rightly stated by Sir Robert Phillimore (*International Law*, vol. 4, section 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur.' 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. . . . 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. 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."

The Privy Council held, at p. 684, that the mere fact that the cause of action had arisen in one country did not operate to confer jurisdiction on the courts of that country over a defendant not otherwise subject to it.

In *Carnick v. Hancock*, 12 T.L.R. 59, the principle of territorial dominion was again referred to. In that case an action was brought upon a monetary judgment obtained in Sweden by an Englishman domiciled in Sweden against a defendant who resided and carried on business at Newcastle. The writ was served on the defendant during a short visit he was paying to Sweden and he duly appeared to answer it. Though he did not himself remain in Sweden, he was represented throughout the subsequent proceedings. He put in a defence and counterclaim and on

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A three separate occasions appealed to the Court of Appeal at Gota. It may be that in those circumstances, notwithstanding his protestations that he had "only appeared under pressure, duress and compulsion of law," the English court could properly have enforced the foreign judgment on the ground that the defendant had submitted to the jurisdiction of the Swedish court. However, Lord Russell of Killowen did not decide the case in favour of the plaintiff on that ground. After reviewing the facts and arguments, he is reported as saying, at p. 60:

B "that the jurisdiction of a court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts. In his opinion that duty of allegiance was correlative to the protection given by a state to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually in the territory was wholly immaterial. This being so it was quite clear that under the facts of this case it was properly and lawfully initiated, and all its subsequent proceedings were lawful and valid, and that the Swedish courts had ample jurisdiction to enforce the plaintiff's claim against the defendant."

In the *Employers' Liability* case, Lord Parmoor said [1927] A.C. 95, 114-115:

E "My Lords, in the case of actions in personam, in which a writ has been regularly served on foreigners or foreign corporations, when present in this country, and a judgment has been obtained, it seems to be clear, as a general rule, that, under the obligations of that branch of international law, which governs the application of foreign judgments, other countries, whose governments have been recognised de jure and de facto by the government of this country, will accept the jurisdiction of the courts of this country, and regard their judgments as valid. In the case of such actions, it may also be stated negatively that, where a writ cannot be served on a defendant foreigner, or foreign corporation, when in this country, and no submission to jurisdiction is proved, any consequent judgment has no validity in any other country, on the ground that the courts of this country have no jurisdiction under international law over the person of an absent foreign defendant. In other words, the right to serve a writ, in an action in personam, on a foreign defendant, only becomes effective, as a source of jurisdiction, to be recognised in other countries when, at the date of service, such defendant is within the territorial jurisdiction of the English courts."

H Lord Parmoor was in terms referring to the recognition by foreign countries of judgments given by our courts, but he was speaking generally in terms of private international law and would presumably have regarded the same principles as applicable (*mutatis mutandis*) in a case where our courts were asked to enforce a foreign judgment.

From the three last mentioned authorities read together, the following principles can, in our judgment, be extracted. First, in determining the

jurisdiction of the foreign court in such cases, our court is directing its mind to the competence or otherwise of the foreign court "to summon the defendant before it and to decide such matters as it has decided;" see *Pemberton v. Hughes* [1899] 1 Ch. 781, 790, per Lindley M.R. Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice.) From the last sentence of the dictum of Lord Parmoor cited above, and from a dictum of Collins M.R. in *Dunlop Pneumatic Tyre Co. Ltd. v. Actien-gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* [1902] 1 K.B. 342, 346, it would appear that the date of service of process rather than the date of issue of proceedings is to be treated as "the time of suit" for these purposes. But nothing turns on this point in the present case and we express no final view on it. Thirdly, we accept the submission of Sir Godfray Le Quesne (not accepted by Mr. Morison) that the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress). Some further support for this submission is to be found in dicta of Parke B. in *General Steam Navigation Co. v. Guillou* (1843) 11 M. & W. 877.

The decision in *Carnick v. Hancock*, 12 T.L.R. 59, has been the subject of criticism in *Cheshire & North's Private International Law*, 11th ed. (1987), p. 342, and in *Dicey & Morris*, 11th ed., vol. 1, where it is said, at pp. 439-440:

"It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned. For the court is not likely to be the forum conveniens, in the sense of the appropriate court most adequately equipped to deal with the facts or the law. Moreover, the English case referred to above is open to the comment that the jurisdiction of the foreign court might just as well have been based on the defendant's submission as on his presence."

Our own courts regard the temporary presence of a foreigner in England at the time of service of process as justifying the assumption of jurisdiction over him: see *Colt Industries Inc. v. Sarlie* [1966] 1 W.L.R. 440 and *H.R.H. Maharajah Seetladday Gaekwar of Bhadola v. Willers* [1972] 2 Q.B. 283. However, *Cheshire & North*, 11th ed., comment, at p. 342:

"any analogy based on the jurisdiction of the English courts is not particularly convincing, since the rules on jurisdiction are operated in conjunction with a discretion to stay the proceedings, and the exercise of the discretion is likely to be an issue when jurisdiction is founded on mere presence."

We see the force of these points. They highlight the possible desirability of a further extension of reciprocal arrangements for the enforcement (or non-enforcement) of foreign judgments by convention.



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- A Nevertheless, while the use of the particular phrase "temporary allegiance" may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country,
- B he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over
- C him under our rules of private international law.
- D In the forefront of his argument on this issue, Mr. Morison submitted that the essential feature of this country's rules relating to the enforcement of foreign judgments is "curial allegiance," which arises "where there is sufficient connection between the debtor and the rendering court at the date of suit so as to make it 'just' to enforce a judgment of that court." The relevance of residence or presence, in his submission, is that it provides the requisite connection. This, in our judgment, is not quite the correct way to look at the matter. While residence or presence will ex hypothesi give rise to a connection, it is the residence or presence, not the connection as such, which gives rise to the jurisdiction of the court. The question whether residence or presence existed at the time of suit is determined by our courts not by
- E reference to concepts of justice or by the exercise of judicial discretion; it is a question of fact which has to be decided with the help of the guidance given by the authorities.
- F However, none of the authorities so far referred to was concerned with the question of enforcement of a foreign judgment against a corporate body. The residence or presence of a corporation is a difficult concept. A corporation is a legal person but it has no corporeal existence. It can own property. It can by its agents perform acts. It is clear that if an English corporation owns a place of business in a foreign state from which it carries on its business that English corporation is, under our law, present in that state for the purposes of in personam jurisdiction. Those clear circumstances, however, may be varied in many different ways. The corporation may not own the place of business but
- G have only the use of it or part of it. It may, instead of carrying on its business by its own servants, cause its business to be done by an agent, or through an agent, in the foreign state. The question will then arise whether the commercial acts done are, for the purposes of our law, to be regarded as done within the jurisdiction of the foreign state (a) by the agent in the course of the agent's business or (b) by the corporation itself. Further, and this is of central importance in this case, if the
- H English corporation causes to be formed under the law of the foreign state a separate but wholly owned corporation to carry out the business of commercial acts which it requires to be done, are those acts within the jurisdiction of the foreign state to be regarded, for the purposes of

enforcement of a judgment of the courts of that state, as the acts of the English corporation within that jurisdiction merely by reason that it owns all the shares of its foreign corporation; and, if not, what degree of power of control, or of exercise of control, and/or what other factors will suffice, in our law, to cause the English corporation to be held to be "present" within the jurisdiction of the foreign state?

The earliest case cited to us in which this court had to consider the concept of residence or presence of a corporation in the context of a claim to enforce a foreign judgment was *Littauer Glove Corporation v. F. W. Millington (1922) Ltd.* (1928) 44 T.L.R. 746. In that case the plaintiffs were manufacturers in the State of New York. The defendant company, which conducted the business of clothiers' merchants, had its principal place of business in Manchester. It bought from manufacturers in various parts of the world and sold to wholesalers. On 17 March 1922 its managing director, Mr. Millington, arrived in New York on a business visit with a view to seeing samples and making purchases. He stayed in a New York hotel for four or five nights, where he did some business for his company. Thereafter he visited various other states where he also did business. On 1 April the plaintiffs took out a summons against the defendant company. On 3 April Mr. Millington returned to New York. On that date, while he was in the sales office in New York of Union Mills Corporation, the defendant's principal United States suppliers, he was served with process in the action. He entered no appearance, took no steps in the proceedings and did not submit to the jurisdiction of the American court. On 4 April he sailed for England. The plaintiffs, having in due course obtained judgment against the defendant company in default of appearance in New York, sought to enforce the judgment against it in England. The defendant contended that, under the rules of private international law, the New York court had no jurisdiction to make the order against it. Many authorities were cited to Salter J. From the report of the argument, it appears to have been common ground that the question turned on the "residence" or otherwise of the defendant company in the State of New York on 1 April 1922 when the proceedings were instituted. Salter J. identified the question for his decision as being whether on 1 April 1922: "the defendant company were resident in the State of New York so as to have the benefit and be under the protection of the laws of that state." The plaintiffs' counsel had contended that it was not necessary for them to show that the defendant company was carrying on business at a fixed place. In his submission, it was resident in New York because it carried on business there: "the company is resident by its travellers and would be subject to process of the country in which they happened to be." Salter J. rejected this contention, saying, at p. 747:

"What was meant by saying that a business corporation was resident in a foreign jurisdiction for that purpose? That depended on whether, on the day in question, it was carrying on business in the foreign state so that it could fairly and properly be said to be then resident in that state. If the defendant company were resident in the State of New York on 1 April 1922, where in that state were they resident? Mr. Le Quesne said that they were resident in Broadway,



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A New York, but there must be some place of residence on which one could put a finger. There was no suggestion that the name of the defendant company was in any way displayed at the address in Broadway, or that any letter paper of the company was used there, or that any business was done there except what the company did with firms in other parts of the United States. If the defendant company were resident in Broadway, it would follow that they were resident wherever Mr. Millington did business. He was, however, nothing more than a commercial traveller on that tour.

B "If the company had 40 or 50 travellers ranging all over the world, was it to be said that the company were resident wherever the travellers put up at an hotel and took orders? He (his Lordship) did not rely on the expression 'fixed place,' but on what was the fair meaning of 'residence.' The inference which he drew from the cases cited was that there must be some carrying on of business at a definite and, to some reasonable extent, permanent place. There was no residence within the jurisdiction on the part of the defendant company; and the action on that point must fail."

D Thus, the effect of Salter J.'s decision was that if a foreign judgment is to be enforced in this country against a corporation, it must be shown that at the relevant time (a) the corporation was carrying on business, and (b) it was doing so at a definite and "to some reasonable extent permanent place." This test is significantly different from that applicable in the case of judgments against individuals. *Littauer* does not bind this court, but we see no reason to doubt the correctness of this test so far as it goes. It seems to us consistent with authority and to represent a common sense approach to the question of "presence" in the case of a corporation. The difficulty may be to determine whether it can properly be said in any given case that the corporation is itself carrying on business in the country concerned.

E The other, and most recent, leading case relating to the enforcement of foreign judgments against corporations is *Vogel v. R. and A. Kohnstamm Ltd.* [1973] Q.B. 133. There the defendants were a company registered in England. They sold leather skins to the plaintiffs through a Mr. Kornbluth who had an office in Tel Aviv. The defendants had no office of their own in Israel. All the material correspondence was conducted with them in England. The contract of sale was not made in Israel. The court in Israel gave judgment for the plaintiff on a claim for breach of contract and the plaintiff sought to enforce it in England. F Ashworth J. dismissed the plaintiff's claim. In his judgment he described the functions of Mr. Kornbluth vis-a-vis the defendants, at p. 136A-B:

G "Mr. Kornbluth's role was that of a person seeking customers who would buy the defendants' goods. For this purpose he was provided with samples for which he paid, and having found a potential customer he would act as a go-between between that person and the defendants. Correspondence would pass between the defendants and Mr. Kornbluth regarding a proposed order and Mr. Kornbluth would be in communication with the customer. If as a result a contract was made it would be made between the defendants and H

the customer and at no time had Mr. Kornbluth any authority to make a contract on behalf of the defendants." A

He said, at p. 136G:

"in order to succeed the plaintiff here has to persuade me either that the defendants were resident in Israel through Mr. Kornbluth as their agent or that they were carrying on business through him in such a way as to give rise to an implied agreement on their part to submit to the jurisdiction of Israeli courts." B

With reference to the first of these two points, he observed, at p. 141:

"As has been said in many cases, residence is a question of fact and when one is dealing with human beings one can normally approach the matter on the footing that residence involves physical residence by the person in question. I keep open the possibility that even in regard to such a person he may be constructively resident in another country although his physical presence is elsewhere. But in the case of a corporation there is broadly speaking no question of physical residence. A corporation or company, if resident in another country, is resident there by way of agents." C

He recognised that the *Littauer* case was distinguishable on the ground: D

"the person through whom the defendant corporation was said to have residence in the United States was not a person with any fixed or reasonably permanent place . . ."

However, Ashworth J. pointed out, at p. 142, that the defendants in the case before him had no office of their own in Israel, and that "All the material correspondence was conducted with them in England and their connection with the State of Israel was limited . . . to their dealings through Mr. Kornbluth." He continued: E

"In examining how far the presence of a representative or agent will, so to speak, impinge on the absent company so as to render that absent company subject to the relevant jurisdiction, I find help to be obtained from cases in which the converse situation has been considered: namely, where the English courts have been invited to allow process to issue to foreign companies on the footing that such foreign companies are 'here.'" F

He expressed his ultimate conclusion, at p. 143:

"... I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel: and all that emerges from this case is that there was a man called Kornbluth who sought customers for them, transmitted correspondence to them and received it from them, had no authority whatever to bind the defendants in any shape or form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time." G

On this appeal, in accordance with the approach of the courts in the *Littauer* and *Vogel* cases, it has been common ground that the Tyler H

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A court was competent to exercise jurisdiction over Cape and Capasco, if at all, only if they could properly be said to be resident or present in the United States of America at the relevant time. (In view of their contentions on the "country" issue, the defendants do not accept that the Tyler court would have been competent, even if the latter condition had been fulfilled.) The words "resident" or "present" or equivalent phrases have been used interchangeably in argument, just as they have been used in the cases; we see no objection to this terminology if it is understood that in the case of a corporation the concept of "residence" or "presence" in any particular place must be no less of a legal fiction than the existence of the corporation itself. The argument has centred on the features which this concept embodies in the case of a corporation.

In considering these features, Salter J. in the *Littauer* case and Ashworth J. in the *Vogel* case clearly attached great weight to a long line of cases where the English court has considered whether it should allow process to issue to foreign companies as being amenable to its jurisdiction. We will call this line "the *Okura* line of cases," because a leading example is the decision of this court in *Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715.

The origin of this line requires some brief explanation. After it had been decided in *Newby v. Von Oppen & Colt's Patent Firearms Manufacturing Co.* (1872) L.R. 7 Q.B. 293 that in appropriate circumstances a foreign corporation was capable of being sued in this country, our courts in a number of cases had to consider (a) whether on the facts the foreign corporate defendant was amenable to the jurisdiction of the English court, and if so (b) whether it had been properly served with the process. Most of these cases were concerned with the old Ord. 9, r. 8 of the Rules of the Supreme Court 1883, which provided:

"In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation . . . ."

The rule contained no such expressions as "reside" or "carry on business." However, as Ackner L.J. pointed out in *South India Shipping Corporation Ltd. v. Export-Import Bank of Korea* [1985] 1 W.L.R. 585, 589:

"Those expressions were used as convenient tests, to ascertain whether the corporation had a sufficient 'presence' within the jurisdiction, since 'generally,' courts exercised jurisdiction only over persons who 'are within the territorial limits of their jurisdiction.' Apart from statute 'a court has no power to exercise jurisdiction over anyone beyond its limits,' per Cotton L.J. in *In re Busfield* (1886) 32 Ch.D. 123, 131, quoted by Lord Searman in *Bethlehem Steel Corporation v. Universal Gas* (unreported), 17 July 1978, House of Lords."

Phrases referring to residence or presence within the jurisdiction, or equivalent phrases, have been used by way of shorthand reference to



the condition (or one of the conditions) which a foreign corporation has to satisfy if it is to be amenable to the jurisdiction of the English court. And indeed they have been used more or less interchangeably by the courts. One typical example is the phraseology used by the Earl of Halsbury L.C. in *La Compagnie Générale Transatlantique v. Thomas Law & Co., La Bourgogne* [1899] A.C. 431, who said, at p. 433:

"It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a corporation can be resident—to use the phrase which Mr. Joseph Walton has so constantly referred to, they are 'here;' and, if they are here, they may be served."

Perhaps the most helpful guidance in determining whether a foreign corporation is "here" so as to be amenable to the jurisdiction of our courts is the following passage from the judgment of Buckley L.J. in the *Okura* case [1914] 1 K.B. 715, 718–719:

"The point to be considered is, do the facts show that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question; what is meant exactly by the expression 'doing business?'"

It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: see *The Theodoros* [1977] 2 Lloyd's Rep. 428, 430, *per* Brandon J.

(All the authorities cited to us have been directed, and all the statements later in this judgment will be directed, to trading corporations. In the case of non-trading corporations, the same principles would presumably apply, with the substitution of references to the carrying on of the corporation's corporate activities for references to the carrying on of business.)

The court will not find much difficulty in holding that a foreign corporation is present in this country if it has a fixed place of business of its own here (whether as owner, lessee or licensee) and for more than a minimal period of time has carried on its own business from such premises by its servants or agents. Typical example of such cases (which we will call "branch office cases") which have been cited to us are

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- A (1) *Newby v. Von Oppen & Colt's Patent Firearms Manufacturing Co.*, L.R. 7 Q.B. 293; (2) *Haggitt v. Comptoir d'Escompte de Paris* (1889) 23 Q.B.D. 519; (3) *La Bourgogne* [1899] P. 1; [1899] A.C. 431; (4) *Dunlop Pneumatic Tyre Co. Ltd. v. Actien-gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* [1902] 1 K.B. 342.

B However, the cases also show that it may be permissible to treat a foreign corporation as resident in this country so as to be amenable to the jurisdiction of our courts even if it has no fixed place of business here of its own, provided that an agent acting on its behalf carries on its business (as opposed to his own business) from some fixed place of business in this country. Typical examples of such cases are:

- C (1) *Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K.B. 516 where the agent, Blasius, occupied and paid rent for offices in London, and in the words of Fletcher Moulton L.J., at p. 524:

"He carries on business at a fixed place in London as sole agent for the defendants in the United Kingdom, though it is true that he is also agent for another firm. He has power to enter into contracts of sale for the defendants."

- D (2) *Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco* (1914) 111 L.T. 97, where Buckley L.J. began his judgment with the following statement of principle, at p. 98:

E "If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party, then the foreign corporation for the present purpose carries on business at that place."

P F The ultimate problem in such cases may lie in determining whether the business carried on by the agent on behalf of the principal should properly be regarded on the one hand as his own business or on the other hand as the business of the foreign corporation. This must necessitate an investigation both of the activities of the agent and of the relationship between him and the corporation.

- G In a few of the *Okura* line of cases which have been cited to us, the court has had to consider the question whether a foreign corporation was carrying on business in this country in a context other than that of the old Ord. 9, r. 8, but nevertheless the like investigation was necessary. In *Grant v. Anderson & Co.* [1892] 1 Q.B. 108 the context was the old Ord. 48A, r. 1, which provided that any two or more persons claiming or being liable as co-partners "and carrying on business within the jurisdiction" might sue or be owed in the name of the respective firms.
- H The defendants, who were a Scottish firm of manufacturers carrying on business in Glasgow, employed an agent in London to obtain orders for them in London. He occupied an office in London, the rent of which he paid himself, and received a commission if, but only if, he got an order



which the firm accepted. In rejecting the contention that the firm carried on business in London, the Court of Appeal attached great weight to the fact that, in the words of Lord Esher M.R., at p. 116 "when he gets an order, he has no power himself to accept it." As he put it, at p. 117: "One might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers."

*Sfeir & Co. v. National Insurance Co. of New Zealand Ltd.* [1964] 1 Lloyd's Rep. 330 concerned a claim covered by section 9(2) of the Administration of Justice Act 1920, of which paragraph (b) precluded the registration of a judgment under the section if the judgment debtor

"being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court . . ."

The first question Mocatta J. had to determine (see, at p. 336) was whether the defendants at any material time carried on business in Ghana. If they did so, this could only have been through a Ghanaian company called Glyndova. He expressed his conclusion on this point, at p. 339:

"In my judgment, Mr. Mustill was right in submitting that the decision of the court at the end of the day after considering the guidance contained in the authorities and their application to the facts of a particular case is one of impression. The conclusion I have reached is that the limited authority possessed by Glyndova to bind the defendants by settlements of claims arising in Ghana under the defendants' policies issued elsewhere, even when coupled with the other matters relied upon which I have recited, did not amount to a carrying on of business by the defendants in Ghana. The business carried on in Ghana by Glyndova was their own and not that of the defendants."

At least in cases other than branch office cases it is obvious that the activities of the agent by whom the foreign corporation is said to be present in this country and the extent of the authority of that agent will be of particular importance in determining whether or not the corporation is amenable to our courts' jurisdiction. Counsel on both sides have referred us to numerous examples from the *Okura* line of cases in which a number of different aphorisms have been used to express the relevant test. Buckley L.J. (later Lord Wrenbury) "who made this subject particularly his own" (see *The Lalandia* [1933] P. 56, 62, *per* Langton J.) himself used a variety of expressions to state it on the facts of particular cases. In the *Thames and Mersey* case he stated it thus, 111 L.T. 97, 98-99:

"Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case the corporation is and in the latter it is not carrying on business at that place."

**EXHIBIT A**  
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**PART 2 OF 4**

A In the *Okura* case itself, Buckley L.J. [1914] 1 K.B. 715, 721, summarised his reasons for concluding that the defendant corporation was not present in this country as follows:

B "In my opinion the defendants are not 'here' by an alter ego who does business for them here, or who is competent to bind them in any way. They are not doing business here by a person but through a person."

C At the trial of the present case a number of decisions from the *Okura* line of authorities were cited to Scott J. He said that counsel before him had treated the statements of principle to be found in the authorities as applicable equally to both classes of case. While expressing "a little unease" in this context, ante, p. 471F, he therefore assumed that the statements of principle applied equally to both classes of case.

Having made this assumption, he extracted the following propositions from the *Okura* line of cases:

D (1) "The cases establish that jurisdiction on the territorial basis may be taken by an English court over a foreign company if the foreign company has business premises in England from which or at which its business is carried on:" ante, p. 468A.

E (2) "There are, however, cases where residence or presence of a foreign company in England has been held established notwithstanding that the foreign company did not itself own or lease any business premises in England. A feature of these cases has been that the foreign company had a resident English agent who had authority to contract on behalf of and thereby to bind the principal. In those circumstances the presence or residence in England of the agent has been treated as the presence or residence of the foreign company, the principal:" ante, p. 468E-F.

F (3) "trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader: see the *Littauer* . . . case. . . . The trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract:" ante, p. 476c.

G These conclusions as to the law were of critical importance because the judge later found as facts, ante, p. 477E-F, that the 150, North Wacker Drive offices were N.A.A.C.'s offices and that N.A.A.C. had no authority to contract on behalf of Cape or Capaseo or any other company in the Cape group. He also found as facts, ante, p. 482E "C.P.C., like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract," and the offices at 150, North Wacker Drive were C.P.C.'s "own offices."

H Mr. Morison did not challenge these particular findings of fact. However, he submitted that Scott J. erred in law in holding that, in cases other than branch office cases, "the trading must be reinforced by . . . a resident agent with power to contract." This conclusion, he pointed out, was based primarily on the judge's analysis of the *Okura* line of cases. However, this line of cases, in Mr. Morison's submission,

while of some relevance and interest, does not provide the correct yardstick to be applied in the present context. Contrary to the suggestion made by Ashworth J. in the *Vogel* case [1973] Q.B. 133, he said, those authorities do not represent the situation truly converse to the enforcement of a foreign judgment; the true converse would be a foreign court applying its own conflict rules, adjudicating on the enforcement of an English judgment. Comity, as Blackburn J. pointed out in *Schibsby v. Westenholtz*, L.R. 6 Q.B. 155, 159, is not the basis on which our courts enforce foreign judgments. Furthermore, the circumstances in which an English court will assume jurisdiction over a foreign corporation are closely bound up with our own rules of procedure which are derived largely from statute or statutory instrument and will be amended from time to time.

Pausing at this point, we would not go so far as to say that in every case one can determine whether a foreign court was competent at common law on territorial grounds to give a judgment against a corporation merely by ascertaining whether in like circumstances, and *mutatis mutandis*, our courts would have assumed jurisdiction over a foreign corporation. Nevertheless, enough has been said to demonstrate that in each case the same broad question falls to be answered by the court under our own common law: "Was the corporation present in the relevant jurisdiction at the relevant time?" In our judgment, Scott J. was fully entitled to derive guidance from the *Okura* line of cases in deciding whether Cape and Capaseo were resident in the United States of America at the relevant time.

Mr. Morison went on to submit that in any event the *Okura* line of cases does not establish a universal rule that in cases where the foreign corporation has no fixed place of business of its own "the trading must be reinforced by . . . a resident agent *with power to contract*." There are, it is true, many dicta which suggest that the existence of power in the agent to bind his principal to contracts, without reference back to the principal, is an important indication that the principal himself is carrying on business by the agent. However, it has apparently never been held that this is an essential feature of "presence" in cases where the corporation has no branch office in this country. Many of the reported cases were concerned with selling agencies, particularly in the shipping field, which were usually not exclusive to the principal concerned. It is therefore hardly surprising, Mr. Morison submitted, that the courts concentrated on the question of authority to contract, because the agency was in a real sense carrying on its own agency business. In the present case it is not alleged that N.A.A.C. or E.P.C. had power to enter into sales contracts on behalf of Cape or Capaseo. However, it is said, they were carrying out a recognised business activity for the exclusive benefit of Cape and Capaseo; that is to say, the function of marketing agents. The question whether N.A.A.C. or E.P.C. were properly to be described as doing their own business or that of their principals was not to be determined by asking whether or not they had authority to contract, but by asking whether they had authority to market and were carrying out this function. Mr. Morison invited us to follow the general approach adopted by the court in two Canadian



- A cases, *Miller v. B. C. Turf Ltd.* (1969) 8 D.L.R. (3d) 383 and *Moore v. Mercator Enterprises Ltd.* (1978) 90 D.L.R. (3d) 5900.

B We would agree with Mr. Morison that the existence of a power in the resident agent to bind the foreign corporation to contracts can be neither an exclusive nor conclusive test of the residence of the corporation itself. As he pointed out, there are many cases in which the corporation has been held *not* to be carrying on business at the agency notwithstanding the existence of authority of this kind: see for example *The Princesse Clementine* [1897] P. 18; *The Lalandia* [1933] P. 56 and *The Holstein* [1936] 2 All E.R. 1660. Conversely, we can conceive hypothetical cases in which it might be absurd to regard the test as conclusive. If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on its behalf; the existence of such a requirement would not by itself prevent the corporation from being present in the country concerned and thus from being amenable to the jurisdiction of its courts.

D Nevertheless, it is a striking fact that with one possible exception (*The World Harmony* [1967] P. 341) in none of the many reported English decisions cited to us has it been held that a corporation has been resident in this country unless either (a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country.

E We do not find this surprising as a matter of principle. Indubitably a corporation can carry on business in a foreign country by means of an agent. "It may be stated as a general proposition that whatever a person has power to do himself he may do by means of an agent:" *Halsbury's Laws of England*, 4th ed., vol. 1 (1973), p. 420, para. 703. However, though the terms "agency" and "agent" have in popular use a number of different meanings:

"in law the word 'agency' is used to connote the relationship which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties:" *Halsbury's Laws of England*, vol. 1, p. 418, para. 701.

G Where the representative of an overseas corporation has general authority to create contractual relations between the corporation and third parties and exercises this authority, there may be little difficulty in applying the maxim "qui facit per alium facit per se." Where no such authority exists, there may be much greater difficulty. We were not persuaded by Mr. Morison's submission, based primarily on a dictum of Verchere J. in *Miller v. B. C. Turf Ltd.*, 8 D.L.R. (3d) 383, 386, that the capacity (or possible capacity) of N.A.A.C. or C.P.C. to render Cape/Capaseo vicariously liable for negligence (and thereby to create relations in tort between them and third parties) is of any weight in

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deciding whether Cape/Capasco were present in the United States of America. The mere authority given by Cape/Capasco to N.A.A.C. or C.P.C. to convey a message to a third party could render Cape/Capasco potentially liable in tort to a third party if that message was carelessly transmitted. The existence of such potential liability would go no way towards establishing the presence of Cape/Capasco in the United States of America.

*General principles derived from the authorities relating to the "presence" issue*

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

A 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.

Nevertheless, we agree with the general principle stated thus by Pearson J. in *F. & K. Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146:

"A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval . . . ."

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation.

*The plaintiffs' submissions on the "presence" issue*

Ordinarily the three propositions set out above will fall to be applied in the same way whether or not the representative is an individual or itself a corporate body. However, the present case has the peculiar feature that one of the representatives in the United States of America, whose acts are relied on as the carrying on of business by Cape, was itself a subsidiary of Cape—a feature which has not been present in any of the directly relevant authorities cited to us. We will make some further observations on the legal relevance, if any, of this feature when we come to consider the second of Mr. Morison's main submissions on the presence issue.

These three main submissions were substantially as follows: (1) Cape and Capaseo were present and carrying on business in the United States

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.)

We find it convenient to deal with the second and third of these arguments before coming to the first.

*The "single economic unit" argument*

There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities." *The Albazero* [1977] A.C. 774, 807, per Roskill L.J.

It is thus indisputable that each of Cape, Capasco, N.A.A.C. and C.P.C. were in law separate legal entities. Mr. Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and N.A.A.C. rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities.

In *The Roberta* (1937) 58 Ll.L.R. 159 agents, acting on behalf of the Dordtsche Co., had signed bills of lading. It was conceded at the trial that in so doing the agents had made Walford Lines Ltd., the parent company of Dordtsche Co., responsible for the bills of lading. Langton J., who described the concession as properly made, said, at p. 169:

"The Dordtsche Co. are a separate entity from Walford Lines Ltd., in name alone, and probably for the purposes of taxation. Walford Lines Ltd. own all the issued shares of the Dordtsche Co., and in fact supply two out of the three directors."

In *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies* [1955] 1 W.L.R. 352 the question arose whether the respondent company, which had entered into a service agreement with Mr. Caddies under which he was appointed managing director of the company, was entitled to require him to devote his whole time to duties in relation to subsidiaries of the



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A company. It was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that therefore the agreement could not be construed as entitling them to assign any such duties to Mr. Caddies. Lord Reid, in agreement with the majority, rejected this argument, saying, at p. 367:

B "My Lords, in my judgment this is too technical an argument. This is an agreement in re mercatoria and it must be construed in light of the facts and realities of the situation."

C In *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] A.C. 324 the respondent based his complaint on section 210 of the Companies Act 1948, which provided:

"(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) . . . may make an application to the court by petition for an order under this section."

D The appellant society had formed a subsidiary company, of which the respondent was a member. It was submitted on behalf of the society that even if it had acted in an oppressive manner, yet it had not conducted the affairs of the company in an oppressive manner within the meaning of the section. The House of Lords unanimously rejected this submission. Lord Simonds said, at p. 342:

E "My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former."

F A little later, at p. 343, Lord Simonds expressly approved words which had been used by Lord President Cooper on the first hearing of the case:

G "In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view."

H In *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852 a group of three companies, "D.H.N.," "Bronze" and "Transport," all in voluntary liquidation at the relevant time, were seeking compensation under the Land Compensation Act 1961 following a compulsory purchase made by the respondent council. D.H.N. held all the shares in Bronze and Transport. The business of the group was owned by D.H.N. The land was owned by Bronze. The vehicles were owned by Transport. The Lands Tribunal held that D.H.N. were licensees of Bronze and had no claim to compensation for

disturbance beyond that which could be allowed under section 20 of the Compulsory Purchase Act 1965, which was negligible. This court allowed D.H.N.'s appeal on three separate grounds. We are concerned with only one of them, which Lord Denning M.R. explained, at p. 860:

"Third, lifting the corporate veil. A further very interesting point was raised by Mr. Dobry on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet, and profit and loss account. They are treated as one concern. Professor Gower in *Modern Company Law*, 3rd ed. (1969), p. 216 says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.' This is especially the case when a parent company owns all the shares of the subsidiaries—so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies* [1955] 1 W.L.R. 352. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one. So D.H.N. are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it."

Goff L.J. said at p. 861:

"this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely, whether the owners of this business have been disturbed in their possession and enjoyment of it."

In *Revlon Inc. v. Cripps & Lee Ltd.* [1980] F.S.R. 85 the question (among many other questions) arose as to whether the goods in question were "connected in the course of trade with the proprietor . . . of the trade mark" within the meaning of section 4(3) of the Trade Marks Act 1938." The proprietor of the trade mark was Revlon Suisse S.A., a subsidiary of Revlon Inc. Buckley L.J., in the course of deciding that the goods were connected in the course of trade with Revlon Suisse S.A., said, at p. 105:

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A "Since, however, all the relevant companies are wholly owned subsidiaries of Revlon, it is undoubted that the mark is, albeit remotely, an asset of Revlon and its exploitation is for the ultimate benefit of no one but Revlon. It therefore seems to me to be realistic and wholly justifiable to regard Suisse as holding the mark at the disposal of Revlon and for Revlon's benefit. The mark is an asset of the Revlon group of companies regarded as a whole, which all belongs to Revlon. This view does not, in my opinion, constitute what is sometimes called 'piercing the corporate veil;' it recognises the legal and factual position resulting from the mutual relationship of the various companies."

B

C Principally, in reliance on those authorities and the case next to be mentioned, Mr. Morison submitted that in deciding whether a company had rendered itself subject to the jurisdiction of a foreign court it is entirely reasonable to approach the question by reference to "commercial reality." The risk of litigation in a foreign court, in his submission, is part of the price which those who conduct extensive business activities within the territorial jurisdiction of that court properly have to pay. He invited us to follow the approach of Advocate General Warner in *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities* (Cases 6 and 7/73) [1974] E.C.R. 223 when considering whether a parent company and subsidiary were separate "undertakings" within the meaning of articles 85 and 86 of the E.E.C. Treaty. He said, at p. 263:

D

E "One starts to my mind from this, that neither article 85 nor article 86 anywhere refers to 'persons.' In both articles the relevant prohibitions are directed to 'undertakings,' a much wider and looser concept. This indeed is what one would expect, because it would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22—i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of conveyancing, of contracts and of liability for tort. But to export it blindly into branches of the law where it has little relevance, could, in my opinion, serve only to divorce the law from reality."

F

G "Suppose my Lords, that C.S.C. had traded in Italy through a branch office. There could have been no doubt then that it was amenable to the jurisdiction of the Commission and of this court. Could it have made any difference if C.S.C. has chosen to trade in Italy through a wholly owned subsidiary? The difference would have been one only of legal form, not of reality. Why then should it make any difference that it chose to trade in Italy through a subsidiary that it controlled by a 51 per cent, majority rather than by a 100 per cent, majority? What matters in this field, in my view, is control . . . ."

H

Advocate General Warner said, at p. 264:

"(1) that there is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience subsidiaries generally do so act; (2) that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated, as a single undertaking for the purposes of articles 85 and 86 of the E.E.C. Treaty . . . ."

We have some sympathy with Mr. Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one. Mr. Morison referred us to *Bulova Watch Co. Inc. v. K. Hattori & Co. Ltd.* (1981) 508 F. Supp. 1322, where the United States District Court held that it had jurisdiction over a Japanese corporation which was expanding into a new market by setting up subsidiaries and dealing with competition, both on the theory that the corporation was "doing business" in New York and under the New York "long-arm statute." In the course of his judgment, Weinstein C.J. said, at p. 1342: "these subsidiaries almost by definition are doing for their parent what their parent would otherwise have to do on its own." It is not surprising that in many cases such as *Holdsworth* [1955] 1 W.L.R. 352, *Scottish Co-operative* [1959] A.C. 324, *Revlon* [1980] F.S.R. 85 and *Commercial Solvents* [1974] E.C.R. 223, the wording of a particular statute or contract has been held to justify the treatment of parent and subsidiary as one unit, at least for some purposes. The relevant parts of the judgments in the *D.H.N.* case [1976] 1 W.L.R. 852 must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in *Woolfson v. Strathclyde Regional Council*, 1978 S.L.T. 159 in a passage which will be quoted below.

Mr. Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on

A what terms. In *Firestone Tyre and Rubber Co. Ltd. v. Lewellin* [1957] 1 W.L.R. 464 (which was referred to by Scott J.) the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below the judge, ante, p. 484b, refused an invitation to infer that there existed an agency agreement between Cape and N.A.A.C. comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 merely because it considers it just so to do.

D 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.

F The plaintiffs further submitted in their notice of appeal that N.A.A.C. "did not deal and was not permitted to deal with Egnep or Casap, but had to go through Cape or Capasco." It seems clear that N.A.A.C., as principal, made direct purchases of raw asbestos from Egnep. On the balance of probabilities, we accept the plaintiffs' submission that it made similar direct purchases from Casap. In referring to the absence of dealing with Egnep or Casap, the plaintiffs were, we understand, intending to submit that as a matter of group policy, which Cape could and did enforce by its power of control over the boards of Egnep, Capasco and N.A.A.C., the transmission of information and orders to or from customers had to be effected and was effected by N.A.A.C. through Capasco. We accept that submission. We also accept that the matters referred to in this paragraph lend some broad support to the submission that Cape ran a single integrated mining division with little regard to corporate formalities as between members of the group. However, there has been no challenge to the judge's finding that the corporate forms applicable to N.A.A.C. as a separate legal entity were observed.



As to the plaintiffs' other factual submissions in this context we will deal with the purpose of N.A.A.C.'s creation and existence in considering the "agency" argument. As to the relationship between Cape and N.A.A.C., 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 over the general policy of the subsidiary. The plaintiffs, however, submitted that Cape's control extended to the day-to-day running of N.A.A.C. They challenged the finding of fact made by Scott J. that "Mr. Morgan was in executive control of N.A.A.C.'s conduct of its business." We explore further the facts relative to this finding and to the extent of Cape's control over N.A.A.C.'s activities in the appendix to this judgment. 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 N.A.A.C. as is common in the case of any parent-subsidary relationship—to a large extent through Dr. Gaze. In particular, Cape would indicate to N.A.A.C. the maximum level of expenditure which 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 N.A.A.C. to the policy requirements of Cape as the controlling shareholders of N.A.A.C. Within these policy limits, such as Cape's requirement that N.A.A.C.'s orders for asbestos for sale by N.A.A.C. in the United States of America be placed through Capasco on behalf of Egnep and Casap, the day-to-day running of N.A.A.C. was left to him. There is no challenge to the judge's findings that (a) the corporate financial control exercised by Cape over N.A.A.C. 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, ante, p. 474A-B; (b) the annual accounts of N.A.A.C. were drawn on the footing that N.A.A.C.'s business was its own business and there was nothing to suggest that the accounts were drawn on a false footing, ante, p. 484A-B.

In the light of the set up and operations of the Cape group and of the relationship between Cape/Capasco and N.A.A.C. we see the attraction of the approach adopted by Lord Denning M.R. in the *D.H.N.* case [1976] 1 W.L.R. 852, 860c, which Mr. Morison urged us to adopt: "This group is virtually the same as a partnership in which all the three companies are partners." In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 41, 64, are apposite:

"[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged."

As to C.P.C., in Mr. Morison's submission, the replacement of N.A.A.C. by C.P.C. was simply a substitute arrangement. The creation

A of C.P.C. was affected and paid for by Cape so that it could perform the same functions on behalf of Cape as N.A.A.C. had previously performed. C.P.C., on behalf of A.M.C. (and thus Cape) made payment arrangements with third parties and received moneys for A.M.C. (Cape). While Mr. Morgan held all the shares in C.P.C. for his own benefit, the rights of pre-emption reserved to A.M.C. by the agency agreement of 5 June 1978 left him with little substantial financial interest in C.P.C.'s business, save for the office furniture and a right to an account which would be of little value; effectively, it was submitted, C.P.C.'s business was owned by A.M.C. (Cape).

B Our reasons for rejecting the "single economic unit" argument in relation to N.A.A.C. apply a fortiori in relation to C.P.C., because C.P.C. was not Cape's subsidiary and its shares were held by Mr. C Morgan for his own benefit. We give our reasons in the next section of this judgment for agreeing with the judge that C.P.C. was an independently owned company.

*The "corporate veil" point*

D Quite apart from cases where statute or contract permits a broad interpretation to be given to references to members of a group of companies, there is one well-recognised exception to the rule prohibiting the piercing of "the corporate veil." Lord Keith of Kinkel referred to this principle in *Woodhouse v. Strathclyde Regional Council*, 1978 S.L.T. 159 in the course of a speech with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed. With reference to the *DHN* decision [1976] 1 W.L.R. 852, he said, at p.161:

E "I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."

F The only allegation of a façade in the plaintiffs' pleadings was that the formation and use of C.P.C. and A.M.C. in the

"alternative marketing arrangements of 1978 were a device or sham or cloak for grave impropriety on the part of Cape or Capasco, namely to ostensibly remove their assets from the United States of America to avoid liability for asbestos claims whilst at the same time continuing to trade in asbestos there."

G In their notice of appeal (paragraph 2(b)) the plaintiffs referred to their contention made at the trial that C.P.C. "was set up to replace N.A.A.C. in such a way as to disguise the defendants' continued involvement in the marketing of the group's asbestos in the United States of America."

H Scott J. more or less accepted this contention. He found as a fact, ante, p. 478F:

"the arrangements made regarding N.A.A.C., A.M.C. and C.P.C. were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the United States while



reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries."

However, he went on to say, ante, p. 479B-C:

"But the question whether C.P.C.'s presence in Illinois can, for jurisdiction purposes, be treated as Cape's presence, must, in my view, be answered by considering the nature of the arrangements that were implemented, not the motive behind them. The documentary evidence I have seen has made clear that the senior management of Cape, including Mr. Penna, were very anxious that Cape's connections with C.P.C. and with A.M.C. should not become publicly known. Some of the letters and memoranda have a somewhat conspiratorial flavour to them. But this too, although interesting to notice, is not, in my opinion, relevant to the main question."

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, as Mr. Morison 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. The decision in *Jones v. Lipman* [1962] 1 W.L.R. 832 referred to below was one case where the proven motive of the individual defendant clearly had a significant effect on the decision of Russell J.

The judge's finding of fact quoted above as to the motives of Cape behind the new arrangements is accepted (no doubt welcomed) by the plaintiffs, so far as it goes. They submit, rightly in our judgment, that any such motives are relevant to the "corporate veil" point. They further submit that the judge (a) erred in concluding that C.P.C. was an "independently owned company;" and (b) failed to make a number of findings of fact which are relevant in the context of the "corporate veil" point.

Mr. Morison has taken us through the arrangements which led to the extinction of N.A.A.C. and the emergence of A.M.C. and C.P.C. with care and in considerable detail. The additional facts which the plaintiffs say the judge ought to have found, and which are set out in the appendix to this judgment, all relate to these arrangements. It is true that, as the judge said, some of the letters and memoranda have a "somewhat conspiratorial flavour to them." 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.

On analysis, much of the new material does little more than amply support the judge's finding quoted above as to the purpose of the composite arrangement. In this court Mr. Morison made it clear that the plaintiffs were not alleging any unlawful purpose or impropriety on the part of Cape in the sense of any intention to deceive or to do any unlawful act, either in Illinois or in this country. It was, however, asserted for the plaintiffs that A.M.C. and C.P.C. together constituted a façade which concealed the real activities of Cape. We understand that

A to mean that the purpose of Cape was to conceal, so far as it lawfully could having regard to the requirements of the law in Illinois and this country, any connection of Cape with A.M.C. or C.P.C.

B Before expressing our own views as to Cape's purpose, we will state our conclusions as to Mr. Morgan's position. It is, in our judgment, right to infer, substantially as submitted by Mr. Morison, that the assistance derived from the presence of Mr. Morgan in Illinois, undertaking the task through C.P.C. of marketing agent for the Cape subsidiaries in the United States, was regarded as being at least of great importance to the general purposes of the Cape group, and possibly essential for those purposes, because, if it was not so regarded, there is no apparent reason why Cape should assume the cost and such risk as might have arisen from setting up C.P.C. Sir Godfray, 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 serving staff of N.A.A.C. Cape also, for its own purposes, wanted Mr. Morgan and Mrs. Holtze to continue with the work previously done by them for N.A.A.C. If Mr. Morgan decided to take on the task of providing services to the subsidiaries of the Cape group through C.P.C., on the terms available to him as owner of the shares in C.P.C., Cape would get the benefit of his knowledge and experience as the person in charge of C.P.C. Nothing in the material to which our attention was drawn under these headings, however, causes us to doubt the correctness of Scott J.'s conclusion that the shares in C.P.C. belonged both at law and in equity to Mr. Morgan. It is clear that Cape intended C.P.C. 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, C.P.C. was Mr. Morgan's company. We therefore reject the challenge to the judge's finding that C.P.C. was an independently owned company.

F As to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C., we think that the extracts from the evidence set out in the appendix to this judgment (particularly under item (17)), sufficiently reveal both 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 G 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) 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. H Inference (a) was also made by the judge. Inference (b) is our own addition.

The question of law which we now have to consider is whether the arrangements regarding N.A.A.C., A.M.C. and C.P.C. made by Cape with the intentions which we have inferred constituted a façade such as to justify the lifting of the corporate veil so as 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 for this reason if no other.

In *Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 Q.B. 173, 206-207, Danckwerts L.J. referred to certain authorities as showing:

"where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance."

The correctness of this statement has not been disputed, but it does not assist in determining whether "the character of a company or the nature of the persons who control it" will be relevant in the present case.

Rather greater assistance on this point is to be found in *Jones v. Lipman* [1962] 1 W.L.R. 832. In that case the first defendant had agreed to sell to the plaintiffs some land. Pending completion the first defendant sold and transferred the land to the defendant company. The evidence showed that this company was at all material times under the complete control of the first defendant. It also showed that the acquisition by him of the company and the transfer of the land to the company had been carried through solely for the purpose of defeating the plaintiff's right to specific performance: see at p. 836. Russell J. made an order for specific performance against both defendants. He held that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed. As to the defendant company, he described it, at p. 836, as being

"the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity."

Following *Jones v. Lipman*, we agree with Mr. Morison that, contrary to the judge's view, where a façade is alleged, the motive of the perpetrator may be highly material.

Other cases were cited to us in which the court, on interlocutory applications, has to a greater or lesser extent been prepared to look behind the corporate veil and have regard to the persons ultimately interested in a company under a group's company structure. For example, it did so in exercising its *Mareva* injunction in *X Bank Ltd. v. G.* (1985) 82 L.S.G. 2016 and in considering stays of execution in *Canada Enterprises Corporation Ltd. v. MacNab Distillers Ltd. (Note)* [1987] 1 W.L.R. 813 and *Burnet v. Francis Industries Plc.* [1987] 1 W.L.R. 802. The two last-mentioned decisions contain no statement of relevant principle and the report of *X Bank Ltd. v. G.* is so brief that we think it would not be safe to rely on it for present purposes.

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1 Ch. Adams v. Cape Industries Pte. (C.A.)

A We were referred to certain broad dicta of Lord Denning M.R. in *Wallersteiner v. Moir* [1974] 1 W.L.R. 991, 1013, and in *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners* [1969] 1 W.L.R. 1241, 1254. In both these cases he expressed his willingness to pull aside the corporate veil, saying in the latter:

B "I decline to treat the [subsidiary] as a separate and independent entity. . . . The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is—the wholly-owned subsidiary of Littlewoods. It is the creature, the puppet, of Littlewoods, in point of fact: and it should be so regarded in point of law."

D However, in *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 (Buckley L.J., at p. 1027), and Scarman L.J., at p. 1032, expressly declined to tear away the corporate veil. In the *Littlewoods* case [1969] 1 W.L.R. 1241, 1255, Sachs L.J. expressly dissociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminski L.J. refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning M.R.

E From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in *Woolfsom*, 1978 S.L.T. 159. We will not attempt a comprehensive definition of those principles.

F Our conclusions are these. In our judgment, the interposition of A.M.C. between Cape and C.P.C. was clearly a façade in the relevant sense. Scott J., ante, p. 479E, said it seemed clear that A.M.C. was "no more than a corporate name" and that he would expect to find, if all the relevant documents were available, that "A.M.C. acted through employees or officers of either Casap or Egnep." He rejected, ante, p. 482A, Mr. Morgan's evidence that he understood A.M.C. to be an independent South African trading company, and was satisfied that he knew very well that it was a "creature of Cape." "The seller in C.P.C.'s time was, nominally, A.M.C. but in reality still, I think, Egnep or Casap," ante, p. 482E. In our judgment, however, the revelation of G A.M.C. 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 on the judge's undisputed findings, A.M.C. was not in reality carrying on any business in the United States of America.

H The relationship between Cape/Capasco and C.P.C. is the crucial factor, since C.P.C. was undoubtedly carrying on business in the United States of America. We have already indicated our acceptance of the judge's findings that C.P.C. was a company independently owned by Mr. Morgan and that 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 C.P.C. involved a façade which entitles the court

to pierce the corporate veil between C.P.C. 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 (as we infer), 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?

We think not. Mr. Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America. 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.

The plaintiffs submitted (paragraph 7 of their notice of appeal) that the motive of the defendants in setting up the arrangements regarding N.A.A.C., A.M.C. and C.P.C. as revealed in the documentary evidence were "consistent only with an acceptance by Cape that they were present in the United States through N.A.A.C. and C.P.C." We think there is no substance in this point. These arrangements at most indicated an apprehension on the part of the defendants that they might be held to be so present and a desire that they should not be. They involved no admission or acceptance of such presence.

We reject the "corporate veil" argument.



