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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2025-002104

RECORD ON APPEAL
(VOLUME XI)

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 in Related Case,

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 Plaintiff/ 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 Defendants,

of which

Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd; Mohed Altrad; and Altrad Investment Authority SAS, are the..... Appellants.

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Kevin A. Hall
S.C. Bar No. 15063
kevin.hall@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Attorneys for Appellants Mohed Altrad and Altrad Investment Authority SAS

GORDON REES SCULLY MANSUKHANI, LLP

A. Victor Rawl, Jr.
S.C. Bar No. 09261
vrawl@grsm.com
677 King Street, Suite 450
Charleston, SC 29403
843.278.5900

Attorneys for Appellants Charter Consolidated Ltd., ESAB Corporation, and Central Mining and Investment Corporation Ltd.

SMITH ROBINSON, LLC

G. Murrell Smith, Jr.
murrell@smithrobinsonlaw.com
Jonathan M. Robinson
jon.robinson@smithrobinsonlaw.com
Shanon N. Peake
shanon.peake@smithrobinsonlaw.com
3200 Devine Street
Columbia, SC 29205
803.254.5445

Attorneys for Respondent

GALLIVAN, WHITE & BOYD, PA

John T. Lay, Jr.
jlay@gwblawfirm.com
Gray T. Culbreath
gculbreath@gwblawfirm.com
Lindsay A. Joyner
ljoyner@gwblawfirm.com
Eleanor L. Jones
ejones@gwblawfirm.com
1201 Main Street, Suite 1200
Columbia, SC 29201
803.779/1833

Attorneys for Respondent

MORGAN, LEWIS & BOCKIUS LLP

Troy S. Brown
troy.brown@morganlewis.com
Dana E. Becker
dana.becker@morganlewis.com
1701 Market Street
Philadelphia, PA 19103
215.963.5000

Lauren McCulloch Semlinger
lauren.semlinger@morganlewis.com
1000 Louisiana Street, Suite 4000
Houston, TX 77002
713.890.5467

Paul A. Scrudato
paul.scrudato@morganlewis.com
101 Park Avenue
New York, NY 10178
212.309.6000

Attorneys for Respondent

Other Counsel of Record:

KASSEL MCVEY

Theile B. McVey
tmcvey@kassellaw.com
John D. Kassel
jkassel@kassellaw.com
Jamie D. Rutkoski
jrutkoski@kassellaw.com
1330 Laurel Street
Columbia, SC 29201
803.256-4242

Counsel for Plaintiffs

DEAN OMAR BRANHAM SHIRLEY LLP

Charles William Branham, III
tbranham@dobslegal.com
Kevin W. Paul
kpaul@dobslegal.com
David Christopher Humen
dhumen@dobslegal.com
1801 North Lamar Street, Suite 300
Dallas, TX 75202
214.722.5990

Counsel for Plaintiffs

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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 Representative of the Estate of **ISABELLA PARK**,	)	**C/A NO. 2021-CP-40-02727**
Plaintiffs,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	**ORDER**
ARMSTRONG INTERNATIONAL, INC., et al.	)	
Defendants.	)	

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.

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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.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership. The Receiver will provide potential insurers with lists of work sites, contractors, and insurance brokers and agents to facilitate

the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of the company in receivership or any company for whom the company in receivership did work as an "additional insured" under coverage written to another entity). The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

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.

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]

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Richland Common Pleas

Case Caption:	Isabella Park , plaintiff, et al vs Armstrong International Inc , defendant, et al
Case Number:	2021CP4002727
Type:	Order/Appointment of Receiver

So Ordered

Jean H. Toal

Electronically signed on 2023-03-16 11:28:55 page 4 of 4

ELECTRONICALLY FILED - 2024 Mar 12 9:42 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

JOHN A. TIBBS and MARGARET B. TIBBS,
Plaintiffs,
v.
3M COMPANY *et al.*,

Defendants.

****

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 Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A.; DE BEERS CENTENARY AG; DE BEERS CONSOLIDATED MINES LTD., n/k/a DE BEERS CONSOLIDATED MINES PROPRIETARY LTD.; DE BEERS UK LTD.; DE BEERS JEWELLERS LTD.; DE BEERS JEWELLERS US, INC.; ANGLO 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 (U.S.A.) JEWELRY INC.; LIGHTBOX JEWELRY INC.; FOREVERMARK US INC.; ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC; CHARTER CONSOLIDATED LTD.; ESAB CORPORATION; CENTRAL MINING & INVESTMENT CORPORATION LTD.; CAPE HOLDCO LTD.; THE LAW DEBENTURE CORPORATION PLC; CAPE INDUSTRIAL SERVICES GROUP LTD.;

C/A No. 2023-CP-40-01759

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

ORDER GRANTING THE RECEIVER'S MOTIONS TO COMPEL DISCOVERY RESPONSES OF THIRD-PARTY DEFENDANTS AND 30(B)(6) DEPOSITIONS OF ARRANCO US, LLC AND CENTRAL MINING & INVESTMENT CORPORATION 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 LTD.; HAWK BIDCO US INC.; ARRANCO US, LLC; SPARROWS OFFSHORE, LLC; THE SPARROWS GROUP, LLC,

Third-Party Defendants.

This matter came before the Court on the following six Motions to Compel filed on January 12, 2024 by Third-Party Plaintiff Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, n/k/a Cape Intermediate Holdings Ltd. ("Cape"), by and through its duly appointed Receiver Peter D. Protopapas (the "Receiver"):

1. Motion to Compel Discovery Responses of Anglo American PLC, De Beers PLC, De Beers UK Ltd., De Beers Centenary AG, and De Beers Consolidated Mines Proprietary Ltd. (together, "Oppenheimer Third-Party Defendants");

2. Motion to Compel Discovery Responses of Mohed Altrad and Altrad Investment Authority S.A.S. (together, "Altrad Owners Third-Party Defendants");

3. Motion to Compel Discovery Responses of Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (together, "Altrad Sparrows Third-Party Defendants");

4. Motion to Compel Discovery Responses of Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation (together, "Charter Third-Party Defendants");

5. Motion to Compel 30(b)(6) Deposition of Central Mining & Investment Corporation Ltd. ("Central Mining"); and

6. Motion to Compel 30(b)(6) Deposition of Arranco US, LLC ("Arranco")

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(together, the "Motions to Compel"). On February 16, 2024, the Third-Party Defendants filed materials opposing the Motions to Compel.[1] Accordingly, the Motions to Compel have been fully briefed and are ready for decision.

Discussion

The Third-Party Defendants argue the Court cannot entertain or grant the relief sought by the Motions to Compel for multiple reasons: (1) the South Carolina Court of Appeals possesses exclusive jurisdiction over this entire action following the Third-Party Defendants' December 18, 2023 appeals of one of the Court's orders, which they claim prevents both the Court and the Receiver from taking any additional action, including engaging in discovery or ruling on discovery motions, during the pendency of those appeals; (2) discovery cannot proceed during the "pendency" of Third-Party Defendants' motions for protective order and/or to stay discovery (collectively, the "Protective Order Motions"), motions which were filed prior to any appeals in this case and prior to the Court's October 25, 2023 hearing, during which the Court effectively granted the primary relief sought by those motions; and (3) the Court now cannot rule on those "pending" Protective Order Motions because it cannot act while the appeals are pending.

As outlined below, the Court finds that the procedural history of this case and recent orders issued by the Court of Appeals in similar circumstances undermine the arguments presented by Third-Party Defendants, and the Court will grant the Motions to Compel.

[1] The Court notes that although Third-Party Defendants included in these February 16 filings what they have termed to be "cross-motions" for "injunctive relief," the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court's advisement to be addressed at another time.

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A. Procedural History.

1. The Receiver's Third-Party Complaint (June 2023).

On June 30, 2023, the Receiver filed a Third-Party Complaint against numerous third-party defendants alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injury underlying the claims against Cape, including specifically those claims asserted by South Carolinians. In doing so, the Receiver categorized the Third-Party Defendants into three groups: the Altrad Third-Party Defendants (Third-Party Compl. ¶ 119); the Oppenheimer Third-Party Defendants (*id.* ¶ 122); and the Charter Third-Party Defendants (*id.* ¶ 124).[2] Following appearances by the Altrad Third-Party Defendants, the Receiver sub-divided that category into two groups: the Altrad Owners Third-Party Defendants (Mohed Altrad and Altrad Investment Authority) and the Altrad Sparrows Third-Party Defendants (Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC).

2. The Receiver's Discovery Requests and Deposition Notices (July-September 2023).

Beginning July 20, 2023, the Receiver served First Sets of Interrogatories and Requests for Production on each of the Third-Party Defendants ("Discovery Requests").[3] In addition, the

[2] Since filing this third-party action, the Receiver has voluntarily dismissed without prejudice 12 Third-Party Defendants; default judgments have been entered against 7 others, including based on intentional failures to respond; and the remaining 13 Third-Party Defendants have been found subject to the proper exercise of personal jurisdiction by this Court.

[3] The materials before the Court indicate the Receiver served his Discovery Requests on the following dates:

- As to the Oppenheimer Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on: (1) Anglo American PLC, De Beers PLC, and De Beers UK Ltd. on August 15, 2023; (2) De Beers Consolidated Mines Proprietary Ltd. on September 26, 2023; and (3) De Beers Centenary AG on December 19, 2023.

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Receiver noticed depositions of various Third-Party Defendants pursuant to Rule 30(b)(6), SCRCP, including serving Arranco on August 30, 2023 and Central Mining on September 6, 2023, with both depositions scheduled for October 2023.

The Receiver has indicated that following those notices and in light of the Court's late-October 2023 hearing on the Receiver's motions for default judgment, as well as on the Third-Party Defendants' Protective Order Motions, motions to dissolve the Receivership, and motions to dismiss, the Receiver voluntarily postponed those depositions to allow the Court to resolve the pending motions.

3. Third-Party Defendants' Protective Order Motions (Filed Prior to the October 25, 2023 Hearing and Included on the Agenda for Oral Argument).

Third-Party Defendants filed various iterations of the Protective Order Motions—in stand-alone motions and combined with or embedded within other motions—all of which were included on the Court's agenda for oral argument at the October 25, 2023 hearing. In September and October 2023, the Oppenheimer Third-Party Defendants (five of the six[4]) filed the only stand-alone Protective Order Motions:

- As to the Charter Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on ESAB Corporation on July 20, 2023, and on Central Mining and Charter Consolidated Ltd. on September 6, 2023.
- As to the Altrad Sparrows Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on July 20, 2023.
- As to the Altrad Owners Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on September 6, 2023.

[4] The Oppenheimer Defendants explain that De Beers Centenary AG did not file a motion for protective order because the Receiver's Discovery Requests were not served on De Beers Centenary AG until December 19, 2023.

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- On September 15, 2023, three of the Oppenheimer Defendants (Anglo American PLC, De Beers PLC, and De Beers UK Ltd.) filed a Motion for Stay of Discovery and Protective Order.

- On October 13, 2023, De Beers Consolidated Mines Proprietary Ltd. filed a Motion for Stay of Discovery and Protective Order.

These motions sought "a stay of discovery pending resolution of the motions to dissolve the receivership filed by other Third-Party Defendants and any appeals stemming therefrom." In footnote 2 of those motions, the Oppenheimer Third-Party Defendants argued as follows:

> The Court of Appeals' one-paragraph order in a separate case confirms the appealability of a denial of a motion to dissolve a receivership **and that a stay during such an appeal is not automatic**. *See Childers v. Davis Mechanical Contractors, Inc., et al.*, No. 2023-000727, at *3 (S.C. Ct. App. Sept. 8, 2023). Here, De Beers plc is asking the Court to exercise its discretion to stay discovery while it considers the validity of the purported Receiver's authority to pursue such discovery and whether this Court has personal jurisdiction over the target of such discovery.

(emphasis added).

The remaining Third-Party Defendants filed their Protective Order Motions as requests combined with or embedded within other motions:

The Charter Defendants: (1) filed on September 1, 2023, motions to dismiss that informally requested an order staying discovery pending resolution of that motion to dismiss; and (2) filed on October 6, 2023, combined motions to dissolve the Receivership and for protective order, the latter of which sought an order the Charter Defendants have "no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice" until the motions to dissolve are "fully resolved."

The Altrad Owners: (1) filed on September 1, 2023, combined motions to dismiss and to stay discovery; and (2) filed on September 20, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

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The Altrad Sparrows: (1) filed on August 21, 2023 combined motions to dismiss and to stay discovery; and (2) filed on September 5, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

4. Order Granting, in part, Protective Order Motions (October 25, 2023).

On October 25, 2023, the Court held a hearing on the pending motions to dissolve the receivership, motions to dismiss, and Protective Order Motions. At the hearing, the Court ruled on the Protective Order Motions by granting a discovery stay "**until** we deal with the motions to dismiss and motions for entry of default." (10/25/23 Hrg. Tr. pp. 174:21–175:23 (emphasis added)). The Court later said it would file "a short order to that effect" if the "parties feel in the interim that I need to do something by way of a protective order" but made it clear "I say from the bench now as an order of the Court that I am pausing discovery –further discovery in this matter until we resolve the issue of who ought to be in this matter, if anybody." (*Id.* at p. 178:9–21).

Following that ruling from the bench giving Third-Party Defendants the primary relief sought in their Protective Order Motions, and following the Court's invitation to enter a written order "to that effect" upon request of any party, no party requested a written order as to the Protective Order Motions.

5. The Dissolution Order and the Default Order (December 6, 2023).

Thereafter, after receiving proposed orders from both the Receiver and Third-Party Defendants, the Court entered two written orders on December 6, 2023. The Court denied all of the Third-Party Defendants' motions to dissolve the Receivership and to dismiss for lack of personal jurisdiction (the "Dissolution Order"), and the Court granted seven motions for entry of default and entered default as to Altrad Services Ltd, Altrad UK Ltd, Cape Holdco Ltd, Cape

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Industrial Services Group Ltd, Cape UK Holdings Newco Ltd, The Sparrows Group LLC, and Sparrows Offshore Group Ltd (the "Default Order").

6. The Receiver's Communication Confirming What Motions Remained Pending (December 8, 2023).

On December 8, 2023, following entry of the Court's Dissolution Order and the Default Order, the Receiver communicated with the Court and all Third-Party Defendants to confirm (1) the Court had ruled on all Protective Order Motions; (2) discovery could proceed; and (3) the only motions remaining for disposition by the Court were additional motions to dismiss on grounds other than personal jurisdiction:

From: John T. Lay
To: JToal@sccourts.org; Diaz, Eva
Cc: Carroll, Todd; Vic Rawl; James Elliott; mary.rose.alexander@lw.com; Steve Pugh; O"Neill, Elizabeth; john.pierce@lw.com; Cameron Berthelsen; caitlin.dahl@lw.com; michele.johnson@lw.com; Ben Carlton; Hall, Kevin; Brian Barnwell; Gray Culbreath; Lindsay Joyner; Jon Robinson; Shannon Peake; murrell@smithrobinsonlaw.com; Troy Brown; Dana Becker; Brady Edwards; Robert Jacques; Lindsay Valek; Brian Barnwell; Paul A. Scrudato; Lori Seaborn; Charity McQueen; 6982_67 John A Tibbs and Margaret B Tibbs v Schneider Electric USA Inc et al Email 6982_67
Subject: Cape PLC v. Anglo American PLCC, et al. (2023-CP-40-01759) – Outstanding Motions for Ruling By the Court [IMAN-IMANMAIN.FID1077725]
Date: Friday, December 8, 2023 11:22:43 AM

Chief Justice Toal and Ms. Diaz,
Given the Court's December 6, 2023 Order denying the Third-Party Defendants' motions to dismiss for lack of personal jurisdiction and motions to dissolve the Receivership, and given the Court's ruling during the October 25, 2023 hearing on all motions for protective order/to stay discovery, which stayed discovery only while the Court considered its ruling on the above-referenced motions (10/25/23 Hrg. Tr. Pp.174:21-175:23), it is the Receiver's understanding: (1) discovery can now proceed; and (2) the only motions remaining for disposition by the Court are those six motions to dismiss filed by certain Third-Party Defendants pursuant to Rule 12(b)(6) (ESAB Corporation; Charter Consolidated, Ltd.; Central Mining & Investment Corp., Ltd.; Mohed Altrad and Altrad Investment Authority SAS; Arranco US, LLC, Hawk Bidco US, LLC, and Sparrows Offshore, LLC; and De Beers Jewellers, Ltd.).

As those six remaining motions have been fully briefed by both sides, counsel for the Receiver requests the Court rule on these remaining motions as briefed and without additional oral argument.

Should the Court need additional information from us, please do not hesitate to let me know.
Thank you in advance for your consideration,

John T.

None of the Third-Party Defendants responded to the Receiver's December 8 communication or otherwise indicated to the Court that Third-Party Defendants believed their Protective Order Motions remained pending.

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7. The Court's Order Denying the Remaining Motions to Dismiss (December 15, 2023).

Having received no response from Third-Party Defendants disputing the Receiver's December 8 characterization of what motions remained for decision by the Court, the Court denied, by Form 4 Order entered on December 15, 2023, all other motions to dismiss (the "Order on Remaining Motions to Dismiss"). On that same day, the Receiver served Amended Notices of Deposition pursuant to Rule 30(b)(6), SCRCP on Arranco and Central Mining for depositions to begin on January 10 and 12, 2024, respectively.

8. Third-Party Defendants' Notices of Appeal (December 18, 2023).

Beginning December 18, 2023, Third-Party Defendants filed notices of appeal with respect to the Court's Dissolution Order and filed the next day in this Court notices of filing notices of appeal. Third-Party Defendants raised to this Court no other objections or concerns at that time about engaging in discovery during the pendency of those appeals.

9. Additional Motions to Dismiss Filed by Oppenheimer Defendants (December 21, 2023).

The Oppenheimer Defendants, who previously acknowledged in their Protective Order Motions "that a stay during such an appeal [of a denial of a motion to dissolve a receivership] is not automatic," invoked the Court's jurisdiction on December 21, 2023—just three days after filing their notices of appeal—by filing additional motions to dismiss echoing the grounds of the motions to dismiss that were denied by the Court one week earlier in the "Order on Remaining Motions to Dismiss."[5]

10. *Communications Between Third-Party Defendants and the Receiver Regarding Discovery Requests and Scheduled Depositions (January 2024).*

[5] On February 2, 2024, the Court heard oral argument on the Oppenheimer's December 21, 2023 motions to dismiss, and on February 23, 2024, the Court entered an order denying these motions.

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On January 5, 2024, the extended deadline set by the Receiver for Third-Party Defendants to respond to the outstanding discovery requests, each set of Third-Party Defendants served Objections to the Discovery Requests refusing to provide substantive responses and indicating their intention not to participate in **any** discovery in this case during the pendency of their appeals of the Dissolution Order.

By letter dated January 8, 2024, pursuant to Rule 11, SCRCP ("Rule 11 Letter"), counsel for the Receiver attempted to consult with all counsel for the Third-Party Defendants regarding the deficient responses they served late on January 5 (a Friday), as well as their anticipated failure to participate in the two depositions noticed the next week, and the Receiver advised the Third-Party Defendants he intended to procced with the depositions of Arranco on January 10 and Central Mining on January 12.

The Receiver has indicated that the only direct responses to the Rule 11 Letter he received came from Arranco (stating on January 9, in response to the Receiver's circulation of a "zoom" link for the deposition set to begin the following day, that it refused to designate or produce any witness); Central Mining (stating on January 10 that it would not produce any deposition witness); and the Oppenheimer Third-Party Defendants (contending on January 12 that the appeal precluded progress in this matter).

B. Current Status and Recent Court of Appeals Orders.

As the procedural history makes clear, there is no active stay of discovery in this proceeding, nor do Third-Party Defendants have any pending Protective Order Motions that require resolution by the Court. At the October 25, 2023 hearing, the Court verbally granted all Third-Party Defendants' Protective Order Motions for a limited duration and with a self-executing

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termination upon the Court's resolution of the remaining pending motions.[6] The Court invited the parties to request a written order memorializing that bench ruling if a written order was desired, but no party accepted that invitation.

To the extent any Third-Party Defendant claims that it believed the Protective Order Motions remained pending following the October 25 hearing, that claim was waived when Third-Party Defendants failed (1) to correct the Receiver's December 8 communication to the Court confirming the Protective Order Motions were ruled on at the October 25 hearing; or (2) otherwise advise the Court it believed some, all, or even part of the Protective Order Motions were still pending. Instead, Third-Party Defendants said nothing, allowing the Court to enter its December 15 Order intended to dispose of all remaining motions filed before, and on the agenda for, the October 25, 2023 hearing. Third-Party Defendants cannot use their appeals as a shield to defend this lack of response, as those appeals were not filed until December 18.

Nor have Third-Party Defendants sought a separate stay from either this Court or the Court of Appeals. Although the Oppenheimer Defendants recognized in their Protective Order Motions that the appeal of a receivership dissolution order did not automatically stay the case below, they never requested a stay from this Court following their December 18 notices of appeal. Instead, the Oppenheimer Defendants filed new motions to dismiss after noticing the appeal, requesting that the Court act on their behalf. For the Oppenheimer Defendants to now suggest that this Court's

[6] Third-Party Defendants apparently take the position their Protective Order Motions remained pending because some of them requested a continued stay of all discovery throughout any hypothetical appeal of any order the Court might issue should such an appeal be filed at some point in the future. There were no appeals pending at the time the Court ruled on the Protective Order Motions, and any ruling addressing this hypothetical ground would have been inappropriately advisory. No additional Protective Order Motions have been filed by Third-Party Defendants following their appeals, nor have they filed any other motions following their appeals requesting such a stay.

ability to act was automatically stayed upon the filing of their Notice of Appeal is entirely inconsistent with their prior arguments and actions.

The Court of Appeals has already addressed—and rejected—Third-Party Defendants' argument that discovery in this case is automatically stayed following the appeal of an order denying a motion to dissolve a receivership; indeed, the Court of Appeals expressly found that the appeal of a dissolution order does **not** stay the Receiver's ability to carry out his duties in the case below. *See* Order, *Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Sept. 8, 2023) (ruling that the "receivership shall proceed" and the "order is not stayed during pendency of this appeal," such that "the receivership action and the receiver's ability to carry out his duties are not stayed"); *see also* Order, *Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Nov. 23, 2023).

Once the Court resolved all pending motions to dismiss and the default-judgment motions, which it did by December 15, 2024, there was no further need for a stay: Discovery was to continue. In multiple communications to the Third-Party Defendants, the Receiver communicated that understanding as well as his proper expectation the Third-Party Defendants would provide "fulsome responses to [discovery] requests . . . on or before January 5, 2024, with depositions to start soon after." No Third-Party Defendant contested that understanding or otherwise indicated they believed Protective Order Motions were outstanding; indeed, no Third-Party Defendant responded at all.

Although the Third-Party Defendants could have addressed (in a timely manner) any concerns about engaging in discovery immediately following the filing of their December 18 notices of appeal, no such objections were raised. Rather, the Third-Party Defendants waited until January 5—*i.e.*, the day that proper discovery responses were due, and less than a week before the

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re-noticed depositions were set to begin—to assert they were taking the position they had no obligation to participate in the case during the pendency of their appeals. Simply put, there is no sound legal basis for the Third-Party Defendants' assertion that discovery in this proceeding has been stayed, and the Court **GRANTS** each of the Receiver's Motions to Compel.

* * * * *

For the reasons set forth herein, the Court **GRANTS** the Receiver's Motions to Compel and **ORDERS** Third-Party Defendants (i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days of entry of this Order and (ii) to begin producing documents in response to the Receivers' Requests for Production the same day. The Court also **ORDERS** Arranco and Central Mining to designate witnesses for the Rule 30(b)(6) depositions noticed by Receiver within 7 days of entry of this Order and produce those witnesses within 21 days of entry of this Order.

IT IS SO ORDERED

SIGNED this _____ day of _____, 2024

_____

HON. JEAN H. TOAL, CHIEF JUSTICE (Ret.)

[JUDGE'S E-SIGNATURE FOLLOWS]

ELECTRONICALLY FILED - 2024 Mar 12 9:42 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Mar 12 9:42 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Compel

So Ordered

Jean H. Toal

ELECTRONICALLY FILED - 2024 May 23 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY *et al.*,

Defendants.

****

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 Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A.; DE BEERS CENTENARY AG; DE BEERS CONSOLIDATED MINES LTD., n/k/a DE BEERS CONSOLIDATED MINES PROPRIETARY LTD.; DE BEERS UK LTD.; DE BEERS JEWELLERS LTD.; DE BEERS JEWELLERS US, INC.; ANGLO 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 (U.S.A.) JEWELRY INC.; LIGHTBOX JEWELRY INC.; FOREVERMARK US INC.; ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC; CHARTER CONSOLIDATED LTD.; ESAB CORPORATION; CENTRAL MINING & INVESTMENT CORPORATION LTD.; CAPE HOLDCO LTD.; THE LAW

C/A No. 2023-CP-40-01759

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

ORDER GRANTING THE RECEIVER FOR CAPE PLC'S MOTION FOR SANCTIONS AND MOTION FOR ADVERSE INFERENCE AS TO THE ALTRAD AND CHARTER THIRD-PARTY DEFENDANTS

ELECTRONICALLY FILED - 2024 May 23 3:52 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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 S.A.S.; SPARROWS OFFSHORE GROUP LTD.; HAWK BIDCO US INC.; ARRANCO US, LLC; SPARROWS OFFSHORE, LLC; THE SPARROWS GROUP, LLC,

Third-Party Defendants.

This matter came before the Court on certain motions of Third-Party Plaintiff Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd., n/k/a Cape Intermediate Holdings Ltd. ("Cape"), by and through its duly appointed Receiver Peter D. Protopapas (the "Receiver"), specifically the Motion for Adverse Inference as to the Altrad and Charter Third-Party Defendants[1] filed on April 5, 2024 and Motion for Sanctions filed on April 12, 2024 (collectively, "Motions"). Having considered the Motions and record, along with the Third-Party Defendants' responses, and having conducted a hearing in which the Third-Party Defendants presented oral argument on the Motions, the Court grants the Motions for the reasons set forth below.[2]

[1] The Altrad Third-Party Defendants are Mohed Altrad and Altrad Investment Authority S.A.S. ("Altrad Owners Third-Party Defendants"), along with the U.S. subsidiaries of the Altrad Group that have responded to the Receiver's third-party action, *i.e.*, Arranco US LLC ("Arranco"), Hawk Bidco (US) Inc., and Sparrows Offshore, LLC ("Altrad Sparrows Third-Party Defendants"). The Charter Third-Party Defendants are Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation.

[2] The Motions exclude the five Third-Party Defendants that are not categorically refusing to participate in discovery: Anglo American PLC (individually and as successor in interest to Anglo

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FACTUAL AND PROCEDURAL BACKGROUND

I. Cape Failed to Respond to Asbestos Claims Asserted by South Carolina Residents.

This action, and the appointment of the Receiver, stem from an underlying asbestos lawsuit in which Cape was named but refused to participate. On June 4, 2021, Isabella Park filed a lawsuit asserting personal injury claims arising from asbestos exposure against (among others) an English entity, Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Compl., *Park v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (June 4, 2021), at 1, 7. Ms. Park sought relief after being "diagnosed with mesothelioma caused by exposure to asbestos dust and fibers" unintentionally "brought home" for years "as a result of her husband's work with and around asbestos-containing products." *Id.* at ¶ 4.

On June 9, 2021, less than five months after her diagnosis, and within five days of filing her lawsuit, Ms. Park passed away. On November 17, 2021, Ms. Park's son, Keith, amended the complaint, appearing individually and as personal representative to Ms. Park's estate (the "*Park* Plaintiffs"), to assert a wrongful death action. *See* First Amended Compl., *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP-4002727 (Nov. 17, 2021). The amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) (together with all predecessors in interest, "Cape") as a defendant. Cape Intermediate Holdings Limited and Cape PLC—both referring to the same English company originally named Cape Asbestos Co. Ltd.—were identified as successors in interest to Cape Asbestos Company Ltd. *Id.* at 9; *see also id.* at ¶¶ 26–27. In December 2021, the *Park* Plaintiffs served the named Cape entities, which (as has been their practice for decades) never answered, moved, or otherwise responded.

American Corporation of South Africa Ltd.), De Beers PLC, De Beers Centenary AG, De Beers UK Ltd., and De Beers Consolidated Mines Pty. Ltd. ("Oppenheimer Third-Party Defendants").

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II. The Court Appointed a Receiver to Identify, Preserve, and Marshal Cape's Assets.

On March 17, 2023, this Court appointed a receiver for an entity identified as Cape PLC as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) pursuant to S.C. Code § 15-65-10(5), as well as § 15-65-10(4) in the alternative. Order, *Park et al. v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) ("Appointment Order"), at 1. Pursuant to the Appointment Order and South Carolina law, the Receiver has "power and authority [to] fully administer all assets of Cape, . . . engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape"—in proper satisfaction of claims against Cape—"whatever they may be." *Id.* The Appointment Order further vested the Receiver with "rights, authority and powers with respect to" Cape's property, including to "obtain from any . . . third party, any financial records belonging to or pertaining to" Cape. *Id.* at 2.

III. The Receiver Asserts Claims Against the Third-Party Defendants.

On June 30, 2023, the Receiver filed the Third-Party Complaint, asserting claims against the Third-Party Defendants for (i) unjust enrichment (first cause of action), (ii) constructive trust (second cause of action), (iii) alter ego and veil-piercing liability (third cause of action), and (iv) accounting (fourth cause of action). Each of the Third-Party Defendants named in the Third-Party Complaint is alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injury underlying the claims against Cape, including specifically those claims asserted by South Carolinians.

The 65-page Third-Party Complaint alleges a remarkable system of avoiding responsibility for the harm caused by Cape's asbestos over a period of decades—which the Court summarizes (as more fully set forth in the Court's December 6, 2023 order) to contextualize the findings and adverse inferences made herein, in resolution of the Receiver's Motions. Although the Third-Party

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Complaint categorized the Third-Party Defendants into three groups, only the Altrad Third-Party Defendants (Third-Party Compl. ¶ 119) and Charter Third-Party Defendants (*id.* ¶ 124) are subject to the sanctions issued herein, though certain allegations against the Oppenheimer Third Party Defendants (Third-Party Compl. ¶ 122) also relate to the alleged common history among the Charter Third-Party Defendants and Cape.

In sum, the Third-Party Complaint comprehensively described the alleged interconnected history of Cape and certain of these entities, including their alleged dominion over the South African commodity mining industry, and their alleged role in controlling, continuing, and/or benefiting from Cape's strategic exploitation of the U.S. asbestos market, as well as its accompanying alleged scheme to insulate itself, and its foreign affiliates and agents, from the resulting litigation exposure.

A. **Cape.**

Cape PLC (as it was known from 1989 to 2011, and as is now known as Cape Intermediate Holdings Ltd.) is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates. At all relevant times, Cape was deeply involved in all aspects of the global asbestos industry, "mining hundreds of thousands of tons of raw asbestos in Apartheid-era South Africa and then selling asbestos fiber to scores of manufacturers of asbestos-containing products in the United States," including into South Carolina. Third-Party Compl. ¶ 40; *see also id.* ¶ 71 (Cape marketed its asbestos directly to U.S.-based customers dating back to the 1930s).

In 1953, while under the control of Central Mining, Cape established North American Asbestos Corporation ("NAAC") "to operate as [its] wholly controlled instrumentality for the 'purpose of expediting and facilitating the movement' of asbestos from South African mines into

the United States (including in South Carolina)." *See id.* ¶¶ 70, 72. The two decades following Cape's formation of NAAC were Cape's "most bountiful years." *Id.* ¶ 70. Cape effectively enjoyed an asbestos monopoly, controlling 90% of the global supply of amosite asbestos and dominating the distribution of other types of asbestos. *Id.* ¶ 69.

The Third-Party Complaint alleges that, at the direction of the amalgamated global business network, Cape and NAAC implemented a "conscious pattern of product distribution [of asbestos] nationally," resulting in NAAC selling massive amounts of asbestos to customers in the United States, which used or distributed those asbestos products in South Carolina. *Id.* ¶¶ 73–75. ("NAAC's own records show that Cape sold asbestos to companies in South Carolina[.]"). As a result, by 1970, NAAC was the "largest U.S. importer of Amphibole Fibers," which it then redistributed throughout the United States. *Id.* ¶¶ 72–73, 75, 77. NAAC's operations and decision-making were "wholly dominated by Cape and its owners," including Charter Consolidated Ltd. (with Central Mining as a merged subsidiary) and "other affiliated mining/investment interests in South Africa," with NAAC not permitted to borrow money without Cape's approval and routinely forced to pay dividends to Cape, thereby depleting the assets that could be reached by NAAC's creditors in the United States. *Id.* ¶¶ 77–79. In other words, Cape and NAAC were alleged to be mere extensions of the Oppenheimer South African mining empire. *Id.* ¶¶ 78–79.

At Cape's direction and consistent with its company-wide policy, NAAC purchased "wholly inadequate" insurance coverage to address its massive future products liability exposure. *Id.* ¶ 80. In addition to allegedly maintaining egregious and inhumane labor practices for its indigenous workers in its South African mines, Cape—as supported by other members of the broader mining business empire—also is alleged to have actively suppressed information about

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the known risks of asbestos in the United States and used misinformation to influence public opinions about asbestos. *See id.* ¶¶ 81–88.

By the early 1970s, asbestos-related products liability lawsuits were being initiated, prompting Cape and its affiliated entities to devise and implement a litigation-avoidance scheme that involved, among other things, (i) taking steps to make it appear—falsely—that Cape was reducing oversight of NAAC, (ii) disclaiming any "moral responsibility" to respond to products liability lawsuits in the United States, (iii) strategically declining to reserve funds in the United States to address those liabilities, and (iv) refusing to accept process or appear in any U.S. judicial proceedings (including in the Park lawsuit). *Id.* ¶¶ 89–102. These allegations are substantiated by Cape's own records, including for example its communications with its former counsel, which reveal a focus on avoiding exposure to U.S. litigation or assets that could be garnished in the United States in light of the strategy of accepting default judgments.

Effective January 31, 1978, Cape liquidated NAAC, siphoning any remaining assets out of the United States to Cape Industries Overseas Ltd., an entity wholly owned by Cape Industries Ltd., in an effort to reduce the assets available to creditors. Third-Party Compl. ¶¶ 94–96. This strategy was allegedly taken directly from a common business practice among the global enterprise that allegedly included Cape, *i.e.*, distributing commodities mined in South Africa in the United States at great profits, draining those domestic profits for the benefit of foreign affiliates, and liquidating (at least formally) any U.S. presence when liability was imminent. *Id.* ¶ 97. Despite the dissolution of NAAC, the Third-Party Complaint alleges that Cape "contemplated ways to continue the flow of asbestos to U.S. customers and asbestos profits out of the United States." *Id.* ¶ 98. For example, through NAAC's final President, Cape allegedly facilitated the formation of Continental Products Corporation to act as a commission agent for the future sales of South African

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asbestos in the United States. *Id.* ¶¶ 94–96, 99. The stated purpose for doing so was to "eliminate or reduce as much as possible the exposure in the United States of [South African mining companies] to [product liability] lawsuits." *Id.* ¶ 101. Although Cape entered into certain agreements to address a fraction of the bodily harm caused by its asbestos around the world, including through a 2006 Scheme of Agreement with former employees in the United Kingdom, Cape has allegedly "done ***nothing*** about its massive unpaid responsibility for the death and illness caused by its asbestos products in South Carolina and elsewhere in the United States." *Id.* ¶ 114.

B. The Altrad Third-Party Defendants.

Since 2017, Cape has been part of the Altrad Group, of which various entities, along with Mohed Altrad, its French-Syrian founder and President, have been named as Third-Party Defendants. Third-Party Compl. ¶¶ 113, 116–119 & nn. 39–40. Specifically, the "Altrad Third-Party Defendants" include:

- Cape subsidiaries or affiliates based in the United Kingdom: Cape Holdco Ltd., Cape UK Holdings NewCo Ltd., Cape Industrial Services Group, Ltd., and Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.);[3]
- Cape owners based in the United Kingdom and France: The foreign Altrad Group entities that now own and control Cape, *i.e.*, AIA and Altrad UK Ltd., with their majority shareholder and founder, Mohed Altrad (*id.* ¶ 116); and

[3] The Receiver originally named The Law Debenture Corporation PLC ("Law Debenture") as an Altrad Third-Party Defendant, based on public information suggesting that it was a "Person with Significant Control" of Cape as of 2016. Third-Party Compl. ¶ 113. After receiving additional information from Law Debenture's counsel regarding the nature of its "control," which was based on representing the interests of certain persons in the United Kingdom also injured by Cape asbestos, the Receiver dismissed Law Debenture on August 21, 2023, without prejudice.

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- Cape U.S. affiliates: Certain Altrad Group U.S. subsidiaries, including Hawk Bidco US Inc., Arranco US, LLC, Sparrows Offshore, LLC, and the Sparrows Group, LLC, as were part of Sparrows Offshore Group, Ltd. d/b/a the "Sparrows Group" (n/k/a "Altrad Sparrows") based in Aberdeen, Scotland.[4] *Id.* ¶¶ 117, 119.

Notably, seven of the 12 Altrad Third-Party Defendants failed to respond to the Third-Party Complaint: Altrad UK Ltd.; Cape Industrial Services Ltd., n/k/a Altrad Services Ltd. (since June 1, 2021); Cape Holdco Ltd.; Cape Industrial Services Group Ltd.; Cape UK Holdings Newco Ltd.; Sparrows Offshore Group Ltd.; and The Sparrows Group LLC. As a result, on December 6, 2024, the Court entered default against those seven non-responding Altrad entities, several of which—including Altrad UK Ltd.—have the same registered address of Cape Intermediate Holdings Ltd. (*i.e.*, the current name of the Cape Asbestos Company Ltd.) in England at 6-7 Lyncastle Way Barleycastle Lane, Appleton, Warrington. In addition, in an email dated August 18, 2023, Todd Carroll, Esq., as counsel for Mohed Altrad and AIA, represented to the Receiver that he also represents one of the non-responding Third-Party Defendants, Altrad UK Ltd. *See* Ex. 87 to Omnibus Opp. to Personal Jurisdiction Motions (Oct. 18, 2023).

[4] On July 11, 2022, Altrad completed the acquisition of "the Sparrows Group." Press Release, *Altrad Completes Acquisition of Engineering and Maintenance Specialist Sparrows Group* (July 11, 2022), https://www.altrad.com/en/newsreader/altrad-completes-acquisition-of-engineering-and-maintenance-specialist-sparrows-group.html. Within two weeks of being served with the Third-Party Complaint on July 14, 2023, Sparrows Offshore Group Ltd. passed a resolution to liquidate on July 27, 2023 (while other Sparrows entities continue to operate at the same registered address, including Sparrows Offshore International Group Ltd.). As of October 2, 2023, Altrad announced the rebranding of the "Sparrows Group" to "Altrad Sparrows." Aberdeen Business News, *Altrad Spreads Its Wings as Altrad Sparrows* (Oct. 2, 2023), https://aberdeenbusinessnews.co.uk/sparrows-spreads-its-wings-as-altrad-sparrows/.

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C. The Charter Third-Party Defendants.