**A** *The "agency argument" in relation to N.A.A.C.*

**B** We now proceed to consider the agency argument in relation to N.A.A.C. on the footing, which we consider to be the correct one, that N.A.A.C. must for all relevant purposes be regarded as a legal entity separate from Cape/Capasco. In an earlier section of this judgment we summarised three propositions which we derived from the authorities relating to the "presence" of an overseas corporation. There we stated that, save in a "branch office" case (which the instant case is not), the English court will be likely to treat an overseas trading corporation as present within the jurisdiction of the courts of another country only if 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. In the present case N.A.A.C., as representative of Cape/Capasco, unquestionably carried on business at a fixed place of business in the United States of America, 150, North Wacker Drive, for a substantial period of time. So no difficulty arises on that score. The crucial question is whether it can fairly be said that Cape's business has been transacted by N.A.A.C. at or from 150, North Wacker Drive. The judge's answer to it was that "N.A.A.C.'s business was its own business and not the business of Cape or Capasco." ante, p. 477E-F. The plaintiffs challenge the correctness of this answer to the question.

**D** This question, as we said earlier, will necessitate an investigation of the functions which N.A.A.C. performed and all aspects of the relationship between it and Cape.

**E** The factual material which we have principally in mind in considering whether Cape's business was being transacted at or from 150, North Wacker Drive is to be found in the section of this judgment headed, "The facts on 'presence' as found by Scott J.," and in our observations in the appendix to this judgment. We summarise below what we consider the most material facts in context, having regard to the list of potentially relevant factors set out in an earlier section of our judgment.

**F** We accept that the intention of Cape in procuring the incorporation of N.A.A.C. in the State of Illinois was that N.A.A.C. should assist in the marketing of asbestos in the United States of America upon sales by Egnep or Casap to purchasers in the United States of America and that it was to be the marketing agent of the Cape group in the United States of America. Nevertheless, in our judgment, it is indisputable that at very least a substantial part of the business carried on by N.A.A.C. at all material times was in every sense its own business. In these contexts we draw attention in particular to the following facts.

**G** (1) Though we were referred to no evidence relating to the original acquisition by N.A.A.C. of its premises at 150, North Wacker Drive, we know that N.A.A.C. itself was the lessee of the premises and paid the rent for them. Furthermore, it owned the office furniture and employed there its own staff of four persons for whom it ran its own pension scheme.

**H** (2) From time to time it conducted the following activities as principal on its own account: (a) it bought asbestos from United States government stocks or from Egnep or Casap and sold it to United States

customers, such purchases representing about 25 per cent, of N.A.A.C.'s business in terms of tonnage; (b) it imported asbestos goods from Japan and sold them to United States customers. (While we accept that the purchase by N.A.A.C. of asbestos goods was subordinate to its business with or for Cape's subsidiaries, we do not accept the plaintiffs' submission that such sales were trivial, having regard to the turnover of N.A.A.C.)

(3) For storing the asbestos which it has purchased from United States Government stocks or Egnep or Casap, N.A.A.C. rented in its own name and paid for warehousing facilities.

(4) N.A.A.C. earned profits and paid United States taxes thereon.

(5) N.A.A.C.'s creditors and debtors were its own (not those of Cape).

(6) The return to Cape as N.A.A.C.'s shareholder took the form of an annual dividend passed by a resolution of N.A.A.C.'s board of directors.

(7) In other respects also the corporate forms applicable to N.A.A.C. as a separate entity were observed.

In the face of these facts, now unchallenged, it is in our judgment clear beyond argument that N.A.A.C. 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. What, then, were these functions? As we see the position from the findings of the judge and the evidence put before us, its functions were to assist in the marketing of asbestos in the United States of America upon sales by Egnep or Casap and generally to assist and encourage sales in the United States of America of asbestos of the Cape group. It acted as the channel of communication between Cape/Capasco and United States customers, such as P.C.C. It organised and arranged the performance of contracts between United States customers and Egnep. It had a co-ordinating role, particularly in arranging delivery. The United States customer would specify to N.A.A.C. from time to time the quantity of asbestos which it wished to purchase and the time when it desired delivery to be made. This information would be conveyed through N.A.A.C. to Casap and Egnep. Shipping arrangements and delivery dates would be arranged by Casap or Egnep and communicated to the United States customers via N.A.A.C. N.A.A.C. 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 that they were satisfied. For its services N.A.A.C. was remunerated by way of a commission paid to it by Casap on sales effected by Egnep or Casap. There was no evidence that N.A.A.C. reserved any part of its office premises or any part of its staff exclusively for performing its agency functions.

Our further findings as to the functions which N.A.A.C. performed and as to its relationship between N.A.A.C. and Cape are to be found set out in the appendix. We bear in mind particularly the submissions contained in item (9) that (i) when corresponding with United States customers, Cape referred to N.A.A.C. as "our Chicago office" and N.A.A.C. referred to Cape and Capasco as "our London office;"

A (ii) N.A.A.C. held itself out to a large United States customer as being part of the Cape selling organisation, and (iii) N.A.A.C. was treated by the major customer "as the channel between them and Cape and Capasco." However, in the appendix we give our reasons for concluding that the matters shown in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to N.A.A.C.'s role and functions.

B There is no doubt that the services rendered by N.A.A.C. 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 N.A.A.C., strictly defined limits were imposed on the functions which N.A.A.C. were authorised to carry out or did carry out as their representative. First, N.A.A.C. had no general authority to bind Cape/Capasco to any contractual obligation. Secondly, as Mr. Morison expressly accepted, there is no evidence that N.A.A.C., 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. This significant factor renders the arguments in favour of "presence," at least in some respects, even less strong than they were in cases such as *The Lalandia* [1933] P. 56 and *The Hjalstein* [1936] 2 All E.R. 1660 where the argument failed. Having regard to the legal principles stated earlier in this judgment, and looking at the facts of the case overall, our conclusion is that the judge was right to hold that the business carried on by N.A.A.C. was exclusively its own business, not the business of Cape or Capasco, and that Cape and Capasco were not present within the United States of America, through N.A.A.C. at any material time. We see no sufficient grounds for disturbing this finding of fact.

F Under this section of our judgment we should mention one further point. The plaintiffs challenged the judge's finding that as from 31 January 1978, N.A.A.C. 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. The object of the challenge was to refute the suggestion that Cape could not be regarded as present in the United States of America through N.A.A.C. during the period between 31 January 1978 and N.A.A.C.'s formal dissolution on 19 May 1978. (They accepted that after 19 May Cape could not be said to be present in the United States of America, by or through N.A.A.C.) The plaintiffs regard this point as having potential legal relevance, since two of the eight actions which comprise Tyler 2 were begun before 18 May 1978. In the appendix we give our reasons for rejecting the challenge to the judge's finding of fact.

H *The agency argument in relation to C.P.C.*

We now consider whether Cape/Capasco were present in the United States of America by or through C.P.C. In dealing with the "corporate veil" point we have stated our inferences as to Cape's purpose in making



the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C. Part of the very purpose of these arrangements was to enable sales of asbestos from the Cape group to continue to be made in the United States of America while creating a greater distance both in appearance and reality between Cape and the company (C.P.C.) which was intended to carry out the functions on its behalf in the United States of America which had previously been carried out by N.A.A.C. Having dealt with the "corporate veil" point, we agree with the following passage in Scott J.'s judgment, ante, p. 482D-F:

"I do not think, on analysis, that the plaintiffs' case is any stronger than their case regarding N.A.A.C. If anything, I think the case is weaker. N.A.A.C. was at least a wholly owned subsidiary. C.P.C., even if incorporated and launched with Cape money, was, on my reading of the facts, an independently owned company. Like N.A.A.C., C.P.C. acted as agent for the purpose of facilitating the sale in the United States of Cape's asbestos. The seller of the asbestos in N.A.A.C.'s time was Egnep or Casap. The seller in C.P.C.'s time was, nominally, A.M.C. but, in reality, still, I think, Egnep or Casap. C.P.C., like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract, C.P.C., like N.A.A.C., carried on its own business from its own offices at 150, North Wacker Drive. The provision by Cape of the \$160,000 as a starting-up fund does not make the offices Cape's offices or the business Cape's business."

The interposition of A.M.C. 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 A.M.C. as one. The functions performed by C.P.C. and its relationship with Cape through A.M.C. are the relevant considerations for present purposes. Since Mr. Morgan held all the shares in C.P.C. beneficially, Cape had no control as a shareholder over the activities of C.P.C. similar to the control which it had exercised over N.A.A.C. 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 C.P.C. and A.M.C. and hence between C.P.C. and Cape. Under the terms of this agreement, C.P.C. were left free to sell materials and products other than asbestos fibre and to involve itself in other commercial activities. It is clear that it did so. While there is no evidence that it followed N.A.A.C. in buying raw asbestos from Egnep or Casap or the United States Government, it undoubtedly bought and sold manufactured textiles on its own behalf as principal.

It is thus quite plain that at least a substantial part of C.P.C.'s business was in every sense its own business. As with N.A.A.C. 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. As the terms of the agency agreement show, these functions were very similar to those which had been performed by N.A.A.C. The services rendered by C.P.C. to Cape/Capasco were similarly active and

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- A important. Again, however, strictly defined limits were imposed on the functions which C.P.C. was authorised to carry out or did carry out as the representative of Cape/Capasco (through A.M.C.). C.P.C. had no authority to bind A.M.C. or Cape or Capasco to any contractual obligation. Again too, there is no evidence that C.P.C., whether with or without prior authority from any of those three companies, ever carried out any transaction in such manner as to subject any of them to contractual obligations to any person. In the light of the legal principles stated above and of the facts of the case looked at as a whole, we see no sufficient grounds for disturbing the judge's finding that the business carried on by C.P.C. was exclusively its own business and that Cape and Capasco were not present within the United States of America through C.P.C. (or A.M.C.) at any material time.

- C Under this heading, we refer to one further matter. The plaintiffs, on the evidence of Mr. Summerfield (that in August 1984 A.M.C.'s name was given as one of the occupants of the offices on the 12th floor at 150, North Wacker Drive), invited us to infer that A.M.C. had their plate up on those offices in 1978-79. Scott J. declined to draw any such inference. In our judgment, he was right to do so for the reasons given in the next section of this judgment dealing with burden of proof and under item D (25) in the appendix.

#### *The onus of proof*

- E The plaintiffs submitted to Scott J. that the onus was on Cape to establish that it was not resident in the United States of America and that he should hold that the defendants had failed to discharge that onus. He rejected that argument, saying, ante, p. 483C-D:

- F "The plaintiffs sue Cape on a judgment given by a United States court. The judgment is an apparently regular one. Cape disputes jurisdiction on the ground that it is a foreign company with no place of business in the United States. The plaintiffs' answer is to assert that the presence in the United States of N.A.A.C. and C.P.C. is to be treated as Cape's presence. But each of N.A.A.C. and C.P.C. is in law an individual legal persona. A contention that the presence of the United States of either is to be treated as the presence of Cape requires, in my opinion, he who so contends to establish facts sufficient to support the contention. This, in my judgment, the plaintiffs have failed to do."

- G Mr. Morison submitted that the judge misdirected himself as to the burden of proof. A foreign judgment, in his submission, prima facie gives rise to a legal obligation on the part of the defendant to obey the judgment and is thus prima facie enforceable in England. In support of this submission he invoked *Dicey & Morris*, 11th ed., vol. 1, p. 465, where it is said:

- H "the statement of claim in an action upon such a judgment need not specifically assert that the foreign court was competent in terms either of the relevant foreign law or of the English rules of conflict of laws, though it is usual to insert an allegation of this sort."



We agree that generally no specific assertion need be made that the foreign court was competent *in terms of the foreign law*, not because of any question of burden of proof, but because such assertion is irrelevant. As is stated in *Dicey & Morris*, 11th ed., vol. 1, pp. 464-465, a foreign judgment cannot, in general, be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned.

However, as all the authorities show, it is only the judgment of a foreign court recognised as competent by English law which will give rise to an obligation on the part of the defendant to obey it. As a matter of principle it seems to us that in the first place the onus must fall on the plaintiff seeking to enforce the judgment of a foreign court to prove the competence (in this sense) of such court to assume jurisdiction over him. None of the authorities cited to us establish the contrary.

No doubt, in any case, the evidentiary burden may shift at the trial. However, we agree with the judge that the presence of A.M.C.'s name on a notice board at the office at 150, North Wacker Drive in 1984 did not give rise to any presumption that it had been there in 1979.

More generally we should state that if, contrary to our view, the onus fell on the defendants to disprove the competence of the Tyler court to give judgment against them, they have discharged that onus by showing that they were not "present" in any part of the United States of America, at the time of commencement of the various suits between April 1978 and November 1979.

This conclusion as to the presence issue means that this appeal must fail on this account if no other. However, for reasons already stated, and in case our conclusion on the "presence" issue is wrong, we think it right to proceed to consider the "country" issue and the "natural justice" issue. (As to the latter issue, there is no dispute that the onus of proof falls on the defendants.)

### III The country issue

Thus far we have been considering the criteria for ascertaining whether a defendant was present in a particular place, and whether on the facts of this case the criteria were satisfied by Cape and Capasco. For this purpose, it was unnecessary to decide how to identify the place in the United States at which the defendant must have been present, when the action commenced, in order to make the judgment enforceable against him here, since if Cape and Capasco were not present in Chicago, they were not present anywhere else in the United States. If, however, the conclusion expressed in the preceding section of this judgment were to be incorrect, so that the companies were present in Chicago, Illinois, it would become necessary to decide whether that presence was sufficient to render enforceable in the United Kingdom the judgment given by the District Court in Tyler, Texas.

This question may conveniently be labelled the "country" issue, echoing the language of *Schibsby v. Westernholz*, L.R. 6 Q.B. 155, and several of the later cases. We should, however, observe that this terminology must be used with caution, lest it beg the very question under consideration, and lead the reader to assume that the political

A entity provides the geographical test. This point was not in issue in any of the cases from which we have already quoted, and no assumption as to the relevant principle can be drawn from the language in which the courts chose to express their opinions on the question of "presence."

B [Their Lordships summarised the evidence concerning the organisation of the federal courts, their jurisdiction and the law which they enforced; referred to *Mississippi Publishing Corporation v. Murphree* (1946) 326 U.S. 438, *Omni Capital International v. Rudolph Wolff & Co. Ltd.* (1987) 108 S. Ct. 404, *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, *Guaranty Trust Co. v. York* (1945) 326 U.S. 99; and continued:]

C Against this background we may now trace the reasoning by which the judge arrived at his conclusion that, if Cape and Capasco had been present in Illinois when the Tyler 2 actions were commenced, this would have been a sufficient basis in English law for the exercise by the Tyler court of jurisdiction over them. He began, by citing a passage from *Dicey & Morris*, 11th ed., vol. 1, pp. 26-27, which we may usefully repeat:

D "Meaning of 'country.' This word has from long usage become almost a term of art among English speaking writers on the conflict of laws, and it is vitally important to appreciate exactly what it means. It was defined by Dicey as 'the whole of a territory subject under one sovereign to one body of law.' He suggested that a better expression might be 'law district;' but this phrase has never found much favour with English speaking writers, who prefer the more familiar word 'country.' England, Scotland, . . . the Isle of Man, Jersey, Guernsey, Alderney, Sark, each British colony, each of the American and the Australian states and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a state known to public international law. . . . A state may or may not coincide with a country in the sense of the conflict of laws. Unitary states like Sweden, the Netherlands and New Zealand, where the law is the same throughout the state, are 'countries' in this sense. But composite states like the United Kingdom, the United States, Australia and Canada are not."

E The judge differed from this opinion. He did not accept that for some private international purposes the United States might not be a "country;" and he went on to develop an analysis of the position which would exist if the district court were sitting in a "federal question" matter such as an anti-trust damages suit. In the result, the judge concluded that the "court would be a United States court applying United States law;" that it would command the obedience of a resident anywhere in the United States; and that the sovereign from which the district court derived its jurisdiction was the United States. The judge continued this line by stating that, if Congress had chosen to establish a Federal District Court at Washington D.C. with in personam jurisdiction in respect of anti-trust cases, "the 'country' of the court would unarguably be the United States as a whole."

H Thus far, as the judge acknowledged, the discussion had been hypothetical, since the Tyler court was sitting in diversity not in a

federal question case. Nevertheless, the judge attached great weight to the rebuttal of what he saw as the main plank of the defendants' case, namely, that the United States could not be a "country" for private international law purposes. Having concluded that it could, he went on to consider and reject the argument which he attributed to the defendants, namely that the district court when sitting in diversity was part of the system for the administration of justice in the state in which it sat.

The judge then stated his own view as to the basis on which the English court recognises the judgment of a foreign court, ante, p. 491A-B:

"the territorial basis of jurisdiction is dependent upon and cannot, in my opinion, be divorced from, the sovereignty of the 'country' that has established the court in question. It is, I think, recognition of the sovereignty of a foreign country that leads to the recognition of the entitlement of its courts to take jurisdiction over persons resident in its sovereign territory."

Founding on this principle, the judge concluded, ante, p. 491D-F:

"As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction. It follows that I agree with Mr. Morison that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of authority of the court. Whatever the function of a federal district court in a diversity case, the source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction."

Any attempt to weigh up the soundness of this or any other account of the rules governing the recognition of foreign judgments should, as it seems to us, begin with an exploration of the reasons why such judgments are recognised at all. Unfortunately, the cases give virtually no guidance on this essential question. Underlying it all must be some notion of comity; but this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of positive law first identified in *Schibsby v. Westernholz*, L.R. 6 Q.B. 153, must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found.



A But this tells one nothing of practical value about how to identify the foreign judgments which have this effect.

B One possibility is to explain the principle in terms of allegiance. This idea, of which traces are found in the earliest cases, may have provided at least a moral underpinning for the concept that a foreigner who has chosen to establish himself within the territory of a sovereign owes to him, in exchange for an obligation to ensure the stranger's personal safety and well-being, a personal duty to pay the sovereign due respect, an obligation which involves an obligation to respect the sovereign's law as enforced by his courts. This concept may have served well enough in the case of an individual established in long-term residence, but the idea that the Dunlop Company, a foreign company of manufacturers, present in the United Kingdom for a few days only through having set up a stall at an exhibition, thereby incurred a duty of fealty to the King-Emperor is surely fanciful.

D Nor in our judgment can this concept be made to seem more persuasive by re-writing it in modern terminology. A foreigner who is physically present in a country does thereby acquire rights and duties expressed in terms of the local law, although not necessarily the same as those which apply to the local citizens; but these are not rights and duties which in any sensible way can be described as arising reciprocally with the sovereign. The foreigner does not owe duties to the Queen, or to the United States of America. Rather, by making himself present he contracts-in to a network of obligations, created by the local law and by the local courts.

E This is not to say that sovereignty is immaterial to the present problem, in the sense that an identification of the source from which the local laws and the agencies which enforce them derive their powers must be part at least of the task of delineating the obligations, stemming from the judgments of those agencies, which a foreign court ought to regard as binding. Thus, we entirely accept the conclusion, flowing from the judge's premise, that if we had here been concerned with the enforcement of a judgment given by a state court in Texas, we should have been obliged to have regard to the territory of Texas alone, so that if the judgment now in suit had been given (say) by a Texas Supreme Court sitting in Austin, it would not (on the hypothesis of Cape and Capasco's presence in Illinois) have been enforceable. For neither the states outside Texas, nor the federal organs established by or on the authority of the constitution, played any part in giving the State of Texas the right and power to establish its own courts of local jurisdiction. But the converse need not be true. Merely to identify X as the ultimate law giver and creator of the agencies through which those laws are enforced, and then move on to the proposition that a judgment given anywhere in the territory governed by X against someone present anywhere else in those territories should be enforced by foreign courts, seems a large step. Even today, Scotland and England are not the same jurisdictions; and if one looks to the past, it is hard indeed to acknowledge that in Imperial times, all persons present in one part of the Empire could properly be regarded as present everywhere else in the Empire; notwithstanding the immense variety of laws, courts and constitutional

systems which then prevailed, simply because as the ultimate source of power there was to be found a single sovereign.

Another aspect of this idea is to be found in the functional test propounded by the judge. We take this to invoke an inquiry as to the task which the Tyler court was performing—a local or a national task. We would not dissent from this approach, but we would venture to ask whether the judge was not approaching it solely in terms of constitutional theory. Because Congress could have created a single “Federal Court” of which every court and every judge was a manifestation, it is assumed that this is what has really happened, notwithstanding the cessation of a state contribution in the sphere of substantive law and personal amenability to service. On the evidence, we cannot accept that this hypothesis is made out, any more than it is possible to say that the Queen in Parliament has chosen, whatever powers may exist in reserve, actually to give England and Scotland a unified judicial system applying a unified law.

It is convenient to mention at this stage three suggested anomalies, relied upon as pointing to one answer rather than another. The first is that the need for the Tyler court in this case to have recourse to the Texan long-arm statute in order to entertain the suit demonstrates that the overseas defendants were not within the “country.” We do not think that this helps. The use of the long-arm statute shows no more than we already know, namely, that the direct personal jurisdiction of a district court is not for American purposes recognised as extending beyond the boundaries of the state within which that particular court happens to sit. The same can be said of another apparent anomaly on which stress was laid, namely that, if the plaintiffs’ submissions are correct, a judgment which would be unenforceable in some other state such as Illinois might nevertheless be effective to give recourse against the defendants’ assets in England. We do not regard this as a surprising result, or one which points to any particular solution of the present problem, for if (contrary to the defendants’ contentions) the whole of the United States is to be regarded as the territory within which the district court had jurisdiction, the imfraction of what must on this view be regarded as an internal procedural rule is not something of which the English court should take account.

The third suggested anomaly is this. On the judge’s own analysis, the jurisdiction of the Texas State Court, as recognised by the English court, would not extend beyond the Texan borders. Thus if the judge’s view is right, the enforceability of the judgment in a case such as this would depend upon whether the action was removed by the defendants into the district court; and this notwithstanding that the courts would sit in the same place and apply the same law. This is certainly a striking result, but it must we believe follow from any tenable view of the law. As we understand the arguments, Sir Goddard would have been disposed to accept that if there were a single federal court of unitary jurisdiction, applying a single law, a defendant could be present anywhere in the United States and still have the judgment enforceable against him; and we should ourselves be of this opinion. All this shows, however, is that a person may be present in two different “countries” at the same time.

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A This is a good reason for discarding the word "country" as a useful test, and discarding with it the simple and attractive argument that the United States is a country, the Tyler court was a court of that country, the defendants were present in the United States, and hence they must necessarily have been within the jurisdiction of the country for the purpose of enforcement in England. Further than this, the argument does not run.

B If these ideas are rejected as inconclusive, where should we look for the test? To our minds, the only way to find an answer is to consider why a person who goes abroad thereby incurs a duty to abide in England by a foreign judgment. The only reason that we can see is that by going to a foreign place he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court: those laws including, of course, the local rules on the conflicts of laws.

Thus far we have experienced no great difficulty. What has raised very real problems is to apply the principle just suggested to the facts of the present case. It may be helpful to summarise the way in which the respective arguments might run.

D For the defendants, one might begin with the example of a foreigner who has set himself up in Scotland. Such a person could properly be regarded as having done so, and having been allowed to do so, on terms that his rights and duties were to be governed by the laws of Scotland. But not by English law, or by decisions of the English courts, even though the latter might without procedural impropriety purport to exercise a jurisdiction over him. Equally, an Englishman who has gone to live in France and engaged in transactions there, might find himself sued on those transactions in Texas. Any resulting judgment would be unenforceable here, not because the Texas court had broken its own rules, or indeed had broken any rules of international comity, but simply because the Englishman had done nothing to bring himself into a relationship with the court in Texas and the law which it administered.

F Now if these examples are sound, they may be transformed into something nearer the present case. If the Englishman had established himself in Chicago, would he be treated as having put himself into a relationship with the State Court in Austin, Texas? Surely not, the defendants could argue. The fact that Chicago is in the United States does not make Texas any the less a foreign court for a resident in Illinois than if Chicago were in France; and the fact that the long arm of the Texas court does not have to reach out to another continent should not make any difference. This would be so, the defendants could argue, even if the laws of Illinois and Texas were identical in the minutest respect; and on the evidence before us it seems that this is not so.

H Let us now make the one alteration necessary to bring the example home to the present case: namely by assuming the court in Texas to be a federal district court of the Tyler Division of the Eastern Division of the State of Texas. This is not a state court, but (so the defendants can argue) a local court in a real sense, administering local law. The juridical identity of the Tyler court might have been different if those invested with constitutional powers had chosen to exercise them differently, but

we must take the facts as they are. On these facts, the defendants can submit, there was no sufficient connection between the defendants, resident as for present purposes we assume they were in Chicago, and the federal court in Tyler, to justify the inference that by establishing their residence there they had consented to the administration of Texan laws as administered by the Tyler court.

For the plaintiffs, two preliminary points may be made. In the first place, the decision to join Cape as defendant in the proceedings in the Tyler court, as contrasted with the institution of separate proceedings against Cape in a federal court in Illinois, was no doubt influenced by the wish to rely upon the arguments about submission and consent, based upon Cape's participation in the Tyler 1 proceedings (which arguments were rejected by Scott J. and not renewed in this court). But the joining of Cape in the proceedings in the Tyler court had, as we understand it, no other element of forum shopping about it: no advantage was gained, or present to be gained, as to the substantive law which would be applicable in proceedings in the Tyler court as compared with that applicable in a federal court sitting in Illinois. The joining of Cape in the Tyler court proceedings was, in short, a normal and appropriate course of proceeding viewed solely from the point of view of United States law, whether federal or state law. If a default judgment obtained in such circumstances is not enforceable according to our law it is because the relevant rule of our law requires our courts thus to discriminate between a judgment given in default by a federal district court sitting in Illinois and a default judgment given by a federal district court sitting in Texas.

Secondly, it is true that the definition of facts, which justified the taking by the Tyler court of in personam jurisdiction over any person or corporation throughout the United States, which is said to constitute legitimate jurisdiction for the purposes of our private international law, would also justify the taking of jurisdiction over any person or corporation outside the territories of the United States, which, as is common ground, would not be regarded as a legitimate jurisdiction for our private international law. Nevertheless, there seems no doubt that Congress has established a system of federal courts of which each one has jurisdiction, in the terms defined by the various long arm statutes of the forum states (where no specific federal statute provides otherwise) to exercise in personam jurisdiction over any person or corporation present in any state of the Union.

More detailed arguments available in support of the plaintiffs' proposition may be summarised.

(i) The concept of "contracting in" by presence means that, in the unitary state, the foreign resident is put in the same position, whether the visitor be an individual or a corporation, as any other person or corporation within that state so far as concerns obligations enforceable by in personam judgments (i.e. not including matters dependent upon domicile as opposed to mere presence).

(ii) Our law sets no standard with which the network of local law is required to comply other than that of natural justice and public policy. Within those limits, the foreign law, substantive and procedural, may be

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A harsh, antiquated and unskillfully operated by the foreign court but the foreign resident must put up with the consequences.

(iii) Our law, faced with a federal system of two networks of local laws as administered by two sets of local courts, should, if it is to be consistent, favour that court which will leave the resident visitor in Illinois subject to the two local networks, both state and federal, to the same extent as any other resident of Illinois so far as concerns the validity of judgments rendered in the courts of either system, unless there is some clear reason to do otherwise.

(iv) The limitations of the federal judicial system as it has in fact been established, which cause the present system to fall short of a fully realised national judicial system, arise from the history and political principles which produced them. In other words, a national judicial system has been devised and established in terms in accordance with the political and social views of the peoples of the states which form the Union. The checks and limitations are available for the protection and convenience of the foreign resident as much as for the resident citizen.

(v) In particular, the decision that federal courts shall apply the law of the forum state does not necessarily alter the fact that the federal court, in so doing, is doing what it is commanded to do by federal law. Equally, the fact that choice of law rules are not the same in all of the states, does not necessarily alter the fact that the Supreme Court of Congress, as the effective authority under the Constitution, has directed or caused federal courts to continue to apply local choice of law rules as the law to be applied to cases in the national courts.

(vi) Finally, if in personam jurisdiction is given by United States law to federal courts to be exercised, within the circumstances stated, over any person or corporation present within the territories of the United States, the effectiveness of that jurisdiction for the purposes of our private international law, is not necessarily reduced by the fact that the jurisdiction is expressed in terms of and limited to the long arm jurisdiction statutes of the forum state. There is no reason to regard the in personam jurisdiction of the federal court of any federal state as necessarily impaired, or as relegated to a local status within one state of the Union, because the federal authorities have seen fit so to express and limit that jurisdiction.

We have set out the facts and arguments on the country issue at some considerable length, notwithstanding that our conclusion on the presence issue is sufficient to dispose of the appeal, because they serve to illuminate a question of general importance which may well arise for decision in the future. In the event, as we have said, it is unnecessary to express a final decision on the country issue and in all the circumstances we think it better not to do so. All we should say is that we all incline to favour, albeit with varying degrees of doubt, the view that if the plaintiffs had not failed at the first hurdle, they would on the country issue have been entitled to succeed.

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#### IV *The natural justice issue*

The assumptions upon which we consider this defence are that our decision on the presence issue is wrong and that the assumed presence



of Cape/Capasco in Illinois at the commencement of the Tyler 2 proceedings rendered them subject to the jurisdiction of the Tyler court in those proceedings for the purpose of our law of enforcement of foreign judgments. A

The conclusion of Scott J. on the issue of natural justice was expressed, ante, p. 500G-H:

"There was, in short, in my opinion, no judicial assessment of damages. In my judgment, the procedure adopted by Judge Steger offended against English principles of substantial justice. The defendants were entitled to a judicial assessment of their liability. They did not have one. The award of damages was arbitrary in amount, not based on evidence and not related to the individual entitlements of the plaintiffs. Many of the features of the procedure to which I have drawn attention might, taken simply, have been insufficient to meet the yardstick of substantial injustice. Taken together, the criterion is, in my judgment, satisfied." B C

The facts relevant to the defence of breach of natural justice were stated in detail by Scott J. and no issue of primary fact has been raised by either side. [Their Lordships referred to the material facts concerning the procedure which led to the default judgment of 12 September 1983, substantially in the words of Scott J., and continued:] D

*The law applied by Scott J.*

In the view of Scott J. the fundamental criterion for the success of a natural justice objection to the enforcement of a foreign judgment was to be found in the judgment of Lindley M.R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790, where he said: E

"If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed." P G

Thus in the opinion of Scott J. if the natural justice objection were to succeed, the proceedings in the foreign court must "offend against English views of substantial justice;" ante, p. 497F-G. With reference to that broad criterion he considered the procedure which led to the default judgment of 12 September 1983. The route which led him to his conclusion on this issue was very briefly as follows: (i) Cape/Capasco were in default and had forfeited any entitlement to a hearing save on H

- A the issue of damages. There was no injustice in that, (ii) Cape/Capasco were given sufficient notice of the application for the default judgment but the application for relief of which notice was given was for a judicial assessment of damages at a judicial hearing, (iii) The effect of the notice given to Cape/Capasco could not be divorced from the context of the Federal Rules for default judgments. Having regard to that context a defendant in default in an action for unliquidated damages in the Tyler court was entitled to expect that his liability to the plaintiff would be assessed by the judge in the light of evidence which the judge had considered and which, in the judge's opinion, justified the award which was made: ante, p. 500A-B.
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- C (iv) "The requirements of substantial justice in a particular case cannot . . . be divorced from the legitimate expectation of both the plaintiff and the defendant in the context of the procedural rules applicable to the case:" ante, p. 500B
- (v) Since there was no judicial assessment of the damages the proceedings offended our principles of substantial justice: ante, p. 500D.
- (vi) The fact that the default judgment might have been set aside on application to the judge, or an appeal, because of the breaches of local rules of procedure, did not as a matter of principle make the judgment enforceable notwithstanding the breach of natural justice: ante, p. 501c-E.
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*Principles not in issue on this appeal: some general observations*

- E In the context of the natural justice issue certain principles are common ground and appear to us to be indisputable. The first is that, upon proof of private international law jurisdiction in the Tyler court, Cape/Capasco would have come under an obligation to obey that judgment unless they should be able to impeach it on the ground of fraud, or breach of natural justice, or breach of the requirements of public policy. For the proof of these grounds of defence, all are to be judged in the courts of this country according to the law in force in England and Wales and to the principles of that law. Further, whether any alleged breach of natural justice based on procedural irregularity is such as to render the foreign judgment unenforceable, the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles.
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- G The basis of the obligation, which our law would enforce against Cape/Capasco upon proof of jurisdiction in the Tyler court, is that, because Cape/Capasco were present within the territorial jurisdiction of that court at the date of service of the proceedings, the command contained in the document or process served upon them is regarded by our law as validly and effectively made. It would regard Cape/Capasco as obliged to make such answer as they could put forward against the claims of the plaintiffs, and to make it in the Tyler court. If they chose not to make any answer, they would not be permitted to dispute in our courts the judgment of the Tyler court upon the merits. Subject to the
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defences of fraud, breach of natural justice, and public policy, Cape/Capasco would be liable upon the judgment. A

It is clear that a corporate defendant, and those called upon to advise it, may thus be placed in great difficulty by the working of our rules of private international law. The directors of a defendant corporation may reasonably believe, upon competent advice, that the corporation was not, at the date of service of the proceedings present within the jurisdiction of the foreign court. If they are right, they can safely ignore the proceedings so far as concerns the assets of the corporation within the jurisdiction of our courts. If they are wrong—and the judgments of Scott J. and of this court show that the question may be of considerable complexity—they may be sued in this country upon a judgment which cannot be questioned as to the merits and substance of the decision upon which the judgment is based. In particular, with reference to the quantum of a judgment, whether for damages for tort or for breach of contract, the corporate defendant is placed in difficulty. Not infrequently plaintiffs, who are claiming damages, exaggerate their injuries and their losses. When the defendant does not appear, and no evidence is presented to answer the plaintiff's case, the court, which has the task of assessing damages, can normally do no more than consider the evidence put before it and base the assessment upon that evidence. In adversarial systems, the court cannot normally do more in investigation of the claims, or call for further evidence, and it is under no obligation to do so. In particular, according to our law, a defendant corporation which denies that it is subject to the jurisdiction of the foreign court, could not effectively continue to dispute that jurisdiction while taking part in the assessment of a damages claim because, if it did so take part, it would thereby normally submit to the jurisdiction of the foreign court and render itself liable to be sued in this country upon that judgment. In the result, if the corporation is to be able effectively to maintain its contention that it was not subject to the jurisdiction of the foreign court, it must leave the plaintiff there to present a wholly uncontested claim (as the defendants did in the present case). It will have no defence to an action upon the ensuing judgment, if it is held by the courts of this jurisdiction to have been in fact subject to the jurisdiction of the foreign court, unless it can rely upon fraud, breach of natural justice or public policy. B C D E F

The plaintiff, too, in such a case may face the risk of an unjust result. The defendant may have no answer on the merits to the plaintiff's claim, and the judgment as entered in default may be in amount wholly in accordance with substantial justice. Yet if, through no personal fault of the plaintiff, the defendant can point to a sufficient breach of our principles of natural justice simply in the procedure by which the judgment was obtained, the plaintiff can recover nothing on the judgment. He may, if the procedure of the foreign court permits him to do so, start again at some point in the existing proceedings and continue in a way which avoids the procedural defect. If the wrong is actionable in this country, and the claim is not statute-barred here, he could sue here. What he cannot do is to enforce the foreign judgment here to the extent that it is unobjectionable and claim the assistance of our courts as G H

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A to the rest, unless, perhaps, some part of the judgment is clearly severable and unaffected by the defect in procedure. Thus, in these proceedings, upon the assumption that Cape/Capasco were present within the jurisdiction of the Tyler court, it would not be open to this court to enter judgment for the plaintiffs for damages to be assessed under the procedures of our court, although such an order would, if the plaintiffs cannot effectively start again in the Tyler court, get closer to substantial justice than dismissal of their claims. Nor was it suggested that this court could direct that judgment be entered for the plaintiffs on liability, with a direction that the plaintiffs be at liberty to apply to enter judgment for such amount as may hereafter be assessed by the Tyler court. These are partial or alternative remedies which could only be provided by the terms of a statute, presumably to be based upon a treaty or convention. The position therefore is that, if through the adoption of the procedure by which Judge Steger directed judgment to be entered for these 206 plaintiffs, there occurred a denial of the requirements of substantial justice, the plaintiffs would fail entirely although (as we assume for present purposes) Cape/Capasco were properly subject to the jurisdiction of the Tyler court. If, on the other hand, there was no such denial according to the established principles of our law, then Cape/Capasco (on the same assumption) would be held liable for the full amount of the judgment notwithstanding the forceful objections of Cape/Capasco to the manner in which the Tyler court left so much of the assessment of the plaintiffs' claims to counsel acting for those plaintiffs.

E *The plaintiffs' submissions on natural justice*

Mr. Falconer's submissions for the plaintiffs may be summarised as follows.

F 1. The natural justice defence has been limited by authority binding upon this court to lack of notice and denial of proper opportunity to be heard: see *Jacobson v. Frachon* (1928) 138 L.T. 386. The underlying basis or reason for this limitation is that our law requires only that the judgment debtor be afforded by the foreign court a fair trial or the opportunity for a fair trial if the defendant chooses to take it. If the defendant is shown to have been deprived irremediably of a fair trial then the judgment is unenforceable here.

G 2. The defendant will be held to have been irremediably deprived of a fair trial by reason of defective procedure in two cases: (i) if the rules of procedure of the foreign court are themselves by our standards unfair, because, in that case, there can be no prospect of the foreign court correcting what has been done under its rules; and, (ii) if the rules of procedure of the foreign court are by our standards fair; and the defective procedure was caused by departure from those rules, but it is impossible or impracticable for the defect to have been corrected within the foreign system: e.g. because the defendant only learned of the judgment too late to advance an effective appeal or procedure for setting the judgment aside.

H 3. If the procedural defect was reasonably capable of remedy within the procedure of the foreign court, whether by application to set aside

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the judgment, or by appeal, the defendant is not released from the obligation to obey the judgment by reason of the procedural defect because, being subject to the jurisdiction of the foreign court, he may properly be required to have resort to the remedies provided by the foreign system.

4. The basis and substance of those submissions for the plaintiffs were said to be in accordance with justice, with practicality and with the principles of our law in that (i) our law recognises that all courts make procedural mistakes: the fact that a mistake is made, for which the foreign court's procedure provides a remedy, should not release the defendant who chooses not to avail himself of the remedy; (ii) the argument is based upon the connection between the foreign court and the defendant created by the voluntary act of the defendant in being present within the foreign jurisdiction, or by submission thereto, etc.; (iii) it is desirable that our courts should not be required to act as a court of error for the examination and assessment of procedural defects within the foreign system for which that system provides an effective remedy; (iv) the submissions provide a framework of reasonable certainty and clarity for the decision of pleas of breach of natural justice. By contrast, the "broad criterion" applied by the judge, is too wide and too uncertain a test.

5. The reliance placed by Scott J. on "legitimate expectation" was unjustified. There had been no actual expectation on the part of Cape/Capasco nor any reliance upon any expected form of procedure. Nothing to that effect had been pleaded or proved. This concept of legitimate expectation amounted, it was said, to no more than the assertion that a defendant is entitled to expect that, in the conduct of the proceedings in the foreign court, that court will correctly apply its own procedure and that, if it does not, a sufficient breach of natural justice is demonstrated. (We will refer to the submissions summarised in this paragraph as "the legitimate expectation point.")

6. Upon the evidence and upon the findings of Scott J. the procedural rules applicable in the Tyler court were fair and just. The defendants could have applied to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would have been allowed if made in due time. Further, an appeal to the Circuit Court was open to Cape/Capasco. Since they took no step to correct the procedural defect, and the consequences of it, they cannot rely upon it as a defence in these proceedings.

*The defendants' submissions on natural justice*

To these submissions Mr. Playford for Cape/Capasco replied by contending that Scott J. was right in his conclusion for the reasons which he gave. Further, if it should appear to this court that the defendants could not impeach the judgment on the ground of a procedural defect which was capable of remedy within the system of the federal courts, then it was said that the defendants did not know in time of the procedural defects and could not reasonably be required or expected to have sought such remedy there.

ELECTRONICALLY FILED - 2024 Nov 15 10:10 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4002727



A *The decision in Jacobson v. Frachon*

A number of decisions were cited to us in the context of the natural justice issue. However, the most important of them was *Jacobson v. Frachon*, 138 L.T. 386, because it was said on behalf of the plaintiffs to establish legal principles which are binding on this court and render the natural justice defence unsustainable on the present facts by limiting that defence to lack of notice and denial of proper opportunity to be heard. Furthermore, it was common ground that this is the only case in which the Court of Appeal has considered points relevant to the questions raised in this case under the heading of the natural justice issue.

B In *Jacobson v. Frachon*, this court applied rigorously the principle that our courts will not impeach the judgment of a foreign court having competent jurisdiction on its merits. However, the crucial passage in C that case particularly relied upon by Mr. Falconer was a statement of Atkin L.J., who, after referring to the judgment of Lindley M.R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790, said, at p. 392, that a judgment could be impeached "if the proceedings, the method by which the court comes to a final decision" are contrary to English views of substantial justice, and continued:

D "The Master of the Rolls seems to prefer, and I can quite understand the use of the expression, 'contrary to the principles of natural justice;' the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court. Both those considerations appear to be essential if they are to be in accordance with natural justice." (Emphasis added.)

F We have had the benefit of very careful and detailed analyses in argument of the judgments in *Jacobson v. Frachon*. We intend no disrespect to such arguments if we do not prolong an already very long judgment (in which we have already decided that the defendants succeed on the presence issue) by recapitulating these analyses. We will summarise our conclusions in relation to *Jacobson v. Frachon*, 138 L.T. 386, as follows.

G (1) Atkin L.J. in his judgment was not attempting to make an exclusive or comprehensive statement of the circumstances in which our courts will treat the procedure adopted by a foreign court in reaching its decision as offending against the principles of natural justice.

H (2) Lord Hanworth M.R. was clearly of the view, at p. 390, which we share, that the requirements of due notice and proper opportunity to be heard will, in the majority of cases which can be expected to arise, sufficiently comprise the concept of natural justice in a procedural context, but he prudently qualified his statement by saying that they "almost, if not entirely" comprise it.

(3) We therefore reject the contention that the decision of this court in *Jacobson v. Frachon* restricted the defence of breach of procedural natural justice to the requirements of due notice and opportunity to put a case. Scott J. was entitled, in our view, to direct himself by reference to the test stated by Lindley M.R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790, and to consider whether the procedural defect alleged by Cape was such as to constitute a breach of an English court's views of substantial justice. The point was not concluded against the defendants merely because they had been given proper notice of the application for default judgment and would, if they had attended, have been allowed full opportunity to put their case.

(4) However, this court in *Jacobson v. Frachon*, 138 L.T. 386, was not required to consider the relevance, if any, of any remedy which might have been available to Jacobson under the French legal system, whether by way of appeal or by application for the judgment to be set aside, if the hearing in the French court had itself constituted a breach of natural justice.

*"No judicial assessment of damages"*

The next question is whether, as Scott J. considered, the "method by which the Tyler court came to its final decision," to use Atkin L.J.'s words, was contrary to our views of substantial justice on the grounds that there had been no judicial assessment of damages.

We have found this to be a matter of difficulty. We have, although well aware of its limited nature, some general knowledge of the working of the system of civil justice in the federal courts of the United States; and we are aware that it is a system which has been developed by judges of great distinction and learning, and subjected to continuous and searching examination and comment both by the legal profession and by academic lawyers of similar distinction and learning. Scott J. expressed his view that the system of civil justice evidenced by the Federal Rules and explained by the witnesses was an unimpeachable system of justice within one of the great common law jurisdictions of the world and was plainly in accordance with the requirements of natural justice. We make the same respectful acknowledgement. But, as Scott J. pointed out, the defendants made no criticism of that system of justice. Their complaint was that, at the invitation of the plaintiffs' counsel, Judge Steger did not proceed in accordance with it.

We recognise, further, that the federal courts have been required to determine, and to develop methods for the effective control and management of, civil litigation in product liability cases in which large numbers of plaintiffs have made claims against numerous defendants arising out of similar classes of injury and having broadly similar consequences but with differing degrees of severity. We have had some experience in this country of such litigation but in smaller volume. Our own procedures have to an extent been modified to deal with the preparation and settlement of such cases but we have not, to the same extent, developed the techniques of a class action or the role of the judge in procuring settlements. We are aware that our present system



A has been subjected to criticism in having failed, as it has been said, to respond sufficiently to the requirements of such litigation.

B The circumstances of 206 plaintiffs making claims based upon a common cause of injury were, as it seems to us, directly relevant to the method of decision adopted by Judge Steger without objection by the plaintiffs' counsel. The purpose was, as we infer, to avoid the private costs and public expenditure of court time which would have been necessary if there had been either individual judicial assessments or judicial assessment by reference to groups based upon evidence directed to the individual cases. The method was adopted for proper purposes. We accept, as submitted by Mr. Falconer, that Judge Steger had knowledge and experience of Mr. Bailey and the other counsel and that Judge Steger must have reposed trust in those counsel to act properly in the matters left by the judge to them. Mr. Falconer submitted that there was nothing inherently objectionable, according to our standards of substantial justice, in a court leaving to the plaintiffs' lawyers the fixing of figures for individual plaintiffs after the court has indicated an average basis of award for all plaintiffs.

D In reply to that contention Mr. Playford pointed out that the indication by Judge Steger of an average basis of award for all plaintiffs was based on nothing in the way of evidence as to the fair sums due for compensation for any of them. It may be that an average figure for settlement of such claims was known by the judge to be \$75,000 but that provided no basis for a holding that the condition of these 206 plaintiffs was such as to justify a total award of \$15.45m. or any other total award. If the judge had had before him, and had considered, evidence, perhaps from one expert, to the effect that, by reference to the listed apparent injuries suffered by the plaintiffs, they properly belonged in certain categories of gravity of injury; and if he had, by reference thereto, estimated a figure for general damages for each category; and, then, by reference to the numbers of plaintiffs in each category calculated a total award which would be fair to the defendants, we could see no valid objection, which the defendants could have put forward, if the judge had then left it to plaintiffs' counsel to allocate precise sums within the total award to individual plaintiffs. But we agree with Mr. Playford's submission that that was not what happened. The defect in the procedure adopted was, as Scott J. found, that the total award was not in any real sense based upon an objective assessment by the judge upon evidence as to the condition of these plaintiffs.

G It seems to us that, in truth, Judge Steger was applying to the process of assessment of damages in default, when only the plaintiffs were represented before him, the process and technique appropriate to a settlement negotiated between both the plaintiffs and defendants with the intervention of the judge. If we understand the position properly, the only basis upon which Judge Steger, as the judge responsible for assessment of the damages, could assert, without knowledge of the evidence relating to the 206 plaintiffs, that \$120,000 average, \$24.72m. total, was too high a figure, and that \$75,000 average, \$15.45m. total, was a proper figure, was that, if the defendants had been present and taking part, they would in probability have refused to settle for \$24.72m.;

so as to avoid the risk of having to pay more after individual assessment, but would, in probability, have agreed to pay \$15.45m. so as to avoid that risk. If that was the basis of his decision, there is nothing to show that he was in fact wrong upon the hypothesis upon which he acted and nothing to show that he was right; but, as Scott J. observed, ante, p. 56xxx, while damages calculated on an average per plaintiff basis may make very good sense for the purposes of a settlement, because defendants are not concerned with how the total will be divided up, a judicial award so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs.

Mr. Playford referred us to authority in order to demonstrate what he said should be regarded as the essential requirements of a court "acting judicially," and, in support of the proposition that it is part of the requirements of natural justice that the judgment of a foreign court, which is rendered for enforcement, be reached by that court "acting judicially." He referred in particular to *Local Government Board v. Arlidge* [1915] A.C. 120 and in particular to passages in the speech of Viscount Haldane L.C. at p. 132, of Lord Shaw of Dunfermline, at p. 138, of Lord Parmoor, at p. 142, and of Lord Moulton, at p. 150. That case was concerned with the validity of a closing order under section 17 of the Housing, Town Planning etc. Act 1909 and with the procedure on appeal to the Local Government Board. An example of the statements relied upon is that of Lord Parmoor, at p. 142:

"Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice."

In our view, no significant assistance is to be derived from this case, or other decisions upon the requirements of natural justice in administrative law cases, where the requirements of substantial fairness depend upon the subject matter and the context. It is sufficient, in our view, to derive the requirements of natural justice for the purposes of enforcement of a foreign judgment and the special defence thereto of breach of natural justice from the principles stated in *Pemberton v. Hughes* [1899] 1 Ch. 781 and relied upon by Scott J., namely: did the proceedings in this foreign court offend against our views of substantial justice?

The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the

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A parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

B We do not find it necessary to decide whether, if the local rules provide for service by the plaintiff of notice of a specific sum claimed for damages, a default judgment may be entered for such a sum without proof of judicial assessment and without there being breach of any requirement of natural justice. Scott J. thought that there could be no objection to such procedure and we think that in most cases that would be right. The matter does not arise for decision in this case and we express no concluded view. We would however not exclude the possibility of a defence being upheld if the facts justified the conclusion that, making due allowance for different levels of awards and of substantive law, the amount of the actual award was irrational.

D Mr. Falconer relied upon Scott J.'s finding that there would be no breach of natural justice in proceedings for a default judgment for unliquidated damages if judgment were entered for the specific sum claimed by the plaintiff. It was submitted that such a claim had in effect been made by the 205 plaintiffs in these proceedings because their pleading placed a limit upon the damages claimed in the sum of \$100m. We see no force in that point. The maximum of \$100m. would, as we understand it, prevent the court from entering judgment for any larger sum but there is nothing to show that the limit was intended to mean, or would be understood by any person familiar with procedure in the federal courts as meaning, that the \$100m. represented a sum which the plaintiffs asserted to be the total of their estimated claims and for which the court would be empowered to give judgment without proof of the amount of injury and loss suffered.

*The "legitimate expectation" point*

F At first sight there appeared to us to be some force in Mr. Falconer's criticism of the relevance of this concept in this case. It was accepted by Mr. Playford that reliance by the defendants had not been pleaded or proved with reference to any subjective expectation on their part that the assessment of damages on the application for the default judgment would proceed according to any particular method. We would also accept that the adoption of a particular method of assessment of damages by the foreign court, would not per se amount to an effective defence, as a breach of natural justice under our law, merely because it was shown that, by reference to the procedural rules of the foreign court, the defendant might (on an objective basis) reasonably have expected that a different method would be used. So to hold would be to introduce, under the concept of reasonable expectation, a rule that breach by the foreign court of its own rules of procedure renders the foreign judgment unenforceable as offending our concepts of substantial justice. It is clear law that mere procedural irregularity, on the part of the foreign court and according to its own rules, is not such a ground of



defence. *Pemberton v. Hughes* [1899] 1 Ch. 781 itself was an example of mere procedural irregularity.

In our view, however, Scott J. did not so regard or use the point of reasonable expectation. He made reference to it in dealing with the question whether what had happened amounted to a breach of the requirements of substantial justice, and after reference to the fact that the rules of a court might, in his view, without offending those requirements, provide for the giving of notice of the plaintiffs' estimate of the recoverable damages and the entry of a default judgment for that amount in the absence of opposition on the part of the defendant. The question was to be decided, in the view of Scott J., by reference to the context in which the alleged procedural defect had occurred. He was, in our view, not in error in this regard. The fact was that the system of legal procedure in which Judge Steger had signed the default judgment had not contained any provision for converting an unliquidated damages claim to a potentially fixed sum for the entry of a default judgment. His reference to the fact that the defendant in a default action was entitled to expect that his liability to the plaintiff would be assessed by the judge on the evidence was not a reference to actual expectation on the part of these defendants but to the requirements of natural justice against the background of a system which contains no such provision.

We therefore conclude that the defendants have demonstrated, as Scott J. held, that the method by which Judge Steger came to a decision as to the amount of the default judgment was by itself contrary to the requirements of substantial justice contained in our law. If that fact is regarded as a sufficient and conclusive description of the proceedings of the Tyler court then, according to the judgment of Atkin L.J. in *Jacobson v. Fractum*, 138 L.T. 386, 390, that finding would serve to invalidate the judgment. But, as noted above, the Court of Appeal in *Jacobson v. Fractum* was not required to consider whether, as Mr. Falconer submits, an opportunity to correct such a defect, provided by the foreign system of procedure, may either cause such a defect to cease to be in our law an effective breach of natural justice or, if there is any difference, cause the defendant to be unable to rely upon it for purposes of impeaching the judgment.

#### *Requirement of use of remedy in foreign court*

Mr. Playford submitted that proof of this defect in the proceedings of the Tyler court is a conclusive defence for the defendants, and he submitted that it is just that it should be so. It is not exorbitant, he said, to require that a default judgment, designed and intended for enforcement in this country, should comply with so basic a principle as that the amount of a judgment for personal injuries be fixed in substance by the court upon the evidence and not in substance by the plaintiff. No authority establishes, he said, the requirement of use by a defendant of any local remedy.

We accept that no authority binding this court has been cited to us establishing the proposition for which Mr. Falconer has contended. It is at least clear that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any



A available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts; see *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295 and *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335. The position may well be the same in cases where there has been a breach of natural justice of the two primary kinds considered by Atkin L.J. in *Jacobson v. Frachon*, 138 L.T. 386, 392, namely, absence of notice of the proceedings or failure to afford the defendant an opportunity of substantially presenting his case.

B In this judgment, however, we are dealing with a case where, although there was in our view a departure from the basic principles of natural justice in the assessment of the amount of a default judgment, nevertheless (a) the error which led to this departure was an honest error on the part of all concerned; (b) the defendants had proper notice of the proceedings and could have presented their case on its merits if they had chosen to do so, but chose not to do so; (c) the procedural rules applicable in the Tyler court were themselves fair and just; (d) the defendants had the right to apply to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would presumably have been allowed if made in due time.

D Against this background, we are not persuaded that possession of and failure to exercise this right by the defendants can be disregarded as being wholly irrelevant in determining whether the proceedings in the Tyler court, which we think must be viewed as a whole, offend against English views of substantial justice, within the principles stated by Lindley M.R. in *Pemberton v. Hughes* [1899] 1 Ch. 781, 790, as the plaintiffs would submit.

E It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is "manifestly wrong." *Godard v. Gray*, L.R. 6 Q.B. 139; *Casriane v. Imrie* (1870) L.R. 4 H.L. 414 and *Robinson v. Fenner* [1913] 3 K.B. 835, 842. In any such case it could be said that there has been a breach of natural justice, but it is not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as may be provided under the foreign system.

G This being the position where there has been an error of substance, it would, in our judgment, be anomalous if our courts were obliged wholly to disregard the existence of a perfectly good remedy under a foreign system of procedure in considering whether the defective operation of that procedure has led to a breach of natural justice. And, indeed, from some of the cases on procedural defects, support can be derived from the proposition that, at least with reference to defects known to the defendant before judgment, the defendant can be required to have made use of any remedy available in the foreign court: see, for example, *Reynolds v. Fenton* (1846) 16 L.J.C.P. 15 and *Crawley v.*

*Isaacs* (1867) 16 L.T. 529, see particularly at p. 531, where Bramwell B. said (obiter):

"If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but on the other hand, if the procedure be in accordance with natural justice, the foreign court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained."

Mr. Falconer relied strongly not only on that passage but on dicta of Fry J. in *Rousillon v. Rousillon*, 14 Ch.D. 351, 370, and of Bray J. in *Jeannett v. Fuenst* (1909) 100 L.T. 816, 818.

Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances.

We return then to the circumstances of this case, of which the most relevant seem to us to be the following. First, the defendants who, for present purposes, we assume were subject to the jurisdiction of the Tyler court, were duly served with the proceedings; they chose to take no part in them; they were given notice of the application for the default judgment; they chose not to attend the hearing of that application; and they were thereafter served with the default judgment.

Secondly, on service of the judgment, the defendants knew the amount of the award to each plaintiff. It seems that they could have obtained access to the medical records as to each plaintiff referred to in the judgment, and advice as to the question whether, upon such material, the awards appeared excessive according to the law in the Tyler court.

Thirdly, by not attending the application for the default judgment, the defendants deprived themselves of information as to what occurred before the court. If they had attended before Judge Steger, the nature of the proceedings would have been largely apparent. The proceedings took place in public before the judge, and, at least so far as concerned the facts that there was no evidence received by the judge in court on the hearing and no arguments presented to the court, the defendants would have discovered those facts.

Fourthly, it would have been open to them to apply for the judgment to be set aside if they had formed an intention to contest the amount of

A the awards. It seems to us to be probable at least that, since the method of assessment adopted by Judge Steger was contrary to the Federal Rules, an application of this nature made promptly to the Tyler court would have succeeded.

B Fifthly, however, the defendants, when the judgment was served upon them, could not and did not know the method by which damages had been assessed from anything stated in the judgment. The recitals in the judgment were, as Scott J. held, false and misleading: there had been no hearing at which damages had been assessed. The facts as to what happened in the Tyler court became known to the defendants at latest when evidence was given in the proceedings before Scott J. There was, as we understand it, no evidence from the defendants directed to the question when they first had knowledge of the method adopted by Judge Steger for assessing damages. There is, however, nothing to indicate that they were aware of the method adopted at any time before the date when, after claims were made on them in this country on the basis of the default judgment, the circumstances in which the judgment was made were investigated for the purposes of these proceedings.

B) *Conclusion on the natural justice issue*

P E Giving full force to all these facts, we find it impossible to say that, because the defendants did not apply to set the default judgment aside, they could not rely upon the substantial injustice in the proceedings constituted by the failure of the court to assess the damages judicially upon the evidence. They did not wish to dispute the amount of the damages award by presenting a case to the Tyler court. We cannot have regard, as an excuse available to them, to the reason why they chose not to appear, namely their unwillingness to submit to the jurisdiction of the Tyler court. However, it cannot, in our view, be required of them that they should have applied to the Tyler court to contest the amount of damages awarded when they were necessarily content to leave the amount of the damages to be assessed by the court. The only complaint which the defendants could thereafter make would be as to procedural irregularity. As to that, as we have stated, they had at the time of service of the judgment no knowledge. F The defendants were not told before the application for the default judgment that plaintiffs' counsel intended to invite Judge Steger to accept the view of plaintiffs' counsel as to the total value of the claim, based upon an average of \$120,000 per plaintiff, and that the plaintiffs would accept in substitution for the assessment of the damages by the judge, such counter-proposal based upon an average sum per plaintiff as the judge might be minded to make, from his general knowledge of the proceedings and of the settlement in the Tyler 2 proceedings to that date and from his knowledge of national average settlement figures in asbestosis cases. G

H The fact that information as to the procedural defect would probably have emerged if Cape had made an application to set the default judgment aside on other grounds, seems to us to be of no relevance. Cape are not to be treated as having information which they did not have because, if they had made an application which they had no reason to make, they could have obtained that information.



A harsh but accurate summary of what happened is, in our judgment, that those acting for the plaintiffs failed to give prior notice to the defendants of the unusual course which they intended to pursue; they chose not to try to prevent Judge Steger from adopting that method of assessment; and they drew up and served a form of judgment which did not reveal what had taken place. That was all done in good faith. There was no dishonest purpose. But the effect upon the defendants was, in our view, that they had at no material time knowledge of any basis for seeking relief from the Tyler court in respect of the defect which Scott J. rightly held to have been demonstrated by them to have occurred in the proceedings in the Tyler court.

The only basis for attributing to the defendants constructive knowledge of the defect, upon which they could reasonably be required to have used any available remedy in the Tyler court, would be that a defendant who has been given notice of the proceedings will be fixed with knowledge of everything which he would have learned if he had attended those proceedings. That, in our judgment, is not an acceptable basis for considering proof of procedural injustice. Plaintiffs can, we think fairly be left to avoid such procedural errors as will prevent enforcement of a judgment in this country.

Accordingly, on the natural justice issue, although for somewhat different reasons, we would uphold the decision of Scott J.

#### V Conclusion

In the result, while we have some doubts as to whether the judge reached the right conclusion on the country issue, we are satisfied that he reached the right conclusions on the presence issue and the natural justice issue. He was accordingly right, in our judgment, to dismiss the plaintiffs' claims and this appeal likewise must be dismissed.

Finally, we acknowledge our debt to all counsel on both sides for the great assistance which they have given us in this interesting but exceptionally difficult case.

*Appeal dismissed with costs.  
Leave to appeal refused.*

24 October 1989. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Griffiths and Lord Ackner) dismissed a petition by the plaintiffs for leave to appeal.

*Solicitors: Nibbner, Nicholson, Davies, Arnold & Cooper.*

A. R.



# APPENDIX

# APPENDIX

In this Appendix we will set out and deal serially 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. We will refer to the section of this judgment headed "The facts on 'presence' as found by Scott J." as "the primary facts section".

"(1) Cape was incorporated in 1893 to take over blue asbestos mining operations in the Orange river valley and thereafter it gradually expanded its blue mining division and in 1925 acquired a number of amosite asbestos mines in the Transvaal including the mines at Penge."

This was not disputed by the defendants.

- "(2) (i) Egnep did not have a sales organisation of its own.
- (ii) Cape and Casap acted as clearing house and bankers within the Cape Group for transactions relating to the sale and marketing of asbestos."

As to (i), the defendants did not dispute that Egnep had no sales organisation 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. That contention was plainly made good.

As to (ii) above, the evidence of Dr. Gaze, upon which the plaintiffs relied (Dep. pages 34-36), showed that Casap acted as a clearing house in South Africa and that Cape so acted in London. The sense of what he said was not that in this respect Cape and Casap acted as bankers, but that they rendered a central banking or clearing house service to the subsidiaries to avoid the sending of a large number of separate cheques for each obligation arising between the subsidiaries or

between a subsidiary and Cape.

- "(3) (i) 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."

It was agreed that NAAC was incorporated in 1953. For the rest, on this point the plaintiffs made reference to the documents at Vol. 3 page 1, Mr. Morgan Dep. 3 page 146, Mr. Morgan Dep. 1, pages 197 and 217-9. That evidence does not by itself show anything inconsistent with Scott J.'s finding set out in paragraph 14 of the primary facts section.

- "(3) (ii) From 1970 NAAC's President was Mr. Meyer, a lawyer, a partner in Cape's attorneys in the USA who ostensibly ran NAAC from his law offices."

For this the plaintiffs referred to Mr. Morgan Dep. 3(iii) page 148. It was agreed that Mr. Meyer was President of NAAC from 1970 until Mr. Morgan became President on 1st July 1974. The position of President of this corporation was substantially the same as that of managing director in a similar English company. 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.

- "(3) (iii) Mr. Morgan joined NAAC on December 1st 1970 having been interviewed in London by Dr. Gaze and took over as President on July 1st 1974 when Mr. Meyer became its Vice-President."

It was agreed that Mr. Morgan started with NAAC on 1st December 1970, that he was interviewed in London by Dr. Gaze

and that Mr. Meyer became Vice-President in July 1974. 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. (Mr. Morgan Dep. 3 pages 144-147.)

"(3) (iv) NAAC was virtually a one man organisation in the sense that Mr. Morgan himself was the only person who had customer contact."

For this the plaintiffs referred to Morgan Dep. 1 page 124, documents Vol. 4 page 262, and Vol. 3 page 198. The evidence shows, however, that 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 with NAAC until its dissolution. Mrs. Holtze contacted customers with regard to documentation and shipping; see her Deposition 2 page 210. She also communicated with customers if there was a shortfall in their requirements from Egnepe and arranged supply from the US Government's stocks.

"(4) NAAC's involvement in the sale of Cape's asbestos took two forms:

- (i) sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from Casap. The stocks it purchased were kept in a warehouse in Philadelphia. This represented in terms of tonnage about 25 per cent of NAAC's business; and
- (ii) organising and arranging the completion of contracts between US customers and Egnepe. NAAC received a commission from Casap."

The proposed findings must be compared with the detailed findings of Scott J. set out in paragraphs 13 to 23 of the primary facts section. The defendants did not dispute that the direct purchases by NAAC for sale by NAAC to customers in the USA



represented about 25 per cent of NAAC's business in terms of tonnage; or that, as the judge found, NAAC rented and paid for warehouse facilities and also organised and arranged the completion (in the sense of performance) of contracts between US customers of Egnep; and that NAAC received a commission from Casap (J. 59G). The point at issue here is the allegation that NAAC bought directly from Casap and not from Egnep and, as Mr. Morison explained, it is directed to the main submission for the plaintiffs that Cape did not regard it as significant which subsidiary sold, or was treated as selling, and that thus it is clear that Cape's entire commercial operation was run as one integrated business project. The plaintiffs relied upon brief statements of account between NAAC and Casap for February 1975 and March 1975 (Vol. 4 pages 250-1) in which reference was made to shipments, commission and in one case to a remittance; and they relied upon the accounts of NAAC which referred to trading with Cape and Casap. For the defendants, Sir Godfray submitted that on the evidence all the sales of asbestos from Egnep mines were made by Egnep in the sense that Egnep were the vendors; and the proceeds, less expenses and commission, were received by Egnep; but to that Mr. <sup>Morison</sup> retorted that the judge had not so found and the evidence left uncertain whether sales were always made by Egnep: see the findings of the judge concerning CPC set out in paragraph 33 of the primary facts section. Thus the judge (J. 60) referred to purchases by NAAC from Egnep or Casap. Again (at J. 76) the judge said that the seller of asbestos in NAAC's time was Egnep or Casap.

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.

"(5) NAAC as a sideline, imported asbestos goods from Japan which it sold to the textile industry."

The plaintiffs relied upon a statement by Mr. Morgan at Deposition 1, page 157 to the effect that such sales were "a sort of sideline". The point is directed to the contention that such business as was carried on by NAAC which was not concerned with Cape asbestos, was either trivial or subordinate to NAAC's business of servicing the contracts under which Egnep, or other subsidiaries, sold asbestos into the US and of buying asbestos direct from a Cape subsidiary for sale on. The purchase by NAAC of asbestos goods was subordinate to its business with or for Cape's subsidiaries, as the judge found: see paragraph 14 of the primary facts section, for the dominant purpose of NAAC. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial: reference was made to accounts showing that such sales amounted to \$466,845 in 1975 and \$239,957 in 1976 out of total sales of \$4.09 million and \$3.54 million in those respective years: see Vol. 4 page 423; and to the accounts for 1972 at Vol. 3 page 117; for 1973 Vol. 3 at page 161; for 1974 at Vol. 3 page 242; and for 1977 at Vol. 4 page 578. 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.

"(6) NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco."

This was not in dispute save that the defendants submitted that NAAC did deal with Casap. For the purposes of the main submissions which the plaintiffs make, an answer to this point requires definition of the words "deal with". The passage in the evidence of Mr. Morgan on which the plaintiffs relied indicates that, when NAAC was concerned with assisting the performance of direct contracts between Egnep or Casap and a United States customer, NAAC passed any information which NAAC received as to the requirements of the customer not direct to Egnep but to Egnep through Capasco. He referred to such matters as shipping schedules, "setting up the boat", and notifying the customers when a shipment would be arriving. The customer - he was referring to PCC - paid Egnep directly. NAAC got commission from Egnep through the running account in which commission was set against NAAC's purchases from Egnep. NAAC's orders for asbestos from Egnep were placed through Capasco. Egnep then shipped the asbestos to NAAC. It was in this context that Mr. Morgan said that NAAC was never permitted to deal directly with Egnep: Deposition 1 page 150. 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.

- "(7) (1) Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed";

(Vol. 3: pages 90 and 94; Dr. Gaze, pages 16 to 19; Mr. Higham, page 274).

"(ii) And for deciding when asbestos should be supplied free of charge to one of its USA customers";

(Vol. 3, page 95).

"(iii) Capasco accepted as their responsibility the contamination of supplies."

(Vol. 3, pages 80-1.)

As to (i) above, the defendants did not dispute that Capasco within the Cape Group had the function of allocations of asbestos worldwide, in the sense that Capasco had information as to existing stocks and probable quantities of production of different sorts and quantities of asbestos from the South African mines owned by Cape subsidiaries, and determined, when supplies were less than demand, how those supplies should be allocated among the customers of Capasco and of the mining companies throughout the world. That function was part of the responsibility for the "supply, marketing and sales promotion throughout the world" as found by Scott J.: see paragraph 5 of the primary facts section. Cape itself, it was submitted, did not allocate, market or sell asbestos but held the shares in its subsidiaries. Upon consideration of the passages in the evidence to which we were referred, the true position appears to us to have been substantially as submitted by the defendants. The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for co-ordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions.

As to (ii) and (iii) above, the submission is based upon



the account of certain events in 1971 set out in the documents mentioned above. PCC had been informed by Mr. J. R. Owens of Capasco that during 1971 amosite grade D-11 would be in short supply but that a quantity of asbestos of inferior grades would be available. PCC asked for and received from Capasco technical aid to enable the lower grades to be used. Later, in a letter of 9th June 1971, Mr. Holman of PCC complained to Dr. Gaze at Cape that the quantity of asbestos allocated to PCC for 1971 was less than "their fair share": Vol. 3 page 92. In the same letter Mr. Holman asserted that PCC's claim, previously made in December 1970 by PCC to Capasco, for \$7,765 for costs incurred as a result of tramp metal and other foreign material in asbestos supplied, should be honoured. As to that claim, PCC had received an unsatisfactory reply from Capasco. Mr. Hauser, Manager of Production Planning at PCC, had written to Mrs. Holtze of NAAC on 15th December 1970 (Vol. 3 page 82) sending copies of the correspondence, with a complaint that PCC's problems were "making no impact upon them" (i.e. Capasco). The most important thing was to ensure further supplies from the mines which were trouble free. He asked that "if NAAC have a magic wand that you can wave to instil in them a sense of urgency ... please use it". PCC had been told in December 1970 by Capasco (Vol. 3 page 85) that Mr. Morgan, the newly appointed General Manager of NAAC, would be visiting PCC shortly to discuss the present situation and the outstanding claim. Mr. Morgan had made his visit in January 1971 (Vol. 3 page 89). He had told PCC in January that, on his return from London in March, he hoped he would be in a position adequately to discuss the availability of desired grades of asbestos but that "NAAC had its work cut out ... in persuading the Cape Group in London to supply us with sufficient

tonnage to satisfy your requirements".

The reply to the complaint of Mr. Holman was written by Dr. Gaze (Vol. 3 page 93) on 15th June 1971. Dr. Gaze was a director of Cape and of Capasco and was responsible for all scientific matters within the Group. He explained the nature, extent and causes of the supply problem for various grades and asserted "our intention to supply you with the maximum amount of long amosite that we can ..." but "... this will depend upon the extent to which the mines can produce extra tonnage ..." and "... Mr. Morgan at NAAC, Chicago, will be kept fully posted on the position." The letter concluded with a reference to the claim for \$7,765 as follows: "I consider that we should accept your claim and I am requesting the fibre selling company to supply you with 46 tons of the next consignment free of charge (f.o.b. Africa) in settlement of this": Vol. 3 page 95.

This incident has been examined in some detail so that the decision of Dr. Gaze to request that Egnef supply 46 tons free of charge in compensation for PCC's claim on Egnef can be seen in its context. 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. Capasco was not accepting responsibility for contamination of asbestos supplied. It seems to us that Capasco was acknowledging, in the commercial situation which had arisen, the good sense of making sure that PCC's claim on Egnef was accepted by Egnef, and Capasco therefore "requested" Egnef to make the allowance with confidence that the request would be followed. There is, accordingly, nothing in this incident which by itself casts doubt upon the conclusion of Scott J. set out at paragraph 34

of the primary facts section. Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.

- "(8) (i) Cape and Capasco provided assistance and personnel to advise the USA customer as to his manufacturing process;
- (ii) Officers of Cape and Capasco visited the USA and met with the customers; and were visited in London by the customers;
- (iii) It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler;
- (iv) In relation to price and allocation of asbestos, Cape, through Dr. Gaze, dealt direct with the main US customers."

As to these matters the relevant findings made by the judge are set out at paragraph 20 of the primary facts section.

As to (i), (ii) and (iii) above, reference was made for the plaintiffs to documents at Vol. 3 pages 32, 58, 73 and 78 and to the evidence of Mr. Buckley at Deposition page 21. Again, for the proper understanding of these additional primary facts, it is necessary to place them in their context. In July 1968 (Vol. 3 page 32) NAAC by Mr. Cryor wrote to PCC with reference to Mr. Stout of PCC having discussed Grade D-3 amosite with Dr. Gaze in London. It was by that letter that Mr. Cryor informed PCC that Grade D-3 would no longer be available as a separate grinding for use by PCC.

In May 1970 (Vol. 3 page 58) Mr. Baumann, Manager of Production Planning at PCC, in a letter to Mrs. Holtze of NAAC, referred to a visit by Mr. Owens (of Capasco) to PCC in April 1970 when he had requested a sample of D-11 amosite after the fibre had been opened in the PCC mills. After examination at "Cape's laboratory in London", Mr. Owens might be able to offer

suggestions for improvement in PCC's production process. NAAC was asked by Mr. Baumann to forward to Cape, as requested by Mr. Owens, sample fibres from two PCC plants and samples of foreign material found in asbestos supplied to PCC. The assistance of NAAC in "channelling these problems to the responsible parties at Cape Asbestos" would be appreciated. Mrs. Holtze replied that NAAC had sent the samples along "to our people at Urbridge in order that their laboratory may examine them": Vol. 3 page 59. Later, NAAC reported to PCC the results of investigations as to the cause of metal contamination and the actions taken at the mines to avoid recurrence.

In October 1970 Capasco replied to a letter from PCC to Mr. Owens and informed PCC that Dr. Gaze would be meeting Mr. Bierer, President of PCC, on Mr. Bierer's visit to London in November to discuss such matters as PCC's request for technical aid and on the use of different grades of fibre, foreign material contamination, etc. The technical aid was later supplied by Capasco. PCC thanked Dr. Gaze for his assistance and commented that "Mrs. Holtze of NAAC did her usual excellent job in co-ordinating" the visit of the two technical experts sent by Capasco to PCC.

The evidence of Mr Buckley of PCC described the manufacture of Unibestos by PCC from 1962 until 1972. Unibestos was a high temperature insulation product. PCC had purchased the Tyler plant in 1962. PCC had known that Unarco had been producing Unibestos and had planned to make something similar. PCC had also known that Unarco's contact for asbestos was NAAC. PCC therefore told NAAC that PCC were interested in discussing the possibility of, and the conditions for, making a product similar to Unibestos. As their discussions with NAAC progressed, PCC



had heard that Unarco would sell both the process and the plant for making Unibestos and PCC had bought them. PCC had dealt with Mr. Cryor at NAAC. Mr. Buckley had understood that there was some business connection between NAAC and Cape Asbestos. He did not know precisely what it was. Mr. Cryor at NAAC had conveyed word of PCC's interest to Cape Asbestos - there were so many corporate entities beginning with "Cape Asbestos" that Mr. Buckley had made no effort to distinguish between them. He understood that, in dealing with Cape Asbestos, he was dealing with the parent corporation. In the result Dr. Gaze contacted PCC in about 1961. Dr. Gaze visited PCC and described in detail the manufacturing process, the character of the material and the physical properties which could be obtained with the technology then existing, the make up of the factory and equipment required. Dr. Gaze told PCC that supply of the material would be available. His visit lasted two days. He arranged a visit by PCC officials to a Canadian company which manufactured a similar product.

As to (8)(iv) above (Dr. Gaze dealing direct with the main US customers), the plaintiffs relied upon the evidence of Mr. Buckley at pages 42-45 of his deposition, and upon Mr. Morgan's second deposition at page 109. From these passages it appears that Mr. Buckley said that from 1962 to about 1971 Dr. Gaze visited PCC about once a year. The discussions on his visits were for the most part of "the goodwill generality type of discussion" (page 43): including general business conditions, whether there would be an ample supply of fibre in the coming years, etc. Dr. Gaze was well informed on conditions of supply and on price and he gave assurances that any problems about the product would be corrected as well as they could be by seeing that the complaints were registered with the supply - the proper

people. (Page 45.) Mr. Buckley understood that any questions which PCC had with reference to the product could be discussed productively with Dr. Gaze. Mr. Morgan, for his part, said that Dr. Gaze visited another US customer, Johns-Manville, once a year.

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. Capasco was responsible for worldwide marketing and co-ordination of sales and also had the laboratory resources, scientists and technicians to provide technical advice and assistance to customers throughout the world. NAAC, whose functions included assisting and encouraging sales in the USA (paragraph 14 of the primary facts section) had no such technical resources. There is no basis for inferring that it was the holding company Cape, as opposed to Capasco, which was providing the advice and assistance to PCC, or that the visits made by Dr. Gaze were made otherwise than as a director of Capasco. Reference was also made to evidence of visits to customers in the USA by Mr. Higham who was managing director of Cape. He had never visited the United States on any occasion with reference to asbestos, either the sale or problems connected with it: page 301. He had been to the office in Chicago (the office of NAAC) not more than once a year and he did not go there otherwise than in the course of going to the United States for some other purpose. This evidence is also consistent with the learned judge's finding (paragraph 20 of the primary facts section) that Mr. Higham's visits were made as a director of Cape and not as a representative of NAAC.

"(9) (1) When corresponding with US customers Cape

referred to NAAC as 'our Chicago office' and NAAC referred to Cape and Capasco as 'our London office'.

- (ii) NAAC held itself out to a large US customer as being part of the Cape selling organisation.
- (iii) NAAC was treated by the major customer as the channel between them and Cape and Capasco."

As to (i) above, reference was made for the plaintiffs to two letters. By a letter of 20th March 1970 (Vol. 3/53) Dr. Gaze, writing as a director of Cape, informed Mr. Holman of PCC that Mr. Owens, as managing director of Capasco, and responsible for the administration of the supply and marketing of "our fibres" would visit PCC in April. Mr. Owens would be ready to discuss questions raised on Dr. Gaze's visit in December 1970. "Our Chicago office", i.e. NAAC, would be in touch with PCC in order to make more precise arrangements for the visit of Mr. Owens. It was that visit of Mr. Owens to PCC which led to the sending of samples by PCC to NAAC for onward transmission to Capasco in connection with the complaints of PCC mentioned under (7)(ii) and (8)(i), (ii) and (iii) above. The second letter was dated 20th October 1970 (Vol. 3 page 67) from NAAC, signed by Mrs. Holtze, to Mr. Hauser of PCC and was to the effect that "our London office" needed certain information for the purposes of Mr. Bierer's intended visit in November 1970: see under (8)(i), (ii) and (iii) above.

There were some other references of this nature: Mrs. Holtze in November 1970 in writing to Mr. Hauser about shipments of Grade M asbestos referred to "our mines in South Africa". There was a similar reference in the same month by Mrs. Holtze to steps being taken "by our mines" to deal with various complaints.

These letters show that the writers were able respectively in the context described to refer naturally to NAAC as "our

Chicago office" and to Cape or Capasco as "our London office" and to the South African mines as "our mines". That evidence is relevant to the way in which the relationship between NAAC and Cape/Capasco appeared to the writers, Dr. Gaze and Mrs. Holtze, in the context in which they were writing. It is, therefore, possibly some evidence of what that relationship was. The letters were to senior officers of PCC, Mr. Holman, who was Vice-President, technology and manufacturing, and to Mr. Hauser, manager of Production Planning. The commercial relationships between PCC and the Cape subsidiaries, including NAAC, had been continuing for some nine years at the date of these letters. The writers of the two letters were writing to a long standing customer which, as it seems to us, is shown to have known in general terms the structure of the Cape Group in which separate corporate members performed distinct functions: see in particular the evidence of Mr. Buckley, of which parts are set out under (8)(i), (ii) and (iii) above. The writers of the letters were not trying to inform persons to whom they were writing as to the relationship between Cape and its subsidiaries or between those subsidiaries. The matters demonstrated in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to the roles and functions of the Cape subsidiaries.

As to (ii) and (iii) above, reference was made by the to Mrs. Holtze's letters to Mr. Hauser of PCC in November 1970 (Vol. 3 pages 76-77) mentioned above and to Dr. Gaze's long letter of 15th June 1971 to Mr. Holman of PCC (Vol. 3 page 93) mentioned under (7)(i), (ii) and (iii) above; to passages in the judgment (see the fourth sentence of paragraph 14 and also paragraph 17 of the primary facts section; and to

two further letters. By a letter of 27th May 1970 Mr. Bauman, manager of Production Planning at PCC, asked Mrs. Holtze to forward, pursuant to the request of Mr. Owens of Capasco, certain samples to Cape's laboratory in London. The other letter was dated 29th September 1970 and was from Mr. Hauser of PCC to Mrs. Holtze. By it PCC communicated to NAAC the request of PCC for technical assistance from Cape Asbestos as to PCC's manufacturing process.

This evidence shows what, in these particular instances, was done and the context in which it was done. 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 (see paragraph 15 of the primary facts section) and as the channel of communication between customers, such as PCC and Capasco or Casap.

"(10) Capasco advertised asbestos in North America and gave both the address of NAAC and Capasco."

The plaintiffs referred to the evidence of Mr. Morgan, Deposition 1 pages 218-219. On this matter there was no dispute. The substance of the evidence was that Capasco had advertised in the United States only in a magazine called "Asbestos Magazine" which was distributed throughout the world including the United States of America. Asbestos was offered for sale and the addresses of both NAAC and Capasco were given in that advertisement. NAAC itself advertised in the yellow pages of the Chicago Directory and in the Thomas Register, a catalogue of manufacturers in the USA, listing addresses and products.

"(11) (i) Dr. Gaze, who was at all material times a Director of Cape, 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.

- (ii) 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.
- (iii) 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."

These proposed findings were directed, as Mr. Morison explained, to the submission that Cape's control over NAAC's activities did not depend upon the corporate form.

As to (i) above, reference was made to Mr. Morgan's evidence: Deposition 1 pages 166-169. The defendants, as stated above, have not questioned the correctness of Scott J.'s finding as to the role of Capasco, of which company Dr. Gaze was Chairman, within the Cape Group: see under (7)(i) above. The substance of this part of Mr. Morgan's evidence was that he dealt primarily with Dr. Gaze for discussion of allocations of asbestos for NAAC to be purchased by NAAC through Capasco from Egnepe and Casap. Mr. Morgan co-ordinated 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 or managed by Dr. Gaze. It was pursuant to the instructions of Dr. Gaze that Mr. Morgan of NAAC dealt through Capasco and left Capasco to deal with Egnepe. Mr. Morgan understood that Dr. Gaze could give instructions which would be followed so far as concerned the distribution of fibre.

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.

As to (ii) above, there was no dispute as to the circumstances in which or as to the reasons for which Cape ceased to have directors on the Board of NAAC: see paragraph 18 of the primary facts section. Nor was it disputed that the resignations in July 1975 produced no significant change in the method of operation of NAAC or the responsibilities of individuals concerned. The question is whether Dr. Gaze "ran NAAC" before or after July 1975 and, if yes, in what sense.

The plaintiffs for this contention referred to Mr. Morgan's evidence, 4th Deposition at page 414. The substance of that part of Mr. Morgan's evidence was as follows. He had not made proposals as to what dividends should be paid by NAAC - that was done by Mr. Meyer at Board meetings; he could not recall Mr. Meyer conferring with him before any meeting about the dividend; Mrs. Holtze had told him that the amount of dividend was calculated by a kind of formula but she did not know what it was; after July 1975 he continued to have contacts with Dr. Gaze by letter, by telex, by telephone and personally when Dr. Gaze visited the United States or when Mr. Morgan visited England. After Dr. Gaze resigned from the Board of NAAC, Mr. Morgan had considered Dr. Gaze to be his superior so far as concerned the discharge of Mr. Morgan's duties at NAAC. Mr. Morgan was then asked the question: "Dr. Gaze in fact ran NAAC, didn't he?" And Mr. Morgan replied: "It would seem he did."

Sir Godfray 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".

This one answer of Mr. Morgan is incapable of bearing the

weight that Mr. Morison's submissions would place upon it. 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 of NAAC was left to him as he himself substantially acknowledged in his evidence summarised under (11)(i) above. Dr. Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business, namely purchase and sale of textiles: see (5) above; or the obtaining of orders for asbestos which NAAC would carry out as principal in buying and selling, which orders amounted to about 20 per cent of NAAC's business in terms of tonnage: see (4) above. Nor did Dr. Gaze, or any representative of Cape, "run NAAC" with reference to the internal affairs of NAAC such as (i) staff, dealing with direct customers, and its own sources of supply - such as US Government stocks; (ii) NAAC's own office premises and warehouse premises; (iii) NAAC's arrangements for insurance; (iv) NAAC's pension scheme; (v) the formulation of NAAC's accounts; (vi) NAAC's payment of US taxes on NAAC's profits.

"(12) Cape decided on the salaries of the staff and made the senior appointments."

For the plaintiffs reliance was placed upon a series of letters. The substance of the evidence to be derived from those letters can be stated as follows. The letter of 7th December 1964 (Vol. 3 page 12) from Mr. Dent of Cape went to Mr. Cryor, the predecessor of Mr. Morgan. It referred to the question of "remuneration of senior officers in the Group" which "naturally included ... your own situation". Details were requested of

Mr. Cryor's full remuneration because Cape did not have them. In May 1969, Mr. Cryor wrote to Mr. Dent in response to a proposal that his salary be increased from \$38,000 to \$43,000. He acknowledged that his remuneration must bear a proper relationship to what NAAC "can do for the Group". After a statement of what NAAC had achieved in the way of selling asbestos and of his forecasts for future trading, the letter continued with a statement, much relied upon by the plaintiffs, that "all of the Board members (of NAAC), I believe, have always considered this to be a question for you in London to raise, consider and decide at your own pleasure".

By the letter of 23rd February 1972 (Vol. 3 page 100) Mr. Meyer wrote to Dr. Gaze with reference to the level of personal expenses incurred by Mr. Morgan in his work for NAAC, and to whether or not Mr. Morgan should be elected President of NAAC at the annual meeting. Mr. Meyer had no definite recommendation. He was himself President of NAAC at that time. After further intervening letters Mr. Dent of Cape by the letter of 2nd May 1974 (Vol. 3 page 210) invited Mr. Meyer to accept the position of Chairman of the Board of NAAC to make way for Mr. Morgan to be appointed President. Mr. Dent wanted it understood that "if the nature of our business in the United States changed substantially, say through the acquisition of a manufacturing organisation, or for any other reason, we would not necessarily use NAAC as the vehicle for managing such a venture, nor would we necessarily feel that Mr. Morgan should head it up".

The letter of 20th May 1974 (Vol. 3 page 215) was also from Mr. Dent to Mr. Meyer: Mr. Dent accepted Mr. Meyer's proposal that Mr. Meyer become Vice-President instead of Chairman. Mr. Dent thought that Mr. Morgan's salary should be \$40,000 upon

his becoming President.

By the letter of 18th June 1974 (Vol. 3 page 221) Dr. Gaze congratulated Mr. Morgan on his appointment; noted that Mr. Higham had taken over from Mr. Dent as Chairman of NAAC but asked Mr. Morgan "to continue to correspond with me on business questions exactly as has been the practice in the past". Mr. Morgan was also asked to keep "closely in touch with Mr. Meyer on finance ... and in general touch with day to day affairs".

Finally, the letter of 23rd November 1974 (Vol. 3 page 235) was from Mr. Meyer to Dr. Gaze about the directors' meeting of NAAC to be held on 5th December. (Dr. Gaze was a director of NAAC until July 1975.) Mr. Meyer reported his discussion with Mr. Morgan about "compensation for everyone except Mr. Morgan" and suggested increases in salary were set out for four members of the staff of NAAC including Mrs. Holtze.

Upon this evidence the additional finding sought by the plaintiffs cannot be made. Cape as the parent company appears to have been exercising its potential authority through its corporate relationship with NAAC to determine the remuneration of Mr. Cryor and Mr. Morgan as the persons successively in executive control of NAAC and to determine the election by the Board of Mr. Morgan as President and of other senior officers of NAAC. The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr. Morgan was placing his suggestions before the Board which included the Cape representatives.

"(13) Cape effectively decided what NAAC was allowed to spend or borrow."

The finding of Scott J. is set out at paragraph 19 of the primary facts section. The issue is as to "what NAAC was allowed



to spend". The defendants acknowledge that Cape, as the parent company, required and received information as to the commercial performance of NAAC and the general cost of its operation. Further, 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 that total expenditure and borrowings stayed within the limits laid down. We have considered the documents to which we were referred by the plaintiffs - Vol. 3 pages 13-18, Vol. 4 pages 261, 264, 350, 379-381 - and in this instance do not find it necessary to set out the substance of what can be derived from those documents. On this matter the submissions for the defendants fairly reflect the facts revealed in the evidence.

└ (14), (15), (16) and (17): The next four headings of additional primary facts will be stated and then considered together. They are concerned with the purposes and motives of Cape with reference to the asbestos litigation and to the formation of CPC in the United States.┐

"(14) From the start of the Tyler 1 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 without the risk of enforceable judgments against Cape.

(15) As part of its plan to attempt to appear to distance itself from NAAC, the Cape directors on the Board of NAAC resigned in July 1975.

(16) After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler 1 (April 1977), Cape then formulated and put into operation, as from February 1978, a four point plan:

- (i) the dissolution of NAAC and the creation of a substitute organisation;

- (ii) the formation, at Cape's expense, of the Liechtenstein Corporation (AMC) as an intermediary for invoicing purposes;
  - (iii) the formation of a new Illinois Corporation (CPC) to be operated by Mr. Morgan and to be set up with Cape money;
  - (iv) no further appearances in any US asbestos litigation.
- (17) In order to set up AMC and liquidate NAAC, Cape required Exchange control permission from The Bank of England. This was sought by letter dated December 23 1977 which discloses the purpose for the formation of AMC and CPC. The plan was executed with secrecy."

The findings of the judge on these aspects of the case are set out in paragraphs 8 to 10 and 24 to 27 of the primary facts section. There is little "additional" in the findings put forward by the plaintiffs but they are relevant to their contention based upon the motives of Cape. We deal with this contention in the section of this judgment concerning the "corporate veil" argument.

As to (14) above, the plaintiffs relied upon a number of documents: Vol. 3 pages 171-172, 173, 174, 213, 215; Vol. 4 pages 268, 273, 279, 289-290, 324-329, 344-345. 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. The first Tyler 1 action was commenced in January 1974. The extent to which any substitute company was intended to be "seemingly unconnected", and the means by which that seeming lack of connection was to be achieved, are of importance.

As to (15) above, reference was made for the plaintiffs to Vol. 4 page 279. There is nothing additional in this so far as concerns any primary fact: see paragraph 18 of the primary facts section.

As to (16) above, there is also nothing additional, so far as concerns primary fact, in sub-paragraph (ii) or (iv) thereof. For the matters set out under (16) the plaintiffs relied upon the documents at Vol. 4 pages 462, 492-495, 504-505, 507-510,

511-518, 529-532.

As to <sup>of</sup> (17) above, there was, of course, no issue as to the writing/the letter to the Bank of England by Mr. Penna. Reference was made to Vol. 4 pages 517-518 and 557 and to Vol. 5 page 625.

The extent of any remaining issue of primary fact under this heading is small. The submissions for the defendants were that the formulation by Cape of its plans for alternative marketing arrangements proceeded in stages. The means through which alternative marketing arrangements would be made depended upon decisions of people who were not employed by Cape, or in their control, in particular Mr. Morgan. 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: see Vol. 4 pages 454, 498. 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.

As to the evidence under these headings, reference is required only to some few parts of it.

The first document listed by the plaintiffs was a Preliminary Fact Memorandum of 2nd March 1974 (Vol. 3 page 171) prepared by Mr. Milwid of Lord Bissel and Brook, attorneys in the USA for Cape. References in it were made to the extent of public knowledge of the hazards associated with asbestos; to the jurisdictional motion filed in Tyler 1; and to the status of NAAC and Egnef as "separately organised corporations" as compared with some of Cape's subsidiaries which became "agents" of Cape. (That

appears to be a reference to the sort of agency agreement mentioned by Scott J.-see paragraph 21 of the primary facts section). In a letter of 21st March 1974 (Vol. 3 page 173) Mr. Hubbard of Cape referred to the fact that Cape had no place of business or assets in Texas, or in the USA, and to a possible project (not connected with asbestos), in which Cape would acquire a factory near Boston, Mass., and which might "proceed through the device of a subsidiary holding company ..." Next, by the letter of 29th March 1974 (Vol. 3 page 174) Mr. Meyer tendered advice which included the statement that "organising a separate subsidiary to own and operate the plant, whether a US or foreign corporation, maybe more of smokescreen than an actual deterrent to anyone who obtains a judgment against Cape".

By June of 1975 Cape was more directly concerned about NAAC. By letter of 20th June (Vol. 4 page 268) Dr. Gaze told Mr. Morgan of "our thoughts about the future operations of NAAC" and sent the letter to Mr. Morgan's home address "to avoid ... speculation in the office". Cape, he wrote, "may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily ..." but "... was determined to do everything possible to maintain a successful selling operation in the United States". Dr. Gaze added that Mr. Penna (Cape Group solicitor) was getting advice from Mr. Meyer. The immediate purpose of the letter concerned "inventory at your warehouse ..." because "... in the present uncertainty, it is clearly desirable that we should operate with the minimum of assets of this type and I should therefore like you to take all possible steps to see that this stock is reduced to the lowest possible level". By letter of 25th June 1975 Mr. Penna explained to Mr. Meyer the need for advice much as Dr. Gaze had

expressed it in the letter last mentioned. Mr. Penna continued (Vol. 4 page 273): "we do want however to maintain Mr. Morgan in his current role to sell and service contracts in North America and Dr. Gaze has asked me to take your advice ..."

Mr. Meyer's reply was a long letter of advice, dated 3rd October 1975 (Vol. 4 page 324). "The objective under consideration" was "... an attempt to limit NAAC's and Cape's exposure to future US litigation". After references to insurance, to the statute of limitations and to legal considerations relating to the possible liquidation of NAAC, Mr. Meyer dealt with "replacement for NAAC". He considered various possibilities and the consequences in terms of taxation and continued: "If it were possible to operate without an office or employee in the United States it would seem to be better to operate directly from some company in England, a mining company in South Africa, or, if an office is needed near North America, from some Caribbean or Central American country that has very low income tax rates: e.g. Netherlands Antilles. Mr. Morgan's predecessor, Robert Cryor, and I used to talk occasionally about such an operation and we considered the tax savings that might result; however, it was always decided that it was not possible to operate in the United States without an office here, or at least without an employee travelling regularly in the United States with authority to negotiate contracts. This would result in the profits being subject to US taxes and therefore there appeared to be nothing to be gained by operating from a country outside the United States". Finally, by way of summary, Mr. Meyer added: "It is possible that some protection as to future actions could be obtained by liquidating NAAC and operating in the future through a Canadian or other foreign corporation; however, no protection would be



obtained if it were necessary to have an office or employees in the United States, or even to have a non-resident employee who continually travels in the US with authority to conclude contracts". It is to be noted, of course, that Mr. Meyer was advising on the exposure of a Cape subsidiary and of Cape to the jurisdiction of the US courts, whether State or Federal, according to the law there in force, and not on the exposure of Cape to enforcement of a judgment of those courts against Cape in this country.

By a letter of 23rd December 1975 (Vol. 4 pages 344-346) Mr. Milwid was tendering further advice to Mr. Penna. Judge Steger had not yet ruled on the jurisdictional motions submitted by Cape and Egnep. The questions addressed included what action should be taken in the event that Cape, Egnep or Capasco should be involved in any other US litigation. It is sufficient to note that Mr. Milwid advised (and thus probably indicated the scope of the questions set to him by Cape) that, even if a UK court should judge a default judgment to be unenforceable against Cape, nevertheless under Texas law a judgment is valid (subject to certain conditions) for ten years. He continued (page 346): "On the ultimate question as to whether Cape itself might be held liable in this litigation for any tort committed by either of its subsidiaries NAAC or Egnep the holding of the Texas Supreme Court in the case of National Hotel Co. v. Motley 123 SW 2nd 461 1938 is most helpful. There the Texas Supreme Court stated on this point: 'It may be stated as a general rule that the fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity, and unless it is shown that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth or

perpetrating fraud, or where the organisation and control of the subsidiary are shown to be such that it is but an instrumentality or adjunct of the dominant corporation, no liability may be imposed upon the latter for the torts of the subsidiary corporation'. Mr. Milwid closed with the expression of his opinion that Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

A telex of 4th July 1977 (Vol. 4 pages 462-3) from Mr. Penna to Mr. Milwid shows that Cape was taking advice in this country upon "withdrawal from Texas proceedings". It continued: "We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Capasco should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult".

We would observe that in the view thus \_\_\_\_\_ expressed by Mr. Penna he was not only wrong but showed a misunderstanding of the law of this country. The enforceability of a foreign judgment at common law does not turn upon such matters; it is a question solely for the court and not the government.

The document at Vol. 4 pages 492-495 is a copy of the minutes of a Board meeting of Cape on 1st November 1977: see paragraph 8 of the primary facts section. It recorded the decision as to "Future claims" that, having regard to legal advice obtained, it was proposed in respect of any future US claims not to contest the proceedings in the American courts and to accept the risk of a default judgment ... it being considered

most unlikely that such a judgment would be enforced by an English court.

By a letter of 11th November 1977 (Vol. 4 page 504) Mrs. Holtze of NAAC reported to Mr. Penna advice and information received from Mr. Sarabia of Lord Bissel and Brook, a specialist in multi-national corporate procedures, on the consequences of trading by or through a new Liechtenstein corporation and of the probable need for a second corporation if warehouse facilities would be required so as not to expose the Liechtenstein corporation to US taxation. Mr. Morison referred to this exchange as the origin of the idea for AMC.

There was a further letter of 23rd November 1977 (Vol. 4 page 507) from Mr. Meyer to Mr. Penna concerned with the "problems of the liquidation of NAAC". He advised that it was essential that NAAC's assets be held in a liquidating trust in Illinois pending settlement of claims against it. There was a reference to taxation of any capital gain. He had had a number of conversations with Mr. Morgan and Mrs. Holtze "regarding the new corporation". He continued: "With respect to helping Gerry Morgan finance the organisation of the new corporation, the only way I know is to have NAAC pay him termination compensation. There would be two questions. How much to pay, and when to pay; as to how much, he estimated that the book value of NAAC's fixed assets will be £8,545 on January 31st 1978. In addition, he has estimated £2,000 for an initial supply of stationery and printing ... Then there would be legal fees and expenses ... including some amount for drafting and having approved by the Internal Revenue Service, a pension plan ... which takes over the assets of the present plan ... perhaps £1,500 would be sufficient. I would suggest a termination payment of somewhere between £20,000

and \$25,000, which will be taxable to Gerry Morgan at close to a 50 per cent rate and would leave approximately half thereof for him to put into the new corporation in order to acquire NAAC's fixed assets, pay for the new corporation's legal expenses and fees and for the start up ... costs. This leaves open the question of what the new corporation will need in the way of income to operate, the amount of commissions or guaranteed income to provide necessary amounts and when and how the income should be paid. Gerry Morgan tells me it is proposed that he come to London early in December to discuss this latter subject but I am sure all of the above matters will be open for discussion ..."

The document at Vol. 4 page 511 was a memorandum dated 2nd December 1977 and prepared by Mr. Penna on the subject of "NAAC liquidation - substitute company" and addressed by name to some five senior officials in Cape with copies to Dr. Gaze and Mr. Tanner, who was, we were told, a South African director of Egnep. The memorandum began with reference to Mr. Meyer's letter of 23rd November. Mr. Tanner had had discussion on the formation of the new Liechtenstein "invoicing company", and formation was proceeding. In the memorandum Mr. Penna referred to the new corporation as "LC" and to the proposed new Gerry Morgan company as "GMC". The implications which needed to be discussed within Cape included: (i) Mr. Penna's wish, from a legal viewpoint, to mask Cape's identity completely and for the shares to be held by nominees; (ii) LC acting just like Botswana Fibres - no detailed accounts and the US customer will pay direct into the Chase Manhattan central account; (iii) all contracts which GMC arranges for fibre supplies to small US customers (the current NAAC marketing operations will be in the name of the LC. Whether the

large contracts ... will continue direct from South Africa or through the LC depends on whether South African legal advice confirms there is no risk - Mr. Penna would think it logical to maintain the camouflage by contracting these through the LC: (iv) GMC's business will be financed, as with NAAC, from commission on sales, with the commission coming from the LC and not from South Africa; (vii) any risk of the mining company's profits being subjected to US tax. The memorandum closed with the following: "We need to get our thinking straight before Gerry Morgan's visit on December 12th."