The Charter Third-Party Defendants include Charter Consolidated Ltd., its subsidiary, Central Mining & Investment Corporation Ltd. ("Central Mining"), and ESAB Corporation, as the ultimate parent company and successor in interest to Charter and Central Mining. *See* Third-Party Compl. ¶ 124. Cape, Central Mining, and Charter were all allegedly critical parts of a common South African mining enterprise, which had a majority of shares in Cape and controlled its board and directed its operations. *Id.* ¶¶ 50–52. In addition, Charter Consolidated Ltd. was created in 1965 by merging Central Mining with two other mining companies, which served as an "international investment arm" for the global mining enterprise. *Id.* ¶ 54. While Charter had direct and indirect interests in Cape from its founding, by 1969 Charter had acquired majority ownership of Cape. *Id.* ¶ 55. Cape was Charter's primary operating company and principal industrial subsidiary, and, by extension, Cape and its subsidiaries were part of a group of companies that dominated the South African mining economy. *Id.* ¶¶ 55–56, 61–62.

By 1993, there were certain organizational changes, by which Charter Consolidated Ltd. was no longer part of the global mining enterprise that allegedly controlled Cape in the 1980s and decades prior, with "Charter" re-registering as a public company. *Id.* ¶ 123. Three years later, Charter sold its interest in Cape for approximately £48 million. *Id.* And in 2012, Charter, with its affiliated entities, was acquired by Colfax Corporation ("Colfax") at a valuation of $2.4 billion. *See id.* (disclosing Charter's exposure to asbestos-related lawsuits in the United States but assessing that exposure as not "material" and making no reserves). In 2022, Colfax spun off ESAB Corporation, allegedly becoming the parent company of Charter and Central Mining. *Id.* ¶ 124.

IV. The Ongoing Refusals to Participate by These Third-Party Defendants.

For the trial block set to commence April 15, 2024, this case was set for a bench trial. It was continued during the April 10 pretrial hearing, however, because of the Altrad and Charter

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Third-Party Defendants' refusal to provide **any** discovery to the Receiver to prepare this case for trial. Despite receiving initial discovery requests more than nine months ago, the Altrad and Charter Third-Party Defendants have provided no substantive information in response.

On January 12, 2024, the Receiver filed motions to compel these Third-Party Defendants' basic compliance with their discovery obligations, which the Court granted on March 12 (the "March 12 Order."). Pursuant to the March 12 Order, the Court directed all Third-Party Defendants "(i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests with 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver's Requests for Production the same day," and (iii) as to Arranco and Central Mining, "to designate witnesses for . . . Rule 30(b)(6) depositions" by March 19 and "produce those witnesses" by April 2. (Order at 13).

The Court-ordered deadlines to provide substantive responses to the Receiver's discovery have long passed, and the Third-Party Defendants' flagrant violations of the Court's March 12 Order persist. In turn, this discovery misconduct has caused delays and prejudiced the Receiver's ability to investigate and bring his claims, which have already been subjected to extensive motion practice. The Receiver has also been forced to exert additional time and resources in a continued effort to have these Third-Party Defendants come into even basic efforts at compliance with existing orders of the Court, including the March 12 Order, and the laws of this State—something that has yet to be achieved.

In defense of this coordinated strategy of non-participation, the only excuses offered by these Third-Party Defendants are frivolous: In essence, they claim a right—above the authority of this Court—to fully relitigate the merits (or lack thereof) of their numerous motions to dismiss and dissolve that were denied by the Court in early December 2023. They argue that Rule 205, SCACR,

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poses a jurisdictional bar preventing this third-party action from continuing, because by simply appealing those denied motions to dissolve the receivership, they can deprive the trial court of jurisdiction for an indeterminate time period.[5] These very same arguments, however, have been repeatedly dismissed by the Court of Appeals and Supreme Court.[6] The Court of Appeals and Supreme Court have identified those attempts to appeal as interlocutory and governed by the limited scope of permissible appealability granted pursuant to S.C. Code Ann. § 14-3-330. Thus, the Supreme Court and Court of Appeals have made clear that—categorically—the denial of motions to dismiss and dissolve a receivership, like discovery orders, are not immediately appealable under South Carolina law. *See also* Order, *Tibbs et al. v. 3M Co. et al.*, Appellate Case No. 2024-000524 (Apr. 17, 2024) (dismissing as interlocutory these Third-Party Defendants' separate attempt to appeal the Court's March 12 discovery order, which they brazenly mischaracterized as a "refusal to enter an injunction"). Those decisions raise the same appealability issues invoked by the Altrad and Charter Third-Party Defendants in their pending appeal. Thus, the legal basis for the Third-Party Defendants' refusal to participate in discovery and comply with

[5] In contrast, the other participating Third-Party Defendants in this action (*i.e.*, in the "Oppenheimer" group) do not take this position currently, and instead have communicated an intent to participate in discovery and have reportedly made efforts in that respect.

[6] *See* Order Denying Rehearing, *Childers v. Davis Mech., et al.*, Appellate Case Nos. 2024-000005 and 2023-000727 (Sup. Ct. Apr. 17, 2024); Order Dismissing Appeal, *Childers v. Davis Mech., et al.*, Appellate Case Nos. 2024-000005 and 2023-000727 (Sup. Ct. Mar. 27, 2024); Order, *Childers v. Davis Mech.*, et al., Appellate Case No. 2023-000727 (Ct. App. Nov. 21, 2023); Order, *Childers v. Davis Mech.*, et al., Appellate Case No. 2023-000727 (Ct. App. Sept. 8, 2023); Order Denying Rehearing, *Link v. 3M Company, et al.*, Appellate Case No. 2024-000342 (Ct. App. Apr. 30, 2024); Order Dismissing Appeal, *Link v. 3M Company, et al.*, Appellate Case No. 2024-000342 (Ct. App. Apr. 12, 2024); Order Denying Rehearing, *Mitchell v. 3M Company, et al.*, Appellate Case No. 2024-000341 (Ct. App. Apr. 30, 2024); Order Dismissing Appeal and Denying Rule 205 Motion to Enforce, *Mitchell v. 3M Company, et al.*, Appellate Case No. 2024-000341 (Ct. App. Apr. 12, 2024); Order Denying Rehearing, *Welch v. Advance Auto Parts, Inc., et al.*, Appellate Case No. 2024-000337 (Ct. App. Apr. 30, 2024); Order Dismissing Appeal and Denying Rule 205 Motion to Enforce, *Welch v. Advance Auto Parts, Inc., et al.*, Appellate Case No. 2024-000337 (Ct. App. Apr. 12, 2024).

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the Court's orders is legally untenable—indeed, frivolous and flatly inconsistent with those recent, directly applicable decisions of the Court of Appeals and Supreme Court—while appearing to further an improper purpose, *i.e.*, to delay progress in this matter.

In light of this ongoing discovery misconduct, the Receiver moved for relief. Specifically, as relevant here, the Receiver filed these Motions on April 5 and 12 requesting certain sanctions for the Altrad and Charter Third-Party Defendants' ongoing discovery misconduct, including (i) that certain inferences be drawn with respect to the Altrad and Charter Third-Party Defendants, including with respect to their alleged current and historical statuses, respectively, as the alter ego(s) of Cape, and alleged unjust enrichment from Cape's liability-avoidance scheme, and (ii) for an award of fees and costs associated with bringing the Motion for Sanctions and all associated motions. On April 25, 2025, the Court heard argument on those motions.

LEGAL STANDARD FOR SANCTIONS

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw Cnty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Thus, where a "party fails to obey an order to provide or permit discovery," then a court "may make such orders in regard to the failure as are just." Rule 37(b)(2), SCRCP. Sanctions can range up to default or dismissal, or more intermediate relief such as designating facts as established; and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should

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be aimed at the specific conduct of the party sanctioned. *Id*. at 198, 511 S.E.2d at 719 (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.S.D. 439 (Ct. App. 1990)).

Among other facts, "courts also consider unnecessary time delays in determining the appropriateness of discovery sanctions." *Jones v. Robinson*, 2023 WL 7685902, at *7 (S.C. Ct. App. Nov. 15, 2023). And where there "is some showing of *bad faith, willful disobedience, or gross indifference* to the rights of the adverse party," even the most severe sanctions, such as "default or dismissal," may be warranted. *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015) (emphasis in original); *see also Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 458, 814 S.E.2d 643, 657 (Ct. App. 2018) (citing "several cases" involving "striking the answer of a defendant in recent years," where the defendant "violated a court order").

Without discovery sanctions, discovery procedures would be ineffectual, as improper conduct would "go unpenalized," thereby "decreas[ing] the likelihood of others being deterred from similar conduct"; accordingly, over-leniency should be avoided. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 124, 512 S.E.2d 510, 524 (Ct. App. 1998); *see also, e.g., McNair v. Fairfield Cnty.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct. App. 2008) (affirming "severe sanction of dismissal" in light of "willful disobedience of previous orders" and "conduct in refusing to provide that which it has been ordered to produce," which was "a serious affront to the integrity of the judicial system"); *Howe v. Air & Liquid Sys. Corp.*, 2021 WL 5626487, at *2 (S.C. Ct. App. Dec. 1, 2021) (affirming imposition of sanctions on common client of Todd Carroll, Esq., Elizabeth O'Neill, Esq., and Steven James Pugh, Esq., based on their client's "failure to cooperate with the discovery process . . . despite numerous requests"). Ultimately, the "imposition of

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sanctions is generally entrusted to the sound discretion" of the Court. *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987).

DECISION ON ADVERSE INFERENCES

It has long been the law of South Carolina that "the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him." *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959). Here, more than six months after being served discovery, and more than a month since the Court imposed deadlines to comply with their discovery obligations, the Altrad and Charter Third-Party Defendants continue to refuse any effort at compliance with the Court's orders and the discovery rules of this State. Despite multiple warnings by this Court and directives to **proceed with discovery**, these Third-Party Defendants have continued their misconduct, while filing multiple frivolous appeals that, based on clearly applicable appellate precedent, will inevitably be dismissed.

The Court finds that this continued discovery misconduct on the part of these Third-Party Defendants amounts to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and this Court's management of its docket. Based on this discovery misconduct, moreover, the Court further finds certain adverse inferences to be warranted (as detailed below) against the Altrad and Charter Third-Party Defendants on facts and matters underlying the Receiver's claims. *See, e.g.*, *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (affirming decision to allow adverse inference for lost evidence, while permitting the party to "explain the circumstances" and mount a defense, which was "drawn to facilitate discovery in . . . asbestos cases"); *Griffith v. Griffith*, 332 S.C. 630, 640–41, 506 S.E.2d

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526, 531–32 (Ct. App. 1998) (finding trial judge "in error when she refused to consider an adverse inference" from a party's "refusal to answer questions"). The Court notes that these rebuttable inferences are subject to evidentiary challenge by these parties in these proceedings 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.

The Court further notes that the parties should treat this sanction as an intermediate form of relief, which stops short of more severe sanctions, such as striking their pleadings or holding them in default. While eventually those sanctions may also be warranted, to the extent these Third-Party Defendants continue to refuse to engage in discovery and comply with the Court's orders, those sanctions are not the subject of this Order, nor should this Order be interpreted as tantamount thereto.

I. The Court's Adverse Inferences Against the Charter Third-Party Defendants.

As to the Charter Third-Party Defendants,[7] the Court draws the adverse inference that each of the Charter Third-Party Defendants was at relevant times the alter ego of Cape, requiring piercing of the corporate veil. Likewise, each of the Charter Third-Party Defendants is responsible for or has benefitted unjustly from Cape's liability-avoidance scheme. In order to reach that inference, the following inferences are made against each of the respective Charter Third-Party Defendants:

[7] The Court makes these adverse inferences independent of any other evidence that may support the Receiver's claims against the Charter Third-Party Defendants. *See*, *e.g.*, Order (Dec. 6, 2023) at 14–15, 52–54, 65–70 (detailing allegations and documents regarding longstanding relationship between Central Mining and Cape; the alleged role of Charter Consolidated Ltd. as a liability buffer, or so-called "products-liability patsy," in the Oppenheimer-dominated "Greater Group"; the common control of Charter Consolidated Ltd. by Oppenheimer Third-Party Defendants and their predecessors; and the control of ESAB Corporation over Central Mining and Charter Consolidated Ltd. currently).

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Inferences as to Central Mining & Investment Corporation Ltd.

1. In the first decades of the twentieth century, Central Mining was one of the most powerful mining finance houses in South Africa.
2. Soon after it was formed in 1905, Central Mining controlled Cape Asbestos Co. Ltd.
3. Central Mining was responsible for and directed Cape's establishment of the North American Asbestos Corporation ("NAAC") in 1953.
4. NAAC was formed to act as Cape's wholly controlled instrumentality for the purpose of facilitating and expediting the movement of asbestos from South Africa to the United States.
5. Central Mining owned Cape and its subsidiaries, including NAAC, through 1965.
6. Central Mining dominated and controlled Cape and its subsidiaries, including NAAC, through 1965, including with respect to their financing and capitalization.
7. Central Mining was responsible for any sale of asbestos into the United States by Cape through 1965.
8. Central Mining knew of certain health hazards of asbestos exposure including death by the 1920s.
9. Central Mining was aware of medical literature authored by J. C. Wagner, C. A. Sleggs, and Paul Marchand, titled *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*, as published in the British Journal of Industrial Medicine, at the time of its publication in 1960 or soon after.

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Inferences as to Control of Cape in Era of Charter Consolidated Ltd.

10. In 1965, Central Mining merged with two other mining and investment companies, The British South Africa Company and The Consolidated Mines Selection Company Ltd., into Charter Consolidated Ltd.
11. With the merger of companies in 1965, Charter Consolidated Ltd. acquired a controlling interest in Cape, including a majority of Cape's preference shares.
12. Prior to the merger of companies in 1965, Charter Consolidated Ltd. knew of certain health hazard of asbestos exposure including death.
13. Charter Consolidated Ltd. and Central Mining were aware of, and responsible for, unsafe and unhealthy working conditions at Cape asbestos mines.
14. Charter Consolidated Ltd. and Central Mining were aware of, and responsible for, Cape's labor practices.
15. Charter Consolidated Ltd. and Central Mining were responsible for Cape's lobbying efforts, including through trade associations such as the U.K.-based Asbestosis Research Council and U.S.-based Asbestos Textile Institute.
16. Charter Consolidated Ltd. and Central Mining were responsible for efforts to misinform companies, persons, and the general public about the health hazards associated with asbestos.
17. Charter Consolidated Ltd. and Central Mining were responsible for operating NAAC in an undercapitalized manner, including through the siphoning of funds from NAAC.
18. Charter Consolidated Ltd. and Central Mining were responsible for NAAC's risk-management decisions and failure to purchase additional liability insurance to adequately satisfy the liabilities of Cape to asbestos personal-injury claimants.

19. Charter Consolidated Ltd. acquired a majority of Cape's common equity shares by 1969, making Cape the principal industrial subsidiary of Charter Consolidated Ltd.

20. Charter Consolidated Ltd. owned, dominated, and controlled Cape and its subsidiaries, including NAAC, between 1965 and 1996, including with respect to their financing and capitalization.

21. Charter Consolidated Ltd. and Central Mining exercised influence in Apartheid-era South Africa, thereby allowing Cape to profitably mine and export asbestos to the United States for decades.

22. Charter Consolidated Ltd. and Central Mining seconded employees and other officials to work for Cape, or otherwise financed and spent resources for Cape, including for operational, marketing, research and development, and lobbying activities.

23. Charter Consolidated Ltd. and Central Mining were both aware that Cape asbestos was being sold or ultimately distributed into the State of South Carolina.

24. Charter Consolidated Ltd. and Central Mining were responsible for a conscious pattern of the production, distribution, and sale of Cape asbestos nationally in the United States, including asbestos used in South Carolina.

25. Charter Consolidated Ltd. was responsible for any sale of asbestos into the United States by Cape between 1965 and 1996.

26. Charter Consolidated Ltd. was responsible for a decision to drop *Asbestos* from the name of "Cape Asbestos Company Ltd."

27. Charter Consolidated Ltd. was responsible for a decision to cease the appointment of Cape officials to the board of directors of NAAC.

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28. Charter Consolidated Ltd. was responsible for the decision to interject another entity (Cape Industries Overseas Ltd.) between NAAC and Cape.
29. Charter Consolidated Ltd. was responsible for decisions to deplete NAAC of assets to avoid claimants.
30. Charter Consolidated Ltd. was responsible for the decision to close and liquidate NAAC.
31. Charter Consolidated Ltd. was responsible for the decision to allow default judgments in asbestos lawsuits to be entered against Cape and its subsidiaries.
32. Charter Consolidated Ltd. was responsible for designing ways to continue the flow of South African asbestos to U.S. customers and the counterflow of asbestos profits out of the United States after the liquidation of NAAC.
33. Charter Consolidated Ltd. was responsible for directing and facilitating the sale of Cape's asbestos mining interests in South Africa to Transvaal Consolidated Land & Exploration Company Ltd.
34. Charter Consolidated Ltd. had financial interests in Transvaal Consolidated Land & Exploration Company Ltd. when it bought Cape's asbestos mining interests in 1979.
35. Charter Consolidated Ltd. was responsible for directing the transfer of certain intellectual property owned by NAAC for future use by other companies selling South African asbestos in the United States, including in South Carolina.
36. After 1979, Charter Consolidated Ltd. profited from entities that continued to mine, distribute, or sell South African asbestos.
37. Charter Consolidated Ltd. was responsible for Cape's refocusing its business on asbestos removal.

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38. Charter Consolidated Ltd. and Central Mining were both part of a scheme to facilitate Cape's escape from legal or financial responsibility for people harmed by Cape asbestos in the United States, including in South Carolina.

39. Charter Consolidated Ltd. and Central Mining were both part of a corporate arrangement to eliminate or reduce as much as possible their exposure in the United States to lawsuits brought against them for the sale of asbestos in the United States.

40. Charter Consolidated Ltd. and Central Mining intentionally designed complexity into their organization and corporate relationships in order to obfuscate those relationships and ownership interests while minimizing Cape's and their own liability risks, including for asbestos sold in the United States, including in South Carolina.

41. Charter Consolidated Ltd. and Central Mining refused to make adequate provisions or reserves of cash for Cape's and their own asbestos-related liabilities.

42. In 1996, Charter Consolidated Ltd. sold off its direct equity interests in Cape for approximately £48 million.

Inferences as to South Carolina Presence,[8] Control by and Responsibility of ESAB Corporation

43. From 1989, ESAB Group, Inc. ("ESAB Group") maintained its principal place of business in Florence, South Carolina.[9]

[8] Paragraphs 43 to 52 undermine the many representations made by ESAB Corporation to this Court regarding an alleged lack of ties to South Carolina.

[9] Brief for Pl.-Appellant ESAB Grp., No. 11-1243, at 7 (4th Cir. Aug. 24, 2011). The Court may take judicial notice of judicial filings. *See* Rule 201(b), SCRE; *Rouse v. Nessel*, 2023 WL 4235614, at *1 n.1 (D.S.C. June 28, 2023) ("[A] court may take judicial notice of public filings, including court filings.").

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44. In 1994, ESAB Group was acquired by Charter PLC (a new holding company formed in 1993) and continued to operate primarily from Florence, South Carolina.[10]

45. In or around October 2008, ESAB Group "became an indirect subsidiary of Charter International plc."[11]

46. Through at least 2012, "ESAB Group has maintained its principal place of business in Florence, South Carolina, where it ha[d] a manufacturing plant, executive offices, and sales, engineering, and research development divisions."[12]

47. While operating in the United States, principally from Florence, South Carolina, ESAB Group initiated multiple lawsuits in South Carolina. *E.g.*, *ESAB Grp., Inc. v. Centricut, Inc.*, No. 4:96-cv-00168 (filed Jan. 19, 1996); *ESAB Grp. Inc. v. Centricut LLC*, No. 4:98-cv-01654 (filed Jun 8, 1998); *ESAB Grp. Inc. v. Arrowood Indem. Co. et al.*, No. 4:09-cv-01701 (filed on June 25, 2009).

48. As of 2011, ESAB Group employed "523 people at its Florence facilities, which include[d] a manufacturing plant, executive offices, the company's information technology department, and a substantial portion of the company's sales, engineering, and research and development divisions"; the company had "paid more than $6 million in taxes to the State of South Carolina and Florence County"; and the company "derive[d] a substantial portion of its total revenue from its operations and facilities in Florence, South Carolina,"

[10] *See ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 383 (4th Cir. 2012) (Floyd, J.).

[11] *Id.*

[12] *Id.*

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including "generat[ing] approximately $225 million in revenue from its Florence operations" from 2008 through the first half of 2009.[13]

49. In 2011, Colfax acquired Charter and ESAB Group, along with ESAB Group's "North American headquarters . . . located in Florence, South Carolina."[14]

50. In 2022, Colfax sold its interests in Charter's businesses, including those associated with Cape-related liabilities—namely, ESAB Corporation.

51. ESAB Group is currently a wholly owned subsidiary of ESAB Corporation.[15]

52. ESAB Group's Terms and Conditions of Sale, which appear on ESAB Corporation's website, require its buyers to "expressly submit[] to the exclusive jurisdiction of the state and/or Federal courts located in Florence, South Carolina with respect to all lawsuits arising under or in connection with this Offer."[16]

53. In 2022, the spinoff of ESAB Corporation, which was formally organized in 2021, was completed.

54. After the spinoff, ESAB Corporation served as the ultimate parent company of Charter Consolidated Ltd. and Central Mining.

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[13] Decl. of Neil C. Schemm, *The ESAB Grp., Inc. v. Arrowood Indem. Co.*, No. 4:09-cv-01701, ECF No. 25-2, at ⁋⁋ 10–14 (July 17, 2009).

[14] "ESAB Acquired by Colfax Corporation," ESAB News Release (Jan. 13, 2012), *available at* https://web.archive.org/web/20121029032933/http://www.esabna.com/us/en/news/ESAB-Acquired-by-Colfax-Corporation.cfm.

[15] ESAB Grp., Inc. 401(k) Retirement Savings Plan, 2022 Form 11-K (July 12, 2023), *available at* http://pdf.secdatabase.com/2169/0001983853-23-000006.pdf; *see also KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601, 607 (4th Cir. 2021) ("We may also take judicial notice of the content of relevant Securities and Exchange Commission ('SEC') filings and other publicly available documents included in the record.").

[16] ESAB Terms and Conditions of Sales (accessed May 4, 2024), https://esab.com/us/nam_en/terms-and-conditions-of-sales/.

55. ESAB Corporation obfuscated the relationship between ESAB and its post-spinoff subsidiaries—including Charter Consolidated Ltd. and Central Mining—and also historically with Cape, with the purpose of frustrating creditors and avoiding liability.

56. ESAB Corporation is the successor in interest to Central Mining and Charter Consolidated Ltd.

57. ESAB Corporation can appoint executive personnel and directors of Charter Consolidated Ltd. and Central Mining.

58. There is common ownership between Central Mining, Charter Consolidated Ltd., and ESAB Corporation.

59. There was common ownership among Central Mining, Charter Consolidated Ltd., and Cape before 1996.

60. There was common ownership among Central Mining, Charter Consolidated Ltd., Cape, and ESAB Group between 1994 and 1996.

61. Cape was financially dependent upon Central Mining and Charter Consolidated Ltd. before 1996.

62. ESAB Group was financially dependent upon Charter PLC between 1994 and 1996, as well as for many years after.

63. Central Mining and Charter Consolidated Ltd. are financially dependent upon ESAB Corporation.

64. The Charter Third-Party Defendants have failed to properly observe corporate formalities over their existence.

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65. The Charter Third-Party Defendants have done nothing to address Cape's massive unpaid responsibility for the death and illness caused by Cape's asbestos products in South Carolina and elsewhere in the United States.

66. The Charter Third-Party Defendants have taken possession of property, including cash and other assets, which they should have not taken from Cape and should have remained available to bodily-injury claimants in the United States, including in South Carolina.

67. The Charter Third-Party Defendants have destroyed corporate records and publicly misrepresented the nature of Cape's business and liability-avoidance scheme in the United States.

68. The Charter Third-Party Defendants are responsible for the absence of corporate records with respect to Cape, with Charter Consolidated Ltd. and Central Mining responsible for the destruction of records referenced with respect to the Barlow World Rand Mines Archive. *See* https://researcharchives.wits.ac.za/5-3-14 (referencing "certain boxes [that] have been destroyed" or "negative material on miners' phthisis and asbestos [that] have been removed – perhaps even before the collection came to Barlows").

General Inferences as to Alter Ego Liability

69. The Charter Third-Party Defendants—with Cape prior to 1996—are subject to the same total dominion and control, and ability to be influenced with respect to major business decisions and are mere instrumentalities for the purposes of committing fraud or other violations of statutory or legal duties—namely, by ESAB Corporation currently, and by Charter Consolidated Ltd. previously.

70. The Charter Third-Party Defendants—with Cape prior to 1996—are part of a single business enterprise or single enterprise-in-fact, have an amalgamation of corporate

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interests, entities, and activities, and have unified, integrated, and intertwined business operations and resources to achieve and act with a common business purpose.

71. The Charter Third-Party Defendants—with Cape prior to 1996—have acted with bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of legal distinctions among the Charter Third-Party Defendants, and that inequitable consequences and fundamental unfairness have been caused from such blurring of legal distinctions and their activities and assertions of corporate separateness, including in an attempt to shield fraud, evasion of existing obligations, circumvention of statutes, criminal conduct, and the like with respect to the Cape liability-avoidance scheme, and that adherence to the fiction of separate corporate identities would defeat justice.

General Inferences as to Unjust Enrichment

72. The Charter Third-Party Defendants participated in, or otherwise directed or facilitated, Cape's liability-avoidance scheme.

73. The Charter Third-Party Defendants have financially benefited from Cape's liability-avoidance scheme, including receiving diverted funds directly or indirectly from Cape and retaining the benefits of Cape's asbestos business.

74. It would be inequitable for the Charter Third-Party Defendants to retain any financial benefit or monetary value from the liability-avoidance scheme without contributing to the compensation of persons harmed by Cape asbestos, including by returning the financial benefit or monetary value of the funds obtained from Cape.

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II. The Court's Adverse Inferences Against the Altrad Third-Party Defendants.

As to the Altrad Third-Party Defendants (inclusive of both the "Altrad Owners" and "Altrad Sparrows" groups),[17] 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 benefitted unjustly from Cape's liability-avoidance scheme. In order to reach that inference, the following inferences are made against each of the respective Altrad Third-Party Defendants:

Inferences as to AIA and Mohed Altrad

1. Mohed Altrad is the majority shareholder of the Altrad Group.
2. Mohed Altrad controls the Altrad Group, including AIA.
3. In 2022, Mohed Altrad was convicted of corruption offenses in France, punished by the imposition of an 18-month suspended jail term.
4. Mohed Altrad has been convicted of a crime involving dishonesty or false statement.
5. AIA is the head company of the Altrad Group and the ultimate parent of all of the Altrad Third-Party Defendants.

Inferences as to Altrad and Cape

6. AIA acquired Cape in 2017 through its wholly owned subsidiary, Altrad UK Ltd.

[17] The Court makes these adverse inferences independent of any other evidence that may support the Receiver's claims against the Altrad Third-Party Defendants. *See, e.g.*, Order (Dec. 6, 2023) at 9–12, 38–50 (detailing allegations and documents regarding AIA's common control of Altrad Third-Party Defendants; the alleged domination of AIA by Mohed Altrad as the founder, face, and owner of more than 90% of AIA shares; the mass termination of "Sparrows" executive management after being acquired by Altrad; the liquidation of a Scottish "Sparrows" entity within two weeks of being served the Receiver's complaint; the rebranding of "Sparrows" entities as "Altrad Sparrows"; and efforts to acquire and integrate Cape, with its affiliates, into the Altrad Group as a profitable, wholly owned subsidiary that—with other Altrad Third-Party Defendants with defaults entered against them—continues to avoid responding to claims in the United States.

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7. Altrad UK Ltd. was incorporated for the specific purpose of acquiring Cape.
8. Altrad UK Ltd. functions as a wholly owned subsidiary of AIA.
9. Altrad UK Ltd. is financed by AIA.
10. AIA and Mohed Altrad own Altrad UK Ltd.
11. AIA and Mohed Altrad dominate and control Altrad UK Ltd.
12. AIA and Mohed Altrad were aware of Cape's asbestos-related liabilities and liability-avoidance scheme prior to the acquisition of Cape.
13. AIA and Mohed Altrad acquired Cape with the intent to continue Cape's liability-avoidance scheme and refusal to respond to litigation in the United States.
14. Since the acquisition of Cape, AIA and Mohed Altrad have dominated and controlled Cape, including with respect to its financing and capitalization.
15. AIA and Mohed Altrad can appoint executive personnel and directors of Cape.
16. The Altrad Group has incorporated Cape into its enterprise, including through rebranding efforts, such as changing the name of Cape Industrial Services Ltd. to Altrad Services Ltd.
17. The Altrad Group set aside substantial proceeds to address certain non-US historical claims relating to asbestos exposure.
18. AIA and Mohed Altrad are responsible for Cape's continued failure to respond to litigation against Cape in the United States.

Inferences as to Altrad and Altrad Sparrows

19. The Altrad Group acquired an enterprise known as the "Sparrows Group" in July 2022.
20. In July 2023, the Sparrows Offshore Group Ltd. passed a resolution to liquidate.
21. AIA and Mohed Altrad were responsible for the decision to liquidate the Sparrows Offshore Group Ltd.

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22. The service of the Third-Party Complaint on the Sparrows Offshore Group Ltd. earlier in July 2023 contributed to the decision to liquidate the Sparrows Offshore Group Ltd.
23. Hawk Bidco US Inc., Arranco US, LLC, and Sparrows Offshore, LLC ("Altrad Sparrows Third-Party Defendants") are U.S. subsidiaries of the Altrad Group.
24. AIA and Mohed Altrad own the Altrad Sparrows Third-Party Defendants.
25. AIA and Mohed Altrad dominate and control the Altrad Sparrows Third-Party Defendants.
26. The Altrad Sparrows Third-Party Defendants are financially dependent upon AIA and Mohed Altrad.
27. AIA and Mohed Altrad can appoint executive personnel and directors of the Sparrows Third-Party Defendants.
28. AIA and Mohed Altrad were responsible for the termination of the executive leadership at the Sparrows Group in April 2023.
29. The Altrad Group has incorporated the Altrad Sparrows Third-Party Defendants into its enterprise, including through rebranding efforts, such as changing the name of "Sparrows" to "Altrad Sparrows."

Inferences as to All Altrad Third-Party Defendants

30. There is common ownership between the Altrad Third-Party Defendants and Cape.
31. The Altrad Third-Party Defendants intentionally designed complexity into their corporate relationships in order to obfuscate those relationships and ownership interests while minimizing Cape's and/or their own liability risks, including for asbestos.
32. The Altrad Third-Party Defendants are part of a scheme to facilitate Cape's escape from legal or financial responsibility for people harmed by Cape asbestos.

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33. AIA and Mohed Altrad are responsible for Cape's and other non-responding Altrad Third-Party Defendants' failure to respond to litigation involving Cape in the United States, including with respect to the actions brought by the Park and Tibbs plaintiffs in this Court.
34. The Altrad Third-Party Defendants have refused to make adequate provisions or reserves of cash for Cape's and their own asbestos-related liabilities.
35. The Altrad Third-Party Defendants have failed to properly observe corporate formalities over their existence.
36. The Altrad Third-Party Defendants have done nothing to address Cape's massive unpaid responsibility for the death and illness caused by Cape's asbestos products in South Carolina and elsewhere in the United States.
37. The Altrad Third-Party Defendants have taken possession of property, including cash and other assets, which they should have not taken from Cape.
38. The Altrad Third-Party Defendants have destroyed corporate records and publicly misrepresented the nature of Cape's business and liability-avoidance scheme in the United States.

General Inferences as to Alter Ego Liability

39. The Altrad Third-Party Defendants—with Cape—are subject to the same total dominion and control, and ability to be influenced with respect to major business decisions and are mere instrumentalities for the purposes of committing fraud or other violations of statutory or legal duties—namely, by Mohed Altrad and AIA.
40. The Altrad Third-Party Defendants—with Cape—are part of a single business enterprise or single enterprise-in-fact, have an amalgamation of corporate interests, entities, and

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activities, and have unified, integrated, and intertwined business operations and resources to achieve and act with a common business purpose.

41. Mohed Altrad acts as the alter ego and "guiding spirit" of the Altrad Group.

42. Mohed Altrad controls decision-making within the Altrad Group, including for Cape.

43. The Altrad Third-Party Defendants—with Cape—have acted with bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of legal distinctions among the Altrad Third-Party Defendants, and that inequitable consequences and fundamental unfairness have been caused from such blurring of legal distinctions and their activities and assertions of corporate separateness, including in an attempt to shield fraud, evasion of existing obligations, circumvention of statutes, criminal conduct, and the like with respect to the Cape liability-avoidance scheme, and that adherence to the fiction of separate corporate identities would defeat justice.

General Inferences as to Unjust Enrichment

44. The Altrad Third-Party Defendants are part of the Cape liability-avoidance scheme, or have otherwise directed or facilitated the liability-avoidance scheme.

45. The Altrad Third Party Defendants have financially benefited from Cape's liability-avoidance scheme, including receiving diverted funds directly or indirectly from Cape and retaining the benefits of Cape's asbestos business.

46. It would be inequitable for the Altrad Third-Party Defendants to retain any financial benefit or monetary value from the liability-avoidance scheme without contributing to the compensation of persons harmed by Cape asbestos, including by returning the financial benefit or monetary value of the funds obtained from Cape.

DECISION ON REQUEST FOR ATTORNEYS' FEES

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A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery. Rule 37(b), SCRCP (stating such payment "shall" be made unless the "failure was substantially justified" or "an award of expenses [is otherwise] unjust"); *see also, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 270, 762 S.E.2d 535, 537 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297-98, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order). "As a general rule," moreover, "the amount of attorneys fees to be awarded in a particular case is within the discretion of the trial judge." *Jones v. Robinson*, 2023 WL 7685902, at *10 (S.C. Ct. App. Nov. 15, 2023).

Consistent with the Court's other findings herein, and following a hearing on these issues, the Court finds that the Altrad and Charter Third-Party Defendants' persistent refusal to participate in discovery amounts to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and the Court's management of its docket, and accordingly, the failure of these Third-Party Defendants falls short of substantial justification. Accordingly, the Court finds that the Receiver is entitled to reasonable attorneys' fees and costs as a sanction against the Altrad Third-Party Defendants and Charter Third-Party Defendants for the litigation activities to date necessary for addressing these Third-Party Defendants' frivolous positions and proceedings, culminating in

these Motions. The Receiver is ordered to produce within thirty (30) days from this order evidence of its reasonable attorneys' fees and costs for this Court's *in camera* review.

* * * * *

For the reasons set forth herein, the Court **GRANTS** the Receiver's Motions and, accordingly, (i) draws the adverse inferences set forth herein given the discovery misconduct of the Altrad Third-Party Defendants and Charter Third-Party Defendants, and (ii) concludes that an award of reasonable attorneys' fees and costs in favor of the Receiver is proper, and accordingly, the Receiver must submit evidence *in camera* of such fees and costs within 30 days of this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]

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Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Sanctions

So Ordered

Jean H. Toal

The Supreme Court of South Carolina

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 Corporation; 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, Inc.; 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; Zurn Industries, LLC, Defendants,

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 Plaintiff, Respondent,

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa LTD., De Beers PLC, individually and as successor in interest to De Beers S.A., De Beers Centenary AG, De Beers Consolidated Mines Ltd., n/k/a De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., De Beers Jewellers LTD., De Beers Jewellers US, Inc., Anglo 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 (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.) 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 S.A.S., Sparrows Offshore Group Ltd., Hawk Bidco US Inc., ArranCo US, LLC, Sparrows Offshore, LLC, and The Sparrows Group, LLC, Third-Party Defendants,

Of which Mohed Altrad and Altrad Investment Authority S.A.S, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the Appellants.

Appellate Case No. 2025-002104

ORDER

On November 20, 2025, this Court certified this case from the court of appeals and instructed the parties to file any objections to expediting the briefing schedule within five days. To date, no objections were filed. Accordingly, this appeal shall be expedited as follows:

- Appellants shall serve and file their briefs, in the form of final briefs, along with a record on appeal that includes all of Appellants' designations of matter, by December 10, 2025.

- Respondent shall serve and file its brief, in the form of a final brief, and its designation of matter, on or before December 30, 2025.

- Appellants shall serve and file their final reply brief(s) and a supplemental record on appeal containing any additional materials designated by Respondent by January 6, 2026.

- For the use of the Court, the parties must also file ten bound copies of the record and their briefs by January 6, 2026.

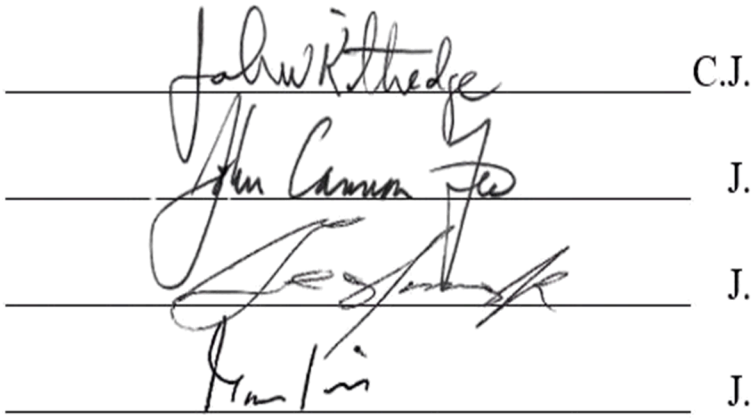
In addition to any other issues Appellants intend to raise on appeal, the parties' briefs must address:

- The impact of *Adams v. Cape Industries Plc* [1990] Ch. 433 on South Carolina's exercise of personal jurisdiction over Cape PLC and its subsidiaries, affiliates, and successors in interest, including NAAC and Appellants;

- Whether *Adams v. Cape Industries Plc* [1990] Ch. 433 estops the receiver, as a matter of international law, from pursuing its alter ego/amalgamation theory on behalf of Cape PLC against Appellants; and

- Whether Appellants have waived the defense of lack of personal jurisdiction.

While no initial briefs will be filed in this case, the content of the briefs shall, to the extent possible, comply with the requirements of Rule 208(b), SCACR. The parties will be advised when this case is scheduled for oral argument.



C.J.

J.

J.

J.

Verdin, J., not participating

Columbia, South Carolina
November 26, 2025

cc:
Matthew Todd Carroll
Kevin A. Hall
Mary Elizabeth O'Neill
George Murrell Smith, Jr.
John Thomas Lay, Jr.
Gray Thomas Culbreath
Lindsay Anne Joyner
Eleanor Lasseigne Jones
Jonathan M. Robinson
Shanon N. Peake
A. Victor Rawl, Jr.
Theile Branham Mc Vey
John D. Kassel
Jamie Rae Rutkoski
Charles William Branham, III
Kevin W. Paul
David Christopher Humen
James H. Elliott, Jr.
Cameron D. Berthelsen

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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 Representative of the Estate of **ISABELLA PARK**,	)	**C/A NO. 2021-CP-40-02727**
Plaintiffs,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
ARMSTRONG INTERNATIONAL, INC., et al.	)	
Defendants.	)	

MOTION TO APPOINT RECEIVER

Plaintiffs, pursuant to S.C. Code §§ 15-65-10(4) and (5), move this Court to appoint a receiver over Cape PLC and its subsidiaries, affiliates, successors, and assigns. Cape PLC is a defendant in the above-captioned action.

BACKGROUND

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

[1] Effective July 1, 1974, Cape Asbestos Company Ltd. changed its name to Cape Industries Ltd. **Ex.1**, CAPE000308 (certificate of incorporation on change of name).