By the letter to the Bank of England of 23rd December 1977 Cape sought permission to carry out its plans. Some passages (Vol. 4 page 517) should be noted. Cape were seeking approval for the liquidation of NAAC and the use of foreign currency to start the new Liechtenstein corporation, AMC. The second paragraph read: "In view of the size of the recent settlement (see the settlement of 28th September 1977 described earlier in this judgment) and the probability of this type of litigation continuing far into the future ... we consider it appropriate to liquidate our abovementioned US subsidiary company to avoid having a recognised permanent wholly owned presence in the United States". Later the letter continued: "... Our Group wishes to continue to sell asbestos fibre in the United States after liquidating NAAC ... we are advised that this may best be achieved for the protection of our UK and US assets by using a Liechtenstein company as an intermediary for invoicing purposes ... Liechtenstein has been chosen under advice from our lawyers because it enables the shareholders to be disguised under a bearer share certificate arrangement. The Liechtenstein company will be managed by the management of Capasco, a wholly owned UK subsidiary



of Cape ... and for reasons explained above we wish to disguise this fact from any would be inquirers." After reference to the costs of establishing the Liechtenstein corporation the letter continued: "In reality we will be merchandising the asbestos fibre using the Liechtenstein company to disguise Cape's existence. The Liechtenstein company will pay South Africa for the fibre and in turn will be paid by the United States customers. The price it pays South Africa will be the price it is paid by its US customers. It will be non-profit making and the commission will accrue to the United Kingdom direct from South Africa."

Some of the passages in that letter are, as we understand it, included within those referred to by Scott J. as having "conspiratorial flavour": see paragraph 25 of the primary facts section.

AMC was formed on 25th January 1978 and the new arrangements were ready to operate. CPC sent out an announcement (Vol. 4 page 537) signed by Mr. Morgan as President, and dated January 1978, to the effect that CPC had been appointed as agent to handle "your requirements for Amosite and Crocidolite asbestos fibre for the United States, Canadian and Mexican markets, effective February 1st 1978." The announcement continued: "Although operating as a new organisation, both Jean Holtze and I will endeavour to maintain the same service to our many customers and friends as previously offered by NAAC".

In the section of our judgment dealing with the "corporate veil" argument we have set out the inferences which we draw from the extracts from the evidence, as set out above, both as to the substance of what the officers of Cape were doing and what they were trying to achieve.

"(18) On January 12th 1978 NAAC's Board approved a plan

of complete liquidation for NAAC. Under the plan, the assets of NAAC did not vest in trustees until after May 2nd at the earliest, and at the latest immediately before the filing of articles of dissolution on May 19th 1978.

(19) NAAC continued to trade at least until the end of April from CPC's offices to which its files were transferred."

These two proposed additional findings can be taken together. They are directed to the finding of Scott J. set out in paragraph 11 of the primary facts section. For the plaintiffs reference was made to documents and to evidence, including Vol. 4 pages 533, 536, 551, 603 and 606; to Vol. 5 pages 625, 633, 634-635, 665-666 and 670; and to Mr. Morgan's second Deposition at pages 52 and 90-91. There is, as it seems to us, very little dispute, if any, as to primary fact. The essential submission of Mr. Morison for the plaintiffs was that Scott J. appears to have concluded that, after 31st 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; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings were commenced on dates between 19th April 1978 and 19th November 1979. In this, Mr. Morison submitted that Scott J. was in error. The contentions for the plaintiffs were that NAAC continued to trade until it was formally dissolved on May 19th and that the plan for liquidation contemplated that NAAC's business would only cease upon filing of the statement of intent to dissolve which did not occur until 2nd May 1978. It was contended that the fact that NAAC's trade between January and May 1978 was in anticipation of a liquidation does not alter the character of the business during that period. If, therefore, NAAC is to be regarded as

carrying on Cape's business in the USA, so that Cape itself was present there before 31st January 1978, then it was submitted that the planned liquidation did not affect the position in any way. The plaintiffs accepted that, after 19th May, Cape could not be said to be present in the USA by or through NAAC. For the defendants, Sir Godfray submitted that the findings of Scott J. as to the cessation of NAAC's business were right in detail and in his conclusion. Scott J., at page 68E-H of his judgment, said: "On 1st November 1977 Cape resolved to place NAAC in liquidation and on 31st January 1978 a liquidating trust agreement for NAAC was signed. NAAC executed articles of dissolution on 18th May 1978 and a certificate of dissolution was issued on 19th May 1978. 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. They did so. However, NAAC at that date was owner of a quantity of asbestos held in US warehouses. Over the period 31st January to 18th May 1978 sales of this asbestos took place. These sales were not made in the course of NAAC carrying on business as a going concern. They were made for the purposes of the intended liquidation of NAAC." Further, Sir Godfray relied upon evidence which, he submitted, showed that CPC did start business as from 1st February 1978 both in fact and in accordance with the public announcement to that effect: Vol. 4 page 532. There was, he said, no evidence that asbestos was purchased by NAAC after 31st January 1978 from any source. NAAC terminated the employment of its staff at 31st January 1978: Mr. Morgan Deposition 2 pages 50-54; Mrs. Holtze Deposition 1 page 11. NAAC's furniture and office equipment was sold on 1st February 1978. CPC took a lease of premises at 150 North Wacker Drive on 1st February 1978. There

was, it was said, no evidence that after 31st January 1978 NAAC performed any function or service for Cape or the Cape Group.

It seems to us that there is under these headings no real issue as to any primary fact. The contest is as to the proper conclusions to be reached and they turn upon the answers to questions of law which are determined in this judgment. Very little in the evidence referred to for the plaintiffs needs to be mentioned. The plan of complete liquidation and dissolution, which was accepted by resolution of the Board of NAAC, with the consent of CIOL as sole shareholders, (Vol. 4 page 536) provided that, upon NAAC filing a "statement of intent to dissolve ... , thereupon NAAC should cease to carry on its business, give any appropriate notice to its creditors, proceed to collect its assets, convey and dispose of its properties, pay, satisfy and discharge or provide for payment of its liabilities and obligations, and do all other acts required to liquidate its business ... and should distribute the remainder of its assets ... to the trustees pursuant to a liquidation trust agreement ..." NAAC was then to file "articles of dissolution pursuant to section 80 of the Business Corporation Act of Illinois". The trustees of the liquidating trust were Mr. Meyer and Mr. Brook, both of Lord Bissel and Brook. The trust agreement was between NAAC, CIOL as sole shareholders, and the two trustees. It recited that NAAC wished to distribute as soon as practicable all of the remaining assets of NAAC as a fund to provide for all claims and unpaid liabilities. The company was to transfer to the trustees all of the distributable assets of NAAC remaining in NAAC immediately prior to the filing by NAAC of articles of dissolution with the Secretary of State of Illinois.

The position within NAAC was stated in a memorandum of 1st February 1978 (Vol. 4 page 556) prepared by Mr. Penna. It was there stated that NAAC ceased trading from 31st January 1978; that there was still some \$35,000 worth of stock in the warehouse and, because of tax problems, if either AMC or CPC should purchase that stock, it would be sold on by NAAC over the next months. That would hold up the date of the actual formal winding up until the end of February. AMC, formed on 25th January 1978, was now (the date of the memorandum) the supplier to US customers; "specific powers of attorney were to be drawn up for those authorised to act in various capacities for AMC; and a letter of request to the Companies Registry was to be lodged for consent to exclude reference to AMC on the Cape file.

On 2nd February 1978 Dr. Gaze sent a memorandum to certain officials of the Cape Group: it was said that NAAC had ceased to trade at the end of January 1978; Mr. Morgan had set up his own company, CPC, and "is being appointed agent for sale of blue and Amosite fibre in the USA, Canada and Mexico by AMC". (Vol. 4 page 557.)

On 8th March 1978 (Vol. 4 page 603) Mr. Milwid sent a telex to Mr. Penna which included the following: "Mr. Meyer advises NAAC not yet formally in liquidation. It still has Philadelphia warehouse material. To the extent not sold by mid-April, proposed to write it off and then liquidate for completion by 30th April".

The document at Vol. 4 page 606 included a statement of account for NAAC including figures for the two months ended February 28th 1978. Sales by NAAC totalled \$4406,640, showing a gross profit of \$66,133. The net earnings were \$19,442. The figure for the same period of 1977 showed that the sorts of sales being made in January and February 1978 appear not to be



materially different from those being made in 1977 and, in the absence of other evidence, we infer that they were the same.

By letter of 19th April 1978 (Vol. 5 page 625) Mrs. Holtze, as a servant of CPC, wrote to the Group financial controller of Cape: "Officially, NAAC closed on 31st January 1978. We are keeping the books for the liquidating trustees through April 30th ... We have sent you the January and February statements (i.e. the document at Vol. 4 page 606 mentioned above) ... even though we are performing these functions, we are not supposed to be receiving any mail that would tie us into Cape after the January 31st 1978 deadline: however, Mr. Morgan and myself are still receiving accounting memoranda from you. I believe, for safety sake, these should be stopped immediately".

We need not refer to any more of the evidence under these headings. 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 31st 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. The business of disposing of NAAC's stock continued until the end of April 1978. CPC commenced trading on 1st February 1978. All or most of NAAC's files were transferred to CPC's offices.

"(20) The respondents' only purpose for the incorporation of CPC was a substituted company for the sale of the respondents' asbestos in the USA."

It is not necessary to refer to any evidence under this heading. 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.

"(21) AMC was incorporated on January 25th 1978. Its nominal Director was Dr. Ritter; it had an issued share capital of 50 x 1000 Swiss Frank shares."

There was no issue upon any of these matters as is apparent from evidence and contentions already set out above.

"(22) AMC's bank account was operated by Cape personnel and its address for accounts was that of Cape."

Again, there was no issue upon these facts: see (2)(11) above.

"(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'."

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. The public announcement of January 1978 was considered with the evidence referred to under (14), (15), (16) and (17) above.

"(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. AMC would then pay Casap (not Egnep). CPC wrote to customers and shippers 'on behalf of AMC' and at least on one occasion a customer wrote to AMC and CPC at North Wacker Drive."

For the plaintiffs reference was made to documents at Vol. 5 pages 657 and 682, 646-1 as an example, and 658.

For the defendants it was submitted that, on the evidence, it is clear that AMC's bank account was in London at Chase Manhattan and not at the New York branch, and that the paying in facility in New York was for transferring the money. It was not disputed that, in assisting the performance of contracts by AMC, CPC wrote to customers on behalf of CPC but (and this was common

ground) CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts. It was accepted that AMC paid Casap. The document sent to AMC and CPC at North Wacker Drive was dated 8th March 1978 (Vol. 5 page 658) and was a statement of sums due to Davis Turner & Co., Customs House Brokers and Foreign Freight Forwarders, of New York. The amount due was \$79.50 in respect of customs entry brokerage, and other services, in respect of one container of asbestos. The container was the fourth shipment (see Vol. 5 page 657) against the purchase order placed by Mead Paper with AMC. Nothing of significance can be derived from the form of address used by Davis Turner & Co. on this occasion. The submissions for the defendants with reference to these matters appear to us to be correct.

"(25) In the light of the facts referred to and 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."

The plaintiffs on this matter relied upon the findings of the judge and upon their submissions as to the onus of proof. Scott J. at page 78G referred to the evidence of Mr. Summerfield and continued: "Whether this notice board was in the same state in 1979 when the sale to TCL took place is not known. ... (It was submitted) ... that since the onus was on Cape to satisfy me that it was not present in the United States, it was for Cape to establish that AMC was not present in the United States at any material time. I do not accept this approach. There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices at the time that the Tyler 2 actions were commenced." The suggestion made to us is that, although this

point derived from the evidence of Mr. Summerfield was not pleaded within the particulars of matters relied upon, there must have been persons within the Cape organisation, for example Mr. Pezra, who could have dealt with the matter when the evidence was given at the trial.

In our view, the conclusion of Scott J. on this point was right. There was no evidence to suggest that ANC was an occupant of CPC's offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979 when the Tyler 2 actions were commenced. On 29th June 1979 Cape sold its mining division to TOL (see paragraph 1 of the primary facts section). That sale involved the sale of the shares in Eggep and ANC and much of Capasco's business: see the text of the agreement at Vol. 5 pages 758-887. 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 evident care taken by the officers of Cape/Capasco in matters of corporate form and function (see Scott J.'s finding set out at paragraph 15 of the primary facts section) that any officer of Cape would have caused or permitted the display of ANC as one of the occupants of the offices at North Wacker Drive, or that any officer of CPC would have permitted such a display while ANC was a subsidiary of Cape and a source of commission earnings for CPC. As to the onus of proof as a matter of law, our conclusions have been stated in the section of our judgment dealing with that topic.

# PRIOR COURT RULING



Const: Slade L.J.

Mustill L.J.

Ralph Gibson L.J.

JIMMY WAYNE ADAMS AND OTHERS

v.

CAPE INDUSTRIES PLC AND CAPASCO LTD.

JUDGMENT OF THE COURT

LORD JUSTICE SLADE:

I INTRODUCTION

This is the judgment of the Court, to which all its members have contributed, on an appeal by the plaintiffs in 205 consolidated actions. On 27th July 1988, Scott J. dismissed all their claims. The trial in the Court below lasted some 35 days and the argument before this Court extended over some 17 days. The case raises important points of law and some substantial issues of fact.

Having reserved judgment at the end of the argument on 3rd May last, we subsequently came to the firm conclusion that the appeal must be dismissed and that in the particular circumstances of this case it was right that the parties should be informed of our decision at once, rather than having to wait for some more weeks before we were in a position to give the reasons for our decision.

On 24th May last we accordingly announced that the appeal would be dismissed and that we would give the reasons for our decision in writing at a later date, at which date the Order dismissing the appeal would be drawn up. This we now do.

The plaintiffs in these proceedings are persons, or the personal representatives of persons, in whose favour awards of damages were made by the judgment, dated 12th September 1983, of the Honourable Judge Steger, a United States Federal District Court judge, in the District Court for the Eastern District of Texas, U.S.A. ("the Tyler Court"). The judgment was a default judgment against Cape Industries PLC ("Cape") and Capasco Ltd. ("Capasco"), companies registered in England and the sole defendants in all the actions before this court. They had taken no part in the proceedings in which the judgment was made. The judgment was for the specific sums payable to individual plaintiffs set out in an appendix to the judgment: \$37,000 each for 67 plaintiffs;

\$60,000 each for 31 plaintiffs; \$85,000 each for 47 plaintiffs and \$120,000 each for 61 plaintiffs. The total of the individual awards was \$15.654 m. and the awards were directed to bear interest at 9% from judgment until payment.

The awards were made in respect of claims for damages for personal injuries and consequential loss allegedly suffered by each plaintiff as a result of exposure to asbestos fibres emitted from the premises of a primary asbestos insulation factory in Owentown, Smith County, Texas, which was operated from 1954 to 1962 by Unarco Industries Inc. ("Unarco") and from 1962 to 1972 by Pittsburgh Corning Corporation ("PCC"). The basis of liability of Cape and Capasco was alleged to be negligent acts and omission and breaches of implied and express warranties.

The relationship of Cape and Capasco to the emission of asbestos fibres from the Owentown factory was, in summary, that Cape owned the shares in subsidiary companies in South Africa which had mined the asbestos and in its subsidiary Capasco. Capasco was concerned in organising the sale of asbestos, mined in South Africa, throughout the world to those who wished to use it in various industrial processes. Between 1953 and 1978 when it was dissolved, another subsidiary of Cape, North American Asbestos Corporation ("NAAC") assisted in the marketing of asbestos of the Cape Group in the U.S.A. The plaintiffs' contention was that the defendants had been responsible for the supply of asbestos fibres directly or indirectly to Unarco and PCC without giving proper warning of the dangers thereof.

#### Summary of the Proceedings in the Tyler Court

Different sets of proceedings with reference to claims arising from the processing of asbestos in the Owentown factory had extended over many years. An account of what took place is necessary for

a proper understanding of the course of the present proceedings. The first action was commenced in the Tyler Court in January 1974 and was framed as a "class" action in which the plaintiffs sued "on behalf of themselves and all others similarly situated". A second action was commenced in the same month. They were assigned to Judge Steger. Cape was one of the defendants. Capasco was added as a defendant in 1976. Egnep (Proprietary) Ltd. ("Egnep") a wholly owned South African subsidiary of Cape, engaged in mining asbestos, was also a defendant. All filed motions to quash service on the ground of lack of jurisdiction.

By July 1974 it was apparent that hundreds of claimants, alleging injury caused by the amosite asbestos used in the Owenton plant, were intending to pursue claims. Judge Steger in December 1974 ruled that the actions should not proceed as class actions; that they should be conducted under the Federal "Rules for complex and multi-district litigation"; and that intervention in the proceedings should be allowed freely for those claimants who wished to join. In consequence a large number of claimants were added. In December 1974 a third action with reference to asbestos from the Owentown plant was commenced in the Tyler Court in which the only defendant was the USA. All these proceedings together have been known as the Tyler 1 proceedings. They were separate and distinct from the proceedings in which the appellants, now before this court, obtained their judgment in September 1983.

The motions by Cape, Capasco and Egnep to dismiss the Tyler 1 proceedings as against them on the ground of lack of jurisdiction were dismissed by Judge Steger in August 1977. That dismissal was not final and it was open to the Cape companies to take the jurisdiction point at the trial of the action. They filed answers in which they pleaded to the merits of the claim while maintaining

their objection to jurisdiction.

The number of claimants in the Tyler 1 proceedings had by mid 1977 risen to more than 400 and was still increasing. Trial was set for 12th September 1977. The purpose of Judge Steger in fixing that date included that of causing the parties to consider settlement. On 12th September 1977 settlement discussions proceeded in which Judge Steger took part in a manner which would be unusual, if not impossible, in this country but which was effective and normal under the United States system of civil justice. By 28th September 1977 a settlement figure of \$20 m. was agreed for all the claimants who then numbered 462. Upon agreement of the settlement figure it was ordered that as from 28th September 1977 no further intervention in any of the Tyler 1 actions would be permitted.

The sum of \$20 m. was provided by the defendants in agreed proportions: £5.2 m. by NAAC, Cape and Egner; \$1 m. by Unarco (who had operated the Owentown plant from 1954 to 1962); \$8.05 m. by PCC (who had operated the plant from 1962 to 1972) and its shareholders; and £5.75 m. by the United States government. The settlement was recorded and approved in a final judgment in the Tyler 1 actions dated 5th May 1978. The reference to shareholders in PCC is to Pittsburgh P.G. Industries Inc. ("PPG") and to Corning Glassworks Inc. who had been joined as defendants on the basis that each had taken such part in the management decisions regarding the use of asbestos as to be liable for injuries arising from that use. (J.6E).

Upon prohibition by the order of Judge Steger of further interventions in the Tyler 1 proceedings, new actions were commenced by claimants in what have been called the Tyler 2 proceedings. There were 8 separate actions. They were assigned to Judge Steger. The first was commenced on 19th April 1978 and the last on



19th November 1979. There followed intervention by a very large number of claimants. Cape, Egnep and NAAC were defendants in all the actions. Capasco was a defendant in three only. PCC, FPG, Corning Glassworks Inc. and OCAW, a trade union to which some claimants had belonged, were also defendants in all actions. The United States Government was a defendant in some actions and third party defendant in others.

In December 1981 Judge Steger gave directions by which each claimant was required to provide specified information with reference to his claim "on personal knowledge and attested to under penalty of perjury". As a result of those directions, and of the response, or lack of response, thereto, a large number of claimants had their claims summarily dismissed "without prejudice". The number of plaintiffs left in the Tyler 2 actions was about 206. It is to be assumed that each of those remaining claimants had responded to the order of December 1981 by alleging some physical condition that was capable of having been caused by exposure to asbestos dust and of constituting an injury.

Cape, Capasco and Egnep took the decision to play no part in any of the Tyler 2 actions. They had initially regarded the Tyler 1 actions as having little more than nuisance value. They could not understand how tortious liability to the Owentown workers could be imposed upon the Cape companies merely on the ground that Cape subsidiary companies had mined the asbestos and sold it into the United States of America. They had had expectations of success on their jurisdiction objection. They had, however, succumbed to the pressure for settlement. They were unwilling to be left as the only defendants in a large and expensive jury trial. Having joined in the settlement of the Tyler 1 actions they decided, since they had no assets in the United States of America, to take no part in

the Tyler 2 proceedings; to allow default judgments to be obtained against them; and to defend any actions brought in this country for enforcement of any such judgment on the ground that, under the law of this country, the Tyler Court had no jurisdiction over Cape Capasco or Egnep with reference to the claims of the claimants.

The Settlement Against some Defendants of the Tyler 2 Proceedings

In circumstances which will be considered in more detail later in this judgment, the Tyler 2 proceedings were in February 1983 settled, as against the effective defendants other than the Cape companies, for a sum of \$1.33 m. The figure of \$1.33 m. was based upon an average award of \$10,000 for each of 133 plaintiffs represented in the settlement negotiations. The sum of \$1.33 m. was to be provided as to \$900,000 by PCC, the firm which had operated the Owentown factory from 1962 to 1972, and by PPG, one of the corporations owning shares in PCC; \$130,000 by Corning Glassworks Inc., the other corporation holding shares in PCC; \$150,000 by OCA, and \$250,000 by NAAC. (J.20). Such was the considered value of the claims, as it emerged from the settlement process between the judge and the parties, as against the parties which included those alleged to have had some direct concern in connection with the emission of asbestos particles at or from the Owentown factory. On payment of those sums the settling defendants were to be released from all claims by the 133 plaintiffs.

That settlement was complicated by a "device" devised by Mr. Bailey, who was the attorney negotiating the settlement on behalf of the claimants and which was intended, it was said, to give the claimants the chance of additional recovery against the United States. The form of this device, and the part which it was alleged to have played in the formulation of the terms of the default judgment against the Cape companies, was important to the

allegations of fraud put forward against Mr. Bailey, which, as stated below, were rejected by Scott J. It is necessary to describe what happened to render intelligible some of the matters discussed later in this judgment. The device was described by Scott J. at page 21 of his judgment as follows:

"The device was this: the settlement figure would be expressed in the intended settlement agreement not as \$1.33 m. but instead as \$6.65 m., an average of \$50,000 per plaintiff. The defendants would be obliged to pay only \$1.33 m. The balance of \$5.32 m. (\$40,000 per plaintiff) would be payable only if and to the extent that the defendants' third party claims against the United States succeeded. The prosecution of those claims in the names of the defendants was to be the responsibility of the plaintiffs' counsel, no cost in respect thereof falling on any of the defendants. The \$6.65 m. was a figure proposed by Mr. Bailey. It was not a figure which mattered at all to the defendants since their obligation to pay was limited to the \$1.33 m. They did not bargain about the amount. They simply agreed to Mr. Bailey's proposal which would cost them nothing. Mr. Bailey told me that the figure was based upon what he thought might be awarded against the US government at the suit of the settling defendants. How it could have been supposed that the liability of the US under the third party claims could exceed the \$1.33 m. that the settling defendants, the third party claimants, had agreed to pay the plaintiffs, defeats me."

On 2nd February 1983 Judge Steger approved the settlement of the Tyler 2 proceedings as against the settling defendants, and that approval extended to the fairness and reasonableness of the settlement in the case of any minor claimants. The trial date for the outstanding Tyler 2 claims against the United States was fixed for 20th June 1983. Settlement was discussed. An agreement of compromise dated 15th June 1983 was signed. The United States government contributed nothing directly to the claimants but, in settlement of their claims against the United States, it was agreed that the United States would bear the costs of enforcement of default judgments against Cape, Capasco and Egnep in the United Kingdom or in South Africa. It is in performance of that promise that these proceedings have been pursued in this country.

**EXHIBIT A**  
**(Adams v. Cape**  
**Industries 1990**  
**Ch. 433)**

**PART 3 OF 4**

The default judgment in the Tyler Court, upon which the present proceedings in this country are based, was, as stated above, signed on 12th September 1983. The nature of the process in which that judgment came to be signed will be examined in detail later in this judgment when the issue of natural justice is considered.

The consolidated actions in this country

There is no statutory provision for the registration in this country of the judgments of the Federal or State courts of the United States of America. The plaintiffs, therefore, took proceedings in this country seeking to recover the amount of their judgments from Cape and Capasco. The writ in the lead action of Mr. Jimmy Adams was issued on 1st August 1984 and claimed the amount of his separate award with interest. In law the claims of all the plaintiffs are based upon the principle of common law that subject to certain qualifications, the judgment in personam of a foreign court of competent jurisdiction may be sued on in this country as creating a debt between the parties to it.

It would have been open to the plaintiffs in the first place to sue the defendants in this country rather than the U.S.A. provided that they could have shown that the acts complained of were actionable as a tort both under English law and the law of the place or places where they were committed: (see Boys v Chaplin [1971] 7 A.C. 356). However, they chose to bring the proceedings in the U.S.A. and then to seek to enforce them in this country, where presumably the defendants are believed to have substantial assets.

The issues at the trial before Scott J. and his decision

The circumstances in which our courts will recognise a foreign court as competent to give a judgment in personam capable of



enforcement in this country are stated thus in Dicey & Morris  
The Conflict of Laws (11th Edition) ("Dicey & Morris") Volume 1,  
 pp. 436-437:

"First Case -If the judgment debtor was, at the time the proceedings were instituted, resident (or, perhaps, present) in the foreign country.

Second Case -If the judgment debtor was plaintiff in, or counterclaimed, in the proceedings in the foreign court.

Third Case -If the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case -If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

At the trial the plaintiffs relied on three separate grounds for enforcement of the judgment of the Tyler Court in England, namely: (i) that the defendants had voluntarily appeared in the proceedings in the Tyler Court; (ii) that the defendants had, before the proceedings commenced, agreed to submit to the jurisdiction of the Tyler Court; (iii) that the defendants were resident in the United States of America at the time of the commencement of the plaintiffs' proceedings in the Tyler Court. (A fourth pleaded ground, referred to as "comity or reciprocity", was not in the event relied on at the trial).

Scott J. concluded that the Tyler Court had been competent to give a judgment against Cape and Capasco on none of the three grounds relied on (Dicey and Morris' First, Third and Fourth Cases). The plaintiffs' claim, therefore, failed for this reason, if no other.

However, the learned Judge proceeded to consider certain additional points raised by the defendants by way of defence. The first point arose in this way. According to the case made

for the plaintiffs, the presence (if any) of Cape and Capasco was in the State of Illinois where Cape's subsidiary, NAAC, had its office in Chicago from 1953 to 1978 when it was wound up; and where in the same building from 1978 onwards Continental Products Corporation ("CPC"), also an Illinois corporation but not a subsidiary of Cape, carried out similar marketing functions in the U.S.A. for the sale of asbestos produced by Cape's South African subsidiaries. The plaintiffs did not contend that Cape or Capasco had been present in Texas. In these circumstances, the defendants contended that under English law presence in Illinois did not suffice to give the Tyler Court (a Federal District Court sitting in Texas) jurisdiction to hear a claim in tort against the defendants governed by the law of Texas. This argument, which we will call "the country issue", Scott J. rejected. He said (J. 94C-D) that if he had felt able to conclude that Cape and Capasco were present in Illinois when the Tyler 2 actions were commenced, he would have held that to be a sufficient basis in English law for the exercise by the Tyler Court of jurisdiction over them.

The defendants further contended that, even if any grounds of jurisdiction in the Tyler Court had existed, yet the judgment should not be enforced because (i) the judgment had been obtained by the fraud of Mr. Blake Bailey, the attorney who had represented some of the plaintiffs before Judge Steger in the proceedings upon the making of the default judgment and who had drafted the terms in which the default judgment was finally expressed; and (ii) it would be contrary to the standards of natural justice required by our law, and contrary to the principles of public policy applied by our law, to enforce the judgment having regard to the circumstances in which, and the procedures by which, it came to be made. Scott J. considered these issues again on the

assumption that, contrary to his conclusion, the plaintiffs had made out a ground for jurisdiction in the Tyler Court over Cape and Capasco. He acquitted Mr. Bailey of having had any intention to deceive and of having deceived anyone with reference to the terms and form of the judgment. The allegations that the judgment had been obtained by fraud accordingly failed. However, the defendants succeeded before Scott J. on the natural justice point. The Judge found that the judgment was not such that it could be enforced in the courts of this country. The primary ground of that finding was that the procedure adopted in this particular case by the Judge of the Tyler Court offended against the principles of substantial justice contained in our law.

Scott J. gave his judgment in two parts, which together covered 150 pages of transcript. On 11th June 1988 he announced that the claims of all the plaintiffs would be dismissed and he gave his reasons for rejecting each of the three grounds upon which the plaintiffs had claimed that their judgment in the Tyler Court should be enforced in this country. He also stated in summary form his reasons for rejecting the allegations of fraud against Mr. Bailey and for upholding the contentions of Cape/Capasco on the natural justice issue. On 27th July 1988 he gave his full reasons with reference to the issues of fraud and natural justice. The plaintiffs have invited this Court to take a different view on some parts of the facts in this case, and to apply principles of law which the Judge considered to be inapplicable. Mr. Morison, however, began his submissions by rightly acknowledging the great care expended in, and the great accuracy and clarity of, the judgment of the learned Judge, to which we also pay tribute.

The issues on this appeal

On this appeal the plaintiffs do not seek to challenge those parts of Scott J.'s judgment by which he rejected their submissions based on the alleged voluntary appearance by the defendants in the Tyler Court proceedings or their alleged agreement to submit to the jurisdiction of that Court. The defendants do not challenge the rejection of their allegation of fraud against Mr. Bailey. The plaintiffs do, however, seek to challenge those parts of his judgment by which (a) he rejected their submissions based on the alleged residence or presence of Cape and Capasco in the U.S.A. ("the presence issue"); (b) he accepted the defendants' submissions based on natural justice ("the natural justice issue").

As part of their answer to the plaintiffs' case on presence, the defendants have cross-appealed on what we have described as "the country issue".

To sum up, the three issues which have been argued on this appeal are

- (A) the presence issue;
- (B) the country issue; and
- (C) the natural justice issue.

A decision on any one of these issues in favour of the defendants would strictly render a decision on the other two issues unnecessary. However, we think it right to deal fully with all three issues, not only out of deference to the excellent arguments which have been presented to us on both sides, but also because these issues are important and we suppose that the case could proceed to a higher Court. Furthermore, at least the first two of the three issues are closely connected with one another.

## II THE PRESENCE ISSUE

### The form of the evidence before Scott J. relating to the presence issue

There was put before Scott J. at the hearing a large amount of written material, some of it consisting of the depositions taken in the course of pre-trial discovery in the Tyler 1 and in other proceedings. The plaintiffs put in under the Civil Evidence Act: (i) four depositions of Mr. G. Morgan who had worked for NAAC from 1970 and had been the President (or Managing Director) of NAAC from 1974 until its dissolution in 1978: these depositions were dated 20th May 1975; 19th May 1982; 20th February 1981; and 18th September 1986; (ii) one deposition of Mr. Higham, Managing Director of Cape from the beginning of 1972, made on 4th June 1975; (iii) one deposition of Dr. Gaze, Chief Scientist of the Cape Group, a Director of Capasco since 1961 and later Chairman, and executive director of Cape, and on the Board of NAAC from a date in the late 1960s until July 1975, made on 5th June 1975; (iv) one deposition of Mr. Buckley, Vice-President of PCC, made on 9th September 1975; (v) four depositions of Mrs. J. Holtze, who had started with NAAC on its formation in 1953 as general factotum and as a secretary to Mr. Cryor, then the President of NAAC. Later, Mrs. Holtze in the 1960s, became Secretary and Assistant Treasurer of NAAC until its dissolution, and thereafter Mrs. Holtze continued with CPC. Her depositions were made on 12th April 1979, 7th November 1980, 20th February 1981 and 17th May 1982. There were, in addition to the depositions, many documents including those disclosed by Cape/Capasco in the course of the consolidated actions in this country. The only witness called for Cape and Capasco on the issue of presence was Mr. A.J. Penna, a solicitor who had entered the employment of Cape



in 1973 as Group Solicitor and remained in their employment until June 1985.

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.<sup>7</sup>

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).

14. 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)
15. 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).
16. 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).
17. 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).

18. 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." (J.60D-G).

19. 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).

. 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).

21. 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-E).

22. 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 creditors 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).

23. 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).

24. 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).

25. 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)

26. 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).

27. As to the formation of CPC: see para 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).

28. The agency agreement of 5th June 1978 between AMC and CPC: see para 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).

29. 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).

30. 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).

31. 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).

32. 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).

33. 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).

34. 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).

35. 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).

36. 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).

37. 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 office at the time of the commencement of the Tyler 2 actions in the period 19th April 1978 to 19th November 1979. (J.78-79).

The plaintiffs' challenge to Scott J.'s finding of facts relevant to the "presence" issue: the Appendix to this judgment

The plaintiffs' challenge to the judgment of Scott J. on the "presence" issue is based not so much on the findings of primary fact which were made, but on his supposed failure to find all the material facts and to draw the correct inferences and conclusions which should have been drawn from such facts. In their amended notice of appeal (which we gave leave to amend at the hearing) the plaintiffs included a "Schedule of facts which ought to have been found". This Schedule included 25 paragraphs. For convenience we will set out and deal with the issues of fact raised by this Schedule in an Appendix to this judgment, which in our view would not need to be reported. We observe at this point that, having been taken through the evidence relating to such of these 25 paragraphs as are disputed, we think that the majority of them (though by no means all) are in broad terms borne out by the evidence. However, we do not think that those which are substantiated add very much to the strength of the plaintiffs' case on the presence issue or that they suffice to invalidate the ultimate conclusion of the learned Judge on that issue.

On the basis of the findings of fact made by Scott J. and the further facts which they submit he ought to have found, the

plaintiffs in their amended notice of appeal submit that he was wrong to conclude that

- "(1) NAAC's business was its own business and not the business of Cape or Capasco (J. p. 68C);
- (2) CPC:...was...an independently owned company and carried on its own business (J. pp. 76G-H, 77B);
- (3) As from January 31st 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. pp. 17H and 68F-H);
- (4) Mr. Morgan was in executive control of NAAC's conduct of its business (J. p. 62A-B)."

Two important inferences of fact made by the Judge (numbers (1) and (2)) and two important findings of primary fact (numbers (3) and (4)) are thus challenged on this appeal. We shall consider contention (4) in the section of this judgment dealing with the "single economic unit" argument and in the Appendix. We shall consider the contention that CPC was "not an independently owned company" in the section dealing with the "corporate veil argument". We shall consider contention (3) and the contentions that NAAC's business was not "its own business" and that CPC's business was not "its own business" in the section dealing with what we will call the "agency" argument.

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Some leading authorities relevant to the presence issue

Provision has been made by statute for the enforcement in this country of the judgments of the courts of Commonwealth and foreign countries in a number of different circumstances: (see in particular section 9 of the Administration of Justice Act 1920; section 4 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgments Act 1982). However, none of these statutory provisions applies in the present case. We are concerned solely with the common law (Dicey & Morris "First Case").

So far as appears from the many cases cited to us, neither this court nor the House of Lords has ever been called on to consider the principles which should guide an English court in deciding whether or not a foreign court was competent to assume jurisdiction over a corporation (as opposed to an individual) on a territorial basis; and we have seen only two decisions of courts of first instance in which these principles fell to be considered. We will begin by mentioning some of the leading cases relating to judgments given against individuals.

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. at p. 133:

"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." [Emphasis added]

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 at p. 146 and the judgment of the Court of Queen's Bench in Schibsby v. Westenholz & Others (1870) L.R. 6 Q.B. 139 at p. 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. Smyth, and again repeated by him in Williams v. Jones, 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:

"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 shows, our courts are generally not concerned with those rules.

Under the plaintiffs' case as pleaded, the obligation of the defendants to obey the judgment of the Tyler Court is said to arise because "the defendants were resident in the United States of America at the time the plaintiffs' proceedings were commenced in the Tyler Court". The jurisdiction of the Tyler Court is thus said to be founded on territorial factors.

Nearly 120 years ago in Schibsby v. Westenholz the "residence" of an individual in a foreign country at time of commencement of suit was recognised by the Court of Queen's Bench as conferring jurisdiction on the court of that country to give a judgment in personam against him. In that case the court declined to enforce a judgment of a French tribunal obtained in default of appearance against defendants who at the time when the suit was brought in France were not subjects of nor resident in France. On these facts the court decided (at p. 163) that "there existed nothing in the present case imposing on the defendants any duty to obey the judgment of the French tribunal". However, it regarded certain points as clear on principle (at p. 161):

" If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

In Roussillon v. Roussillon (1880) 14 Ch. D. 351, Fry J., after referring to Schibsby v. Westenholz and in enumerating the cases where the courts of this country regard the judgment of a foreign court as imposing on the defendant the duty to obey it, (at p. 371) similarly referred to one such case as being "where he was resident in the foreign country when the action began".

In Emanuel v. Symon (1908) 1 K.B. 302, this court had to consider whether the fact of possessing property situate in Western Australia or the fact of entering into a contract of partnership in that country was sufficient to give a Western Australian court jurisdiction (in the private international law sense) over a British subject not resident in Western Australia at the start of the action, who had neither appeared to the process nor expressly agreed to submit to the jurisdiction of that court. This question was answered in the negative.

Buckley L.J. said (at p. 309):

" In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case."

After referring to the principles established by (inter alia) Godard v. Gray and Schibsby v. Westenholz, Buckley L.J. observed (at p. 310):

"In other words, the Courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognised in this country and leads to judgment here also."

In agreement with the rest of the court, he considered that the factors relied on by the plaintiff mentioned above did not suffice to impose a duty on the defendant to obey the Western Australian judgment which should be recognised in this country.

We pause to observe that Buckley L.J.'s second, third, fourth and fifth cases mentioned in his statement broadly correspond with Dicey & Morris' respective four cases. It is doubtful whether the first case mentioned in his statement would still be held to give rise to jurisdiction: (see Dicey & Morris Vol. 1 at pp. 447-448 and the cases there cited). With this point we are not concerned.

Residence will much more often than not import physical presence. On the facts of the four cases last mentioned, any distinction between residence and presence would have been irrelevant. However, the brief statements of principle contained in the judgments left at least three questions unanswered. First, does the temporary presence of a defendant in a foreign country render the court of that country competent (in the private international law sense) to assume jurisdiction over him? Secondly, what is the relevant time for the purpose of ascertaining such competence? Thirdly, what is to be regarded as the "country" in the case of a political country, such as the U.S.A. comprising different states which have different rules of law and legal procedure?

We will have to revert to the third question in the section of this judgment dealing with the "country" issue; in the present section we will assume in favour of the plaintiffs that the U.S.A., rather than the state of Texas, is to be regarded as the relevant country. As to the first and second questions, we

think that the most helpful guidance is to be obtained from the decision of the Privy Council in Sirdar Gurdval Singh v. Rajah of Faridkote (1894) A.C. 670 ("Singh"), the decision of Lord Russell of Killowen in Carrick v. Hancock (1895) 2 T.L.R. 59 and the decision of the House of Lords in Employers' Liability Assurance Corporation v. Sedgwick Collins & Co. (1927) A.C. 95 ("Employers' Liability").

In Singh the Privy Council on an appeal from the Chief Court of the Punjab considered the question whether the Courts of British India ought to have enforced against the defendant two judgments obtained against him ex parte in the native state of Faridkote, which for this purpose fell to be regarded as foreign judgments. The defendant had ceased to reside in the state before the actions were brought, and though he had received notice of the proceedings, he had never appeared in either of them or otherwise submitted to the jurisdiction of the Faridkote Court. The Privy Council held the judgments to be a nullity under international law. Lord Selborne, delivering their opinion, said (at pp. 683-684):

" Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('Actor sequitur forum rei'); which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, s. 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur'. 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. .... 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.



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".

The Privy Council held (at p. 684) that the mere fact that the cause of action had arisen in one country did not operate to confer jurisdiction on the courts of that country over a defendant not otherwise subject to it.

In Carrick v. Hancock (1895) 12 T.L.R. 59 the principle of territorial dominion was again referred to. In that case an action was brought upon a monetary judgment obtained in Sweden by an Englishman domiciled in Sweden against a defendant who resided and carried on business at Newcastle. \_\_\_\_\_

\_\_\_\_\_ The writ was served on the defendant during a short visit he was paying to Sweden and he duly appeared to answer it. Though he did not himself remain in Sweden, he was represented throughout the subsequent proceedings. He put in a defence and counterclaim and on three separate occasions appealed to the Court of Appeal at Gota. It may be that in those circumstances, notwithstanding his protestations that he had "only appeared under pressure, duress and compulsion of law", the English court could properly have enforced the foreign judgment on the ground that the defendant had submitted to the jurisdiction of the Swedish court. However, Lord Russell of Killowen did not decide the case in favour of the plaintiff on that ground. After reviewing the facts and arguments, he is reported as saying:

"that the jurisdiction of a Court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its Courts. In his opinion that duty of allegiance was correlative to the protection given by a State to any person within its territory. This

relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually in the territory was wholly immaterial. This being so it was quite clear that under the facts of this case it was properly and lawfully initiated, and all its subsequent proceedings were lawful and valid, and that the Swedish Courts had ample jurisdiction to enforce the plaintiff's claim against the defendant."

In Employers' Liability Lord Parmoor said this (at pp. 114-115):

" My Lords, in the case of actions in personam, in which a writ has been regularly served on foreigners or foreign corporations, when present in this country, and a judgment has been obtained, it seems to be clear, as a general rule, that, under the obligations of that branch of international law, which governs the application of foreign judgments, other countries, whose Governments have been recognised de jure and de facto by the Government of this country, will accept the jurisdiction of the Courts of this country, and regard their judgments as valid. In the case of such actions, it may also be stated negatively that, where a writ cannot be served on a defendant foreigner, or foreign corporation, when in this country, and no submission to jurisdiction is proved, any consequent judgment has no validity in any other country, on the ground that the Courts of this country have no jurisdiction under international law over the person of an absent foreign defendant. In other words, the right to serve a writ, in an action in personam, on a foreign defendant, only becomes effective, as a source of jurisdiction, to be recognised in other countries when, at the date of service, such defendant is within the territorial jurisdiction of the English Courts."

Lord Parmoor was in terms referring to the recognition by foreign countries of judgments given by our courts, but he was speaking generally in terms of private international law and would presumably have regarded the same principles as applicable (*mutatis mutandis*) in a case where our courts were asked to enforce a foreign judgment.

From the three last-mentioned authorities read together, the following principles can, in our judgment, be extracted. First, in determining the jurisdiction of the foreign court in such cases, our court is directing its mind to the

competence or otherwise of the foreign court "to summon the defendant before it and to decide such matters as it has decided": (see Pemberton v. Hughes {1899} 1 Ch. at p. 790 per Lindley M.R.). Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice). From the last sentence of the dictum of Lord Parmoor cited above, and from a dictum of Collins M.R. in Dunlop Pneumatic Tyre Company v. Actiengesellschaft fur Motor Und Motorfahr- Zeugbau Vorm. Cudell & Co. (1902) 1 K.H. 342 at p. 346 it would appear that the date of service of process rather than the date of issue of proceedings is to be treated as "the time of suit" for these purposes. But nothing turns on this point in the present case and we express no final view on it. Thirdly, we accept the submission of Sir Godfray Le Quesne (not accepted by Mr. Marison) that the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress), Some further support for this submission is to be found in dicta of Parke B. in The General Steam Navigation Company v. Guillon (1843) M. & W. 877.

The decision in Carrick v. Hancock has been the subject of criticism in Cheshire & North's Private International Law (11th Edition) at p. 342 ("Cheshire & North"), and in Dicey & Morris where it is said (at pp. 439-440):

"It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned. For the court is not likely to be the forum conveniens, in the

sense of the appropriate court most adequately equipped to deal with the facts or the law. Moreover, the English case referred to above is open to the comment that the jurisdiction of the foreign court might just as well have been based on the defendant's submission as on his presence."

Our own courts regard the temporary presence of a foreigner in England at the time of service of process as justifying the assumption of jurisdiction over him: (see Colt Industries Inc. v. Sarlie (1966) 1 A.E.R. 673 and H.R.H. Maharanee Seethaderi of Baroda v. Wildenstein (1972) 2 Q.B. 283. However, Cheshire & North comment (at p. 342):

"Any analogy based on the jurisdiction of the English courts is not particularly convincing, since the rules on jurisdiction are operated in conjunction with a discretion to stay the proceedings, and the exercise of the discretion is likely to be an issue when jurisdiction is founded on mere presence".

We see the force of these points. They highlight the possible desirability of a further extension of reciprocal arrangements for the enforcement (or non-enforcement) of foreign judgments by Convention. Nevertheless, while the use of the particular phrase "temporary allegiance" may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a / foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary

and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.

In the forefront of his argument on this issue, Mr. Morison submitted that the essential feature of this country's rules relating to the enforcement of foreign judgments is "curial allegiance", which arises "where there is sufficient connection between the debtor and the rendering court at the date of suit so as to make it 'just' to enforce a judgment of that court". The relevance of residence or presence, in his submission, is that it provides the requisite connection. This, in our judgment, is not quite the correct way to look at the matter. While residence or presence will ex hypothesi give rise to a connection, it is the residence or presence, not the connection as such, which gives rise to the jurisdiction of the court. The question whether residence or presence existed at the time of suit is determined by our courts not by reference to concepts of justice or by the exercise of judicial discretion; it is a question of fact which has to be decided with the help of the guidance given by the authorities.

However, none of the authorities so far referred to was concerned with the question of enforcement of a foreign judgment against a corporate body. The residence or presence of a corporation is a difficult concept. A corporation is a legal person but it has no corporeal existence. It can own property. It can by its agents perform acts. It is clear that if an English corporation owns a place of business in a foreign state from which it carries on its business that English corporation is,



under our law, present in that state for the purposes of in personam jurisdiction. Those clear circumstances, however, may be varied in many different ways. The corporation may not own the place of business but have only the use of it or part of it. It may, instead of carrying on its business by its own servants, cause its business to be done by an agent, or through an agent, in the foreign state. The question will then arise whether the commercial acts done are, for the purposes of our law, to be regarded as done within the jurisdiction of the foreign state (a) by the agent in the course of the agent's business or (b) by the corporation itself. Further, and this is of central importance in this case, if the English corporation causes to be formed under the law of the foreign state a separate but wholly-owned corporation to carry out the business or commercial acts which it requires to be done, are those acts within the jurisdiction of the foreign state to be regarded, for the purposes of enforcement of a judgment of the courts of that state, as the acts of the English corporation within that jurisdiction merely by reason that it owns all the shares of its foreign corporation; and, if not, what degree of power of control, or of exercise of control, and/or what other factors will suffice, in our law, to cause the English corporation to be held to be "present" within the jurisdiction of the foreign state?

The earliest case cited to us in which this court had to consider the concept of residence or presence of a corporation in the context of a claim to enforce a foreign judgment was Littauer Glove Corporation v. F.W. Millington (1920) Limited (1928) 44 T.L.R. 746 ("Littauer"). In that case the plaintiffs were manufacturers in the State of New York. The defendant

company, which conducted the business of clothiers' merchants, had its principal place of business in Manchester. It bought from manufacturers in various parts of the world and sold to wholesalers. On March 17th 1922 its managing director, Mr. Millington, arrived in New York on a business visit with a view to seeing samples and making purchases. He stayed in a New York hotel for 4 or 5 nights, where he did some business for his company. Thereafter he visited various other states where he also did business. On April 1st the plaintiffs took out a summons against the defendant company. On April 3rd Mr. Millington returned to New York. On that date, while he was in the sales office in New York of Union Mills Corporation, the defendant's principal U.S. suppliers, he was served with process in the action. He entered no appearance, took no steps in the proceedings and did not submit to the jurisdiction of the American court. On April 4th he sailed for England. The plaintiffs, having in due course obtained judgment against the defendant company in default of appearance in New York, sought to enforce the judgment against it in England. The defendant contended that (under the rules of private international law) the New York court had no jurisdiction to make the order against it. Many authorities were cited to Salter J. From thereport of the argument, it appears to have been common ground that the question turned on the "residence" or otherwise of the defendant company in the State of New York on April 1st 1922 when the proceedings were instituted. Salter J. identified the question for his decision as being whether on 1st April 1922 "the defendant company were resident in the State of New York so as to have the benefit and be under the protection of the laws of that state". The plaintiffs' counsel had

contended that it was not necessary for them to show that the defendant company was carrying on business at a fixed place. In his submission, it was resident in New York because it carried on business there: "the company is resident by its travellers and would be subject to process of the country in which they happened to be". Salter J. rejected this contention, saying this (at p. 747):

" What was meant by saying that a business corporation was resident in a foreign jurisdiction for that purpose? That depended on whether, on the day in question, it was carrying on business in the foreign State so that it could fairly and properly be said to be then resident in that State. If the defendant company were resident in the State of New York on April 1, 1922, where in that State were they resident? Mr. Le Quesne said that they were resident in Broadway, New York, but there must be some place of residence on which one could put a finger. There was no suggestion that the name of the defendant company was in any way displayed at the address in Broadway, or that any letter-paper of the company was used there, or that any business was done there except what the company did with firms in other parts of the United States. If the defendant company were resident in Broadway, it would follow that they were resident wherever Mr. Millington did business. He was, however, nothing more than a commercial traveller on that tour.

If the company had 40 or 50 travellers ranging all over the world, was it to be said that the company were resident wherever the travellers put up at an hotel and took orders? He (his Lordship) did not rely on the expression 'fixed place', but on what was the fair meaning of 'residence'. The inference which he drew from the cases cited was that there must be some carrying on of business at a definite and, to some reasonable extent, permanent place. There was no residence within the jurisdiction on the part of the defendant company, and the action on that point must fail".