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which were used in South Carolina. Cape also concocted a scheme to avoid its legal responsibilities to persons injured from using those end products because, startingly, Cape deemed itself as having—in its own words—no "moral responsibility" to those end users. Rather than defending its conduct in front of juries in the United States, Cape decided to simply accept default judgments in asbestos lawsuits and ultimately flee the country, knowing that nearly all the Company's assets were in jurisdictions (namely, the U.K., South Africa, and Lichtenstein) where judgments in those lawsuits could not be enforced. Although Cape stiff-armed its creditors in the United States—namely, workers exposed to asbestos mined by Cape—and absconded to London and South Africa, certain of its insurance assets presumably remain. The appointment of a receiver to marshal Cape's assets and satisfy claims is therefore the appropriate remedy, as explained below.

A. Cape Establishes American Presence and Operations Through NAAC.

At its peak, from mines in Apartheid-era South Africa, Cape produced approximately 90%[2] of the world's supply of amosite asbestos, including asbestos imported and used in South Carolina.

For the "purpose of expediting and facilitating the movement" of asbestos from South African mines, on October 14, 1953, Cape Asbestos Company Ltd. (a U.K. entity) established the North American Asbestos Corporation ("NAAC"), a direct subsidiary that was part of the Company's "mining division" and domiciled in Illinois.[3] NAAC had both marketing and distribution roles: (i) serving as Cape's sales agency in the United States, with sole authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines, and (ii) ensuring proper distribution of asbestos products and that shipments from Africa

[2] *Hammond v. North American Asbestos Corp.*, 454 N.E. 2d 210, (Ill. 1983)(confirming that Cape Asbestos supplies 90% of the world's supply of amosite asbestos and virtually the sole supplier of longer fiber grades).
[3] *See* **Ex. 2**, CAPE000110–12 (1982 court filing describing NAAC's history); **Ex. 3**, CAPE000177 (identifying NAAC as the sole U.S.-based entity of the Cape mining division); **Ex. 4**, CAPE000869 (1973 letter describing NAAC as "a division of Cape Asbestos Co. Ltd., with corporate offices in London").

made it "all the way through to the customer's plant," including, on information and belief, to plants in South Carolina or through South Carolina ports.[4] NAAC "effect[ively] . . . put the Mines at every U.S. port" (**Ex. 5**, CAPE000988–89) and by 1970 was the "largest U.S. importer of Amphibole Fibres," which were "re-distributed from . . . warehouse locations in East Coast, Gulf Coast and West Coast Ports" (**Ex. 6**, CAPE000878–79).

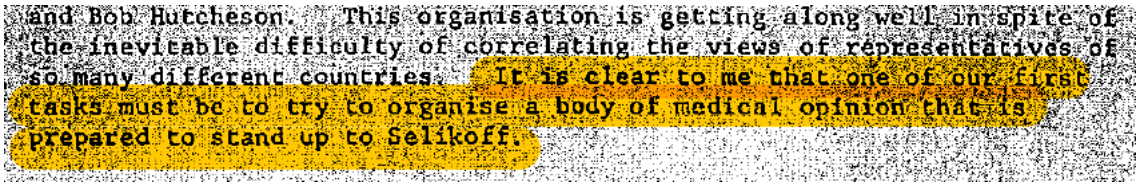
Over its history, NAAC was "essentially a one-man operation" consisting of an operational lead supported by four office clerical personnel (overseen by a board of directors made up of largely of Company lawyers or other Cape executives, until all Cape officials resigned in 1975 as a "sensible precaution" in light of U.S. litigation).[5] In coordination with the global Cape network, however, NAAC sold asbestos to Cape's numerous American-based clients, including, but not limited to, the U.S. Government, Keene Corporation (f/k/a Baldwin-Ehret-Hill), Carey, Fibreboard, GAF (f/k/a Ruberoid), Owens Corning, Johns-Manville and Pittsburgh Corning. **Ex. 7**, CAPE000994–95. These companies were giants among asbestos product manufacturers, and on information and belief, their products were used extensively in South Carolina. In addition, NAAC tried to influence public and corporate opinion about the safety of asbestos, including, but not limited to, rebutting emerging medical critiques of its safety.[6]

[4] *See* **Ex. 8,** CAPE000263–66 (describing intended business of NAAC); **Ex. 9**, CAPE000333 (1975 Cape Asbestos cover letter of NAAC director resignations); **Ex. 10**, CAPE000729 (appointment announcement describing NAAC as "specialize[d] in marketing and distribution of Blue and Amosite asbestos in the United States, Canada, Mexico and the Caribbean"); **Ex. 5**, CAPE000988–89 (1969 NAAC memorandum describing customer services).

[5] *See* **Ex. 2**, CAPE000110–12 (describing NAAC's lean staffing); **Ex. 11**, CAPE001514 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees"); **Ex. 12**, CAPE001528 (six directors in 1970).

[6] *See, e.g.*, **Ex. 13**, CAPE000130 (1977 Cape Asbestos Fibres Limited prioritizing efforts of Asbestos International Association to "organise a body of medical opinion that is prepared to stand up" to critical opinions).

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and Bob Hutcheson. This organisation is getting along well in spite of the inevitable difficulty of correlating the views of representatives of so many different countries. It is clear to me that one of our first tasks must be to try to organise a body of medical opinion that is prepared to stand up to Selikoff.

Cape Asbestos, moreover, dominated NAAC's decision-making, with NAAC, for example, unable to "borrow one dollar without [Cape Asbestos's] approval" and routinely forced to withdraw cash from the United States to pay dividends to Cape Asbestos (minimizing the assets on NAAC's balance sheet).[7]

B. Cape Accepts Default Judgements and Liquidates NAAC to Evade Claimants.

After the onset of asbestos-related product liability litigation in the 1970s, Cape became especially concerned with its own liability.[8] Thus, 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.[9]

In addition, Cape began to engage in a campaign of litigation avoidance by refusing to accept process or appear in any proceedings in the United States, including failing to respond to

[7] *See, e.g.*, **Ex. 14**, CAPE001507 (1976 letter noting borrowing limit); **Ex. 15,** CAPE000261–62 (1959 letter suggesting that Cape was "extremely cautious" in picking NAAC personnel who would "fit into [the Company's] scheme of things . . . without causing embarrassment all around"); **Ex. 16**, CAPE000816 (1976 board minutes showing payment of $250,000 dividend); **Ex. 17**, CAPE000931–32 (NAAC President stating in 1956 that NAAC "think[s] of ourselves as being part of a coordinated group with responsibilities to the whole, even though this may mean subordinating other and more profitable interests of NAAC," and expressing offense at being called "commission agents," which "implies an independent, lack of responsibility, and an emphasis on local self-interest").

[8] *See, e.g.*, **Ex. 18**, CAPE000351–56 (1975 lawyer letter referring to "attempt to limit NAAC's and Cape's exposure to future United States litigation").

[9] *See* **Ex. 19**, CAPE000123 (NAAC discouraging Cape visits to the U.S. in 1978 or else negate "maneuvers" related to "continued problems with product liability litigation"); **Ex. 20**, CAPE000152 (1975 letter suggesting to "disassociate the Parent Company as fully as possible from the operating companies"); **Ex. 21**, CAPE000154 (1975 letter raising whether to "do something to change the identity of NAAC in order to avoid exposing the company unnecessarily," while doing "everything possible to maintain a successful selling operation in the United States"); **Ex. 22**, CAPE000166–67 (1974 NAAC letter suggesting that "no one from Cape be an officer of NAAC since we want it to be as independent as possible in order to avoid any contention that it is the alter ego of Cape and that Cape is doing business in the United States"); **Ex. 9**, CAPE000333 (1975 Cape Asbestos letter stating "that it would be a sensible precaution against Cape's involvement in any future proceedings for [Cape personnel] to resign from the N.A.A.C. Board," and enclosing resignation letters).

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the Second Amended Summons in this action, as properly served pursuant to Article 10 of the Hague Convention on March 8, 2022 *See* Exhibit A.[10] According to Cape executives, this strategy was warranted because they "really cannot be said to have a moral responsibility [to respond to the suits] and are simply victims of [a] US product liability cult." Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950-2004; Tweedale and Flynn, *Enterprise & Society,* June 2007, Vol.8 No. 2 pp.268-296 (1977 letter from Cape's counsel) attached as **Ex. 25**.

Ultimately, to avoid paying damages to workers whom were made sick or killed by using its asbestos, Cape resolved to liquidate NAAC, effective January 31, 1978. *See, e.g.*, **Ex. 26**, CAPE001035 (April 1978 letter noting liquidation and requesting Cape Asbestos official to stop sending accounting memoranda to former NAAC officials, "for safety's sake"). Existing debts of NAAC were paid, with remaining assets transferred upstream to NAAC's direct parent company at the time, Cape Industries Overseas Ltd. (a U.K. entity wholly owned by Cape Industries Ltd.). *See* **Ex. 27**, CAPE000593 (noting conveyance of assets). NAAC's liquidation was central to Cape's litigation-avoidance strategy, based on legal advice that no British or South African court would enforce a judgment against a Cape entity if it never appeared again in the United States.[11]

[10] *See* **Ex. 23**, CAPE000550–51 (NAAC personnel opining in 1978 "that it is most unlikely that any plaintiff would bother to pursue collection of any default judgments against Cape"); **Ex. 24**, CAPE000702 (NAAC counsel in 1979 confirming receipt of correspondence stating that "U.K. and South African lawyers confirm that any resulting judgments will not be enforceable against Cape's U.K. and South African assets" and that "the potential loss of all NAAC's outstanding assets is not material in the Cape Group context").

[11] *See, e.g.*, **Ex. 28**, CAPE000141–43 (1975 legal letter advising Cape on default-judgment risk); **Ex. 29**, CAPE000566 (1978 memorandum agreeing that it would be in the "best interests of Cape companies other than NAAC" to make "no response" to litigation); **Ex. 30**, CAPE000617–19 (summarizing 1984 deposition testimony regarding litigation strategy).

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Yet, Cape continued to contemplate schemes to facilitate the sale of asbestos to U.S. customers while minimizing its product-liability risk.[12] For example, Continental Products Corporation (using the same physical address as NAAC in Chicago, Illinois) was formed to "act as a commission agent for the future sales of asbestos from South Africa" in the United States, with South African mines selling to a new Lichtenstein subsidiary called Associated Mines Company, which in turn sold asbestos to the United States under its own invoices. **Ex. 32**, CAPE000386; *see also* **Ex. 33**, CAPE000531 (announcement of Continental Products Corporation as "Agent to handle the North American requirements for Amosite and Crocidolite asbestos fibre"). The express "purpose of this corporate arrangement [was] to eliminate or reduce as much as possible the exposure in the United States of [South African mining companies] to lawsuits brought against it under theories of strict liability concerning products liability on the sale of asbestos in the United States." **Ex. 34**, CAPE000377–79.

C. A Receiver Can Marshal Cape's Assets to Satisfy Claims.

Asbestos claimants have been generally unsuccessful in recovering against Cape entities (except for a single instance in which Cape contributed to the settlement of certain asbestos claims brought in Texas). Indeed, due to its complex scheme to liquidate NAAC and not respond to litigation, Cape left its creditors—namely, the thousands of people it exposed to asbestos—without any meaningful entity to proceed against and, apparently, disposed of its United States-based assets without regard to those creditors. Now, apparently, all that potentially remains of Cape in the United States is its historical insurance coverage.

[12] *See, e.g.*, **Ex. 31**, CAPE000728 (1977 meeting memorandum "to discuss liquidation of NAAC and formation of new off-shore company to service North American market").

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Plaintiffs request that this Court appoint a receiver to marshal Cape's assets, including insurance coverage, and that the receiver be granted such further and other powers as may be appropriate, including, but not limited to, the acceptance of service of claims, retaining counsel, making claims against insurance policies that may exist, and otherwise wholly administer all of the assets and attendant business of Cape.

LAW AND ARGUMENT

South Carolina Code § 15-65-10(4) states that:

> 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 ….

It is undisputed that Cape, through its complex scheme and 1978 liquidation of its American subsidiary, NAAC, has intentionally fled the United States to avoid its liabilities and obligations to its creditors and to the extent it ever properly qualified itself to do business in South Carolina has forfeited those rights. *See, e.g.*, Black's Law Dictionary (11th ed. 2019), *forfeiture* ("loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty") Thus, appointment of a receiver over Cape and its affiliates is appropriate under subsection (4).

South Carolina Code §15-65-10(5), moreover, states that:

> 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 ….

Section 15-65-10(5) reflects an "old practice" of equity and "important principle of law" to correct injustice, particularly "when a debtor is trying to defeat his 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." *Va.-Carolina Chem. Co. v. Hunter*, 66 S.E. 177, 179 (S.C. 1909). Thus, if a business "disposes of large resources" but "leaves . . . debts unpaid"—while "set[ting]

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creditors at arm's length by refusing . . . to take any interest in the satisfaction of their claims"—then there is a prima facie case of fraud warranting appointment of a receiver. *Id.* at 180 (citing *Miller v. Hughes*, 12 S.E. 419 (S.C. 1890)). It is respectfully submitted that the appointment of a receiver over Cape and its affiliates is appropriate under subsection (5) because Cape engaged in an intentional scheme to defraud its creditors by refusing to appear or accept service in the United States after being faced with substantial asbestos-related liabilities.

Section 15-65-20 requires that notice of this application be provided to the party to the action whose property is sought to be put in the hands of the receiver. Plaintiffs, concurrently herewith, have provided copies of this motion to Cape PLC.[13]

CONCLUSION

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. Plaintiffs request that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled. Plaintiffs respectfully suggest that Peter Protopapas be appointed the receiver over Cape.

Respectfully submitted,

s/ Aaron D. Chapman
Aaron D. Chapman (SC Bar No. 104485)
Charles W. Branham, III (To be Admitted *PHV)*
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Third Floor
Dallas, TX 75202
achapman@dobslegal.com
tbranham@dobslegal.com
Other email: tgilliland@dobslegal.com

Theile B. McVey (SC Bar No. 16682)
Jamie D. Rutkoski (SC Bar No. 103270)

[13] Plaintiffs have placed into the hands of DHL, an international carrier, a copy of this motion and its exhibits, for delivery to the same address at which service was perfected.

KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Other email: emoultrie@kassellaw.com
ATTORNEYS FOR PLAINTIFF

March 6, 2023,
Dallas, Texas.

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EXHIBIT 1

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1960

CERTIFICATE OF INCORPORATION

ON CHANGE OF NAME

No. 40203

I hereby certify that

THE CAPE ASBESTOS COMPANY LIMITED

having by special resolution and with the approval of the Secretary of State changed its name, is now incorporated under the name of

CAPE INDUSTRIES LIMITED

Given under my hand at London the 1ST JULY 1974

N. Taylor

N. TAYLOR

Assistant Registrar of Companies

CAPE000308

EXHIBIT 2

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NOV 2 6 1982

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO

IN RE ASBESTOS CASE NO. 79-CV-1774-2D

LOUIS PACELLO, CASE NO. 80-CV-0029-2
Plaintiff,

v.

JOHNS-MANVILLE SALES CORPORATION (successor by merger to JOHNS-MANVILLE PRODUCTS CORPORATION), et al. Defendants.

NORTH AMERICAN ASBESTOS CORPORATION
ANSWERS TO PLAINTIFF'S REQUEST FOR PRODUCTION

OPENING STATEMENT

NORTH AMERICAN was formed in 1953 for the purpose of expediting and facilitating the movement of raw crocidolite asbestos sold by Cape Blue Mines (Pty.), Ltd. of Koegas and Pomfret, South Africa, and raw amosite asbestos sold by EGNEP (Pty.), Ltd. of Penge, South Africa, as well as for the sale of raw asbestos and certain asbestos products such as rope, yarns, and cloth purchased from other sources. The company was essentially a one-man operation consisting of a president-sales representative, and four office clerical personnel. Robert Cryor (now deceased) acted in the capacity as president and director of the corporation from 1953 through 1970. Mr. C. G. Morgan acted as Director and Chief Sales Representative from December 1, 1971 through May 19, 1978, and was President from June 10, 1974 through May 19, 1978. The company was voluntarily dissolved on May 19, 1978.

NORTH AMERICAN operated a small, experimental manufacturing facility at 500 McKinley, Mundelein, Illinois, from time to time during the years of 1963 through 1966. This operation produced, on an experimental basis, an asbestos mat-like product, sold under the name of Noramite, and was used primarily in the plastics and space industries. The great majority of Noramite produced at the Mundelein facility was sold to a single customer in California.

The company has not been in existence since May 19, 1978, and has had no officers, directors of employees since that date who can provide personal knowledge as to the company's affairs. The information which formed the basis of the Defendant's

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Answers herein, has been gathered by counsel for the Liquidating Trustee, Mr. Max E. Meyer, of 115 South LaSalle Street, Chicago, Illinois 60603, and is based in part on the personal knowledge of the said trustee, and information derived by counsel from existing business records of NORTH AMERICAN now in custody of counsel. Many of the company's records are now unavailable. Records of purchases and sales made by the company for the period 1953 through 1967 were destroyed in 1970 at the time the company moved to new and smaller quarters at 150 South Wacker Drive, Chicago, Illinois. NORTH AMERICAN will permit Plaintiff to inspect and copy its remaining business records upon receipt of an appropriate document request therefor.

1. The records and books of NAAC in the control and custody of Mary G. Oppenheim, Liquidating Receiver, 111 West Washington Street, Chicago, Illinois, which contain information about the names and locations of Defendant's customers for asbestos or asbestos-containing products, the quantity of insulation distributed to the State of Colorado and/or sold or used in the State of Colorado, and the number or amount of products distributed to the State of Colorado and sold in the State of Colorado which contain or are manufactured with asbestos, and which products would include products other than insulation.

RESPONSE: See opening statement. The files and records of NAAC will be made available to you upon receipt of proper notice.

2. All NAAC insurance policies where the company is the insured on a liability insurance policy that would cover the incident referred to in the Complaint.

RESPONSE: The files and records of NAAC will be made available to you upon receipt of proper notice.

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CAPE000111

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Personally appeared before me, MARY G. OPPENHEIM, who, being duly sworn, deposes and says that she is the Liquidating Receiver of the NORTH AMERICAN ASBESTOS CORPORATION Liquidating Trust; that the NORTH AMERICAN ASBESTOS CORPORATION has been dissolved and liquidated: that as Liquidating Receiver of the Liquidating Trust she has custody of the existing business records of NORTH AMERICAN ASBESTOS CORPORATION, and has knowledge of the said files and records, to the extent they are available, as set forth in Exhibit A to NORTH AMERICAN's Answers herein. In the course of the preparation of these Answers, she examined the files and records of the corporation, or caused the same to be examined, and that she has read the foregoing Answers and, based upon the aforesaid records of the corporation, the same are true and correct to the best of her information and belief.

Mary G. Oppenheim
Mary G. Oppenheim

Subscribed and sworn to
before me this 4th day
of November, 1982.

Adrienne Pike
Notary Public

[redacted]

Sep-08-99 03:37P

P.05

CAPE000112

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EXHIBIT 3

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...pany	Holding Company	Country of Incorporati...
...VERSEAS GROUP		
Building & Insulation Division		
Cape Insulation (Ireland) Limited	Cape Industries Overseas Limited	Ireland
Soltex Limited	Cape Insulation (Ireland) Limited	Ireland
Automotive Division		
Cape Asbestos (Ireland) Limited	Cape Industries Overseas Limited	Ireland
Don Deutschland G.m.b.H.	Cape Industries Overseas Limited	Germany
Don France S.A.	Cape Industries Overseas Limited	France
Don International S.A.	Cape Industries Overseas Limited	Belgium
Mining Division		
Cape Asbestos South Africa (Pty) Limited	Cape Industries Overseas Limited	South Afri...
Amosite Mines of South Africa (Pty) Limited	Cape Asbestos South Africa (Pty) Limited	South Afri...
Consolidated Blue Asbestos Corporation (Pty) Limited	Cape Asbestos South Africa (Pty) Limited	South Afri...
Egnep (Pty) Limited	Cape Asbestos South Africa (Pty) Limited	South Afri...
Amosa (Pty) Limited	Egnep (Pty) Limited	South Afri...
Cape Blue Mines (Pty) Limited	Cape Asbestos South Africa (Pty) Limited	South Afr...
North American Asbestos Corporation	Cape Industries Overseas Limited	U.S.A.

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EXHIBIT 4

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9,213

President,
C-X Products Corporation,
3005 Fidelity Union Towers,
Dallas, Texas 75201.

September 26, 1973

Dear Sir:

We are a division of Cape Asbestos Co. Ltd., with corporate offices in London. Cape are marketers of raw asbestos fibers mined in South Africa. They also have numerous manufacturing facilities in the United Kingdom.

During a recent visit by Cape officials to the U.S. Pipe Division at Johns-Manville in Denver, it developed that your Company is supplying them with silica products, and J-M management had apparently visited your plant in Overton, Nevada, where they had viewed your process of pulverizing silica.

Inasmuch as Cape uses silica in some of their manufacturing operation, they expressed considerable interest in your process, and asked us to contact you in an effort to ascertain if your Company would have any interest in a licensing arrangement.

Your prompt reply would be appreciated in order that we may pass along your comments to our management in London.

Thank you very much.

Very truly yours,

NORTH AMERICAN ASBESTOS CORPORATION

Vice President-General Manager

GGMorgan/sp

PLAINTIFF'S EXHIBIT

CAPE000869

EXHIBIT 5

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NAAC SERVICE TO CUSTOMERS October 27, 1969

U.S. customers for Amosite and Blue asbestos dislike buying raw materials from overseas sources and would eliminate these purchases if they possibly could. Further, it is a well-established principal in U.S. industry that no company should depend on a raw material or ... [illegible] that is available from a single source only.

NAAC offers a variety of services to try to make it easier for the customer to buy and take delivery of Amosite and Blue -- in effect to make it more like purchasing a domestic material.

In respect to the single source problem NAAC represents that NAAC/Cape fully recognize this difficulty and take serious responsibility in maintaining continuity of supply of Amosite and Blue fibre at fair prices. We contend no plant in the U.S.A. has, in the past 15 years or more, ever had to cease operation for lack of supply of these fibres. Even during three serious dock strikes in the past six years this has been true.

Specific services performed or offered by NAAC are as follows:

1. We schedule customer requirements with the Mines, tentatively 90 and 60 days in advance and finally 30 days in advance -- adjusting with the customer the frequent revisions of scheduling that the Mines impose due to lack of material or need to substitute grades.

2. We regularly keep informed of the customer's inventory position to anticipate and avoid possible plant shutdown due to lack of material.

3. We keep the customer informed of shipping dates, anticipated shortages and any deviation the Mines must make from the preferred scheduling.

4. We deliver Amosite and Blue to the U.S. port closest to the customer's plant -- all freight, insurance and customs charges fully paid. In effect we put the Mines at every U.S. port.

5. On arrival of the shipment we have our import forwarding agents clear the material properly through customs and port facilities and see that it is forwarded to the customer's plant by rail or motor carrier at the most economical freight rate. We are constantly in touch with the carriers in matters of inland freight and we employ a freight rate specialist -- consultant -- to advise us.

CAPE000988

6. NAAC provides insurance coverage on each shipment from Africa port all the way through to the customer's plant. When there are overages or shortages in a shipment or mixed gradings through error in handling at the port, we sort this out for the customer and arrange that he receives proper credit. Where there are mixed grades in a consignment we see that the bags of incorrect gradings are removed from his premises and replaced with the correct number of bags of the proper grade. All without charge to the customer.

7. NAAC maintains stocks of Amosite and Blue fibre in warehouse in Philadelphia, Pennsylvania - Los Angeles, California - Burlington, Ontario, Canada - and Monterrey, Mexico. Such stocks are for the convenience of both small and large customers, some of whom prefer to be supplied from warehouse rather than to depend on inbound shipments. The warehouse stocks are also used for sample purposes -- frequently enabling us to supply immediate trial tonnage to users or prospects who otherwise would have to wait six to eight weeks for shipment from Africa.

8. NAAC provides financing or credit terms to small and large customers where necessary to facilitate the sale. In case of certain users we extend terms of 90 days and in some instances up to 180 days on irrevocable letter of credit. We also have customers with whom we have set up consigned stocks in the customer's plant, they paying for the material as used.

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EXHIBIT 6

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WITNESS

DEC - 1970

Vol. 5, No. 12 ~ December, 1970

NAAC's PLACE IN THE SUN - Because of changing personnel duties and the entry of new people into the industry each year, NAAC herewith presents a 'quick overview' of our own role in the asbestos industry. As many of you know, North American Asbestos Corporation is a member of the Cape Group of Companies which has its headquarters in England. Cape, through its mining subsidiaries, owns and operates Amosite and Crocidolite (Blue) Asbestos mines in seven locations in Southern Africa. NAAC imports and distributes these Amphibole Mineral Fibres in the United States, Canada, Mexico and the Caribbean region. NAAC currently is importing 12 different grades of Amosite and eight grades of Crocidolite. NAAC does not import or sell Chrysotile asbestos. NAAC is the largest U.S. importer of Amphibole Fibres which are re-distributed from our warehouse locations in East Coast, Gulf Coast and West Coast Ports. Depending on the vissicitudes of the ocean freight industry and fibre supply at the mines, the normal order-to-delivery time for the most popular grades of Amosite and Crocidolite fibres is about 45 days. NAAC has complete access to three Cape Asbestos Fibre laboratories in the U.K., and is always ready to assist customers with technical and manufacturing problems.

DENT NAMED CHAIRMAN OF SUBSIDIARIES - R. H. Dent, Chairman of the Cape Group of Companies, has been appointed Chairman of five subsidiaries of our Cape Group affiliate, Charter Consolidated, Ltd. The subsidiaries, all located in England, include Heatrae, Ltd., Elastic Rail Spike Co., Ltd., Rathdown Holdings Ltd., Rathdown Industries, Ltd., and Lee Green Precision Industries, Ltd.

ASBESTOS DOWN UNDER - Asbestos Bulletin reports a $160 million Chrysotile asbestos mining operation, Australia's first of any consequence, is to be established 11 miles east of Barraba, New South Wales. It's expected that the mine will produce 70,000 tons of fibre per year from 1.5 million tons of ore.

ASBESTOS/ALUMINUM PAINT - An American company has developed a combination aluminum and asbestos paint, six to eight times thicker than ordinary paint, which is said to last for 15 to 20 years. The paint, says the Asbestos Producer, combines the heat-reflective qualities of aluminum with the long life and weather-resistance of asbestos fibres.

RUSSIAN ASBESTOS INDUSTRY - Russian author P. Ya. Titarenke says that there are now 14 large asbestos deposits in Russia being "exploited industrially," and these represent 63% of the world's resources. He says Soviet production





CAPE000878

of asbestos accounts for 50% of the world's output.

MEANWHILE, IN FINLAND - Asbestos is said to have been in use in Finland for 4,500 years, according to a couple of Finnish writers. The earliest use of asbestos fibres was in pottery clay for reinforcement. Today, the Paakkila deposits of Finland turn out from 15,000 to 18,000 tons of Anthophyllite asbestos annually.

LAST DIAMOND RUSH? - Grab that shovel. What may be "the last in Southern Africa" diamond rush is now underway in an alluvial field on the Zwartrand Farm near Koster, Transvaal. Minister of Mines and Health, Dr. Carel de Wet said that payable alluvial diamond fields were becomming scarcer, and the "few left must be protected for the bona fide digger". The current diamond rush has attracted a mere 300 diggers even though one man found a 48.12 carat stone which he sold for $42,000. Perhaps we're getting less adventurous; the diamond rush in 1926 attracted 20,000 people.

A/C FOR LAWN AND GARDEN - New product catalog of a Southern African company called Superconcrete Pipes contains a rich assortment of a/c products for the lawn and garden. Among the products included are outdoor furniture (including a stool that looks just like an elephant's foot), flower pots and barrels in many shapes, fish ponds, and decorative items. The company also makes a/c products for indoor gardening, reports booming sales, and has no worries about bugs consuming their output.

SCARES OFF KILLER WHALES - J. H. Loubser, light house keeper at Cape St. Bla Cape Province, was watching eight whales about 120 yards from the lighthouse cliff when they were suddenly cornered by a large pack of killer whales. Leubser put in an emergency call to the town council, which immediately dispatched a helicopter. The helicopter 'hoved over the the killer whales, the took fright and swam out to sea at great speed". The brave 'copter pilot intoned: "It was no time for engine failure."

NEW S.A. HARBOR - Legislation to provide for building of a new harbor at Richards Bay is expected to be introduced in the 1972 session, according to Transport Minister Ben Schoeman. After approval, completion of the first stage of the harbor is expected to take four years.

SOPHISTICATED WHISTLERS - Dr. J. R. Grindley, director of the Port Elizabeth Oceanarium, reporting on comprehensive study of living dolphins, says: "Dolphins' social organization depends on a dominance hierarchy that requir a sophisticated communication system. Dolphins communicate with each other by whistling."

AND TO ALL - - - OUR BEST WISHES TO YOU AND YOURS FOR A HAPPY HOLIDAY SEASO AND A HEALTHFUL AND PROSPEROUS NEW YEAR!

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EXHIBIT 7

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July 8, 1969

Dr. R. Gaze
The Cape Asbestos Company Ltd.
114 Park Street
London W. 1, England

Dear Richard,

I am sorry to be so tardy in replying to your letter of the 23rd June, but I have been travelling quite a little.

Your letter points to the fact that NAAC has been receiving a 5% commission on fibre purchases for customers we are now selling directly and who formerly purchased by contract from the Mines. These customers are Keene Corporation (formerly Baldwin-Ehret-Hill), Carey, Fibreboard, GAF (formerly Ruberoid), and Owens Corning. You also list, in your letter, Johns-Manville and Pittsburgh Corning, however, we have never received more than 2.5% commission on these two customers.

Naturally I accept your decision in this matter and we can revert to the 2.5% basis whenever you wish to have it become effective, although, as you point out, it is a source of some disappointment and concern to me.

I do not know what you have in mind as a commission or financial arrangement for NAAC for next year, although when I was in London recently there was discussion about a 3.5% commission for NAAC on all purchases and contract sales in North America.

I will not trouble you now with the various reasons why I think the relationships we have with these companies are entirely different than those that existed "pre-1955". However, in thinking of any basis of compensation for NAAC for its activities as sales agency or distributor for the Mines it is quite important to keep in mind that NAAC, either by commission or by price markup or both, must achieve enough return to maintain increasingly costly services that our fibre customers require. For example, the customers listed above have each, at various times, insisted that they no longer wanted to purchase

directly from the Mines and have to pay for the material at the time of shipment from Africa. Further, they have all objected to the annoyances of having to do their own importing of the material through customs house brokers and the troublesome details of filing claims for the shortages that regularly occur on the out-turn of the bags from the vessels, and they do not want to worry about marine insurance, etc. Instead they prefer to have NAAC look after these details leaving to us the in-transit financing costs, insurance problems, the handling of the details in the shortages and the claims at each of the ports, etc., etc.

I have held the opinion that we must provide these services wherever the customer finds it troublesome to perform them for himself -- we must, in fact, make it as easy as possible for the customer to deal with us. This is the one great advantage we have over Central, Kuruman, and Turners in their efforts to sell Blue and Amosite in this market.

These competitive companies, lacking a U.S. distributor, can only quote c.i.f. U.S. port, which is relatively unattractive to most of our customers who have become accustomed to the services we supply. It should be obvious, however, that these services cannot be covered with a 2.5% commission, and for the five companies listed above NAAC has no extra markup with which to provide such services. It is a fact that the Mines also enjoy a higher price from these companies for the grades that they buy than, I believe, any other customer. This is because NAAC has r regularly encouraged increases in the prices to these customers, thus creating the overprice.

I am not sure you are aware of all the services that we perform for our customers, but these are fairly extensive and costly.

Whatever the financial arrangements between the Mines and NAAC that you may plan for the future, I hope you will keep in mind that we have an increasing burden here in the cost of doing business, in increased services, and the administration of these services.

With best regards.

Sincerely,

RECryor/jc

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Copy to Mr. Cryor

RHD/JR

6th October 1953

Messrs. Lord, Bissell & Kadyk,
135 South La Salle Street,
Chicago 3,
U. S. A.

For the attention of Mr. M.E. Meyer

Dear Sirs,

Thank you for your letter of 29th September with regard to our proposal to form a subsidiary company in the United States, and we are glad that you are willing to act for us in this matter. Your observations on the taxation aspect of this matter have been most helpful in enabling us to come to a decision to proceed with the formation of the Company, as we feel that provided we are guided by you in certain detailed matters there is no fundamental reason why the establishment of such a Company should involve us in taxation other than that on the profits of the American Company.

We are asking Mr. Cryor to call on you, and he will be able to supply a good deal of the information which you will require, but in order to be sure that we are quite clear from the tax point of view as we go along, I am putting down in detail the method by which we hope it will be possible for the new Company to conduct its business.

CAPE000263

Considering first the sales of crude asbestos made by our Mining Companies in South Africa, we should wish to divide these sales into two categories: "Scheduled Contracts" and "Other Sales". By "Scheduled Contracts" we mean the main bulk of the sales which are normally made by contract towards the end of any year for supply during the ensuing year. The expression "Other Sales" is intended to cover any sale of surplus crude asbestos not contracted for under the above-mentioned arrangements.

Our proposal is that in the case of all Scheduled Contracts the sale should be made as at present, direct between the Mining Company and the American customer, the offer and acceptance being in accordance with the attached form of letter which we have used for some years and which we are advised is in conformity with the arrangements necessary to cover the taxation aspect. In the case of Other Sales, we should like the Mining Companies to be able to sell outright quantities of asbestos to the American Company at the lowest current price, and the American Company to sell to its customers at the best price they can obtain, acting of course as a principal and not in any way as agent.

We have ascertained that the South African Authorities would have no objection to the payment to the American Company of a commission of 2½% on Scheduled Contracts, and this should be the American Company's income for their work on behalf of the Mining Companies in the capacity of correspondents, it being made clear that the American Company will have no authority to negotiate or make contracts, but shall act as a source of information and provide general assistance to the South African business.

So far as the sale of insulation and other asbestos goods manufactured in the United Kingdom is concerned, these sales have not been extensive in the past although we hope to increase them by means of our new venture, and here again we should like to be able to sell these goods to the American Company as a principal at the best possible terms, the American Company then selling to customers on its own account. This would of course avoid warehousing on our behalf,

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It is likely that we might at some time in the future also require the American Company to undertake manufacture of asbestos products on its own account, and it would of course purchase the raw material, acting as a principal, from our Mines. We may also require the American Company to undertake agencies for other businesses, partly as a convenience and partly because we feel this may be of assistance in establishing its independence of the Parent Company here.

Turning to the points which you raise towards the end of your letter, we shall certainly wish Mr. L.W. Dennis and Mr. R.E. Cryor to be Directors of the Company, but in the first place we should be glad if one or two members of your office staff could act with Mr. Cryor to be the first subscribers and incorporators, and we can later transfer the shares to the proper holders.

We agree that the Corporation should be organized under the laws of the State of Illinois and we should be glad to have a copy at your convenience of the standard Bye-Laws of a private Limited Company of this kind. We are proposing that the name of the Company should be the North American Asbestos Corporation, which name we understand from Mr. Cryor is available, and we feel that the initial capital of $1,000 which I referred to in my earlier letter will be enough to start with. I think that this covers all the points which it is convenient to deal with at this stage.

After you have had an opportunity of discussing the matter with Mr. Cryor, I should be glad to hear from you again in due course with particular reference as to whether these more detailed proposals for the Company's operations are likely to complicate matters by involving us in U.S. taxation other than on any profits which the American Company may earn. I feel I need hardly add that our anxiety in this matter is not to escape any taxation which should properly be paid by any of our Companies, but merely to avoid exposing ourselves to taxes which may fairly be avoided by the prudent disposition of our business arrangements.

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I should not like to close this letter without adding my thanks to you for dealing with my original enquiry so expeditiously, thus enabling us to proceed with this proposal.

Yours faithfully,

Director

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910.12

~~THE CAPE ASBESTOS COMPANY LIMITED~~

CAPE INDUSTRIES LIMITED

114 Park Street London W1Y 4AB

TELEPHONE 01 499 6022 TELEGRAMS INCORRUPT LONDON TELEX 24811

Mr. Max Meyer,
Lord Bissell & Brook,
135 South La Salle Street,
Chicago,
Illinois 60603,
U.S.A.

15th July, 1975.

Dear Max,

Re:. NAAC.

As you may already have heard from Jerry Morgan, we feel that it would be a sensible precaution against Cape involvement in any future proceedings for Mr. Higham and Dr. Gaze to resign from the N.A.A.C. Board and I accordingly enclose their resignation letters.

I believe this will bring the number of remaining directors below the minimum provided for in the Articles but presumably this can be corrected by resolution bringing down the minimum.

Kind regards.

Yours sincerely,

A. J. Penna.
Group Solicitor.

Enc.

AJP/JG

CAPE000333

EXHIBIT 10

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NORTH AMERICAN ASBESTOS CORPORATION

We are Pleased to Announce



Mr. C. G. MORGAN
has been appointed Vice President and General Manager of North American Asbestos Corporation. Mr. Morgan was formerly a Vice President of Eagle-Picher Industries Inc., and Division Manager of its Lusterlite Division.



Mrs. JOAN HOLTZE
continues as Corporate Secretary responsible for office administration. Mrs. Holtze will continue to handle ordering and delivery procedures and related day-to-day matters. Mrs. Holtze joined the company in 1953.



Mr. JIM POLIZZI
Vice President and Sales Consultant since 1954, has particular responsibility for West Coast operations.

North American Asbestos Corporation, which is a subsidiary of the Cape Asbestos Company Limited of London, will continue to specialize in marketing and distribution of Blue and Amosite asbestos in the United States, Canada, Mexico and the Caribbean. Our prime consideration will be to maintain close relationships with our many friends and to continue our established policies.

200 SOUTH MICHIGAN AVENUE, CHICAGO, ILLINOIS 60604 PHONE: (312) 922-7435

Def. Ex. No. 30
For I.D. as of 12/23/86

PLAINTIFF'S EXHIBIT 30

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EXHIBIT 11

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Mr. J. Morris,
Group Chief Management Accountant,
Cape Industries Limited,
114 Park Street,
London W1Y 4AB, England.

3rd
December
1975

Dear Mr. Morris,

Budgeting/Planning

Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees.

All of our bookkeeping and accounting is hand recorded, with just the help of some unsophisticated calculators. Needless to say, under our rather unusual circumstances, any highly sophisticated computer systems would cause a great deal more work, and create more problems than the costs would warrent, and we would be against going to computers, which I am sure you can understand.

Sincerely,

Secretary - Assistant Treasurer

JHoltze:sp
cc: Mr. J. L. Sparkes

CAPE001514

EXHIBIT 12

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The Cape Asbestos Company Limited
Notification of Subsidiary's Particulars

Notification no.197 /.....
Particulars correct as at
.....(date)

1. Name of Company: North American Asbestos Corporation 2. Registered No:
3. Type of Company:
4. Subsidiary of: The Cape Asbestos Company Ltd.
5. Administered by:
6. Date of incorporation: 14.10.53 7. Country of incorporation: U.S.A.
8. Date acquired/formed:
9. Registered Office: 150 North Wacker Drive, Chicago, Illinois 60606, U.S.A.
10. Head Office " " " " " "
(Postal address)
11. Locations: Chicago
12. Principal activities (if non-trading state 'dormant') Sale of crude asbestos fibre.