Thus, the effect of Salter J.'s decision was that if a foreign judgment is to be enforced in this country against a corporation, it must be shown that at the relevant time (a) the corporation was carrying on business, and (b) it was doing so at a definite and "to some reasonable extent permanent place". This test is significantly different from that applicable in the

case of judgments against individuals. Littauer does not bind this court, but we see no reason to doubt the correctness of this test so far as it goes. It seems to us consistent with authority and to represent a commonsense approach to the question of "presence" in the case of a corporation. The difficulty may be to determine whether it can properly be said in any given case that the corporation is itself carrying on business in the country concerned.

The other, and most recent, leading case relating to the enforcement of foreign judgments against corporations is Vogel v. R.A. Konstamm Ltd. (1973) 1 Q.B. 133 ("Vogel"). There the defendants were a company registered in England. They sold leather skins to the plaintiffs through a Mr. Kornbluth who had an office in Tel Aviv. The defendants had no office of their own in Israel. All the material correspondence was conducted with them in England. The contract of sale was not made in Israel. The court in Israel gave judgment for the plaintiff on a claim for breach of contract and the plaintiff sought to enforce it in England. Ashworth J. dismissed the plaintiff's claim. In his judgment he described the functions of Mr. Kornbluth vis-à-vis the defendants thus (at p. 136):

" Mr Kornbluth's role was that of a person seeking customers who would buy the defendants' goods. For this purpose he was provided with samples for which he paid, and having found a potential customer he would act as a go-between between that person and the defendants. Correspondence would pass between the defendants and Mr. Kornbluth regarding a proposed order and Mr. Kornbluth would be in communication with the customer. If as a result a contract was made it would be made between the defendants and the customer and at no time had Mr. Kornbluth any authority to make a contract on behalf of the defendants."

He said (at p. 136) that:

"in order to succeed the plaintiff here has to persuade me either that the defendants were resident in Israel through Mr. Kornbluth as their agent or that they were carrying on business through him in such a way as to give rise to an implied agreement on their part to submit to the jurisdiction of Israeli courts".

With reference to the first of these two points, he observed (at p. 141):

"As has been said in many cases, residence is a question of fact and when one is dealing with human beings one can normally approach the matter on the footing that residence involves physical residence by the person in question. I keep open the possibility that even in regard to such a person he may be constructively resident in another country although his physical presence is elsewhere. But in the case of a corporation there is broadly speaking no question of physical residence. A corporation or company, if resident in another country, is resident there by way of agents".

He recognised (at p. 141G) that Littauer was distinguishable on the grounds that:

"the person through whom the defendant corporation was said to have residence in the United States was not a person with any fixed or reasonably permanent place".

However, Ashworth J. pointed out (at p. 142) that the defendants in the case before him had no office of their own in Israel, and that "all the material correspondence was conducted with them in England and their connection with the State of Israel was limited ..... to their dealings through Mr. Kornbluth". He continued (at p. 142):

"In examining how far the presence of a representative or agent will, so to speak, impinge on the absent company so as to render that absent company subject to the relevant jurisdiction, I find help to be obtained from cases in which the converse situation has been considered: namely, where the English courts have been invited to allow process to issue to foreign companies on the footing that such foreign companies are 'here'".

He expressed his ultimate conclusion thus (at p. 143):

" I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel: and all that emerges from this case is that there was a man called Kornbluth who sought



customers for them, transmitted correspondence to them and received it from them, had no authority whatever to bind the defendants in any shape of form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time."

On this appeal, in accordance with the approach of the courts in Littauer and Vogel, it has been common ground that the Tyler Court was competent to exercise jurisdiction over Cape and Capasco, if at all, only if they could properly be said to be resident or present in the U.S.A. at the relevant time. (In view of their contentions on the "country" issue, the defendants do not accept that the Tyler Court would have been competent, even if the latter condition had been fulfilled). The words "resident" or "present" or equivalent phrases have been used interchangeably in argument, just as they have been used in the cases; we see no objection to this terminology if it is understood that in the case of a corporation the concept of "residence" or "presence" in any particular place must be no less of a legal fiction than the existence of the corporation itself. The argument has centred on the features which this concept embodies in the case of a corporation.

In considering these features, Salter J. in Littauer and Ashworth J. in Vogel clearly attached great weight to a long line of cases where the English court has considered whether it should allow process to issue to foreign companies as being amenable to its jurisdiction. We will call this line "the Okura line of cases", because a leading example is the decision of this court in Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag (1914) 1 K.H. 715 ("Okura").

The origin of this line requires some brief explanation. After it had been decided in Newby v. Van Oppen (1872)

7 Q.B. 293 that in appropriate circumstances a foreign corporation was capable of being sued in this country, our courts in a number of cases had to consider (a) whether on the facts the foreign corporate defendant was amenable to the jurisdiction of the English court, and if so (b) whether it had been properly served with the process. Most of these cases were concerned with the old Order IX, rule 8 of the Rules of the Supreme Court 1883, which provided:

"In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, treasurer or secretary of such corporation."

The rule contained no such expressions as "reside" or "carry on business". However, as Ackner L.J. pointed out in South India Shipping Corporation Ltd. v. Export-Import Bank of Korea (1985) 1 W.L.R. 585 at p. 589:

"Those expressions were used as convenient tests, to ascertain whether the corporation had a sufficient 'presence' within the jurisdiction, since 'generally', courts exercised jurisdiction only over persons who 'are within the territorial limits of their jurisdiction'. Apart from statute 'a court has no power to exercise jurisdiction over anyone beyond its limits', per Cotton L.J. in In re Busfield (1886) 32 Ch.D. 123, 131, quoted by Lord Scarman in Bethlehem Steel Corporation v. Universal Gas (unreported), 17 July 1978, House of Lords".

Phrases referring to residence or presence within the jurisdiction, or equivalent phrases, have been used by way of shorthand reference to the condition (or one of the conditions) which a foreign corporation has to satisfy if it is to be amenable to the jurisdiction of the English court. And indeed they have been used more or less interchangeably by the courts. One typical example is the phraseology used by the Earl of Halsbury L.C. in La 'Bourgogne' (1899) A.C. 431, who said (at p. 433):

"It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a corporation can be resident - to use the phrase which Mr. Joseph Walton has so constantly referred to, they are 'here'; and, if they are here, they may be served".

Perhaps the most helpful guidance in determining whether a foreign corporation is "here" so as to be amenable to the jurisdiction of our courts is the following passage from the judgment of Buckley L.J. in Okura (1914) 1 K.B. 715 (at pp. 718-719):

"The point to be considered is do the facts shew that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business'?"

It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: (see The Theodohos (1977) 2 LL.L.R. 428 at p. 430 per Brandon J.).

[All the authorities cited to us have been directed, and all the statements later in this judgment will be directed, to trading corporations. In the case of non-trading corporations, the same principles would presumably apply, with the substitution of references to the carrying on of the corporation's

corporate activities for references to the carrying on of business 7.

The court will not find much difficulty in holding that a foreign corporation is present in this country if it has a fixed place of business of its own here (whether as owner, lessee or licensee) and for more than a minimal period of time has carried on its own business from such premises by its servants or agents. Typical examples of such cases (which we will call "branch office cases") which have been cited to us are:

- (1) Newby v. Van Oppen (supra),
- (2) Haggin v. Comptoir d'Escompte (1889) 23 Q.B.D. 519
- (3) La "Bourgogne" (1899) P.1 and (1899) A.C. 431.
- (4) Dunlop Pneumatic Tyre Company Limited v. Aktien-Gesellschaft Fur Motor Und Motorfahrzeugbau Verm Cudell & Co. (1902) 1 K.B. 342 ("Dunlop")

However, the cases also show that it may be permissible to treat a foreign corporation as resident in this country so as to be amenable to the jurisdiction of our courts even if it has no fixed place of business here of its own, provided that an agent acting on its behalf carries on its business (as opposed to his own business) from some fixed place of business in this country. Typical examples of such cases are:

- (1) Saccharia Corporation Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft (1911) 2 K.B. 517 ("Saccharin") where the agent, Blasius, occupied and paid rent for offices in London, and in the words of Fletcher Moulton L.J. (at p. 524) "He carries on business at a fixed place in London as sole agent for the defendants in the United Kingdom, though it is true that he is also agent for another firm. He has power to enter into contracts of sale for the defendants".

(2) Thames and Mersey Marine Insurance Company v. Societa di Navigazione A Vapore Del Lloyd Austilaco (1914) 111 L.T. 97 ("Thames and Mersey"), where Buckley L.J. began his judgment with the following statement of principle (at p. 98):

" If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the jurisdiction by a firm or a person there, without referring each time to the foreign corporation for instructions, and with the result that the foreign corporation has become bound to another party, then the foreign corporation for the present purpose carries on business at that place."

The ultimate problem in such cases may lie in determining whether the business carried on by the agent on behalf of the principal should properly be regarded on the one hand as his own business or on the other hand as the business of the foreign corporation. This must necessitate an investigation both of the activities of the agent and of the relationship between him and the corporation.

In a few of the Okura line of cases which have been cited to us, the court has had to consider the question whether a foreign corporation was carrying on business in this country in a context other than that of the old Order IX, rule 8, but nevertheless the like investigation was necessary. In Grant v. Anderson & Co. (1892) 1 Q.B. 108 the context was the old Order XLVIII, rule 1, which provided that any two or more persons claiming or being liable as co-partners "and carrying on business within the jurisdiction" might sue or be owed in the name of the respective firms .... The defendants, who were a Scottish firm of manufacturers carrying on business in Glasgow, employed an agent in London to obtain orders for them in London. He occupied an office in London, the rent of which he paid himself,



and received a commission if, but only if, he got an order which the firm accepted. In rejecting the contention that the firm carried on business in London, the Court of Appeal attached great weight to the fact that, in the words of Lord Esher M.R. (at p. 116) "when he gets an order he has no power himself to accept it". As he put it (at p. 117): "One might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers".

The case of Sfeir & Co. v. National Insurance Company of New Zealand (1964) 1 LL.L.Rep. 330 concerned a claim covered by section 9(2) of the Administration of Justice Act 1920, of which sub-paragraph (b) precluded the registration of a judgment under the section if the judgment debtor "being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court." The first question Mocatta J. had to determine (see at p. 336) was whether the defendants at any material time carried on business in Ghana. If they did so, this could only have been through a Ghanaian company called Glyndova. He expressed his conclusion on this point thus (at p. 339):

"In my judgment, Mr. Mustill was right in submitting that the decision of the Court at the end of the day after considering the guidance contained in the authorities and their application to the facts of a particular case is one of impression. The conclusion I have reached is that the limited authority possessed by Glyndova to bind the defendants by settlements of claims arising in Ghana under the defendants' policies issued elsewhere, even when coupled with the other matters relied upon which I have recited, did not amount to a carrying on of business by the defendants in Ghana. The business carried on in Ghana by Glyndova was their own and not that of the defendants,"

At least in cases other than branch office cases it is obvious that the activities of the agent by whom the foreign cor-

poration is said to be present in this country and the extent of the authority of that agent will be of particular importance in determining whether or not the corporation is amenable to our courts' jurisdiction. Counsel on both sides have referred us to numerous examples from the Okura line of cases in which a number of different aphorisms have been used to express the relevant test. Buckley L.J. (later Lord Wrenbury) "who made this subject particularly his own" (see The Lalandia (1933) P. 56 at p. 62 per Langton J.) himself used a variety of expressions to state it on the facts of particular cases. In Thames and Mersey (at pp. 98-99) he stated it thus:

"Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation or does the agent in carrying on the agent's own business sell a contract with the foreign corporation? In the former case, the corporation is and in the latter it is not carrying on business at that place."

In Okura itself, Buckley L.J. (at p. 721) summarised his reasons for concluding that the defendant corporation was not present in this country as follows:

"In my opinion the defendants are not 'here' by an alter ego who does business for them here or who is competent to bind them in any way. They are not doing business here by a person but through a person."

At the trial of the present case a number of decisions from the Okura line of authorities were cited to Scott J. He said that Counsel before him had treated the statements of principle to be found in the authorities as applicable equally to both classes of case. While expressing "a little unease" in this context (J.57B) he therefore assumed that the statements of principle applied equally to both classes of case.

Having made this assumption, he extracted the following propositions from the Okura line of cases:

- (1) "The cases establish that jurisdiction on the territorial basis may be taken by an English Court over a foreign company if the foreign company has business premises in England from which or at which its business is carried on". (L50G-51A.)
- (2) "There are, however, cases where residence or presence of a foreign company in England has been held established notwithstanding that the foreign company did not itself own or lease any business premises in England. A feature of these cases has been that the foreign company had a resident English agent who had authority to contract on behalf of and thereby to bind the principal. In these circumstances the presence or residence in England of the agent has been treated as the presence or residence of the foreign company, the principal." (J. 51F-52A.)
- (3) "Trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader: see The Littauer Glove Co. case. The trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract". (J.65G-H).

These conclusions as to the law were of critical importance because the learned judge later found as facts (at p. 68B) that the 150 North Wacker Drive offices were N.A.A.C.'s offices and that N.A.A.C. had no authority to contract on behalf of Cape or Capasco or any other company in the Cape Group. He also found as facts (at p. 77B) that C.P.C., "like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract" and the offices at 150 North Wacker Drive were "CPC's own offices".

Mr. Morison did not challenge these particular findings of fact. However, he submitted that Scott J. erred in law in holding that, in cases other than branch office cases, "the trading must be reinforced by ... a resident agent with power to contract". This conclusion, he pointed out, was based primarily on the learned judge's analysis of the Okura line of cases. However, this line of cases, in Mr Morison's submission, while of some relevance and interest, does not provide the correct

yardstick to be applied in the present context. Contrary to the suggestion made by Ashworth J. in Vogel, he said, those authorities do not represent the situation truly converse to the enforcement of a foreign judgment; the true converse would be a foreign court applying its own conflict rules, adjudicating on the enforcement of an English judgment. Comity, as Blackburn J. pointed out in Schibsby v. Westenholz, is not the basis on which our courts enforce foreign judgments. Furthermore, the circumstances in which an English court will assume jurisdiction over a foreign corporation are closely bound up with our own rules of procedure which are derived largely from statute or statutory instrument and will be amended from time to time.

Pausing at this point, we would not go so far as to say that in every case one can determine whether a foreign court was competent at common law on territorial grounds to give a judgment against a corporation merely by ascertaining whether in like circumstances, and mutatis mutandis, our courts would have assumed jurisdiction over a foreign corporation. Nevertheless, enough has been said to demonstrate that in each case the same broad question falls to be answered by the court under our own common law: "Was the corporation present in the relevant jurisdiction at the relevant time?". In our judgment, Scott J. was fully entitled to derive guidance from the Okura line of cases in deciding whether Cape and Capasco were resident in the U.S.A. at the relevant time.

Mr. Morison went on to submit that in any event the Okura line of cases does not establish a universal rule that in cases where the foreign corporation has no fixed place of business of its own "the trading must be reinforced by ..... a

resident agent with power to contract". There are, it is true, many dicta which suggest that the existence of power in the agent to bind his principal to contracts, without reference back to the principal, is an important indication that the principal himself is carrying on business by the agent. However, it has apparently never been held that this is an essential feature of "presence" in cases where the corporation has no branch office in this country. Many of the reported cases were concerned with selling agencies, particularly in the shipping field, which were usually not exclusive to the principal concerned. It is therefore hardly surprising, Mr Morison submitted, that the courts concentrated on the question of authority to contract, because the agency was in a real sense carrying on its own agency business. In the present case it is not alleged that N.A.A.C. or C.P.C. had power to enter into sales contracts on behalf of Cape or Capasco. However, it is said, they were carrying out a recognised business activity for the exclusive benefit of Cape and Capasco, that is to say, the function of marketing agents. The question whether N.A.A.C. or C.P.C. were properly to be described as doing their own business or that of their principals was not to be determined by asking whether or not they had authority to contract, but by asking whether they had authority to market and were carrying out this function. Mr. Morison invited us to follow the general approach adopted by the court in two Canadian cases, Miller v. B.C. Turf Ltd. (1969) 8 D.L.R. (3d) 383 and Moore v. Mercator Enterprises Ltd. (1978) 90 D.L.R., 3rd Ed. 590.

We would agree with Mr. Morison that the existence of a power in the resident agent to bind the foreign corporation to contracts can be neither an exclusive nor conclusive test of the



residence of the corporation itself. As he pointed out, there are many cases in which the corporation has been held not to be carrying on business at the agency notwithstanding the existence of authority of this kind: (see for example The Princess Clementine (1897) P. 13, The Ialandia (1933) P. 56, The Holstein (1936) 2 A.E.R. 1660). Conversely, we can conceive hypothetical cases in which it might be absurd to regard the test as conclusive. If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on its behalf; the existence of such a requirement would not by itself prevent the corporation from being present in the country concerned and thus from being amenable to the jurisdiction of its courts.

Nevertheless, it is a striking fact that with one possible exception (The World Harmony (1967) P. 341) in none of the many reported English decisions cited to us has it been held that a corporation has been resident in this country unless either (a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country.

We do not find this surprising as a matter of principle. Indubitably a corporation can carry on business in a foreign country by means of an agent. "It may be stated as a

general proposition that whatever a person has power to do himself he may do by means of an agent": (Halsbury's Laws of England (4th Edition) Volume 1, para. 703). However, though the terms "agency" and "agent" have in popular use a number of different meanings, "in law the word 'agency' is used to connote the relationship which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties": (ibid, para. 701). Where the representative of an overseas corporation has general authority to create contractual relations between the corporation and third parties and exercises this authority, there may be little difficulty in applying the maxim "qui facit per alium facit per se". Where no such authority exists, there may be much greater difficulty. We were not persuaded by Mr. Morison's submission, based primarily on a dictum of Verchere J. in Miller v. B.C. Turf Ltd. (supra) (at p. 386), that the capacity (or possible capacity) of N.A.A.C. or C.P.C. to render Cape/Capasco vicariously liable for negligence (and thereby to create relations in tort between them and third parties) is of any weight in deciding whether Cape/Capasco were present in the U.S.A. The mere authority given by Cape/Capasco to N.A.A.C. or C.P.C. to convey a message to a third party could render Cape/Capasco potentially liable in tort to a third party if that message was carelessly transmitted. The existence of such potential liability would go no way towards establishing the presence of Cape/Capasco in the U.S.A.

General Principles derived from the authorities  
relating to the "presence" issue

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 court 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 learned judge (at p. 65G-H of his judgment) 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. at p. 18 per Collins L.J.).

Nevertheless, we agree with the general principle stated thus by Pearson J. in F. & K. Jabbur v. Custodian of Absentee Property for the State of Israel (1953) 2 L. Rep. 760 at p. 776:

" A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval".

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in



the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation.

The plaintiffs' submissions on the "presence" issue

Ordinarily the three propositions set out above will fall to be applied in the same way whether or not the representative is an individual or itself a corporate body. However, the present case has the peculiar feature that one of the representatives in the U.S.A., whose acts are relied on as the carrying on of business by Cape, was itself a subsidiary of Cape - a feature which has not been present in any of the directly relevant authorities cited to us. We will make some further observations on the legal relevance (if any) of this feature when we come to consider the second of Mr. Morison's main submissions on the presence issue.

These three main submissions were substantially as follows:

- (1) Cape and Capasco were present and carrying on business in the U.S.A., namely marketing and selling the Cape Group's asbestos, through N.A.A.C. until May 1978, and through C.P.C. (or A.M.C.) 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 U.S.A. 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).

We find it convenient to deal with the second and third of these arguments before coming to the first.

The "single economic unit" argument

There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities": (The Albazero (1977) A.C. 774 at p. 807 per Roskill L.J.).

It is thus indisputable that each of Cape, Capasco, N.A.A.C. and C.P.C. were in law separate legal entities. Mr. Morison did not go so far as to submit that the very fact of the parent-subsidary relationship existing between Cape and N.A.A.C. rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities.

In The Roberta (1937) 58 LL. Rep. 159 agents acting on behalf of the Dordtsche Company, had signed bills of lading.

It was conceded at the trial that in so doing the agents had made Walford Lines Ltd., the parent company of Dordtsche Company, responsible for the bills of lading. Langton J., who described the concession as properly made, said (at p. 169):

"The Dordtsche Company are a separate entity from Walford Lines Ltd., in name alone, and probably for the purposes of taxation. Walford Lines Ltd. own all the issued shares of the Dordtsche Company, and in fact supply two out of the three directors".

In Harold Holdsworth & Co. (Wakefield) Ltd. v.

Caddies (1955) 1 W.L.R. 352 ("Holdsworth") the question arose whether the respondent company, which had entered into a service agreement with Mr. Caddies under which he was appointed managing director of the company, was entitled to require him to devote his whole time to duties in relation to subsidiaries of the company. It was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that therefore the agreement could not be construed as entitling them to assign any such duties to Mr. Caddies. Lord Reid, in agreement with the majority, rejected this argument, saying (at p. 367):

"My Lords, in my judgment this is too technical an argument. This is an agreement in re mercatoria and it must be construed in light of the facts and realities of the situation."

In Scottish Co-operative Wholesale Society Ltd. v.

Meyer (1959) A.C. 324 ("Scottish Co-operative") the respondent based his complaint on section 210 of the Companies Act 1948, which provided that "any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) .... may make

application to the court by petition for an order under this section". The appellant society had formed a subsidiary company, of which the respondent was a member. It was submitted on behalf of the Society that even if it had acted in an oppressive manner, yet it had not conducted the affairs of the company in an oppressive manner within the meaning of the section. The House of Lords unanimously rejected this submission. Lord Simonds said (at p. 342):

"My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former."

A little later (at p. 343) Lord Simonds expressly approved words which had been used by Lord President Cooper on the first hearing of the case:

"In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view".

In D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council (1976) 1 W.L.R. 852 ("the D.H.N. case") a group of three companies, "D.H.N.", "Bronze" and "Transport", all in voluntary liquidation at the relevant time, were seeking compensation under the Land Compensation Act 1961 following a compulsory purchase made by the respondent Council. D.H.N. held all the shares in Bronze and Transport. The business of the group was owned by D.H.N. The land was owned by Bronze. The vehicles were owned by Transport. The Lands Tribunal held that D.H.N. were licensees of Bronze and had no claim to compensation for disturbance beyond that which could be allowed under section 20 of the

Compulsory Purchase Act 1965, which was negligible. This court allowed D.H.N.'s appeal on three separate grounds. We are concerned with only one of them, which Lord Denning N.R, explained (at p. 860) as follows:

" Third, lifting the corporate veil. A further very interesting point was raised by Mr. Dobry on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet, and profit and loss account. They are treated as one concern. Professor Gower in *Modern Company Law*, 3rd ed. (1969), p. 216 says:

'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'.

This is especially the case when a parent company owns all the shares of the subsidiaries - so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies (1955) 1 W.L.R 352. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one. So D.H.N. are entitled to claim compensation accordingly. If was not necessary for them to go through a conveyancing device to get it".

Goff L.J. (at p. 861) said:

"... this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned, further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely, whether the owners of this business have been disturbed in their possession and enjoyment of it".

In Revlon Inc. v. Cripps & Lee Ltd. (1980) F.S.R. 85 the question (among many other questions) arose as to whether the



goods in question were "connected in the course of trade with the proprietor .... of the trade mark" within the meaning of section 4(3) of the Trade Marks Act 1938". The proprietor of the trade mark was Revlon Suisse S.A., a subsidiary of Revlon Inc. Buckley L.J., in the course of deciding that the goods were connected in the course of trade with Revlon Suisse S.A., said this (at p. 105):

"Since, however, all the relevant companies are wholly owned subsidiaries of Revlon, it is undoubted that the mark is, albeit remotely, an asset of Revlon and its exploitation is for the ultimate benefit of no one but Revlon. It therefore seems to me to be realistic and wholly justifiable to regard Suisse as holding the mark at the disposal of Revlon and for Revlon's benefit. The mark is an asset of the Revlon Group of companies regarded as a whole, which all belongs to Revlon. This view does not, in my opinion, constitute what is sometimes called 'piercing the corporate veil'; it recognises the legal and factual position resulting from the mutual relationship of the various companies,"

Principally, in reliance on those authorities and the case next to be mentioned, Mr. Morison submitted that in deciding whether a company had rendered itself subject to the jurisdiction of a foreign court it is entirely reasonable to approach the question by reference to "commercial reality". The risk of litigation in a foreign court, in his submission, is part of the price which those who conduct extensive business activities within the territorial jurisdiction of that court properly have to pay. He invited us to follow the approach of Advocate-General Warner (as he then was) in Institute Chemioterapico Italiano SpA & Commercial Solvents Corporation v. E.C. Commission (1974) C.M.L.R. 309 ("Commercial Solvents") when considering whether a parent company and subsidiary were separate "undertakings" within the meaning of Articles 85 and 86 of the Treaty of Rome. He said (at pp. 319-320):

" One starts to my mind from this, that neither Article 85 nor Article 86 anywhere refers to 'persons'. In both Articles the relevant prohibitions are directed to 'undertakings', a much wider and looser concept. This indeed is what one would expect, because it would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of Salomon v. Salomon & Co. Ltd. - i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of conveyancing, of contracts and of liability for tort. But to export it blindly into branches of the law where it has little relevance, could, in my opinion, serve only to divorce the law from reality.

Suppose, my Lords, that CSC had traded in Italy through a branch office. There could have been no doubt then that it was amenable to the jurisdiction of the Commission and of this Court. Could it have made any difference if CSC has chosen to trade in Italy through a wholly owned subsidiary? The difference would have been one only of legal form, not of reality. Why then should it make any difference that it chose to trade in Italy through a subsidiary that it controlled by a 51 per cent. majority rather than by a 100 per cent. majority? What matters in this field, in my view, is control".

Advocate-General Warner (at p. 321) said:

- "(1) that there is a presumption that a subsidiary will act in accordance with the wishes of its parent - because according to common experience subsidiaries generally do so act;
- (2) that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Article 85 and 86 of the EEC Treaty."

We have some sympathy with Mr. Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one. Mr. Morison referred us to Bulova Water Company Inc. v. Haltori & Co. 508 F. Supp. 1322 (1981), where the United States District Court held that it had jurisdiction over a Japanese

corporation, which was expanding into a new market by setting up subsidiaries and dealing with competition, both on the theory that the corporation was "doing business" in New York and under the New York "long-arm statute". In the course of his judgment, Chief Justice Weinstein said (at p. 1342):

"these subsidiaries almost by definition are doing for their parent what their parent would otherwise have to do on its own".

It is not surprising that in many cases such as Holdsworth, Scottish Co-operative, Revlon and Commercial Solvents the wording of a particular statute or contract has been held to justify the treatment of parent and subsidiary as one unit, at least for some purposes. The relevant parts of the judgments in D.H.N. must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in Woolfson v. Strathclyde Regional Council ("Woolfson") (1978) S.L.T. 2, 159 in a passage which will be quoted below.

Mr. Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. Salomon merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the

general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms. In Firestone v. Llewellyn (1957) 1 W.L.R. 464 (which was referred to by Scott J.) the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below the Judge (J.79) refused an invitation to infer that there existed an agency agreement between Cape and N.A.A.C. comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of Salomon v. Salomon merely because it considers it just so to do.

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 U.S.A. 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.

The plaintiffs further submitted in their notice of appeal that N.A.A.C. "did not deal and was not permitted to deal with Egnep or Casap, but had to go through Cape or Capasco." It seems clear that N.A.A.C., as principal, made direct purchases of raw asbestos from Egnep. On the balance of probabilities, we accept the plaintiffs' submission that it made similar direct purchases from Casap: (see our observations under item (4) of the Appendix). In referring to the absence of dealing with Egnep or Casap, the plaintiffs were, we understand, intending to submit that as a matter of Group policy, which Cape could and did enforce by its power of control over the boards of Egnep, Capasco and N.A.A.C., the transmission of information and orders to or from customers had to be effected and was effected by N.A.A.C. through Capasco. We accept that submission. We also accept that the matters referred to in this paragraph lend some broad support to the submission that Cape ran a single integrated mining division with little regard to corporate formalities as between



members of the Group. However, there has been no challenge to the judge's finding that the corporate forms applicable to N.A.A.C. as a separate legal entity were observed.

As to the plaintiffs' other factual submissions in this context we will deal with the purpose of N.A.A.C.'s creation and existence in considering the "agency" argument. As to the relationship between Cape and N.A.A.C., 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 over the general policy of the subsidiary. The plaintiffs, however, submitted that Cape's control extended to the day-to-day running of N.A.A.C. They challenged the finding of fact made by Scott J. that "Mr. Morgan was in executive control of N.A.A.C.'s conduct of its business". We explore further the facts relative to this finding and to the extent of Cape's control over N.A.A.C.'s activities in the Appendix to this judgment under items (11), (12) and (13). 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 N.A.A.C. as is common in the case of any parent-subsidary relationship - to a large extent through Dr. Gaze. In particular, Cape would indicate to N.A.A.C. the maximum level of expenditure which 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 N.A.A.C. to the policy requirements of Cape as the controlling shareholders of N.A.A.C. Within these policy limits, such as Cape's requirement that N.A.A.C.'s orders for asbestos for sale by N.A.A.C. in the U.S.A. be placed through Capasco on behalf of Egnep and Casap, the day-to-day running of N.A.A.C. was left to him. There is no challenge to the

judge's findings that -

- (a) the corporate financial control exercised by Cape over N.A.A.C. 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 (J. 61);
- (b) the annual accounts of N.A.A.C. were drawn on the footing that N.A.A.C.'s business was its own business and there was nothing to suggest that the accounts were drawn on a false footing (J. 70).

In the light of the set-up and operations of the Cape Group and of the relationship between Cape/Capasco and N.A.A.C. we see the attraction of the approach adopted by Lord Denning M.R. in the D.H.N. case (1976) 1 W.L.R. at p. 860 which Mr. Morison urged us to adopt:

"This group is virtually the same as a partnership in which all the three partners are companies,"

In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in Bank of Tokyo Ltd. v. Karoon (1987) A.C. 45 (at p. 64) are apposite:

"(Counsel) suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically he said they were one. But we are concerned not with economics but with law. The distinction between the two is in law fundamental and cannot be bridged".

As to C.P.C., in Mr. Morison's submission, the replacement of N.A.A.C. by C.P.C. was simply a substitute arrangement. The creation of C.P.C. was effected and paid for by Cape so that it could perform the same functions on behalf of Cape as N.A.A.C. had

previously performed. C.P.C., on behalf of A.M.C. (and thus Cape) made payment arrangements with third parties and received moneys for A.M.C. (Cape). While Mr. Morgan held all the shares in C.P.C. for his own benefit, the rights of pre-emption reserved to A.M.C. by the agency agreement of 5th June 1978 left him with little substantial financial interest in C.P.C.'s business, save for the office furniture and a right to an account which would be of little value; effectively, it was submitted, C.P.C.'s business was owned by A.M.C. (Cape).

Our reasons for rejecting the "single economic unit" argument in relation to N.A.A.C. apply a fortiori in relation to C.P.C., because C.P.C. was not Cape's subsidiary and its shares were held by Mr. Morgan for his own benefit. We give our reasons in the next section of this judgment for agreeing with the judge that C.P.C. was an independently owned company.

The "corporate veil" point

Quite apart from cases where statute or contract permits a broad interpretation to be given to references to members of a group of companies, there is one well-recognised exception to the rule prohibiting the piercing of "the corporate veil". Lord Keith of Kinkel referred to this principle in Woolfson v. Strathclyde Regional Council (1978) S.L.T. 159 ("Woolfson") in the course of a speech with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed. With reference to the D.H.N. decision, he said (at p. 161):

"I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."

The only allegation of a façade in the plaintiffs' pleadings was

that the formation and use of C.P.C. and A.M.C. in the "alternative marketing arrangements of 1978 were a device or sham or cloak for grave impropriety on the part of Cape or Capasco, namely to ostensibly remove their assets from the U.S.A. to avoid liability for asbestos claims whilst at the same time continuing to trade in asbestos there". In their notice of appeal (paragraph 2 (b)) the plaintiffs referred to their contention made at the trial that C.P.C. "was set up to replace N.A.A.C. in such a way as to disguise the defendants' continued involvement in the marketing of the Group's asbestos in the U.S.A."

Scott J. more or less accepted this contention. He found as a fact that "the arrangements made regarding N.A.A.C., A.M.C. and C.P.C. were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the United States while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries".

However, he went on to say (at p. 71B-D):

"But the question whether C.P.C.'s presence in Illinois can, for jurisdiction purposes, be treated as Cape's presence, must, in my view, be answered by considering the nature of the arrangements that were implemented, not the motive behind them. The documentary evidence I have seen has made clear that the senior management of Cape, including Mr. Penna, were very anxious that Cape's connections with C.P.C. and with A.M.C. should not become publicly known. Some of the letters and memoranda have a somewhat conspiratorial flavour to them. But this too, although interesting to notice, is not, in my opinion, relevant to the main question."

If and so far as the learned 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, as Mr. Morison 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. The decision in Jones v. Lipman (1962) 1 W.L.R. 832 referred to below was one case where the proven motive of the individual defendant clearly had a significant effect on the decision of Russell J.

The judge's finding of fact quoted above as to the motives of Cape behind the new arrangements is accepted (no doubt welcomed) by the plaintiffs, so far as it goes. They submit, rightly in our judgment, that any such motives are relevant to the "corporate veil" point. They further submit that the learned judge

- (a) erred in concluding that C.P.C. was an "independently owned company"; and
- (b) failed to make a number of findings of fact which are relevant in the context of the "corporate veil" point.

Mr. Morison has taken us through the arrangements which led to the extinction of N.A.A.C. and the emergence of A.N.C. and C.P.C. with care and in considerable detail. The additional facts which the appellants say the learned judge ought to have found, and which are set out in paragraphs (16) to (25) of the Appendix to this judgment, all relate to these arrangements. It is true that, as the judge said, some of the letters and memoranda have a "somewhat conspiratorial flavour to them". 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.

On analysis, much of the new material does little more than amply support the judge's finding quoted above as to the purpose of the composite arrangement. In this court Mr.



Morison made it clear that the plaintiffs were not alleging any unlawful purpose or impropriety on the part of Cape in the sense of any intention to deceive or to do any unlawful act, either in Illinois or in this country. It was, however, asserted for the plaintiffs that A.M.C. and C.P.C. together constituted a façade which concealed the real activities of Cape. We understand that to mean that the purpose of Cape was to conceal, so far as it lawfully could having regard to the requirements of the law in Illinois and this country, any connection of Cape with A.M.C. or C.P.C.

Before expressing our own views as to Cape's purpose, we will state our conclusions as to Mr. Morgan's position. It is, in our judgment, right to infer, substantially as submitted by Mr. Morison, that the assistance derived from the presence of Mr. Morgan in Illinois, undertaking the task through C.P.C. of marketing agent for the Cape subsidiaries in the United States, was regarded as being at least of great importance to the general purposes of the Cape Group, and possibly essential for those purposes, because, if it was not so regarded, there is no apparent reason why Cape should assume the cost and such risk as might have arisen from setting up C.P.C. Sir Godfray, 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 serving staff of N.A.A.C. Cape also, for its own purposes, wanted Mr. Morgan and Mrs. Holtze to continue with the work previously done by them for N.A.A.C. If Mr. Morgan decided to take on the task

of providing services to the subsidiaries of the Cape Group through C.P.C., on the terms available to him as owner of the shares in C.P.C., Cape would get the benefit of his knowledge and experience as the person in charge of C.P.C. Nothing in the material to which our attention was drawn under these headings, however, causes us to doubt the correctness of Scott J.'s conclusion that the shares in C.P.C. belonged both at law and in equity to Mr. Morgan. It is clear that Cape intended C.P.C. 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, C.P.C. was Mr. Morgan's company. We therefore reject the challenge to the judge's finding that C.P.C. was an independently owned company.

As to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C., we think that the extracts from the evidence set out in the Appendix to this judgment (particularly under item (17) ), sufficiently reveal both 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) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for U.S. taxation or subject to the jurisdiction of the U.S. courts, whether State or Federal, and the risk of any default judgment by such a court being held to be

enforceable in this country. Inference (a) was also made by the learned judge. Inference (b) is our own addition.

The question of law which we now have to consider is whether the arrangements regarding N.A.A.C., A.M.C. and D.P.C. made by Cape with the intentions which we have inferred constituted a facade such as to justify the lifting of the corporate veil so as that C.P.C.'s and A.M.C.'s presence in the U.S.A. should be treated as the presence of Cape/Capasco for this reason if no other.

In Merchandise Transport Ltd. v. British Transport Commission (1962) 2 Q.B. 173 Danckwerts L.J. (at p. 206-207) referred to certain authorities as showing that

"where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance."

The correctness of this statement has not been disputed, but it does not assist in determining whether "the character of a company or the nature of the persons who control it" will be relevant in the present case.

Rather greater assistance on this point is to be found in Jones v. Lipman (1962) 1 W.L.R. 832. In that case the first defendant had agreed to sell to the plaintiffs some land. Pending completion the first defendant sold and transferred the land to the defendant company. The evidence showed that this company was at all material times under the complete control of the first defendant. It also showed that the acquisition by him of the company and the transfer of the land to the company had been carried through solely for the purpose of defeating the

plaintiff's right to specific performance (see at p. 836).

Russell J. made an order for specific performance against both defendants. He held that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed. As to the defendant company, he described it (at p. 836) as being "the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity". Following Jones v. Lipman, we agree with Mr. Morison that, contrary to the learned judge's view, where a façade is alleged, the motive of the perpetrator may be highly material.

Other cases were cited to us in which the court, on interlocutory applications, has to a greater or lesser extent been prepared to look behind the corporate veil and have regard to the persons ultimately interested in a company under a group's company structure. For example, it did so in exercising its Mareva injunction in X Bank Ltd. v. G. (1985) Law Society's Gazette p. 2016 and in considering stays of execution in Canada Enterprises Corporation Ltd. v. MacNab Distillers Ltd. (1987) 1 W.L.R. 813 and Burnet v. Francis Industries PLC (1987) 1 W.L.R. 802. The two last-mentioned decisions contain no statement of relevant principle and the report of X. Bank Ltd. v. G. is so brief that we think it would not be safe to rely on it for present purposes.

We were referred to certain broad dicta of Lord Denning M.R. in Wallersteiner v. Moir (1974) 1 W.L.R. 991 at p. 1013, and in Littlewoods Mail Order Ltd. v. I.P.C. (1969) 1 W.L.R. 1241 at p. 1254. In both these cases he expressed his willingness to pull aside the corporate veil, saying in the latter:

" I decline to treat the [subsidiary] as a separate and independent legal entity ..... The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is - the wholly-owned subsidiary of Littlewoods. It is the creature, the puppet, of Littlewoods, in point of fact: and it should be so regarded in point of law."

However, in Wallersteiner v. Moir (supra) Buckley L.J. at p. 127 and Scarman L.J. (at p. 1032) expressly declined to tear away the corporate veil. In Littlewoods, Sachs L.J. (at p. 1255) expressly dissociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminski L.J. refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning M.R.

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a facade within the meaning of that word as used by the House of Lords in Woolfsen. We will not attempt a comprehensive definition of those principles.

Our conclusions are these. In our judgment, the interposition of A.M.C. between Cape and C.P.C. was clearly a facade in the relevant sense. Scott J. (J. pp. 71H-72A) said it seemed clear that A.M.C. was "no more than a corporate name" and that he would expect to find, if all the relevant documents were available, that "A.M.C. acted through employees or officers of either Casap or Egnep". He rejected (p. 76A) Mr. Morgan's evidence that he understood A.M.C. to be an independent South African trading company, and was satisfied that he knew very well



that it was a "creature of Cape". "The seller in C.P.C.'s time was, nominally, A.M.C. but in reality still, I think, Egnep or Casap": (p. 77A). In our judgment, however, the revelation of A.M.C. as the creature of Cape does not suffice to enable the plaintiffs to show the presence of Cape/Capasco in the U.S.A., since on the judge's undisputed findings, A.M.C. was not in reality carrying on any business in the U.S.A.

The relationship between Cape/Capasco and C.P.C. is the crucial factor, since C.P.C. was undoubtedly carrying on business in the U.S.A. We have already indicated our acceptance of the judge's findings that C.P.C. was a company independently owned by Mr. Morgan and that 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 C.P.C. involved a façade which entitles the court to pierce the corporate veil between C.P.C. 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 (as we infer), 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 U.S. taxation or subject to the jurisdiction of the U.S. courts and the risk of any default judgment by such a court being held to be enforceable in this country?

We think not. Mr. Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed

on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the U.S.A. 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 U.S.A., 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. Salomon in the

ordinary way.

The plaintiffs submitted (para. 7 of their notice of appeal) that the motive of the defendants in setting up the arrangements regarding N.A.A.C., A.M.C. and C.P.C. as revealed in the documentary evidence were "consistent only with an acceptance by Cape that they were present in the United States through N.A.A.C. and C.P.C." We think there is no substance in this point. These arrangements at most indicated an apprehension on the part of the defendants that they might be held to be so present and a desire that they should not be. They involved no admission or acceptance of such presence.

We reject the "corporate veil" argument.

The "agency argument" in relation to N.A.A.C.

We now proceed to consider the agency argument in relation to N.A.A.C. on the footing, which we consider to be the correct one, that N.A.A.C. must for all relevant purposes be regarded as a legal entity separate from Cape/Capasco. In an earlier section of this judgment we summarised three propositions which we derived from the authorities relating to the "presence" of an overseas corporation. There we stated that, save in a "branch office" case (which the instant case is not), the English court will be likely to treat an overseas trading corporation as present within the jurisdiction of the courts of another country only if 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. In the present case N.A.A.C., as representative of Cape/Capasco, unquestionably carried on business at a

fixed place of business in the U.S.A., 150 North Wacker Drive, for a substantial period of time. So no difficulty arises on that score. The crucial question is whether it can fairly be said that Cape's business has been transacted by N.A.A.C. at or from 150 North Wacker Drive. The judge's answer to it was that "N.A.A.C.'s business was its own business and not the business of Cape or Capasco": (J. 68C). The plaintiffs challenge the correctness of this answer to the question.

This question, as we said earlier, will necessitate an investigation of the functions which N.A.A.C. performed and all aspects of the relationship between it and Cape.

The factual material which we have principally in mind in considering whether Cape's business was being transacted at or from 150 North Wacker Drive is to be found in the section of this judgment headed "The facts on 'presence' as found by Scott J.", and in our observations on items (1) to (13) in the Appendix to this judgment. We summarise below what we consider the most material facts in context, having regard to the list of potentially relevant factors set out in an earlier section of our judgment.

We accept that the intention of Cape in procuring the incorporation of N.A.A.C. in the State of Illinois was that N.A.A.C. should assist in the marketing of asbestos in the U.S.A. upon sales by Egnep or Casap to purchasers in the U.S.A. and that it was to be the marketing agent of the Cape Group in the U.S.A. Nevertheless, in our judgment, it is indisputable that at very least a substantial part of the business carried on by N.A.A.C. at all material times was in every sense its own business. In these contexts we draw attention in particular to

the following facts:

(1) Though we were referred to no evidence relating to the original acquisition by N.A.A.C. of its premises at 150 North Wacker Drive, we know that N.A.A.C. itself was the lessee of the premises and paid the rent for them. Furthermore, it owned the office furniture and employed <sup>there</sup> its own staff of 4 persons for whom it ran its own pension scheme.

(2) From time to time it conducted the following activities as principal on its own account:-

(a) it bought asbestos from U.S. Government Stocks or from Egnep or Casap and sold it to U.S. customers, such purchases representing about 25% of N.A.A.C.'s business in terms of tonnage;

(b) it imported asbestos goods from Japan and sold them to U.S. customers.

(While we accept that the purchase by N.A.A.C. of asbestos goods was subordinate to its business with or for Cape's subsidiaries, we do not accept the plaintiffs' submission that such sales were trivial, having regard to the turnover of N.A.A.C: (see our observations under item (5) in the Appendix.)

(3) For storing the asbestos which it had purchased from U.S. Government stocks or Egnep or Casap, N.A.A.C. rented in its own name and paid for warehousing facilities.

(4) N.A.A.C. earned profits and paid U.S. taxes thereon.

(5) N.A.A.C.'s creditors and debtors were its own (not those of Cape.)

(6) The return to Cape as N.A.A.C.'s shareholder took the form of an annual dividend passed by a resolution of N.A.A.C.'s



Board of Directors.

(7) In other respects also the corporate forms applicable to N.A.A.C. as a separate entity were observed.

In the face of these facts, now unchallenged, it is in our judgment clear beyond argument that N.A.A.C. 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. What, then, were these functions? As we see the position from the findings of the judge and the evidence put before us, its functions were to assist in the marketing of asbestos in the U.S.A. upon sales by Egnepe or Casap and generally to assist and encourage sales in the U.S.A. of asbestos of the Cape Group. It acted as the channel of communication between Cape/Capasco and U.S. customers, such as P.C.C. It organised and arranged the performance of contracts between U.S. customers and Egnepe. It had a co-ordinating role, particularly in arranging delivery. The U.S. customer would specify to N.A.A.C. from time to time the quantity of asbestos which it wished to purchase and the time when it desired delivery to be made. This information would be conveyed through N.A.A.C. to Casap and Egnepe. Shipping arrangements and delivery dates would be arranged by Casap or Egnepe and communicated to the U.S. customers via N.A.A.C. N.A.A.C. would receive documents and pass them on to the customers. It also received requests and complaints which it would normally pass on to Caspasco. Generally it assisted in "nursing" the Group's customers for asbestos and ensuring that they were satisfied. For its services N.A.A.C. was remunerated by way of a commission paid to it by Casap on sales effected by Egnepe or Casap. There was no evidence that

N.A.A.C. reserved any part of its office premises or any part of its staff exclusively for performing its agency functions.

Our further findings as to the functions which N.A.A.C. performed and as to its relationship between N.A.A.C. and Cape are to be found set out in the Appendix under items (1) to (3). We bear in mind particularly the submissions contained in item (9) that (i) when corresponding with U.S. customers, Cape referred to N.A.A.C. as "our Chicago office" and N.A.A.C. referred to Cape and Capasco as "our London office"; (ii) N.A.A.C. held itself out to a large U.S. customer as being part of the Cape selling organisation, and (iii) N.A.A.C. was treated by the major customer "as the channel between them and Cape and Capasco". However, in the Appendix we give our reasons for concluding that the matters shown in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to N.A.A.C.'s role and functions.

There is no doubt that the services rendered by N.A.A.C. in acting as intermediary in respect of contracts between the U.S. customers and Egnef 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 U.S.A. Nevertheless, for all the closeness of the relationship between Cape/Capasco and N.A.A.C., strictly defined limits were imposed on the functions which N.A.A.C. were authorised to carry out or did carry out as their representative. First, N.A.A.C. had no general authority to bind Cape/Capasco to any contractual obligation. Secondly, as Mr. Morison expressly accepted, there is no evidence that N.A.A.C., 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. This significant factor renders the arguments in favour of "presence", at least in some respects, even less strong than they were in cases such as The Lalandia (1933) P. 56 and The Holstein (1936) 2 A.E.R. 1660 where the argument failed. Having regard to the legal principles stated earlier in this judgment, and looking at the facts of the case overall, our conclusion is that the judge was right to hold that the business carried on by N.A.A.C. was exclusively its own business, not the business of Cape or Capasco, and that Cape and Capasco were not present within the U.S.A. through N.A.A.C. at any material time. We see no sufficient grounds for disturbing this finding of fact.

Under this section of our judgment we should mention one further point. The plaintiffs challenged the judge's finding that as from 31st January 1978, N.A.A.C. 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. The object of the challenge was to refute the suggestion that Cape could not be regarded as present in the U.S.A. through N.A.A.C. during the period between 31st January 1978 and N.A.A.C.'s formal dissolution on 19th May 1978. (They accepted that after 19th May Cape could not be said to be present in the U.S.A., by or through N.A.A.C.). The plaintiffs regard this point as having potential legal relevance, since two of the eight actions which comprise Tyler II were begun before 18th May 1978. In the Appendix (under item (19)) we give our reasons for rejecting the challenge to the judge's finding of fact.

The agency argument in relation to C.P.C.

We now consider whether Cape/Capasco were present in

the U.S.A. by or through C.P.C. In dealing with the "corporate veil" point we have stated our inferences as to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C. Part of the very purpose of these arrangements was to enable sales of asbestos from the Cape Group to continue to be made in the U.S.A. while creating a greater distance both in appearance and reality between Cape and the company (C.P.C.) which was intended to carry out the functions on its behalf in the U.S.A. which had previously been carried out by N.A.A.C. Having dealt with the "corporate veil" point, we agree with the following passage in Scott J.'s judgment (pp. 76F-77B):

"I do not think, on analysis, that the plaintiffs' case is any stronger than their case regarding N.A.A.C. If anything, I think the case is weaker. N.A.A.C. was at least a wholly owned subsidiary. C.P.C., even if incorporated and launched with Cape money, was, on my reading of the facts, an independently owned company. Like N.A.A.C., C.P.C. acted as agent for the purpose of facilitating the sale in the U.S. of Cape's asbestos. The seller of the asbestos in N.A.A.C.'s time was Egnep or Casap. The seller in C.P.C.'s time was, nominally, A.M.C. but, in reality, still, I think, Egnep or Casap. C.P.C., like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract. C.P.C., like N.A.A.C., carried on its own business from its own offices at 150 North Wacker Drive. The provision by Cape of the \$160,000 as a starting-up fund does not make the offices Cape's offices or the business Cape's business."

The interposition of A.M.C. in the new arrangements made in 1978 cannot one way or the other affect the question whether Cape/Capasco were present in the U.S.A. thereafter. For all relevant purposes, as we have already indicated, we are prepared to treat Cape and A.M.C. as one. The functions performed by C.P.C. and its relationship with Cape through A.M.C. are the relevant considerations for present purposes. Since

Mr. Morgan held all the shares in C.P.C., beneficially Cape had no control as a shareholder over the activities of C.P.C. similar to the control which it had exercised over N.A.A.C. Mr. Merison did not dispute the judge's finding that the terms of the agency agreement of 5th June 1978 were a reliable guide to the nature of the relationship between C.P.C. and A.M.C. and hence between C.P.C. and Cape. Under the terms of this agreement, C.P.C. were left free to sell materials and products other than asbestos fibre and to involve itself in other commercial activities. It is clear that it did so. While there is no evidence that it followed N.A.A.C. in buying raw asbestos from Egnep or Casap or the U.S. Government, it undoubtedly bought and sold manufactured textiles on its own behalf as principal.