13. Share Capital:

	Authorised	Issued
(a) Ordinary shares of $100 each	$ 100,000	$ 100,000
(b).....		
	$100,000	$100,000

14. Shareholders:

Name	Number of Shares (state for whom held in trust)
CAC	1,000

15. Share Certificates, declarations of trust and blank transfers held ~~at~~ by NWB
16. Number of directors permitted under Articles: Min....6.....; Max....6.....
17. Directors:

Name	Date of appointment as director	Name	Date of appointment as director
G. A. Higham (Chairman)	1.7.74		
C. G. Morgan (President & Treasurer)	5.4.71		
J. J. Polizzi (Vice President)	4.5.67		
M. E. Meyer (Vice President & Assistant Secty)	15.10.53		
R. Gaze	7.4.70		
H. C. Brook	21.5.59		

18. Secretary: J. Holtze (Ass't. Treas.) Date of appointment: 29.4.70
19. Auditors Peat Marwick Mitchell & Co., 222 South Riverside Plaza, Chicago 60606
20. Nature of revision (see note 20)....Changes in Directors and Officers

CAPE001328

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EXHIBIT 13

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Cape Asbestos Fibres Limited

REGISTERED IN ENGLAND No. 878 216

REGISTERED OFFICE
Iver Lane, Cowley, Uxbridge, Middlesex, UB8 2JQ
Telephone Uxbridge 37111
Telegrams Amoblue Uxbridge
Telex 23471/UXB

Please reply to:
114 PARK STREET
LONDON, W1Y 4AB.
Tel: 01-499 6022

JUL 12 1977

Mr. C.G. Morgan,
North American Asbestos Corporation,
150 North Wacker Drive,
Chicago,
Illinois 60606.

7th July, 1977

Dear Jerry,

I am grateful to you for keeping me in touch with the important factors which may affect the future of asbestos in the United States. Your letter of 28th June is somewhat pessimistic but I am sufficiently aware of the position to understand the concern which you clearly express in that letter.

I appreciate too that you must have a feeling of isolation in Chicago and while the problems are, I believe, no less serious in our part of the world, we do at least have the benefit of regular contact with many others who are equally concerned.

We had a meeting of the Executive of the Asbestos International Association yesterday and this gave me a chance to talk to John Marsh and Bob Hutcheson. This organisation is getting along well in spite of the inevitable difficulty of correlating the views of representatives of so many different countries. It is clear to me that one of our first tasks must be to try to organise a body of medical opinion that is prepared to stand up to Selikoff.

I know that you will be over in August - either en route for South Africa or on your way back - but let me repeat that I do understand your feelings - which have come through strongly in your recent letters - and if you do feel that you would like to discuss them with me personally at any time, do not hesitate to get in touch and make arrangements for a short trip especially for this purpose.

The situation is certainly a difficult one and changes in our industry are inevitable. I am quite sure however that the result will not be entirely unfavourable and that many new opportunities will emerge.

Yours sincerely,

Dr. R. Gaze

CAPE000130

R. p. 3156

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EXHIBIT 14

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February 25, 1976

Mr. M. E. Meyer
Lord, Bissell & Brook
135 South LaSalle Street
Chicago, Illinois

Dear Max,

Per our conversation in your office today, we are enclosing copies of the entire file pertinent to loan procedures, from Cape.

If I interpret this correctly, we are not entitled to borrow one dollar without their approval, which would severely limit NAAC's management flexibility to extend credit to customers, maintain warehouse stocks and make prompt monthly payments to CASAP.

We understand the necessity for some restrictions on borrowing and would request a line of up to $400,000 without restrictions. Considering increased pricing, some 1975 payments to CASAP have been in excess of one-half million dollars per month.

Could we suggest that copies of your memo be sent to Messrs. Gaze and Higham.

Would it be advisable to mention the fact that if substantial dividends were not withdrawn each year we would perhaps have sufficient operating capital to alleviate loans?

Sincerely,

CGMorgan/jc
encl.

CAPE001507

EXHIBIT 15

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CONTRACTORS TO THE BRITISH COLONIAL AND FOREIGN GOVERNMENTS: ON ADMIRALTY LIST

THE CAPE ASBESTOS COMPANY LIMITED

HEAD OFFICE 114 & 116 PARK STREET · LONDON W·1

TELEPHONE: GROSVENOR 6022

TELEGRAMS: MICORRUFF LONDON

WORKS
BARKING · HEBBURN BRIDGE
KENTMERE · UXBRIDGE · STIRLING
BEDFORD · GLASGOW · TURIN · ITALY
WENONI - S. A. · BARNIA · CAN.

MINES
BLUE MINES · ROCOAN · CAPE PROVINCE
ANDSITE MINES · PENGE · EASTERN TRANSVAAL

BRANCHES ETC
MANCHESTER · BIRMINGHAM
GLASGOW · PARIS · ROUBAIX
JOHANNESBURG · TORONTO
CHICAGO · MILAN

RHD/JR

13th April 1959

Mr. R.E. Cryor,
North American Asbestos Corporation,
Board of Trade Building,
Chicago, 4,
Illinois,
U. S. A.

PRIVATE & CONFIDENTIAL

Dear Bob,

Thank you for your two letters on the subject of further Directors for N.A.A.C. Firstly we should be very happy to have either Herb Brook or Gordon Close. I have discussed this with Mr. Newton and we both feel that the best method would be to approach Lord, Bissell & Brook and to ask them whether they would be kind enough to nominate one or the other in accordance with their own wishes. Mr. Newton, I think, would like to write to John Lord himself asking him to do this, and subject to your reply he will do so accordingly.

So far as the second vacancy goes, both he and I are impressed by your description of Harper Boyd and particularly your assurance that he is the type of man who would fit into our scheme of things. The appointment of a Director, however, is one which above all is the most difficult to undo if one makes a mistake, without causing embarrassment all round, and I am a little concerned at the prospect of taking this step with someone whom you say you have only known for a short time.

Would it be possible, therefore, to hold this vacancy open for some time yet, or if not, then to make the proposal to Harper Boyd in such a way that would enable us to get out of it again if by any chance, which is no doubt unlikely, he turned out to be a disappointment? The sort of thing I have in mind is the possibility

CAPE000261

of saying to him that possibly in a couple of years' time we would wish to have a rather higher proportion of English representatives on the Board and therefore, while we did not wish to increase its size we might as a matter of policy be thinking in terms of having two English to three American Directors or something of this kind; would he therefore be prepared to begin his association with us on the understanding that it might well be of a temporary nature and that if for reasons entirely unconnected with himself we wanted to change things round, he would not have too violent an objection to dropping out.

I am sure I need not labour the point, but we have had in the past experiences which lead us to be extremely cautious in this direction.

Perhaps before taking any further steps you would firstly confirm that you are happy for Mr. Newton to write to Lord, Bissell & Brook on the lines suggested, and secondly your view on the other vacancy.

Yours sincerely,

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(1)

MINUTES OF ANNUAL MEETING OF DIRECTORS OF NORTH AMERICAN ASBESTOS CORPORATION HELD APRIL 23, 1976 AT 11:15 A.M.

Charles G. Morgan, Herbert C. Brook and Max E. Meyer, constituting all of the directors, and Joan Holtze, Secretary of the corporation, were present in person. Mr. Morgan acted as chairman and Joan Holtze acted as secretary of the meeting.

Mr. Morgan presented a management report, reviewing NAAC's activities during 1975 and for the first quarter of 1976. He noted that commissions on contract sales from the mines provided only 23% of the net profit, before taxes. Sales of amosite fiber are declining. Demand is decreasing, both because of health hazard problems and increased prices. Blue fiber is in short supply and by 1977 it is expected that pipe manufacturers will be accepting amosite fiber for this purpose because blue fiber will not be available.

Mr. Morgan expects that 1976 will be a good year although not as good as 1975. Mr. Morgan presented to the directors a five-year comparison of tonnage sales of amosite and blue fibers and sales from the GSA stockpile. He also presented a 7-year comparison of sales of Cape fibers, GSA fibers and textiles as well as selling and administrative expenses and commissions, as well as profit for the same period.

Mr. Morgan reported on the difficulty in renewing products liability insurance and the greatly increased cost. The directors were unanimously of the opinion, however, that there is no alternative but to renew adequate coverage, if it can be obtained, regardless of the cost.

The chairman stated that the next order of business is to elect officers. The following persons were unanimously elected to the offices set before their respective names for the term provided in the by-laws:

President and Treasurer ..... Charles G. Morgan

Vice President and Assistant Secretary .. Max E. Meyer

Secretary and Assistant Treasurer ..... Joan Holtze

The chairman stated that the next order of business is to consider the declaration of a dividend. After discussion, on motion duly made and seconded, it was unanimously

RESOLVED, that this corporation pay a dividend of $250,000 which may be paid in installments on or before December 1, 1976 to shareholders of record on June 1, 1976.

DEPOSITION EXHIBIT Morgan-D 9-17-86

PLAINTIFF'S EXHIBIT 816

1411AS JUN 015

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EXHIBIT 17

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ELECTRONICALLY FILED - 2023 Mar 06 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002727

December 28, 1956

Malcolm Reid
The Cape Asbestos Co. Ltd.
114-116 Park Street
London, W.1, England

Subject: Cartagena Expenses

Dear Malcolm,

You wrote me on this subject under date of November 22nd, and I have purposely put off replying because every time I have read your letter, I have had a rise in blood pressure and my thoughts have been relatively unprintable.

I am offended somewhat to have you place us in the category of ordinary "commission agents" which implies an independence, lack of responsibility, and an emphasis on local self-interest, which we try to keep out of our thinking and our approach to business in behalf of CAC. To be somewhat trite, we rather try to think of ourselves as being part of a coordinated group with responsibilities to the whole, even though this may mean subordinating other and more profitable interests of NAAC. Certainly you are not obligated to absorb any part of these extraordinary expenses in the Cartagena project, but I feel in not doing so, you are taking some advantage of our wholehearted acceptance of the group idea. This seems particularly so where we have gone to considerable trouble and special expense to get the job and to make it stick, at a price well above the level to which you were prepared to go.

PLAINTIFF'S EXHIBIT 600

Dep. Ex. No. 600
I.D. as of 8/21/20

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Mr. Malcolm Reid--Dec. 28, 1956.

There is only a limited amount of time and manpower available to NAAC, and it is pretty clear that we would earn a greater profit for NAAC (and probably could do more good for CAC in the long run) through the development and attention to other projects than the sale of Caposite in the oil industry. Nevertheless, we shall continue to do all we can to further these oil industry sales, since that appears to be the established policy and the desired objective. However, your approach to the Cartagena expense problem does not fill us with wild enthusiasm and inspiration for the task.

Sincerely,

REC/mfg

EXHIBIT 18

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ELECTRONICALLY FILED - 2023 Mar 06 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002727

October 3, 1975

Mr. A. J. Penna
Group Solicitor
Cape Industries Limited
114 Park Street
London W 1 Y 4AB

Dear Tony; Re: NAAC

This is a private and confidential reply to the questions raised by Dr. Gaze when he was here this spring, and by your letter of June 25, 1975.

The objective under consideration is an attempt to limit NAAC's and Cape's exposure to future United States litigation. At some point in the past the potential danger of working with asbestos fibers must have been publicized and became generally so well known that sales thereafter should have been at the buyers' risk, and not result in any further liability. Of course, anyone can file a lawsuit at very little cost even though the chance of success is minimal.

In the light of Dr. Gaze's coming trip to Chicago I wanted you and him to have the benefit of the discussion herein before he leaves.

INSURANCE: At Dr. Gaze's suggestion when he was here I immediately contacted NAAC's insurance broker and with one of our product liability experts discussed the possible extension of NAAC's insurance coverage even though the corporation might be liquidated. For weeks I had no answer, and finally I was advised that the insurance coverage could be continued if NAAC were to continue as a shell corporation with officers and directors, even though no longer carrying on business. I advised the broker that this is not really what we had in mind; that he should try again to see if there could be coverage of the corporation for two years after dissolution, and of the officers and directors for a longer period. After considerable time I checked again and was advised that the present insurance carrier would not do this, but that another company might. I was

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told that I could expect a more definite answer within a week or two but I still have not heard.

STATUTE OF LIMITATIONS: Under Illinois law actions for damages for an injury to the person must be commenced within two years after the cause of action accrued. The question, of course, is when the two-year statute starts to run. I understand this is one of the issues in the Yandle case in Texas; however, the majority rule and the rule in Illinois seems to be that the cause of action accrues when the "cumulative effect" of the exposures causes disablement. Another way of stating the rule is that the claim accrues when the injury occurs, and the injury occurs when the plaintiff knows or should know of his right to sue the defendant for the injury. It does not accrue upon delivery of the asbestos. Under separate cover I have mailed to you a Cornell Law Review article entitled "Effect of Corporate Dissolution on Products Liability Claims - Volume 56 - July 1971 - No. 6". This comprehensive article discusses pre-dissolution and post-dissolution claims. The dissolution of NAAC would seem to be helpful only with respect to post-dissolution claims. The statute of limitations on pre-dissolution claims would expire before the two-year period that the corporation remains alive for purposes of being sued after dissolution. However, post-dissolution claims might be barred by the expiration of the two-year statute of limitations. Thus it seems to me that our primary concern is about liability from sales made 3, 5 - 10 years ago which might result in disablement to some potential claimant more than two years from now. Claims for disablement prior to that time could be filed within the two-year period after dissolution.

NAAC LIQUIDATION: Enclosed herewith is a copy of the Illinois Business Corporation Act. Note the following provisions. Sec. 80 provides that before filing Articles of Dissolution all debts, liabilities and obligations of the corporation must have been paid or discharged or adequately provided for, including provision for the satisfaction of any judgment which may be entered against it in any pending suit. Sec. 94 provides that any action or proceeding on a claim existing or liability incurred prior to dissolution may be commenced within two years after the date of dissolution. Sec. 42.3 provides that the directors of a corporation who vote for or assent to the distribution of assets to shareholders after filing an intent to dissolve without adequate provision for payment and discharge of all liabilities shall be jointly and severally liable to the corporation to the extent that such liabilities are not thereafter paid and discharged. Sec. 42.6 provides that directors who fail to mail to a known creditor a notice of filing a statement of intent to dissolve shall be jointly and severally liable to such creditor for any loss or damage occasioned thereby. Sec. 42.11 provides that any director who is held liable under various provisions, including 42.3 above, is entitled to contribution from other directors who are likewise liable and from shareholders who knowingly accepted or received any such distribution of assets. Sec. 42.8 provides that the directors who vote or assent to any distribution of assets to shareholders prohibited by this act shall be guilty of conspiracy and may be punished under the Criminal Code.

To the extent that there is adequate insurance coverage it would seem that the directors would be safe in distributing NAAC's assets in liquidation; however, it seems to me that there is a great deal of uncertainty regarding potential claims against the corporation.

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Although the directors may not actually know of additional claims, if they should know that there is a good chance that there will be additional claims, they too must be provided for. There have been cases where the court held that the liquidation of a corporation was not effective where claims which were known or should have been known were not provided for, and thus the corporation remained in being for purposes of being sued, and the claimants were not limited to the two-year period after liquidation.

Any claimants might have a difficult time pursuing assets if the corporation were actually liquidated and the assets distributed out of the country. In such a case, however, it is most likely that the directors would then be named as defendants individually for permitting such a distribution to take place without adequately providing for claims. The general rule is that directors can be sued individually only if they are negligent beyond the scope of their duties as directors. Normally only the corporation is sued if its assets are intact; however, if its assets were distributed, any claimant is almost certain to allege that directors did not adequately provide for claims that they should have known would arise and that they therefore are individually liable. Further, NAAC's insurance coverage extends to officers and directors only "while acting within their duties as such."

There also seems to be little doubt that liability would be transferred through to any new corporate entity set up to replace NAAC, particularly if it could be shown that the activities, president and principal shareholders were the same. This same risk would probably also be present if the new entity were outside the United States although, as will be mentioned below, any claimant might have to prove his case in the courts of the country of the new entity.

REPLACEMENT FOR NAAC: If the replacement for NAAC had an office and one or more employees in the U.S. it would have to qualify to do business in the state or states of its activities and would be subject to the jurisdiction of the U.S. courts the same as if it were a U. S. corporation. For example, if NAAC's business were transferred to Cape Canada but Cape Canada maintained the same office that NAAC has here with substantially the same employees there would be nothing gained insofar as products liability cases in the U. S. are concerned. It would be the same as if the local office were an Illinois corporation as at present; in fact, someone in Illinois would have to be designated as agent of Cape Canada for service of process in Illinois. Even if only a warehouse were maintained in the U.S. and no other office or employees, it is likely that the warehouse would be considered as a place of business in the U.S. and subject the foreign corporation to the jurisdiction of U.S. courts.

It would be impossible to use a Mexican corporation as a replacement for NAAC because under the current foreign investment law in Mexico a sales company of the type under consideration cannot be more than 49% owned by non-Mexican shareholders; further, there are heavy penalties for Mexicans who act as nominees for non-Mexican shareholders. The total tax rate on income, including the withholding rate on dividends to get the income out of the country, would be 53.6%, as follows:

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Corporate Income Tax	42%
Dividend withholding tax (rates from 15 to 20% at the rate of 20%)	11.6%
Total effective tax rate	53.6%

There is also a Gross Receipts Tax of 4%.

Canada too has a new Foreign Investment Review Act, part of which is just becoming effective. However, since Cape Canada is already in existence, I think there would be no problem if it were merely to extend its activities and continue to be wholly owned by non-Canadian shareholders. The following corporate income taxes are in effect:

Canadian Federal Tax	48%
Provincial Effective Tax (Ontario and Quebec have a 12% corporate income tax but the Canadian federal tax allows a credit of 10%)	2%
	50%
Dividend withholding tax at 15%	7.5%
Effective Tax Rate	57.5%

There is also a Canadian federal sales tax of approximately 12%.

If the Canadian corporation were subject to U.S. taxes under the treaty between Canada and the United States, the Canadian company would get a credit against the Canadian taxes for the U. S. taxes paid. The corporate rates in the two countries are substantially the same. The Canadian corporation would probably not be subject to U.S. taxes on the sales in Mexico although it would be subject to Canadian taxes. So far NAAC has been successful in not subjecting itself to Mexican taxes. Presumably a Canadian corporation could continue in the same manner.

If it were possible to operate without an office or employees in the United States it would seem to be better to operate directly from some company in England, the mining companies 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 traveling regularly in the United

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R. p. 3171

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States with authority to negotiate contracts. This would result in the profits being subject to U.S. taxes and therefore there appeared to be nothing to be gained by operating from a country outside the United States.

ENFORCEMENT of U.S. JUDGMENTS by FOREIGN COURTS: The U.S. courts are continuing extending the length of their "long arm jurisdiction". It has reached the point where merely selling into a state, without any other activities in the state, will give rise to jurisdiction of the state court if the product sold results in damage in that state. Along with a copy of the Cornell Law Journal article on product liability, and the Illinois Business Corporation Act, I have also sent under separate cover the current issue of the Corporation Journal containing an article on Long Arm Jurisdiction.

Many countries have a reciprocal enforcement of foreign judgments law. Many, including South Africa, do not. In a country which does not have such a provision the defendant can usually raise in the suit on the judgment all of the defenses he could have raised at the original trial in the U.S.; thus, in taking a default judgment in the U.S. all defenses can still be raised in the suit in the foreign court on the judgment.

Your information with respect to Quebec law is apparently correct. A foreign default judgment is not executory in Quebec. Any defense which might have been raised in the original action is available in an action on the judgment; thus, if it is decided to operate in the U.S. through Cape Canada it may well be desirable to transfer Cape Canada from Ontario to Quebec.

SUMMARY: 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 U.S. with authority to conclude contracts.

There would be no protection as to suits which might be commenced in the next two years, and it is a judgment question as to whether, in the light of the now public knowledge with respect to asbestos fibers, it is likely that there will be claims accruing and suits arising more than two years from now.

We will try to have more definite information on insurance coverage by the time Dr. Gaze arrives late this month but there appears to be danger to the directors who approve the distribution of assets in liquidation unless they can show that they do not have a reasonable expectation that additional claims against the company exist or might be filed in the future.

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We are looking forward to Dr. Gaze's visit and hope to discuss these matters further at that time.

Sincerely,

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EXHIBIT 19

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Ex. 37

939 17

February 2, 1978

Mr. S. M. Dougherty
Cape Asbestos South Africa (Pty) Ltd.
P. O. Box 8644
Johannesburg, South Africa

Dear Simon,

Mrs. Holtze has returned and continues to tell us, in glowing terms, how much she enjoyed her visit to South Africa. I would like to personally thank you for your efforts in making this possible, and for your gracious cooperation.

Joan has advised me of her conversation with you regarding our continued problems with product liability litigation. To avoid any misunderstanding, please do not feel that I have any personal reasons for suggesting a low profile of Cape or Casap in the United States. On the contrary, I would be delighted to have you visit all of our accounts, but we are only endeavoring to pass along the opinion of our legal staff.

Max Meyer has suggested that he would be happy to talk with either you or your legal staff, relative to this matter, should you be so inclined. Perhaps it would be advantageous to call him if there are further questions.

Further to this matter, we met with Rolly Heath at JM, whom you may recall is Director of Purchasing, and also on their legal staff. After we had explained all of the ramifications of our recent changes, he commented that he thought all of your maneuvers were proper, correct and positive measures, but that he hoped Cape would not negate these actions by personal visits to U.S. customers for a period of time.

Please understand that I shall be pleased to abide and cooperate with you on your decision. Most certainly I shall look forward to seeing you in Mexico and personally I cannot see any reason why you cannot pay us a social visit in Chicago. We would be happy to have you here.

Best personal regards.

Sincerely,

CGMorgan/jc

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EXHIBIT 20

ELECTRONICALLY FILED - 2023 Mar 06 12:49 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4002727

Cape Asbestos Fibres Limited

REGISTERED IN ENGLAND No. 670 215

REGISTERED OFFICE
Iver Lane, Cowley, Uxbridge, Middlesex UB8 2JQ
Telephone Uxbridge 37111
Telegrams Amoblue Uxbridge
Telex 23471/UXB

Please reply to:
114 PARK STREET
LONDON, W1Y 4AB.
Tel: 01-499 6022

910 13

Mr. C.G. Morgan,
39 Croydon Lane,
York Woods,
Oak Brook,
Illinois 60521.

4th July, 1975

Dear Gerry,

Tony Penna has come to the conclusion that it would have been of some advantage so far as the Pittsburgh case is concerned, if neither Mr. Higham nor I had been members of the NAAC and (in Mr. Higham's case) EGNEP Boards.

Although it will not affect the present situation, Tony has recommended that it would be as well for Mr. Higham and me to resign from these and other Boards which could conceivably be involved in future actions. You will understand that the reason for this is to dissociate the Parent Company as fully as possible from the operating companies and that it does not imply any change whatever in the method of operation or the present responsibilities of individuals concerned, including yourself.

The formal resignations will reach you in due course and I understand that it will be necessary to amend the Articles to reduce the minimum number of directors to three. In view of the other changes we are contemplating and about which I wrote to you recently, it would hardly seem appropriate to appoint other directors at this time but it will of course be necessary to go through the formality of appointing a Chairman. I suggest that you discuss these formalities with Max as soon as you can and it would seem logical for either him or for Herb to become Chairman.

It would I think be as well for this letter not to appear on the office file and so I am sending it to your home. I am also sending a copy to Max at his private address.

Yours sincerely,

Dr. R. Gaze

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RG/WFG

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EXHIBIT 21

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Cape Industries Limited

114 Park Street London W1Y 4AB

Telephone 01-499 8022 Telex 24811

Telegrams Incorrupt London

Reg no. 00020C England Registered office as above

911 11

JUN 30 1975

Mr. C.G. Morgan,
39 Croydon Lane,
York Woods,
Oakbrook,
Illinois 60521.

20th June, 1975

Dear Gerry,

I undertook to keep you in touch with our thoughts about the future operations of NAAC and thought I should send this to your home address so as to avoid unnecessary speculation in the office.

As I mentioned during my visit, it is possible that we may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily. At the same time, I am determined to do everything possible to maintain a successful selling operation in the United States.

I have asked Tony Penna to write to Max Meyer posing a number of questions in this connection and one thought that has occurred to me is that we should examine the possibility of using Cape Canada as the selling company. With the headquarters of this company established in Toronto or Montreal, it might be possible to maintain the operation in Chicago virtually unchanged (but perhaps at a different address).

The immediate purpose of my letter however, concerns inventory at your warehouse. 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.

I am aware that for some reason, a greater tonnage than you had actually requested, was shipped to you and I am therefore making a point of asking CASAP and CAE to ensure that no shipments are sent to you other than those specifically requested.

Yours sincerely,

Dr. R. Gaze

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RG/WFC

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EXHIBIT 22

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910 28

May 6, 1974

Mr. Ronald H. Dent
The Cape Asbestos Company Limited
114 Park Street
London, W 1, England

Dear Ronnie:

Thank you for your letter of May 2. I am in full agreement that Gerry Morgan should be elected President of NAAC. If you would like me to say anything to him about the qualification with respect to any other ventures of Cape in the United States, I will be glad to do so. I am sure if Cape acquired a manufacturing organization on the east coast, or anywhere else away from Chicago, it may be preferable to use a vehicle other than NAAC - perhaps even an off-shore company - for the operation.

I hope that your retirement from the board in favor of Geoffrey Higham will not decrease your visits to Chicago. We would be disappointed if it did.

I would be pleased to accept the position of Chairman of the Board as an officer of the company if you are sure that is what Cape wants to do. Not being directly involved in operations, it may be just as well if I held an officer's title nominally - such as Vice President - just so someone is available to execute documents if Gerry is not available. In such case Dick Gaze or Geoffrey Higham could hold the title of Chairman. This may be desirable from Cape's point of view and would make possible an officer of Cape to serve as chairman of shareholders' and directors' meetings when present.

I think it would be better that no one from Cape be an officer of NAAC since we want it to be as independent as possible in order to avoid any contention that it is the alter ego of Cape and that Cape is doing business in the United States.

Gerry will be pleased to become President, I am sure, and whatever you think best for Cape should govern your decision with respect to Chairman of the Boar

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f you decide that I should be Chairman, as an officer of the company, I visualize that he relative by-law provisions would be amended to read as per the enclosed draft.

Kind regards.

Sincerely,

MEM/v

cc: Mr. Geoffrey Higham
Dr. Richard Gaze

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EXHIBIT 23

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March 6, 1978

A. J. Penna, Esq.
Group Solicitor
Cape Industries Limited
114 Park Street
London W1Y 4AB, England

RE: Cape - Future Commercial Activities in the U.S.A.

Dear Tony:

Thank you for your letter of February 24th which Max and I have reviewed carefully. Many of the questions that you raise have been discussed previously in connection with the NAAC operation. It is our opinion that if Don International and Cape Contracts International Ltd. operate as wholly autonomous subsidiaries, then any assets that such subsidiaries might have in the United States would not be subject to attachment to satisfy any asbestosis default judgment obtained against Cape. However, if Don International is incorporated in the United States and is wholly owned by the Cape, any dividends declared might be subject to attachment by a judgment creditor of the Cape.

If Cape should exercise direct control over the activities of either of these subsidiaries in the United States, Cape would be faced with the same contentions that were made in the Tyler cases with respect to the doctrine of piercing the corporate veil. The judgment creditor would have the burden of showing such domination by the Cape and that the subsidiaries of Cape selling or contracting in the United States are merely branches or divisions of Cape rather than independent subsidiaries. The

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greater autonomy in the operation of the subsidiaries, the less chance there would be of any successful attachment of the assets of the subsidiary to satisfy any default judgments against Cape.

We agree that it is most unlikely that any plaintiff would bother to pursue collection of any default judgments against Cape in any of the current asbestosis cases pending in the United States. It has been the practice of practically every plaintiff to join as many defendants as possible, most of whom are substantial corporations such as Johns-Manville and most of whom are adequately insured. There is, of course, the risk that some of the defendants who may have been customers of any of the Cape subsidiaries would endeavor to obtain indemnification and/or contribution from the Cape on the same grounds asserted in the Tyler litigation.

The only cases that we are aware of where the Cape and/or EGNEP have been named as defendants are the two Illinois cases pending in the United States District Court fo the Northern District of Illinois involving employees of the Johns-Manville Sales Corporation Waukegan plant. As I advised you in our recent telephone conversation, we withdrew from that litigation as attorneys for Cassiar when it appeared that under a most recent decision of the Illinois Supreme Court a doctrine of contribution among tortfeasor defendants based on relative fault might be available to Cassiar. However, a recent modification of that decision by our Supreme Court now makes such a doctrine available only prospectively to occurrences after March 1, 1978, and accordingly, such relief will not be available to Cassiar against the Cape. However, there is still the possibility that Johns-Manville as a "customer" of Cape and/or EGNEP might seek indemnity on the theory of active-passive negligence and if a counterclaim is filed against Cape and EGNEP asserting such a claim for relief and a default is permitted, Johns-Manville might take steps to enforce that judgment against the assets of Cape. We doubt that the plaintiffs in these two cases would seek to take an early default judgment against Cape and/or EGNEP and such relief would not be available to Johns-Manville until a final money

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EXHIBIT 24

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RECEIVED
MAR 7 1979
LORD, BISSELL & BROOK

24-11 CAPIND G

MARCH 7, 1979

CAPE INDUSTRIES LIMITED, LONDON
TELEX NO. 24811
ATTN: A. J. PENNA

REF YOUR TELEX OF 6 MARCH ON THE BASIS THAT YOU U.K. AND SOUTH AFRICAN LAWYERS CONFIRM THAT ANY RESULTING JUDGEMENTS WILL NOT BE ENFORCEABLE AGAINST CAPE'S U.K. AND SOUTH AFRICAN ASSETS AND THAT PEAT MARWICK AGREE THAT THE POTENTIAL LOSS OF ALL NAAC'S OUTSTANDING ASSETS IS NOT MATERIAL IN THE CAPE GROUP CONTEXT, THE NOTE SET FORTH IN YOUR TELEX IS ACCEPTABLE TO US.

BEST REGARDS,
S. A. MILNE
253479 LOWTEC: GEO

24811 CAPIND G
1081.7 MIN

cc/MEM

PLAINTIFF'S EXHIBIT #215
CAPE000702

EXHIBIT 25

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CAMBRIDGE
UNIVERSITY PRESS

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Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950—2004

Author(s): GEOFFREY TWEEDALE and LAURIE FLYNN

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Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004

GEOFFREY TWEEDALE
LAURIE FLYNN

The 'corporate veil' refers to the separation of legal identity between parent firms and their subsidiaries, which gives the parent protection against the liabilities of its subsidiaries. Fearing that such liability protection would facilitate illicit activity, early twentieth century courts, especially in America, would sometimes 'pierce' the corporate veil. This article explores *Adams v. Cape* (1990), in which American plaintiffs attempted to persuade the English courts to lift the corporate veil and impose liability for industrial disease on Cape Industries, a leading U.K. asbestos manufacturer. This landmark case shows how corporate strategy can be closely intertwined with international corporate law and occupational health and safety issues. It also highlights how limited liability law and separate legal personality can result in significant injustice to claimants against multinational enterprises.

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GEOFFREY TWEEDALE is reader in business history at Manchester Metropolitan University. Contact information: Manchester Metropolitan University Business School, Aytoun Street, Manchester M1 3GH, U.K. E-mail: G.Tweedale@mmu.ac.uk.

LAURIE FLYNN is a freelance writer and documentary film producer. Contact information: E-mail: laurievincentflynn@mac.com.

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Corporations are typically organized according to the laws of limited liability and increasingly operate across national boundaries by means of subsidiaries. A massive business literature has described this process and extolled the enormous material benefits that have ensued. Business historians have made important contributions to this field: indeed, the writings of Alfred D. Chandler, Jr., Mira Wilkins, and Geoffrey Jones on multinational enterprises (MNEs) are one of the most prominent achievements of the profession. But it is also clear that this literature is not comprehensive. Its overwhelming focus has been on structure, economic performance, technology, and entrepreneurship. Political interactions, regulation, and legal aspects are much less well covered. As Morton Keller noted over twenty-five years ago, law and government regulation are lacunae in the Chandler paradigm.[1] Recently, there are encouraging signs that this picture is beginning to change, but even so much more historical work is needed on the interaction between law and business.

Besides this failure to see MNEs as legal constructs, other blind spots exist in business history. Alongside an obsession with entrepreneurship and the internal organization of the firm, there is a tendency to see many facets of company activity as simply 'externalities'. As C. M. Rosen and C. C. Sellers have highlighted, many aspects of big business—such as its environmental impact, culture, and ethics—are not commonly discussed by historians.[2] This yields a somewhat sanitized view of corporate life, in which business historians rarely discuss how corporations injure workers, pollute the environment, or engage in illegal activity. This may explain why business history has so far failed to connect with recent widely publicized debates about the nature of the corporation and globalization.[3]

This paper looks at one of the 'externalities' left out of the literature on the history of MNEs—the occupational and environmental impact of a toxic product. In doing so, it explores the operations of limited liability law and emphasizes the way in which MNEs are shaped by legal as well as economic considerations. At the heart of our discussion is the relationship between parent companies and their

1. Morton Keller, "Business History and Legal History," *Business History Review* 53 (Autumn 1979): 295–303.

2. C. M. Rosen and C. C. Sellers, "The Nature of the Firm: Towards an Eco-cultural History of Business," *Business History Review* 73 (Winter 1999): 577–600.

3. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, 2004).

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subsidiaries. In particular, we explore the way in which companies can shield their assets behind the 'corporate veil'—a phrase that rarely (if ever) occurs in business history writing, yet relates to a fundamental concept in company law.

What is the Corporate Veil?

In British law it is well established that corporations are shielded from the liabilities of their subsidiaries by the 'corporate veil'. The roots of this term lie in the evolution of limited liability doctrine as it developed in the nineteenth century and the legal concept that a corporation is an artificial legal person with a 'corporate personality'. Legal reasoning has held that the corporate person is fundamentally separate from its members, whether they are individuals or companies. The principle was enshrined in a House of Lords ruling in *Salomon v. Salomon & Co.* (1897)—a legal decision so important that it has since been "treated by judges and academics alike with a reverence bordering on the religious."[4] It involved the question as to whether Aron Salomon, a boot manufacturer, was personally responsible for the losses of A. Salomon & Co, Ltd. When it was ruled that he was not, the scope of limited liability was greatly extended by establishing that the corporate form could be used legitimately to shield a business owner (whether individual or company) from liability.[5] *Salomon* thus drew a 'veil' between a limited company and its group members or subsidiaries.

Despite the evident success of limited liability—which fully realized Parliament's hopes that it would stimulate entrepreneurial risk-taking—it is important to remember that *Salomon* was regarded by some contemporaries as immoral, even disastrous, because it flew in the face of the logic that those engaged in corporate activity should support it with all their resources. It appeared that limited liability undermined this concept, while separate corporate personality provided an incentive for risks to be externalized by the relatively simple mechanism of making one company a 'parent' or 'holding' company, and another a 'subsidiary'. A parent company now became simply a shareholder and was therefore, legally, no more responsible for the unlawful behavior of a subsidiary than would be a

4. *Salomon v. A. Salomon & Co. Ltd* (1897) A.C. 22; R. Grantham and C. Rickett, eds., *Corporate Personality in the 20th Century* (Oxford, U.K., 1998), 1.

5. For details of *Salomon*, see Grantham and Rickett, *Corporate Personality*.

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member of the public for the liabilities of a large public company in which he or she owned a single share.

Anxieties about these aspects of company law sharpened in the early twentieth century, when it was realized—especially in America—that giant corporations had the potential to overwhelm institutions and governments. In the Progressive era, popular discontent and labor agitation led to calls for more government regulation. Limited liability was basically unaffected, but to protect society it was sometimes deemed appropriate for the courts in exceptional cases (usually involving fraud or sham companies) to impose liability upon a shareholder. This was known as 'piercing' the corporate veil—a phrase apparently first coined in America in 1912.[6] By the 1920s, this had become an accepted legal doctrine in the United States. It was also adopted in England, where the more genteel phrase of 'lifting' the corporate veil was used.

Since the early twentieth century, corporate veil litigation has increased. It has also become more complex and controversial with the increasing number of MNEs.[7] Marked national differences have appeared in judicial willingness to pierce the corporate veil, with the practice more widespread in the United States than it is in England (where the orthodoxies of *Salomon* are usually strictly maintained).[8] Transnational business has also complicated veil piercing because of jurisdictional issues about where a case should be litigated (*forum non conveniens*). Above all, the burgeoning of multinational enterprise—much of it occurring after limited liability law was conceived—has introduced areas of litigation not apparent in the nineteenth century. One such area is international toxic tort.[9] The complexities of veil piercing in toxic product cases are strikingly

6. I. M. Wormser, "Piercing the Veil of Corporate Identity," *Columbia Law Review* 12 (Dec. 1912): 496–524. See, generally, G. Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865–1917* (Baltimore, Md., 1997).

7. P. I. Blumberg, *The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality* (New York, 1993), 65–150; Richard Meeran, "Liability of Multinational Corporations: A Critical Stage in the UK," in *Liability of Multinational Corporations under International Law*, eds., Menno Kamminga and Sam Zia-Zarifi (The Hague, 2000), 251–64. See also Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford, 1995), 325–27.

8. Sandra K. Miller, "Piercing the Corporate Veil among Affiliated Companies in the European Community and in the US: A Comparative Analysis of US, German and UK Veil-Piercing Approaches," *American Business Law Journal* 36 (Fall 1998): 73–149; David Milman, ed., *Regulating Enterprise: Law and Business Organization in the UK* (Oxford, 1999), 218–40.

9. Mary E. Rolle, "Unravelling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases," *Georgetown International Environmental Law Review* 15 (Winter 2003): 137–201. See also Frank Pearce

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illustrated by a landmark English legal case, *Adams v. Cape* (1990). This involved a British MNE and its liabilities for the toxic mineral asbestos.

Asbestos and Cape Industries

Asbestos defines a group of fibrous, fireproof minerals, which first attracted the attention of industrialists in the late nineteenth century. Within a few decades, asbestos was a global industry, with mines in South Africa and Canada, and factories in America, Europe, and the Far East. The industry's heyday occurred after the Second World War, when a handful of companies—notably Johns-Manville in the U.S. and Turner & Newall (T&N) in the U.K.—dominated world production.

Until the 1960s, asbestos was widely regarded as a lifesaver, but since then a sinister undercurrent has surfaced. Asbestos is now the most controversial and feared of the industrial minerals, because it can cause asbestosis (a potentially fatal fibrosis of the lungs) and cancers. Most countries in the developed world have virtually banned its manufacture, though they still have to come to terms with its legacy of asbestos-related disease. In America, such has been the explosion in litigation that there have been demands for congressional action. The leading asbestos companies have retreated into bankruptcy or adopted various strategies to limit billions of dollars in liabilities.[10]

The way in which the industry was structured has become important. Asbestos companies were amongst the first to use multidivisional organizations, which extended overseas through complex cartels, licensing agreements, and holding companies. It was an industry with several sectors, which were not only vertically interconnected, but also functioned like separate industries. The production of asbestos textiles, asbestos cement, insulation, and brake linings revolved around the key industry of asbestos mining and the distribution of various fibers. The three main commercial asbestos fibers were white (chrysotile), blue (crocidolite), and brown (amosite). Chrysotile accounted for about 95 percent of world

and Steve Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth, N.H., 1998).