It is thus quite plain that at least a substantial part of C.P.C.'s business was in every sense its own business. As with N.A.A.C., 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. As the terms of the agency agreement show, these functions were very similar to those which had been performed by N.A.A.C. The services rendered by C.P.C. to Cape /Capasco were similarly active and important. Again, however, strictly defined limits were imposed on the functions which C.P.C. was authorised to carry out or did carry out as the representative of Cape/Capasco (through A.M.C.). C.P.C. had no authority to bind A.M.C. or Cape or Capasco to any contractual obligation. Again too, there is no evidence that C.P.C., whether with or without prior authority from any of those three companies, ever carried out any transaction in such



manner as to subject any of them to contractual obligations to any person. In the light of the legal principles stated above and of the facts of the case looked at as a whole, we see no sufficient grounds for disturbing the judge's finding that the business carried on by C.P.C. was exclusively its own business and that Cape and Capasco were not present within the U.S.A through C.P.C. (or A.M.C.) at any material time.

Under this heading, we refer to one further matter. The plaintiffs, on the evidence of Mr. Summerfield, (that in August 1984 A.M.C.'s name was given as one of the occupants of the offices on the 12th floor at 150 North Wacker Drive) invited us to infer that A.M.C. had their plate up on those offices in 1978/79. Scott J. declined to draw any such inference. In our judgment, he was right to do so for the reasons given in the next section of this judgment dealing with burden of proof and under item (25) in the Appendix.

#### The onus of proof

The plaintiffs submitted to Scott J. that the onus was on Cape to establish that it was not resident in the U.S.A. and that he should hold that the defendants had failed to discharge that onus. He rejected that argument (J. 78) saying:

" The plaintiffs sue Cape on a judgment given by a United States court. The judgment is an apparently regular one. Cape disputes jurisdiction on the ground that it is a foreign company with no place of business in the United States. The plaintiffs' answer is to assert that the presence in the United States of N.A.A.C. and C.P.C. is to be treated as Cape's presence. But each of N.A.A.C. and C.P.C. is in law an individual legal persons. A contention that the presence in the U.S. of either is to be treated as the presence of Cape requires, in my opinion, he who so contends to establish facts sufficient to support the contention. This, in my judgment, the plaintiffs have failed to do."

Mr. Morison submitted that the judge misdirected himself as to the burden of proof. A foreign judgment, in his submission, *prima facie* gives rise to a legal obligation on the part of the defendant to obey the judgment and is thus *prima facie* enforceable in England. In support of this submission he invoked Dicey & Morris, where it is said (Volume 1 at p. 465):

"the statement of claim in an action upon such a judgment need not specifically assert that the foreign court was competent in terms either of the foreign law or of the English rules of conflict of laws, though it is usual to insert an allegation of this sort."

We agree that generally no specific assertion need be made that the foreign court was competent in terms of the foreign law, not because of any question of burden of proof, but because such assertion is irrelevant. As is stated in Dicey & Morris (Volume 1 at pp. 464-465) a foreign judgment cannot, in general, be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned.

However, as all the authorities show, it is only the judgment of a foreign court recognised as competent by English law/<sup>which will give rise to an</sup> obligation on the part of the defendant to obey it. As a matter of principle it seems to us that in the first place the onus must fall on the plaintiff seeking to enforce the judgment of a foreign court to prove the competence (in this sense) of such court to assume jurisdiction over him. None of the authorities cited to us establish the contrary.

No doubt, in any case, the evidentiary burden may shift at the trial. However, we agree with the judge that the presence of A.M.C.'s name on a notice board at the office at 150 North Wacker Drive in 1984 did not give rise to any

presumption that it had been there in 1979.

More generally we should state that if, contrary to our view, the onus fell on the defendants to disprove the competence of the Tyler Court to give judgment against it, they have discharged that onus by showing that they were not "present" in any part of the U.S.A, at the time of commencement of the various suits between April 1978 and November 1979.

This conclusion as to the presence issue means that this appeal must fail on this account if no other. However, for reasons already stated, and in case our conclusion on the "presence" issue is wrong, we think it right to proceed to consider the "country" issue and the "natural justice" issue. (As to the latter issue, there is no dispute that the onus of proof falls on the defendants).

### III: THE COUNTRY ISSUE

Thus far we have been considering the criteria for ascertaining whether a defendant was present in a particular place, and whether on the facts of this case the criteria were satisfied by Cape and Capasco. For this purpose, it was unnecessary to decide how to identify the place in the United States at which the defendant must have been present, when the action commenced, in order to make the judgment enforceable against him here, since if Cape and Capasco were not present in Chicago, they were not present anywhere else in the United States. If, however, the conclusion expressed in the preceding section of this judgment were to be incorrect, so that the companies were present in Chicago, Illinois, it would become necessary to decide whether that presence was sufficient to render unenforceable in the United Kingdom the judgment given by the District Court in Tyler, Texas.

This question may conveniently be labelled the "country" issue, echoing the language of Schibsby v. Westenholz, supra, and several of the later cases. We should, however, observe that this terminology must be used with caution, lest it beg the very question under consideration, and lead the reader to assume that the political entity provides the geographical test. This point was not in issue in any of the cases from which we have already quoted, and no assumption as to the relevant principle can be drawn from the language in which the courts chose to express their opinions on the question of "presence".

It is convenient to begin by summarising the evidence placed before us, concerning the organisation of the Federal Courts, their jurisdiction and the law which they enforce.

The organisation of the Federal Courts is laid down by

Part I of Title 28 of the U.S. Code. These courts exist in three tiers. First, there is the Supreme Court of the United States. This court has various jurisdictions. In particular, it is the final court of recourse from decisions of Federal Courts of Appeals (section 1254) and from the highest court of each State (section 1257). The second tier comprises the Courts of Appeals. The United States is divided into thirteen judicial circuits each extending to a number of states, or to the District of Columbia (section 41). In each circuit there is a Court of Appeals, known as "the United States Court of Appeals for the circuit" (section 43(a)) and consisting of the circuit judges of the circuit (section 43(b)). The circuit judges are appointed by the President, by and with the advice and consent of the Senate, in numbers which vary from circuit to circuit (section 44(a)). They hold office during good behaviour (section 44(b)) and are required to reside on the circuit (section 44(c)).

The third tier consists of the District Courts. Each State is divided into judicial districts. In each judicial district there is a District Court known as "the United States District Court for the District" (section 132(a)). Each District Court consists of the district judge or judges "for the district" (section 132(b)). Each district judge is required to reside in the district for which he is appointed (section 134(b)). Texas has four districts, each of which is sub-divided into seven divisions. The Tyler Division, which comprises ten counties, is a division of the Eastern Division of Texas. The court for the Tyler Division is held at Tyler (section 124). Like the judges of the Courts of Appeals the judges of the District Courts are appointed by the President, hold office during good behaviour and receive salaries fixed by Federal legislation.



When a claimant seeks to invoke the jurisdiction of one of these District Courts it may be necessary to consider three questions - (i) whether there is a sufficient geographical relationship between the parties, or the subject-matter and the individual District Court where the action is to be commenced ("venue"); (ii) whether the subject-matter of the action is such that a District Court is entitled to hear it ("subject-matter jurisdiction"); (iii) whether the defendant is amenable to service of the process of the District Court ("personal jurisdiction").

As regards venue, the following provisions of Title 28 are most immediately relevant -

1. A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose (section 1391(a) of Title 28).

2. A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose except as otherwise provided by law (section 1391(b)).

3. An alien may be sued in any district (section 1391(d)).

It may be noted that venue is defined, not by reference to the State, or to the judicial division, but to the judicial district. So that the venue here was the Eastern District of Texas.

Notwithstanding that venue is properly found in the District Court where the action has been commenced, a District Court has power under section 1404 of Title 28 to transfer the action to any other district or division, for the convenience of parties

and witnesses in the interest of justice. The right of transfer is not however unlimited, since an action may be transferred only to a district or division where it might have been brought. In addition, an action may by consent be transferred from one division to another within the same district, or to another place within the same division.

There is also provision in section 1407 for the transfer of actions pending in different districts to any one district for co-ordinated or consolidated pretrial proceedings. Such a transfer is made and administered by a panel on multi-district litigation, drawn from the Federal bench at large. Upon the conclusion of the pretrial proceedings each action is remitted to the district from which it was transferred.

The original subject-matter jurisdiction of the District Courts is defined by sections 1330 to 1366 of Title 28. In some instances the jurisdiction is exclusive, in others it is shared with other tribunals. We need not list all the instances in which the courts have jurisdiction. For present purposes it is sufficient to say that the District Courts have jurisdiction over -

1. All civil actions where the matter exceeds the sum or value of \$10,000, and is between citizens of different States (section 1332(a)(1)).
2. All civil actions where the matter exceeds that sum between citizens of a state and citizens or subjects of a foreign state (section 1332(a)(2)).
3. All civil actions or claims against the United States for money damages for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government under circumstances where the United

States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred (section 1346(b)).

There is/room for doubt that the Tyler court had subject-matter jurisdiction over the Tyler II action under all three heads.

Venue and subject-matter are not the only considerations relevant to the assertion of jurisdiction. Service of summons is the procedure whereby a court having venue and jurisdiction of the subject-matter of the suit asserts jurisdiction over the person of the party served: Mississippi Publishing Corp. v. Murphree 326 U.S. 438, 444-5 (1946) cited Omni Capital International v. Rudolph Wolff & Co. S.Ct. 404, 409 (1987).

The provisions governing amenability to service and modes of service are distributed between the Federal rules of Civil Procedure and the civil procedure legislation and practice of the forum state. Under Rule 4(f) all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and when authorized by a statute or by the Rules, beyond the territorial limits of that state. Where the party to be served is not an "inhabitant of or found within the state in which the district court is held", service may be made in accordance with a statute of the United States or order of court made thereunder: Rule 4(e). Where there is no such statute or order of court, the service must be effected under the circumstances and in the manner prescribed in any statute or rule of court of the state in which the district court is held (ibid). In fact Congress and the Federal Rule-making bodies have abstained from making any provision for "long-arm" jurisdiction, whereby personal jurisdiction

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is exercised by the District Court outside the boundaries of the state. In Omni Capital International, supra, the Supreme Court firmly repudiated any notion that the Federal courts had a common law jurisdiction to create a rule authorizing nationwide service of process on non-resident defendants. Absent specific statutory authorization, each District Court contemplating service of process on an absent defendant must have recourse to the "long-arm" statute of the state in which it sits.

Thus far, we have considered questions relating to actions commenced in the District Court. Title 28 also makes provisions for the assumption by the District Court of jurisdiction over actions commenced elsewhere. A civil action brought in a State court of which the District Courts have original jurisdiction, may be removed by the defendant or the defendants to the District court for the district or division where the action is pending (section 1441(a)). If the action concerns a federal question, removal is as of right. Otherwise, the case is removable only if none of the defendants is a citizen of the state where the action is brought (section 1441(b)).

It may be noted that removal is to the "district and division" embracing the place where the action is pending. Thus, if the present action had been commenced in a court of the State of Texas seated in one of the counties representing the geographical extent of the Tyler Division, the action would have been removable, not to a District Court anywhere in Texas, or to court anywhere in the Eastern District, but only to the Tyler Division.

Upon removal, the Federal Rules of Civil Procedure apply to the procedures after removal. It appears that in general the action continues after removal, without the need to be



entirely recommenced (Rule 81(c)).

Finally, we turn to the question of enforcement. Where execution is sought within the state where the District Court sits, that court once again borrows its procedure from the practice and procedure of the State Court: Rule 69 of the Rules of Civil Procedure.

Where execution is sought out of state, the position differs as between State and District Courts. There is no doubt that one State Court is entirely foreign to another, in the sense that the judgments of one create the basis of a cause of action in another, in the same way as a cause of action is created in England by the judgment of a court overseas: unless the enforcing state has adopted the uniform code relating to the enforcement of the judgments of sister states, in which case the mechanism is less cumbersome. The judgment of a District Court is more compelling. Under Title 28, section 1963, a judgment in an action for the recovery of money entered in a District Court may be registered in any other district by filing a certified copy of the judgment, in which event it has the same effect as a judgment of the District Court of the district there registered and may be enforced accordingly. Proceedings on judgment in one district are not however completely assimilated to proceedings in another, as they would if judgment were given in (say) London and enforcement were sought in Manchester. If the defendant comes into the proceedings in the rendering court and unsuccessfully objects to the jurisdiction the objection cannot be repeated in the court where enforcement is sought. On the other hand, if the defendant abstains from any participation in the action and judgment is given in default, he may challenge the judgment in the receiving court by means of

collateral proceedings raising procedural objections.

In addition to the procedural rules thus far summarised, it is necessary to say something about the substantive law which the Federal Courts must apply when sitting in diversity. So far as concerns matters of substance, as distinct from pure procedure, it is now clear that the District Court must apply the law of the forum state, subject to any countervailing federal policy. Until Erie Railroad Company v. Tomkins 304 U.S. 64 (1938) it had for many years been conceived that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute", so that State court decisions were not the law "but merely someone's opinion - to be sure an opinion to be respected - concerning the content of this all-pervading law" (see Guaranty Trust Co. v. York 326 U.S. 99 (1945)). In the Erie case this notion of a federal common law was decisively repudiated. The precise basis of the decision is a matter of controversy. Undoubtedly, it involved an element of judicial policy, the intent being (in the words of the Supreme Court in Guaranty Trust, supra, page 319) "to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in the state Court." It may be that this motive did no more than reinforce a much more fundamental constitutional decision concerning the extent of the powers of a federal judicial organ, delegated to it by the constitution, to create rights conflicting with those existing under the laws of individual States. Erie certainly reads like a case on constitutional law, but the

reasoning of the court on this aspect of the decision has been called in question, and it seems that there is a controversy here which has yet to be resolved. We need not trouble with this for present purposes, since it is now clearly established that the District Court sitting in diversity must apply the law of the forum State, whether declared by the State's legislature or by its highest court. If we correctly understand the evidence, when so acting the District Court does not apply a body of federal law, into which is read the local law of the particular state in which the court is sitting. Instead, it directly applies the law of the State in precisely the same way as would a State Court hearing the same matter.

The substantive law of the forum State which the District Court is obliged to apply when sitting in diversity includes the choice of law rules of that State. Ideally, if the choice of law rules of the various States were homogeneous, the same State substantive law would apply, no matter what court was first seized of the matter. So also if the State's laws were themselves homogeneous. But they are not. It follows that, although it should make no difference to the outcome whether, within a given State, the action is tried by a State Court or by the District Court, it may make a difference in which State the action is commenced.

What do these various detailed rules add up to, in terms of the present issue? It is hard for an English lawyer to make a general appreciation of the American system. In part, because the real similarities between the jurisprudence and modes of process prevailing in different parts of the common law world tend to mask the fact that the American system is much more complex than anything which exists here: so that the ideas of

"the country" (in the legal sense) and "the local court", which work well enough when referred to a unitary judicial structure like that of <sup>England and Wales,</sup> are too broad to be applied without qualification to the state of affairs in the United States. In part also, because the system appears to involve a devolution of powers in the fields of law-making and law-enforcement by the individual States to the federal organs of Government; a further devolution to the Supreme Court and the rule-making agencies; and a voluntary borrowing in some degree from the States of their individual substantive laws and jurisdictional rules. This is a subtle process, hard to grasp simply by reading the evidence and the written sources which the parties have naturally had to select from a large bulk, the more so since, even on the materials which we have seen, it is evident that the constitutional mechanisms are neither static nor straightforward enough to be stated without controversy even by the American courts and jurists themselves.

Nevertheless, hazardous as the task may be of catching the essence of the American judicial system, it is one which we are bound to attempt. As it seems to us, the spectrum of possible judicial regimes may have at one extreme, a mosaic of individual courts, local in jurisdictions and jurisprudence, each "foreign" to the other; and at the other extreme, a truly national court, in which the courts and judges, although perhaps localised for administrative convenience, nevertheless are the courts and judges of the whole country, indistinguishable parts of an integrated structure, applying an integrated national law. Considered in isolation, the legal systems of England and Wales, Scotland and Northern Ireland lie close to the latter end of the system, since they comprise courts of unlimited jurisdiction

applying a homogeneous law. Nevertheless, they are not at the furthest extreme, since none of them has a jurisdiction co-existent with the dominion of the sovereign power by which they are established. The United Kingdom is not a legal and judicial unit.

If one sets out to measure the institutions of the United States against this scale, it seems quite clear that there exists within each State a juridical entity which is almost as close to one extremity of the spectrum as it is possible to be, whilst still being part of a single political design. The State Courts are not perfectly autonomous, being subject to an appeal to the Supreme Court of the United States, and the law which they apply is in the course of harmonisation through the voluntary adoption of model codes. Nevertheless, the State courts are local courts in the fullest sense, created and empowered by the Government of the State. They apply the local law, created by the State legislature and by the superior courts of the State. Their judges are local judges, selected and maintained in office by methods peculiar to each State, and having no powers outside the boundaries of the State, except through the exercise of the "exorbitant" long-arm powers of service which every national court claims to exercise. The judgment of each such court is, vis à vis the courts of other States, a foreign judgment. It is recognised as creating an enforceable obligation, but not one which is self-executing in the sense that a judgment in one part of England and Wales is directly enforceable in another.

Turning to the federal system, the evidence suggests that, Congress had thought it appropriate to create a unitary federal court, comprising a fully collegiate bench of judges,



having nation-wide jurisdiction, constrained by no limitations on venue or on the amenability to service of persons anywhere within the territory of the United States, it would have had constitutional power to do so. It also appears - and here we venture on more treacherous ground - that at least within certain limits the Congress could have empowered these courts to administer a truly nation-wide law. In fact, whatever the federal organisers might constitutionally have been able to do, they have plainly gone nowhere near so far. Instead, the federal judicial function has been dispersed amongst a series of geographical District Courts, with locally stationed judges of local limited jurisdiction. Subject of course to very important exceptions, these judges apply the local law, and they borrow their modes of asserting an extraterritorial jurisdiction from the local law. They are not courts foreign to each other, in the sense that the State Courts are, but their judgments do not command automatic recognition in other parts of the nation.

Against this background we may now trace the reasoning by which the learned judge arrived at his conclusion that, if Cape and Capasco had been present in Illinois when the Tyler II actions were commenced, this would have been a sufficient basis in English law for the exercise by the Tyler Court of jurisdiction over them. He began by citing a passage from Dicey & Morris ————— pages 26 and 27 which we may usefully repeat:

"Meaning of 'country'. This word has from long usage become almost a term of art among English-speaking writers on the conflict of laws; and it is vitally important to appreciate exactly what it means. It was defined by Dicey as 'the whole of a territory subject under one sovereign to one body of law'. He suggested that a better expression might be 'law district'; but this phrase has never found much favour with English-speaking writers, who prefer the more familiar word 'country'. England, Scotland, the Isle of Man, Jersey, Guernsey, Alderney, Sark, each British

colony, each of the American and the Australian states and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a State known to private international law ... A state may or may not coincide with a country in the sense of the conflict of laws. Unitary States like Sweden, the Netherlands and New Zealand, where the law is the same throughout the State, are 'countries' in this sense. But composite States like the United Kingdom, the United States, Australia and Canada are not."

The learned judge differed from this opinion. He did not accept that for some private international purposes the United States might not be a "country"; and he went on to develop an analysis of the position which would exist if the District Court were sitting in a "federal question" matter such as an anti-trust damages suit. In the result, the learned judge concluded that the "court would be a U.S. Court applying U.S. law"; that it would command the obedience of a resident anywhere in the United States; and that the sovereign from which the District Court derived its jurisdiction was the United States. The learned judge continued this line by stating that, if Congress had chosen to establish a Federal District Court at Washington D.C. with in personam jurisdiction in respect of anti-trust cases, "the 'country' of the court would unarguably be the United States as a whole".

Thus far, as the learned judge acknowledged, the discussion had been hypothetical, since the Tyler Court was sitting in diversity not in a federal question case. Nevertheless, the judge attached great weight to the rebuttal of what he saw as the main plank of the defendants' case, namely that the United States could not be a "country" for private international law purposes. Having concluded that it could, he went on to consider and reject the argument which he attributed to the defendants, namely that the District Court when sitting in

diversity was part of the system for the administration of justice in the State in which it sat.

The learned judge then stated his own view as to the basis on which the English Court recognises the judgment of a foreign court:

"... the territorial basis of jurisdiction is dependent upon and cannot, in my opinion, be divorced from, the sovereignty of the 'country' that has established the court in question. It is, I think, recognition of the sovereignty of a foreign country that leads to the recognition of the entitlement of its courts to take jurisdiction over persons resident in its sovereign territory."

Founding on this principle, the learned judge concluded:

"As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction. It follows that I agree with Mr. Morison that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of authority of the court. Whatever the function of a federal district court in a diversity case, the source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction."

my attempt to weigh up the soundness of this or any other account of the rules governing the recognition of foreign judgments should, as it seems to us, begin with an exploration of the reasons why such judgments are recognised at all. Unfortunately, the cases give virtually no guidance on this essential question. Underlying it all must be some notion of comity, but this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to

limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of positive law first identified in Schibsby v. Westenholz, supra, must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found. But this tells one nothing of practical value about how to identify the foreign judgments which have this effect.

One possibility is to explain the principle in terms of allegiance. This idea, of which traces are found in the earliest cases, may have provided at least a moral underpinning for the concept that a foreigner who has chosen to establish himself within the territory of a sovereign owes to him, in exchange for an obligation to ensure the stranger's personal safety and well-being, a personal duty to pay the sovereign due respect, an obligation which involves an obligation to respect the sovereign's law as enforced by his courts. This concept may have served well enough in the case of an individual established in long-term residence, but the idea that the Dunlop Company, a foreign company of manufacturers, present in the United Kingdom for a few days only through having set up a stall at an exhibition, thereby incurred a duty of fealty to the King-Emperor is surely fanciful.

Nor in our judgment can this concept be made to seem more persuasive by re-writing it in modern terminology. A foreigner who is physically present in a country does thereby acquire rights and duties expressed in terms of the local law, although not necessarily the same as those which apply to the local

citizens; but these are not rights and duties which in any sensible way can be described as arising reciprocally with the sovereign. The foreigner does not owe duties to The Queen, or to the United States of America. Rather, by making himself present he contracts-in to a network of obligations, created by the local law and by the local courts.

This is not to say that sovereignty is immaterial to the present problem, in the sense that an identification of the source from which the local laws and the agencies which enforce them derive their powers must be part at least of the task of delineating the obligations, stemming from the judgments of those agencies, which a foreign court ought to regard as binding. Thus, we entirely accept the conclusion, flowing from the learned Judge's premise, that if we had here been concerned with the enforcement of a judgment given by a state court in Texas, we should have been obliged to have regard to the territory of Texas alone, so that if the judgment now in suit had been given (say) by a Texas Supreme Court sitting in Austin, it would not (on the hypothesis of Cape and Capasco's presence in Illinois) have been enforceable. For neither the States outside Texas, nor the Federal organs established by or on the authority of the Constitution, played any part in giving the State of Texas the right and power to establish its own courts of local jurisdiction. But the converse need not be true. Merely to identify X as the ultimate law-giver and creator of the agencies through which those laws are enforced, and then move on to the proposition that a judgment given anywhere in the territory governed by X against someone present anywhere else in those territories should be enforced by foreign courts, seems a large step. Even today, Scotland and England are not the same jurisdictions, and if one looks to the past, it is



hard indeed to acknowledge that in Imperial times, all persons present in one part of the Empire could properly be regarded as present everywhere else in the Empire, notwithstanding the immense variety of laws courts and constitutional systems which then prevailed, simply because as the ultimate source of power there was to be found a single sovereign.

Another aspect of this idea is to be found in the functional test propounded by the learned Judge. We take this to invoke an enquiry as to the task which the Tyler court was performing - a local or a national task. We would not dissent from this approach, but we would venture to ask whether the learned Judge was not approaching it solely in terms of constitutional theory. Because the Congress could have created a single "Federal Court" of which every court and every judge was a manifestation, it is assumed that this is what has really happened, notwithstanding the cession of a State contribution in the sphere of substantive law and personal amenability to service. On the evidence, we cannot accept that this hypothesis is made out, any more than it is possible to say that the Queen in Parliament has chosen, whatever powers may exist in reserve, actually to give England and Scotland a unified judicial system applying a unified law.

It is convenient to mention at this stage three suggested anomalies, relied upon as pointing to one answer rather than another. The first is that the need for the Tyler court in this case to have recourse to the Texan long-arm statute in order to entertain the suit demonstrates that the overseas defendants were not within the "country". We do not think that this helps. The use of the long-arm statute shows no more than we already know, namely that the direct personal jurisdiction of a district court

is not for American purposes recognised as extending beyond the boundaries of the State within which that particular court happens to sit. The same can be said of another apparent anomaly on which stress was laid, namely that if the plaintiffs' submissions are correct, a judgment which would be unenforceable in some other State such as Illinois might nevertheless be effective to give recourse against the defendants' assets in England. We do not regard this as a surprising result, or one which points to any particular solution of the present problem, for if (contrary to the defendants' contentions) the whole of the United States is to be regarded as the territory within which the District Court had jurisdiction, the infraction of what must on this view be regarded as an internal procedural rule is not something of which the English court should take account.

The third suggested anomaly is this. On the Judge's own analysis, the jurisdiction of the Texas State Court, as recognised by the English court, would not extend beyond the Texan borders. Thus if the learned Judge's view is right, the enforceability of the judgment in a case such as this would depend upon whether the action was removed by the defendants into the district court: and this notwithstanding that the courts would sit in the same place and apply the same law. This is certainly a striking result, but it must we believe follow from any tenable view of the law. As we understand the arguments, Sir Godfray would have been disposed to accept that if there were a single federal court of unitary jurisdiction, applying a single law, a defendant could be present anywhere in the United States and still have the judgment enforceable against him: and we should ourselves be of this opinion. All this shows, however, is that a person may be present in two different "countries" at the same time. This

is a good reason for discarding the word "country" as a useful test, and discarding with it the simple and attractive argument that the United States is a country, the Tyler court was a court of that country; the defendants were present in the United States, and hence they must necessarily have been within the jurisdiction of the country for the purpose of enforcement in England. Further than this, the argument does not run.

If these ideas are rejected as inconclusive, where should we look for the test? To our minds, the only way to find an answer is to consider why a person who goes abroad thereby incurs a duty to abide in England by a foreign judgment. The only reason that we can see is that by going to a foreign place he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court: those laws including, of course, the local rules on the conflicts of laws.

Thus far we have experienced no great difficulty. What has raised very real problems is to apply the principle just suggested to the facts of the present case. It may be helpful to summarise the way in which the respective arguments might run.

For the defendants, one might begin with the example of a foreigner who has set himself up in Scotland. Such a person could properly be regarded as having done so, and having been allowed to do so, on terms that his rights and duties were to be governed by <sup>the</sup> laws of Scotland. But not by English law, or by decisions of the English courts, even though the latter might without procedural impropriety purport to exercise a jurisdiction over him. Equally, an Englishman who has gone to live in France and engaged in transactions there, might find himself sued on

those transactions in Texas. Any resulting judgment would be unenforceable here, not because the Texas court had broken its own rules, or indeed had broken any rules of international comity, but simply because the Englishman had done nothing to bring himself into a relationship with the court in Texas and the law which it administered.

Now if these examples are sound, they may be transformed into something nearer the present case. If the Englishman had established himself in Chicago, would he be treated as having put himself into a relationship with the State Court in Austin, Texas? Surely not, the defendants could argue. The fact that Chicago is in the United States does not make Texas any the less a foreign court for a resident in Illinois than if Chicago were in France; and the fact that the long arm of the Texas court does not have to reach out to another continent should not make any difference. This would be so, the defendants could argue, even if the laws of Illinois and Texas were identical in the minutest respect; and on the evidence before us it seems that this is not so.

Let us now make the one alteration necessary to bring the example home to the present case: namely by assuming the court in Texas to be a federal District Court of the Tyler Division of the Eastern Division of the State of Texas. This is not a state court but (so the defendants can argue) a local court in a real sense, administering local law. The juridical identity of the Tyler court might have been different if those invested with constitutional powers had chosen to exercise them differently, but we must take the facts as they are. On these facts, the defendants can submit, there was no sufficient connection between the defendants, resident/ as for present purposes we assume they were in Chicago, and the Federal

Court in Tyler, to justify the inference that by establishing their residence there they had consented to the administration of Texan laws as administered by the Tyler court.

For the plaintiffs, two preliminary points may be made. In the first place, the decision to join Cape as defendant in the proceedings in the Tyler Court, as contrasted with the institution of separate proceedings against Cape in a Federal Court in Illinois, was no doubt influenced by the wish to rely upon the arguments about submission and consent, based upon Cape's participation in the Tyler 1 proceedings, (which arguments were rejected by Scott J. and not renewed in this court). But the joining of Cape in the proceedings in the Tyler Court had, as we understand it, no other element of forum shopping about it: no advantage was gained, or present to be gained, as to the substantive law which would be applicable in proceedings in the Tyler Court as compared with that applicable in a Federal Court sitting in Illinois. The joining of Cape in the Tyler Court proceedings was, in short, a normal and appropriate course of proceeding viewed solely from the point of view of United States law, whether Federal or State law. If a default judgment obtained in such circumstances is not enforceable according to our law it is because the relevant rule of our law requires our courts thus to discriminate between a judgment given in default by a Federal District Court sitting in Illinois and a default judgment given by a Federal District Court sitting in Texas.

Secondly, it is true that the definition of facts, which justified the taking by the Tyler Court of in personam jurisdiction over any person or corporation throughout the United States, which is said to constitute legitimate jurisdiction for the purposes of our private international law, would also justify the taking of jurisdiction over any person or corporation outside the territories



of the United States, which, as is common ground, would not be regarded as a legitimate jurisdiction for our private international law. Nevertheless, there seems no doubt that Congress has established a system of Federal Courts of which each one has jurisdiction, in the terms defined by the various long arm statutes of the forum states (where no specific Federal statute provides otherwise) to exercise in personam jurisdiction over any person or corporation present in any State of the Union.

More detailed arguments available in support of the plaintiffs' proposition may be summarised as follows -

(i) The concept of "contracting in" by presence means that, in the unitary state, the foreign resident is put in the same position, whether the visitor be an individual or a corporation, as any other person or corporation within that State so far as concerns obligations enforceable by in personam judgments (i.e. not including matters dependent upon domicile as opposed to mere presence).

(ii) Our law sets no standard with which the network of local law is required to comply other than that of natural justice and public policy. Within those limits, the foreign law, substantive and procedural, may be harsh, antiquated and unskillfully operated by the foreign court but the foreign resident must put up with the consequences.

(iii) Our law, faced with a Federal system of two networks of local laws as administered by two sets of local courts, should, if it is to be consistent, favour that course which will leave the resident visitor in Illinois subject to the two local networks,

both State and Federal, to the same extent as any other resident of Illinois so far as concerns the validity of judgments rendered in the courts of either system, unless there is some clear reason to do otherwise.

(iv) The limitations of the Federal judicial system as it has in fact been established, which cause the present system to fall short of a fully realised national judicial system, arise from the history and political principles which produced them. In other words, a national judicial system has been devised and established in terms in accordance with the political and social views of the peoples of the States which form the Union. The checks and limitations are available for the protection and convenience of the foreign resident as much as for the resident citizen.

(v) In particular, the decision that Federal Courts shall apply the law of the forum State does not necessarily alter the fact that the Federal Court, in so doing, is doing what it is commanded to do by Federal Law. Equally, the fact that choice of law rules are not the same in all of the States, does not necessarily alter the fact that the Supreme Court or Congress, as the effective authority under the Constitution, has directed or caused Federal Courts to continue to apply local choice of law rules as the law to be applied to cases in the national courts.

(vi) Finally, if in personam jurisdiction is given by United States law to Federal Courts to be exercised,

within the circumstances stated, over any person or corporation present within the territories of the United States, the effectiveness of that jurisdiction for the purposes of our private international law, is not necessarily reduced by the fact that the jurisdiction is expressed in terms of and limited to the long arm jurisdiction statutes of the forum state. There is no reason to regard the in personam jurisdiction of the Federal Court of any Federal State as necessarily impaired, or as relegated to a local status within one State of the Union, because the Federal authorities have seen fit so to express and limit that jurisdiction.

We have set out the facts and arguments on the country issue at some considerable length, notwithstanding that our conclusion on the presence issue is sufficient to dispose of the appeal, because they serve to illuminate a question of general importance which may well arise for decision in the future. In the event, as we have said, it is unnecessary to express a final decision on the country issue and in all the circumstances we think it better not to do so. All we should say is that we all incline to favour, albeit with varying degrees of doubt, the view that if the plaintiffs had not failed at the first hurdle, they would on the country issue have been entitled to succeed.

#### IV THE "NATURAL JUSTICE" ISSUE

The assumptions upon which we consider this defence are that our decision on the presence issue is wrong and that the assumed presence of Cape/Capasco in Illinois at the commencement of the Tyler 2 proceedings rendered them subject to the jurisdiction of the Tyler Court in those proceedings for the purpose of our law of enforcement of foreign judgments.

The conclusion of Scott J. on the issue of natural justice was expressed thus: J.48G:

"There was, in short, in my opinion, no judicial assessment of damages. In my judgment, the procedure adopted by Judge Steger offended against English principles of substantial justice. The defendants were entitled to a judicial assessment of their liability. They did not have one. The award of damages was arbitrary in amount, not based on evidence and not related to the individual entitlements of the plaintiffs. Many of the features of the procedure to which I have drawn attention might, taken simply, have been insufficient to meet the yardstick of substantial injustice. Taken together, the criterion is, in my judgment, satisfied."

The facts relevant to the defence of breach of natural justice were stated in detail by Scott J. and no issue of primary fact has been raised by either side. We shall, therefore, state the most material facts shortly and substantially in his words.

#### The facts relevant to natural justice

1. Mr. Bailey who had been involved in the Tyler 1 proceedings on behalf of some of the plaintiffs, took over the management of the claims of some 2000 plaintiffs in the Tyler 2 proceedings. He weeded out, with the help of a doctor, and upon examination of X-rays, those claims which seemed unsustainable for want of evidence of any condition attributable to exposure to asbestos. Those claims were dismissed "without prejudice". There then remained, out of the 2000 plaintiffs, only 18 who had manifested a physical condition capable of having been caused by exposure to

asbestos. This process was carried out in response to the order of Judge Steger of 28th December 1981 directing pre-trial statements: see page 6 of this judgment.

2. The other plaintiffs in the Tyler 2 proceedings were represented by Mr. Clark and Mr. Yarborough. Presumably they carried out a similar process, with the assistance of a doctor, of weeding out.

3. At an early stage in Tyler 2, Mr. Bailey was appointed by Judge Steger to be "liaison counsel". That meant that Judge Steger would deal only with him as representing all the plaintiffs. A defence liaison counsel was also appointed for the defendants taking part in the proceedings.

4. The plaintiffs who, in the view of their counsel, had arguable claims, filed depositions containing details of the physical condition or injury alleged to have been caused by their exposure to asbestos. On the application of some Tyler 2 defendants (those taking part in the proceedings), Judge Steger, on 8th July 1982 summarily dismissed the claims of some plaintiffs and, as to others, adjourned the application for further medical reports. The claims of the remainder of the plaintiffs were left to proceed. This did not signify that Judge Steger had reviewed medical evidence relating to the physical condition of the plaintiffs. He had had no occasion to do so. There was no contested hearing on the defendants' application. Those plaintiffs who remained in the proceedings were still there because counsel for the defendants did not press the applications for summary dismissal against them. Thus Judge Steger knew, without reviewing any evidence, that the remaining plaintiffs were those considered by their own counsel to have viable cases for recovery of damages; and were considered by counsel for the defendants taking part in Tyler 2 to be persons against



whom applications for summary dismissal were not worth pressing. Further, in the course of his dealings with Judge Steger, Mr. Bailey informed the judge of the general nature of the physical condition of the remaining plaintiffs. The number of the remaining plaintiffs was 133.

5. Once the process of weeding out and of summary dismissal was completed, pressure was applied to bring the parties into settlement negotiations. (J.2/4H). The result has been described earlier in this judgment. Some of the details of that process must be added. On 25th January 1983, on the direction of Judge Steger, there was a conference of counsel for plaintiffs and defendants. Mr. Bailey was there. The initial proposal for the plaintiffs was settlement at an average of \$40,000, a total of \$5.32 m. among the 133 plaintiffs. That was later reduced to \$30,000 average, a total of \$3.99 m. The offer of the defendants was then \$614,000 in total. (J.2/5F) Negotiations continued with assistance from the judge. On 2nd February 1983 the average figure of \$10,000 producing a total of \$1.33 m. was agreed. As appeared from the evidence of Mr. Bailey, that conclusion was reached, after discussion by Judge Steger separately with defendants' counsel, and separately with Mr. Bailey. Mr. Bailey was told by the judge that "Mr. Bailey needed to take \$10,000 average per plaintiff and to tell the defendants that... they needed to take ... it". (J./6E).

6. Features of the manner in which that settlement of February 1983 was reached threw light on later events in connection with the default judgment, namely (a) there was no significant discussion of the value for settlement of any individual case; and (b) the judge added his weight to the negotiations, on the footing that he

was aware of the overall value of the 133 cases, his knowledge coming only from what he had been told in general terms by counsel for the plaintiffs, and from the fact that the 133 plaintiffs, together with the Unarco plaintiffs not included in the settlement, had survived the weeding out process; and (c) the judge had neither seen nor heard any evidence in the ordinary sense. (J.2/6F to 7B).

7. On 2nd February 1983 Mr. Bailey proposed the scheme or device regarding "contingent" recovery from the US Government: see pages 7 and 8 of this judgment: with the settlement figure expressed as \$6.65 m. made up as to \$1.33 m. by immediate payment and as to \$5.32 m. by a payment contingent on recovery from the United States Government. The only negotiated figure and the only possible liability of the settling defendants was the \$1.33 m. (J.2/8A to B) On the same day Judge Steger was informed by counsel in open court that a settlement figure had been reached. No figure was mentioned but the transcript showed the judge saying that he was aware of "the negotiations ... and the amounts ... and ... it is a fair settlement at this point".

8. On 29th March 1983 the Judge made an order approving the settlement on behalf of certain infant plaintiffs. The form of his order, though approving the infants' share of the settlement figure of \$1.33 m., purported to extinguish their share of the \$5.32 m. which was contingent on recovery from the US Government. This suggests, though it is not clear, that Judge Steger was unaware of the device regarding "contingent" recovery. There was no evidence that there was any legal basis for this device under the law of Texas. However, it seems very unlikely that the liability of the US Government under the supposed third party claims could possibly have exceeded the \$1.33 m. that the settling defendants had agreed to pay to the plaintiffs. We cannot attribute any

rational purpose to the incorporation of the device in the settlement, other than that of being able later to assert that the average on which the settlement was based was \$50,000 instead of the \$10,000 which alone the settling defendants agreed and were liable to pay.

9. The settlement of the claims against the US Government was described at page 8 above. Judge Steger was informed of the negotiations including the fact that it was intended to enforce a default judgment against Cape/Capasco by proceedings in this country: J.2/10A. To that end in June 1983 Mr. Bailey and Mr. Nowinski of the Justice Department had consultations in London with Messrs Oppenheimers, the solicitors acting for the plaintiffs. J.2/10B.

10. The default judgment, which was in due course signed on 12th September 1983, was drafted by Mr. Bailey and was probably approved by Mr. Nowinski. Mr. Bailey had informal discussions with Judge Steger about it.

11. The rules of Federal Practice, which are similar to those in force in this country, provide by Rule 8(d) to the effect that, in such a case as this, averments, other than those as to the amounts of damages, are admitted when not denied. J.2/10G.

The effect of the default of Cape/Capasco was that the allegations of negligence, and the allegation that such negligence was a cause of injury to the plaintiffs, stood admitted but not the allegations as to amount of damage. By Rule 55 (Judgment by Default) it was, in effect, provided that where there is a tort claim for unliquidated damages, the quantum of damage in a default case must be assessed by the court: J.2/12D. Contrary to the evidence of Mr. Bailey, it was established by the evidence of other expert witnesses that it was not open to the judge to

dispense with evidence in the strict sense, or to receive unauthenticated statements from counsel as to the plaintiffs' medical condition and circumstances. The judge was not entitled to act otherwise than on evidence, including authenticated medical reports, and oral or affidavit evidence: J.2/13A to D.

12. The form of the default judgment as drafted by Mr. Bailey after consultation with Judge Steger was irregular and unusual, in that it contained in one document not only the order made but also recitals of findings of fact directed to a supposed connection between the Tyler 1 and Tyler 2 proceedings, which it represented as being one comprehensive continuous action. This was done with a view to assisting enforcement of the judgment in the English Courts. From the start, Judge Steger had co-operated with Mr. Bailey in this objective.

13. There were two further informal meetings between Mr. Bailey and Judge Steger prior to 12th September 1983, the date of the default judgment. (J.2/15D). At the second meeting Mr. Bailey was told by Judge Steger that the judge needed "...the necessary medical evidence so that he could make a decision on what kind of damages should be awarded". At the third informal meeting Judge Steger, when he heard the suggested average figure of \$120,000 put forward by Mr. Bailey, was initially inclined to grant judgment for no more than \$10,000 average per case because Mr. Bailey had accepted that amount in settlement from other defendants; but Mr. Bailey explained that he had actually settled the other cases for \$50,000 average against "peripheral defendants" and that the more deserving Unarco plaintiffs were included in the application for default judgment against the Cape companies. Mr. Bailey, reporting this discussion to Mr. Nowinski, said that he believed that Judge

Steger would now award \$75,000 average per case: J.2/16B to E. (The allegations of fraud were based, as to an important part, on what Mr Bailey told Judge Steger on this occasion.) The figure of \$120,000, had come "from the top of Mr. Bailey's head in order to see what Judge Steger's reaction might be". When the judge referred to the settlement at \$10,000, Mr. Bailey then attempted, "as an advocate would", to justify his figure. The conversation was informal and in no sense equivalent to a hearing in court. J.2/18C.

14. The figure of \$75,000, which came from the judge, must have been based upon what he had been told in the course of settlement negotiations in 1983 and, possibly, upon the fact, reported in legal journals, that in 1983 the average settlement figure for asbestos related personal injury suits was \$75,000. J.2/19.

15. There was no misrepresentation, (quite apart from there being no fraudulent intent on the part of Mr. Bailey), by Mr. Bailey in referring to the settling defendants as "peripheral" and to the "Unarco plaintiffs as more deserving". They were expressions of opinion fairly within the bounds of tolerance reasonably to be allowed to an advocate. J.2/20G. No false impression of the terms of the settlement was given by Mr. Bailey. J.2/21G.

16. On 29th July 1983 Messrs Oppenheimers, as solicitors for the plaintiffs, served on Cape in London notice in the Tyler 2 proceedings entitled "Application by Plaintiffs for entry of Default Judgment". It read in part: "Plaintiffs ... therefore move the court to enter default judgment ... against defendants ... and further to hold hearing to determine the amount of relief entitled to the plaintiffs ... this motion is based on the records and files herein". The date for hearing in the Tyler Court was 12th September 1983. In August 1983 a similar notice was served upon Capasco.



There was some error in this in that Capasco was not party to all the Tyler 2 actions but nothing turns on that. J.2/22E.

17. Before the application for judgment on 12th September 1983 there was discussion between the counsel for the 206 plaintiffs: Mr. Bailey representing 18, Mr. Yarborough 4 and Mr. Clark the remaining 184 plaintiffs. The sum to be sought at the default hearing was agreed at \$120,000 average: there was no other basis of discussion: J.2/23A to B. These counsel also agreed that the plaintiffs would be listed in four separate levels for allocations to each individual plaintiff of his or her share of the total. The levels were \$150,000; \$115,000; \$85,000 and \$60,000. This came from Mr. Clark who had obtained advice from a Dr. Spivey who had identified four broad categories of injury. Dr. Spivey swore an affidavit on 8th March 1988 in which he described those categories. The affidavit was admitted before Scott J. under the Civil Evidence Act but nothing from Dr. Spivey was before Judge Steger. J.2/23C to G.

18. The "medical documentation" for each plaintiff was agreed between counsel to be prepared by the counsel who represented him or her and counsel was to place each plaintiff in the category thought appropriate by counsel. The overall claim was to represent an average of \$120,000 per plaintiff: J.2/24A. The medical material prepared for submission to the court included a summary in respect of each plaintiff, in form agreed by plaintiffs' counsel, containing the name, address and date of birth, a statement of the plaintiff's medical examination and the amount of damages sought. J.2/24E. With each summary there was a collection of medical records relating to that plaintiff. They were of various types. Some were questionnaires completed by plaintiffs. Some were letters

from doctors after examination of the plaintiffs. In respect of each of the 18 plaintiffs represented by Mr. Bailey there was a short report from Dr. Kurt expressing a view as to the cause of that plaintiff's symptoms and the likely prognosis. There was no such report in respect of the other plaintiffs. The bulk of the material was large. In respect of the 184 plaintiffs represented by Mr. Clark there were nine boxes each about 18 inches by 12 by 12 inches. J.2/25. Each plaintiff was listed alphabetically in an Appendix A prepared by counsel: one list for the plaintiffs represented by Mr. Bailey and Mr. Yarbrough, and another for those represented by Mr. Clark. J.2/26A.

19. On 12th September 1983 Mr. Bailey attended court at Marshall, Texas, where Judge Steger was sitting. Mr. Bailey handed in the draft judgment together with his Appendix A. He also delivered to the room of Judge Steger the medical material for those plaintiffs. Mr Clark was not present having been delayed. The hearing lasted for less than ten minutes. There was little discussion save that the judge said he would review the medical material. Later Mr. Clark arrived, delivered his material to the judge's room, and lodged his own Appendix A. J.2/26.

20. In the afternoon of 12th September 1983, or perhaps the next day, Mr. Bailey was told by Judge Steger's law clerk that Judge Steger was not willing to award damages based on an average of \$120,000 but was willing to award damages on an average of \$75,000 per plaintiff. Thereupon Mr. Bailey and Mr. Clark altered their four levels down to \$120,000, \$85,000, \$60,000 and \$37,000. Two plaintiffs were moved into a different category. Mr. Bailey could not explain the reason for that to Scott J. The amended Appendices were lodged at the Tyler Court house. J.2/26G-27B.

21. Judge Steger signed the judgment and dated it 12th September 1983. The total amount of the individual sums listed in the two amended Appendices, namely \$15.654 m. was added in typescript to the judgment, and on 14th September 1983 a note was entered on the docket sheet in respect of each of the Tyler 2 actions. J.2/27C-D.

22. The total of \$15.654 m. was not based upon an average of \$75,000 per plaintiff. Such an average would have produced a total of \$15.45 m. The excess of \$200,000 shows that the typed figure of \$15.654 m. could not have been typed on the judgment until after the amended Appendices had been lodged. The probability is that Judge Steger signed the <sup>the</sup> completed judgment on 13th September or on 12th September before lodging of the amended Appendices and with the total amount left blank. J.2/27E to H.

23. As to whether Judge Steger had had an opportunity for reviewing the medical material lodged, and whether the quantum of damages awarded to the plaintiffs could have owed anything to that review, it was accepted by Mr. Bailey that Judge Steger had played no part in the placing of any plaintiff into his or her category or level of damages. The only input from Judge Steger was his requirement that an average of \$75,000 be produced, and despite that requirement <sup>the total based on</sup> the total judgment exceeded that average by \$200,000. There was no review of the medical material by Judge Steger because it was impossible for him to have reviewed it in the time available.

24. The form of the default judgment upon which these proceedings are based, was, as stated above, irregular and unusual. It contained the statement referred to above directed to showing that the Tyler 2 proceedings were part of a continuing process of litigation which began with the filing of complaints in the Tyler 1 litigation and which "continued under new cause numbers and styles"

as Tyler 2. It also contained statements that "the court after receiving evidence and hearing arguments of counsel makes the following findings of fact"; and "the court having reviewed the medical records as to each plaintiff hereby awards damages as to each plaintiff as set forth in Appendix A of this judgment which this court has determined were proximately caused by the ...

(negligence) ... of defaulting defendants and which would properly compensate plaintiffs for reasonable cost of necessary medical treatment, pain and anguish, and physical disability which each has incurred in the past and which in probability they will suffer in the future."

25. In all the circumstances the default judgment served upon Cape/Capasco did not accurately describe the nature of the court hearing that led to the judgment because:

- (a) There was no evidence, in the strict sense, that the court received;
- (b) Counsel put no arguments to the court;
- (c) The court had not and could not have "reviewed the medical records as to each plaintiff";
- (d) The court had no material before it from which a determination of proximate cause could have been made;
- (e) The court had no material before it from which an assessment of the "necessary medical treatment; pain and anguish; and physical disability" of the individual plaintiffs could have been made; and
- (f) The implied representation that there had been a hearing at which damages were assessed was false. J.2/31B-32B.

26. The circumstances in which the judgment was obtained justified three conclusions:

(a) No judicial hearing, worthy of the name, at which quantum of damages was assessed, took place.

(b) The attribution of specific damages to the individual plaintiffs was not the result of a judicial assessment of the individual entitlements of the respective plaintiffs.

(c) The total sum of damages awarded was based on the judge's opinion as to what would represent an appropriate average award. J.2/39C-E.

27. The procedure leading to the damages award of 12th September 1983 was not in accordance with the Federal Rules. J.2/39F.

The law applied by Scott J.

In the view of Scott J. the fundamental criterion for the success of a natural justice objection to the enforcement of a foreign judgment was to be found in the judgment of Lord Lindley MR in Pemberton v Hughes [1899] 1 ChD 781 where he said:

"If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court has jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed."