10. See S. J. Carroll et al., *Asbestos Litigation* (Santa Monica, Calif., 2005) (posted at: www.rand.org), who note that through 2002, about 730,000 people had filed claims in the U.S. against 8,400 defendant entities. The eventual costs are likely to exceed $200 billion.

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asbestos production, but crocidolite and amosite (known collectively as amphiboles) were important in specialist applications, such as thermal insulation.

In Britain, the industry was controlled by three firms—T&N, Cape Asbestos, and British Belting & Asbestos—whose respective positions can be shown by their approximate issued capital in the early 1970s, when asbestos use was reaching a peak: T&N £65 m, BBA £9 m, and Cape £5 m.[11] Cape Asbestos had been incorporated in London in 1893 to control a syndicate that operated South African crocidolite mines. It then integrated forward into manufacturing by establishing a London plant in 1897 and then later German and French plants.[12] The mines were the linchpin of Cape's business, however. It mined most of the world's amosite and was a leading producer of crocidolite. However, it was not until after the 1930s that Cape became profitable, with specialties such its preformed amosite high-temperature pipe and boiler insulation. The company grew dramatically during and after the Second World War, with sales of fireproof board, insulation for warships, gas masks, brake linings, and parts for armored vehicles.

Throughout the twentieth century, Cape Asbestos was regarded as very much a British business, run from a London headquarters. Yet, even from the 1890s, it was linked with the South African diamond mining company, De Beers, and was also related to another great South African business empire—Anglo-American Corporation. Both, De Beers, and Anglo-American were intertwined through the industrialist Sir Ernest Oppenheimer (1880–1957), who had founded Anglo-American in 1917 and became chairman of both the latter and De Beers. Cape Asbestos, therefore, became part of the most powerful economic conglomerate in South Africa.[13] In the 1930s and 1940s, Anglo-American developed a decentralized structure that was a maze of interlocking directorships, mutual agreements,

11. Monopolies Commission, *Asbestos and Certain Asbestos Products* (London, 1973).

12. Monopolies Commission, *Asbestos*, 135-38. See, also, Cape Asbestos Ltd, *The Story of the Cape Asbestos Company Ltd* (London, 1953); J. McCulloch, *Asbestos Blues: Labour, Capital, Physicians and the State in South Africa* (Oxford, U.K., 2002), 42–58.

13. S. Katzenellenbogen (updated by R. A. Salamie), "Anglo-American Corporation of South Africa Ltd," in *International Directory of Company Histories*, ed., T. Grant (London, 1997), 25–30. See, also, T. Gregory, *Ernest Oppenheimer and the Economic Development of South Africa* (Cape Town, 1962); D. Pallister et al., *South Africa Inc.: The Oppenheimer Empire* (London, 1988); D. Innes, *Anglo-American and the Rise of Modern South Africa* (London, 1984).

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restrictive arrangements, and monopolistic business practices.[14] The structure was said to facilitate and stimulate business, but it also made it difficult to trace the group's financial connections. Under the Oppenheimers, Anglo-American emerged as the world's largest mining company. Its empire was "so complex that it [was] never recognized as a single entity."[15] In 1957, Anglo-American and De Beers controlled 40 percent of South Africa's gold, 80 percent of the world's diamonds, a sixth of the world's copper, and produced most of South Africa's coal.

Anglo-American's involvement in Cape Asbestos grew during the Second World War, when an Oppenheimer company—Central Mining & Investment Corporation—became the majority shareholder. By 1949, Central had a majority on the board of directors of Cape. In 1969, Central Mining's shareholding in Cape was superseded by that of Charter Consolidated, a British registered mining finance company, also controlled by Oppenheimer interests.[16] (Charter was one of four major holding companies within the Oppenheimer group: the others were Anglo-American, De Beers, and Rand Selection.) Cape Asbestos thus became a subsidiary of Charter, which had a 63 percent holding.

Structurally, Cape Industries (as Cape Asbestos was known after 1974) resembled its bigger parent and during the twentieth century it became a jumble of holding companies, subsidiaries, interlocking directorships, and cross-licensing agreements. Major company reorganizations occurred in 1948, when Cape formed a holding company, Cape Asbestos South Africa Pty Ltd (CASAP), and in 1960, when Cape Asbestos itself became a holding company with 24 subsidiaries. At the head office at 112–116 Park Street, London, separate holdings companies handled U.K. and overseas business, while beneath them the trading groups were organized into major divisions. By the 1970s, Cape's overseas group had four main divisions: building and insulation, automotive products, mining, and a South African industrial group (see Figure 1).

14. L. Flynn, *Studded with Diamonds and Paved with Gold: Miners, Mining Communities and Human Rights in South Africa* (London, 1992).

15. Pallister et al., *South Africa*, viii.

16. The chairman was now Harry Oppenheimer (1908–2000). See C. Denny, "Dynastic Diamond Billionaire Dies in South Africa," *Guardian*, 21 Aug. 2000.

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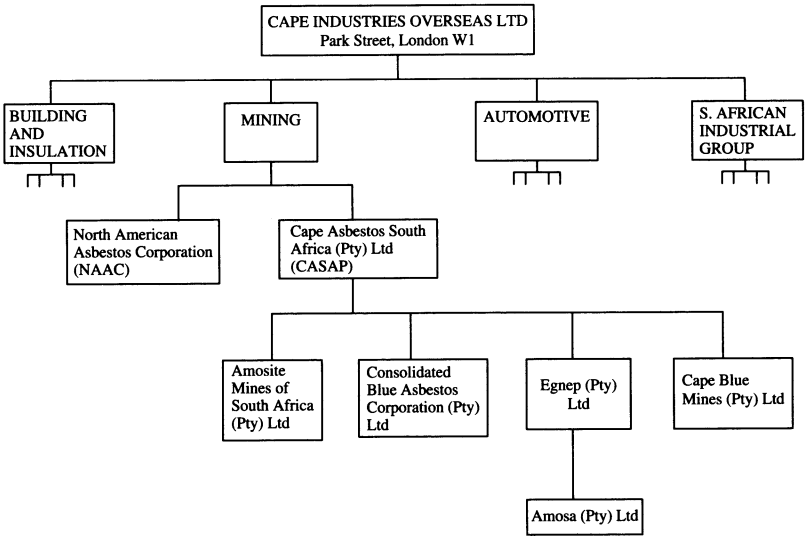


Figure 1 Structure of Cape's overseas business, 1975.

North American Asbestos Corporation

After the 1930s, Cape developed a profitable American business in amosite and crocidolite. In 1936, it began marketing its asbestos products through the Union Asbestos & Rubber Company (UNARCO). Cape contracted with UNARCO to manufacture its products under the 'Unibestos' trade name at various plants, including one in Paterson, New Jersey, in 1941 (later moved to Tyler, Texas, in 1954); and another in Bloomington, Illinois, opened in 1951. Unibestos sold widely and was included in U.S. Navy specifications in 1942, stretching Cape's mines to capacity. Cape sold amosite to UNARCO at a discount in an exclusive arrangement.

After the war, Cape decided to start its own American company. In 1953, it established the North American Asbestos Corporation (NAAC) in Chicago.[17] The NAAC sold blue fiber from Cape's mines in Koegas and Pomfret, and amosite from the Penge mine.[18] The fiber found a ready market throughout the U.S., Canada, the Caribbean, and Mexico. In 1956, Cape reported that it had earned nearly $5 m from fiber sales in North America. In the early 1960s, the NAAC's turnover

17. 'NAAC', *CAC* (Cape Asbestos Companies) *Magazine* 3 (Summer 1954): 5, 27; "Mr Cryor Receives 32 Storeys Up," *CAC Magazine* 4 (Spring 1955): 20.

18. Penge was named after Penge in England.

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still topped $5 m a year, generating gross profits of nearly $0.5 m a year.[19] Sales peaked at $10 m in the early 1970s, but in 1977 profits of over $3 m still netted Cape a dividend of $200,000.[20]

The NAAC became an important contributor to Cape's economic performance in the 1950s and 1960s, when Cape often paid its shareholders dividends up to 25 percent. Meanwhile, Cape's asbestos found its way to most of the major American users of amphiboles (particularly Johns-Manville), while most of the fiber used at UNARCO's Tyler and Bloomington plants was supplied by the NAAC. By the late 1970s, Cape had sold nearly half-a-million tons of asbestos in the United States.

The business was undisturbed by the dangers of asbestos. When Cape opened its Chicago office in 1953, it had known for decades that inhaling asbestos fibers scarred the lungs and caused asbestosis. Knowledge of this disease at the firm was better than in most other companies. This was partly because its factories were among the dustiest in the industry, and partly because Cape, in 1930, had been party to the British government's formulation of the world's first asbestosis regulations.[21] By the late 1940s, Cape also knew that there was a rising incidence of lung cancers at its main factory in Barking, near London. Dr. Richard Gaze (1917–1982), who had joined Cape as its chemist and later became its technical director with special responsibility for health and safety, learned of asbestosis the day he joined the company in 1943. He later discussed these dangers with American personnel, though that was hardly necessary.[22] By the 1940s, UNARCO was already receiving compensation claims from workers with asbestosis; and it had helped sponsor industry research into the carcinogenic potential of asbestos (research which was kept secret).[23]

However, dust control in American asbestos plants was poor. Working conditions were particularly bad at UNARCO's Tyler and Bloomington factories—conditions of which Gaze was aware. He visited both plants and was also alerted to the poor conditions at Tyler

19. A. R. Sarabia (Lord, Bissell & Brook) to M. E. Meyer, 23 Jan. 1978, Manchester Metropolitan University Business School [hereinafter, MMUBS Archive].

20. C. G. Morgan memo to Meyer, 6 April 1977, MMUBS Archive.

21. M. Greenberg, "Cape Asbestos, Barking, Health and Environment: 1928–1946," *American Journal Industrial Medicine* 43 (Feb. 2003): 109–19.

22. R. Gaze deposition, US District Court for the District of Texas, Tyler Division, *Herman Yandle/Lester Kay v. PPG Industries Inc.* [Civ. Action Nos. TY-74-3-CA; TY-74-13-CA], London, 4–5 June 1975, 50, 57, MMUBS Archive.

23. B. I. Castleman, *Asbestos: Medical and Legal Aspects* (Englewood Cliffs, N.J., 2005), 554–55; D. Ozonoff, "Failed Warnings: Asbestos-Related Disease and Industrial Medicine," in *The Health and Safety of Workers*, ed. R. Bayer (New York, 1988), 139–218.

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by others.[24] Asbestosis cases were inevitable, but these were dealt with under a state workmen's compensation system that provided little coverage for occupational diseases and only modest benefits.[25] Shielded by the latency of asbestos-related diseases, which may take decades to appear, the industry made a fortune, while deferring the fateful day when thousands of sick workers would launch legal claims against the industry.

The disease and litigation 'time bomb' would explode after the 1960s—an explosion made worse by mesothelioma. This extraordinary disease is a painful and invariably fatal cancer of the lining of the chest or of the abdomen. It is both slow growing (taking thirty years or more to appear) and virulent (killing within a year or so of first symptoms). Yet the fatal exposure can be quite trivial (sometimes a matter of days or weeks rather than years) and need not be occupational: environmental or 'bystander' exposure is also dangerous, leading to mesotheliomas among office staff, construction workers, railwaymen, housewives, and schoolteachers.

Cape had a unique insight into mesothelioma. Crocidolite is a particularly potent cause of the disease. Indeed, the appearance of the world's first mesothelioma cluster occurred in the 1950s around Cape's blue asbestos mines in the Northern Cape. By 1969, the U.K. government was so concerned about mesothelioma that it pressured asbestos manufacturers (including Cape) to cease importing crocidolite—though Cape was free to market it elsewhere, including the United States.

Litigation against NAAC and Cape

In the early 1970s, the U.S. market for asbestos was so profitable that Cape contemplated opening a factory near Boston. In 1973, annual American asbestos usage hit 800,000 tons, though this was to prove a peak. In that year, a landmark legal decision involving an asbestos insulation worker (Clarence Borel) effectively shifted awards from the workmen's compensation system to the courts. This ruling (*Borel v. Fibreboard*) held manufacturers strictly liable for their failure to warn of an unreasonably dangerous product, thus launching the

24. R. Brittingham (Pittsburgh Corning) to Gaze, 17 July 1962, MMUBS Archive.

25. Similar problems were evident in the U.K., even though a national compensation scheme operated. See N. J. Wikeley, *Compensation for Industrial Disease* (Aldershot, U.K., 1993).

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"greatest avalanche of toxic-tort litigation in the history of American jurisprudence."[26] For an industry built on a failure to warn, that had been using a product that it knew to be lethal for over half a century, this ruling was catastrophic—no more so than to suppliers like Cape.

Within a year of Borel, Texas lawyers launched a class action suit (*Yandle v. PPG Industries*, 1975) for $100 m dollars in damages on behalf of a group of workers allegedly made ill by conditions at UNARCO's old Tyler plant. The action was launched against Pittsburgh Plate Glass (PPG), which had bought the Tyler factory in 1962, and a decade later dismantled and buried its production facilities after a government survey had highlighted "major industrial hygiene deficiencies."[27] Under product liability law, the NAAC and parent Cape Industries were also sued. In London, Cape's management expressed mystification that "time should be taken up in claims of this nature... [and] could not understand why Cape itself had been joined in the legal proceedings at all."[28] In 1974, Cape told its shareholders that the action was being "strenuously contested ... [because] ... the amounts are highly speculative and conjectural and have only a tenuous basis in law and fact."[29] However, chemist Gaze and NAAC boss Gerry Morgan were soon deposed, as plaintiffs' lawyers made a first stab at piercing Cape's corporate veil. Over two days in 1975, in a solicitor's office in London, Gaze helped seal the fate of PPG and also the NAAC.[30] He testified that since 1961 he had continually discussed health hazards with the Tyler managers (including PPG staff) and that neither Cape nor the NAAC had ever placed warning labels on asbestos bags.

In 1977, lawyers for 462 Tyler employees and those for the defendants (which included the U.S. government, as another seller of asbestos to Tyler) settled the case for over $20 m, with no one accepting liability. Having informed its shareholders that the action had no merit, Cape now had the humiliation of informing them that its share of the damages was $5.2 m (with the NAAC

26. Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York, 1985), 73.

27. UNARCO had sold its asbestos business to Pittsburgh Corning Corporation (a joint venture of Pittsburgh Plate Glass Company [later PPG] and Corning Glass Works); NIOSH, "Asbestos Survey: Pittsburgh-Corning Corporation, Tyler, Texas." Project No: 71-45, 7 Dec. 1971, MMUBS Archive.

28. *Jimmy Wayne Adams and Others v. Cape Industries Plc. and Capasco Ltd*, High Court Chancery Division, 15 March 1988, Day 20, 9, MMUBS Archive.

29. Cape Industries Ltd, *Reports & Accounts* (1974), 18, MMUBS Archive.

30. Gaze deposition, London, 4, 5 June 1975, *Yandle/Kay v. PPG*, MMUBS Archive.

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insurers paying about $4 m and Cape over $1 m, or £571,000).[31] The settlement generated enormous publicity—not least because *New Yorker* journalist Paul Brodeur made the Tyler plant the centerpiece of his powerful exposé.[32]

With asbestosis and mesothelioma cases rising, further American litigation was inevitable. Meanwhile, in the early 1970s, several regulatory agencies—notably the Occupational Safety & Health Administration (OSHA) and the Environmental Protection Agency—were becoming concerned about asbestos, raising the specter of regulation for the industry.[33] In 1971, for example, OSHA set its first dust threshold that limited exposure to asbestos in the workplace and thereby began to drive up production costs for asbestos products. Events in South Africa in the 1970s, especially the introduction of economic sanctions against apartheid, compounded Cape's difficulties. So, too, did the growing aversion to amphiboles in world asbestos markets. The company had further problems closer to home. In 1973, it set aside £3.5 m compensation for its U.K. workforce. Many claims related to a Cape factory in Hebden Bridge, Yorkshire, where the mortality from the dusty conditions attracted, first, the attentions of TV documentary makers, and then a major government inquiry.

Meanwhile the NAAC had exhausted its insurance. To reinsure would cost over half-a-million dollars a year, which was far more than the business was worth, even if insurers could be found. In November 1977, Cape decided to liquidate the NAAC and then refuse to appear in American court cases. New cases soon materialized. In 1981, injured workers and their dependants from the Bloomington UNARCO factory launched actions, led by a local lawyer, Jim Walker. By the following year, 250 workers at this plant were alleged to have developed asbestos-related diseases. The first case was lost on a technicality, but 54 former workers succeeded in 1982 in suing the Cape group on the grounds of strict liability in tort and willful and wanton misconduct. The plaintiffs were awarded $55 m in damages. Part of this total ($35 m) was punitive damages against Cape—an expression of the moral outrage of the jury at the manufacturer's behavior in exporting a lethal product without warnings.

31. Cape Industries Ltd, *Reports & Accounts* (1977), 4, MMUBS Archive.

32. Paul Brodeur, *Expendable Americans: The Incredible Story of How Tens of Thousands of American Men and Women Die Each Year of Preventable Industrial Disease* (New York, 1974); Brodeur, *Outrageous Misconduct*.

33. Morgan listed six regulatory agencies causing "chaos in our industry." Letter to Gaze, 28 June 1977, MMUBS Archive.

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The year 1982 was eventful. The mighty Johns-Manville filed for bankruptcy, as did UNARCO. In Britain, a two-hour TV documentary ("Alice: A Fight for Life") had given national publicity to Alice Jefferson—a mesothelioma victim from a Cape factory in the north of England. The Bloomington factory was the subject of a "World in Action" TV documentary, which described how "Cape Industries of London, part of one of the richest corporations in the world, has run away from its responsibilities to the sick and dying families of a small town in America."[34] Cape management responded by telling shareholders that it would not be defending the Bloomington action or paying damages. They asserted that the firm did no business in the United States and that judgments were not enforceable in England. Future litigation, they predicted, would have no material effect on Cape Industries.[35]

Did Cape Do Business in America?

In 1983, a federal district judge in Tyler awarded a further 205 Tyler plaintiffs damages of about $75,000 each against Cape. With Cape in default, the plaintiffs then brought proceedings against the group in London. Cape's defense was its nonappearance in U.S. courts and its reliance on the corporate veil. The English courts would now have to decide whether Cape had conducted business in the United States, whether it had controlled the NAAC, and whether Cape had been involved in "morally culpable" acts.

One obstacle for the plaintiffs was the way in which Cape's American operation, the NAAC, had been structured. Cape had made full use of the advantages created by the legal fiction that a company is distinct from its shareholders. The NAAC was a wholly owned subsidiary, with Cape owning all the 1,000 shares. However, the NAAC structure was designed so that Cape had no 'permanent establishment' in the United States. The parent firm had no formal office in America and no 'name' on a door, which meant that Cape was not subject to income tax as a U.S. domestic corporation. This reflected the input of Cape's Chicago attorneys, who were recruited in 1953 to advise, not on the health hazard (that had not yet been accepted as a serious liability for Cape), but on U.S. federal and state taxation. They assured their clients that this could be avoided by

34. ITV, World in Action, "A Small Town Tragedy," 5 July 1982.
35. Cape Industries Ltd, *Reports & Accounts* (1981), 22, MMUBS Archive.

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ensuring that all contracts were completed either in the U.K. or South Africa.[36] Other attractions of such a subsidiary arrangement were that returns at that time did not have to be filed at Companies House in London (though Cape had to pay tax on its overall corporate profits in the U.K).[37] Cape's American lawyers explained further advantages of incorporating in Illinois, where "laws are quite liberal as to who may be shareholders and directors and where shareholders' and directors' meetings are held."[38] The eventual arrangement was that Cape had two directors on the board of the NAAC (by the 1970s, these were Cape's managing director and later chairman, Geoffrey Higham, and Richard Gaze). Two Chicago attorneys, Max Meyer and Herbert Brook, were also board members.

Despite its grand title, the NAAC was a small outfit. In Chicago, the office staff consisted of its office director (first Bob Cryor, then after 1970, Gerry Morgan), assisted by four female secretaries, and a handful of sales people.[39] In legal testimony, Morgan confirmed that the company sold fiber to PPG, but he distanced its activities from Cape Industries. He stated that NAAC was "virtually a one-man organization ... a marketing arm ... a service organization" that handled "virtually no paperwork."[40] Cape's secretary and group lawyer in London, Tony Penna, agreed and argued that NAAC directors were "really cosmetic."[41] Cape Chairman Higham emphasized that his firm's control of its subsidiaries was "arms length" and that the holding company merely "provides services to these subsidiaries."[42]

This testimony appeared to support Cape's contention that it did no business in the United States, though some evidence pointed the other way. For example, Cape exercised close control over the NAAC's accounting. Cape received monthly financial statements, besides detailed quarterly board meeting reports, and dictated the NAAC's dividend. In 1971, Cape Industries' own parent, Charter, began examining Cape's accounting and financial control systems,

36. R. H. Dent to Lord, Bissell & Kadyk, Chicago, 18 Sept. 1953, MMUBS Archive.

37. Evidence of A. J. Penna, *Adams and Others v. Cape*, 15 March 1988, Day 20, 5, MMUBS Archive.

38. Lord, Bissell & Kadyk, 29 Sept. 1953, MMUBS Archive.

39. "Our Men in Chicago," *CAC Magazine* 9 (Spring 1960): 4–5.

40. C. G. Morgan deposition, Chicago, 20 May 1975, *Yandle/Kay v. PPG*, 10, 28, 33, 55, MMUBS Archive.

41. *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 12, MMUBS Archive.

42. G. A. Higham deposition, *Yandle/Kay v. PPG*, London, 4 June 1975, 11, 29, MMUBS Archive.

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including the use of computers. Richard Gaze wrote to Chicago attorney Meyer to ensure that the NAAC was part of the modernization program.[43] Cape also monitored and vetted staffing in Chicago. Interestingly, Cape's own legal advice on its policy of giving discounts to favored U.S. customers was that American courts might decide that they had jurisdiction over Cape because the NAAC was so active in the United States and because Cape's trade could not be carried out without its subsidiary.[44]

Richard Gaze's testimony of the close involvement of Cape's directors with the American scene also seemed at odds with Cape's argument that it did not control the NAAC. In the 1950s and 1970s, Cape developed joint ventures with Johns-Manville to make the asbestos marine board 'Marinite'. The NAAC was also closely linked with Cape's London fiber laboratories, which dealt with technical problems in thermal insulation that arose in the U.S. market. Not surprisingly, a transatlantic traffic of personnel and information developed. Unibestos production was launched at UNARCO by a former manager of Cape's Barking facility, Rudolf Wild, who worked for UNARCO between 1928 and the 1940s. In the late 1940s and early 1950s, regular personal contacts were maintained by Thomas C. Hale, another Barking manager, and K. C. Gray, a Cape sales manager.[45] Bob Cryor visited Cape in London almost yearly and his successor at UNARCO visited Barking equally regularly. Cape directors regularly visited the United States. These included Geoffrey Higham, chairman of Cape after 1980. Gaze visited Bloomington in 1956, Pittsburgh in 1961, and thereafter his visits to America became annual. These people (alongside NAAC staff) also visited large contract customers in the U.S. on behalf of the South African mining operations, thus generating new customers.

In private, NAAC personnel did not view themselves as mere 'commission agents' of another firm. Cryor viewed the NAAC as the 'nucleus' of a national distribution organization. "To be somewhat trite," he wrote, "we rather try to think of ourselves as being part of a co-ordinated group with responsibilities to the whole, even though this may mean subordinating other and more profitable interests of NAAC."[46] In fact, Cape did treat the NAAC as part of a coordinated group. Its American subsidiary gave Cape a direct input into the

43. Gaze to M. E. Meyer, 20 July 1971, MMUBS Archive.
44. R.K. Decker memo, 26 Nov. 1962, MMUBS Archive.
45. R. Gaze, "The Development of Unibestos in the USA," n.d., MMUBS Archive.
46. R. Cryor to Malcolm Reid (Cape), 28 Dec. 1956, MMUBS Archive.

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industrial politics of U.S. asbestos production. The NAAC had a seat on the Asbestos Textile Institute (ATI), which in turn was linked with the Asbestos Information Association (AIA). These were trade organizations that in the 1970s became increasingly involved with the defense of asbestos and the minimization of health risks. Cryor once served as president of the ATI, while Gaze was on the board of the AIA. Through the NAAC, Cape helped American industrialists defend asbestos and counteract the influence of physicians, such as Dr Irving Selikoff, who in the 1960s had publicized the mineral's dangers. In 1977, Gaze, after attending one AIA meeting, told Morgan that "one of your first tasks must be to try to organize a body of medical opinion that is prepared to stand up to Selikoff."[47]

A most revealing yardstick by which to judge Cape's involvement with the NAAC was the reaction to the *Yandle* litigation in 1974. Far from feeling any regret over the harm to workers or misgivings over the American situation, Cape bitterly resented the way in which it had been hauled before the courts. Penna told the Chicago attorneys that, "we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult."[48] Cape's solution was to launch a major reorganization, in which the primary aim was to evade American litigation, while protecting the trade in asbestos until such time as Cape could withdraw from the market.

The first step in 1974 was to rename the parent company Cape Industries (thus shedding asbestos in name, though the mineral was not eliminated from the company's products until 1990).[49] Then in 1975, the South African mines were moved in Cape's corporate structure from Cape Industries (a large public company) to Cape Industries Overseas Ltd (which had only £100 in shares). (See Figure 1). Meanwhile, on a visit to Chicago in May 1975 Gaze and Penna discussed taking the NAAC 'offshore,' so that Cape's continued presence in America could be disguised—an idea that Gaze raised formally in a confidential letter to then NAAC boss Gerry Morgan.[50] In July 1975, Gaze told Morgan that he and Higham were resigning from the NAAC board "to disassociate the parent company as fully as possible from the operating companies." Gaze added: "It would I think be as well for this letter not to appear on the office file and so I

47. Gaze to Morgan, 7 July 1977, MMUBS Archive.

48. Penna to S. Milwid, 4 July 1977, MMUBS Archive.

49. G. Foster, "The Conundrum at Cape," *Management Today* (Dec. 1977): 43–50, 49–50.

50. Gaze to Morgan, 20 June 1975; Meyer to Penna, 3 Oct. 1975; *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 37, MMUBS Archive.

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am sending it to your home. I am also sending a copy to Max [Meyer] at his private address."[51]

The reorganization was to be completed in 1977, as the *Yandle* case reached a conclusion. In November of that year, the Cape board met in London to agree the settlement of *Yandle*, the liquidation of the NAAC, and Cape's disappearance from the U.S. courts. Also on Cape's agenda was "the formation of a new off-shore company to sell asbestos to the North American market."[52] Within days of the meeting, Gaze travelled to Chicago to inform Morgan that he would soon be out of a job. This personal visit was a remarkable courtesy, if Morgan was regarded as merely a distant salesman, especially since Gaze had resigned from the NAAC board. Morgan would later testify that it was Gaze who ran the NAAC and that he himself knew nothing of the approaching liquidation.[53] Now apparently without a job, in December 1977 Morgan visited London, where he met with Tony Penna.

Within days of being fired, Morgan was running a new company—Continental Products Corporation (CPC)—which, although it was not a Cape subsidiary, was based in the same Chicago building (150 North Wacker Drive) and had the same office equipment, furnishings, and telephone number as the NAAC. Like its predecessor, CPC sold asbestos, which coincidentally came from Cape's South African mines. Cape had paid Morgan a generous redundancy package, which along with another $160,000 effectively seeded the new organization.[54] But Cape's involvement was deeper than that. CPC traded through another company, Associated Minerals Corporation (AMC), which was formed in January 1978 and was based in Liechtenstein—a country renowned for its secrecy in financial matters. The AMC stock was held by a nominee, a Liechtenstein lawyer named Dr. Karl Ritter, who agreed to vote as instructed by Cape.[55]

In reality, AMC operated as a Cape shell company that was inserted into a network that did not differ markedly from the previous NAAC arrangement, except that now Cape had no formal link to the United

51. Gaze to Morgan, 4 July 1975, MMUBS Archive.

52. Memo to file, Cape Industries, London, 12/13/14 Dec. 1977, MMUBS Archive.

53. *Mau v. UNARCO*. Morgan direct examination, 14, MMUBS Archive.

54. *Adams and Others v. Cape*, 15 March 1988, Day 20, 4, MMUBS Archive.

55. On bearer share certificates, see Organization for Economic Cooperation and Development [OECD], *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (Paris, 2001), 29–30. Posted at: www1.oecd.org/publications/e-book/2101131e.pdf.

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States. (See Figure 2(a), (b).) An internal memorandum explained candidly:

The Liechtenstein company 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 ... Cape Asbestos Fibres Ltd, a wholly owned UK subsidiary of Cape Industries Ltd, but ... we wish to disguise this fact from would-be enquirers. The benefits receivable from the United

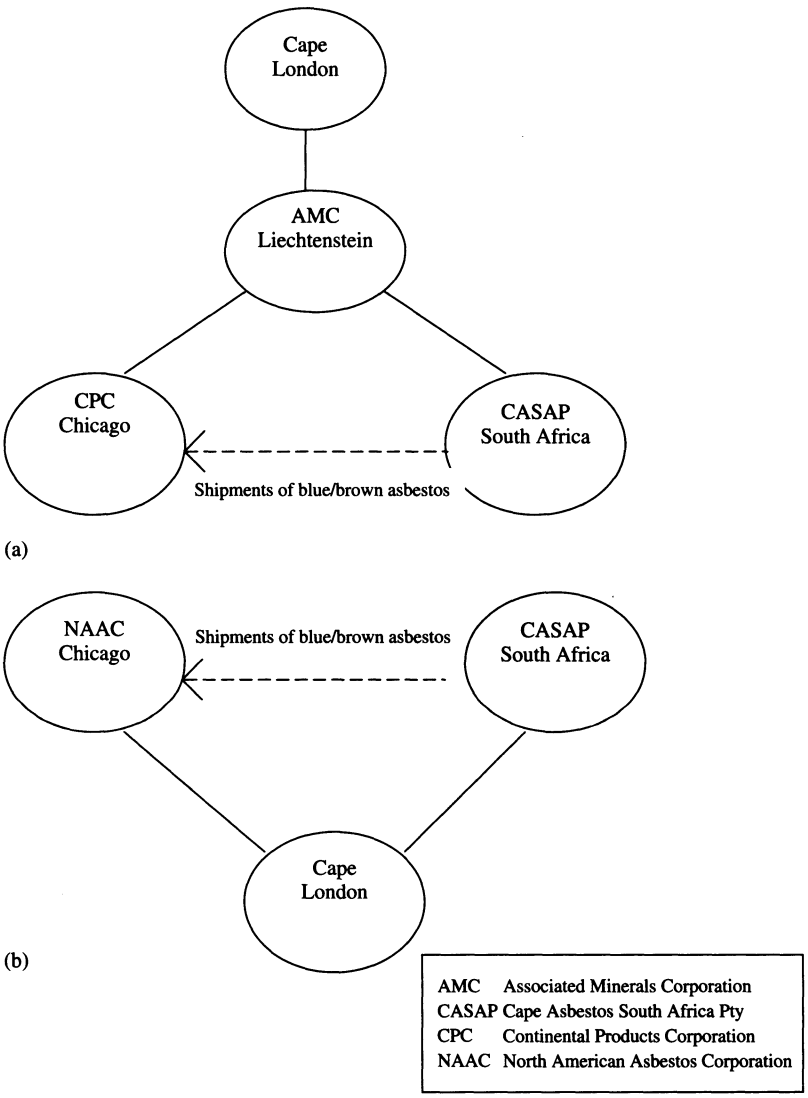


Figure 2 (a) Continental Products Corporation, 1977–81; (b) North American Asbestos Corporation, 1953–1977.

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Kingdom from this investment are indirect. It is simply an exercise to enable us to continue to sell asbestos fiber in the United States, thereby protecting commission income from our wholly owned South African subsidiary . . . [56]

Once again the lawyers—Penna and Meyer—were involved, ensuring that there were no cross-directorships, that Cape and CASAP directors kept out of the U.S., and that the Cape connection was secret. As Penna later put it: ''clearly disclosure of it was likely to hinder rather than help.''[57]

The secret Liechtenstein company enabled Cape to continue selling asbestos to America, despite American product liability law and apartheid sanctions, until it was ready to distance itself from asbestos mining. This occurred in 1979, when a complex series of moves began that was akin to Anglo-American swallowing its own tail. Cape's South African mines were first sold for £15.5 m to Barlow Rand (another Anglo-American company), alongside an indemnity that U.S. judgments were not enforceable in England. The asbestos mines were then sold on again to General Mining (another Oppenheimer-linked firm). As to the fate of the AMC: an attentive reader of Companies House filings would have noted in 1979 the disposal of AMC by Cape Industries Overseas.[58] CPC, a company that was uninsured, was liquidated in 1981.

Despite Cape's documented links with the AMC, Cape staff proved unwilling (or unable) to shed any light upon its origins. When questioned in 1984, the Cape and Charter director Geoffrey Higham stated that he could not recall whether he had ever heard of the AMC (until lawyers mentioned it) and knew nothing about its business.[59] Penna repeatedly denied to the press that Cape had any involvement with the Liechtenstein based firm. Morgan, when questioned in a deposition, testified that he also knew nothing about Cape's connection with the AMC:

Q: Were the principals of that entity (AMC) the principals of some part of Cape Asbestos?

A: I have no idea.

Q: Have you ever . . .

56. Cape memo, *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 14–15, MMUBS Archive.

57. *Adams and Others v. Cape*, 15 March 1988, Day 20, transcript, 50, MMUBS Archive.

58. Companies House, London: Cape Industries Overseas Ltd (1979). Reports, MMUBS Archive.

59. J. Walker documents: notes on deposition of G.A. Higham, 3, 4, Oct. 1984, *Thacker v. UNR Industries*, 70, MMUBS Archive.

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A: Nobody talks about that.

Q: Have you ever determined the identity of the principals until this very day?

A: No, sir. I can't even read the name of the man who signed the contract.[60]

The attempt to enforce the 205 Tyler claims against Cape Industries (*Adams v. Cape*) came to trial in London in 1988. Documents produced in legal discovery now revealed more fully the legal web behind the reorganizations. This was encouraging for the American plaintiffs, because sham companies can induce the courts to pierce the corporate veil. Less helpful to the Americans was significant hostility among the English judiciary to American-style product liability law and the level of damages set by the U.S. courts, which were regarded as astronomic and unfair by English standards. The media took little interest in the case.

In his decision in 1988, Mr. Justice Scott accepted that the NAAC had been an integral part of the Cape group, which operated worldwide as a single economic entity.[61] He also agreed that the AMC/CPC arrangement was a façade that was designed to sell fiber in America while avoiding liability. He was skeptical of many of the details presented at the trial by Cape's directors and dismissed Morgan's testimony as "disingenuous and false." Nevertheless, he regarded the NAAC as a separate legal entity, so that "the presence of NAAC at 150 North Wacker Drive, Chicago, Illinois, did not constitute the presence in Illinois of Cape ... "[62] Cape's actions had been "somewhat conspiratorial," but these were too subjective and "not ... relevant to the main question."[63] In Scott's view, the corporate veil could not be lifted simply because justice demanded it, and so he dismissed the *Adams*' claims.

Cape's labyrinthine relationship with Charter was not an issue in *Adams*. However, Charter was pursued by the same group of lawyers and plaintiffs simultaneously in the United States, where a district court decided that Charter was liable because it controlled Cape and was therefore guilty of fraud and injuring workers. This was reversed in 1988, when the U.S. Court of Appeal judged that Charter's control

60. C. G. Morgan deposition, Pittsburgh, 31 Oct. 1980. Court of Common Pleas of Allegheny County, Pennsylvania Civil Division. *Anthony A. Barber et al v. Pittsburgh Corning Corporation v. Commonwealth of Pennsylvania et al.* No. GD 79-21544: 191-2, 193-4, MMUBS Archive.

61. *Adams and Others v. Cape Industries plc and Another* [1991] 1 All ER. 929 CA, MMUBS Archive.

62. *Adams and Others v. Cape*, All ER, 966-7, MMUBS Archive.

63. "*Adams and Others v. Cape,*" All ER, 967, MMUBS Archive.

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of Cape did not reach the required level of dominance.[64] In England, too, the *Adams'* case went to the Court of Appeal, which refused to overturn the original verdict. The English Court underlined the legality of Cape's Liechtenstein company. It described the AMC as the "creature of Cape," but did not feel entitled to lift the corporate veil "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 . . . 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."[65] This was a landmark decision and the most detailed review of this aspect of corporate law ever undertaken in England. The result was a striking restatement of the *Salomon* principle of strict separate personality.

The Corporate Veil and the Asbestos Industry

In the aftermath of *Adams*, Cape promptly declared that it had a "distinguished past and confident future"—an astonishing statement, especially in view of the catastrophic mesothelioma epidemic that was emerging in the polluted towns around Cape's former mines in South Africa.[66] In 1996, Charter Consolidated sold its interest in Cape for about £48 million, leaving Cape Plc to make its own way as an international asbestos removal contractor and manufacturer of nonasbestos fire protection and insulation products. Cape prospered again, though as a shadow of its former self and still burdened with asbestos liabilities.[67]

In retrospect, one is struck by the number of legal landmarks in which Cape was involved. It was part of the first big American asbestos settlement (1977); it was the first company in the United States to incur punitive damages in asbestos litigation (1982); and it owned the first U.S. asbestos company to file for bankruptcy (1982).

64. *Clarence Craig and Duveen A. Craig v. Lake Asbestos of Quebec Ltd v. Charter Consolidated, 1988*. US Court of Appeals for the Third Circuit. No. 87–1254, MMUBS Archive.

65. L.J. Slade, "*Adams and Others v. Cape,*" All ER, 102, MMUBS Archive.

66. Cape Plc, *A Distinguished Past and a Confident Future: A Short History of Cape PLC 1893–1993* (London, 1993).

67. D. Blackwell, "Cape Leaves Litigation Behind," *Financial Times*, 26 March 2004; T. Macalister, "Cape Misses Court Date to Avoid Payment," *Guardian*, 18 Nov. 2003.

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In 2003, it settled yet another important case (*Lubbe v. Cape*) brought by 7,500 of its former South African workers, after the court made a precedent-setting ruling that the case could proceed in London.[68] Yet despite all this litigation, Cape emerged remarkably unscathed and had proved itself "astonishingly adept at extricating itself from the (asbestos) business without paying huge compensation."[69]

The question arises as to whether Cape's actions were typical. Before examining that point, it should be noted that the asbestos industry has its defenders. An authorized history of Turner & Newall (T&N) has described the company as a model health hygienist unfairly traduced by historians with an aversion to capitalism.[70] Another historian has absolved the American asbestos companies of conspiracy against the public interest and has pinned the blamed for litigation on 'malevolent' journalists and on opportunistic lawyers.[71] In fact, Cape's use of the corporate veil was quite routine. T&N operated wholly owned American asbestos factories between the 1930s and 1960s through a holding company in Montreal, which also controlled T&N's Canadian mining and manufacturing interests. The structure was originally dictated by T&N's desire to evade American taxes and antitrust law. In 1977, T&N implemented a complex reorganization of its Canadian holding company that involved the setting up of 'buffer' companies to distance its assets from claimants. The arrangements proved highly effective in repelling jurisdictional claims when asbestos personal-injury cases were launched against T&N in the 1980s, both in the United States and Canada.[72] In America, the reaction of W. R. Grace & Company to its spiralling asbestos liabilities after the mid-1980s was to divest itself of over $4 bn in assets behind an elaborate series of restructurings and technical bankruptcy. The result was a near-empty shell for asbestos claimants and a tax-free exit with the assets for the stockholders (though the

68. *Lubbe and Others v. Cape plc* [2000] 1 WLR 1545, MMUBS Archive. See R. Meeran, "Cape Plc: South African Mineworkers' Quest for Justice," *International Journal of Occupational and Environmental Health* 9 (Sept. 2003): 218–27; Peter Muchlinski, "Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases," *International and Comparative Law Quarterly* 50 (Jan. 2001): 1–25.