Thus in the opinion of Scott J. if the natural justice objection were to succeed, the proceedings in the foreign court must "offend against English views of substantial justice": J.2/43E. With reference to that broad criterion he considered the procedure which led to the default judgment of 12th September 1983. The



route which led him to his conclusion on this issue was very briefly as follows:

(i) Cape/Capasco were in default and had forfeited any entitlement to a hearing save on the issue of damages. There was no injustice in that. J.2/45H.

(ii) Cape/Capasco were given sufficient notice of the application for the default judgment but the application for relief of which notice was given was for a judicial assessment of damages at a judicial hearing: J.2/46A-C.

(iii) The effect of the notice given to Cape/Capasco could not be divorced from the context of the Federal Rules for default judgments. Having regard to that context a defendant in default in an action for unliquidated damages in the Tyler Court was entitled to expect that his liability to the plaintiff would be assessed by the judge in the light of evidence which the judge had considered and which, in the judge's opinion, justified the award which was made.

J.2/46C-47F.

(iv) "The requirements of substantial justice in a particular case cannot be divorced from the legitimate expectation of both the plaintiff and the defendant in the context of the procedural rules applicable to the case..." J2/47G.

(v) Since there was no judicial assessment of the damages the proceedings offended our principles of substantial justice. J.2/48A-H.

(vi) The fact that the default judgment might have been set aside on application to the judge, or on appeal, because of the breaches of local rules of procedure, did not as a matter of principle make the judgment enforceable notwithstanding the breach of natural justice. J.2/49B-49G.

Principles not in issue on this appeal: some general observations

In the context of the natural justice issue certain principles are common ground and appear to us to be indisputable. The first is that, upon proof of private international law jurisdiction in the Tyler Court, Cape/Capasco would have come under an obligation to obey that judgment unless they should be able to impeach it on the ground of fraud, or breach of natural justice, or breach of the requirements of public policy. For the proof of these grounds of defence, all are to be judged in the courts of this country according to the law in force in England and Wales and to the principles of that law. Further, whether any alleged breach of natural justice based on procedural irregularity is such as to render the foreign judgment unenforce-  
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 able, the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or <sup>in</sup> the relevant foreign system, are designed to give effect to those principles.

The basis of the obligation, which our law would enforce against Cape/Capasco upon proof of jurisdiction in the Tyler Court, is that, because Cape/Capasco were present within the territorial jurisdiction of that court at the date of service of the proceedings, the command contained in the document or process served upon them is regarded by our law as validly and effectively made.

\_\_\_\_\_ It would regard Cape/Capasco as obliged to make such answer as they could put forward against the claims of the plaintiffs, and to make it in the Tyler Court. If they chose not to make any answer, they would not be permitted to dispute in our courts the judgment of the Tyler Court upon the merits. Subject to the defences of fraud, breach of natural justice, and public policy, Cape/Capasco would be liable upon the judgment.

It is clear that a corporate defendant, and those called upon to advise it, may thus be placed in great difficulty by the working of our rules of private international law. The directors of a defendant corporation may reasonably believe, upon competent advice, that the corporation was not, at the date of service of the proceedings present within the jurisdiction of the foreign court. If they are right, they can safely ignore the proceedings so far as concerns the assets of the corporation within the jurisdiction of our courts. If they are wrong, - and the judgments of Scott J. and of this court show that the question may be of considerable complexity - they may be sued in this country upon a judgment which cannot be questioned as to the merits and substance of the decision upon which the judgment is based. In particular, with reference to the quantum of a judgment, whether for damages for tort or for breach of contract, the corporate defendant is placed in difficulty. Not infrequently plaintiffs, who are claiming damages, exaggerate their injuries and their losses. When the defendant does not appear, and no evidence is presented to answer the plaintiff's case, the court, which has the task of assessing damages, can normally do no more than consider the evidence put before it and base the assessment upon that evidence. In adversarial systems, the court cannot normally do <sup>no</sup> more in investigation of the claims, or call for further evidence, and it is under no obligation to do so. In particular, according to our law, a defendant corporation which denies that it is subject to the jurisdiction of the foreign court, could not effectively continue to dispute that jurisdiction while taking part in the assessment of a damages claim because, if it did so take part, it would thereby normally submit to the jurisdiction of the foreign court and render itself liable to be

sued in this country upon that judgment. In the result, if the corporation is to be able effectively to maintain its contention that it was not subject to the jurisdiction of the foreign court, it must leave the plaintiff there to present a wholly uncontested claim (as the defendants did in the present case). It will have no defence to an action upon the ensuing judgment, if it is held by the courts of this jurisdiction to have been in fact subject to the jurisdiction of the foreign court, unless it can rely upon fraud, breach of natural justice or public policy.

The plaintiff, too, in such a case may face the risk of an unjust result. The defendant may have no answer on the merits to the plaintiff's claim, and the judgment as entered in default may be in amount wholly in accordance with substantial justice. Yet if, through no personal fault of the plaintiff, the defendant can point to a sufficient breach of our principles of natural justice simply in the procedure by which the judgment was obtained, the plaintiff can recover nothing on the judgment. He may, if the procedure of the foreign court permits him to do so, start again at some point in the existing proceedings and continue in a way which avoids the procedural defect. If the wrong is actionable in this country, and the claim is not statute barred here, he could sue here. What he cannot do is to enforce the foreign judgment here to the extent that it is unobjectionable and claim the assistance of our courts as to the rest, unless, perhaps, some part of the judgment is clearly severable and unaffected by the defect in procedure. Thus, in these proceedings, upon the assumption that Cape/Capasco were present within the jurisdiction of the Tyler Court, it would not be open to this Court to enter judgment for the plaintiffs for damages to be assessed under the procedures of our court, although such an order would, if the plaintiffs cannot effectively start again in the Tyler Court, get

closer to substantial justice than dismissal of their claims. Nor was it suggested that this court could direct that judgment be entered for the plaintiffs on liability, with a direction that the plaintiffs be at liberty to apply to enter judgment for such amount as may hereafter be assessed by the Tyler Court. These are partial or alternative remedies which could only be provided by the terms of a statute, presumably to be based upon a treaty or convention. The position therefore is that, if through the adoption of the procedure by which Judge Steger directed judgment to be entered for these 206 plaintiffs, there occurred a denial of the requirements of substantial justice, the plaintiffs would (as we assume for present purposes) fail entirely although Cape/Capasco were properly subject to the jurisdiction of the Tyler Court. If, on the other hand, there was no such denial according to the established principles of our law, then Cape/Capasco (on the same assumption) would be held liable for the full amount of the judgment notwithstanding the forceful objections of Cape/Capasco to the manner in which the Tyler Court left so much of the assessment of the plaintiffs' claims to counsel acting for those plaintiffs.

The plaintiffs' submissions on natural justice

Mr. Falconer's submissions for the plaintiffs may be summarised as follows:-

1. The natural justice defence has been limited by authority binding upon this court to lack of notice and denial of proper opportunity to be heard: see Jacobson v Frachon [1928] 138 IT 386. The underlying basis or reason for this limitation is that our law requires only that the judgment debtor be afforded by the foreign court a fair trial or the opportunity for a fair trial if the defendant chooses to take it. If the defendant is shown to



have been deprived irremediably of a fair trial then the judgment is unenforceable here.

2. The defendant will be held to have been irremediably deprived of a fair trial by reason of defective procedure in two cases:

(i) if the rules of procedure of the foreign court are themselves by our standards unfair, because, in that case, there can be no prospect of the foreign court correcting what has been done under its rules; and,

(ii) if the rules of procedure of the foreign court are by our standards fair; and the defective procedure was caused by departure from those rules, but it is impossible or impracticable for the defect to have been corrected within the foreign system: e.g. because the defendant only learned of the judgment too late to advance an effective appeal or procedure for setting the judgment aside.

3. If the procedural defect was reasonably capable of remedy within the procedure of the foreign court, whether by application to set aside the judgment, or by appeal, the defendant is not released from the obligation to obey the judgment by reason of the procedural defect because, being subject to the jurisdiction of the foreign court, he may properly be required to have resort to the remedies provided by the foreign system.

4. The basis and substance of those submissions for the plaintiffs were said to be in accordance with justice, with practicality and with the principles of our law in that:

(i) our law recognises that all courts make procedural mistakes: the fact that a mistake is made, for which the foreign court's procedure provides a remedy, should not

release the defendant who chose not to avail himself of the remedy;

(ii) the argument is based upon the connection between the foreign court and the defendant created by the voluntary act of the defendant in being present within the foreign jurisdiction, or by submission thereto, etc.;

(iii) it is desirable that our courts should not be required to act as a court of error for the examination and assessment of procedural defects within the foreign system for which that system provides an effective remedy;

(iv) the submissions provide a framework of reasonable certainty and clarity for the decision of pleas of breach of natural justice. By contrast, the "broad criterion" applied by the judge, is too wide and too uncertain a test.

5. The reliance placed by Scott J. on "legitimate expectation" was unjustified. There had been no actual expectation on the part of Cape/Capasco nor any reliance upon any expected form of procedure. Nothing to that effect had been pleaded or proved. This concept of legitimate expectation amounted, it was said, to no more than the assertion that a defendant is entitled to expect that, in the conduct of the proceedings in the foreign court, that court will correctly apply its own procedure and that, if it does not, a sufficient breach of natural justice is demonstrated. (We will refer to the submissions summarised in this paragraph as "the legitimate expectation point".)

6. Upon the evidence and upon the findings of Scott J. the procedural rules applicable in the Tyler Court were fair and just. The defendants could have applied to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would

have been allowed if made in due time. Further, an appeal to the Circuit Court was open to Cape/Capasco. Since they took no step to correct the procedural defect, and the consequences of it, they cannot rely upon it as a defence in these proceedings.

The defendants' submissions on natural justice

To these submissions Mr. Playford for Cape/Capasco replied by contending that Scott J. was right in his conclusion for the reasons which he gave. Further, if it should appear to this court that the defendants could not impeach the judgment on the ground of a procedural defect which was capable of remedy within the system of the Federal courts, then it was said that the defendants did not know in time of the procedural defects and could not reasonably be required or expected to have sought such remedy there.

The decision in Jacobson v Frachon

A number of decisions were cited to us in the context of the natural justice issue. However, the most important of them was Jacobson v Frachon (supra) because it was said on behalf of the plaintiffs to establish legal principles which are binding on this Court and render the natural justice defence unsustainable on the present facts by limiting that defence to lack of notice and denial of proper opportunity to be heard. Furthermore, it was common ground that this is the only case in which the Court of Appeal has considered points relevant to the questions raised in this case under the heading of the natural justice issue.

In Jacobson's case, this Court applied rigorously the principle that our courts will not impeach the judgment of a foreign court having competent jurisdiction on its merits. However, the

crucial passage in that case particularly relied upon by Mr. Falconer was a statement of Atkin LJ., who, after referring to the judgment of Lord Lindley in *Pemberton v Hughes*, said (at p.392) that a judgment could be impeached "if the proceedings, the method by which the court comes to a final decision" are contrary to English views of substantial justice, and continued:

"The Master of the Rolls seems to prefer, and I can quite understand the use of the expression, "contrary to the principles of natural justice"; the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigants that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court. (Emphasis added)

Both those considerations appear to be essential if they are to be in accordance with natural justice."

We have had the benefit of very careful and detailed analyses in argument and judgments in Jacobson's case. We intend no disrespect to such arguments if we do not prolong an already very long judgment (in which we have already decided that the defendants succeed on the presence issue) by recapitulating these analyses. We will summarise our conclusions in relation to Jacobson's case as follows:

(1) Atkin LJ in his judgment was not attempting to make an exclusive or comprehensive statement of the circumstances in which our Courts will treat the procedure adopted by a foreign court in reaching its decision as offending against the principles of natural justice.

(2) Lord Hanworth MR was clearly of the view (see *ibid* at p.390), which we share, that the requirements of due notice and proper opportunity to be heard will, in the majority of cases which can be expected to arise, sufficiently comprise the concept of natural justice in a procedural context, but he prudently qualified his statement by saying that they "almost, if not entirely" comprise it.

(3) We therefore reject the contention that the decision of this Court in Jacobson's case restricted the defence of breach of procedural natural justice to the requirements of due notice and opportunity to put a case. Scott J. was entitled, in our view, to direct himself by reference to the test stated by Lord Lindley in Pemberton v Hughes and to consider whether the procedural defect alleged by Cape was such as to constitute a breach of an English court's views of substantial justice. The point was not concluded against the defendants merely because they had been given proper notice of the application for default judgment and would, if they had attended, have been allowed full opportunity to put their case.

(4) However, this Court in Jacobson's case was not required to consider the relevance (if any) of any remedy which might have been available to Jacobson under the French legal system (whether by way of appeal or by application for the judgment to be set aside) if the hearing in the French court had itself constituted a breach of natural justice.



"No judicial assessment of damages"

The next question is whether, as Scott J. considered, the "method by which the Tyler Court came to its final decision", to use Atkin LJ's words, was contrary to our views of substantial justice on the grounds that there had been no judicial assessment of damages.

We have found this to be a matter of difficulty. We have, although well aware of its limited nature, some general knowledge of the working of the system of civil justice in the Federal Courts of the United States; and we are aware that it is a system which has been developed by judges of great distinction and learning, and subjected to continuous and searching examination and comment both by the legal profession and by academic lawyers of similar distinction and learning. Scott J. expressed his view that the system of civil justice evidenced by the Federal Rules and explained by the witnesses was an unimpeachable system of justice within one of the great common law jurisdictions of the world and was plainly in accordance with the requirements of natural justice. We make the same respectful acknowledgement. But, as Scott J. pointed out, the defendants made no criticism of that system of justice. Their complaint was that, at the invitation of the plaintiffs' counsel, Judge Steger did not proceed in accordance with it.

We recognise, further, that the Federal Courts have been required to determine, and to develop methods for the effective control and management of, civil litigation in product liability cases in which large numbers of plaintiffs have made claims against numerous defendants arising out of similar classes of injury and having broadly similar consequences but with differing degrees of severity. We have had some experience in this country

of such litigation but in smaller volume. Our own procedures have to an extent been modified to deal with the preparation and settlement of such cases but we have not, to the same extent, developed the techniques of a class action or the role of the judge in procuring settlements. We are aware that our present system has been subjected to criticism in having failed, as it has been said, to respond sufficiently to the requirements of such litigation.

The circumstances of 206 plaintiffs making claims based upon a common cause of injury were, as it seems to us, directly relevant to the method of decision adopted by Judge Steger without objection by the plaintiffs' counsel. The purpose was, as we infer, to avoid the private costs and public expenditure of court time which would have been necessary if there had been either individual judicial assessments or judicial assessment by reference to groups based upon evidence directed to the individual cases. The method was adopted for proper purposes. We accept, as submitted by Mr. Falconer, that Judge Steger had knowledge and experience of Mr. Bailey and the other counsel and that Judge Steger must have reposed trust in those counsel to act properly in the matters left by the judge to them. Mr. Falconer submitted that there was nothing inherently objectionable, according to our standards of substantial justice, in a court leaving to the plaintiff's lawyers the fixing of figures for individual plaintiffs after the court has indicated an average basis of award for all plaintiffs.

In reply to that contention Mr. Playford pointed out that the indication by Judge Steger of an average basis of award for all plaintiffs was based on nothing in the way of evidence as to

the fair sums due for compensation for any of them. It may be that an average figure for settlement of such claims was known by the judge to be \$75,000 but that provided no basis for a holding that the condition of these 206 plaintiffs was such as to justify a total award of \$15.45 m. or any other total award. If the judge had had before him, and had considered, evidence, perhaps from one expert, to the effect that, by reference to the listed apparent injuries suffered by the plaintiffs, they properly belonged in certain categories of gravity of injury; and if he had, by reference thereto, estimated a figure for general damages for each category; and, then, by reference to the numbers of plaintiffs in each category calculated a total award which would be fair to the defendants, we could see no valid objection, which the defendants could have put forward, if the judge had then left it to plaintiffs' counsel to allocate precise sums within the total award to individual plaintiffs. But we agree with Mr. Playford's submission that that was not what happened. The defect <sup>was,</sup> the procedure adopted/as Scott J. found, that the total award was not in any real sense based upon an objective assessment by the judge upon evidence as to the condition of these plaintiffs.

It seems to us that, in truth, Judge Steger was applying to the process of assessment of damages in default, when only the plaintiffs were represented before him, the process and technique appropriate to a settlement negotiated between both the plaintiffs and defendants with the intervention of the judge. If we understand the position properly, the only basis upon which Judge Steger, as the judge responsible for assessment of the damages, could assert, without knowledge of the evidence relating to the 206 plaintiffs, that \$120,000 average, \$24.72 m. total, was too high a figure, and that \$75,000 average, \$15.45 m. total, was a

proper figure, was that, if the defendants had been present and taking part, they would in probability have refused to settle for \$24.72 m., so as to avoid the risk of having to pay more after individual assessment, but would, in probability, have agreed to pay \$15.45 m. so as to avoid that risk. If that was the basis of his decision, there is nothing to show that he was in fact wrong upon the hypothesis upon which he acted and nothing to show that he was right; but, as Scott J. observed (J.2/48C), while damages calculated on an average per plaintiff basis may make very good sense for the purposes of a settlement, because defendants are not concerned with how the total will be divided up, a judicial award so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs.

Mr. Playford referred us to authority in order to demonstrate what he said should be regarded as the essential requirements of a court "acting judicially", and, in support of the proposition that it is part of the requirements of natural justice that the judgment of a foreign court, which is rendered for enforcement, be reached by that court "acting judicially". He referred in particular to R. v Local Government Board, ex parte Arlidge, [1915] A.C. 120 and in particular to passages in the speech of Lord Haldane at page 132, of Lord Shaw at page 138, of Lord Parmoor at page 142 and of Lord Moulton at page 150. That case was concerned with the validity of a closing order under section 17 of the Housing, Town Planning Etc. Act 1909 and with the procedure on appeal to the Local Government Board. An example of the statements relied upon is that of Lord Parmoor at page 142:

"Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice."

In our view, no significant assistance is to be derived from this case, or other decisions upon the requirements of natural justice in administrative law cases, where the requirements of substantial fairness depend upon the subject matter and the context. It is sufficient, in our view, to derive the requirements of natural justice for the purposes of enforcement of a foreign judgment and the special defence thereto of breach of natural justice from the principles stated in Pemberton v Hughes and relied upon by Scott J., namely: did the proceedings in this foreign court offend against our views of substantial justice?

The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the Federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed



objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

We do not find it necessary to decide whether, if the local rules provide for service by the plaintiff of notice of a specific sum claimed for damages, a default judgment may be entered for such a sum without proof of judicial assessment and without there being breach of any requirement of natural justice. Scott J. thought that there could be no objection to such procedure and we think that in most cases that would be right. The matter does not arise for decision in this case and we express no concluded view. We would however not exclude the possibility of a defence being upheld if the facts justified the conclusion that, making due allowance for different levels of awards and of substantive law, the/actual award was irrational

Mr Falconer relied upon Scott J's finding that there would be no breach of natural justice in proceedings for a default judgment for unliquidated damages if judgment were entered for the specific sum claimed by the plaintiff. It was submitted that such a claim had in effect been made by the 206 plaintiffs in these proceedings because their pleading placed a limit upon the damages claimed in the sum of \$100 m./would, as we understand it, prevent the court from entering judgment for any larger sum but there is nothing to show that the limit was intended to mean, or would be understood by any person familiar with procedure in the Federal Courts as meaning, that the \$100 m. represented a sum which the plaintiffs asserted to be the total

of their estimated claims and for which the court would be empowered to give judgment without proof of the amount of injury and loss suffered.

The "legitimate expectation" point

At first sight there appeared to us to be some force in Mr. Falconer's criticism of the relevance of this concept in this case. It was accepted by Mr. Playford that reliance by the defendants had not been pleaded or proved with reference to any subjective expectation on their part that the assessment of damages on the application for the default judgment would proceed according to any particular method. We would also accept that the adoption of a particular method of assessment of damages by the foreign court, would not per se amount to an effective defence, as a breach of natural justice under our law, merely because it was shown that, by reference to the procedural rules of the foreign court, the defendant might (on an objective basis) reasonably have expected that a different method would be used. So to hold would be to introduce, under the concept of reasonable expectation, a rule that breach by the foreign court of its own rules of procedure renders the foreign judgment unenforceable as offending our concepts of substantial justice. It is clear law that mere procedural irregularity, on the part of the foreign court and according to its own rules, is not such a ground of defence. Pemberton v Hughes itself was an example of mere procedural irregularity.

In our view, however, Scott J. did not so regard or use the point of reasonable expectation. He made reference to it in dealing with the question whether what had happened amounted to a breach of the requirements of substantial justice, and after reference to the fact that the rules of a court might, in his

view, without offending those requirements, provide for the giving of notice of the plaintiffs' estimate of the recoverable damages and the entry of a default judgment for that amount in the absence of opposition on the part of the defendant. The question was to be decided, in the view of Scott J., by reference to the context in which the alleged procedural defect had occurred. He was, in our view, not in error in this regard. The fact was that the system of legal procedure in which Judge Steger had signed the default judgment had not contained any provision for converting an unliquidated damages claim to a potentially fixed sum for the entry of a default judgment. His reference to the fact that the defendant in a default action was entitled to expect that his liability to the plaintiff would be assessed by the judge on the evidence was not a reference to actual expectation on the part of these defendants but to the requirements of natural justice against the background of a system which contains no such provision.

We therefore conclude that the defendants have demonstrated, as Scott J. held, that the method by which Judge Steger came to a decision as to the amount of the default judgment was by itself contrary to the requirements of substantial justice contained in our law. If that fact is regarded as a sufficient and conclusive description of the proceedings of the Tyler Court then, according to the judgment of Atkin LJ in Jacobson's case cited above, that finding would serve to invalidate the judgment. But, as noted above, the Court of Appeal in Jacobson's case was not required to consider whether, as Mr. Falconer submits, an opportunity to correct such a defect, provided by the foreign system of procedure, may either cause such a defect to cease to be in our law an effective breach of natural justice or, if there is any difference, cause the defendant to be unable to rely upon it for purposes of impeaching the judgment.

Requirement of use of remedy in foreign court

Mr. Playford submitted that proof of this defect in the proceedings of the Tyler Court is a conclusive defence for the defendants, and he submitted that it is just that it should be so. It is not exorbitant, he said, to require that a default judgment, designed and intended for enforcement in this country, should comply with so basic a principle as that the amount of a judgment for personal injuries be fixed in substance by the court upon the evidence and not in substance by the plaintiff. No authority establishes, he said, the requirement of use by a defendant of any local remedy.

We accept that no authority binding this court has been cited to us establishing the proposition for which Mr. Falconer has contended. It is at least clear that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts: (see Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295; Jet Holdings Inc. v. Patel (1988) 3 W.L.R. 295). The position may well be the same in cases where there has been a breach of natural justice of the two primary kinds considered by Atkin L.J. in Jacobson v. Fraxion namely absence of notice of the proceedings or failure to afford the defendant an opportunity of substantially presenting his case.

In this judgment, however, we are dealing with a case where, although there was in our view a departure from the basic principles of natural justice in the assessment of the amount of a default judgment, nevertheless (a) the error which led to this departure was an honest error on the part of all concerned;

(b) the defendants had proper notice of the proceedings and could have presented their case on its merits if they had chosen to do so, but chose not to do so; (c) the procedural rules applicable in the Tyler Court were themselves fair and just; (d) the defendants had the right to apply to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would presumably have been allowed if made in due time.

Against this background, we are not persuaded that possession of and failure to exercise this right by the defendants can be disregarded as being wholly irrelevant in determining whether the proceedings in the Tyler Court, which we think must be viewed as a whole, offend against English views of substantial justice, within the principles stated by Lord Lindley in Pemberton v. Hughes, as the plaintiffs would submit.

It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is "manifestly wrong": (Godard v. Grey (1870) L.R. 6 Q.B. 139; Castrique v. Imrie (1870) L.R. 4 H.L. 414; Robinson v. Fenner (1913) 3 K.B. 835, 842). In any such case it could be said that there has been a breach of natural justice, but it is not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as



may be provided under the foreign system.

This being the position where there has been an error of substance, it would, in our judgment, be anomalous if our courts were obliged wholly to disregard the existence of a perfectly good remedy under a foreign system of procedure in considering whether the defective operation of that procedure has led to a breach of natural justice. And, indeed, from some of the cases on procedural defects, support can be derived from the proposition that, at least with reference to defects known to the defendant before judgment, the defendant can be required to have made use of any remedy available in the foreign court: (see, for example, Reynolds v. Fenton (1846) 5 C. 16 L.J.C.P. 15 and Crawley v. Isaacs (1857) 16 L.T. 529, see particularly at page 531 where Bramwell B. said (obiter):

"If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but on the other hand, if the procedure be in accordance with natural justice, the foreign court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained."

Mr. Falconer relied strongly not only on that passage but on dicta of Fry J. in Rousillon v. Rousillon (1880) 14 Ch.D. 351 at page 370 and of Bray J. in Jeannot v. Fuerst (1909) L.T. Vol. C. 816 at page 818.

Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of

a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances.

We return then to the circumstances of this case, of which the most relevant seem to us to be the following. First, the defendants who, for present purposes, we assume were subject to the jurisdiction of the Tyler Court, were duly served with the proceedings; they chose to take no part in them; they were given notice of the application for the default judgment; they chose not to attend the hearing of that application; and they were thereafter served with the default judgment.

Secondly, on service of the judgment, the defendants knew the amount of the award to each plaintiff. It seems that they could have obtained access to the medical records as to each plaintiff referred to in the judgment, and advice as to the question whether, upon such material, the awards appeared excessive according to the law in force in the Tyler Court.

Thirdly, by not attending the application for the default judgment, the defendants deprived themselves of information as to what occurred before the court. If they had attended before Judge Steger, the nature of the proceedings would have been largely apparent. The proceedings took place in public before the judge, and, at least so far as concerned the facts that there was no evidence received by the judge in court on the

hearing and no arguments presented to the court, the defendants would have discovered those facts.

Fourthly, it would have been open to them to apply for the judgment to be set aside if they had formed an intention to contest the amount of the awards. It seems to us to be probable at least that, since the method of assessment adopted by Judge Steger was contrary to the Federal Rules, an application of this nature made promptly to the Tyler Court would have succeeded.

Fifthly, however, the defendants, when the judgment was served upon them, could not and did not know the method by which damages had been assessed from anything stated in the judgment. The recitals in the judgment were, as Scott J. held, false and misleading: there had been no hearing at which damages had been assessed. The facts as to what happened in the Tyler Court became known to the defendants at latest when evidence was given in the proceedings before Scott J. There was, as we understand it, no evidence from the defendants directed to the question when they first had knowledge of the method adopted by Judge Steger for assessing damages. There is, however, nothing to indicate that they were aware of the method adopted at any time before the date when, after claims were made on them in this country on the basis of the default judgment, the circumstances in which the judgment was made were investigated for the purposes of these proceedings.

#### Conclusion on the natural justice issue

Giving full force to all these facts, we find it impossible to say that, because the defendants did not apply to set the default judgment aside, they could not rely upon the substantial injustice in the proceedings constituted by the failure of the court to assess the damages judicially upon the evidence. They

did not wish to dispute the amount of the damages award by presenting a case to the Tyler Court. We cannot have regard, as an excuse available to them, to the reason why they chose not to appear, namely their unwillingness to submit to the jurisdiction of the Tyler Court. However, it cannot, in our view, be required of them that they should have applied to the Tyler Court to contest the amount of damages awarded when they were necessarily content to leave the amount of the damages to be assessed by the court. The only complaint which the defendants could thereafter make would be as to procedural irregularity. As to that, as we have stated, they had at the time of service of the judgment no knowledge. The defendants were not told before the application for the default judgment that plaintiffs' counsel intended to invite Judge Steger to accept the view of plaintiffs' counsel as to the total value of the claim, based upon an average of \$120,000 per plaintiff, and that the plaintiffs would accept in substitution for the assessment of the damages by the judge, such counter-proposal based upon an average sum per plaintiff as the judge might be minded to make, from his general knowledge of the proceedings and of the settlement in the Tyler 2 proceedings to that date and from his knowledge of national average settlement figures in asbestosis cases.

The fact that information as to the procedural defect would probably have emerged if Cape had made an application to set the default judgment aside on other grounds, seems to us to be of no relevance. Cape are not to be treated as having information which they did not have because, if they had made an application which they had no reason to make, they could have obtained that information.

A harsh but accurate summary of what happened is, in our judgment, that those acting for the plaintiffs failed to give prior notice to the defendants of the unusual course which they intended to pursue; they chose not to try to prevent Judge Steger from adopting that method of assessment; and they drew up and served a form of judgment which did not reveal what had taken place. That was all done in good faith. There was no dishonest purpose. But the effect upon the defendants was, in our view, that they had at no material time knowledge of any basis for seeking relief from the Tyler Court in respect of the defect which Scott J. rightly held to have been demonstrated by them to have occurred in the proceedings in the Tyler Court.

The only basis for attributing to the defendants constructive knowledge of the defect, upon which they could reasonably be required to have used any available remedy in the Tyler Court, would be that a defendant who has been given notice of the proceedings will be fixed with knowledge of everything which he would have learned if he had attended those proceedings. That, in our judgment, is not an acceptable basis for considering proof of procedural injustice. Plaintiffs can, we think, fairly be left to avoid such procedural errors as will prevent enforcement of a judgment in this country.

Accordingly, on the natural justice issue, although for somewhat different reasons, we would uphold the decision of Scott J.

#### V CONCLUSION

In the result, while we have some doubts as to whether the learned judge reached the right conclusion on the country issue, we are satisfied that he reached the right conclusions on the



presence issue and the natural justice issue. He was accordingly right, in our judgment, to dismiss the plaintiffs' claims and this appeal likewise must be dismissed.

Finally, we acknowledge our debt to all counsel on both sides for the great assistance which they have given us in this interesting but exceptionally difficult case.

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# APPENDIX

In this Appendix we will set out and deal 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. We will refer to the section of this judgment headed "The facts on 'presence' as found by Scott J." as "the primary facts section".

"(1) Cape was incorporated in 1893 to take over blue asbestos mining operations in the Orange river valley and thereafter it gradually expanded its blue mining division and in 1925 acquired a number of amosite asbestos mines in the Transvaal including the mines at Penge."

This was not disputed by the defendants.

"(2) (i) Egnep did not have a sales organisation of its own.

(ii) Cape and Casap acted as clearing house and bankers within the Cape Group for transactions relating to the sale and marketing of asbestos."

As to (i), the defendants did not dispute that Egnep had no sales organisation 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. That contention was plainly made good.

As to (ii) above, the evidence of Dr. Gaze, upon which the plaintiffs relied (Dep. pages 34-36), showed that Casap acted as a clearing house in South Africa and that Cape so acted in London. The sense of what he said was not that in this respect Cape and Casap acted as bankers, but that they rendered a central banking or clearing house service to the subsidiaries to avoid the sending of a large number of separate cheques for each obligation arising between the subsidiaries or

between a subsidiary and Cape.

- "(3) (i) 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."

It was agreed that NAAC was incorporated in 1953. For the rest, on this point the plaintiffs made reference to the documents at Vol. 3 page 1, Mr. Morgan Dep. 3 page 146, Mr. Morgan Dep. 1, pages 197 and 217-9. That evidence does not by itself show anything inconsistent with Scott J.'s finding set out in paragraph 14 of the primary facts section.

- "(3) (ii) From 1970 NAAC's President was Mr. Meyer, a lawyer, a partner in Cape's attorneys in the USA who ostensibly ran NAAC from his law offices."

For this the plaintiffs referred to Mr. Morgan Dep. 3(iii) page 148. It was agreed that Mr. Meyer was President of NAAC from 1970 until Mr. Morgan became President on 1st July 1974. The position of President of this corporation was substantially the same as that of managing director in a similar English company. 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.

- "(3) (iii) Mr. Morgan joined NAAC on December 1st 1970 having been interviewed in London by Dr. Gaze and took over as President on July 1st 1974 when Mr. Meyer became its Vice-President."

It was agreed that Mr. Morgan started with NAAC on 1st December 1970, that he was interviewed in London by Dr. Gaze

and that Mr. Meyer became Vice-President in July 1974. 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. (Mr. Morgan Dep. 3 pages 144-147.)

"(3) (iv) NAAC was virtually a one man organisation in the sense that Mr. Morgan himself was the only person who had customer contact."

For this the plaintiffs referred to Morgan Dep. 1 page 124, documents Vol. 4 page 262, and Vol. 3 page 198. The evidence shows, however, that 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 with NAAC until its dissolution. Mrs. Holtze contacted customers with regard to documentation and shipping; see her Deposition 2 page 210. She also communicated with customers if there was a shortfall in their requirements from Egnepe and arranged supply from the US Government's stocks.

"(4) NAAC's involvement in the sale of Cape's asbestos took two forms:

- (i) sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from Casap. The stocks it purchased were kept in a warehouse in Philadelphia. This represented in terms of tonnage about 25 per cent of NAAC's business; and
- (ii) organising and arranging the completion of contracts between US customers and Egnepe. NAAC received a commission from Casap."

The proposed findings must be compared with the detailed findings of Scott J. set out in paragraphs 13 to 23 of the primary facts section. The defendants did not dispute that the direct purchases by NAAC for sale by NAAC to customers in the USA

represented about 25 per cent of NAAC's business in terms of tonnage; or that, as the judge found, NAAC rented and paid for warehouse facilities and also organised and arranged the completion (in the sense of performance) of contracts between US customers of Egnep; and that NAAC received a commission from Casap (J. 59G). The point at issue here is the allegation that NAAC bought directly from Casap and not from Egnep and, as Mr. Morison explained, it is directed to the main submission for the plaintiffs that Cape did not regard it as significant which subsidiary sold, or was treated as selling, and that thus it is clear that Cape's entire commercial operation was run as one integrated business project. The plaintiffs relied upon brief statements of account between NAAC and Casap for February 1975 and March 1975 (Vol. 4 pages 250-1) in which reference was made to shipments, commission and in one case to a remittance; and they relied upon the accounts of NAAC which referred to trading with Cape and Casap. For the defendants, Sir Godfray submitted that on the evidence all the sales of asbestos from Egnep mines were made by Egnep in the sense that Egnep were the vendors; and the proceeds, less expenses and commission, were received by Egnep; but to that Mr. <sup>Morison</sup> retorted that the judge had not so found and the evidence left uncertain whether sales were always made by Egnep: see the findings of the judge concerning CPC set out in paragraph 33 of the primary facts section. Thus the judge (J. 60) referred to purchases by NAAC from Egnep or Casap. Again (at J. 76) the judge said that the seller of asbestos in NAAC's time was Egnep or Casap.

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.

"(5) NAAC as a sideline, imported asbestos goods from Japan which it sold to the textile industry."

The plaintiffs relied upon a statement by Mr. Morgan at Deposition 1, page 157 to the effect that such sales were "a sort of sideline". The point is directed to the contention that such business as was carried on by NAAC which was not concerned with Cape asbestos, was either trivial or subordinate to NAAC's business of servicing the contracts under which Egnep, or other subsidiaries, sold asbestos into the US and of buying asbestos direct from a Cape subsidiary for sale on. The purchase by NAAC of asbestos goods was subordinate to its business with or for Cape's subsidiaries, as the judge found: see paragraph 14 of the primary facts section, for the dominant purpose of NAAC. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial: reference was made to accounts showing that such sales amounted to \$466,845 in 1975 and \$239,957 in 1976 out of total sales of \$4.09 million and \$3.54 million in those respective years: see Vol. 4 page 423; and to the accounts for 1972 at Vol. 3 page 117; for 1973 Vol. 3 at page 161; for 1974 at Vol. 3 page 242; and for 1977 at Vol. 4 page 578. 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.

"(6) NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco."

This was not in dispute save that the defendants submitted that NAAC did deal with Casap. For the purposes of the main submissions which the plaintiffs make, an answer to this point requires definition of the words "deal with". The passage in the evidence of Mr. Morgan on which the plaintiffs relied indicates that, when NAAC was concerned with assisting the performance of direct contracts between Egnep or Casap and a United States customer, NAAC passed any information which NAAC received as to the requirements of the customer not direct to Egnep but to Egnep through Capasco. He referred to such matters as shipping schedules, "setting up the boat", and notifying the customers when a shipment would be arriving. The customer - he was referring to PCC - paid Egnep directly. NAAC got commission from Egnep through the running account in which commission was set against NAAC's purchases from Egnep. NAAC's orders for asbestos from Egnep were placed through Capasco. Egnep then shipped the asbestos to NAAC. It was in this context that Mr. Morgan said that NAAC was never permitted to deal directly with Egnep: Deposition 1 page 150. 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.

- "(7) (1) Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed";

(Vol. 3: pages 90 and 94; Dr. Gaze, pages 16 to 19; Mr. Higham, page 274).

"(ii) And for deciding when asbestos should be supplied free of charge to one of its USA customers";

(Vol. 3, page 95).

"(iii) Capasco accepted as their responsibility the contamination of supplies."

(Vol. 3, pages 80-1.)

As to (i) above, the defendants did not dispute that Capasco within the Cape Group had the function of allocations of asbestos worldwide, in the sense that Capasco had information as to existing stocks and probable quantities of production of different sorts and quantities of asbestos from the South African mines owned by Cape subsidiaries, and determined, when supplies were less than demand, how those supplies should be allocated among the customers of Capasco and of the mining companies throughout the world. That function was part of the responsibility for the "supply, marketing and sales promotion throughout the world" as found by Scott J.: see paragraph 5 of the primary facts section. Cape itself, it was submitted, did not allocate, market or sell asbestos but held the shares in its subsidiaries. Upon consideration of the passages in the evidence to which we were referred, the true position appears to us to have been substantially as submitted by the defendants. The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for co-ordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions.

As to (ii) and (iii) above, the submission is based upon

the account of certain events in 1971 set out in the documents mentioned above. PCC had been informed by Mr. J. R. Owens of Capasco that during 1971 amosite grade D-11 would be in short supply but that a quantity of asbestos of inferior grades would be available. PCC asked for and received from Capasco technical aid to enable the lower grades to be used. Later, in a letter of 9th June 1971, Mr. Holman of PCC complained to Dr. Gaze at Cape that the quantity of asbestos allocated to PCC for 1971 was less than "their fair share": Vol. 3 page 92. In the same letter Mr. Holman asserted that PCC's claim, previously made in December 1970 by PCC to Capasco, for \$7,765 for costs incurred as a result of tramp metal and other foreign material in asbestos supplied, should be honoured. As to that claim, PCC had received an unsatisfactory reply from Capasco. Mr. Hauser, Manager of Production Planning at PCC, had written to Mrs. Holtze of NAAC on 15th December 1970 (Vol. 3 page 82) sending copies of the correspondence, with a complaint that PCC's problems were "making no impact upon them" (i.e. Capasco). The most important thing was to ensure further supplies from the mines which were trouble free. He asked that "if NAAC have a magic wand that you can wave to instil in them a sense of urgency ... please use it". PCC had been told in December 1970 by Capasco (Vol. 3 page 85) that Mr. Morgan, the newly appointed General Manager of NAAC, would be visiting PCC shortly to discuss the present situation and the outstanding claim. Mr. Morgan had made his visit in January 1971 (Vol. 3 page 89). He had told PCC in January that, on his return from London in March, he hoped he would be in a position adequately to discuss the availability of desired grades of asbestos but that "NAAC had its work cut out ... in persuading the Cape Group in London to supply us with sufficient

tonnage to satisfy your requirements".

The reply to the complaint of Mr. Holman was written by Dr. Gaze (Vol. 3 page 93) on 15th June 1971. Dr. Gaze was a director of Cape and of Capasco and was responsible for all scientific matters within the Group. He explained the nature, extent and causes of the supply problem for various grades and asserted "our intention to supply you with the maximum amount of long amosite that we can ..." but "... this will depend upon the extent to which the mines can produce extra tonnage ..." and "... Mr. Morgan at NAAC, Chicago, will be kept fully posted on the position." The letter concluded with a reference to the claim for \$7,765 as follows: "I consider that we should accept your claim and I am requesting the fibre selling company to supply you with 46 tons of the next consignment free of charge (f.o.b. Africa) in settlement of this": Vol. 3 page 95.

This incident has been examined in some detail so that the decision of Dr. Gaze to request that Egneep supply 46 tons free of charge in compensation for PCC's claim on Egneep can be seen in its context. 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. Capasco was not accepting responsibility for contamination of asbestos supplied. It seems to us that Capasco was acknowledging, in the commercial situation which had arisen, the good sense of making sure that PCC's claim on Egneep was accepted by Egneep, and Capasco therefore "requested" Egneep to make the allowance with confidence that the request would be followed. There is, accordingly, nothing in this incident which by itself casts doubt upon the conclusion of Scott J. set out at paragraph 34



of the primary facts section. Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.

- "(8) (i) Cape and Capasco provided assistance and personnel to advise the USA customer as to his manufacturing process;
- (ii) Officers of Cape and Capasco visited the USA and met with the customers; and were visited in London by the customers;
- (iii) It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler;
- (iv) In relation to price and allocation of asbestos, Cape, through Dr. Gaze, dealt direct with the main US customers."

As to these matters the relevant findings made by the judge are set out at paragraph 20 of the primary facts section.

As to (i), (ii) and (iii) above, reference was made for the plaintiffs to documents at Vol. 3 pages 32, 58, 73 and 78 and to the evidence of Mr. Buckley at Deposition page 21. Again, for the proper understanding of these additional primary facts, it is necessary to place them in their context. In July 1968 (Vol. 3 page 32) NAAC by Mr. Cryor wrote to PCC with reference to Mr. Stout of PCC having discussed Grade D-3 amosite with Dr. Gaze in London. It was by that letter that Mr. Cryor informed PCC that Grade D-3 would no longer be available as a separate grinding for use by PCC.

In May 1970 (Vol. 3 page 58) Mr. Baumann, Manager of Production Planning at PCC, in a letter to Mrs. Holtze of NAAC, referred to a visit by Mr. Owens (of Capasco) to PCC in April 1970 when he had requested a sample of D-11 amosite after the fibre had been opened in the PCC mills. After examination at "Cape's laboratory in London", Mr. Owens might be able to offer

suggestions for improvement in PCC's production process. NAAC was asked by Mr. Baumann to forward to Cape, as requested by Mr. Owens, sample fibres from two PCC plants and samples of foreign material found in asbestos supplied to PCC. The assistance of NAAC in "channelling these problems to the responsible parties at Cape Asbestos" would be appreciated. Mrs. Holtze replied that NAAC had sent the samples along "to our people at Uxbridge in order that their laboratory may examine them": Vol. 3 page 59. Later, NAAC reported to PCC the results of investigations as to the cause of metal contamination and the actions taken at the mines to avoid recurrence.

In October 1970 Capasco replied to a letter from PCC to Mr. Owens and informed PCC that Dr. Gaze would be meeting Mr. Bierer, President of PCC, on Mr. Bierer's visit to London in November to discuss such matters as PCC's request for technical aid and on the use of different grades of fibre, foreign material contamination, etc. The technical aid was later supplied by Capasco. PCC thanked Dr. Gaze for his assistance and commented that "Mrs. Holtze of NAAC did her usual excellent job in co-ordinating" the visit of the two technical experts sent by Capasco to PCC.

The evidence of Mr Buckley of PCC described the manufacture of Unibestos by PCC from 1962 until 1972. Unibestos was a high temperature insulation product. PCC had purchased the Tyler plant in 1962. PCC had known that Unarco had been producing Unibestos and had planned to make something similar. PCC had also known that Unarco's contact for asbestos was NAAC. PCC therefore told NAAC that PCC were interested in discussing the possibility of, and the conditions for, making a product similar to Unibestos. As their discussions with NAAC progressed, PCC

had heard that Unarco would sell both the process and the plant for making Unibestos and PCC had bought them. PCC had dealt with Mr. Cryor at NAAC. Mr. Buckley had understood that there was some business connection between NAAC and Cape Asbestos. He did not know precisely what it was. Mr. Cryor at NAAC had conveyed word of PCC's interest to Cape Asbestos - there were so many corporate entities beginning with "Cape Asbestos" that Mr. Buckley had made no effort to distinguish between them. He understood that, in dealing with Cape Asbestos, he was dealing with the parent corporation. In the result Dr. Gaze contacted PCC in about 1961. Dr. Gaze visited PCC and described in detail the manufacturing process, the character of the material and the physical properties which could be obtained with the technology then existing, the make up of the factory and equipment required. Dr. Gaze told PCC that supply of the material would be available. His visit lasted two days. He arranged a visit by PCC officials to a Canadian company which manufactured a similar product.

As to (8)(iv) above (Dr. Gaze dealing direct with the main US customers), the plaintiffs relied upon the evidence of Mr. Buckley at pages 42-45 of his deposition, and upon Mr. Morgan's second deposition at page 109. From these passages it appears that Mr. Buckley said that from 1962 to about 1971 Dr. Gaze visited PCC about once a year. The discussions on his visits were for the most part of "the goodwill generality type of discussion" (page 43): including general business conditions, whether there would be an ample supply of fibre in the coming years, etc. Dr. Gaze was well informed on conditions of supply and on price and he gave assurances that any problems about the product would be corrected as well as they could be by seeing that the complaints were registered with the supply - the proper

people. (Page 45.) Mr. Buckley understood that any questions which PCC had with reference to the product could be discussed productively with Dr. Gaze. Mr. Morgan, for his part, said that Dr. Gaze visited another US customer, Johns-Manville, once a year.

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. Capasco was responsible for worldwide marketing and co-ordination of sales and also had the laboratory resources, scientists and technicians to provide technical advice and assistance to customers throughout the world. NAAC, whose functions included assisting and encouraging sales in the USA (paragraph 14 of the primary facts section) had no such technical resources. There is no basis for inferring that it was the holding company Cape, as opposed to Capasco, which was providing the advice and assistance to PCC, or that the visits made by Dr. Gaze were made otherwise than as a director of Capasco. Reference was also made to evidence of visits to customers in the USA by Mr. Higham who was managing director of Cape. He had never visited the United States on any occasion with reference to asbestos, either the sale or problems connected with it: page 301. He had been to the office in Chicago (the office of NAAC) not more than once a year and he did not go there otherwise than in the course of going to the United States for some other purpose. This evidence is also consistent with the learned judge's finding (paragraph 20 of the primary facts section) that Mr. Higham's visits were made as a director of Cape and not as a representative of NAAC.

"(9) (1) When corresponding with US customers Cape

referred to NAAC as 'our Chicago office' and NAAC referred to Cape and Capasco as 'our London office'.

- (ii) NAAC held itself out to a large US customer as being part of the Cape selling organisation.
- (iii) NAAC was treated by the major customer as the channel between them and Cape and Capasco."

As to (i) above, reference was made for the plaintiffs to two letters. By a letter of 20th March 1970 (Vol. 3/53) Dr. Gaze, writing as a director of Cape, informed Mr. Holman of PCC that Mr. Owens, as managing director of Capasco, and responsible for the administration of the supply and marketing of "our fibres" would visit PCC in April. Mr. Owens would be ready to discuss questions raised on Dr. Gaze's visit in December 1970. "Our Chicago office", i.e. NAAC, would be in touch with PCC in order to make more precise arrangements for the visit of Mr. Owens. It was that visit of Mr. Owens to PCC which led to the sending of samples by PCC to NAAC for onward transmission to Capasco in connection with the complaints of PCC mentioned under (7)(ii) and (8)(i), (ii) and (iii) above. The second letter was dated 20th October 1970 (Vol. 3 page 67) from NAAC, signed by Mrs. Holtze, to Mr. Hauser of PCC and was to the effect that "our London office" needed certain information for the purposes of Mr. Bierer's intended visit in November 1970: see under (8)(i), (ii) and (iii) above.

There were some other references of this nature: Mrs. Holtze in November 1970 in writing to Mr. Hauser about shipments of Grade M asbestos referred to "our mines in South Africa". There was a similar reference in the same month by Mrs. Holtze to steps being taken "by our mines" to deal with various complaints.

These letters show that the writers were able respectively in the context described to refer naturally to NAAC as "our



Chicago office" and to Cape or Capasco as "our London office" and to the South African mines as "our mines". That evidence is relevant to the way in which the relationship between NAAC and Cape/Capasco appeared to the writers, Dr. Gaze and Mrs. Holtze, in the context in which they were writing. It is, therefore, possibly some evidence of what that relationship was. The letters were to senior officers of PCC, Mr. Holman, who was Vice-President, technology and manufacturing, and to Mr. Hauser, manager of Production Planning. The commercial relationships between PCC and the Cape subsidiaries, including NAAC, had been continuing for some nine years at the date of these letters. The writers of the two letters were writing to a long standing customer which, as it seems to us, is shown to have known in general terms the structure of the Cape Group in which separate corporate members performed distinct functions: see in particular the evidence of Mr. Buckley, of which parts are set out under (8)(i), (ii) and (iii) above. The writers of the letters were not trying to inform persons to whom they were writing as to the relationship between Cape and its subsidiaries or between those subsidiaries. The matters demonstrated in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to the roles and functions of the Cape subsidiaries.

As to (ii) and (iii) above, reference was made by the to Mrs. Holtze's letters to Mr. Hauser of PCC in November 1970 (Vol. 3 pages 76-77) mentioned above and to Dr. Gaze's long letter of 15th June 1971 to Mr. Holman of PCC (Vol. 3 page 93) mentioned under (7)(i), (ii) and (iii) above; to passages in the judgment (see the fourth sentence of paragraph 14 and also paragraph 17 of the primary facts section; and to

two further letters. By a letter of 27th May 1970 Mr. Bauman, manager of Production Planning at PCC, asked Mrs. Holtze to forward, pursuant to the request of Mr. Owens of Capasco, certain samples to Cape's laboratory in London. The other letter was dated 29th September 1970 and was from Mr. Hauser of PCC to Mrs. Holtze. By it PCC communicated to NAAC the request of PCC for technical assistance from Cape Asbestos as to PCC's manufacturing process.

This evidence shows what, in these particular instances, was done and the context in which it was done. 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 (see paragraph 15 of the primary facts section) and as the channel of communication between customers, such as PCC and Capasco or Casap.

"(10) Capasco advertised asbestos in North America and gave both the address of NAAC and Capasco."