69. Pallister et al, *South Africa*, 254.

70. P. Bartrip, *The Way from Dusty Death: Turner & Newall and the Regulation of Occupational Health in the British Asbestos Industry 1890s–1970* (London, 2001).

71. Rachel Maines, *Asbestos and Fire: Technological Trade-offs and the Body at Risk* (New Brunswick, N. J., 2005).

72. G. Tweedale, *Magic Mineral to Killer Dust: Turner & Newall and the Asbestos Hazard* (Oxford, U.K., 2nd ed., 2001), 219.

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bankruptcy court was later able to claw back about $1 bn).[73] The core Grace company remains profitable today, though it remains under the shadow of heavy fines levied by the Environmental Protection Agency for asbestos damages at a former Grace mine in Libby, Montana, while seven of its current and former executives face federal indictments that they knowingly placed their workers and the public in danger.

In the late 1990s, the leading Australian asbestos company, James Hardie, also restructured its business to deal with its growing asbestos liabilities. In 2001, it established a compensation fund, while simultaneously and surreptitiously shifting its assets and corporate headquarters to the Netherlands. When the fund ran dry within only three years, the Dutch parent was revealed to be immune to claims because Australia did not have an enforcement treaty with the Netherlands. The subsequent public outcry resulted in a New South Wales Government Commission. The Commission's report revealed a masterly use of the corporate veil to distance Hardie from liability.[74] It also identified a string of possible offences against the Corporations and Trade Practices Acts and the common law.[75]

Inevitably, such problems have been magnified in countries where government regulations are more lax, leading to accusations that the separation of legal identity has enabled MNEs to apply 'double standards'. Certainly, in the United Kingdom, Cape had to operate under far more stringent safety standards than abroad—standards that were never applied, for example, in South Africa.[76] Double standards were also evident in Cape's policy towards the United States, whence fiber was shipped without the safety warnings that became a requirement on bags of raw asbestos imported into the United Kingdom after 1976—an action that reflects little credit on

73. K. Rivlin and J.D. Potts, "Not So Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies with Asbestos Liabilities," *New York University Environmental Law Journal* 11, no. 3 (2003): 626–61; J. Heenan, "Graceful Maneuvering: Corporate Avoidance of Liability through Bankruptcy and Corporate Law," *Vermont Journal of Environmental Law* (2003), online journal published at: www.vjel.org/roscoe/roscoe03a.html.

74. New South Wales Government: Cabinet Office, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (Sept. 2004). Posted at: www.cabinet.nsw.gov.au/publications.

75. Ben Hills, "The James Hardie Story: Asbestos Victims' Claims Evaded by Manufacturer," *International Journal of Occupational and Environmental Health* 11 (April/June 2005): 212–14.

76. J. McCulloch and G. Tweedale, "Double Standards: The Multinational Asbestos Industry and Asbestos-Related Disease in South Africa," *International Journal of Health Services* 34, no. 4 (2004): 663–79.

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Cape Industries, given its unparalleled knowledge of the hazards of amphiboles.

Much more is now known about mesothelioma in South Africa than when *Adams* was contested. It is the story of the concealment of a major public health hazard.[77] In the early 1960s, Cape and other South African producers had at first supported research into mesothelioma, but then ensured that the alarming results showing that mesothelioma was linked with environmental exposure were suppressed. This allowed Cape to continue to mine and sell amphiboles vigorously, while denying or minimizing the dangers.

Similarly, knowledge at Cape of health dangers rarely made it to the United States or influenced policy at Cape's operations there. In 1966, for example, Richard Gaze told NAAC boss, Cryor, that asbestos "in no way presents a hazard to the public at large" and denied that there was any evidence that amosite caused mesothelioma.[78] Yet, (as Gaze knew) independent medical studies had appeared only the year before in England that showed that mesothelioma deaths had occurred close to Cape's main factory, even among individuals who had never worked in the asbestos industry.[79] In the late 1970s, Gaze was still telling U.S. asbestos industrialists that crocidolite was not much worse than chrysotile and that "the hazards are greatly exaggerated in this country [the UK]."[80] Such scientifically inaccurate statements facilitated the export of Cape's blue fiber to America, after its import had been effectively banned in the United Kingdom. We shall never know how many workers died as a result, but some idea of the risks can be appreciated from the fate of several Cape executives.[81] Rudolf Wild died of mesothelioma in 1951, as did his daughter who was probably exposed to dust from her father's clothes. Tom Hale died of mesothelioma in 1961. So, too, did Bob Cryor in 1970. Gaze himself, who was a key architect of the NAAC, died from peritoneal mesothelioma in 1982.[82]

77. Flynn, *Studded with Diamonds*, 189–202; McCulloch, *Asbestos Blues*, 181–200.

78. Gaze to Cryor, 22 March 1966, MMUBS Archive.

79. M.L. Newhouse and H. Thompson, "Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area," *British Journal of Industrial Medicine* 22 (Oct. 1965): 261–69.

80. Gaze to Guy Gabrielson (Nicolet Inc.), 18 Feb. 1977, MMUBS Archive.

81. One recent estimate suggests that 10,000 Americans are dying annually from asbestos-related diseases, with 100,000 deaths projected over the next decade. See, Environmental Working Group, *Asbestos: Think Again* (Washington, D.C., 2004). Posted at: www.ewg.org/reports/asbestos.

82. Information from death certificates, legal documents, personal information, and Brodeur, *Expendable Americans*, 141.

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Conclusion

Separate legal personality still stands in the shape of *Salomon* and *Adams* and is regarded by most legal experts as 'inherently sound'.[83] This article, however, demonstrates that the corporate veil can allow MNEs to escape responsibility and leave victims of corporate actions with no recourse.[84] The story of Cape Industry's American operations provides a striking illustration of how limited liability can act as a bar to recovery for corporate injuries even when a firm has been found guilty. Over the past twenty-five years tort law has arguably been "*the* uniquely effective and indispensable means of exposing and defeating the asbestos conspiracy, providing compensation to victims, and deterring future malfeasance."[85] Yet in Bloomington and Tyler and in many other American locations, hundreds (indeed thousands) of asbestos victims were denied the opportunity to claim damages from Cape Industries because of the legal doctrines supporting the corporate veil. Companies have been able to use traditional entity law to externalize the costs of conducting highly risky activities. A distinct pattern therefore emerges from this discussion of corporations enjoying the benefits of personality without the drawbacks (such as punishment for misdeeds); and of being able to restructure their businesses in flagrant disregard of industrial hazards and of the interests of anyone but their shareholders.[86]

For business historians, *Adams* and related cases have some intriguing implications. This episode is incomprehensible without an understanding of corporate law, which business historians have largely avoided in favor of a focus on management, technology, and other core business operations. Yet the asbestos cases show that lawyers played a key role in shaping company strategy. This may be a feature of companies involved in the manufacture of toxic

83. Grantham and Ross, *Corporate Personality*, 7.

84. For similar criticisms, see J. Dine, *The Governance of Corporate Groups* (Cambridge, Mass., 2000), 46–48; and Blumberg, *Multinational Challenge*, 133.

85. D. Rosenberg, "The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation," *Harvard Law Review* 99 (May 1986): 1693–1706, 1695. See also M. Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer?" *Washburn Law Journal* 41 (Spring 2002): 399–425.

86. The corporate veil in other industries remains to be explored. Interestingly, in 1994 BAT Industries in London claimed that it had been wrongfully named in a Minnesota tobacco damages suit, because it was merely a holding company with 164 employees and had only a distant relationship with its U.S. subsidiary Brown & Williamson. On this occasion, the American courts were not convinced. See P. Pringle, *Dirty Business: Big Tobacco at the Bar of Justice* (London, 1998), 203–6.

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products. Stanton Glantz, for example, has shown the "unusually active role" played by tobacco industry attorneys, even in scientific research.[87] This view is shared by former Food & Drug Administration head, David Kessler, who believes that the tobacco industry "put itself in the hands of its lawyers" to counter threats to regulation.[88] Until now, the corporate attorney has not been a prominent figure in business history MNE scenarios, but these experiences suggest that it was not simply the entrepreneur that devised corporate strategy.

Above all, this story is important for the discordant note it strikes in the business history literature. It is a story of tax-avoidance, offshore companies, shells, the concealment of information, and the deaths of workers. It would appear that not all MNEs are the progressive institutions commonly portrayed in the literature of business history. Some are closer to Joel Bakan's depiction of the corporation as a monster, whose "legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others."[89] Business historians may disagree with this characterization, but they need to address these issues if they are to relate their work to contemporary debates in management and globalization. To do that they need to bring subjects such as the environment, regulation, ethics, and the social costs of business much closer to the center of the stage than they currently occupy in the Chandler paradigm. For Cape and other asbestos manufacturers the occupational and environmental health problems of producing a toxic product were far from being an 'externality', but were central to the operation, structure, and survival of the business.

87. S. Glantz et al. eds., *The Cigarette Papers* (Berkeley, Calif., 1996), 236.

88. D. Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (New York, 2001), 205.

89. Bakan, *Corporation*, 1–2.

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425 South Dryden Place,
Arlington Heights, Illinois
60005 U. S. A.

April 19, 1978

Mr. J. L. Sparkes,
Group Financial Controller,
Cape Industries Limited,
114 Park Street,
London W1Y 4AB, England.

Dear John,

Officially, North American Asbestos Corporation closed on January 31, 1978. We are keeping the books for the liquidating trustees through April 30th - after which there will be a Peat Marwick audit through April 30th.

We have sent you the January and February statements, and will shortly be sending you March, and then a further April statement; or possibly, this will wait until the audited statement is completed.

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 31, 1978 deadline; however, Mr. Morgan and myself are still receiving accounting memorandums from you. I believe, for safety's sake, these should be stopped immediately.

Many thanks. Best regards.

Sincerely,

Joan Holtze

JHoltze sp

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EXHIBIT 27

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MEMORANDUM

TO: M. E. Meyer

FROM: M. P. Grear

DATE: 24 August 1979

RE: North American Asbestos Corporation
Liquidating Trust
File No. 74600 NAA - 009 LIQ

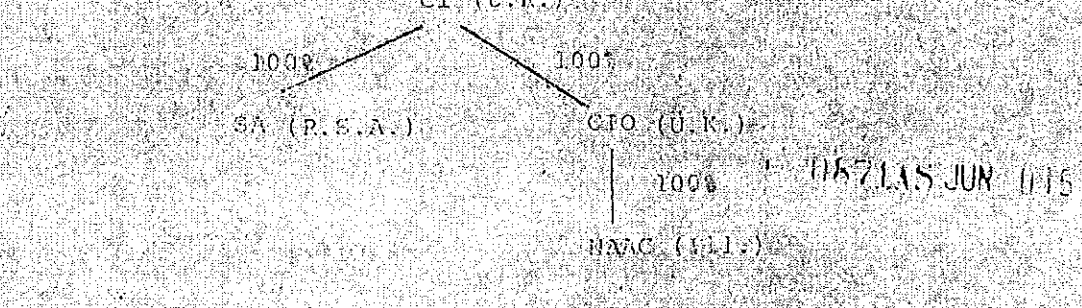
Immunity of Assets of Liquidating Trust From Levy by Judgment Creditor of Cape Industries Ltd.

FACTS:

North American Asbestos Corporation ("NAAC") is an Illinois corporation. NAAC has filed an Intent to Dissolve pursuant to §77 of the Illinois Business Corporation Act, but Articles of Dissolution pursuant to §80 have not yet issued. All of the assets of NAAC were conveyed to Herbert C. Brook and Max E. Meyer as trustees under a certain Liquidating Trust Agreement dated January 31, 1978, and are at present so held. After payment of NAAC's debts, it is intended that the assets of NAAC will be distributed to NAAC's sole shareholder.

The sole shareholder of NAAC is Cape Industries Overseas Ltd. ("CIO"), a corporation organized in the United Kingdom. CIO, in turn, is wholly-owned by Cape Industries Ltd. ("CI"). Among CI's subsidiaries is a corporation organized under the laws of South Africa (for convenience, referred to herein as "SA"), which corporation owned the asbestos mine whose products were sold by NAAC among others.

The foregoing corporate structure may be diagramed as follows:



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MEM

LORD, BISSELL & BROOK
135 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
312-786-6200
CABLE: LOWIRCO 25-3070
TELEX: 25-3070

WRITER'S DIRECT DIAL NUMBER
(313) 786 - 6208
WASHINGTON OFFICE
21 DUPONT CIRCLE, N.W.
WASHINGTON, D.C. 20036
AREA CODE 202
833-3031

LORD
N B. BISSELL
RE C. DILLER
T C. BROOK
N A. HILWIG
. H. HILLIER
. GOODEN
R. BECKER
MEYER
S N. WEILAND
CEN MILLER
I. SMITH
I B. LEGG
R. WINNER
BT L. TOZER
IO K. MUELLER
N A. JOHNSON
F. SCHAUER
C. ROY PETERSON
CUSHMAN B. BISSELL, JR.
JOHN N. O'CONNOR
ANTONIO R. SARAGIA
THOMAS P. McCALY
HAROLD J. JACOBSON
KENNETH E. WIESE
WILLIAM P. BUTLER

JOHN T. ANDERSON
THOMAS L. STEVENS
RICHARD C. VALENTINE
WARREN C. INGERSOLL
LESTER C. ZACZEK
RICHARD C. CONKLIN
JOHN C. MERRIMAN
ALEX R. SEITH
CLARK C. KING, JR.
EUGENE H. WACHTEL
MICHAEL SCHUETTE
JOHN S. SHAPIRA
THOMAS W. DEMPSEY
ALVIN E. DONAHA
WALLACE C. MALONEY
HARVEY S. LICHTERMAN
ROBERT B. AUSTIN
JOHN C. GURLEY
R. R. McMAHAN
ROBERT C. STEVENS
LESLIE W. MICHAEL
THOMAS J. BURKE, JR.
MICHAEL DAVIS
JOSEPH E. COUGHLIN
ROGER A. FROSS
JOHN W. ADLER, JR.

CHARLES A. ADAMS
F. GORDON ALLEN
SIMON H. ANDSON
TERRY W. BACAUS
FRED C. BEGY III
JOHN J. BERWANGER
ELLEN HIGGINS BROWER
GEORGE L. BURGETT
EILEEN CAIRNS
CORNELIUS P. CALLAHAN
JOHN S. CHAPMAN
ROBERT B. CHAPMAN
WILLIAMS P. DORR
EDWARD F. FITZPATRICK
DON W. FOWLER
DEBORAH C. FRANCZEK
LAWRENCE X. GRAY
HUGH C. GRIFFIN
WILLIAM GROEBE
JOHN B. HAARLOW
CHARLES J. HANSEN
MICHAEL R. HASSAN
JOHN J. HENELY
LELAND C. HUTCHINSON

RICHARD F. JOHNSON
ROBERT A. KNUTI
SPENCER LEROY III
JOHN P. MACRAE
RONALD SCOTT MANOUK
REBECCA MAXWELL
DAVID C. McLAUGHLAN
T. McNAMARA
KENNETH C. MILLER
HUGH L. MOORE
STEPHEN H. MURRAY
JOHN D. NICHOLSON
JAMES L. PITTMAN
ROBERT DENNIS RASOR
ROBERT P. SCHMIDT
JOHN H. SHEFFEY
JOHN J. TIGERT III
JAMES J. WALSH
WILLIAM T. WEAVER
FREDERIC WEBER
GARY W. WESTERBERG
WILLIAM J. WHITE
HERMAN WIHO

COUNSEL
RAYMOND WEARING
GORDON R. CLOSE
EDWARD B. HAYES
GRAYDON H. ELLIS
HAMILTON K. BECBE

ROBERT S. NEOVECKY
WALTON N. SMITH

December 23, 1975

A. J. Penna, Esq.
Group Solicitor
Cape Industries Limited
114 Park Street
London W1Y 4AB England

Re: Yandle/Kay Actions

Dear Tony:

At the meeting that Max Meyer and I had with Dr. Gaze and Mr. Dougherty several months ago, we informed them that Judge Steger at the resumption of the Fall Term of court indicated that he had taken the jurisdictional issues presented by the motions that we filed on behalf of Cape Industries and Egnep and the motions filed by certain other defendants under advisement and that he further informed all counsel that if any further documentary information or briefing were desired it should be done promptly. To date no one has filed any additional information. However, Judge Steger has not as yet indicated when he will rule on the pending motions. Dick Bernays and I have discussed the status of the matter recently and we agreed that steps should be taken after the first of the year to inquire as to when a ruling by the court on the jurisdictional issues may be expected.

We have given further consideration to the matters raised in your letters of November 4 and June 16, particularly as to what action should be taken in the event the Cape Egnep or Cape Fibres should be involved in any other U. S. litigation.

With reference to the Yandle/Kay suits, if the court should sustain the motions only on the ground of insufficient and improper service, while this would be tantamount to restarting the actions for purposes of effecting service of summonses it would not have, in our opinion, any limitation consequences, for the date of the initial filing of the complaints rather than the date of proper service governs any limitations questions. However, if such a ruling is handed

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down and subsequent service is properly effected, both Cape and Egnep would then be before the court properly for the first time and would be faced with the decision of whether or not default judgments should be permitted.

With reference to the other questions raised in your letter of June 16 be advised as follows:

1. Although Cape is 63% owned by Charter Consolidated Limited it is our opinion that there is no valid basis to join Charter in the pending litigation or that there would be any valid basis of enforcing against Charter or any of its U. S. subsidiaries or U. S. assets any judgment entered against Cape, Egnep or NAAC. Nothing has come to our attention which would indicate complete control or dominance by Charter as to the activities of Cape, Egnep or NAAC.

2. It is also our opinion that the directors of any of the Cape Companies or of Charter would not be subject to any civil or criminal liability by reason of any U. S. default judgments entered against such Companies or their subsidiaries. Under Texas law a corporation itself cannot be found criminally liable. Fletcher's Cyclopedia of the Law of Private Corporation, Vol. 10, 1970, §4942 p. 459. A fortiori the directors of such a corporation would not be subject to any criminal liability. The only exception to civil liability would be under the laws of Great Britain if their Companies might be subject to respond in damages to satisfy any default judgments and if it were improper to allow default judgments to be entered.

3. If Cape in the future should set up or acquire any U. S. Company or business, then such Company or business would be deemed to be an asset of Cape, even though acquired after the entry of any default judgments. Such new Company or business would be considered an asset of Cape in the U. S. and subject to garnishment to satisfy the default judgments.

4. If default judgments were awarded against Cape and/or Egnep, such judgments would be ordinarily considered final. However, if the action continued against NAAC who would subsequently be successful in its own defense, then under Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure a remedy may be available for setting aside even a default judgment under specified circumstances. The granting of such relief, however, would be entirely in the discretion of the court.

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5. It is our opinion that even if a U. K. Court should judge a default judgment unenforceable, under Texas law (Articles 3773 and 5532 of Vernon's Civil Statutes of Texas) a judgment is valid for 10 years and it may be revived by the issuance of execution against a defendant within the 10 year period. Mingus v. Kadane, 125 SW 2d 630 (Tex. Civ. App. 1939). Of course, if a judgment is allowed to be dormant without issuance of execution it cannot be revived after 10 years from the date of the judgment.

On the ultimate question as to whether Cape Industries 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 2d 461 (Tex. 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 be 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 organization 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."

Certainly on the basis of the discovery to date and based on our knowledge of the operations of Cape and its subsidiaries, none of the exceptions stated by the Texas Supreme Court would be applicable. Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

If any further clarification of our foregoing views is required, please advise.

Sincerely,

Stephen A. Milwid

SAM/w

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MAY 24, 1978

TELEX TO: CAPE INDUSTRIES LIMITED, LONDON

TELEX NO.: 24811

ATTN: A. J. PENNA

YOUR TELEX MAY 24, 1978 RECEIVED TODAY DURING MY ABSENCE IN DAVENPORT, IOWA, ON A PROTRACTED TRIAL. IT WAS READ TO ME BY TELEPHONE AND IN RESPONSE PLEASE BE ADVISED THAT THE TYLER LITIGATION THAT WAS SETTLED COVERED ONLY THE 459 PLAINTIFFS WHO HAD MADE CLAIM AND WERE ACTUALLY PARTIES IN THE LITIGATION AT THE TIME OF THE SETTLEMENT ON SEPTEMBER 22(?), 1977. JUDGE STEIGER ALSO MADE A CONDITION OF THE SETTLEMENT THAT NO OTHER PERSONS WOULD BE ALLOWED TO INTERVENE AS PLAINTIFFS AFTER THAT DATE AND ALL PLAINTIFF ATTORNEYS OF RECORD ALSO COMMITTED NOT TO PARTICIPATE IN LITIGATION ON BEHALF OF ANY OTHER PERSONS FORMERLY EMPLOYED AT THE TYLER PLANT. SUBJECT TO FOX-ANDREWS' CONFIRMATION, WE AGREE BEST INTERESTS OF CAPE COMPANIES OTHER THAN NAAC IS TO MAKE NO RESPONSE TO THIS NEW LITIGATION. IF SUMMONS SERVED ON NAAC, IT SHOULD BE DIRECTED PROMPTLY TO THE BROKER TO REFER TO THE APPROPRIATE INSURER AND WE WILL TAKE MEASURES TO SO INSTRUCT ALL NAAC PERSONNEL. IF ANY FURTHER INFORMATION REQUIRED, PLEASE ADVISE. I CAN ALWAYS BE REACHED BY MY OFFICE AND CAN CALL YOU WITHIN SEVERAL HOURS AFTER RECEIVING SUCH ADVICES.

BEST REGARDS,

S. A. MILWID

CAPE000566

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CONFIDENTIAL AND WORK
PRODUCT MEMORANDUM

TO: Evan Burkholder

DATE: November 28, 1984

FROM: Stephen A. Milwid

RE: Deposition of Geoffrey A. Higham

I reviewed the Abstract of the Deposition of Geoffrey A. Higham that Walter took in London, England and I wish to make the following comments.

Throughout the deposition, reference was made to statements contained in Cape Asbestos' Annual Reports starting with the report for 1973 ((pp. 42 - 45). These reports stated with reference to the Tyler, Texas litigation that the actions were being strenuously contested and in the opinion of the Cape's American legal advisors, the amounts claimed were highly speculative and conjectural and had no basis in law or in fact. Mr. Higham identified our firm as the "American legal advisors" and stated that the person he dealt with was myself. I can recall no direct dealings with Mr. Higham with respect to the contents of the notes in the Annual Reports. Tony Penna, the Group Solicitor for the Cape Companies, was the person with whom I dealt. Our opinion was based primarily on the defense of lack of jurisdiction over the person of the Cape Companies as the law on that subject existed at that time, and a defense that we continued to assert in all pleadings, even after the trial court overruled the jurisdiction motions. (See draft of an Affidavit that I recently prepared and forwarded to Penna for use in the Tyler II proceedings pending in the High Court of England).

At page 47, Mr. Higham testified as to the Minutes of a Cape Board meeting on November 1, 1977 dealing with the settlement of the Tyler I cases in which it was indicated that the settlement was made on the basis of legal advice from the

DEPOSITION EXHIBIT
Higham 47
9-12-86

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United States and the United Kingdom. In that connection, the total settlement was $20,000,000 to which Cape Industries contributed $1,000,000 and the insurers for North American Asbestos contributed $4,200,000. The person with whom I dealt at Cape Industries in September, 1977 as to such authorization was Dr. Richard Gaze. The primary factor that was considered in authorizing the payment of $1 million on behalf of Cape Industries was that the other co-defendants including the insurers of NAAC indicated that they were prepared to settle separately with the 407 plaintiffs and would seek indemnity from the Cape Companies and that the plaintiffs' attorneys would proceed separately to trial against the Cape Companies as the sole remaining defendants. Dr. Gaze and I took into consideration the exposures that were involved, primarily with the expense of such further litigation as well as the risk of being the sole defendants appearing before a Texas jury with 407 Texan plaintiffs.

Mr. Higham's statement at page 53 that he had no recollection of the discussion that gave rise to the proposal that NAAC be wound-up should be helpful in the subsequent deposition of Max Meyer. At page 54, he referred to the Board Minutes as saying that the reason for winding up NAAC was that the selling arrangement for asbestos in the U.S. would be more closely controlled from South Africa and at pp. 73 - 76, this was tied into the formation of Associated Mineral Corporation of Liechtenstein and its agreement with Continental Products Corporation of Chicago since, as he stated at page 74, "the reason behind it was that some countries do not like doing business with South Africa and it is necessary for them to make arrangements," and at page 76 he gave the further reason that through Associated Mineral Corporation, Cape would have another subsidiary as a selling outlet in various areas of the world.

At pp. 62 and following, Walker questioned Mr. Higham as to the source of in his recommendation to the Board that Cape would not appear and defend product liability litigation in the U.S. He stated that the basis for that recommendation to Board would have been legal advice received both in the U.S. and the U.K. suggesting that as being the best course

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of action for the company. At pp. 64 -65, he stated that the source for the legal advice from the U.S. would be Lord, Bissell & Brook. I know of no basis for that conclusion by Mr. Higham. After the Tyler I litigation was settled, I recall a telephone conversation with Tony Penna in which he stated that based on the advices of Cape's U.K. solicitors, Cape would not appear in any subsequent U.S. product liability litigation and would resist in the U.K. any endeavors to collect any default judgments that might be entered in the U. S. I also recall that even as early as 1975, Mr. Penna advised that attorneys representing EGNEP in South Africa had already given the same advice.

At page 67, Mr. Higham testified that he met very rarely with Max Meyer and did not meet him more than once a year. I met him only once in August, 1977, in London, just prior to the scheduled commencement of the trial in Tyler, Texas.

We certainly had no participation in the negotiations that commenced some time in 1976 (pp. 68 - 73) with Transvaal Consolidated Land (TCL), dealing with the sale of the Cape mining properties in South Africa. Mr. Higham testified at page 71 that Cape made it very plain to TCL that the Cape was not responding to any product liability claims in the U.S.

On the whole, from my review of this Abstract, it does not appear that Walker, in the 89 pages of the deposition, uncovered very much, particularly pertaining to the decision for the dissolution of NAAC.

Stephen A. Milwid

SAM/ds

CAPE000419

EXHIBIT 31

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December 12, 13, 14, 1977

MEMO TO FILE

CAPE INDUSTRIES/ LONDON

Meeting to discuss liquidation of NAAC and formation of new off-shore company to service North American market.

Attending:
Dr. Richard Gaze
Mr. H. M. S. Tanner
Mr. Tony Penna
Mr. Barry Stevenson

Meeting to discuss North American market and customer requirements.

Attending: Mr. H.M.S.Tanner
Mr. R. Gale
Mr. W. Scott
Mr. K. Andrews

Meeting to discuss North American market of pipe coverings for Cape Contracts International.

Attending: Mr. Cris Cusack

CGMorgan/jc

Dep. Ex. No. 22
For I.D. as of 9/25/90

PLAINTIFF'S EXHIBIT #22

CAPE000728

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EXHIBIT 32

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Dep. Ex. No. Z
For I.D. as of 12/25/84
A. M. Golab

MEMORANDUM

7 April 1978

To: North American Asbestos File
From: A. R. Sarabia

NAAC, the Illinois corporate subsidiary, has been liquidated (I understand). An independent Illinois corporation with no shareholders from Cape Asbestos or any other English or South African company has been organized. This is Continental Products Corporation (CPC). It is my understanding that CPC will act as commission agent for the future sales of asbestos from South Africa. It will handle the United States, Canada and Mexico (I believe).

The South African mines, primarily Cape Blue Mines and Egnep (which supplies amosite) will now sell to a new Liechtenstein subsidiary organized by London which is called Associated Mines Company (AMC). AMC, in turn, will sell to Canada, the U.S. and Mexico. Hence the invoices going to, e.g. Mexico, will be AMC invoices. However, because shipment is being made from South Africa, an agent or office for AMC in Johannesburg will perform this invoicing task.

Since CPC has the chore of following through on the shipments, payments, etc., copies of all invoices are supposed to be airmailed to CPC here (which continues at the same address and phone number as before, held by NAAC).

Gerry Morgan was in Mexico City in January of this year and is supposed to have explained the new corporate arrangement to the Eureka group of companies' officers, namely, the Suarez, Hector Vargas and Gustavo Herrera.

There is one remaining Promissory Note running to NAAC, number 21, which is supposed to be paid, I believe, on 24 April.

After some discussion, Joan Holtze and I decided it would be better to wait until that Promissory Note is paid and then go back to Hector Vargas and explain the new corporate set-up.

PLAINTIFF'S EXHIBIT 1458

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EXHIBIT 33

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VIA WUI
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4.7.77

RECEIVED
JUL 5 1977
LORD, BISSELL & BROOK

ATTENTION STEPHEN MILWID

THANKS FOR YOUR RECENT TELEX WHICH SHOULD CONFIRM PREVIOUS ADVICE THAT EGNER STILL SAFE FROM SOUTH AFRICAN JUDGEMENT ENFORCEMENT IF WITHDRAWAL FROM TEXAS PROCEEDINGS DECIDED UPON AT THIS STAGE. COUNSEL OR FOX-ANDREWS IS KEEN TO CONFER WITH YOU BEFORE FINALLY CONFIRMING HIS ADVICE THAT CAPE WOULD BE SUBJECT TO UK ENFORCEABILITY IF WITHDRAWAL NOW. WE HERE, HAVING HEARD MORE DISTURBING INFORMATION RECENTLY ABOUT THE VALUE OF TEXAS AWARDS ARE RAPIDLY COMING TO THE CONCLUSION THAT CAPE AND CAPE-ETI-RES SHOULD TAKE A RISK ON THE UK ENFORCEABILITY AND WITHDRAW, AS IN PRACTICE WE CANNOT FORSEE ANY COURT OR GOVERNMENT HERE ENFORCING A JUDGEMENT WHICH WOULD HAVE ENORMOUS FINANCIAL AND EMPLOYMENT REPURCUSSIONS, WHICH WE REALLY CANNOT BE SAID TO HAVE A MORAL RESPONSIBILITY AND ARE SIMPLY VICTIMS OF THE US PRODUCT LIABILITY CULT.

AN URGENT MEETING IS OBVIOUSLY ESSENTIAL AS CLEARLY YOU CANNOT INDEFINITELY CONTINUE BY INSTRUCTIONS OF TAKING NO FURTHER STEP IN THE PROCEEDINGS. SUGGEST 21ST AND 22ND JULY IN LONDON.

NOTE
1111

THIS IS URGENT + PLEASE CONTACT MR MILWID URGENTLY IN CALIFORNIA FOR REACTION.

A J PENNA
+
LOWIRCO GGO

24811 CAPTND G

07 777 6038

PLAINTIFF'S EXHIBIT #205

This is to announce that Continental Products Corporation has been appointed as Agent to handle the North American requirements for Amosite and Crocidolite asbestos fibre, effective _____.

Our location will be the same as the former North American Asbestos Corporation. Please note our address and telephone number are as follows:

Continental Products Corporation
150 North Wacker Drive
Chicago, Illinois 60606

Telephone: (312)_____

Although operating as a new organization, both Joan Holtze and myself will endeavor to maintain the same service to our many customers and friends as offered at North American Asbestos Corporation.

Sincerely,

CONTINENTAL PRODUCTS CORPORATION

President

CGMorgan/jc

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EXHIBIT 34

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MEMORANDUM

Sandra Dep. Ex. No. 196
Id. as of 8/24/06
A. M. Gold

23 January 1978

To: M. E. Meyer
From: A. R. Sarabia
Re: North American Asbestos Corporation

A new corporate arrangement is being made concerning the entities which will sell asbestos to purchasers in the Western Hemisphere. This includes Canada, the United States and Mexico.

The South Africa mining companies ("Cape Mines") will own 100% of a Liechtenstein sales corporation ("Sales Corp"). Sales Corp will sell in the Western Hemisphere through an independent commission agent.

North American Asbestos Corporation ("NAAC") will be liquidated. An independent corporation owned by Mr. C. G. Morgan will be organized. This corporation will be the commission agent for the sale of asbestos in this area. It will earn commissions on the sales it arranges for Sales Corp.

The purpose of this corporate arrangement is to eliminate or reduce as much as possible the exposure in the United States of Cape Mines to lawsuits brought against it under theories of strict liability concerning products liability on the sale of asbestos in the United States. Thus Sales Corp will buy from Cape Mines and sell here.

1. If the purpose is to eliminate the risk or exposure of Cape Mines to civil actions against it for products liability on the sale of asbestos in the United States, the most certain approach is to eliminate any assets owned directly or indirectly by Cape Mines in the United States. A U.S. plaintiff would seek to pierce the corporate veil and go beyond Sales Corp to Cape Mines. Hence, the ideal way to continue to sell asbestos in the United States would be for Sales Corp to sell all asbestos f.o.b. a South Africa port, transferring full title and interest there and insisting that payment be made upon embarcation. Under these conditions Sales Corp would be paid for the asbestos under a letter of credit at the time it turned over the bill of lading showing loading of the asbestos aboard ship.

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This system of sale would eliminate any assets owned by Sales Corp in the United States. With no assets located in the United States which might be attached under legal proceedings brought against Sales Corp there would be no pressure on it to appear to defend. Any default judgment would have to be enforced in the courts of Liechtenstein.

2. Anything short of that will establish some assets in the United States owned by Sales Corp. The presence of these assets in the United States subjects them to attachment under legal proceedings which may be brought against Sales Corp.

The greater the number of assets or the greater the value the greater the risk of this happening.

If Sales Corp sells on open account, those receivables would be subject to attachment.

The same would be true if a warehouse was maintained or if goods were shipped on consignment to the U.S. commission agent.

3. The comments made by Mrs. Joan Holtze in her letter of November 11, 1977 to Mr. A. J. Penna refer to a discussion she and I had. One question concerned the U.S. federal income tax liability of having Sales Corp sell f.o.b. New York, i.e. pass title to the goods in New York.

The other question had to do with the U.S. federal income tax consequences of Sales Corp maintaining a warehouse somewhere in the United States. Section 882 of the Internal Revenue Code ("Code") provides for the taxation of "effectively connected income" of a foreign corporation. Section 881 provides for the taxation of other income such as interest, dividends, etc. Section 861 provides that if title to personal propeuty passes from the selling foreign corporation to the purchaser in the United States, that constitutes U.S. source income.

With respect to maintaining a warehouse where asbestos could be stored and shipped from there to U.S. customers, maintaining a warehouse assumes that the goods stored there would continue to be the property of Sales Corp. These would constitute assets within the United States which could be attached as described above. Upon the "sale" of the goods to the U.S. customer, there would be U.S. source income subject to taxation under the Code. Even if the warehouse were to be maintained in a foreign trade zone or free trade zone in the United States, under Revenue Ruling 76-161, income earned by Sales Corp from the sale of the asbestos would be subject to U.S.

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CAPE000378

income tax. Further, the receivables from such sales would also be subject to attachment by any would-be plaintiff.

If the goods were to be sold on consignment, the net result would be the same, namely, either there would be goods owned by Sales Corp or there would be a receivable payable to Sales Corp arising from the sale of those goods. In either instance, said assets may be attached by potential plaintiffs.

ARS:klk
Attachments

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ELECTRONICALLY FILED - 2023 Sep 20 4:04 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
JOHN A. TIBBS and MARGARET B. TIBBS,	)	Civil Action No. 2023-CP-40-01759
Plaintiffs,	)	In Re: Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
3M COMPANY, *et al.*,	)	
Defendants.	)	
**********		
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 DEFENDANTS MOHED ALTRAD AND ALTRAD INVESTMENT AUTHORITY S.A.S'S MOTION FOR PROTECTIVE ORDER AND TO DISSOLVE RECEIVERSHIP**
Third-Party Plaintiff,	)	
v.	)	
ANGLO AMERICAN PLCS, *et al*.,	)	
Third-Party Defendants.	)	

Third-Party Defendants Mohed Altrad ("Mr. Altrad), and Altrad Investment Authority S.A.S. ("AIA") (collectively "Altrad Defendants")—without waiving but instead specifically preserving all of their objections to personal jurisdiction in South Carolina, as set forth in the Rule 12(b)(2) motions filed by each of the Altrad Defendants on September 1, 2023 —move: (i) for a protective order striking the Interrogatories and Requests for Production directed to each of the Altrad Defendants (collectively, the "Discovery Requests") by the Receiver for Cape PLC; (ii) for a protective order quashing and denying the Rule 30(b)(6), SCRCP, Deposition Notices issued to

each of the Altrad Defendants (collectively, the "30(b)(6) Notices"); and (iii) to dissolve the receivership.

On September 1, 2023, the Altrad Defendants filed Motions to Dismiss for Lack of Personal Jurisdiction, Motions to Dissolve the Receivership and Motions to Dismiss, Strike or Sever. Collectively, these Motions set forth evidence showing not just the lack of personal jurisdiction over the Altrad Defendants, but also the lack of subject matter jurisdiction for the entire third-party proceeding because the Receiver was improvidently appointed. Instead of responding to these points, the Receiver served Interrogatories, Requests for Production of Documents and Notices of Deposition for 30(b)(6) witnesses on the Altrad Defendants.

Arguments that the Receiver has heretofore ignored are explained more fully in the Altrad Defendants' Motions to Dismiss Third-Party Claims and Dissolve the Cape PLC Receivership, and are incorporated by reference as if fully set forth herein— include:

The order purporting to appoint the Receiver was procured in *Park v. Armstrong International, Inc*., Case No. 2021-CP-40-02727 ("*Park* Lawsuit"), nine months after that matter was reported to be "fully resolved." The Order granting the motion purports to appoint the Receiver "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 in this case." Each of these facts are demonstrably incorrect—Cape PLC, a Jersey company formed in 2011, has not dissolved or forfeited its charter; it is not the "successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.); and there is no evidence anywhere in the *Park* Lawsuit record showing that it (or any Cape entity) was actually and properly served with the operative Summons, Second Amended Complaint, and Motion for Appointment of Receiver for which it was incorrectly asserted that

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a failure to answer had occurred. Mr. Park 's "Notice of Filing of Ommitted (*sic*) Exhibit" purporting to provide the Court with the "Exhibit A" proof of service that was missing from Mr. Park's Motion to Appoint Receiver does not cure these defects.

In addition to and independent of those grounds, the receivership violates basic tenets of constitutional law because it purports to give a South Carolina receiver authority over property that is not located in and has no relationship to South Carolina, and purports to do so without any notice to or jurisdiction over the impacted foreign companies. Finally, the Receiver's Third-Party Complaint seeks not to protect the interests of the company over which he has purportedly been given authority, but to generate liability for that company and obtain an impermissible advisory opinion on alter ego and veil piercing liability against the Third-Party Defendants when no asbestos exposure liability against any Cape entity has been adjudicated in any South Carolina court.

For all of these reasons, the rule of law and the principles of equity demand the receivership be dissolved. And because the Receiver was improperly appointed and does not have standing to bring its third-party claims, it has no authority to take discovery from the Altrad Defendants, in any form or under any mechanism, or from any other third-party defendant.

Accordingly, the Court should enter an order: (1) dissolving the Cape PLC Receivership and dismissing the Altrad Defendants from this case; (2) striking the Discovery Requests; (3) quashing and denying the 30(b)(6) Notices; and (4) ruling that the Altrad Defendants have no obligations to respond to the Discovery Requests or the 30(b)(6) Notices. *See* Rule 26(c), SCRCP (providing that the Court may issue an order "that the discovery not be had").[1]

[1] To ensure no doubt on the point, the timely filing and service of this motion relieves the Altrad Defendants from any obligation to respond to the challenged Discovery Requests or the 30(b)(6) Notices until this motion has been finally resolved. *Baughman v. AT&T Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991). The Altrad Defendants specifically preserve all, and do not waive any, of their objections to the Discovery Requests and the 30(b)(6) Notices, in whole and/or in

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Undersigned counsel certifies that consultation in an attempt to resolve this matter would serve no useful purpose.

Respectfully submitted this 20th day of September 2023.

WOMBLE BOND DICKINSON (US) LLP

/s/ *M. Elizabeth O'Neill*
M. Elizabeth O'Neill (SC Bar No. 104013)
M. Todd Carroll (SC Bar No. 74000)
One Wells Fargo Center
301 South College Street, Suite 3500
Charlotte, North Carolina 28202
Ph.: (704) 350-6310
Elizabeth.ONeill@wbd-us.com
Todd.Carroll@wbd-us.com
WBD.SCAsbestos@wbd-us.com

Attorneys for Third-Party Defendants Mohed Altrad and Altrad Investment Authority S.A.S.

part, including, but not limited to, based on: the attorney–client, attorney work product, common interest, and any and all other applicable privileges and protections; relevancy; scope and the vague, duplicative and unduly burdensome nature of the discovery sought.

ELECTRONICALLY FILED - 2024 Nov 22 6:07 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs, v. 3M COMPANY, *et al.*, Defendants. ********** 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 Plaintiff, v. ANGLO AMERICAN PLCS, *et al*., Third-Party Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2023-CP-40-01759 **THIRD-PARTY DEFENDANTS MOHED ALTRAD & ALTRAD INVESTMENT AUTHORITY SAS'S LEGAL & PROCEDURAL OPPOSITION TO THE PURPORTED RECEIVER'S MOTION FOR SUMMARY JUDGMENT**

Third-Party Defendants Mohed Altrad and Altrad Investment Authority, SAS ("AIA") [collectively, the "Altrad Defendants"] respectfully submit this Legal and Procedural Opposition (the "Legal Opposition") to the Receiver's Motion for Summary Judgment Against the Charter and Altrad Third-Party Defendants (the "Motion").

First and foremost, this Legal Opposition is based on:

(1) the November 22, 2024 Judgment of the High Court of Justice of England and Wales (the "High Court of Justice"), in which the status, authority, and *ultra vires* actions of the Receiver were reviewed and addressed by the court with competent jurisdiction over Cape

Intermediate Holdings Limited ("CIHL"), the entity purportedly in receivership here (the "2024 Judgment"); and

(2) the accompanying November 22, 2024 Order of the High Court of Justice refusing to recognize the purported CIHL receivership; finding that CIHL has not submitted to the jurisdiction of the State of South Carolina; making five dispositive declarations; and issuing five categories of injunctions against Mr. Protopapas, as an unauthorized "Receiver" (the "2024 Order").

Conclusively, the 2024 Judgment and the 2024 Order—both of which are further detailed below—included ***declarations*** that this purported Receiver has ***no authority*** to act and ***injunctions*** enjoining and restraining this purported Receiver from so acting ***worldwide—including in South Carolina***, including in this ***specific Tibbs case*** and the ***earlier Park case***, and including in ***any legal proceedings*** here or elsewhere. Within these binding rulings, the 2024 Order specifically declared that the purported Receiver has and had no power of authority to bring the Third-Party Complaint ("TPC") against the Altrad Defendants or anyone else and that Mr. Protopapas is enjoined from continuing to prosecute the TPC. The 2024 Judgment further found that because the purported Receiver has no authority, his actions are ***tortious*** and, accordingly, he is subject to liability as an "***impostor***." The clear result of the 2024 Judgment and the 2024 Order is that this case is over; the Motion cannot be granted; and the purported Receiver's improper quest for a "reckoning" has ended.

Secondarily, as a matter of completeness and preservation, while the Altrad Defendants need not advance beyond the 2024 Judgment and the 2024 Order to prevail against the imposter "Receiver's" Motion and end this case, this Legal Opposition further attempts to outline the numerous legal and procedural improprieties with the pleadings, procedure, and manner in which

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the Receiver is attempting to litigate this case without due authority; outside the bounds of the law; in full denigration of the United States and South Carolina Constitutions; and contrary to the historical and recent declarations of a court with competent authority over the entity(ies) purportedly in receivership here.

The combined effect of what is outlined herein requires that this Court—which has been seemingly been misled throughout by both the Receiver and those seeking his appointment and appears to have been a victim of a lack of candor and misrepresentations—either deny the Motion and dismiss this action in its entirety as a matter of law or, alternatively, refuse to hear and/or rule on the Motion.

This Legal Opposition should in no manner, and under no circumstances, be construed as submission to the jurisdiction of this Court; acknowledgement of validity of this Court's authority and/or jurisdiction over either Mohed Altrad or AIA; or be viewed in any way as a waiver of the continuing objections to the exercise of personal jurisdiction over the Altrad Defendants or to this Court's and the Receiver's breach of Rule 205's provision of "exclusive jurisdiction" to the appellate courts regarding the subject matter of this dispute.

In addition to the grounds contained herein, this Legal Opposition is further based on all pleadings, filings, motions, objections, appellate filings and designations, briefs and memoranda, federal and state jurisprudence, federal and state constitutional law, statutory authority, and any other material properly before this Court, the South Carolina Court of Appeals, the Supreme Court of South Carolina, any court with competent jurisdiction over the entity(ies) purportedly in receivership, or as was otherwise submitted in the federal court proceedings bearing case number 3:24-cv-03771-MGL, all of which is incorporated herein. The Altrad Defendants also incorporate

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by reference and adopt the arguments advanced by any other party, as applicable to them, in response to the Motion, or otherwise.

BACKGROUND

On Friday, November 8, 2024, the fictive "Receiver" (hereinafter, simply referred to as the "Receiver" for simplicity, and not out of any concession as to his authority to act, of which there is and has been determined to be ***none***)—who purports to act on behalf of Cape PLC and CIHL, both of which are active, foreign, solvent entities, with no connection to South Carolina—filed a Motion for Summary Judgment against two sets of "third-party" defendants. The instant Motion is merely a continuation of a long string of other abusive, vexatious, oppressive, unconscionable, and unconstitutional actions taken thus far, a brief and incomplete compilation of which follow.

The direct issues in this case—*Tibbs*—began with the fraudulent and *ultra vires* TPC that was filed June 30, 2023, even though—pursuant to a secret agreement between counsel for the *Tibbs* Plaintiffs and the Receiver executed weeks earlier—the first-party claims, from which the TPC was supposedly derived, were agreed to be dismissed against Cape PLC / CIHL (the "Dismissal Agreement"). With the Dismissal Agreement hidden, the Receiver—who, based on the very nature of such purported appointment, was to be an "officer of the court" and a "representative of all" and was required to remain "entirely impartial"—filed the TPC seeking a purported "reckoning" relative to Cape PLC (but not CIHL) for, stated plainly, an attempted cash grab of an imagined "billions of dollars of past, present, and calculable future damages."

However, the procedural shortcomings that have plagued this receivership from the start began in a completely different case: *Park*. Months after counsel for the Parks family represented to the circuit court that the case was "fully resolved," those lawyers nevertheless sought a receiver over Cape PLC (only), apparently believing Cape PLC to be the successor to "Cape Asbestos."

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Of course, at the time, counsel for the Parks knew that Cape PLC and CIHL were two different entities, as they intentionally named both in their pleadings: CIHL was added as part of the First Amendment to the *Park* Complaint, while Cape PLC had been an initially named defendant.

Compounding the error, pleadings were never duly served, proper notice or service of a motion seeking a receiver was not given (even though it was statutorily required), and the purported foundations on which a receiver was sought were fraught with inaccuracies and misrepresentations. Rather than attempt to comply with South Carolina law and constitutional due process, the "drastic remedy" of a receiver appointment was sought and made—without a hearing and without taking evidence—in the face of defective service, lack of notice, no provision for the posting of a bond, no judgment, no creditors, and no basis in law for such a receivership. Notwithstanding these obvious fatal defects, the *Park* Order appointing the Receiver was clear (notwithstanding its unlawful and fictive nature): the Receiver was appointed *only* in *Park* and *only* as to Cape PLC; accordingly, the Receiver had *no authority* outside of *Park*; the Receiver had *no authority* as to CIHL or any other affiliated entity; and, in all respects, the Receiver was required to "take any and all steps necessary *to protect the interests of Cape* whatever they may be." (Emphasis added).

But, as an imposter acting without due authority, the Receiver has done precisely the opposite and has taken any and all actions he can surmise to *obliterate* the "interests of Cape" rather than *protect* them.

Seeking to export his *Park*-only appointment, the Receiver flaunted the *Park*-ordered limitations by taking *ultra vires* action in *Tibbs* and purporting to bring third-party claims on behalf of Cape PLC—"derivative" to nothing by virtue of the impact of the Dismissal Agreement—under obviously inapplicable piercing-the-corporate-veil, alter-ego, amalgamation / single-business-

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enterprise, and related theories centered on a historical relationship between Cape PLC / CIHL and the North American Asbestos Corporation ("NAAC").

Not only are his styled "equitable theories"—disguisedly seeking billions of dollars in legal damages—inapplicable, but the Receiver is also barred or otherwise estopped from asserting them. Why? Because:

- ***First***, because the 2024 Judgment and the 2024 Order has ***declared*** that Mr. Protopapas, as purported Receiver, has and had no power or authority over CIHL ***worldwide*** (including South Carolina) and no power or authority to file the TPC or pursue the claims alleged therein and further ***enjoined*** him from acting or purporting to act on behalf of CIHL, under any authority, and from continuing to prosecute the TPC.

- ***Second***, because each of these "equitable theories" was directly addressed and categorically rejected, on nearly identical facts, in a 34-day trial and a subsequent 17-day appeal decades ago in the United Kingdom in *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA) [hereinafter, "*Adams*"], which *Adams* decision has now been further reaffirmed and enforced by virtue of the 2024 Judgment and the 2024 Order.

Instead of bringing forth the extensive legal and factual findings of the Court of Appeal of England and Wales in *Adams*, and respecting principles of international comity—as one would expect, as the law unequivocally requires from an "officer of the court" with a duty of candor (in addition to the same owed as an attorney) who has been charged with the responsibility of "tak[ing] any and all steps necessary to protect the interests of Cape"—the imposter Receiver has ignored and obfuscated them completely.

In response to the filing of the *ultra vires* TPC in *Tibbs*, the Altrad Defendants and others objected on a number of substantive and procedural grounds, including on the basis that the Cape

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PLC receivership was improperly created and ported from *Park* into *Tibbs* based on a host of inaccuracies and misrepresentations; was unconstitutional and unsupported by applicable law; and was foundationally defective, including because it was sought and granted over the wrong entity. Rather than concede these obvious these foundational issues, the Receiver doubled-down, asking this Court for a retroactive modification and entirely new appointment blurring the lines between reality and the Receiver's TPC fiction to allow him to act as a receiver on behalf of CIHL instead. No order appointing a receiver over CIHL had been entered in *Tibbs* or in *Park*. Yet, on December 6, 2023, the Court granted the Receiver everything he asked for—in the 74-page Order of his own drafting that was entered without a single material modification—notwithstanding the fact the Receiver's requests were at complete odds with applicable law, were wholly inconsistent with the very notion of an "impartial" receivership, and, again, were completely contrary to the well-established findings in *Adams* and now also to those made and reaffirmed as part of the 2024 Judgment and the 2024 Order.

Since that time, and due to the obviously fatal nature of these defects, the Receiver has embarked on a mitigation campaign, with the apparent aim of intentionally establishing or otherwise conceding jurisdiction, liability, and damages on behalf of CIHL (and others)—again in the scenario of an unlawful *pre-judgment* receivership. Even more amazingly, through a series of correspondence and filings at the appellate courts, counsel for the Receiver have regularly and repeatedly espoused feigned indignation and anger to the Third-Party Defendants' pursuit and preservation of legitimate defenses and constitutional protections, including those that the Receiver himself *should* be mounting as part of his charge to "protect the interests of Cape"—a charge he seems to have abdicated wholesale. At no point has the Receiver refuted the argument that his appointment and his actions, including pursuit of this Motion, violate various constitutional

provisions, including the Commerce and dormant Commerce, Takings, Due Process, Equal Protection, Excessive Fines, Import–Export, and Supremacy Clauses of the U.S. Constitution. At each turn, the Receiver has sought to avoid altogether the merits of those issues and many others.

As is their statutorily prescribed right, the Altrad Defendants have sought neutral and immediate appellate review based on clear South Carolina law. The effect of those appeals should have halted all action in this Court. Yet, rather than follow the law or seek to protect the interests of the entity(ies) in receivership, the Receiver has continued his pattern of *ultra vires* actions to do the exact opposite. He argues time is of the essence on numerous occasions, but can point to no active creditors of CIHL (or Cape PLC) in South Carolina, let alone any assets within its territorial limits—nor will there ever be. And for months, as a product of the now-disclosed Dismissal Agreement, counsel for the *Tibbs* have repeatedly represented to this Court that Cape PLC and CIHL are not defendants in the underlying first-party asbestos action.

Undeterred by these self-evident truths, the Receiver hurriedly sought and obtained, in contravention of South Carolina law: (i) the "pre-admission" of 2,538 exhibits as being genuine—as to *some*, but not all of the Third-Party Defendants—and (ii) adverse inferences—riddled with errors and legal impossibilities—short-circuiting the entirety of the Receiver's claims in a scheduled bench trial before this Court, even though the Altrad Defendants had requested, are entitled to, and have been deprived of their jury trial rights. The Receiver then sought and obtained a permitted recovery of attorneys' fees and costs incurred relative to bringing certain specific discovery motions over a finite period of time; however, in response to this Court's request that the Receiver submit additional information, the Receiver submitted redacted invoices, from three law firms, seeking over $2.5 million for fees and costs dating back to the inception of this case.

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While this attempt to improperly monetize seemingly stalled, the Receiver was separately notified of the conclusiveness of the long-established *Adams* judgment and the impropriety of his *ultra vires* actions, this time by Winston & Strawn *London*, attorneys for CIHL and Cape PLC. As part of this proper notice, the Receiver was invited to participate in proceedings before an appropriate forum—a judiciary actually having jurisdiction over the foreign entities purportedly in receivership here. Instead of accepting this invitation, the Receiver:

- slammed the door in the process server's face and threatened him with trespass;
- sued Winston & Strawn *USA*, seeking declarations that it violated South Carolina Rules of Professional Conduct, attempted to obstruct justice and interfere with the due administration of justice, attempted to extort the Receiver, and committed a fraud on the Court;
- sought to oppose duly initiated proceedings in the United Kingdom by seeking to have this Court intervene—an invitation for *ex parte* contact that this Court rightly declined—and by filling the record here with "Notices" of foreign filings, in an apparent effort to fight them *in absentia*; and
- returned to the *Park* case—in which neither the Altrad Defendants nor any of the other *Tibbs* Third-Party Defendants are parties—to have the *Park* Court "clarify" *ex post facto* that everything the Receiver had done in *Tibbs* and elsewhere was approved (all without a hearing; without compliance with Rule 6(d), SCRCP; and even though active, unopposed dispositive motions of a third-party defendant in *Park* had been pending for fourteen months and remain so).

With knowledge of the proceedings set to be held before the High Court of Justice of England and Wales during the week of November 11, 2024—which have now concluded and resulted in the issuance of the dispositive 2024 Judgment and the 2024 Order—the Receiver has filed (i) an opposed Motion for Leave to Amend Third-Party Complaint to plead a separate claim

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for purported "amalgamation" (the "Proposed Am. TPC") and (ii) the instant Motion, seeking summary judgment on its "various successorship or veil piercing theories," prematurely inclusive of the not-yet-live amalgamation claim the Receiver desires to add a year-and-a-half after first bringing this improper action and months before his requested accelerated trial date.

Simply put and as recognized in the 2024 Judgment and the 2024 Order, the imposter Receiver is acting, *ultra vires*, on behalf of an unlawful receivership having no validity under South Carolina law or constitutional authority, which the Court—as a victim of compounding misrepresentations and falsehoods and unfulfilled duties by its purported "arm of the Court"—has empowered and let run amok to the damage of all caught up in the wake of this impropriety. The receivership fallacy must end, and the laws of South Carolina and the United States, as well as long-settled precedent that fully discredits the now-enjoined Receiver's "alter ego" theory, must be enforced.

ARGUMENT

Given the improprieties described above, and for the additional reasons detailed below in "Part One" and "Part Two" of this Argument section, the Receiver's Motion is improper and should be denied or otherwise refused. For preservation purposes, the first reason why the Motion should be denied is straightforward: the Court has no personal jurisdiction over the Altrad Defendants (*see also* Argument Part Two # IV, *infra*). The Altrad Defendants incorporate by reference the entirety of their prior motion to dismiss for lack of personal jurisdiction, and reiterate those same arguments here. There are exactly zero facts in the record that could possibly support a finding of personal jurisdiction over either Mr. Altrad or AIA—there aren't any alleged in the Receiver's pleadings, there aren't any contained in the "presumptions," and there aren't any in reality, either. Accordingly, the Court should deny summary judgment—and instead dismiss this

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case for want of personal jurisdiction, which the Altrad Defendants have maintained throughout this case.

Additionally, as set forth in Argument Part One, this case must end (and the Motion denied) as to the Altrad Defendants and all others as a result of the 2024 Judgment and the 2024 Order, which mandate this result because the receivership itself is improper and has no legal effect ***worldwide***, the imposter Receiver has no authority to act on behalf of CIHL ***worldwide***, the imposter Receiver is now enjoined for continuing to pursue this case or any others on behalf of CIHL ***worldwide***.

Similarly, *Adams*—a seminal ruling involving CIHL which was reaffirmed and given effect through the 2024 Judgment and the 2024 Order—is likewise dispositive of the entirety of the Receiver's claims; *Adams* is likewise binding precedent or should otherwise be recognized and enforced by this Court; and the Receiver is likewise barred or otherwise estopped from pursuing this unlawful and *ultra vires* campaign to negate *Adams* and circumvent the relief granted in the 2024 Judgment and the 2024 Order, counter to the best interests of CIHL and Cape PLC (*see* Argument Part Two # I, *infra*).

Moreover, as independent, alternative grounds, summary judgment should be denied because: (i) application of Rule 205, SCACR, divests this Court of jurisdiction and authority to proceed, including as to the Receiver's Motion (*see* Argument Part Two # II, *infra*); (ii) as a result of the Dismissal Agreement, this case has always been and remains an improper "derivative" action under Rule 14, SCRCP, which should continue no longer (*see* Argument Part Two # III, *infra*); (iii) this Motion is premature given the still-in-limbo Proposed Am. TPC and the supposed "rebuttable" adverse inferences the Receiver now seeks to make non-rebuttable (*see* Argument Part Two # IV, *infra*); and (iv) a host of other reasons exist as to why this Court cannot rule on the

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Motion, must deny it, or should dismiss this action entirely, each of which have been previously raised and are hereby renewed (*see* Argument Part Two # V, *infra*).

PART ONE
THE 2024 JUDGMENT & 2024 ORDER—RECEIVERSHIP VOID; IMPOSTER RECEIVER ENJOINED

On November 22, 2024, the only court with proper jurisdiction over CIHL to have reviewed this receivership issued the 2024 Order (attached as **Exhibit A-1**) and the 2024 Judgement (attached as **Exhibit A-2**). The effect of the 2024 Order and the 2024 Judgment is clear—***this case was never proper and must end immediately***.

The High Court of Justice's reasoning is clear and unequivocally confirms what every Third-Party Defendant has been saying for the entirety of these proceedings: ***the Receiver has no authority to act on behalf of CIHL, including, in bringing and continuing to prosecute this third-party action and this Motion***.

Effective immediately, the only court with competent jurisdiction to rule on matters regarding authority to bind and act on behalf of CIHL has ruled as follows:

> **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.

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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.

Ex. A-1, at p.2–3 (bolding in original). This leaves no room to arrive at an alternate conclusion—

nothing more can occur here.

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After duly serving the imposter Receiver with process and copies of the relevant filings, to which no response was ever made (excepting the Receiver's "notice filings" in this Court), the High Court of Justice held a trial between November 12 and 14, 2024. The Honorable Mr. Justice Mann, who presided over the trial, issued his judgment on November 22, 2024. As a part of the proceedings, as is evident through the 2024 Judgment, the court considered: (1) witness statements from CIHL executives and their authorized counsel; (2) an expert witness report from the Honorable William W. Wilkins, retired Chief Judge of the United States Court of Appeals for the Fourth Circuit; (3) a vast majority, if not all, of the filings before this Court in this "third-party" action; (4) the *Adams v. Cape* judgment, appeal, appendix, and other related materials (which are further described in Argument Part Two #1); (5) and other such related documents, including filings and correspondences in the long-resolved *Park* matter, subpoenas to expert witnesses, threatening correspondences to the Winston & Strawn law firm, filings related to Locke Lord, LLP, removal filings, and other material relevant to the Receiver's constant overreaches of his purported and ill-gotten authority.

With that mass of material, the High Court of Justice approached the requests of CIHL, which were to rule that: the receivership order has no effect; Mr. Protopapas has no power or rights over CIHL or Cape PLC; he has no authority to act as a "receiver"; and that he be enjoined in England, Wales, and worldwide from interfering or usurping the rights and duties of CIHL, he be enjoined from further action in *Park* and *Tibbs*, and he be prohibited from acting on behalf of CIHL (and Cape PLC) in any legal proceedings.

It is with that foreground, and after what was clearly careful consideration including as to principles of comity, the High Court of Justice granted CIHL its requested relief in full. Not only

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did the High Court of Justice rule that the law of England or Wales would not recognize this receivership (*see* Ex. A-2, at p.63), but that:

> 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. [CIHL] is entitled to relief which will help protect it from the effects of that conduct, and that relief is a declaration.

Ex. A-2, at p.63–64.

The High Court of Justice also explored the Receiver's failure to bring to light the *Adams* judgment, questioning how a Receiver who has filed a general denial as an Answer on behalf of CIHL can then turn around and file a pleading (the TPC) which "basically sells the pass on issues of liability, responsibility and presence, quite contrary to the findings in the English proceedings." *Id.*, at p.33. The High Court of Justice analyzed the patent impropriety of the TPC, stating:

> 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.

Id.

The High Court of Justice acknowledged it does not sit for appeals of this Court's rulings, but rather, through the only law applicable to CIHL and taking into account principles of comity, the court ruled that the Receiver is committing the tort of "impostor" by acting as an agent of CIHL

without any authority recognized by the law. *Id.*, at p.56. In so ruling, the High Court of Justice noted a pattern—which has repeatedly been noted to South Carolina courts, but ignored—that the Receiver's actions "smack of a very aggressive approach which is surprising" and "give rise to a justifiable fear of unpredictability in his future steps" while pursuing litigation that entirely "seems to ignore and indeed contradict the careful findings of two English courts." *Id.*, at p.59.

Thus, the High Court of Justice ruled CIHL "should have injunctions to restrain the receiver from holding himself out as having general authority to act on behalf of CIHL." *Id.*, at p.66. The High Court of Justice noted that "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." *Id.*, at p.72.

On that basis, by virtue of the 2024 Order, the imposter Receiver is now ***enjoined and restrained from***: (1) on a ***worldwide*** basis, acting in any way related to CIHL; (2) on a ***worldwide*** basis, in any way interfering with or usurping the rights of CIHL; (3) acting in relation to ***Tibbs*** **and** ***Park***; (4) prosecuting the TPC (and, thereby, this Motion); and (5) acting on behalf of CIHL in Civil Action No. 2024-CP-40-06639 or any other legal proceedings. *See* Ex. A-1. Underpinning these rulings were declarations that the order appointing the Receiver is void and without effect worldwide, that the Receiver has no authority as to CIHL, that CIHL is unaffected by the purported appointment, and that he has no authority in *Park*, *Tibbs*, or otherwise relative to any of the named parties including to accept service or otherwise act. *Id*.

The effect of the 2024 Judgment in indisputable. Not only does it reaffirm *Adams*—which the Receiver has never put before this Court even though he was duty bound to do so—but more importantly, the 2024 Judgment also clarifies and confirms what the parties have known all along:

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the Receiver has no authority. Without any authority, he could never have acted for CIHL, including in filing the TPC or this instant Motion.

The immediate effect of the 2024 Judgment and the 2024 Order, of course, is this ***entire action must be dismissed***.

PART TWO
ADAMS & OTHER, ADDITIONAL DISPOSITIVE ARGUMENTS

As noted above, the 2024 Judgment and the 2024 Order are dispositive on a standalone basis. However, for the sake of completeness and to renew and preserve all arguments previously made in opposition to the imposter Receiver's *ultra vires* actions and an unlawful receivership, the Altrad Defendants submit that each and every of the below arguments are likewise dispositive of this Motion and this case on an independent, alternative basis.

I. *Adams v. Cape*

In *Adams* (which is further summarized in the 2024 Judgment, *see* Ex. A-2), a number of Texas plaintiffs filed suit in the High Court of Justice of England and Wales (the court of first instance, i.e., the trial court) seeking enforcement of a default judgment against CIHL (which at the time was named Cape Industries PLC) and related entities based on the actions of and relationship with NAAC. After an exhaustive trial and appeal, all courts agreed that ***CIHL is not the alter ego of NAAC***; there was no basis to pierce CIHL's corporate veil or impose vicarious liability on it; and CIHL could not be held responsible in the United States for any alleged conduct of NAAC. These findings—of which the Receiver must be aware and which he has not disclosed to this Court—are directly contrary to the allegations now asserted by him.

A. The *Adams* Judgment & Accompanying Materials

The ultimate 140-page *Adams* reported judgment, a copy of which is attached hereto as **Exhibit B-1** and incorporated herein by reference (the "*Adams* Judgment"), was the product of

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(i) a 34-day trial before the High Court of Justice spanning from February through July 1988 and (ii) a 17-day appellate process before the Court of Appeal of England and Wales spanning from April through July 1989, culminating with the appellate court affirming the trial court's decision in favor of CIHL (referred to as "Cape" in the decision) in all relevant and material respects and dismissing the plaintiffs' appeal.

The decision of Justice Scott (Scott J) for the court of first instance (i.e., trial court) is set forth on pages 441G–502H of the *Adams* Judgment, while the appellate judgment—issued by Lord Justice Slade (Slade LJ) on behalf of a panel of three Lord Justices of the Court of Appeal—is set forth on pages 504H–572F. *See* Ex. B-1. In places, this reported *Adams* Judgment refers to additional materials. For example, at page 512A (Ex. B-1), the appellate court referred to a "listing" of "primary facts" made by the trial court (Scott J), which is included in the unreported "Judgment of the Court," a full copy of which is attached hereto as part of **Exhibit B-2** and incorporated herein by reference. *See* Ex. B-2, at p.15–25 (containing 37 "primary facts" relevant to the contested issue of CIHL "presence" in Illinois) [hereinafter, the "Statement of Primary Facts"]; *see also* Ex. A-2, Appendix 1 to 2024 Judgment (further enumerating, in summary form, this Statement of Primary Facts).

Page 503B of the *Adams* Judgment (Ex. B-1) includes reference to the "grounds of appeal" of the plaintiffs against the trial court's decision in favor of CIHL; these "grounds" were listed in the plaintiffs' Amended Notice of Appeal, a full copy of which is attached hereto as **Exhibit B-3** and incorporated herein by reference. Within the plaintiffs' Amended Notice of Appeal is a "Schedule of facts which ought to have been found," setting forth in 25-numbered paragraphs (some containing subparagraphs) the factual basis of the plaintiffs' challenge to and appeal of the

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decision of the trial court (Scott J). *See* Ex. B-3, at p.6–12 [hereinafter, the "Schedule of Appealed Factual Findings"].

As specifically explained at page 512C–D of the *Adams* Judgment (Ex. B-1), the Court of Appeal directly addressed each of the plaintiffs' Schedule of Appealed Factual Findings in an unreported appendix to the appellate court's judgment (the "Appendix")—a full copy of which is attached hereto as **Exhibit A-4** and incorporated herein by reference. *See, e.g.*, Ex. B-4, at p.1 ("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."). Also, as part of the Appendix, the appellate court also referred back to the trial court Statement of Primary Facts (Ex. B-2). *See, e.g.*, *id.* at p.1 ("We will refer to the section of this judgment headed 'The facts on 'presence' as found by Scott J.' as the 'primary facts section.'").

Like the 2024 Judgment and the 2024 Order (Exs. A-1 through A-2), the *Adams* Judgment and the accompanying, compiled bundle of materials (Exs. B-1 through B-4) are of paramount importance and consequence in this case and this Court's purported jurisdiction thereunder; the faulty foundations of the Cape PLC (and CIHL) receivership(s) and the Receiver's authority (or lack thereof) thereunder; and the Receiver's TPC and Proposed Am. TPC and the claims asserted therein. As detailed above relative to the 2024 Judgment and the 2024 Order and further discussed below, *Adams* is dispositive of both the Motion and this case *and* is binding or otherwise should be enforced. And the Receiver is barred or otherwise estopped from acting inconsistent with and inapposite to the 2024 Judgment, the 2024 Order, and *Adams* and from seeking to undermine and overturn its conclusive findings made in favor of the entity over which the Receiver should—and is required, by appointment mandate and South Carolina law, to—be protecting.

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B. *Adams*—Like the 2024 Judgment & 2024 Order—Is Dispositive.

The core issues in *Adams* were: (i) whether CIHL was present in the United States (in Illinois), directly or indirectly via NAAC or another entity such that jurisdiction could be exerted over CIHL; and (ii) as extensions thereof, (A) whether NAAC or another was CIHL's agent/alter-ego, (B) whether NAAC, CIHL, and others were part of a single-business enterprise or amalgamated unit, and (C) whether the corporate structure of CIHL should be pierced or otherwise disregarded. After heavily contested proceedings, CIHL prevailed on *each and every one* of these core issues, which are precisely the same issues upon which the Receiver is pursuing his claims under alter-ego, amalgamation, and related piercing theories of derivative liability—improperly untethered to any active first-party action. *Compare* Ex. B-1, *Adams* Judgment (finding in CIHL's favor as to each of these issues) *with* TPC (alleging—purportedly on behalf of Cape PLC / CIHL—the exact opposite) *and* Proposed Am. TPC (same).

These issues—co-extensive of those in *Adams* and those retreaded here—were fully addressed as part of a complete and comprehensive factual record that was subject to thorough challenge and appellate review. As exemplified in the "Schedule of Factual Findings" attached hereto as **Schedule 1** and incorporated herein by reference, the Receiver—on behalf of the entity that prevailed decades ago—is seeking to recycle these same facts to support his fictional narrative and reach the opposite result, to establish or otherwise concede the jurisdiction (i.e., "presence") that both the trial and appellate court in *Adams* found to not exist, and to short-circuit liability and damages as part of a pursued "reckoning" for the recovery of billions of dollars. That is improper; *Adams*—like the 2024 Judgment and the 2024 Order—is wholly dispositive.

As additional highlighting on this point, both the *Adams* court of first instance and the appellate court found that CIHL was *not present* within the United States of America directly or

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indirectly through NAAC under any theory and further found (which was expressly reaffirmed in the 2024 Judgment and the 2024 Order), *inter alia*:

1. NAAC and CIHL were separate legal entities.

2. NAAC had no authority to behave or act on behalf of CIHL or any of its related entities.

3. NAAC carried on its own business.

4. NAAC was the direct purchaser of asbestos fibers, not from CIHL, but instead from Egnep Pty. Ltd ("Egnep") and Cape Asbestos South Africa (Pty.) Ltd. ("Casap")—entities that were sold to a South African entity, Transvaal Consolidated Exploration Co. Ltd in 1979.

5. All NAAC did was assist in sale of asbestos. That was not enough to find action on behalf of CIHL.

6. There was no evidence of any control by CIHL over NAAC's commercial activities.

7. The corporate form and formalities of the "Cape Group," including as to NAAC, were observed. Each member of the group had its own commercial functions which were well-defined and provided no basis for veil-piercing.

8. Any allegation of impropriety by the plaintiffs that the liquidation of NAAC was intentionally and "rightly abandoned."

The conclusions reached and affirmed in *Adams* are crystal clear as to CIHL and its relationship with NAAC and others—no alter ego, no single-business enterprise or amalgamated unit, and no basis to pierce or otherwise disregard the corporate form, as exemplified by the following excerpts:

> There is *no reasonable basis*, in my view, for regarding [NAAC] as the alter ego of Cape. . . . 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 [NAAC] and Cape.
>
> ***

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> [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*.
>
> ***
>
> The plaintiffs submitted (paragraph 7 of their notice of appeal) that the motive of the defendants in setting up the arrangements regarding [NAAC and others] as revealed in the documentary evidence were "consistent only with an acceptance by Cape that they were present in the United States through [NAAC] . . . ." 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*.
>
> ***
>
> [I]n our judgment, *it is indisputable* that at very least a substantial part of the business carried on by [NAAC] at all material times was in every sense its own business.

In sum, these factual findings and conclusions of law (that have now been reaffirmed as part of the 2024 Judgment and the 2024 Order) are wholly dispositive of the Receiver's claims. Put simply, the Altrad Defendants cannot be responsible for "Cape's Asbestos-Related Liabilities" in the United States—under any theory or unsupportable claim of "express assumption"—where *Adams* found there was no such CIHL responsibility in the first place. *See* Mot., at p.67–75; *see also* Ex. A-2, 2024 Judgment (reaffirming finding of no responsibility). Not only should his Motion be denied, but this illusory and unlawful case—based on issues that have already been fully litigated and decided—should be dismissed.

C. *Adams*—Like the 2024 Judgment & 2024 Order—Is Binding or Otherwise Should Be Recognized and Enforced.

Statutorily, the *Adams* judgment, the 2024 Judgment, the 2024 Order, and the principles of law relied on therein as well as created as a result—a part of the common law of England—are

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already "in full force and effect" in South Carolina by virtue of the "Reception Statute." *See* S.C. Code Ann. § 14-1-50 ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section."). Accordingly, the Court should enforce *Adams* (in addition to the 2024 Judgment and the 2024 Order) as binding authority, the result of which, as stated above, should be the denial of the Motion and the dismissal of the Receiver's claims.

Alternatively, even if not rendered binding as a result of application of the South Carolina Reception Statute, this Court should nevertheless recognize and enforce these dispositive judgments pursuant to general principles of comity, the result of which is the same: the denial of the Motion and the dismissal of the Receiver's claims. *See, e.g.*, *S.C. Nat'l Bank v. Westpac Banking Corp.*, 678 F. Supp. 596, 598 (D.S.C. 1987) (explaining that courts in the United States apply principles of comity to determine the effect of foreign judgments (quoting *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895))). In the seminal *Hilton* case, the United States Supreme Court explained the standards to be assessed and applied when recognizing and enforcing foreign judgments:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

159 U.S. at 202–03. *Hilton* "remains the standard," and as the South Carolina district court explained in *S.C. Nat'l Bank*:

> Following these principles, courts will generally recognize and enforce the judgments of foreign courts if (1) the foreign court had personal and subject matter jurisdiction; (2) the defendant in the foreign action had adequate notice and opportunity to be heard; (3) the judgment was not obtained by fraud; and (4) enforcement will not contravene important public policy.

678 F. Supp. at 598 (citation omitted) (concluding that Australian judgment should be recognized and enforced); *see also Bluewave Boat Rentals Ltd. v. Collins*, No. 2:16-CV-01043-DCN, 2016 WL 5720146, at *2 (D.S.C. Oct. 3, 2016) (citing *S.C. Nat'l Bank* and *Hilton* and applying same four factor test).

Each of these four factors is clearly satisfied here with respect to *Adams* (and are equally satisfied with regard to the 2024 Judgment and the 2024 Order). *First*, CIHL is an English company, and the *Adams* plaintiffs brought their case in England; thus, the *Adams* court had personal and subject matter jurisdiction—there was and can be no argument or contest about it. *Second*, it is clear that all parties (inclusive of CIHL, a defendant) in *Adams* had adequate notice and a full opportunity to be heard, including as evidenced by the fact that the trial extended 34 days and the subsequent appeal extended another 17 days. At both stages, it was conclusively determined that CIHL was not "present" in the United States either directly or through the acts of or relationship with its subsidiaries, including NAAC. *Third*, there are no allegations that the *Adams* judgment was obtained by fraud, nor could there be—the *Adams* plaintiffs brought their case, decades ago, and lost after a lengthy trial and a lengthy appeal on a developed record. *Fourth*, and finally, enforcement of *Adams* will not contravene important public policy; instead, it is entirely consistent with the important public policy of this state to enforce long-established English common law—specific to the very CIHL entity over which the Receiver purports to act and the

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very facts the Receiver has warped to match his fiction and further his crusade—so as to, *inter alia*, end an unlawful and unconstitutional receivership with an improper extraterritorial aim and ensure that traditional, personal jurisdiction notions of fair play and substantial justice are given effect and preserved.

The Motion should be denied and this case ended. Anything short of these required results will necessarily mean that this Court has refused to apply binding English common law via the South Carolina Reception Statute or to otherwise recognize and enforce the recent judgment of a court of competent jurisdiction over CIHL, as well as a well-established and decades-old English judgment that was the product of a lengthy trial and a long appeal pursued by United States plaintiffs against CIHL concerning the very same facts and circumstances upon which the Receiver (for CIHL) now—through diametrically opposed arguments as determined in CIHL's favor in *Adams*—seeks billions-of-dollars as part of a self-proclaimed "reckoning."

D. In Addition to Being Enjoined, the Receiver Is Barred or Otherwise Estopped.

Not only is both (i) the 2024 Judgment and the 2024 Order and (ii) *Adams* binding authority or should otherwise be recognized and enforced as such by this Court, but the Receiver—in addition to now being enjoined and restrained from taking any further action—is also barred and estopped from contesting otherwise, taking inconsistent position to those successfully taken by CIHL in *Adams* or relative to the 2024 Judgment and the 2024 Order, and relitigating the same issues fully addressed therein.

Judicial Estoppel

Under the judicial estoppel doctrine, as firmly recognized by the United States Supreme Court:

> "[W]here 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."

New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); 18 Moore's Federal Practice § 134.30, p. 134–62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."). This same doctrine is recognized in South Carolina and applied using the following five elements:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013); *see also Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–52, 489 S.E.2d 472, 477 (1997) (Toal, C.J.) ("We now explicitly adopt the doctrine of judicial estoppel as it relates to matters of fact (not law). . . . In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.").

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Applying this doctrine, CIHL—the prevailing party in *Adams* and relative to the 2024 Judgment and the 2024 Order—is the same CIHL entity this Court has deemed the Receiver to be representing and pursuing his claims in this case. The positions successfully taken by CIHL in *Adams* and now relative to the 2024 Judgment and the 2024 Order are completely counter to the positions the Receiver is pursuing here, a related proceeding by virtue of the subject matter and identical factual allegations involved. *Compare* Exs. A-2 through A-2; Exs.B-1 through B-4; *and* Schedule 1 (CIHL prevailing) *with* TPC and Proposed Am. TPC (Receiver alleging the opposite); *see also Hayne Fed. Credit Union*, 327 S.C. at 251–52, 489 S.E.2d at 477 (interpreting broadly the "same or related proceedings" requirement).

By taking and succeeding on its positions in *Adams* and relative to the 2024 Judgment and the 2024 Order, CIHL received a clear benefit—recognition that it was not present in the United States, thereby preventing a court in the United States—including this Court—from finding personal jurisdiction over it and subjecting it to liability where it had no business, assets, or property. Further, by pursuing these "derivative" claims untethered to any direct tort claims and by failing to raise *Adams*—let alone even mentioning it—as an "officer of the Court" expressly charged with protecting CIHL's interests, the "inconsistency" appears to be part of an effort to mislead this Court. Unquestionably, *Adams* and what is being alleged and sought here are "totally inconsistent" and diametrically opposed. *See, e.g.*, *Wright v. Craft*, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct. App. 2006) (citation omitted) (explaining "totally inconsistent" as meaning "the truth of one position must necessarily preclude the veracity of the other position"). Each of the requisite elements are satisfied; judicial estoppel bars the Receiver from pursuing or prevailing on the Motion, let alone continuing on with this case based on "totally inconsistent" factual allegations.

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Collateral Estoppel

In addition to judicial estoppel, application of the collateral estoppel doctrine (i.e., issue preclusion) results in the same outcome. Parties are prohibited from relitigating issues decided in previous actions, regardless of whether the claims in the first and subsequent lawsuits differ. *Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189–90 n.1 (Ct. App. 1984)). Early use of collateral estoppel required mutuality of parties between the two suits, but modern courts have lessened that restriction, as have South Carolina courts. "In dispensing with the mutuality requirement, our courts have applied collateral estoppel only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Id.* (citation omitted).

As detailed above, the issues in the Receiver's present lawsuit were actually and fully litigated and directly determined in *Adams* and reaffirmed as part of the 2024 Judgment and the 2024 Order. *See* Ex. B-1 through B-4; *see also* Ex. A-1 through A-2. Additionally, the findings that CIHL was not present in the United States; that CIHL did not supply asbestos to the United States; and that CIHL and NAAC were not alter egos, they were not part of a single economic unit or amalgamated enterprise, and there was no basis to pierce or otherwise disregard the corporate form, where necessary to support the *Adams* judgment. *See* Ex. B-1, *Adams* Judgment, at 474F–H, 531G–532C, 538G–H, 544G–H, 545G, 547E. Here again, collateral estoppel requires that the Motion be denied and the Receiver's claims dismissed.

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Whether by application of judicial or collateral estoppel this required result is the same—denial of the Motion and dismissal of this frivolous lawsuit, which should never have been initiated in the first place. As an "officer of the Court," the purported Receiver violated his duties to be a "representative of all" and to remain "entirely impartial"; his duty of candor to this Court; and his obligation to "protect" the interests of the entity(ies) supposedly in receivership by failing to raise *Adams* and its relevant "packet of materials." Those clear violations cannot and should not be rewarded by granting the Receiver's Motion and letting this case proceed any longer.

II. Rule 205, SCACR.

As an independent, alternative basis, pursuant to Rule 205, SCACR, this Court is entirely divested of all jurisdiction and authority to make the requisite fact-based findings—directly contrary to those made in *Adams* and now relative to the 2024 Judgment and the 2042 Order—necessary for a ruling on the Receiver's Motion. This Rule 205 argument has been briefed repeatedly, and while no appellate court has yet answered the question as applied here, South Carolina law makes clear that Rule 205 bars further action, the Receiver should not have even made the Motion, and this Court must refuse or otherwise deny it on this basis.

Rule 205 reads, in its entirety:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR. As is clear from its terms, the service of a notice of appeal brings about two effects. The first is that the appellate court has exclusive jurisdiction over the appeal. *See id.*; *see also Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, et al.,

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Appellate Practice in South Carolina 121 (3d ed. 2016) (explaining that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon the service of the notice of appeal"). The second is that the lower court may proceed in only two scenarios, neither of which apply here; the lower court may proceed with (i) petitions for writs of supersedeas under Rule 241, SCACR, and (ii) "matters not affected by the appeal." Rule 205, SCACR. There are no exceptions to Rule 205.

The Receiver's ability to even pursue this action in the first place and this Court's ability to exercise personal jurisdiction over the Altrad Defendants—including fundamental issues relative to his appointment and continued authority—remain on appeal before South Carolina appellate courts and, thereby, prevent this Court from taking action on the Motion. *See, e.g.*, *id.* (providing that "[u]pon the service of the notice of appeal, the appellate court shall have *exclusive jurisdiction* over the appeal" (emphasis added)); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '*matters affected by the appeal*'" (emphasis supplied by the Supreme Court) (quoting *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012))); *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal."); *Arnal v. Fraser*, 371 S.C. 512, 641 S.E.2d 419 (2007) ("Rule 205, SCACR, provides the appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal."); *Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Tillman*, 398 S.C. at 255 & n.3, 728 S.E.2d at 51 & n.3 (reiterating that "[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal," and explaining that this rule "deprives the lower court of

the power to address a particular issue, or 'matter,' during the pendency of the appeal"); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter.").

III. Rule 14, SCRCP; Dismissal Agreement.

As a separate, independent, and alternative basis (which, like personal jurisdiction and Rule 205, has been repeatedly briefed), by virtue of the Dismissal Agreement and the representations of the Tibbs' counsel, this illusory case has always been and remains an improper "derivative" action under Rule 14, SCRCP, which should continue no longer. *Compare* Rule 14, SCRCP(a) ("[A] defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him*." (emphasis added)) *with* TPC (asserting zero properly derivative claims in light of the Dismissal Agreement) *and* Proposed Am. TPC (same).

It is objectionable and, in fact, nonsensical to conceive of granting summary judgment on claims set forth in an illusory pleading. It remains a legal impossibility for the Altrad Defendants to be liable to Cape PLC/CIHL—under any theory or cause of action—for all or part of the *Tibbs* Plaintiffs' non-existent claims against Cape PLC/CIHL. *See* Rule 14, SCRCP; *see also Uptagrafft v. United States*, 315 F.2d 200, 202 (4th Cir. 1963) ("The right to bring in such third party exists only when the third party 'is or may be liable to him for all or part of plaintiff's claim against him.'"); *CNH Indus. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. 2017) ("It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff's claim" (quotation omitted)); *Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006) ("The third-party statute does not contemplate an institution of a new cause of action against a third-party defendant in which the

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third-party defendant is liable to the defendant on a cause of action independent of the original cause of action; rather, the statute intends that the third-party defendant be liable to the defendant for such damages for which the defendant may be liable to the plaintiff. . . . [A] third-party claim is only viable where a proposed third-party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third-party defendant is derivatively liable and must reimburse me for all or part of anything I must pay plaintiff.'" (citations and internal quotation marks omitted)); *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) ("The outcome of the principal claim must impact the third-party defendant's liability[.]"); *see also Travelers Prop. Cas. Co. of Am. v. M.B. Kahn Constr. Co., Inc.*, No. 3:20-CV-01304-SAL, 2021 WL 1177861, at *29 (D.S.C. Mar. 29, 2021) ("Third-party claims require a very specific connection to the original claims—derivative liability. The third-party claim must be 'derivative' of the plaintiff's claim because [d]erivative liability is central to the operation of Rule 14. Such a claim says, [i]f I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third-party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff." (internal quotations and quotation marks omitted)).

IV. Prematurity.

As a further independent, alternative basis for this Court to deny or otherwise refuse the Motion, summary judgment is premature in relation to the Proposed Am. TPC and its separate purported claim for "amalgamation" as well as to the interplay with the supposed "rebuttable" adverse inferences a dispositive ruling on the Motion in favor of the Receiver would work to make non-rebuttable. Though futile, the Proposed Am. TPC—which seeks to add a "Fifth Cause of Action," entitled "Amalgamation of Interests and Single Business Enterprise Liability"—is not yet

"live." *See* Rule 15, SCRCP. Yet, the Receiver nevertheless seeks summary judgment on such a claim. *See, e.g.*, Mot., at p. 53, 64. That is both premature and improper.

Similarly, the Receiver's Motion is premature given that it seeks to render "non-rebuttable" the adverse inferences granted in the Court's May 23, 2024 Order as purportedly being "rebuttable inferences." *See* Order, at p.16 (May 23, 2024). Granting summary judgment in favor of the Receiver would make it impossible for the Altrad Defendants to rebut the inferences made against them, including as to the ultimate claims being asserted. *Compare id.* at p.27–28, 29–31 (adverse inferences issued against the Altrad Defendants) *with* Mot. at p.67–75 (summary judgment sought on same basis). That too is both premature and improper.

V. Other Preserved & Renewed Reasons.

In addition to the foregoing, the Receiver's Motion should be denied or otherwise refused for each and every reason previously submitted by the Altrad Defendants to this Court and preserved in this case. For the sake of brevity, these other preserved grounds—renewed here in opposition to the Motion—are not set forth in the same detail, but, instead, the Altrad Defendants incorporate their prior, extensive briefing on the issues and provide the following summary:

A. The Court Lacks Personal Jurisdiction over the Altrad Defendants.

As noted at the outset of the argument, the Receiver's case must be dismissed—and this Motion must thus be denied—because of, *inter alia*, his: (1) failure to make a prima facie showing of personal jurisdiction as to the Altrad Defendants (nor as to Cape PLC / CIHL); (2) failure to assert any specific facts to establish either general or specific personal jurisdiction over the Altrad Defendants; and (3) failure to put forth anything beyond insufficient conclusory allegations, relative to his alter-ego and other related theories, as to the nature of any relationship between the

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Altrad Defendants and Cape PLC / CIHL or their historical subsidiaries or affiliates, especially and including NAAC.

At no point has the Receiver properly shown anything *remotely close* to personal jurisdiction over the Altrad Defendants, who have: (1) *never* resided in, been registered in, or had their principal place of business located within South Carolina; (2) *never* been in any business operation—at any time or in any place, including South Carolina—related to the milling, mining, production, manufacture, sale, or distribution of asbestos or asbestos-containing products; (3) *no* connection to or contacts with South Carolina; (4) *had no* direct or indirect affiliation or connection with Cape PLC, CIHL, or any direct or indirect subsidiaries thereof prior to 2017 (inclusive of NAAC); and (5) *had no* direct or indirect influence or control over any corporate entity, including, but not limited to, Cape PLC and CIHL. Additionally, neither of the Altrad Defendants have any business, assets, or property in South Carolina nor connection to this state.

This Court does not have personal jurisdiction over either of the Altrad Defendants, both foreign (French) residents. On this basis alone, the Motion should be denied, and this case dismissed.

B. The Court Lacks Subject Matter Jurisdiction, and the Receiver Has No Standing.

The Receiver has no standing, and, thus, the Court has no subject matter jurisdiction over the claims he seeks to have resolved, including for the following reasons: (1) Cape PLC is not the successor-in-interest to Cape Asbestos Company Limited; (2) the *Park* "receivership order" (procured over the wrong entity in a case that was fully resolved and thereafter twice improperly modified after the host of fatal errors were raised) purporting to appoint him receiver is unlawful for the various reasons detailed in the Altrad Defendants' briefing on their motions to dissolve receivership and the appeals flowing from this Court's December 6, 2023 Order thereon; (3) the

Receiver's "self-piercing" claims are not recognizable or supportable; and (4) the Receiver seeks an unlawful and expansive advisory opinion that cannot be reconciled with the Dismissal Agreement, specifically, and more generally with the limited scope of third-party practice in South Carolina. Here again, the Motion should be denied, and this case dismissed.

C. The Receiver Was Improperly Appointed over Cape PLC in *Park*; Thereafter, in *Tibbs*, the Receivership Was Improperly Modified and Continued or an Entirely New Receivership over CIHL Was Unlawfully Created; and, Subsequently, Back in *Park*, the Receivership Was Again Improperly Modified and Continued and One or More New Receiverships Were Unlawfully Created.

The unlawful receiverships—first over Cape PLC in *Park* (riddled with fatal substantive and procedural errors and constitutional violations and, thus, meaningless); then purportedly *nunc pro tunc* over CIHL in *Tibbs* (likewise, incomprehensibly defective); and now, by this Court's recent "clarification" in *Park*, purportedly extending to entities "related to or responsible for" CIHL—cannot continue. There was no supportable basis for the appointment of a pre-judgment receiver over either Cape PLC or CIHL under S.C. Code Ann. § 15-65-10. Subsection (4)—as has now been conceded—could not apply where neither Cape PLC nor CIHL had been dissolved, were insolvent or in imminent danger of insolvency, or has forfeited its corporate rights, and the subsection (5) "existing practice" basis is equally inapplicable; both cannot apply where an active, solvent, foreign entity has no assets, business, property, creditors, judgments, or connection in or to South Carolina. Equally, there was no lawful basis for the appointment of a custodian over either of these foreign entities, which the nature of this receivership and the Receiver's *ultra vires* actions taken to date seem to suggest is the as applied nature of this "receivership." S.C. Code Ann. § 33-14-320 (permitting the appointment of a custodian, with the power to manage the affairs of an active business, only with respect to *domestic* corporations). Substantively, the *Park* receivership appointment; the *Tibbs* receivership modification, continuation, and/or creation of an

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entirely new receivership; and the subsequent *Park* modification, continuation, and/or creation of one or more entirely new receiverships are statutorily improper and void, as now fully recognized by virtue of the 2024 Judgment and the 2024 Order.

In addition to these substantive grounds, the receivership appointments were and remain procedurally flawed. Cape PLC—a Bailiwick of Jersey entity—was never served with anything in *Park*. Likewise, even though CIHL—a U.K. entity—was a separately named defendant in *Park*, it too was not served with the operative "second amended" pleading, and, in violation of S.C. Code Ann. § 15-65-20, no proof of service has ever been submitted indicating that the Motion to Appoint Receiver had actually been served on CIHL (or Cape PLC, or any related entity). The only "proof" of service offered to date pertains to purported service of only the *summons* (not the complaint) pertinent to the inoperative "first amended" pleading, here again in violation of the South Carolina Rules of Civil Procedure. *See* Rule 4(d), SCRCP. And, the *Park* order of appointment—even as subsequently amended—fails to contain the mandatory "clause fixing the value of the property for which the bond may be given," rendering each appointment statutorily defective and void as a matter of law. *See* S.C. Code Ann. § 15-65-60.

D. These Receiverships Seek to Acquire Unlawful Extraterritorial Jurisdiction.

Being that neither Cape PLC nor CIHL have any property or assets in South Carolina, and further given that this is not a case involving insurance carrier parties, the natural effect of these receiverships can only be viewed as an attempt to acquire unlawful extraterritorial jurisdiction. A receiver's power only extends to the boundaries of the territorial jurisdiction of the Court appointing him—in this instance, the geographic borders of the State of South Carolina. A South Carolina Court cannot acquire extraterritorial jurisdiction over property through the appointment of a receiver. In addition to being expressly recognized by long-established South Carolina

jurisprudence, these principles are also entrenched in the protections afforded by the United States Constitution and have expressly been applied as to this purported Receiver. *See, e.g.*, Ex. A-1 & A-2 (noting extraterritoriality); *Protopapas v. Whittaker, Clark & Daniels, Inc.*, No. 23-4151 (ZNQ), 2024 WL 2796449, at *7 n.8 (D.N.J. May 31, 2024) (holding that a South Carolina receivership did not displace the authority of the board of a New Jersey corporation to declare bankruptcy because, among other reasons, "such a position would violate the rights of other states to dispose of the property within their territories").

E. Continuing these Proceedings and Granting the Receiver's Motion Would Further Violate the Altrad Defendants' Constitutional Rights.

Allowing this litigation to continue violates a number of the Altrad Defendants' constitutional rights; specifically, the facts and circumstances here present continuing violations of the Commerce and dormant Commerce, Takings, Due Process, Equal Protection, Excessive Fines, Import-Export, and Supremacy Clauses of the U.S. Constitution and the related analogs contained in the South Carolina Constitution.

First, "the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation,'" and the same principle applies to gross discrimination against "foreign corporations." *etro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878–79 (1985). The substantive due process analysis is virtually the same—that is, whether the challenged law is rationally related to a legitimate state purpose. *Id*. at 875; *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487–88 (1955). The abuse of South Carolina's receivership statute to attempt to seize foreign assets on a pre-judgment basis, strip the company of its ability to defend itself, and then redistribute them to an in-state receiver and non-creditor residents lacks all legitimacy. Entering an order granting the Motion would permit this abuse to continue; therefore, the Motion should be denied.

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Due process is violated as there was no notice, no hearing, and no proper method to refute the proceedings—and it appears that was done so intentionally here relative to the appointment over Cape PLC and CIHL. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 540 (4th Cir. 2013) (cleaned up). "At bottom, procedural due process requires fair notice of impending state action and an opportunity to be heard." *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146 (4th Cir. 2014). The Due Process Clause also imposes limits on "grossly excessive" monetary penalties that go beyond what is necessary to vindicate the Government's "legitimate interests in punishment and deterrence." *Id*. Here, the purported pre-judgment seizure of a foreign company and all its foreign assets by a South Carolina court can only be described as an extreme civil sanction and forfeiture. It is clearly disproportionate to the gravity of the offense, because it was based upon Cape PLC's (and/or CIHL's) alleged non-appearance in *Park*, without even an entry of default or a default judgment. These constitutional provisions bar a South Carolina court from giving power to a Receiver to take over a foreign company and its assets without any predicate adjudication of liability, and without the personal jurisdiction to do so, and distribute those assets in violation of the property rights of the foreign company and its owners. Again, granting this Motion would affirm this ongoing constitutional violation.

"The Excessive Fines Clause of the Eighth Amendment prohibits the government from imposing excessive fines as punishment." *Korangy v. FDA*, 498 F.3d 272, 277 (4th Cir. 2007). Where "a civil sanction 'can only be explained as serving in part to punish,' then the fine is subject to the Eighth Amendment." *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 387 (4th Cir. 2015). In such a case, the fine "will be found constitutionally excessive only if it is 'grossly disproportional to the gravity of [the] offense.'" *Id*. A civil forfeiture is considered to be a punishment and, thus, constitutes a fine for purposes of an Eighth Amendment proportionality

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analysis. *United States v. 79,650.00 Seized from Bank of Am. Account Ending in 8247*, 650 F.3d 381, 386 n.8 (4th Cir. 2011).

Allowing the Receiver to attempt to take control of, and essentially abuse the legal process in an attempt to extract funds from, active foreign companies in a state where they have never had a presence runs afoul of the Takings Clause, especially where a court permits the action and there are no creditors. *See Branch ex rel. Me. Nat'l Bank v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (holding that the legal predicate for creating a receivership "might be challenged on Takings Clause or other constitutional grounds"). "[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). Such a taking would not be for the public use, and thus, violates both the United States and South Carolina constitution. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). The public use requirement circumscribes the scope of government power to seize private property: the Government may compel an individual to forfeit his property for the public's use, but not for the benefit of another private person. *See id*.

CONCLUSION

The Receiver's Motion, seeking a summary judgment against the Altrad Defendants, is the latest installment of abusive, vexatious, oppressive, unconscionable, and unconstitutional *ultra vires* action in circumstances where the subject receivership(s) are unlawful and void *ab initio*. The one court with competent jurisdiction and authority over the entity purportedly in receivership has ruled as much: the receivership order "is not recognised and has no legal effect . . . worldwide";

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Mr. Protopapas "has and had no power or authority to act on behalf of CIHL . . . worldwide"; Mr. Protopapas "has and had no power or authority on behalf of CIHL . . . in respect of" *Park* or *Tibbs*; and Mr. Protopapas "has and had no power or authority on behalf of CIHL to issue or pursue third party claims . . . against any of the third party defendants" inclusive of the Altrad Defendants. To effectuate each of these rulings, Mr. Protopapas has now been enjoined and restrained accordingly. The result thereof is simple: this case and the imposter Receiver's crusade to manufacture presence and liability in South Carolina as part of a "reckoning" is over.

For these reasons and each of the other independent, alternative reasons set forth or otherwise incorporated herein, not only should the Receiver's Motion be denied or otherwise refused, but the entirety of this case should be dismissed.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Kevin A. Hall
S.C. Bar No. 15063
kevin.hall@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Attorneys for Mohed Altrad and Altrad Investment Authority SAS

November 22, 2024

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Exhibit A-1

CIHL v. Protopapas Order

HIGH COURT OF JUSTICE
THE BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
22 Nov 2024
BL-2024-001337

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Claim No. 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

ORDER

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 202H4 ("**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**")

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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

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Exhibit A-2

CIHL v. Protopapas Judgment

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

Case No: BL-2024-001337

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

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

Date: 22/11/2024

Before :

MR JUSTICE MANN, SITTING IN RETIREMENT

- -

Between :

(1) CAPE INTERMEDIATE HOLDINGS LIMITED
(2) CAPE PLC (a company incorporated under the laws of Jersey) — **Claimants**

- and -

PETER D. PROTOPAPAS — **Defendant**

- -
- -

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

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

- -

APPROVED JUDGMENT (subject to editorial corrections)

…….

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Mr Justice Mann:

Introduction

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

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

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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.

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The evidence in this application

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

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

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

The corporate personalities relevant to this case

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

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

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

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

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

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

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

Background - the Cape Compensation Scheme

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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

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

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

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

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

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

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

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

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

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

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

And he went on to observe:

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

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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."

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> 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

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> 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

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> 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.

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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.

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(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.

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> 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)

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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

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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

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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

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

The receivership application and proceedings

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

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

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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 …."

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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.

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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

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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

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> 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.

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

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

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

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

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

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

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

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

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

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

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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).

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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

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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."

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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.

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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

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> 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.

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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".

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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.

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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

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> 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.

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

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

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

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

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

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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

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

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

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

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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

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> 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*.

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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*

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[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*:

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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.

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

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

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

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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

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

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

The problems that the English board faces

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

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

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

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

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

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

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

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

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

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(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

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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

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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).

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

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

AND IT IS ORDERED THAT:

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

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

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

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

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

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”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

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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:

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> "(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.

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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,

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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

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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

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

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

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

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

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

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

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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.

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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.

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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

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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;

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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).

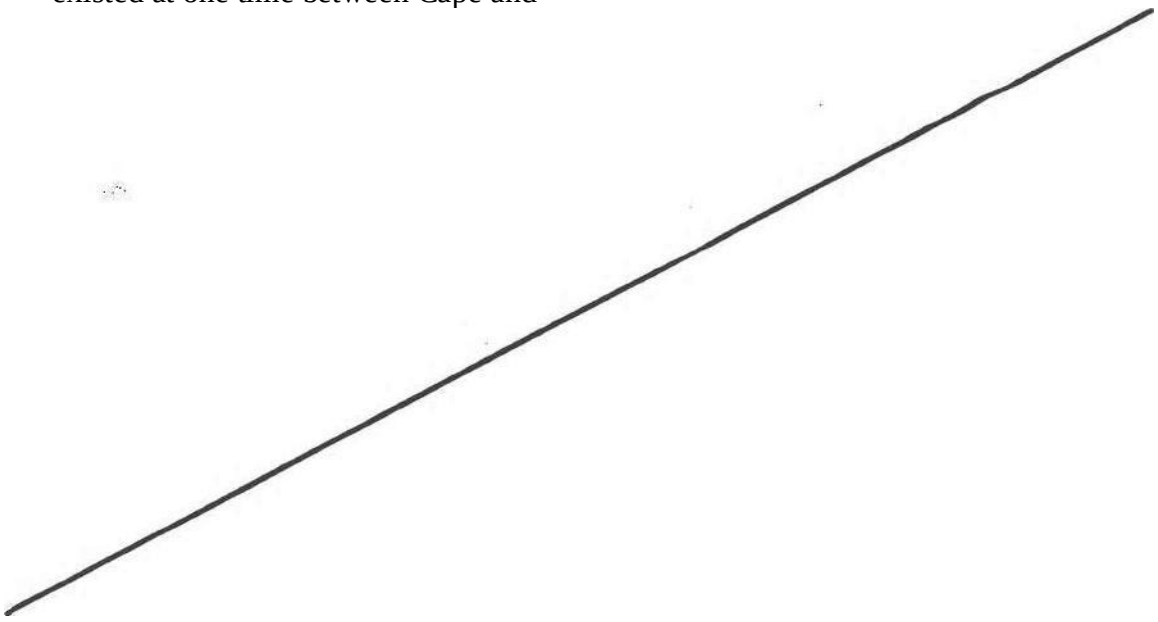
17. Directorships: prior to 11th July 1975 the Board of Directors of NAAC included two senior officers of Cape. Until 1974 Mr. Dent, Chief Executive of Cape, was Chairman of NAAC. In 1975, Mr. Higham succeeded Mr. Dent in both positions. The Other Cape director of NAAC was Dr. Gaze, Chief Scientist of 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).

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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



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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

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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).

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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).

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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.

Exhibit B-1

Adams v. Cape Judgment

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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.

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.

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.

S. W.

[COURT OF APPEAL]

ADAMS AND OTHERS v. CAPE INDUSTRIES PLC. AND ANOTHER

[1984 A. No. 2597]

1988 Feb. 15, 16, 17, 18, 19, 24, 25, 26, 29; March 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25; April 11, 12, 13, 14, 18, 19; June 17; July 26; Scott J.

1989 April 5, 6, 7, 10, 11, 13, 14, 17, 18, 20, 21, 24, 25, 27, 28; May 2, 3, 24; July 27 Slade, Mustill and Ralph Gibson L.JJ.

Conflict of Laws—Foreign judgment—Jurisdiction 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

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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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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.$15½m. 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.

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 consent order of 5 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 an agreement to submit to the jurisdiction of a foreign court might be evidenced either by a term of an agreement binding in contract 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 not contracted to submit nor made any representation of willingness to submit in the Tyler 2 actions; that, on the basis 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 N.A.A.C. and C.P.C. 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 1983 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.

On an appeal by the plaintiffs:—

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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).

Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag [1914] 1 K.B. 715, 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. 550C–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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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).

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.

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.

Albazero, 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.

Baroda (Maharanee of) v. Wildenstein [1972] 2 Q.B. 283; [1972] 2 W.L.R. 1077; [1972] 2 All E.R. 689, C.A.

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.

Burnet 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.

Carrick v. Hancock (1895) 12 T.L.R. 59

Castrique v. Imrie (1870) L.R. 4 H.L. 414, 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.

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. Lewellin (Inspector of Taxes) [1957] 1 W.L.R. 464; [1957] 1 All E.R. 561, H.L.(E.)

General Steam Navigation Co. v. Guillou (1843) 11 M. & W. 877

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

Haggin v. Comptoir d'Escompte de Paris (1889) 23 Q.B.D. 519, C.A.

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 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, E.C.J.

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Jabbour (F. & K.) v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145
Jacobson v. Frachon (1928) 138 L.T. 386, C.A.
Jeannot v. Fuerst (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. Thomas Law & Co.* [1899] A.C. 431, H.L.(E.)
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. 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. 438
Moore v. Mercator Enterprises 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, C.A.
Omni Capital International v. Rudolph Wolff & Co. Ltd. (1987) 108 S. Ct. 404
Pemberton v. Hughes [1899] 1 Ch. 781, C.A.
Princesse Clementine, The [1897] P. 18
Revlon Inc. v. Cripps & Lee Ltd. [1980] F.S.R. 85, C.A.
Reynolds v. Fenton (1846) 16 L.J. C.P. 15
Roberta, 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 Aktiengesellschaft [1911] 2 K.B. 516, C.A.
Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22, H.L.(E.)
Schibsby v. Westenholz (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.(Sc.)
Sfeir & Co. v. National Insurance Co. of New Zealand Ltd. [1964] 1 Lloyd's Rep. 330
Sirdar Gurdyal Singh v. Rajah of Faridkote [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) 111 L.T. 97, C.A.
Theodohos, 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. Moir [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217, C.A.
Williams v. Jones (1845) 13 M. & W. 628
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
X Bank Ltd. v. G. (1985) 82 L.S.G. 2016, C.A.

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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.)

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

Albazero, 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
Boissière & 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.
Erie 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. 561, H.L.(E.)
Godard v. Gray (1870) L.R. 6 Q.B. 139, D.C.
Holstein, The [1936] 2 All E.R. 1660
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, E.C.J.
Jabbour (F. & K.) v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145
Jacobson v. Frachon (1928) 138 L.T. 386, C.A.
La Bourgogne [1899] P. 1, C.A.
Lalandia, The [1933] P. 56
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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 C 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 D 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 E 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 Falconer* for the plaintiffs.

F *Sir Godfray Le Quesne Q.C., Jonathan Playford Q.C., Adrian Brunner* and *George Alliott* 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 G 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 H 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

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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 bar 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

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

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 B 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 C has led to these actions. When I have done so I will endeavour to describe the issues that arise for decision.

History

Cape until 1979 presided over a group of subsidiary companies engaged in the mining and marketing of asbestos. On 29 June 1979 the D 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"), E 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.

One of the important markets for sale of the asbestos produced by the South African mines was the United State of America. On 14 F 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 G 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 H main to N.A.A.C.

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

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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 B 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.

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 C 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 D 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.

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 E 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:

> "The court is of the opinion that the superior method for adjudication of this case is to continue to allow intervention freely F 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 H "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.

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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

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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.

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."

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.

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:

> "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."

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

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by the numbers 78–102, 78–104, and 79–114. P.C.C., 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.

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."

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.
>
> "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.
>
> "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.
>
> "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.

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

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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.

Cape, Capasco and Egnep took no part in any of the Tyler 2 actions. B 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 C 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 D 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.

After the settlement had been concluded the future did not look attractive to Cape. It was known, or at least feared, that there were E 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 F 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, G 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:

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> "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

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> 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.O.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

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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 B 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.

On the following day another conference took place. On this occasion the plaintiffs' counsel, too, were present. So was the judge, who seems C 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 D represented in the settlement negotiations that took place on 25 January 1983 and thereafter. The plaintiffs represented at these negotiations numbered 133.

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. E 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 F 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.

This figure was within reach of a figure that defendants' counsel would have been prepared to accept. But they lacked authority from G 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 H 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

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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

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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:

> "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.
>
> "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."

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.

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.

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

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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 Capasco. The plaintiffs rely on three alternative grounds. First, the plaintiffs contend that Cape and Capasco voluntarily appeared in the proceedings in the Tyler court. This contention requires some explanation since it is common ground that Cape and Capasco took no part at all in the Tyler 2 actions. The plaintiffs rely, however, on the steps taken by Cape and Capasco 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

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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.

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.

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.

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

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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.

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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 B be enforced in this country." In *Godard v. Gray* (1870) L.R. 6 Q.B. 139, 148–149, Blackburn J. said:

> "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, C 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 D 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 E 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 . . ."

In *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155 judgment was delivered on the same day as the judgment in *Godard v. Gray*, L.R. 6 F 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."

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 G 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 Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670, 683. He expanded the proposition thus:

> "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 H they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist

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> 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

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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:

> "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

> "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.

(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

> "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 . . ."

(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

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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.

(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.

(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.

(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.

(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.

(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.

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(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.

(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.

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.

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

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.

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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

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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?

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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

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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,
C 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:

"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
F reasonable to find the implied submission or agreement; the court must also conclude from the evidence that the implication is a necessary one."

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
G 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.

I do not think Diplock J. was right in regarding it as settled law that
H 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 Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670, 686, and Kennedy L.J. in *Emanuel v. Symon* [1908] 1 K.B. 302, 314. But,

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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

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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.

B

Issues 4 and 5

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. F.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:

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> "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

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the French company's premises, cf. *The Princesse Clémentine* [1897] P. 18. 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:

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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."

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 if 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."

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

"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:

"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."

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."

The *Saccharin Corporation* case [1911] 2 K.B. 516 may be contrasted with *Okura & Co. Ltd. v. Forsbacka Jernverks 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, 718–719:

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"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'."

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."

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."

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.

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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:

> "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:

> "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."

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.

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.

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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 imporant 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

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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.

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

> "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 . . ."

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.

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.

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.

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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

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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?

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, *Firestone 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:

> "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."

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

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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 Corporation* 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:

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> "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:

> "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."

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.

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.

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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

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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

C 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

D 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,

E 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

F 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

G 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,

H 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.:

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"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 . . ."

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."

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:

"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.

"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."

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 . . ."

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

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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.

(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.

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. 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.

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:

> "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."

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This evidence is, in my opinion, disengenuous 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

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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 B hold that Cape had failed to discharge that onus. I am not satisfed 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 C 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.

D 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 E 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, F 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.

G 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 Capasco under which all of Capasco's business had been carried on by Capasco as agent for Cape. In effect, Capasco'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 H 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

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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

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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.

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.

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 . . ."

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.

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.

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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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.

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."

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.

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.

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.

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

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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

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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, B 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 C 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 D 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 E 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 F 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. G 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 H 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

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

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. Westenholz*, L.R. 6 Q.B. 155. 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."

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.

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.

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.

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

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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.

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 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.

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

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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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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.

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:

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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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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, 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.

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 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 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 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 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 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

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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. Papelier* (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:

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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.

In *Schibsby 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 C 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:

"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, D 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 E 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."

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 G and continued, at p. 392:

"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 H 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,

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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 violence 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.

The effect of the notice given to Cape and Capasco cannot be D 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 E 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.

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 F 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 G 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.

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

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

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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

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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." *Jacobson v. Frachon*, 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. 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 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.

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 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 assessment.

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

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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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Solicitors: Herbert Oppenheimer Nathan & Vandyk; Davies Arnold & Cooper.

APPEAL from Scott J.

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. Frachon* (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 Falconer* 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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SLADE L.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 andconsequential 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 fibres from the Owentown factory was, in summary, that Cape owned the sharesin 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

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responsible for the supply of asbestos fibres directly or indirectly to Unarco and P.C.C. 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 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.

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 MultiDistrict 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.

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 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.

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The sum of $20m. was provided by the defendants in agreed proportions: £5.2m. 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 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.

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 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.

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

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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

D 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.

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,

E 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.

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

H 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

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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 C on (*Dicey & Morris'* First, Third and Fourth Cases). The plaintiffs' claim, therefore, failed for this reason, if no other.

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 D 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 E 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 F 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 G 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 H 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

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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.

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 C 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").

As part of their answer to the plaintiffs' case on presence, the defendants have cross-appealed on what we have described as "the G 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 H 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.

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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.

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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,* vol. 1, p. 436, "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. 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 . . . " (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, 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:

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> "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. Westenholz,* 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. 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

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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,* L.R. 6 Q.B. 139, and *Schibsby v. Westenholz*, L.R. 6 Q.B. 155, 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,* 11th ed., vol. 1, 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 United States of America 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 United States of America,

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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 Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670, the decision of Lord Russell of Killowen in *Carrick 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 Gurdyal Singh* case 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, 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 *Carrick 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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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:

> "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:

> "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

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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 *Carrick 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. Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein* [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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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

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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) 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 sale 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 B 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 C 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 D 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 E 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.

The other, and most recent, leading case relating to the enforcement of foreign judgments against corporations is *Vogel v. R. and A.* F *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. G Ashworth J. dismissed the plaintiff's claim. In his judgment he described the functions of Mr. Kornbluth vis-à-vis the defendants, at p. 136A–B:

"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 H 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

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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 D

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

"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 H

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

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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 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

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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 Theodohos* [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) *Haggin 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.

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
B 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) *Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K.B. 516 where the agent, Blasius, occupied
C 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:

> "If contracts have been habitually made for a reasonably substantial period of time at a fixed place of business within the juris-
E diction 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."

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.

In a few of the *Okura* line of cases which have been cited to us, the
G 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

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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."

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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:

> "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
B 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, ante, p. 471F, he therefore assumed that
C 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
D which its business is carried on:" ante, p. 468A.
>
> (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.
E 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.
>
> (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
F trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract:" ante, p. 476C.

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
G no authority to contract on behalf of Cape or Capasco 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."

Mr. Morison did not challenge these particular findings of fact.
H 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,

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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. Westenholz*, 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 Capasco 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 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

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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) 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 B 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 C 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 D (*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 E 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 ed., vol. 1 (1973), p. 420, para. 703. However, though the terms "agency" and "agent" have in popular use a number of F different meanings:

> "in law the word 'agency' is used to connote the relation[ship] 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 H 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/Capasco 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

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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 Capasco were present and carrying on business in the United States

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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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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 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."

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 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

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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 B 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 C 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 D *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:

"One starts to my mind from this, that neither article 85 nor article E 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 F 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. 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 H 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 . . . "

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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

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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.

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.

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.

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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-subsidiary 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-subsidiary 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. 45, 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

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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 B 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. 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

Quite apart from cases where statute or contract permits a broad D 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 in the course of a speech with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed. With reference to the *D.H.N.* 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."

The only allegation of a façade in the plaintiffs' pleadings was that F 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."

Scott J. more or less accepted this contention. He found as a fact, H 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

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

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." B C

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. D

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. E F

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. G

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 H

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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 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. Inference (a) was also made by the judge. Inference (b) is our own addition.

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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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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:

> "I decline to treat the [subsidiary] as a separate and independent
> B 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
> C be so regarded in point of law."

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
D 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 façade within the meaning of that word as used by the House of Lords in
E *Woolfson*, 1978 S.L.T. 159. 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 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
F 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.

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
H 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

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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.

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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 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.

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 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 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.

(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.

(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

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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;"

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(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.

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 Holstein* [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.

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.

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

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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
B 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 Unites 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

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
E that he should hold that the defendants had failed to discharge that onus. He rejected that argument, saying, ante, p. 483c–d:

> "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
> F 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:

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> "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."

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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. Westenholz*, 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

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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."

[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 B 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:]

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 C 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:

> "Meaning of 'country.' This word has from long usage become almost a term of art among English speaking writers on the conflict D 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 E 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, F are 'countries' in this sense. But composite states like the United Kingdom, the United States, Australia and Canada are not."

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" G 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 H in respect of anti-trust cases, "the 'country' of the court would unarguably be the United States as a whole."

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

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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 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. Westenholz*, L.R. 6 Q.B. 155, 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.

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A 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 B 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 C 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 D 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 E 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 F 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 G 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, H 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

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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 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 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.

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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 C 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 D 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 E 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 F 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 G 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 H 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

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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 unskilfully 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 B 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 C 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. D 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 E 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 F 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 G 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.

H

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

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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, 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."

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:]

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:

> "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."

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

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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 B 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.

(iv) "The requirements of substantial justice in a particular case cannot . . . be divorced from the legitimate expectation of both the C 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 D of procedure, did not as a matter of principle make the judgment enforceable notwithstanding the breach of natural justice: ante, p. 501C–E.

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 F 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 G 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 H 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.

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.

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

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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 B 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 C 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 D 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.

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 F 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 G 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 H 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

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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.

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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.

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 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:

> "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 oportunity 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.)

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.

(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.

(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.

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(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

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A 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 B 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 C 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.

In reply to that contention Mr. Playford pointed out that the indication by Judge Steger of an average basis of award for all plaintiffs D 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, E 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 F 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 H 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.,

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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 asessment. 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 B 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 C 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.

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 D 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 E 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 G 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 H 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

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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. Frachon*, 138 L.T. 386, 390, that finding would serve to invalidate the judgment. But, as noted above, the Court of Appeal in *Jacobson v. Frachon* 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

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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 B 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 C 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 E 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. Gray,* L.R. 6 Q.B. F 139; *Castrique 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 G 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 H 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.*

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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 *Jeannot v. Fuerst* (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

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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.

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 B 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 C 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.

D *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 E 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 F 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 G 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 H 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.

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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: Nabarro Nathanson; Davies Arnold & Cooper.

A. R.

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