The plaintiffs referred to the evidence of Mr. Morgan, Deposition 1 pages 218-219. On this matter there was no dispute. The substance of the evidence was that Capasco had advertised in the United States only in a magazine called "Asbestos Magazine" which was distributed throughout the world including the United States of America. Asbestos was offered for sale and the addresses of both NAAC and Capasco were given in that advertisement. NAAC itself advertised in the yellow pages of the Chicago Directory and in the Thomas Register, a catalogue of manufacturers in the USA, listing addresses and products.

"(11) (1) Dr. Gaze, who was at all material times a Director of Cape, 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.

- (ii) 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.
- (iii) 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."

These proposed findings were directed, as Mr. Morison explained, to the submission that Cape's control over NAAC's activities did not depend upon the corporate form.

As to (i) above, reference was made to Mr. Morgan's evidence: Deposition 1 pages 166-169. The defendants, as stated above, have not questioned the correctness of Scott J.'s finding as to the role of Capasco, of which company Dr. Gaze was Chairman, within the Cape Group: see under (7)(i) above. The substance of this part of Mr. Morgan's evidence was that he dealt primarily with Dr. Gaze for discussion of allocations of asbestos for NAAC to be purchased by NAAC through Capasco from Egnepe and Casap. Mr. Morgan co-ordinated 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 or managed by Dr. Gaze. It was pursuant to the instructions of Dr. Gaze that Mr. Morgan of NAAC dealt through Capasco and left Capasco to deal with Egnepe. Mr. Morgan understood that Dr. Gaze could give instructions which would be followed so far as concerned the distribution of fibre.

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.

As to (ii) above, there was no dispute as to the circumstances in which or as to the reasons for which Cape ceased to have directors on the Board of NAAC: see paragraph 18 of the primary facts section. Nor was it disputed that the resignations in July 1975 produced no significant change in the method of operation of NAAC or the responsibilities of individuals concerned. The question is whether Dr. Gaze "ran NAAC" before or after July 1975 and, if yes, in what sense.

The plaintiffs for this contention referred to Mr. Morgan's evidence, 4th Deposition at page 414. The substance of that part of Mr. Morgan's evidence was as follows. He had not made proposals as to what dividends should be paid by NAAC - that was done by Mr. Meyer at Board meetings; he could not recall Mr. Meyer conferring with him before any meeting about the dividend; Mrs. Holtze had told him that the amount of dividend was calculated by a kind of formula but she did not know what it was; after July 1975 he continued to have contacts with Dr. Gaze by letter, by telex, by telephone and personally when Dr. Gaze visited the United States or when Mr. Morgan visited England. After Dr. Gaze resigned from the Board of NAAC, Mr. Morgan had considered Dr. Gaze to be his superior so far as concerned the discharge of Mr. Morgan's duties at NAAC. Mr. Morgan was then asked the question: "Dr. Gaze in fact ran NAAC, didn't he?" And Mr. Morgan replied: "It would seem he did."

Sir Godfray 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".

This one answer of Mr. Morgan is incapable of bearing the

weight that Mr. Morison's submissions would place upon it. 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 of NAAC was left to him as he himself substantially acknowledged in his evidence summarised under (11)(i) above. Dr. Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business, namely purchase and sale of textiles: see (5) above; or the obtaining of orders for asbestos which NAAC would carry out as principal in buying and selling, which orders amounted to about 20 per cent of NAAC's business in terms of tonnage: see (4) above. Nor did Dr. Gaze, or any representative of Cape, "run NAAC" with reference to the internal affairs of NAAC such as (i) staff, dealing with direct customers, and its own sources of supply - such as US Government stocks; (ii) NAAC's own office premises and warehouse premises; (iii) NAAC's arrangements for insurance; (iv) NAAC's pension scheme; (v) the formulation of NAAC's accounts; (vi) NAAC's payment of US taxes on NAAC's profits.

"(12) Cape decided on the salaries of the staff and made the senior appointments."

For the plaintiffs reliance was placed upon a series of letters. The substance of the evidence to be derived from those letters can be stated as follows. The letter of 7th December 1964 (Vol. 3 page 12) from Mr. Dent of Cape went to Mr. Cryor, the predecessor of Mr. Morgan. It referred to the question of "remuneration of senior officers in the Group" which "naturally included ... your own situation". Details were requested of



Mr. Cryor's full remuneration because Cape did not have them. In May 1969, Mr. Cryor wrote to Mr. Dent in response to a proposal that his salary be increased from \$38,000 to \$43,000. He acknowledged that his remuneration must bear a proper relationship to what NAAC "can do for the Group". After a statement of what NAAC had achieved in the way of selling asbestos and of his forecasts for future trading, the letter continued with a statement, much relied upon by the plaintiffs, that "all of the Board members (of NAAC), I believe, have always considered this to be a question for you in London to raise, consider and decide at your own pleasure".

By the letter of 23rd February 1972 (Vol. 3 page 100) Mr. Meyer wrote to Dr. Gaze with reference to the level of personal expenses incurred by Mr. Morgan in his work for NAAC, and to whether or not Mr. Morgan should be elected President of NAAC at the annual meeting. Mr. Meyer had no definite recommendation. He was himself President of NAAC at that time. After further intervening letters Mr. Dent of Cape by the letter of 2nd May 1974 (Vol. 3 page 210) invited Mr. Meyer to accept the position of Chairman of the Board of NAAC to make way for Mr. Morgan to be appointed President. Mr. Dent wanted it understood that "if the nature of our business in the United States changed substantially, say through the acquisition of a manufacturing organisation, or for any other reason, we would not necessarily use NAAC as the vehicle for managing such a venture, nor would we necessarily feel that Mr. Morgan should head it up".

The letter of 20th May 1974 (Vol. 3 page 215) was also from Mr. Dent to Mr. Meyer: Mr. Dent accepted Mr. Meyer's proposal that Mr. Meyer become Vice-President instead of Chairman. Mr. Dent thought that Mr. Morgan's salary should be \$40,000 upon

his becoming President.

By the letter of 18th June 1974 (Vol. 3 page 221) Dr. Gaze congratulated Mr. Morgan on his appointment; noted that Mr. Higham had taken over from Mr. Dent as Chairman of NAAC but asked Mr. Morgan "to continue to correspond with me on business questions exactly as has been the practice in the past". Mr. Morgan was also asked to keep "closely in touch with Mr. Meyer on finance ... and in general touch with day to day affairs".

Finally, the letter of 23rd November 1974 (Vol. 3 page 235) was from Mr. Meyer to Dr. Gaze about the directors' meeting of NAAC to be held on 5th December. (Dr. Gaze was a director of NAAC until July 1975.) Mr. Meyer reported his discussion with Mr. Morgan about "compensation for everyone except Mr. Morgan" and suggested increases in salary were set out for four members of the staff of NAAC including Mrs. Holtze.

Upon this evidence the additional finding sought by the plaintiffs cannot be made. Cape as the parent company appears to have been exercising its potential authority through its corporate relationship with NAAC to determine the remuneration of Mr. Cryor and Mr. Morgan as the persons successively in executive control of NAAC and to determine the election by the Board of Mr. Morgan as President and of other senior officers of NAAC. The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr. Morgan was placing his suggestions before the Board which included the Cape representatives.

"(13) Cape effectively decided what NAAC was allowed to spend or borrow."

The finding of Scott J. is set out at paragraph 19 of the primary facts section. The issue is as to "what NAAC was allowed

to spend". The defendants acknowledge that Cape, as the parent company, required and received information as to the commercial performance of NAAC and the general cost of its operation. Further, 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 that total expenditure and borrowings stayed within the limits laid down. We have considered the documents to which we were referred by the plaintiffs - Vol. 3 pages 13-18, Vol. 4 pages 261, 264, 350, 379-381 - and in this instance do not find it necessary to set out the substance of what can be derived from those documents. On this matter the submissions for the defendants fairly reflect the facts revealed in the evidence.

└ (14), (15), (16) and (17): The next four headings of additional primary facts will be stated and then considered together. They are concerned with the purposes and motives of Cape with reference to the asbestos litigation and to the formation of CPC in the United States.┐

"(14) From the start of the Tyler 1 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 without the risk of enforceable judgments against Cape.

(15) As part of its plan to attempt to appear to distance itself from NAAC, the Cape directors on the Board of NAAC resigned in July 1975.

(16) After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler 1 (April 1977), Cape then formulated and put into operation, as from February 1978, a four point plan:

- (i) the dissolution of NAAC and the creation of a substitute organisation;

- (ii) the formation, at Cape's expense, of the Liechtenstein Corporation (AMC) as an intermediary for invoicing purposes;
  - (iii) the formation of a new Illinois Corporation (CPC) to be operated by Mr. Morgan and to be set up with Cape money;
  - (iv) no further appearances in any US asbestos litigation.
- (17) In order to set up AMC and liquidate NAAC, Cape required Exchange control permission from The Bank of England. This was sought by letter dated December 23 1977 which discloses the purpose for the formation of AMC and CPC. The plan was executed with secrecy."

The findings of the judge on these aspects of the case are set out in paragraphs 8 to 10 and 24 to 27 of the primary facts section. There is little "additional" in the findings put forward by the plaintiffs but they are relevant to their contention based upon the motives of Cape. We deal with this contention in the section of this judgment concerning the "corporate veil" argument.

As to (14) above, the plaintiffs relied upon a number of documents: Vol. 3 pages 171-172, 173, 174, 213, 215; Vol. 4 pages 268, 273, 279, 289-290, 324-329, 344-345. 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. The first Tyler 1 action was commenced in January 1974. The extent to which any substitute company was intended to be "seemingly unconnected", and the means by which that seeming lack of connection was to be achieved, are of importance.

As to (15) above, reference was made for the plaintiffs to Vol. 4 page 279. There is nothing additional in this so far as concerns any primary fact: see paragraph 18 of the primary facts section.

As to (16) above, there is also nothing additional, so far as concerns primary fact, in sub-paragraph (ii) or (iv) thereof. For the matters set out under (16) the plaintiffs relied upon the documents at Vol. 4 pages 462, 492-495, 504-505, 507-510,

511-518, 529-532.

As to <sup>of</sup> (17) above, there was, of course, no issue as to the writing/the letter to the Bank of England by Mr. Penna. Reference was made to Vol. 4 pages 517-518 and 557 and to Vol. 5 page 625.

The extent of any remaining issue of primary fact under this heading is small. The submissions for the defendants were that the formulation by Cape of its plans for alternative marketing arrangements proceeded in stages. The means through which alternative marketing arrangements would be made depended upon decisions of people who were not employed by Cape, or in their control, in particular Mr. Morgan. 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: see Vol. 4 pages 454, 498. 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.

As to the evidence under these headings, reference is required only to some few parts of it.

The first document listed by the plaintiffs was a Preliminary Fact Memorandum of 2nd March 1974 (Vol. 3 page 171) prepared by Mr. Milwid of Lord Bissel and Brook, attorneys in the USA for Cape. References in it were made to the extent of public knowledge of the hazards associated with asbestos; to the jurisdictional motion filed in Tyler 1; and to the status of NAAC and Egnef as "separately organised corporations" as compared with some of Cape's subsidiaries which became "agents" of Cape. (That



appears to be a reference to the sort of agency agreement mentioned by Scott J.-see paragraph 21 of the primary facts section). In a letter of 21st March 1974 (Vol. 3 page 173) Mr. Hubbard of Cape referred to the fact that Cape had no place of business or assets in Texas, or in the USA, and to a possible project (not connected with asbestos), in which Cape would acquire a factory near Boston, Mass., and which might "proceed through the device of a subsidiary holding company ..." Next, by the letter of 29th March 1974 (Vol. 3 page 174) Mr. Meyer tendered advice which included the statement that "organising a separate subsidiary to own and operate the plant, whether a US or foreign corporation, maybe more of smokescreen than an actual deterrent to anyone who obtains a judgment against Cape".

By June of 1975 Cape was more directly concerned about NAAC. By letter of 20th June (Vol. 4 page 268) Dr. Gaze told Mr. Morgan of "our thoughts about the future operations of NAAC" and sent the letter to Mr. Morgan's home address "to avoid ... speculation in the office". Cape, he wrote, "may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily ..." but "... was determined to do everything possible to maintain a successful selling operation in the United States". Dr. Gaze added that Mr. Penna (Cape Group solicitor) was getting advice from Mr. Meyer. The immediate purpose of the letter concerned "inventory at your warehouse ..." because "... in the present uncertainty, it is clearly desirable that we should operate with the minimum of assets of this type and I should therefore like you to take all possible steps to see that this stock is reduced to the lowest possible level". By letter of 25th June 1975 Mr. Penna explained to Mr. Meyer the need for advice much as Dr. Gaze had

expressed it in the letter last mentioned. Mr. Penna continued (Vol. 4 page 273): "we do want however to maintain Mr. Morgan in his current role to sell and service contracts in North America and Dr. Gaze has asked me to take your advice ..."

Mr. Meyer's reply was a long letter of advice, dated 3rd October 1975 (Vol. 4 page 324). "The objective under consideration" was "... an attempt to limit NAAC's and Cape's exposure to future US litigation". After references to insurance, to the statute of limitations and to legal considerations relating to the possible liquidation of NAAC, Mr. Meyer dealt with "replacement for NAAC". He considered various possibilities and the consequences in terms of taxation and continued: "If it were possible to operate without an office or employee in the United States it would seem to be better to operate directly from some company in England, a mining company in South Africa, or, if an office is needed near North America, from some Caribbean or Central American country that has very low income tax rates: e.g. Netherlands Antilles. Mr. Morgan's predecessor, Robert Cryor, and I used to talk occasionally about such an operation and we considered the tax savings that might result; however, it was always decided that it was not possible to operate in the United States without an office here, or at least without an employee travelling regularly in the United States with authority to negotiate contracts. This would result in the profits being subject to US taxes and therefore there appeared to be nothing to be gained by operating from a country outside the United States". Finally, by way of summary, Mr. Meyer added: "It is possible that some protection as to future actions could be obtained by liquidating NAAC and operating in the future through a Canadian or other foreign corporation; however, no protection would be

obtained if it were necessary to have an office or employees in the United States, or even to have a non-resident employee who continually travels in the US with authority to conclude contracts". It is to be noted, of course, that Mr. Meyer was advising on the exposure of a Cape subsidiary and of Cape to the jurisdiction of the US courts, whether State or Federal, according to the law there in force, and not on the exposure of Cape to enforcement of a judgment of those courts against Cape in this country.

By a letter of 23rd December 1975 (Vol. 4 pages 344-346) Mr. Milwid was tendering further advice to Mr. Penna. Judge Steger had not yet ruled on the jurisdictional motions submitted by Cape and Egnep. The questions addressed included what action should be taken in the event that Cape, Egnep or Capasco should be involved in any other US litigation. It is sufficient to note that Mr. Milwid advised (and thus probably indicated the scope of the questions set to him by Cape) that, even if a UK court should judge a default judgment to be unenforceable against Cape, nevertheless under Texas law a judgment is valid (subject to certain conditions) for ten years. He continued (page 346): "On the ultimate question as to whether Cape itself might be held liable in this litigation for any tort committed by either of its subsidiaries NAAC or Egnep the holding of the Texas Supreme Court in the case of National Hotel Co. v. Motley 123 SW 2nd 461 1938 is most helpful. There the Texas Supreme Court stated on this point: 'It may be stated as a general rule that the fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity, and unless it is shown that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth or

perpetrating fraud, or where the organisation and control of the subsidiary are shown to be such that it is but an instrumentality or adjunct of the dominant corporation, no liability may be imposed upon the latter for the torts of the subsidiary corporation'. Mr. Milwid closed with the expression of his opinion that Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

A telex of 4th July 1977 (Vol. 4 pages 462-3) from Mr. Penna to Mr. Milwid shows that Cape was taking advice in this country upon "withdrawal from Texas proceedings". It continued: "We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Capasco should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult".

We would observe that in the view thus \_\_\_\_\_ expressed by Mr. Penna he was not only wrong but showed a misunderstanding of the law of this country. The enforceability of a foreign judgment at common law does not turn upon such matters; it is a question solely for the court and not the government.

The document at Vol. 4 pages 492-495 is a copy of the minutes of a Board meeting of Cape on 1st November 1977: see paragraph 8 of the primary facts section. It recorded the decision as to "Future claims" that, having regard to legal advice obtained, it was proposed in respect of any future US claims not to contest the proceedings in the American courts and to accept the risk of a default judgment ... it being considered

most unlikely that such a judgment would be enforced by an English court.

By a letter of 11th November 1977 (Vol. 4 page 504) Mrs. Holtze of NAAC reported to Mr. Penna advice and information received from Mr. Sarabia of Lord Bissel and Brook, a specialist in multi-national corporate procedures, on the consequences of trading by or through a new Liechtenstein corporation and of the probable need for a second corporation if warehouse facilities would be required so as not to expose the Liechtenstein corporation to US taxation. Mr. Morison referred to this exchange as the origin of the idea for AMC.

There was a further letter of 23rd November 1977 (Vol. 4 page 507) from Mr. Meyer to Mr. Penna concerned with the "problems of the liquidation of NAAC". He advised that it was essential that NAAC's assets be held in a liquidating trust in Illinois pending settlement of claims against it. There was a reference to taxation of any capital gain. He had had a number of conversations with Mr. Morgan and Mrs. Holtze "regarding the new corporation". He continued: "With respect to helping Gerry Morgan finance the organisation of the new corporation, the only way I know is to have NAAC pay him termination compensation. There would be two questions. How much to pay, and when to pay; as to how much, he estimated that the book value of NAAC's fixed assets will be £8,545 on January 31st 1978. In addition, he has estimated £2,000 for an initial supply of stationery and printing ... Then there would be legal fees and expenses ... including some amount for drafting and having approved by the Internal Revenue Service, a pension plan ... which takes over the assets of the present plan ... perhaps £1,500 would be sufficient. I would suggest a termination payment of somewhere between £20,000



and \$25,000, which will be taxable to Gerry Morgan at close to a 50 per cent rate and would leave approximately half thereof for him to put into the new corporation in order to acquire NAAC's fixed assets, pay for the new corporation's legal expenses and fees and for the start up ... costs. This leaves open the question of what the new corporation will need in the way of income to operate, the amount of commissions or guaranteed income to provide necessary amounts and when and how the income should be paid. Gerry Morgan tells me it is proposed that he come to London early in December to discuss this latter subject but I am sure all of the above matters will be open for discussion ..."

The document at Vol. 4 page 511 was a memorandum dated 2nd December 1977 and prepared by Mr. Penna on the subject of "NAAC liquidation - substitute company" and addressed by name to some five senior officials in Cape with copies to Dr. Gaze and Mr. Tanner, who was, we were told, a South African director of Egnep. The memorandum began with reference to Mr. Meyer's letter of 23rd November. Mr. Tanner had had discussion on the formation of the new Liechtenstein "invoicing company", and formation was proceeding. In the memorandum Mr. Penna referred to the new corporation as "LC" and to the proposed new Gerry Morgan company as "GMC". The implications which needed to be discussed within Cape included: (i) Mr. Penna's wish, from a legal viewpoint, to mask Cape's identity completely and for the shares to be held by nominees; (ii) LC acting just like Botswana Fibres - no detailed accounts and the US customer will pay direct into the Chase Manhattan central account; (iii) all contracts which GMC arranges for fibre supplies to small US customers (the current NAAC marketing operations will be in the name of the LC. Whether the

large contracts ... will continue direct from South Africa or through the LC depends on whether South African legal advice confirms there is no risk - Mr. Penna would think it logical to maintain the camouflage by contracting these through the LC: (iv) GMC's business will be financed, as with NAAC, from commission on sales, with the commission coming from the LC and not from South Africa; (vii) any risk of the mining company's profits being subjected to US tax. The memorandum closed with the following: "We need to get our thinking straight before Gerry Morgan's visit on December 12th."

By the letter to the Bank of England of 23rd December 1977 Cape sought permission to carry out its plans. Some passages (Vol. 4 page 517) should be noted. Cape were seeking approval for the liquidation of NAAC and the use of foreign currency to start the new Liechtenstein corporation, AMC. The second paragraph read: "In view of the size of the recent settlement (see the settlement of 28th September 1977 described earlier in this judgment) and the probability of this type of litigation continuing far into the future ... we consider it appropriate to liquidate our abovementioned US subsidiary company to avoid having a recognised permanent wholly owned presence in the United States". Later the letter continued: "... Our Group wishes to continue to sell asbestos fibre in the United States after liquidating NAAC ... we are advised that this may best be achieved for the protection of our UK and US assets by using a Liechtenstein company as an intermediary for invoicing purposes ... Liechtenstein has been chosen under advice from our lawyers because it enables the shareholders to be disguised under a bearer share certificate arrangement. The Liechtenstein company will be managed by the management of Capasco, a wholly owned UK subsidiary

of Cape ... and for reasons explained above we wish to disguise this fact from any would be inquirers." After reference to the costs of establishing the Liechtenstein corporation the letter continued: "In reality we will be merchandising the asbestos fibre using the Liechtenstein company to disguise Cape's existence. The Liechtenstein company will pay South Africa for the fibre and in turn will be paid by the United States customers. The price it pays South Africa will be the price it is paid by its US customers. It will be non-profit making and the commission will accrue to the United Kingdom direct from South Africa."

Some of the passages in that letter are, as we understand it, included within those referred to by Scott J. as having "conspiratorial flavour": see paragraph 25 of the primary facts section.

AMC was formed on 25th January 1978 and the new arrangements were ready to operate. CPC sent out an announcement (Vol. 4 page 537) signed by Mr. Morgan as President, and dated January 1978, to the effect that CPC had been appointed as agent to handle "your requirements for Amosite and Crocidolite asbestos fibre for the United States, Canadian and Mexican markets, effective February 1st 1978." The announcement continued: "Although operating as a new organisation, both Jean Holtze and I will endeavour to maintain the same service to our many customers and friends as previously offered by NAAC".

In the section of our judgment dealing with the "corporate veil" argument we have set out the inferences which we draw from the extracts from the evidence, as set out above, both as to the substance of what the officers of Cape were doing and what they were trying to achieve.

"(18) On January 12th 1978 NAAC's Board approved a plan

of complete liquidation for NAAC. Under the plan, the assets of NAAC did not vest in trustees until after May 2nd at the earliest, and at the latest immediately before the filing of articles of dissolution on May 19th 1978.

(19) NAAC continued to trade at least until the end of April from CPC's offices to which its files were transferred."

These two proposed additional findings can be taken together. They are directed to the finding of Scott J. set out in paragraph 11 of the primary facts section. For the plaintiffs reference was made to documents and to evidence, including Vol. 4 pages 533, 536, 551, 603 and 606; to Vol. 5 pages 625, 633, 634-635, 665-666 and 670; and to Mr. Morgan's second Deposition at pages 52 and 90-91. There is, as it seems to us, very little dispute, if any, as to primary fact. The essential submission of Mr. Morison for the plaintiffs was that Scott J. appears to have concluded that, after 31st 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; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings were commenced on dates between 19th April 1978 and 19th November 1979. In this, Mr. Morison submitted that Scott J. was in error. The contentions for the plaintiffs were that NAAC continued to trade until it was formally dissolved on May 19th and that the plan for liquidation contemplated that NAAC's business would only cease upon filing of the statement of intent to dissolve which did not occur until 2nd May 1978. It was contended that the fact that NAAC's trade between January and May 1978 was in anticipation of a liquidation does not alter the character of the business during that period. If, therefore, NAAC is to be regarded as

carrying on Cape's business in the USA, so that Cape itself was present there before 31st January 1978, then it was submitted that the planned liquidation did not affect the position in any way. The plaintiffs accepted that, after 19th May, Cape could not be said to be present in the USA by or through NAAC. For the defendants, Sir Godfray submitted that the findings of Scott J. as to the cessation of NAAC's business were right in detail and in his conclusion. Scott J., at page 68E-H of his judgment, said: "On 1st November 1977 Cape resolved to place NAAC in liquidation and on 31st January 1978 a liquidating trust agreement for NAAC was signed. NAAC executed articles of dissolution on 18th May 1978 and a certificate of dissolution was issued on 19th May 1978. 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. They did so. However, NAAC at that date was owner of a quantity of asbestos held in US warehouses. Over the period 31st January to 18th May 1978 sales of this asbestos took place. These sales were not made in the course of NAAC carrying on business as a going concern. They were made for the purposes of the intended liquidation of NAAC." Further, Sir Godfray relied upon evidence which, he submitted, showed that CPC did start business as from 1st February 1978 both in fact and in accordance with the public announcement to that effect: Vol. 4 page 532. There was, he said, no evidence that asbestos was purchased by NAAC after 31st January 1978 from any source. NAAC terminated the employment of its staff at 31st January 1978: Mr. Morgan Deposition 2 pages 50-54; Mrs. Holtze Deposition 1 page 11. NAAC's furniture and office equipment was sold on 1st February 1978. CPC took a lease of premises at 150 North Wacker Drive on 1st February 1978. There



was, it was said, no evidence that after 31st January 1978 NAAC performed any function or service for Cape or the Cape Group.

It seems to us that there is under these headings no real issue as to any primary fact. The contest is as to the proper conclusions to be reached and they turn upon the answers to questions of law which are determined in this judgment. Very little in the evidence referred to for the plaintiffs needs to be mentioned. The plan of complete liquidation and dissolution, which was accepted by resolution of the Board of NAAC, with the consent of CIOL as sole shareholders, (Vol. 4 page 536) provided that, upon NAAC filing a "statement of intent to dissolve ... , thereupon NAAC should cease to carry on its business, give any appropriate notice to its creditors, proceed to collect its assets, convey and dispose of its properties, pay, satisfy and discharge or provide for payment of its liabilities and obligations, and do all other acts required to liquidate its business ... and should distribute the remainder of its assets ... to the trustees pursuant to a liquidation trust agreement ..." NAAC was then to file "articles of dissolution pursuant to section 80 of the Business Corporation Act of Illinois". The trustees of the liquidating trust were Mr. Meyer and Mr. Brook, both of Lord Bissel and Brook. The trust agreement was between NAAC, CIOL as sole shareholders, and the two trustees. It recited that NAAC wished to distribute as soon as practicable all of the remaining assets of NAAC as a fund to provide for all claims and unpaid liabilities. The company was to transfer to the trustees all of the distributable assets of NAAC remaining in NAAC immediately prior to the filing by NAAC of articles of dissolution with the Secretary of State of Illinois.

The position within NAAC was stated in a memorandum of 1st February 1978 (Vol. 4 page 556) prepared by Mr. Penna. It was there stated that NAAC ceased trading from 31st January 1978; that there was still some \$35,000 worth of stock in the warehouse and, because of tax problems, if either AMC or CPC should purchase that stock, it would be sold on by NAAC over the next months. That would hold up the date of the actual formal winding up until the end of February. AMC, formed on 25th January 1978, was now (the date of the memorandum) the supplier to US customers; "specific powers of attorney were to be drawn up for those authorised to act in various capacities for AMC; and a letter of request to the Companies Registry was to be lodged for consent to exclude reference to AMC on the Cape file.

On 2nd February 1978 Dr. Gaze sent a memorandum to certain officials of the Cape Group: it was said that NAAC had ceased to trade at the end of January 1978; Mr. Morgan had set up his own company, CPC, and "is being appointed agent for sale of blue and Amosite fibre in the USA, Canada and Mexico by AMC". (Vol. 4 page 557.)

On 8th March 1978 (Vol. 4 page 603) Mr. Milwid sent a telex to Mr. Penna which included the following: "Mr. Meyer advises NAAC not yet formally in liquidation. It still has Philadelphia warehouse material. To the extent not sold by mid-April, proposed to write it off and then liquidate for completion by 30th April".

The document at Vol. 4 page 606 included a statement of account for NAAC including figures for the two months ended February 28th 1978. Sales by NAAC totalled \$4406,640, showing a gross profit of \$66,133. The net earnings were \$19,442. The figure for the same period of 1977 showed that the sorts of sales being made in January and February 1978 appear not to be

materially different from those being made in 1977 and, in the absence of other evidence, we infer that they were the same.

By letter of 19th April 1978 (Vol. 5 page 625) Mrs. Holtze, as a servant of CPC, wrote to the Group financial controller of Cape: "Officially, NAAC closed on 31st January 1978. We are keeping the books for the liquidating trustees through April 30th ... We have sent you the January and February statements (i.e. the document at Vol. 4 page 606 mentioned above) ... even though we are performing these functions, we are not supposed to be receiving any mail that would tie us into Cape after the January 31st 1978 deadline: however, Mr. Morgan and myself are still receiving accounting memoranda from you. I believe, for safety sake, these should be stopped immediately".

We need not refer to any more of the evidence under these headings. 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 31st 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. The business of disposing of NAAC's stock continued until the end of April 1978. CPC commenced trading on 1st February 1978. All or most of NAAC's files were transferred to CPC's offices.

"(20) The respondents' only purpose for the incorporation of CPC was a substituted company for the sale of the respondents' asbestos in the USA."

It is not necessary to refer to any evidence under this heading. 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.

"(21) AMC was incorporated on January 25th 1978. Its nominal Director was Dr. Ritter; it had an issued share capital of 50 x 1000 Swiss Frank shares."

There was no issue upon any of these matters as is apparent from evidence and contentions already set out above.

"(22) AMC's bank account was operated by Cape personnel and its address for accounts was that of Cape."

Again, there was no issue upon these facts: see (2)(ii) above.

"(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'."

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. The public announcement of January 1978 was considered with the evidence referred to under (14), (15), (16) and (17) above.

"(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. AMC would then pay Casap (not Egnep). CPC wrote to customers and shippers 'on behalf of AMC' and at least on one occasion a customer wrote to AMC and CPC at North Wacker Drive."

For the plaintiffs reference was made to documents at Vol. 5 pages 657 and 682, 646-1 as an example, and 658.

For the defendants it was submitted that, on the evidence, it is clear that AMC's bank account was in London at Chase Manhattan and not at the New York branch, and that the paying in facility in New York was for transferring the money. It was not disputed that, in assisting the performance of contracts by AMC, CPC wrote to customers on behalf of CPC but (and this was common

ground) CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts. It was accepted that AMC paid Casap. The document sent to AMC and CPC at North Wacker Drive was dated 8th March 1978 (Vol. 5 page 658) and was a statement of sums due to Davis Turner & Co., Customs House Brokers and Foreign Freight Forwarders, of New York. The amount due was \$79.50 in respect of customs entry brokerage, and other services, in respect of one container of asbestos. The container was the fourth shipment (see Vol. 5 page 657) against the purchase order placed by Mead Paper with AMC. Nothing of significance can be derived from the form of address used by Davis Turner & Co. on this occasion. The submissions for the defendants with reference to these matters appear to us to be correct.

"(25) In the light of the facts referred to and 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."

The plaintiffs on this matter relied upon the findings of the judge and upon their submissions as to the onus of proof. Scott J. at page 78G referred to the evidence of Mr. Summerfield and continued: "Whether this notice board was in the same state in 1979 when the sale to TCL took place is not known. ... (It was submitted) ... that since the onus was on Cape to satisfy me that it was not present in the United States, it was for Cape to establish that AMC was not present in the United States at any material time. I do not accept this approach. There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices at the time that the Tyler 2 actions were commenced." The suggestion made to us is that, although this



point derived from the evidence of Mr. Summerfield was not pleaded within the particulars of matters relied upon, there must have been persons within the Cape organisation, for example Mr. Perra, who could have dealt with the matter when the evidence was given at the trial.

In our view, the conclusion of Scott J. on this point was right. There was no evidence to suggest that ANC was an occupant of CPC's offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979 when the Tyler 2 actions were commenced. On 29th June 1979 Cape sold its mining division to TOL (see paragraph 1 of the primary facts section). That sale involved the sale of the shares in TOL and ANC and much of Capasco's business: see the text of the agreement at Vol. 5 pages 758-887. 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 evident care taken by the officers of Cape/Capasco in matters of corporate form and function (see Scott J.'s finding set out at paragraph 15 of the primary facts section) that any officer of Cape would have caused or permitted the display of ANC as one of the occupants of the offices at North Wacker Drive, or that any officer of CPC would have permitted such a display while ANC was a subsidiary of Cape and a source of commission earnings for CPC. As to the onus of proof as a matter of law, our conclusions have been stated in the section of our judgment dealing with that topic.

EXHIBIT B To Motion  
Winston & Strawn Letter to Protopapas  
(Aug. 30, 2024)

# COMPLAINT EXHIBIT 1

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30 August 2024

**FAO:** Peter D. Protopapas  
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**BY EMAIL ONLY:** [pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)

Dear Mr Protopapas

**Re: Pre-Action Letter Regarding Declaratory and Injunctive Relief Contemplated Before the English court**

## Introduction

We are instructed by Cape Intermediate Holdings Limited ("**CIHL**") (a company incorporated in England and Wales) and Cape Plc ("**Cape plc**") (a company incorporated under the laws of Jersey) (together, "**the Claimants**").

We are writing to request that:

1. you agree to consent by 12 pm on Friday 6 September to the terms of the draft court order we propose to seek from the English Court, which is provided at Annex A ("**the Draft Order**").
2. alternatively, should you be unwilling to agree to the terms of the Draft Order, you agree to accept service of our clients' claim form and related documents on counsel you have engaged in London (Morgan, Lewis & Bockius UK LLP), or out of the jurisdiction at 2110 N Beltline Blvd, Columbia, South Carolina 29204, United States of America.

Should you decline to consent to the Draft Order, our clients intend to commence proceedings against you in the English Court pursuant to Part 8 of the CPR for an order substantially in the form set out in the Draft Order ("**the Part 8 Claim**"). Should you decline to provide your agreement to accept service, our clients will make an application for permission to serve the Claim out of the jurisdiction.

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### Factual background to the Part 8 Claim

CIHL is a holding company registered in England and Wales and is the successor to “Cape Asbestos Company Ltd” (which was incorporated in 1893).

Cape plc is a company incorporated in Jersey in 2011. It is the ultimate parent company of the Cape group of companies (“**the Cape Group**”). In 2017 Cape plc was acquired by Altrad UK Ltd (which is part of the Altrad group of companies – “**the Altrad Group**” – a world leader in industrial services with a turnover of £5 billion per year).

The Part 8 Claim arises in the context of (and relates to) certain legal proceedings in the US commenced against “Cape plc” and CIHL.

These proceedings (“**the USA Proceedings**”) involve two separate actions in the Court of Common Pleas, State of South Carolina, County of Richland (“**the South Carolina Court**”) against various defendants for the alleged exposure of the respective plaintiffs to asbestos. The two separate actions are: (1) the “**Park Claim**” (which was initiated in June 2021 by Ms Park, and subsequently taken over by her son) and (2) the “**Tibbs Claim**” (which was brought in April 2023 by Mr and Mrs Tibbs).

In the Park Claim, the Summons and Complaint names “Cape plc” as a defendant – and an Amended Summons and Complaint has added CIHL as a defendant. In the Tibbs Claim, “Cape plc” is a named defendant (but CIHL is not a named defendant).

The Part 8 Claim relates to certain of your actions in the Park Claim and the Tibbs Claim – which actions you purport to pursue in the name of and on behalf of the Claimants. Specifically, we refer to the following:

1. The Receivership Order.

- (a) This is the receivership order of Toal J dated 16 March 2023 (“**the Receivership Order**”) that was granted pursuant to the Park Plaintiffs’ motion dated 6 March 2023 (“**the Receivership Motion**”). (see enclosure)
- (b) The Receivership Order<sup>1</sup> appears to provide you with very broad powers in your capacity as receiver, including “***the power and authority [to] fully administer all assets of Cape<sup>2</sup>, 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***” (emphasis added).
- (c) The Receivership Motion was based on rule 15-65-10(4) of the South Carolina Code which provides that a receivership order can be made in relation to a company where it (1) is dissolved (2) is insolvent or in imminent danger of insolvency or (3)

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<sup>1</sup> While it is only Cape plc that is named in the Receivership Order, you have subsequently confirmed that CIHL was the only company over which the Receivership Order was intended to be made, and the Claim has been issued in the name of both the Claimants (i.e. CIHL and Cape plc) as ‘belt and braces’ and in order to provide maximum security/protection to those companies’ respective positions.

<sup>2</sup> “Cape” is defined in the Receivership Order as “*Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape AsbestosCompany Ltd.) (“Cape Asbestos”) and its subsidiaries and global affiliates*”.

has forfeited its corporate rights. Neither Cape plc or CIHL have been dissolved, nor are they insolvent, nor are they in imminent danger of insolvency.

- (d) Despite the Tibbs Plaintiffs never having issued a motion seeking to appoint you as a receiver of Cape plc or CIHL in the Tibbs Claim, you have purported to act as such.

(1) The 3P Complaint.

- (a) These are the third-party proceedings issued by you on 30 June 2023 in the name of and on behalf of Cape plc against a variety of defendants ("**the 3P Complaint**").
- (b) The 3P Complaint was stated to be brought by "*Cape plc, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas*" against various third party defendants ("**the Third-Party Defendants**") including, but not limited to, "Cape Holdco Ltd", "Cape Industrial Services Group Ltd", "Mohed Altrad", "Altrad UK Ltd", "Cape UK Holdings NewCo Ltd", "Altrad Services Ltd., f/k/a Cape Industrial Services Ltd", "Altrad Investment Authority S.A.S.", "Sparrows Offshore Group Limited", "Hawk Bidco US Inc", "Arranco US, LLC", "Sparrows Offshore, LLC" and "The Sparrows Group LLC".
- (c) The Third-Party Defendants include, *inter alia*, both the direct subsidiaries and the immediate parent companies of the Claimants.
- (d) The 3P Complaint is based on many highly contentious and wide-ranging allegations against Cape itself – and also purports to constitute admissions by Cape which are against the best interests of Cape.
- (e) The claims sought in the 3P Complaint are based on unjust enrichment and/or constructive trust and/or alter-ego and veil-piercing liability and/or accounting. The claims are for an indeterminate amount.
- (f) There is no express authority given to a receiver under rule 15-65-10(4) of the South Carolina Code to pursue third-party derivative claims and the Receivership Order did not expressly authorise you to initiate any third-party derivative proceedings.
- (g) Despite this, you have taken the various steps in the name of Cape plc in pursuit of the 3P Complaint. Amongst other things, this has included: (i) seeking and obtaining the 3P Complaint Default Judgement against certain Third-Party Defendants including the Claimants' direct parent and subsidiaries (which include companies in the Altrad Group, and upon which the Cape Group rely for funding/financing and business cross-opportunities); (ii) making motions for disclosure, adverse inferences and sanctions for adverse inferences against certain Third-Party Defendants.

In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim. In this regard, CIHL and Cape plc refer to and rely upon the decision of the English Court of Appeal in *Adams v Cape Industries Plc* [1990] 1 Ch 433 ("**Adams v Cape**"). Nor has there been any judgment made in the Park Claim or the Tibbs Claim against CIHL or Cape plc in the State of South Carolina.



**Our clients' reasons for requesting relief from the English court should you fail to agree to the terms of the Draft Order**

As a matter of English private international law (which is the law governing the incorporation of CIHL) the Receivership Order has not been made by a court of competent authority, it cannot be recognised or enforced as such in England and Wales, and it provides no legitimate basis upon which you can act as the receiver of CIHL. You therefore have no authority or mandate to act on behalf of CIHL, and the directors of CIHL require you to cease and desist from purporting to do so. The same applies in respect of Jersey law and Cape plc.

In this regard:

1. CIHL is a holding company incorporated in England, which is where its management and control is based. It does not carry on any business activities in the US, or the State of South Carolina (and never has) and its management and control is not, and never has been, in the US or the State of South Carolina. It also has no, and never has had any, assets in the US or the State of South Carolina.
2. Cape plc is a holding company incorporated in Jersey, its management and control is not in the US or the State of South Carolina, it does not carry on business in the US, or the State of South Carolina and it has no, and never has had any, assets in the US or the State of South Carolina.
3. Accordingly, neither CIHL nor Cape plc have any connection with the State of South Carolina.
4. In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim.
5. In these circumstances, as a matter of English private international law the Receivership Order made by the South Carolina Court is not capable of recognition or enforcement by the English Court. It does not satisfy the "*sufficient connection*" threshold test for the recognition of the appointment of a foreign receiver as a matter of English private international law (in relation to which see the decision *Goulding J in Re Schemmer* [1975] Ch 273). As to this:
  - (a) Pursuant to this test, the English Court is required to determine whether a foreign court was jurisdictionally capable to make the appointment according to the relevant principles of English private international law.
  - (b) The "*sufficient connection*" test involves looking at the place of incorporation, where a company's management and control is based, whether a company is carrying on business within the jurisdiction of the foreign court and whether a company has submitted to the jurisdiction of the foreign court.
  - (c) In the light of the above facts, none of those criteria are satisfied in this case.
6. In this regard, it should be noted that the only relevant American subsidiary of CIHL was North American Asbestos Corporation, which was dissolved in 1978 and has been the subject of controversy in historic American asbestos litigation. However, in *Adams v Cape* the English Court of Appeal specifically found that CIHL was not present in the US jurisdiction via NAAC

for the purposes of applying the common law test on the recognition of foreign judgments and that it had not otherwise submitted to the jurisdiction of the US Courts. That is the established legal position.

7. Given that, the English Court cannot recognise a final (let alone an interlocutory) US judgment against CIHL as having been made by a jurisdictionally competent foreign court it therefore follows that the English Court cannot recognise a receivership order against CIHL made on the same basis. The same applies in respect of Cape plc.
8. In this regard, the question of capacity and the constitution of the Claimants, namely, whether the acts of its directors, or others who purport to be the companies' agents, are the acts of CIHL is exclusively a question of English law, in the case of CIHL, and Jersey law in the case of Cape Plc. The law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf. The appointments of the directors of CIHL are therefore governed by the law of England in the case of CIHL, and Jersey in the case of Cape plc.
9. Further, as a matter of English law, the appointment of the directors of CIHL and their competence to act on its behalf is legally unaffected by the Receivership Order made by the South Carolina Court. The same applies under Jersey law in respect of Cape plc. In this regard, any questions in relation to the governance of a company incorporated in England and Wales are plainly and properly a matter for the supervision and determination of the English Court.
10. The *de jure* directors of the Claimants (whose authority arises pursuant to the Claimants' articles of association, as well as the English Companies Act 2006 and the Jersey Companies Law 1991) remain in lawful control of the Claimants. Accordingly, the directors of both of the Claimants are entitled to seek the relief sought from the Court to be able to manage respectively CIHL and Cape plc in accordance with their best interests.
11. Accordingly, and for these reasons, and given that as a matter of English law the South Carolina Court was not jurisdictionally competent to make the Receivership Order, you have had no legitimate basis for acting and you have been acting without the Claimants' authority and/or any mandate from the Claimants.
12. The directors of CIHL and Cape plc are entitled to the relief sought against you to prevent the actual and potential harm caused by your actions. They rely *inter alia* on the following:
  - a. The negative impact on directors/management. There are currently two conflicting centres of authority, which is highly prejudicial to the directors of the Claimants and the proper management of those companies (and the broader group of which they form part).
  - b. The negative impact on operations/business. Customers and/or suppliers of the Cape Group (who will carry out regular credit checks and adverse media checks through their online reporting databases) will be concerned as to the extent to which authority is apparently vested in yourself as receiver and this could adversely impact their willingness to do business with the companies within the Cape Group (which are the operational subsidiaries of CIHL and Cape plc).
  - c. The issues associated with your purported authority to deal with all the assets of the Claimants on a worldwide basis. In this regard, the Claimants own substantial assets

worldwide (for example, the shares that they own in the subsidiary trading companies of the Cape Group – which has a turnover of approximately £1 billion per year).

- d. The negative impact on the reputation of the Claimants and the broader Cape Group. The Cape Group has a valuable brand, both in the UK and abroad, which it has sought to protect and secure.
  - e. The negative impact on the Scheme of Arrangement in respect of CIHL (and 12 other subsidiary companies in the Cape Group) which was sanctioned in 2006 and continues to be supervised by the English High Court.
  - f. The negative impact on the funding/financing arrangements of the Altrad Group (which have an indirect effect on the funding/financing of the Claimants and the broader Cape Group).
13. In addition, the issuing and pursuit of the 3P Complaint is abusive, vexatious and unconscionable. The 3P Complaint makes multiple – and highly contentious – allegations directed against the Claimants. It also purports to constitute admissions that have not been authorised by the directors of the Companies.
14. The 3P Complaint is self-evidently contrary to the Companies' best interests and the Companies are entitled to injunctions from the English Court requiring you to cease and desist pursuing such claims in their respective names.

In these circumstances, the directors of CIHL and Cape plc are entitled to the assistance of the English court as the duly appointed directors of CIHL and Cape plc in order to enable them to administer, manage and run the companies efficaciously in accordance with their legal duties and in the best interests of the companies; and to prevent and contain the manifest prejudice to both them and the wider Cape group of companies by your conduct, which is directly contrary to the interests of CIHL and Cape plc and is abusive, vexatious and unconscionable.

There is a real and present dispute as to who is in control and authorised to act on behalf of the Claimants, and it is appropriate for the Court to make the declarations sought. In addition, it is appropriate to grant the injunctive relief sought where (1) you have no legitimate authority to act on behalf of the Claimants (and, in that regard, you have harmed the rights of the Claimants) and (2) your conduct is abusive, vexatious and unconscionable.

Accordingly, CIHL and Cape plc seek your consent to the Draft Order and, if not provided, the assistance of the English Court to obtain clarification that you have no legal authority to act on behalf of our clients, that authority remains vested in the directors, and restraining you from taking any further steps in the name of Cape as set out in the Draft Order.

#### **Requirement for you to provide consent on an urgent basis**

As you will be aware, various of the Third-Party Defendants in the 3P Complaint, applied to transfer the 3P Complaint from the South Carolina Court to a Federal Court. By an order of 13 August 2024, the Federal Court remanded the case back to the South Carolina Court.

In these circumstances and given the imminent trial of the 3P Complaint on 9 December 2024 – which is not being brought with the authority of the Claimants and is plainly contrary to their interests – it is paramount that the Claim is addressed urgently.

In consideration for our clients refraining from taking action against you in the English Court, you are required to agree to the terms of the Draft Order by no later than 12pm on 6 September 2024.

Should you fail to do so, we will without further notice apply to the English Court for the relief in the form of the Draft Order.

For the avoidance of doubt, nothing in this letter should be considered as a waiver of any of our clients' rights which are, to the fullest extent, reserved.

#### **Part 8 of the Civil Procedure Rules**

In accordance with paragraph 13.3 of the Business and Property Courts of England & Wales Chancery Guide 2022, we hereby notify you that the use of Part 8 of the England & Wales Civil Procedure Rules is being contemplated to issue the intended claim against you.

We consider that Part 8 is the more appropriate route than Part 7 in the circumstances of the current dispute, for the following reasons:

1. The contemplated claim does not relate to any substantial dispute of fact. The contemplated claim is merely requesting the court's decision on a question by way of declaratory and injunctive relief.
2. A quick resolution of the contemplated claim is required given the imminent trial date of the 3P Complaint on 9 December 2024.

In accordance with paragraph 13.3 of the Chancery Guide, we have attached the Draft Order at Annex A (which we ask you to consent to).

Given that the relief sought in the Claim arises out of the application of well-established principles of English private international law to the USA Proceedings, we do not contemplate that there will a substantial factual dispute (or that disclosure will be necessary).

#### **Agreement to Service Out of the Jurisdiction**

As you are aware, on 13 July 2023 you used David Waldron of Morgan, Lewis & Bockius UK LLP to attempt to serve documents from the USA Proceedings on Altrad Services Ltd.

In accordance with the provisions of the English Civil Procedure Rules, and to the extent that you do not agree to provide the undertakings requested above, we request your agreement to accept service of the claim form and associated documents:

1. by way of service on Morgan, Lewis & Bockius UK LLP, Condor House, 5-10 St. Paul's Churchyard, London EC4M 8AL; or, in the alternative,
2. outside the jurisdiction of England and Wales at your address at 2110 N Beltline Blvd, Columbia, South Carolina 29204, United States of America

Please confirm your consent to accept service of the claim form by either (1) or (2) by 6 September 2024, so as to facilitate the efficient and timely progress of the contemplated proceedings. Should you

fail to provide your agreement to accept service, our clients will make an application for permission to serve out of the jurisdiction.

**Pre-Action Protocol**

This letter is being sent to you in accordance with the Practice Direction on Pre-Action Conduct and Protocols (the “**Pre-Action PD**”) contained in the Civil Procedure Rules (CPR) (albeit that, as envisaged in paragraph 13 of the Pre-Action PD, the urgency of the matter means that it is not possible to give you the full time suggested for your response to this letter). We refer you to paragraphs 13 to 16 of the Pre-Action PD concerning the court’s powers to impose sanctions for failing to comply with its provisions.

We enclose the key documents which we intend to rely on to substantiate our clients’ claims. Ignoring this letter will lead our clients to commence proceedings against you and may increase your liability for costs.

We look forward to your response.

Yours faithfully,



**Winston & Strawn London LLP**

Enc. Receivership Order



Annex A – Draft Order

Claim No. [#]

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

BUSINESS LIST (CHD)

Before [Mr]/[Mrs] Justice []

B E T W E E N:

(1) CAPE INTERMEDIATE HOLDINGS LIMITED

(2) CAPE PLC (a company incorporated under the laws of Jersey)

Claimants

- and -

PETER D. PROTOPAPAS

Defendant

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[DRAFT] ORDER

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**UPON THE CLAIM** of Cape Intermediate Holdings Limited (“**CIHL**”) and Cape plc (“**the Claimants**”) issued by Part 8 Claim Form on [] September 2024

**AND UPON HEARING** Leading Counsel for the Claimants [and Leading Counsel for the Defendant]

**AND UPON READING** the evidence, being the first witness statement of Ran Oren dated [] September 2024 (“**Oren 1**”)

**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 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.

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 the 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, 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:**

5. Mr Protopapas be enjoined in England and Wales and worldwide from acting or purporting to act as a receiver of the Claimants pursuant to the Receivership Order.
6. Mr Protopapas be enjoined in England and Wales and worldwide from appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of the Claimants.
7. Mr Protopapas be enjoined 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).
8. Mr Protopapas be enjoined from litigating as "Cape plc" or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere.