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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 XII)

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.

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TABLE OF CONTENTS

Document — Page

Volume I

Order on Motion to Confirm the Appointment of the Receiver (Oct. 13, 2025) 1

Tibbs Pleadings

Tibbs Complaint (Apr. 5, 2023) 50

Tibbs First Amended Complaint (May 3, 2023) 141

"Cape PLC's" Answer (June 29, 2023) 245

Putative Receiver's Third-Party Complaint (June 30, 2023) 249

Volume II

Motions to Dismiss for Lack of Personal Jurisdiction and Motions to Dissolve Receivership

Mohed Altrad's Motion to Dismiss for Lack of Personal Jurisdiction with Affidavit (Sept. 1, 2023) 316

Altrad Investment Authority SAS's Motion to Dismiss for Lack of Personal Jurisdiction with Affidavit (Sept. 1, 2023) 336

ESAB's Motion to Dismiss for Lack of Personal Jurisdiction with Affidavit (Sept. 1, 2023). 360

Central Mining's Motion to Dismiss for Lack of Personal Jurisdiction with Affidavit (Sept. 1, 2023) 377

Charter Consolidated's Motion to Dismiss for Lack of Personal Jurisdiction with Affidavit (Sept. 1, 2023) 394

Volume III

Altrad Defendants' Motion to Dissolve the Putative Receivership with Exhibits from *Park* Tort Case (Sept. 1, 2023) 411

Volume IV

ESAB's Motion to Dissolve the Putative Receivership (Oct. 6, 2023) 807

Centrral Mining's Motion to Dissolve the Putative Receivership (Oct. 6, 2023) 813

Charter Consolidated's Motion to Dissolve the Putative Receivership (Oct. 6, 2023) 819

Putative Receiver's Opposition to Motion to Dissolve (Oct. 18, 2023) (without exhibits).....825

ESAB's Memorandum in Support of Motion to Dismiss (Oct. 23, 2023) 862

Central Mining's Memorandum in Support of Motion to Dismiss (Oct. 23, 2023) 903

Charter Consolidated's Memorandum in Support of Motion to Dismiss (Oct. 23, 2023).....942

Volume V

Transcript of Hearing (Oct. 25, 2023) 982

Altrad Defendants' Objections to Proposed Order (Dec. 4, 2023) (without exhibits) 1034

ESAB's Objections to Proposed Order (Dec. 4, 2023) (without exhibits) 1056

Central Mining's Objections to Proposed Order (Dec. 4, 2023) (without exhibits).....1073

Charter Consolidated's Objections to Proposed Order (Dec. 4, 2023) (without exhibits) 1089

Order Denying Motions to Dismiss for Lack of Personal Jurisdiction and to Dissolve Receivership (Dec. 6, 2023).....1104

Initial Notices of Appeals

Altrad Defendants' Notice of Appeal (Dec. 18, 2023) 1178

ESAB's Notice of Appeal (Dec. 19, 2023).....1196

Central Mining's Notice of Appeal (Dec. 19, 2023) 1213

Charter Consolidated's Notice of Appeal (Dec. 19, 2023).....1230

Answers to Third-Party Complaint

Altrad Defendants' Answer (Jan. 2, 2024) 1247

Charter Defendants' Answer (Jan. 2, 2024).....1310

Initial Proceedings Before the Court of Appeals

Altrad Defendants' Initial Appellate Brief (Feb. 22, 2024).....1371

Charter Defendants' Initial Appellate Brief (Feb. 22, 2024) 1429

Volume VI

Receiver's Motion to Dismiss Appeal (Apr. 16, 2024) 1491

Court of Appeals Order Dismissing Appeal (May 9, 2024) 1518

Activity Pending Appeal

Receiver's Motion to Compel Against Herbert, Smith Freehills (Nov. 18, 2024) 1522

Receiver's Motion for Summary Judgment (Nov. 8, 2024) 1556

Supreme Court Order (Jan. 16, 2025) 1637

Remand and Post-Remand Proceedings

Supreme Court Order (June 26, 2025) 1643

Putative Receiver's Motion to "Confirm" Appointment (July 11, 2025) 1649

Altrad Defendants' Notice of Recent Supreme Court Authority Voiding Litigation (July 18, 2025) 1691

Charter Defendants' Objection to the Receiver's Motion to Confirm (July 18, 2025) 1711

Volume VII

Transcript of Hearing (July 22, 2025) 1721

Joint Response to the Circuit Court's First Report (July 31, 2025) 1915

Altrad Defendants' Objection to Proposed Order (Aug. 4, 2025) 1924

Charter Defendants' Objection to Proposed Order (Aug. 5, 2025) 1943

Transcript of Hearing (Aug. 12, 2025) 1967

Letter from Circuit Court (Aug. 13, 2025) 2036

Altrad Defendants' Objections to Letter (Aug. 27, 2025) 2039

Charter Defendants' Objection to Letter (Aug. 27, 2025) 2057

Transcript of Hearing (Oct. 6, 2025) 2087

Volume VIII

Order Approving Confidential Settlement and Qualified Settlement Fund Operating Agreement (Oct. 30, 2025) 2172

Park Filings

Initial Complaint (June 4, 2021) 2206

Note: All subsequent complaints in *Park*, as well as other materials related to service, scheduling trial, and the case being "fully resolved," are attached as exhibits to the Altrad Defendants' Motion to Dissolve the Receivership in **Volume III**.

Receiver's Amended Complaint Against Troutman Pepper Locke (Aug. 9, 2023) 2276

Troutman Pepper Locke's Motion to Dissolve the Putative Receivership (Sept. 15, 2023) (without exhibits) 2285

Receiver's Motion to Clarify (Nov. 1, 2024).....2306

Order Granting Receiver's Motion to Clarify (Nov. 5, 2024) 2312

Troutman Pepper Locke's Rule 59 Motion Regarding Order Granting Motion to Clarify (Nov. 15, 2024) (without exhibits).....2316

Order on Motion to Enforce Subpoenas [Confirm the Appointment of the Receiver in *Park*] (Oct. 13, 2025) 2324

Order Vacating Confirmation of Appointment in *Park* (Oct. 30, 2025) 2367

Volume IX

Complete Park Probate File

Park Will 2370

Application for Formal Testacy and Appointment as Personal Representative 2387

Inventory and Appraisement of Estate.....2415

Receipt and Release of Beneficiary Fiona Wiley (May 21, 2022) 2432

Receipt and Release of Beneficiary Alastair Park (May 22, 2022) 2433

Receipt and Release of Beneficiary Keith Park (June 6, 2022).....2434

Sworn/Notarized Application to Close Estate and Discharge Personal Representative (June 6, 2022) 2435

Probate Court Order Closing Estate (Aug. 26, 2022) 2436

Probate Court Order Terminating Appointment as Personal Representative (Aug. 26, 2022)2438

Application for Subsequent Appointment (July 24, 2025) 2443

Certificate of Appointment (July 30, 2025).....2447

Park Mediation Appointment (May 24, 2022) 2448

Park is "Fully Resolved" Email of Counsel (June 3, 2022) 2449

Additional Activity of the Receiver

"Tolling Agreement" (June 12, 2023) 2457

Receiver's Complaint Against Winston & Strawn, LLP (Sept. 5, 2024) 2461

Letter from Winston & Strawn on behalf of CIHL (Aug. 30, 2024) 2488

Complaint in *Adams v. Cape plc* (Richland County Nov. 12, 2024) 2498

Acceptance of Service as "Attorney For" Cape plc (Nov. 12, 2024) 2588

Volume X

International Authorities

Adams v. Cape Industries plc (1990) 1 Ch 433 (CA) 2589

Appendix to *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA) 2729

CIHL v. Protopapas [2024] EWHC 2999 ("*Mann I*") 2769

Schedule of Overlap between *Adams* and "Third-Party Complaint" 2854

Transcript of Preliminary Proceedings in *Mann I* (Oct. 9, 2024) 2875

Cape plc v. Protopapas, Case DBYB-W-B7J-PM3N (Montpellier Court of Appeal Apr. 8, 2025) 2923

Altrad Investment Auth. SAS v. Protopapas [2025] EWHC 2470 (Ch) ("*Smith*") 2937

Agreement for Full and Final Settlement and Release of Claims 2976

CIHL v. Protopapas [2025] EWHC 2706 (Ch) ("*Mann II*") 2986

Additional Materials

South Carolina Receivership Statute (1880) 3004

South Carolina Receivership Statute (1897) 3009

In re Plan of Arrangement or Compromise of Asbestos Corporation Limited, Case No. 235-11-000008-259 (Superior Court of Quebec July 30, 2025) 3013

Altrad Defendants' Notice of Appeal of October 13, 2025 Order (Oct. 14, 2025) 3044

Charter Defendants' Notice of Appeal of October 13, 2025 Order (Oct. 14, 2025) 3050

Volume XI

Orders Designated by Receiver

Order Appointing Receiver, *Park v. Armstrong International, Inc., et al., No. 2021-CP-40-02727* (S.C. Ct. Com. Pl. Richland Cnty. March 17, 2023) 3057

Order Granting the Receiver's Motions to Compel Discovery Responses of Third-Party Defendants and 30(b)(6) Depositions of Arranco US, LLC & Central Mining & Investment Corp. Ltd., Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. March 12, 2024) 3061

Order Granting the Receiver's Motions to Compel Discovery Responses of Third-Party Defendants and 30(b)(6) Depositions of Arranco US, LLC & Central Mining & Investment Corp. Ltd., Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. March 12, 2024) 3075

Order, *Tibbs v. 3M Co., at al.*, Appellate Case No. 2025-002104 (S.C. November 26, 2025) 3109

Motions, Memoranda, and Other Filings Designated by Receiver

Plaintiffs' Motion to Appoint Receiver, *Park v. Armstrong International, Inc., et al.*, No. 2021-CP-40-02727 (S.C. Ct. Com. Pl. Richland Cnty. March 6, 2023).....3114

Appellants Mohed Altrad and Altrad Investment Authority SAS's Motion for Protective Order and to Dissolve Receivership, *Tibbs v. 3M Co., et al.*, No. 2023- 4 CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. September 20, 2023).....3244

Appellants Mohed Altrad and Altrad Investment Authority SAS's Legal and Procedural Opposition to the Purported Receiver's Motion for Summary Judgment, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. November 22, 2024) 3248

Volume XII

Appellants Mohed Altrad and Altrad Investment Authority SAS's Legal and Procedural Opposition to the Purported Receiver's Motion for Summary Judgment, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. November 22, 2024), *continued*.....3516

Appellants Charter Consolidated Ltd.'s and ESAB Corporation's Memorandum in Opposition to Receiver's Motion for Summary Judgment, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. November 22, 2024).....3789

Volume XIII

Appellants Charter Consolidated Ltd.'s and ESAB Corporation's Memorandum in Opposition to Receiver's Motion for Summary Judgment, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759, *continued* (S.C. Ct. Com. Pl. Richland Cnty. November 22, 2024).....4005

Volume XIV

Appellants Charter Consolidated Ltd.'s and ESAB Corporation's Memorandum in Opposition to Receiver's Motion for Summary Judgment, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759, *continued* (S.C. Ct. Com. Pl. Richland Cnty. November 22, 2024) .....…. 4373

Notice of Release of Claims, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. June 4, 2025).....4603

Report of the Receiver Relating to the Factual Predicate Underlying the Cape Appointment Order, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. July 11, 2025) 4629

Exhibits 1–81, including all subparts, to Report of the Receiver Relating to the Factual Predicate Underlying the Cape Appointment Order, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. July 11, 2025) 4669

Volume XV

Exhibits 1–81, including all subparts, to Report of the Receiver Relating to the Factual Predicate Underlying the Cape Appointment Order, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759, *continued* (S.C. Ct. Com. Pleas, Richland Cnty. July 11, 2025) 4834

Volume XVI

Exhibits 1–81, including all subparts, to Report of the Receiver Relating to the Factual Predicate Underlying the Cape Appointment Order, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759, *continued* (S.C. Ct. Com. Pleas, Richland Cnty. July 11, 2025) 5302

Volume XVII

Exhibits 1–81, including all subparts, to Report of the Receiver Relating to the Factual Predicate Underlying the Cape Appointment Order, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759, *continued* (S.C. Ct. Com. Pleas, Richland Cnty. July 11, 2025) 5789

Volume XVIII

Bench Brief to the Court on the Status of the Park Case, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. August 4, 2025) and *Park v. Armstrong International, Inc., et al.*, No. 2021-CP-40-02727 (S.C. Ct. Com. Pl. Richland Cnty. August 4, 2025) 6260

The Receiver for Cape's Pre-Trial Memorandum, Tibbs v. 3M Co., et al., No. 2023- CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. October 16, 2025). 6517

Notice of Filing Supplemental Exhibit to Bench Brief to the Court on the Status of the Park Case, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. August 6, 2025) and *Park v. Armstrong International, Inc., et al.*, No. 2021-CP-40-02727 (S.C. Ct. Com. Pl. Richland Cnty. August 6, 2025), including exhibit to the same. 6512

Appellants Mohed Altrad and Altrad Investment Authority SAS's Omnibus Response to the Receiver's Numerous Filings, Tibbs v. 3M Co., et al., No. 2023- CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. October 19, 2025). 6622

Notice of Filing, France Summons for Hearing, Tibbs v. 3M Co., et al., No. 2023- CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. December 22, 2025), including exhibit to the same 6633

Notice of Filing Supplemental Exhibit to Bench Brief to the Court on the Status of the Park Case, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. August 6, 2025) and *Park v. Armstrong International, Inc., et al.*, No. 2021-CP-40-02727 (S.C. Ct. Com. Pl. Richland Cnty. August 6, 2025), including exhibit to the same. 6512

Volume XIX

Notice of Filing, France Summons for Hearing, Tibbs v. 3M Co., et al., No. 2023- CP-40-01759 (S.C. Ct. Com. Pleas, Richland Cnty. December 22, 2025), including exhibit to the same, *continued*. 6512

Transcripts Designated by Receiver

Trial Transcript, Volume I, *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. October 20, 2025) 6767

Volume XX

Trial Transcript, Volume II, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. October 21, 2025) 7038

Trial Transcript, Volume III, Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. October 22, 2025) 7337

Other Items Designated by Receiver

McDaniels v. Carey Canada, No. 83-1412 (D.N.J. Nov. 11, 1985) (unpublished) 7476

Brown v. Lac D'Amiante Du Quebec, Ltd., No. 84-357 (E.D. Pa. June 12, 1985) (unpublished) 7508

Figueroa v. Charter Consolidated P.L.C., No. 4351 (2123) (Ct. Comm. Pl. Phil. Cnty. June 24, 1985) (unpublished) 7525

Volume XXI

Trial Exhibits in Tibbs v. 3M Co., et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. October 20-22, 2025) Designated by Receiver

The Receiver for Cape's Fourth Amended Trial Exhibit List, *Tibbs v. 3M Co.*, et al., No. 2023-CP-40-01759 (S.C. Ct. Com. Pl. Richland Cnty. November 18, 2025) 7529

Trial Exhibit 43, Telex from A. Penna to S. Milwid (July 4, 1977) 7541

Trial Exhibit 52, NAAC Sales List (undated).....7542

Trial Exhibit 63, Trial Testimony of Anthony John Penna, *Adams v. Cape Indus. plc*, [1990] Ch. 433 (Q.B. Mar. 14, 1988).....7572

Trial Exhibit 68, Deposition of Charles G. Morgan, *Barber v. Pittsburgh Corning Corp.*, No. GD 79-21544 (Ct. Com. Pl. Allegheny Cnty., Pa. Oct. 31, 1980) 7589

Trial Exhibit 102, 2023 Altrad Annual Report 7593

Trial Exhibit 107, Altrad Website, *Our History* (2024).....7596

Trial Exhibit 117, Correspondence from Winston & Strawn London LLP to Peter D. Protopapas (Aug. 30, 2024) 7598

Trial Exhibit 138, Letter from R. Oren to Lloyd's (May 7, 2025) 7608

Trial Exhibit 207, North America: Contact Us, Altrad RMD Kwikform Website, https://www.rmdkwikform.com/us/contact-us/ (last accessed Nov. 17, 2025) 7613

Trial Exhibit 208, United States, Altrad RMD Kwikform Website, https://www.rmdkwikform.com/us/ (last accessed Nov. 17, 2025).....7616

Trial Exhibit 209, ESAB US – Sales Terms & Conditions, ESAB Website, https://esab.com/us/nam_en/terms-and-conditions-of-sales/ (last accessed Nov. 17, 2025) 7618

Trial Exhibit 218, RMD Kwikform North America Inc., South Carolina Secretary 7 of State Business Entities Online Report (last accessed Oct. 20, 2025) 7623

Trial Exhibit 225, South Carolina Secretary of State Search Business Entries Online Search, ESAB Corporation (last accessed Nov. 6, 2025) 7624

Trial Exhibit 242, Deposition of Richard Gaze, *Yandle v. PPG Indus., Inc.*, Civil Action Nos. TY-74-3-CA & TY-74-13-CA (E.D. Tex. June 4-5, 1975) 7625

Trial Exhibit 250, ESAB Corporation, Workers Compensation Coverage Verification, South Carolina Workers Compensation Commission) 7740

Additional Items

Adams v. Cape plc Judgement with Statement of Primary Facts 7746

In re Asbestos Litig. Venued in Middlesex Co., No. L-37243-79 (N.J. Super. Ct July 10, 1987) 7850

Dillman v. Celotex, No. A87-599 Civil (D. Alaska Aug. 22, 1988).....7904

Kessinger v. North American Asbestos Corp., No. 87-L-120 (11th Cir. McClean Co., Ill. Dec. 1, 1988) 7914

A.J. Adams, et al. v. A.W. Chesterton, a Corporation, et al. (1st Cir., Hinds Co. Miss.).....7951

Denham v. Unarco Industries, Inc., et al, No. 85-L-360 (11th Cir. McClean Co., Ill, Dec. 1, 1988) 7972

Gray v. Crown Cork & Seal Co., et al., No., 84-6067 (W.D. Ark. Jan. 7, 1986).....7990

A.J. Adams, et al. v. A.W. Chesterton, a Corporation, et al. (1st Cir., Hinds Co. Miss.).....7951

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Exhibit B-2 (Part i)

Judgment with Statement of Primary Facts

Const: Slade L.J.

Mustill L.J.

Ralph Gibson L.J.

JIMMY WAYNE ADAMS AND OTHERS

v.

CAPE INDUSTRIES PLC AND CAPASCO LTD.

JUDGMENT OF THE COURT

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LORD JUSTICE SLADE:

I INTRODUCTION

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

Having reserved judgment at the end of the argument on 3rd May last, we subsequently came to the firm conclusion that t appeal must be dismissed and that in the particular circumstances of this case it was right that the parties should be informed of our decision at once, rather than having to wait for some more weeks before we were in a position to give the reasons for our decision.

On 24th May last we accordingly announced that the appeal would be dismissed and that we would give the reasons for our decision in writing at a later date, at which date the Order dismissing the appeal would be drawn up. This we now do.

The plaintiffs in these proceedings are persons, or the personal representatives of persons, in whose favour awards of damages were made by the judgment, dated 12th September 1983, of the Honourable Judge Steger, a United States Federal District Court judge, in the District Court for the Eastern District of Texas, U.S.A. ("the Tyler Court"). The judgment was a default judgment against Cape Industries PLC ("Cape") and Capasco Ltd. ("Capasco"), companies registered in England and the sole defendants in all the actions before this court. They had taken no part in the proceedings in which the judgment was made. The judgment was for the specific sums payable to individual plaintiffs set out in an appendix to the judgment: $37,000 each for 67 plaintiffs;

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$60,000 each for 31 plaintiffs; $85,000 each for 47 plaintiffs and $120,000 each for 61 plaintiffs. The total of the individual awards was $15.654 m. and the awards were directed to bear interest at 9% from judgment until payment.

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

The relationship of Cape and Capasco to the emission of asbestos fibres from the Owentown factory was, in summary, that Cape owned the shares in subsidiary companies in South Africa which had mined the asbestos and in its subsidiary Capasco. Capasco was concerned in organising the sale of asbestos, mined in South Africa, throughout the world to those who wished to use it in various industrial processes. Between 1953 and 1978 when it was dissolved, another subsidiary of Cape, North American Asbestos Corporation ("NAAC") assisted in the marketing of asbestos of the Cape Group in the U.S.A. The plaintiffs' contention was that the defendants had been responsible for the supply of asbestos fibres directly or indirectly to Unarco and PCC without giving proper warning of the dangers thereof.

Summary of the Proceedings in the Tyler Court

Different sets of proceedings with reference to claims arising from the processing of asbestos in the Owentown factory had extended over many years. An account of what took place is necessary for

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

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 multi-district litigation"; and that intervention in the proceedings should be allowed freely for those claimants who wished to join. In consequence a large number of claimants were added. In December 1974 a third action with reference to asbestos from the Owentown plant was commenced in the Tyler Court in which the only defendant was the USA. All these proceedings together have been known as the Tyler 1 proceedings. They were separate and distinct from the proceedings in which the appellants, now before this court, obtained their judgment in September 1983.

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

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

their objection to jurisdiction.

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

The sum of $20 m. was provided by the defendants in agreed proportions: £5.2 m. by NAAC, Cape and Egnep; $1 m. by Unarco (who had operated the Owentown plant from 1954 to 1962); $8.05 m. by PCC (who had operated the plant from 1962 to 1972) and its shareholders; and £5.75 m. by the United States government. The settlement was recorded and approved in a final judgment in the Tyler 1 actions dated 5th May 1978. The reference to shareholders in PCC is to Pittsburgh P.G. Industries Inc. ("PPG") and to Corning Glassworks Inc. who had been joined as defendants on the basis that each had taken such part in the management decisions regarding the use of asbestos as to be liable for injuries arising from that use. (J.6E).

Upon prohibition by the order of Judge Steger of further interventions in the Tyler 1 proceedings, new actions were commenced by claimants in what have been called the Tyler 2 proceedings. There were 8 separate actions. They were assigned to Judge Steger. The first was commenced on 19th April 1978 and the last on

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

19th November 1979. There followed intervention by a very large number of claimants. Cape, Egnep and NAAC were defendants in all the actions. Capasco was a defendant in three only. PCC, PPG, Corning Glassworks Inc. and OCAW, a trade union to which some claimants had belonged, were also defendants in all actions. The United States Government was a defendant in some actions and third party defendant in others.

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

Cape, Capasco and Egnep took the decision to play no part in any of the Tyler 2 actions. They had initially regarded the Tyler 1 actions as having little more than nuisance value. They could not understand how tortious liability to the Owentown workers could be imposed upon the Cape companies merely on the ground that Cape subsidiary companies had mined the asbestos and sold it into the United States of America. They had had expectations of success on their jurisdiction objection. They had, however, succumbed to the pressure for settlement. They were unwilling to be left as the only defendants in a large and expensive jury trial. Having joined in the settlement of the Tyler 1 actions they decided, since they had no assets in the United States of America, to take no part in

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

the Tyler 2 proceedings; to allow default judgments to be obtained against them; and to defend any actions brought in this country for enforcement of any such judgment on the ground that, under the law of this country, the Tyler Court had no jurisdiction over Cape, Capasco or Egnep with reference to the claims of the claimants.

The Settlement Against some Defendants of the Tyler 2 Proceedings

In circumstances which will be considered in more detail later in this judgment, the Tyler 2 proceedings were in February 1983 settled, as against the effective defendants other than the Cape companies, for a sum of $1.33 m. The figure of $1.33 m. was based upon an average award of $10,000 for each of 133 plaintiffs represented in the settlement negotiations. The sum of $1.33 m. was to be provided as to $900,000 by PCC, the firm which had operated the Owentown factory from 1962 to 1972, and by PPG, one of the corporations owning shares in PCC; $130,000 by Corning Glassworks Inc., the other corporation holding shares in PCC; $150,000 by OCAW, and $250,000 by NAAC. (J.20). Such was the considered value of the claims, as it emerged from the settlement process between the judge and the parties, as against the parties which included those alleged to have had some direct concern in connection with the emission of asbestos particles at or from the Owentown factory. On payment of those sums the settling defendants were to be released from all claims by the 133 plaintiffs.

That settlement was complicated by a "device" devised by Mr. Bailey, who was the attorney negotiating the settlement on behalf of the claimants and which was intended, it was said, to give the claimants the chance of additional recovery against the United States. The form of this device, and the part which it was alleged to have played in the formulation of the terms of the default judgment against the Cape companies, was important to the

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

allegations of fraud put forward against Mr. Bailey, which, as stated below, were rejected by Scott J. It is necessary to describe what happened to render intelligible some of the matters discussed later in this judgment. The device was described by Scott J. at page 21 of his judgment as follows:

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

On 2nd February 1983 Judge Steger approved the settlement of the Tyler 2 proceedings as against the settling defendants, and that approval extended to the fairness and reasonableness of the settlement in the case of any minor claimants. The trial date for the outstanding Tyler 2 claims against the United States was fixed for 20th June 1983. Settlement was discussed. An agreement of compromise dated 15th June 1983 was signed. The United States government contributed nothing directly to the claimants but, in settlement of their claims against the United States, it was agreed that the United States would bear the costs of enforcement of default judgments against Cape, Capasco and Egnep in the United Kingdom or in South Africa. It is in performance of that promise that these proceedings have been pursued in this country.

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

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

The consolidated actions in this country

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

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

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

The circumstances in which our courts will recognise a foreign court as competent to give a judgment in personam capable of

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

enforcement in this country are stated thus in Dicey & Morris The Conflict of Laws (11th Edition) ("Dicey & Morris") Volume 1, pp. 436-437:

> "First Case -If the judgment debtor was, at the time the proceedings were instituted, resident (or, perhaps, present) in the foreign country.
>
> Second Case -If the judgment debtor was plaintiff in, or counterclaimed, in the proceedings in the foreign court.
>
> Third Case -If the judgment debtor, being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> Fourth Case -If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

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

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

However, the learned Judge proceeded to consider certain additional points raised by the defendants by way of defence. The first point arose in this way. According to the case made

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

for the plaintiffs, the presence (if any) of Cape and Capasco was in the State of Illinois where Cape's subsidiary, NAAC, had its office in Chicago from 1953 to 1978 when it was wound up; and where in the same building from 1978 onwards Continental Products Corporation ("CPC"), also an Illinois corporation but not a subsidiary of Cape, carried out similar marketing functions in the U.S.A. for the sale of asbestos produced by Cape's South African subsidiaries. The plaintiffs did not contend that Cape or Capasco had been present in Texas. In these circumstances, the defendants contended that under English law presence in Illinois did not suffice to give the Tyler Court (a Federal District Court sitting in Texas) jurisdiction to hear a claim in tort against the defendants governed by the law of Texas. This argument, which we will call "the country issue", Scott J. rejected. He said (J. 94C-D) that if he had felt able to conclude that Cape and Capasco were present in Illinois when the Tyler 2 actions were commenced, he would have held that to be a sufficient basis in English law for the exercise by the Tyler Court of jurisdiction over them.

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

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

assumption that, contrary to his conclusion, the plaintiffs had made out a ground for jurisdiction in the Tyler Court over Cape and Capasco. He acquitted Mr. Bailey of having had any intention to deceive and of having deceived anyone with reference to the terms and form of the judgment. The allegations that the judgment had been obtained by fraud accordingly failed. However, the defendants succeeded before Scott J. on the natural justice point. The Judge found that the judgment was not such that it could be enforced in the courts of this country. The primary ground of that finding was that the procedure adopted in this particular case by the Judge of the Tyler Court offended against the principles of substantial justice contained in our law.

Scott J. gave his judgment in two parts, which together covered 150 pages of transcript. On 11th June 1988 he announced that the claims of all the plaintiffs would be dismissed and he gave his reasons for rejecting each of the three grounds upon which the plaintiffs had claimed that their judgment in the Tyler Court should be enforced in this country. He also stated in summary form his reasons for rejecting the allegations of fraud against Mr. Bailey and for upholding the contentions of Cape/ Capasco on the natural justice issue. On 27th July 1988 he gave his full reasons with reference to the issues of fraud and natural justice. The plaintiffs have invited this Court to take a different view on some parts of the facts in this case, and to apply principles of law which the Judge considered to be inapplicable. Mr. Morison, however, began his submissions by rightly acknowledging the great care expended in, and the great accuracy and clarity of, the judgment of the learned Judge, to which we also pay tribute.

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

The issues on this appeal

On this appeal the plaintiffs do not seek to challenge those parts of Scott J.'s judgment by which he rejected their submissions based on the alleged voluntary appearance by the defendants in the Tyler Court proceedings or their alleged agreement to submit to the jurisdiction of that Court. The defendants do not challenge the rejection of their allegation of fraud against Mr. Bailey. The plaintiffs do, however, seek to challenge those parts of his judgment by which (a) he rejected their submissions based on the alleged residence or presence of Cape and Capasco in the U.S.A. ("the presence issue"); (b) he accepted the defendants' submissions based on natural justice ("the natural justice issue").

As part of their answer to the plaintiffs' case on presence, the defendants have cross-appealed on what we have described as "the country issue".

To sum up, the three issues which have been argued on this appeal are

(A) the presence issue;

(B) the country issue; and

(C) the natural justice issue.

A decision on any one of these issues in favour of the defendants would strictly render a decision on the other two issues unnecessary. However, we think it right to deal fully with all three issues, not only out of deference to the excellent arguments which have been presented to us on both sides, but also because these issues are important and we suppose that the case could proceed to a higher Court. Furthermore, at least the first two of the three issues are closely connected with one another.

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

II THE PRESENCE ISSUE

The form of the evidence before Scott J. relating to the presence issue

There was put before Scott J. at the hearing a large amount of written material, some of it consisting of the depositions taken in the course of pre-trial discovery in the Tyler 1 and in other proceedings. The plaintiffs put in under the Civil Evidence Act: (i) four depositions of Mr. G. Morgan who had worked for NAAC from 1970 and had been the President (or Managing Director) of NAAC from 1974 until its dissolution in 1978: these depositions were dated 20th May 1975; 19th May 1982; 20th February 1981; and 18th September 1986; (ii) one deposition of Mr. Higham, Managing Director of Cape from the beginning of 1972, made on 4th June 1975; (iii) one deposition of Dr. Gaze, Chief Scientist of the Cape Group, a Director of Capasco since 1961 and later Chairman, and executive director of Cape, and on the Board of NAAC from a date in the late 1960s until July 1975, made on 5th June 1975; (iv) one deposition of Mr. Buckley, Vice-President of PCC, made on 9th September 1975; (v) four depositions of Mrs. J. Holtze, who had started with NAAC on its formation in 1953 as general factotum and as a secretary to Mr. Cryor, then the President of NAAC. Later, Mrs. Holtze in the 1960s, became Secretary and Assistant Treasurer of NAAC until its dissolution, and thereafter Mrs. Holtze continued with CPC. Her depositions were made on 12th April 1979, 7th November 1980, 20th February 1981 and 17th May 1982. There were, in addition to the depositions, many documents including those disclosed by Cape/Capasco in the course of the consolidated actions in this country. The only witness called for Cape and Capasco on the issue of presence was Mr. A.J. Penna, a solicitor who had entered the employment of Cape

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

in 1973 as Group Solicitor and remained in their employment until June 1985.

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

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

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

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

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

4. NAAC did not at any time have authority to make contracts,

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

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 Englis. company, was incorporated as a wholly owned subsidiary of Cape. The shares in Casap (the South African company which owned the shares in the mining subsidiaries) and the shares in NAAC (the marketing subsidiary in Illinois) were transferred to CIOL. This insertion of CIOL between Cape, on the one hand, and Casap and NAAC on the other, did not materially alter the way in which the subsidiaries carried on business and managed their affairs. The sale by Cape to TCL in June 1979 (see para 1 above) was effected by sale of the shares in CIOL. (J.5).

7. Before 1962 the Owentown factory was run by Unarco who were customers for Egnep's amosite asbestos. In 1962 PCC purchased the factory and, until 1972 when the factory was closed, purchased asbestos supplied by Egnep and used it in the factory. (J.5).

8. When the settlement of the Tyler 1 proceedings was concluded in September 1977 Cape, as stated above, decided to take no part in the Tyler 2 proceedings. (J.16B). The further decision was made at a Board meeting of Cape in November 1977 to reorganise the group's asbestos selling arrangements in the USA which would

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

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

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

be remembered that the Tyler 2 actions were commenced on dates between 19th April 1978 and 19th November 1979. If presence of Cape/Capasco could be proved through the office and actions of NAAC but not through the office and actions of CPC under the new marketing arrangements, the point could be of importance). NAAC executed articles of dissolution on 18th May 1978. (J.68).

12. Through the medium of AMC and with the assistance of CPC, Egnep's amosite asbestos continued to be sold into the US until the sale on 29th June 1979 to TCL by Cape of its interests in the subsidiaries: (J.18B) see para 1. above.

/ In paragraphs 13 to 23 below we summarise the detailed findings of Scott J. as to the location, control and operations of NAAC as marketing agent for the Cape Group asbestos. These are to be compared with the location, control and operation of the alternative marketing arrangements provided by AMC and CPC after those arrangements came into existence on some date between 12th December 1977 when CPC was formed and 5th June 1978 when the agency agreement of that date between CPC and AMC was made. We summarise the findings of Scott J. as to the location, control and operations of CPC and AMC in paragraphs 24 to 37 below./

13. Mr. Morgan in December 1970 had been appointed Vice-President of NAAC. He was made President on 1st July 1974 and so continued until dissolution of NAAC in 1978. At all material times the Vice-President of NAAC was Mr. Meyer, an attorney and partner in the firm of Lord Bissell and Brook of Chicago. That firm acted for the Cape Group of companies as their US attorneys. NAAC had offices on the 5th Floor of 150 North Wacker Drive, Chicago. NAAC was the lessee; paid the rent; owned the office furniture and fittings; and employed a staff of some 4 people. Mr. Morgan was in charge. (J.58).

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

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

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

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

17. NAAC was the channel of communication between US customers, such as PCC, and Capasco or Casap. There was undoubtedly "a sense

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

in which NAAC was, if the Cape Group of companies is viewed as a whole, part of the selling organisation of the group and Cape's agent in the US". (J.61C-D).

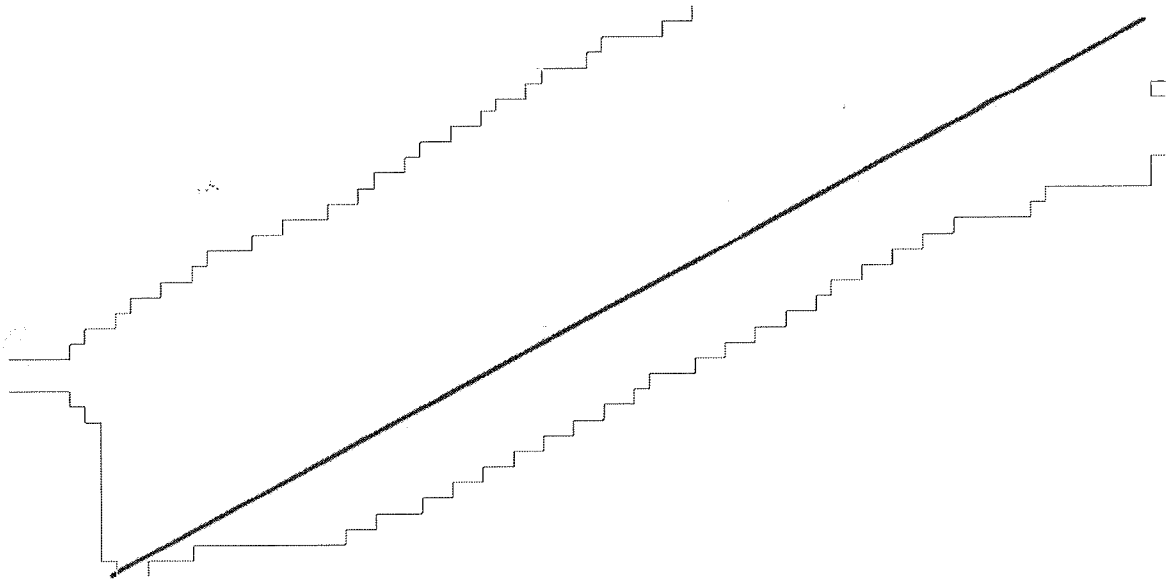
18. Directorships: prior to 11th July 1975 the Board of Directors of NAAC included two senior officers of Cape. Until 1974 Mr. Dent, Chief Executive of Cape, was Chairman of NAAC. In 1975, Mr. Higham succeeded Mr. Dent in both positions. The other Cape director of NAAC was Dr. Gaze, Chief Scientist of the Group, Chairman of Capasco and an Executive Director of Cape. In July 1975, Mr. Higham and Dr. Gaze resigned from the Board of NAAC. This change was, according to the deposition of Mr. Morgan in the Tyler 1 proceedings, attributable to the existence of the Tyler 1 proceedings and was made "to dissociate the parent company as fully as possible from the operating companies" but implied no "change whatever in the method of operation or the present responsibilities of individuals concerned." (J.60D-G).

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

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

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

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



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

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).

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

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

24. The arrangements for the dissolution of NAAC and the formation of AMC and CPC (see paras 8 to 10 above) over the period November 1977 to February 1978 were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the USA while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries. (J.70C). This arrangement was associated with the decision to take no part in the Tyler 2 proceedings and to resist enforcement of any default

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

judgments on the ground that the Tyler Court had no jurisdiction over Cape or its subsidiaries other than NAAC. The defence on those lines would require the trading connection between Cape and its subsidiaries on the one hand and the United States on the other to be kept to a minimum. Hence the need to liquidate NAAC, a Cape subsidiary, and to allow at least some of NAAC's trading functions to be assumed by an Illinois corporation which was not a Cape subsidiary, i.e. CPC. (J.70-71).

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

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

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

through employees or officers of Casap or Egnep. (J.72A).

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

28. The agency agreement of 5th June 1978 between AMC and CPC: see para 10 above: Mr. Morgan was also a party to this agreement. By it AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of USA, Canada and Mexico for a period of 10 years from 1st February 1978 to 31st January 1988. There was a proviso for termination on 12 months' notice. The duties imposed on CPC were to carry out the appointment diligently and in particular (a) to keep AMC advised... as to competitor products... and market conditions... (b) to... facilitate or expedite delivery of products contracted to be sold by AMC in the territory; (c) to seek out and promote prospective business on behalf ofAMC 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

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

bureau. Remuneration for CPC was to be by commission upon the cost of all asbestos sales by AMC in the territory. (J.72-73).

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

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

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

32. As to the cost of CPC's commencement in business:- CPC had

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

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

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

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

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

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

37. In August 1984, according to the evidence of Mr. Summerfield, a solicitor acting for the plaintiffs, there was at 150 North

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

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).

The plaintiffs' challenge to Scott J.'s finding of facts relevant to the "presence" issue: the Appendix to this judgment

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

On the basis of the findings of fact made by Scott J. and the further facts which they submit he ought to have found, the

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

plaintiffs in their amended notice of appeal submit that he was wrong to conclude that

> "(1) NAAC's business was its own business and not the business of Cape or Capasco (J. p. 68C);
> (2) CPC:...was...an independently owned company and carried on its own business (J. pp. 76G-H, 77B);
> (3) As from January 31st 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets (J. pp. 17H and 68F-H);
> (4) Mr. Morgan was in executive control of NAAC's conduct of its business (J. p. 62A-B)."

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

Continued on page 28

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

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

Some leading authorities relevant to the presence issue

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

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

Two points at least are clear. First, at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of a principle explained thus by Parke B. in Williams v. Jones (1845) 13 M. & W. at p. 133:

> " Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." [Emphasis added]

Blackburn J. stated and followed the same principle

in delivering the judgment of himself and Mellor J. in Godard v. Gray (1870) L.R. 6 Q.B. 139 at p. 146 and the judgment of the Court of Queen's Bench in Schibsby v. Westenholz & Others (1870) L.R. 6 Q.B. 139 at p. 159. In the latter case he said (at p. 159):

> "It is unnecessary to repeat again what we have already said in Godard v. Gray.
>
> We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B. in Russell v. Smyth, and again repeated by him in Williams v. Jones, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Secondly, however, in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. As Lindley M.R. put it in Pemberton v. Hughes (1899) 1 Ch. 781:

> " There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained - i.e., over the subject-matter or over the persons brought before them ..... But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense - i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country".

Subsequent references in this section of this judgment to the competence of a foreign court are intended as

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

references to its competence under our principles of private international law, which will by no means necessarily coincide with the rules applied by the foreign court itself as governing its own jurisdiction. As the decision in Pemberton v. Hughes shows, our courts are generally not concerned with those rules.

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

Nearly 120 years ago in Schibsby v. Westenholz the "residence" of an individual in a foreign country at time of commencement of suit was recognised by the Court of Queen's Bench as conferring jurisdiction on the court of that country to give a judgment in personam against him. In that case the court declined to enforce a judgment of a French tribunal obtained in default of appearance against defendants who at the time when the suit was brought in France were not subjects of nor resident in France. On these facts the court decided (at p. 163) that "there existed nothing in the present case imposing on the defendants any duty to obey the judgment of the French tribunal". However, it regarded certain points as clear on principle (at p. 161):

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

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

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

In Emanuel v. Symon (1908) 1 K.B. 302, this court had to consider whether the fact of possessing property situate in Western Australia or the fact of entering into a contract of partnership in that country was sufficient to give a Western Australian court jurisdiction (in the private international law sense) over a British subject not resident in Western Australia at the start of the action, who had neither appeared to the process nor expressly agreed to submit to the jurisdiction of that court. This question was answered in the negative. Buckley L.J. said (at p. 309):

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

After referring to the principles established by (inter alia) Godard v. Gray and Schibsby v. Westenholz, Buckley L.J. observed (at p. 310):

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

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

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

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

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

We will have to revert to the third question in the section of this judgment dealing with the "country" issue; in the present section we will assume in favour of the plaintiffs that the U.S.A., rather than the state of Texas, is to be regarded as the relevant country. As to the first and second questions, we

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

think that the most helpful guidance is to be obtained from the decision of the Privy Council in Sirdar Gurdval Singh v. Rajah of Faridkote (1894) A.C. 670 ("Singh"), the decision of Lord Russell of Killowen in Carrick v. Hancock (1895) 12 T.L.R. 59 and the decision of the House of Lords in Employers' Liability Assurance Corporation v. Sedgwick Collins & Co. (1927) A.C. 95 ("Employers' Liability").

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

> " Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('Actor sequitur forum rei'); which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, s. 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur'. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it and when they are living in another independent country. .... no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

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

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

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

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

In Carrick v. Hancock (1895) 12 T.L.R. 59 the principle of territorial dominion was again referred to. In that case an action was brought upon a monetary judgment obtained in Sweden by an Englishman domiciled in Sweden against a defendant who resided and carried on business at Newcastle. The writ was served on the defendant during a short visit he was paying to Sweden and he duly appeared to answer it. Though he did not himself remain in Sweden, he was represented throughout the subsequent proceedings. He put in a defence and counterclaim and on three separate occasions appealed to the Court of Appeal at Gota. It may be that in those circumstances, notwithstanding his protestations that he had "only appeared under pressure, duress and compulsion of law", the English court could properly have enforced the foreign judgment on the ground that the defendant had submitted to the jurisdiction of the Swedish court. However, Lord Russell of Killowen did not decide the case in favour of the plaintiff on that ground. After reviewing the facts and arguments, he is reported as saying:

> "that the jurisdiction of a Court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its Courts. In his opinion that duty of allegiance was correlative to the protection given by a State to any person within its territory. This

relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually in the territory was wholly immaterial. This being so it was quite clear that under the facts of this case it was properly and lawfully initiated, and all its subsequent proceedings were lawfub and valid, and that the Swedish Courts had ample jurisdiction to enforce the plaintiff's claim against the defendant."

In Employers' Liability Lord Parmoor said this (at pp. 114-115):

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

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

From the three last-mentioned authorities read together, the following principles can, in our judgment, be extracted. First, in determining the jurisdiction of the foreign court in such cases, our court is directing its mind to the

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

competence or otherwise of the foreign court "to summon the defendant before it and to decide such matters as it has decided": (see Pemberton v. Hughes (1899) 1 Ch. at p. 790 per Lindley M.R.). Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice). From the last sentence of the dictum of Lord Parmoor cited above, and from a dictum of Collins M.R. in Dunlop Pneumatic Tyre Company v. Actiengesselschaft fur Motor Und Motorfahr- Zeugbau Vorm. Cudell & Co. (1902) 1 K.B. 342 at p. 346 it would appear that the date of service of process rather than the date of issue of proceedings is to be treated as "the time of suit" for these purposes. But nothing turns on this point in the present case and we express no final view on it. Thirdly, we accept the submission of Sir Godfray Le Quesne (not accepted by Mr. 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 The General Steam Navigation Company v. Guillon (1843) M. & W. 877.

The decision in Carrick v. Hancock has been the subject of criticism in Cheshire & North's Private International Law (11th Edition) at p. 342 ("Cheshire & North"), and in Dicey & Morris where it is said (at pp. 439-440):

> "It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned. For the court is not likely to be the forum conveniens, in the

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

> sense of the appropriate court most adequately equipped to deal with the facts or the law. Moreover, the English case referred to above is open to the comment that the jurisdiction of the foreign court might just as well have been based on the defendant's submission as on his presence."

Our own courts regard the temporary presence of a foreigner in England at the time of service of process as justifying the assumption of jurisdiction over him: (see Colt Industries Inc. v. Sarlie (1966) 1 A.E.R. 673 and H.R.H. Maharanee Seethaderi of Baroda v. Wildenstein (1972) 2 Q.B. 283. However, Cheshire & North comment (at p. 342):

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

We see the force of these points. They highlight the possible desirability of a further extension of reciprocal arrangements for the enforcement (or non-enforcement) of foreign judgments by Convention. Nevertheless, while the use of the particular phrase "temporary allegiance" may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary

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

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,

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

under our law, present in that state for the purposes of in personam jurisdiction. Those clear circumstances, however, may be varied in many different ways. The corporation may not own the place of business but have only the use of it or part of it. It may, instead of carrying on its business by its own servants, cause its business to be done by an agent, or through an agent, in the foreign state. The question will then arise whether the commercial acts done are, for the purposes of our law, to be regarded as done within the jurisdiction of the foreign state (a) by the agent in the course of the agent's business or (b) by the corporation itself. Further, and this is of central importance in this case, if the English corporation causes to be formed under the law of the foreign state a separate but wholly-owned corporation to carry out the business or commercial acts which it requires to be done, are those acts within the jurisdiction of the foreign state to be regarded, for the purposes of enforcement of a judgment of the courts of that state, as the acts of the English corporation within that jurisdiction merely by reason that it owns all the shares of its foreign corporation; and, if not, what degree of power of control, or of exercise of control, and/or what other factors will suffice, in our law, to cause the English corporation to be held to be "present" within the jurisdiction of the foreign state?

The earliest case cited to us in which this court had to consider the concept of residence or presence of a corporation in the context of a claim to enforce a foreign judgment was Littauer Glove Corporation v. F.W. Millington (1920) Limited (1928) 44 T.L.R. 746 ("Littauer"). In that case the plaintiffs were manufacturers in the State of New York. The defendant

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

company, which conducted the business of clothiers' merchants, had its principal place of business in Manchester. It bought from manufacturers in various parts of the world and sold to wholesalers. On March 17th 1922 its managing director, Mr. Millington, arrived in New York on a business visit with a view to seeing samples and making purchases. He stayed in a New York hotel for 4 or 5 nights, where he did some business for his company. Thereafter he visited various other states where he also did business. On April 1st the plaintiffs took out a summons against the defendant company. On April 3rd Mr. Millington returned to New York. On that date, while he was in the sales office in New York of Union Mills Corporation, the defendant's principal U.S. suppliers, he was served with process in the action. He entered no appearance, took no steps in the proceedings and did not submit to the jurisdiction of the American court. On April 4th he sailed for England. The plaintiffs, having in due course obtained judgment against the defendant company in default of appearance in New York, sought to enforce the judgment against it in England. The defendant contended that (under the rules of private international law) the New York court had no jurisdiction to make the order against it. Many authorities were cited to Salter J. From thereport of the argument, it appears to have been common ground that the question turned on the "residence" or otherwise of the defendant company in the State of New York on April 1st 1922 when the proceedings were instituted. Salter J. identified the question for his decision as being whether on 1st April 1922 "the defendant company were resident in the State of New York so as to have the benefit and be under the protection of the laws of that state". The plaintiffs' counsel had

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

contended that it was not necessary for them to show that the defendant company was carrying on business at a fixed place. In his submission, it was resident in New York because it carried on business there: "the company is resident by its travellers and would be subject to process of the country in which they happened to be". Salter J. rejected this contention, saying this (at p. 747):

> " What was meant by saying that a business corporation was resident in a foreign jurisdiction for that purpose? That depended on whether, on the day in question, it was carrying on business in the foreign State so that it could fairly and properly be said to be then resident in that State. If the defendant company were resident in the State of New York on April 1, 1922, where in that State were they resident? Mr. Le Quesne said that they were resident in Broadway, New York, but there must be some place of residence on which one could put a finger. There was no suggestion that the name of the defendant company was in any way displayed at the address in Broadway, or that any letter-paper of the company was used there, or that any business was done there except what the company did with firms in other parts of the United States. If the defendant company were resident in Broadway, it would follow that they were resident wherever Mr. Millington did business. He was, however, nothing more than a commercial traveller on that tour.
>
> If the company had 40 or 50 travellers ranging all over the world, was it to be said that the company were resident wherever the travellers put up at an hotel and took orders? He (his Lordship) did not rely on the expression 'fixed place', but on what was the fair meaning of 'residence'. The inference which he drew from the cases cited was that there must be some carrying on of business at a definite and, to some reasonable extent, permanent place. There was no residence within the jurisdiction on the part of the defendant company, and the action on that point must fail".

Thus, the effect of Salter J.'s decision was that if a foreign judgment is to be enforced in this country against a corporation, it must be shown that at the relevant time (a) the corporation was carrying on business, and (b) it was doing so at a definite and "to some reasonable extent permanent place". This test is significantly different from that applicable in the

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

case of judgments against individuals. Littauer does not bind this court, but we see no reason to doubt the correctness of this test so far as it goes. It seems to us consistent with authority and to represent a commonsense approach to the question of "presence" in the case of a corporation. The difficulty may be to determine whether it can properly be said in any given case that the corporation is itself carrying on business in the country concerned.

The other, and most recent, leading case relating to the enforcement of foreign judgments against corporations is Vogel v. R.A. Konstamm Ltd. (1973) 1 Q.B. 133 ("Vogel"). There the defendants were a company registered in England. They sold leather skins to the plaintiffs through a Mr. Kornbluth who had an office in Tel Aviv. The defendants had no office of their own in Israel. All the material correspondence was conducted with them in England. The contract of sale was not made in Israel. The court in Israel gave judgment for the plaintiff on a claim for breach of contract and the plaintiff sought to enforce it in England. Ashworth J. dismissed the plaintiff's claim. In his judgment he described the functions of Mr. Kornbluth vis-à-vis the defendants thus (at p. 136):

> " Mr Kornbluth's role was that of a person seeking customers who would buy the defendants' goods. For this purpose he was provided with samples for which he paid, and having found a potential customer he would act as a go-between between that person and the defendants. Correspondence would pass between the defendants and Mr. Kornbluth regarding a proposed order and Mr. Kornbluth would be in communication with the customer. If as a result a contract was made it would be made between the defendants and the customer and at no time had Mr. Kornbluth any authority to make a contract on behalf of the defendants."

He said (at p. 136) that:

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

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

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

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

He recognised (at p. 141G) that Littauer was distinguishable on the grounds that:

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

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

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

He expressed his ultimate conclusion thus (at p. 143):

" I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel: and all that emerges from this case is that there was a man called Kornbluth who sought

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

customers for them, transmitted correspondence to them and received it from them, had no authority whatever to bind the defendants in any shape of form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time."

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

In considering these features, Salter J. in Littauer and Ashworth J. in Vogel clearly attached great weight to a long line of cases where the English court has considered whether it should allow process to issue to foreign companies as being amenable to is 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 ("Okura").

The origin of this line requires some brief explanation. After it had been decided in Newby v. Van Oppen (1872)

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

7 Q.B. 293 that in appropriate circumstances a foreign corporation was capable of being sued in this country, our courts in a number of cases had to consider (a) whether on the facts the foreign corporate defendant was amenable to the jurisdiction of the English court, and if so (b) whether it had been properly served with the process. Most of these cases were concerned with the old Order IX, rule 8 of the Rules of the Supreme Court 1883, which provided:

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

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

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

Phrases referring to residence or presence within the jurisdiction, or equivalent phrases, have been used by way of shorthand reference to the condition (or one of the conditions) which a foreign corporation has to satisfy if it is to be amenable to the jurisdiction of the English court. And indeed they have been used more or less interchangeably by the courts. One typical example is the phraseology used by the Earl of Halsbury L.C. in La 'Bourgogne' (1899) A.C. 431, who said (at p. 433):

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

"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 Mf. 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 determing whether a foreign corporation is "here" so as to be amenable to the jurisdiction of our courts is the following passage from the judgment of Buckley L.J. in Okura (1914) 1 K.B. 715 (at pp. 718-719):

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

It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: (see The Theodohos (1977) 2 LL.L.R. 428 at p. 430 per Brandon J.).

All the authorities cited to us have been directed, and all the statements later in this judgmentwill 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

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

corporate activities for references to the carrying on of business 7.

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

(1) Newby v. Van Oppen (supra),
(2) Haggin v. Comptoir d'Escompte (1889) 23 Q.B.D. 519
(3) La "Bourgogne" (1899) P.1 and (1899) A.C. 431.
(4) Dunlop Pneumatic Tyre Company Limited v. Aktien-Gesellschaft Fur Motor Und Motorfahrzeugbau Verm Cudell & Co. (1902) 1 K.B. 342 ("Dunlop")

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

(1) Saccharin Corporation Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft (1911) 2 K.B. 517 ("Saccharin") where the agent, Blasius, occupied and paid rent for offices in London, and in the words of Fletcher Moulton L.J. (at p. 524) "He carries on business at a fixed place in London as sole agent for the defendants in the United Kingdom, though it is true that he is also agent for another firm. He has power to enter into contracts of sale for the defendants".

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

(2) Thames and Mersey Marine Insurance Company v. Societa di Navigazione A Vapore Del Lloyd Austilaco (1914) 111 L.T. 97 ("Thames and Mersey"), where Buckley L.J. began his judgment with the following statement of principle (at p. 98):

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

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

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

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

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

The case of Sfeir & Co. v. National Insurance Company of New Zealand (1964) 1 LL.L.Rep. 330 concerned a claim covered by section 9(2) of the Administration of Justice Act 1920, of which sub-paragraph (b) precluded the registration of a judgment under the section if the judgment debtor "being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court." The first question Mocatta J. had to determine (see at p. 336) was whether the defendants at any material time carried on business in Ghana. If they did so, this could only have been through a Ghanaian company called Glyndova. He expressed his conclusion on this point thus (at p. 339):

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

At least in cases other than branch office cases it is obvious that the activities of the agent by whom the foreign cor-

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

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

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

In Okura itself, Buckley L.J. (at p. 721) summarised his reasons for concluding that the defendant corporation was not present in this country as follows:

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

At the trial of the present case a number of decisions from the Okura line of authorities were cited to Scott J. He said that Counsel before him had treated the statements of principle to be found in the authorities as applicable equally to both classes of case. While expressing "a little unease" in this context (J.57B) he therefore assumed that the statements of principle applied equally to both classes of case.

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

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

(1) "The cases establish that jurisdiction on the territorial basis may be taken by an English Court over a foreign company if the foreign company has business premises in England from which or at which its business is carried on". (J.50G-51A.)

(2) "There are, however, cases where residence or presence of a foreign company in England has been held established notwithstanding that the foreign company did not itself own or lease any business premises in England. A feature of these cases has been that the foreign company had a resident English agent who had authority to contract on behalf of and thereby to bind the principal. In these circumstances the presence or residence in England of the agent has been treated as the presence or residence of the foreign company, the principal." (J. 51F-52A.)

(3) "Trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader: see The Littauer Glove Co. case. The trading must be reinforced by some residential feature, be it a branch office or a resident agent with power to contract". (J.65G-H).

These conclusions as to the law were of critical importance because the learned judge later found as facts (at p. 68B) that the 150 North Wacker Drive offices were N.A.A.C.'s offices and that N.A.A.C. had no authority to contract on behalf of Cape or Capasco or any other company in the Cape Group. He also found as facts (at p. 77B) that C.P.C., "like N.A.A.C., had no authority to bind Egnep, Casap or any other of the Cape subsidiaries to any contract" and the offices at 150 North Wacker Drive were CPC's "own offices".

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

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

yardstick to be applied in the present context. Contrary to the suggestion made by Ashworth J. in Vogel, he said, those authorities do not represent the situation truly converse to the enforcement of a foreign judgment; the true converse would be a foreign court applying its own conflict rules, adjudicating on the enforcement of an English judgment. Comity, as Blackburn J. pointed out in Schibsby v. Westenholz, is not the basis on which our courts enforce foreign judgments. Furthermore, the circumstances in which an English court will assume jurisdiction over a foreign corporation are closely bound up with our own rules of procedure which are derived largely from statute or statutory instrument and will be amended from time to time.

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

Mr. Morison went on to submit that in any event the Okura line of cases does not establish a universal rule that in cases where the foreign corporation has no fixed place of business of its own "the trading must be reinforced by ..... a

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

resident agent with power to contract". There are, it is true, many dicta which suggest that the existence of power in the agent to bind his principal to contracts, without reference back to the principal, is an important indication that the principal himself is carrying on business by the agent. However, it has apparently never been held that this is an essential feature of "presence" in cases where the corporation has no branch office in this country. Many of the reported cases were concerned with selling agencies, particularly in the shipping field, which were usually not exclusive to the principal concerned. It is therefore hardly surprising, Mr Morison submitted, that the courts concentrated on the question of authority to contract, because the agency was in a real sense carrying on its own agency business. In the present case it is not alleged that N.A.A.C. or C.P.C. had power to enter into sales contracts on behalf of Cape or Capasco. However, it is said, they were carrying out a recognised business activity for the exclusive benefit of Cape and Capasco, that is to say, the function of marketing agents. The question whether N.A.A.C. or C.P.C. were properly to be described as doing their own business or that of their principals was not to be determined by asking whether or not they had authority to contract, but by asking whether they had authority to market and were carrying out this function. Mr. Morison invited us to follow the general approach adopted by the court in two Canadian cases, Miller v. B.C. Turf Ltd. (1969) 8 D.L.R. (3d) 383 and Moore v. Mercator Enterprises Ltd. (1978) 90 D.L.R., 3rd Ed. 590.

We would agree with Mr. Morison that the existence of a power in the resident agent to bind the foreign corporation to contracts can be neither an exclusive nor conclusive test of the

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

residence of the corporation itself. As he pointed out, there are many cases in which the corporation has been held not to be carrying on business at the agency notwithstanding the existence of authority of this kind: (see for example The Princess Clementine (1897) P. 13, The Lalandia (1933) P. 56, The Holstein (1936) 2 A.E.R. 1660). Conversely, we can conceive hypothetical cases in which it might be absurd to regard the test as conclusive. If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on its behalf; the existence of such a requirement would not by itself prevent the corporation from being present in the country concerned and thus from being amenable to the jurisdiction of its courts.

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

We do not find this surprising as a matter of principle. Indubitably a corporation can carry on business in a foreign country by means of an agent. "It may be stated as a

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

general proposition that whatever a person has power to do himself he may do by means of an agent": (Halsbury's Laws of England (4th Edition) Volume 1, para. 703). However, though the terms "agency" and "agent" have in popular use a number of different meanings, "in law the word 'agency' is used to connote the relationship which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties": (ibid, para. 701). Where the representative of an overseas corporation has general authority to create contractual relations between the corporation and third parties and exercises this authority, there may be little difficulty in applying the maxim "qui facit per alium facit per se". Where no such authority exists, there may be much greater difficulty. We were not persuaded by Mr. Morison's submission, based primarily on a dictum of Verchere J. in Miller v. B.C. Turf Ltd. (supra) (at p. 386), that the capacity (or possible capacity) of N.A.A.C. or C.P.C. to render Cape/Capasco vicariously liable for negligence (and thereby to create relations in tort between them and third parties) is of any weight in deciding whether Cape/Capasco were present in the U.S.A. The mere authority given by Cape/Capasco to N.A.A.C. or C.P.C. to convey a message to a third party could render Cape/Capasco potentially liable in tort to a third party if that message was carelessly transmitted, The existence of such potential liability would go no way towards establishing the presence of Cape/Capasco in the U.S.A.

General Principles derived from the authorities relating to the "presence" issue

In relation to trading corporations, we derive the three following propositions from consideration of the many

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

authorities cited to us relating to the "presence" of an overseas corporation:-

(1) The English court will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either

(i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), OR

(ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.

(2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

(3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant

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

on such investigation:

(a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;

(b) whether the overseas corporation has directly reimbursed him for

(i) the cost of his accommodation at the fixed place of business;

(ii) the cost of his staff;

(c) what other contributions (if any) the overseas corporation makes to the financing of the business carried on by the representative;

(d) whether the representative is remunerated by reference to transactions (e.g. by commission) or by fixed regular payments or in some other way;

(e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative;

(f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation;

(g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;

(h) what business (if any) the representative transacts as principal exclusively on his own behalf;

(i) whether the representative makes contracts with customers

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

or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it;

(j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the learned judge (at p. 65G-H of his judgment) was intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve "a nice examination of all the facts and inferences must be drawn from a number of facts adjusted together and contrasted": ("La Bourgogne" (1899) P. at p. 18 per Collins L.J.).

Nevertheless, we agree with the general principle stated thus by Bearson J. in F. & K. Jabbur v. Custodian of Absentee Property for the State of Israel (1953) 2 L. Rep. 760 at p. 776:

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

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in

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

the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation.

The plaintiffs' submissions on the "presence" issue

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

These three main submissions were substantially as follows:

(1) Cape and Capasco were present and carrying on business in the U.S.A., namely marketing and selling the Cape Group's asbestos, through N.A.A.C. until May 1978, and through C.P.C. (or A.M.C.) until June 1979 from a place of business in Illinois because N.A.A.C. and C.P.C. were the agents of Cape. (We will call this "the agency argument").

(2) Cape/Capasco and N.A.A.C. constituted a single commercial unit and for jurisdictional purposes, N.A.A.C.'s presence in Illinois therefore sufficed to constitute the presence of Cape/Capasco. Likewise, Cape/Capasco and C.P.C., which performed the same functions as those previously carried on by N.A.A.C., constituted a single economic unit, and C.P.C.'s presence in

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

Illinois sufficed to constitute the presence of Cape/Capasco. (We will call this "the single economic unit argument").

(3) In relation to C.P.C./A.M.C., the corporate veil should be lifted so that C.P.C.'s and A.M.C.'s presence in the U.S.A. should be treated as the presence of Cape/Capasco. (We will call this argument, which does not extend to N.A.A.C., "the corporate veil" argument).

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

The "single economic unit" argument

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

It is thus indisputable that each of Cape, Capasco, N.A.A.C. and C.P.C. were in law separate legal entities. Mr. Morison did not go so far as to submit that the very fact of the parent-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. Rep. 159 agents acting on behalf of the Dordtsche Company, had signed bills of lading.

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

It was conceded at the trial that in so doing the agents had made Walford Lines Ltd., the parent company of Dordtsche Company, responsible for the bills of lading. Langton J., who described the concession as properly made, said (at p. 169):

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

In Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies (1955) 1 W.L.R. 352 ("Holdsworth") the question arose whether the respondent company, which had entered into a service agreement with Mr. Caddies under which he was appointed managing director of the company, was entitled to require him to devote his whole time to duties in relation to subsidiaries of the company. It was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that therefore the agreement could not be construed as entitling them to assign any such duties to Mr. Caddies. Lord Reid, in agreement with the majority, rejected this argument, saying (at p. 367):

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

In Scottish Co-operative Wholesale Society Ltd. v. Meyer (1959) A.C. 324 ("Scottish Co-operative") the respondent based his complaint on section 210 of the Companies Act 1948, which provided that "any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) .... may make

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

application to the court by petition for an order under this section". The appellant society had formed a subsidiary company, of which the respondent was a member. It was submitted on behalf of the Society that even if it had acted in an oppressive manner, yet it had not conducted the affairs of the company in an oppressive manner within the meaning of the section. The House of Lords unanimously rejected this submission. Lord Simonds said (at p. 342):

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

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

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

In D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council (1976) 1 W.L.R. 852 ("the D.H.N. case") a group of three companies, "D.H.N.", "Bronze" and "Transport", all in voluntary liquidation at the relevant time, were seeking compensation under the Land Compensation Act 1961 following a compulsory purchase made by the respondent Council. D.H.N. held all the shares in Bronze and Transport. The business of the group was owned by D.H.N. The land was owned by Bronze. The vehicles were owned by Transport. The Lands Tribunal held that D.H.N. were licensees of Bronze and had no claim to compensation for disturbance beyond that which could be allowed under section 20 of the

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

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) as follows:

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

Goff L.J. (at p. 861) said:

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

In Revlon Inc. v. Cripps & Lee Ltd. (1980) F.S.R. 85 the question (among many other questions) arose as to whether the

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

goods in question were "connected in the course of trade with the proprietor .... of the trade mark" within the meaning of section 4(3) of the Trade Marks Act 1938". The proprietor of the trade mark was Revlon Suisse S.A., a subsidiary of Revlon Inc. Buckley L.J., in the course of deciding that the goods were connected in the course of trade with Revlon Suisse S.A., said this (at p. 105):

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

Principally, in reliance on those authorities and the case next to be mentioned, Mr. Morison submitted that in deciding whether a company had rendered itself subject to the jurisdiction of a foreign court it is entirely reasonable to approach the question by reference to "commercial reality". The risk of litigation in a foreign court, in his submission, is part of the price which those who conduct extensive business activities within the territorial jurisdiction of that court properly have to pay. He invited us to follow the approach of Advocate-General Warner (as he then was) in Institute Chemioterapico Italiano SpA & Commercial Solvents Corporation v. E.C. Commission (1974) C.M.L.R. 309 ("Commercial Solvents") when considering whether a parent company and subsidiary were separate "undertakings" within the meaning of Articles 85 and 86 of the Treaty of Rome. He said (at pp. 319-320):

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

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

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

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

Advocate-General Warner (at p. 321) said:

"(1) that there is a presumption that a subsidiary will act in accordance with the wishes of its parent - because according to common experience subsidiaries generally do so act;

(2) that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Article 85 and 86 of the EEC Treaty."

We have some sympathy with Mr. Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one. Mr. Morison referred us to Bulova Water Company Inc. v. Haltori & Co. 508 F. Supp. 1322 (1981), where the United States District Court held that it had jurisdiction over a Japanese

corporation, which was expanding into a new market by setting up subsidiaries and dealing with competition, both on the theory that the corporation was "doing business" in New York and under the New York "long-arm statute". In the course of his judgment, Chief Justice Weinstein said (at p. 1342):

> "these subsidiaries almost by definition are doing for their parent what their parent would otherwise have to do on its own".

It is not surprising that in many cases such as Holdsworth, Scottish Co-operative, Revlon and Commercial Solvents the wording of a particular statute or contract has been held to justify the treatment of parent and subsidiary as one unit, at least for some purposes. The relevant parts of the judgments in D.H.N. must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in Woolfson v. Strathclyde Regional Council ("Woolfson") (1978) S.L.T. 2, 159 in a passage which will be quoted below.

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

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

general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms. In Firestone v. Llewellyn (1957) 1 W.L.R. 464 (which was referred to by Scott J.) the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below the Judge (J.79) refused an invitation to infer that there existed an agency agreement between Cape and N.A.A.C. comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of Salomon v. Salomon merely because it considers it just so to do.

In support of the single commercial unit argument, Mr. Morison made a number of factual submissions to the following effect: The purpose of N.A.A.C.'s creation was that it

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

might act as a medium through which goods of the Cape Group might be sold. The purpose of the liquidation of NA.A.C. was likewise to protect Cape. Any major policy decisions concerning N.A.A.C. were taken by Cape. Cape's control over N.A.A.C. did not depend on corporate form. It exercised the same degree of control both before and after the removal of the Cape directors from the N.A.A.C. board. The functions of N.A.A.C.'s directors were formal only. Dr. Gaze effectively controlled its activities. Cape represented N.A.A.C. to its customers as its office in the U.S.A. In broad terms, it was submitted, Cape ran a single integrated mining division with little regard to corporate formalities as between members of the group in the way in which it carried on its business.

The plaintiffs further submitted in their notice of appeal that N.A.A.C. "did not deal and was not permitted to deal with Egnep or Casap, but had to go through Cape or Capasco". It seems clear that N.A.A.C., as principal, made direct purchases of raw asbestos from Egnep. On the balance of probabilities, we accept the plaintiffs' submission that it made similar direct purchases from Casap: (see our observations under item (4) of the Appendix). In referring to the absence of dealing with Egnep or Casap, the plaintiffs were, we understand, intending to submit that as a matter of Group policy, which Cape could and did enforce by its power of control over the boards of Egnep, Capasco and N.A.A.C., the transmission of information and orders to or from customers had to be effected and was effected by N.A.A.C. through Capasco. We accept that submission. We also accept that the matters referred to in this paragraph lend some broad support to the submission that Cape ran a single integrated mining division with little regard to corporate formalities as between

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

members of the Group. However, there has been no challenge to the judge's finding that the corporate forms applicable to N.A.A.C. as a separate legal entity were observed.

As to the plaintiffs' other factual submissions in this context we will deal with the purpose of N.A.A.C.'s creation and existence in considering the "agency" argument. As to the relationship between Cape and N.A.A.C., it is of the very nature of a parent company-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 under items (11), (12) and (13). Our conclusion, shortly stated, is that the finding was justified by the evidence. A degree of overall supervision, and to some extent control, was exercised by Cape over N.A.A.C. as is common in the case of any parent-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 ofexpenses 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 NA.A.C. in the U.S.A. be placed through Capasco on behalf of Egnep and Casap, the day-to-day running of N.A.A.C. was left to him. There is no challenge to the

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

judge's findings that -

(a) the corporate financial control exercised by Cape over N.A.A.C. in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be expected in a group of companies such as the Cape Group (J. 61);

(b) the annual accounts of N.A.A.C. were drawn on the footing that N.A.A.C.'s business was its own business and there was nothing to suggest that the accounts were drawn on a false footing (J. 70).

In the light of the set-up and operations of the Cape Group and of the relationship between Cape/Capasco and N.A.A.C. we see the atrraction of the approach adopted by Lord Denning M.R. in the D.H.N. case (1976) 1 W.L.R. at p. 860 which Mr. Morison urged us to adopt:

> "This group is virtually the same as a partnership in which all the three partners are companies,"

In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in Bank of Tokyo Ltd. v. Karoon (1987) A.C. 45 (at p. 64) are apposite:

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

As to C.P.C., in Mr. Morison's submission, the replacement of N.A.A.C. by C.P.C. was simply a substitute arrangement. The creation of C.P.C. was effected and paid for by Cape so that it could perform the same functions on behalf of Cape as N.A.A.C. had

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

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 CP.C. for his own benefit, the rights of pre-emption reserved to A.M.C. by the agency agreement of 5th June 1978 left him with little substantial financial interest in CPC's business, save for the office furniture and a right to an account which would be of little value; effectively, it was submitted, C.P.C.'s business was owned by A.M.C. (Cape).

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

The "corporate veil" point

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

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

The only allegation of a façade in the plaintiffs' pleadings was

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

that the formation and use of C.P.C. and A.M.C. in the "alternative marketing arrangements of 1978 were a device or sham or cloak for grave impropriety on the part of Cape or Capasco, namely to ostensibly remove their assets from the U.S.A. to avoid liability for asbestos claims whilst at the same time continuing to trade in asbestos there". In their notice of appeal (paragraph 2 (b)) the plaintiffs referred to their contention made at the trial that C.P.C. "was set up to replace N.A.A.C. in such a way as to disguise the defendants' continued involvement in the marketing of the Group's asbestos in the U.S.A.".

Scott J. more or less accepted this contention. He found as a fact that "the arrangements made regarding N.A.A.C., A.M.C. and C.P.C. were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the United States while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries".

However, he went on to say (at p. 71B-D):

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

If and so far as the learned judge intended to say that the motive behind the new arrangements was irrelevant as a matter of law, we would respectfully differ from him. In our judgment, as Mr. Morison submitted, whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant, and indeed this no doubt is the

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

reason why the question of motive was examined extensively at the trial. The decision in Jones v. Lipman (1962) 1 W.L.R. 832 referred to below was one case where the proven motive of the individual defendant clearly had a significant effect on the decision of Russell J.

The judge's finding of fact quoted above as to the motives of Cape behind the new arrangements is accepted (no doubt welcomed) by the plaintiffs, so far as it goes. They submit, rightly in our judgment, that any such motives are relevant to the "corporate veil" point. They further submit that the learned judge

(a) erred in concluding that C.P.C. was an "independently owned company"; and

(b) failed to make a number of findings of fact which are relevant in the context of the "corporate veil" point.

Mr. Morison has taken us through the arrangements which led to the extinction of N.A.A.C. and the emergence of A.M.C. and C.P.C. with care and in considerable detail. The additional facts which the appellants say the learned judge ought to have found, and which are set out in paragraphs (16) to (25) of the Appendix to this judgment, all relate to these arrangements. It is true that, as the judge said, some of the letters and memoranda have a "somewhat conspiratorial flavour to them". Since, contrary to the judge's view, we think motive is relevant in this context, we have thought it right to investigate these contentions in some detail in the Appendix.

On analysis, much of the new material does little more than amply support the judge's finding quoted above as to the purpose of the composite arrangement. In this court Mr.

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

Morison made it clear that the plaintiffs were not alleging any unlawful purpose or impropriety on the part of Cape in the sense of any intention to deceive or to do any unlawful act, either in Illinois or in this country. It was, however, asserted for the plaintiffs that A.M.C. and C.P.C. together constituted a façade which concealed the real activities of Cape. We understand that to mean that the purpose of Cape was to conceal, so far as it lawfully could having regard to the requirements of the law in Illinois and this country, any connection of Cape with A.M.C. or C.P.C.

Before expressing our own views as to Cape's purpose, we will state our conclusions as to Mr. Morgan's position. It is, in our judgment, right to infer, substantially as submitted by Mr. Morison, that the assistance derived from the presence of Mr. Morgan in Illinois, undertaking the task through C.P.C. of marketing agent for the Cape subsidiaries in the United States, was regarded as being at least of great importance to the general purposes of the Cape Group, and possibly essential for those purposes, because, if it was not so regarded, there is no apparent reason why Cape should assume the cost and such risk as might have arisen from setting up C.P.C. Sir Godfray, however, was in our view plainly right in submitting that the agreement of Mr. Morgan was required for the creation of the alternative marketing arrangements by means of a new independent Illinois company and that his agreement, when given, was real. Cape had obligations of a moral nature to Mr. Morgan and to the long serving staff of N.A.A.C. Cape also, for its own purposes, wanted Mr. Morgan and Mrs. Holtze to continue with the work previously done by them for N.A.A.C. If Mr. Morgan decided to take on the task

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

of providing services to the subsidiaries of the Cape Group through C.P.C., on the terms available to him as owner of the shares in C.P.C., Cape would get the benefit of his knowledge and experience as the person in charge of C.P.C. Nothing in the material to which our attention was drawn under these headings, however, causes us to doubt the correctness of Scott J.'s conclusion that the shares in C.P.C. belonged both at law and in equity to Mr. Morgan. It is clear that Cape intended C.P.C. to be in reality Mr. Morgan's company because that was part of their purpose. Such as it was, and dependent for almost all of its business on the Cape subsidiaries, C.P.C. was Mr. Morgan's company. We therefore reject the challenge to the judge's finding that C.P.C. was an independently owned company.

As to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C., we think that the extracts from the evidence set out in the Appendix to this judgment (particularly under item (17)), sufficiently reveal both the substance of what the officers of Cape were doing and what they were trying to achieve. The allegation of impropriety was, in our view, rightly abandoned. The inference which we draw from all the evidence was that Cape's intention was to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for U.S. taxation or subject to the jurisdiction of the U.S. courts, whether State or Federal, and the risk of any default judgment by such a court being held to be

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

enforceable in this country. Inference (a) was also made by the learned judge. Inference (b) is our own addition.

The question of law which we now have to consider is whether the arrangements regarding N.A.A.C., A.M.C. and 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 U.S.A. should be treated as the presence of Cape/Capasco for this reason if no other.

In Merchandise Transport Ltd. v. British Transport Commission (1962) 2 Q.B. 173 Danckwerts L.J. (at p. 206-207) referred to certain authorities as showing that

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

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

Rather greater assistance on this point is to be found in Jones v. Lipman(1962) 1 W.L.R. 832. In that case the first defendant had agreed to sell to the plaintiffs some land. Pending completion the first defendant sold and transferred the land to the defendant company. The evidence showed that this company was at all material times under the complete control of the first defendant. It also showed that the acquisition by him of the company and the transfer of the land to the company had been carried through solely for the purpose of defeating the

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

plaintiff's right to specific performance (see at p. 836). Russell J. made an order for specific performance against both defendants. He held that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed. As to the defendant company, he described it (at p. 836) as being "the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity". Following Jones v. Lipman, we agree with Mr. Morison that, contrary to the learned judge's view, where a façade is alleged, the motive of the perpetrator may be highly material.

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

We were referred to certain broad dicta of Lord Denning M.R. in Wallersteiner v. Moir (1974) 1 W.L.R. 991 at p. 1013, and in Littlewoods Mail Order Ltd. v. I.P.C. (1969) 1 W.L.R. 1241 at p. 1254. In both these cases he expressed his willingness to pull aside the corporate veil, saying in the latter:

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

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

However, in Wallersteiner v. Moir (supra) Buckley L.J. at p. 127 and Scarman L.J. (at p. 1032) expressly declined to tear away the corporate veil. In Littlewoods, Sachs L.J. (at p. 1255) expressly dissociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminski L.J. refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning M.R.

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in Woolfson. 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. (J. pp. 71H-72A) said it seemed clear that A.M.C. was "no more than a corporate name" and that he would expect to find, if all the relevant documents were available, that "A.M.C. acted through employees or officers of either Casap or Egnep". He rejected (p. 76A) Mr. Morgan's evidence that he understood A.M.C. to be an independent South African trading company, and was satisfied that he knew very well

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

that it was a "creature of Cape". "The seller in C.P.C.'s time was, nominally, A.M.C. but in reality still, I think, Egnep or Casap": (p. 77A). In our judgment, however, the revelation of A.M.C. as the creature of Cape does not suffice to enable the plaintiffs to show the presence of Cape/Capasco in the U.S.A., since on the judge's undisputed findings, A.M.C. was not in reality carrying on any business in the U.S.A.

The relationship between Cape/Capasco and C.P.C. is the crucial factor, since C.P.C. was undoubtedly carrying on business in the U.S.A. We have already indicated our acceptance of the judge's findings that C.P.C. was a company independently owned by Mr. Morgan and that the shares therein belonged to him in law and in equity. These findings by themselves make it very difficult to contend that the operation of C.P.C. involved a façade which entitles the court to pierce the corporate veil between C.P.C. and Cape/Capasco and treat them all as one. Is the legal position altered by the facts that Cape's intention, in making the relevant arrangements (as we infer), was to enable sales of asbestos from the South African subsidiaries to be made while (a) reducing if not eliminating the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for U.S. taxation or subject to the jurisdiction of the U.S. courts and the risk of any default judgment by such a court being held to be enforceable in this country?

We think not. Mr. Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed

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

on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the U.S.A. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondinly the risk of enforcement of that liability) will fall on another member of the Group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr. Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the Group's asbestos trade in the U.S.A, without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the Group's affairs in that manner and (save in the case of A.M.C. to which special considerations apply) to expect that the court would apply the principle of Salomon v. Salomon in the

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

ordinary way.

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

We reject the "corporate veil" argument.

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

We now proceed to consider the agency argument in relation to N.A.A.C. on the footing, which we consider to be the correct one, that N.A.A.C. must for all relevant purposes be regarded as a legal entity separate from Cape/Capasco. In an earlier section of this judgment we summarised three propositions which we derived from the authorities relating to the "presence" of an overseas corporation. There we stated that, save in a "branch office" case (which the instant case is not), the English court will be likely to treat an overseas trading corporation as present within the jurisdiction of the courts of another country only if a representative of the overseas corporation has for more than a minimal period of time been carrying on the oversess 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

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

fixed place of business in the U.S.A., 150 North Wacker Drive, for a substantial period of time. So no difficulty arises on that score. The crucial question is whether it can fairly be said that Cape's business has been transacted by N.A.A.C. at or from 150 North Wacker Drive. The judge's answer to it was that "N.A.A.C.'s business was its own business and not the business of Cape or Capasco": (J. 68C). The plaintiffs challenge the correctness of this answer to the question.

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

The factual material which we have principally in mind in considering whether Cape's business was being transacted at or from 150 North Wacker Drive is to be found in the section of this judgment headed "The facts on 'presence' as found by Scott J.", and in our observations on items (1) to (13) in the Appendix to this judgment. We summarise below what we consider the most material facts in context, having regard to the list of potentially relevant factors set out in an earlier section of our judgment.

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

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

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 4 persons for whom it ran its own pension scheme.

(2) From time to time it conducted the following activities as principal on its own account:-

(a) it bought asbestos from U.S. Government Stocks or from Egnep or Casap and sold it to U.S. customers, such purchases representing about 25% of N.A.A.C.'s business in terms of tonnage;

(b) it imported asbestos goods from Japan and sold them to U.S. customers.

(While we accept that the purchase by N.A.A.C. of asbestos goods was subordinate to its business with or for Cape's subsidiaries, we do not accept the plaintiffs' submission that such sales were trivial, having regard to the turnover of N.A.A.C: (see our observations under item (5) in the Appendix.)

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

(4) N.A.A.C. earned profits and paid U.S. taxes thereon.

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

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

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

Board of Directors.

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

In the face of these facts, now unchallenged, it is in our judgment clear beyond argument that N.A.A.C. was carrying on business of its own. The only question is whether, in performing the functions which it performed on behalf of Cape/Capasco, it was carrying on its own business or their business. What, then, were these functions? As we see the position from the findings of the judge and the evidence put before us, its functions were to assist in the marketing of asbestos in the U.S.A. upon sales by Egnep or Casap and generally to assist and encourage sales in the U.S.A. of asbestos of the Cape Group. It acted as the channel of communication between Cape/Capasco and U.S. customers, such as P.C.C. It organised and arranged the performance of contracts between U.S. customers and Egnep. It had a co-ordinating role, particularly in arranging delivery. The U.S. customer would specify to N.A.A.C. from time to time the quantity of asbestos which it wished to purchase and the time when it desired delivery to be made. This information would be conveyed through N.A.A.C. to Casap and Egnep. Shipping arrangements and delivery dates would be arranged by Casap or Egnep and communicated to the U.S. customers via N.A.A.C. N.A.A.C. would receive documents and pass them on to the customers. It also received requests and complaints which it would normally pass on to 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

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

N.A.A.C. reserved any part of its office premises or any part of its staff exclusively for performing its agency functions.

Our further findings as to the functions which N.A.A.C. performed and as to its relationship between N.A.A.C. and Cape are to be found set out in the Appendix under items (1) to (3). We bear in mind particularly the submissions contained in item (9) that (i) when corresponding with U.S. customers, Cape referred to N.A.A.C. as "our Chicago office" and N.A.A.C. referred to Cape and Capasco as "our London office"; (ii) N.A.A.C. held itself out to a large U.S. customer as being part of the Cape selling organisation, and (iii) N.A.A.C. was treated by the major customer "as the channel between them and Cape and Capasco". However, in the Appendix we give our reasons for concluding that the matters shown in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to N.A.A.C.'s role and functions.

There is no doubt that the services rendered by N.A.A.C. in acting as intermediary in respect of contracts between the U.S. customers and 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 U.S.A. Nevertheless, for all the closeness of the relationship between Cape/Capasco and N.A.A.C., strictly defined limited 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/

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

Capasco thereby became subject to contractual obligations to any person. This significant factor renders the arguments in favour of "presence", at least in some respects, even less strong than they were in cases such as The Lalandia (1933) P. 56 and The Holstein (1936) 2 A.E.R. 1660 where the argument failed. Having regard to the legal principles stated earlier in this judgment, and looking at the facts of the case overall, our conclusion is that the judge was right to hold that the business carried on by N.A.A.C. was exclusively its own business, not the business of Cape or Capasco, and that Cape and Capasco were not present within the U.S.A. through N.A.A.C. at any material time. We see no sufficient grounds for disturbing this finding of fact.

Under this section of our judgment we should mention one further point. The plaintiffs challenged the judge's finding that as from 31st January 1978, N.A.A.C. ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets. The object of the challenge was to refute the suggestion that Cape could not be regarded as present in the U.S.A. through N.A.A.C. during the period between 31st January 1978 and N.A.A.C.'s formal dissolution on 19th May 1978. (They accepted that after 19th May Cape could not be said to be present in the U.S.A, by or through N.A.A.C.). The plaintiffs regard this point as having potential legal relevance, since two of the eight actions which comprise Tyler II were begun before 18th May 1978. In the Appendix (under item (19)) we give our reasons for rejecting the challenge to the judge's finding of fact.

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

We now consider whether Cape/Capasco were present in

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

the U.S.A. by or through C.P.C. In dealing with the "corporate veil" point we have stated our inferences as to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C. Part of the very purpose of these arrangements was to enable sales of asbestos from the Cape Group to continue to be made in the U.S.A. while creating a greater distance both in appearance and reality between Cape and the company (C.P.C.) which was intended to carry out the functions on its behalf in the U.S.A. which had previously been carried out by N.A.A.C. Having dealt with the "corporate veil" point, we agree with the following passage in Scott J.'s judgment (pp. 76F-77B):

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

The interposition of A.M.C. in the new arrangements made in 1978 cannot one way or the other affect the question whether Cape/Capasco were present in the U.S.A. thereafter. For all relevant purposes, as we have already indicated, we are prepared to treat Cape and A.M.C. as one. The functions performed by C.P.C. and its relationship with Cape through A.M.C. are the relevant considerations for present purposes. Since

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

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 5th June 1978 were a reliable guide to the nature of the relationship between C.P.C. and A.M.C. and hence between C.P.C. and Cape. Under the terms of this agreement, C.P.C. wereleft free to sell materials and products other than asbestos fibre and to involve itself in other commercial activities. It is clear that it did so. While there is no evidence that it followed N.A.A.C. in buying raw asbestos from Egnep or Casap or the U.S. Government, it undoubtedly bought and sold manufactured textiles on its own behalf as principal.

It is thus quite plain that at least a substantial part of C.P.C.'s business was in every sense its own business. As with N.A.A.C., the only question is whether, in performing the functions which it performed on behalf of Cape/Capasco, it was carrying on its own business or their business. As the terms of the agency agreement show, these functions were very similar to those which had been performed by N.A.A.C. The services rendered by C.P.C. to Cape /Capasco were similarly active and important. Again, however, strictly defined limits were imposed on the functions which C.P.C. was authorised to carry out or did carry out as the representative of Cape/Capasco (through A.M.C.). C.P.C. had no authority to bind A.M.C. or Cape or Capasco to any contractual obligation. Again too, there is no evidence that C.P.C., whether with or without prior authority from any of those three companies, ever carried out any transaction in such

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

manner as to subject any of them to contractual obligations to any person. In the light of the legal principles stated above and of the facts of the case looked at as a whole, we see no sufficient grounds for disturbing the judge's finding that the business carried on by C.P.C. was exclusively its own business and that Cape and Capasco were not present within the U.S.A through C.P.C. (or A.M.C.) at any material time.

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

The onus of proof

The plaintiffs submitted to Scott J. that the onus was on Cape to establish that it was not resident in the U.S.A. and that he should hold that the defendants had failed to discharge that onus. He rejected that argument (J. 78) saying:

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

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

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

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

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

However, as all the authorities show, it is only the judgment of a foreign court recognised as competent by English law 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

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

presumption that it had been there in 1979.

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

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

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

III: THE COUNTRY ISSUE

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

This question may conveniently be labelled the "country" issue, echoing the language of Schibsby v. Westenholz, supra, and several of the later cases. We should, however, observe that this terminology must be used with caution, lest it beg the very question under consideration, and lead the reader to assume that the political entity provides the geographical test. This point was not in issue in any of the cases from which we have already quoted, and no assumption as to the relevant principle can be drawn from the language in which the courts chose to express their opinions on the question of "presence".

It is convenient to begin by summarising the evidence placed before us, concerning the organisation of the Federal Courts, their jurisdiction and the law which they enforce.

The organisation of the Federal Courts is laid down by

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

Part I of Title 28 of the U.S. Code. These courts exist in three tiers. First, there is the Supreme Court of the United States. This court has various jurisdictions. In particular, it is the final court of recourse from decisions of Federal Courts of Appeals (section 1254) and from the highest court of each State (section 1257). The second tier comprises the Courts of Appeals. The United States is divided into thirteen judicial circuits each extending to a number of states, or to the District of Columbia (section 41). In each circuit there is a Court of Appeals, known as "the United States Court of Appeals for the circuit" (section 43(a)) and consisting of the circuit judges of the circuit (section 43(b)). The circuit judges are appointed by the President, by and with the advice and consent of the Senate, in numbers which vary from circuit to circuit (section 44(a)). They hold office during good behaviour (section 44(b)) and are required to reside on the circuit (section 44(c)).

The third tier consists of the District Courts. Each State is divided into judicial districts. In each judicial district there is a District Court known as "the United States District Court for the District" (section 132(a)). Each District Court consists of the district judge or judges "for the district" (section 132(b)). Each district judge is required to reside in the district for which he is appointed (section 134(b)). Texas has four districts, each of which is sub-divided into seven divisions. The Tyler Division, which comprises ten counties, is a division of the Eastern Division of Texas. The court for the Tyler Division is held at Tyler (section 124). Like the judges of the Courts of Appeals the judges of the District Courts are appointed by the President, hold office during good behaviour and receive salaries fixed by Federal legislation.

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

When a claimant seeks to invoke the jurisdiction of one of these District Courts it may be necessary to consider three questions - (i) whether there is a sufficient geographical relationship between the parties, or the subject-matter and the individual District Court where the action is to be commenced ("venue"); (ii) whether the subject-matter of the action is such that a District Court is entitled to hear it ("subject-matter jurisdiction"); (iii) whether the defendant is amenable to service of the process of the District Court ("personal jurisdiction").

As regards venue, the following provisions of Title 28 are most immediately relevant -

1. A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose (section 1391(a) of Title 28).

2. A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose except as otherwise provided by law (section 1391(b)).

3. An alien may be sued in any district (section 1391(d)).

It may be noted that venue is defined, not by reference to the State, or to the judicial division, but to the judicial district. So that the venue here was the Eastern District of Texas.

Notwithstanding that venue is properly found in the District Court where the action has been commenced, a District Court has power under section 1404 of Title 28 to transfer the action to any other district or division, for the convenience of parties

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

and witnesses in the interest of justice. The right of transfer is not however unlimited, since an action may be transferred only to a district or division where it might have been brought. In addition, an action may by consent be transferred from one division to another within the same district, or to another place within the same division.

There is also provision in section 1407 for the transfer of actions pending in different districts to any one district for co-ordinated or consolidated pretrial proceedings. Such a transfer is made and administered by a panel on multi-district litigation, drawn from the Federal bench at large. Upon the conclusion of the pretrial proceedings each action is remitted to the district from which it was transferred.

The original subject-matter jurisdiction of the District Courts is defined by sections 1330 to 1366 of Title 28. In some instances the jurisdiction is exclusive, in others it is shared with other tribunals. We need not list all the instances in which the courts have jurisdiction. For present purposes it is sufficient to say that the District Courts have jurisdiction over -

1. All civil actions where the matter exceeds the sum or value of $10,000, and is between citizens of different States (section 1332(a)(1)).

2. All civil actions where the matter exceeds that sum between citizens of a state and citizens or subjects of a foreign state (section 1332(a)(2)).

3. All civil actions or claims against the United States for money damages for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government under circumstances where the United

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

States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred (section 1346(b)).

There is no room for doubt that the Tyler court had subject-matter jurisdiction over the Tyler II action under all three heads.

Venue and subject-matter are not the only considerations relevant to the assertion of jurisdiction. Service of summons is the procedure whereby a court having venue and jurisdiction of the subject-matter of the suit asserts jurisdiction over the person of the party served: Mississippi Publishing Corp. v. Murphrée 326 U.S. 438, 444-5 (1946) cited Omni Capital International v. Rudolph Wolff & Co. S.Ct. 404, 409 (1987).

The provisions governing amenability to service and modes of service are distributed between the Federal rules of Civil Procedure and the civil procedure legislation and practice of the forum state. Under Rule 4(f) all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and when authorised by a statute or by the Rules, beyond the territorial limits of that state. Where the party to be served is not an "inhabitant of or found within the state in which the district court is held", service may be made in accordance with a statute of the United States or order of court made thereunder: Rule 4(e). Where there is no such statute or order of court, the service must be effected under the circumstances and in the manner prescribed in any statute or rule of court of the state in which the district court is held (ibid). In fact Congress and the Federal Rule-making bodies have abstained from making any provision for "long-arm" jurisdiction, whereby personal jurisdiction

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

is exercised by the District Court outside the boundaries of the state. In Omni Capital International, supra, the Supreme Court firmly repudiated any notion that the Federal courts had a common law jurisdiction to create a rule authorising nationwide service of process on non-resident defendants. Absent specific statutory authorisation, each District Court contemplating service of process on an absent defendant must have recourse to the "long-arm" statute of the state in which it sits.

Thus far, we have considered questions relating to actions commenced in the District Court. Title 28 also makes provisions for the assumption by the District Court of jurisdiction over actions commenced elsewhere. A civil action brought in a State court of which the District Courts have original jurisdiction, may be removed by the defendant or the defendants to the District court for the district or division where the action is pending (section 1441(a)). If the action concerns a federal question, removal is as of right. Otherwise, the case is removable only if none of the defendants is a citizen of the state where the action is brought (section 1441(b)).

It may be noted that removal is to the "district and division" embracing the place where the action is pending. Thus, if the present action had been commenced in a court of the State of Texas seated in one of the counties representing the geographical extent of the Tyler Division, the action would have been removable, not to a District Court anywhere in Texas, or to court anywhere in the Eastern District, but only to the Tyler Division.

Upon removal, the Federal Rules of Civil Procedure apply to the procedures after removal. It appears that in general the action continues after removal, without the need to be

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

entirely recommenced (Rule 81(c)).

Finally, we turn to the question of enforcement. Where execution is sought within the state where the District Court sits, that court once again borrows its procedure from the practice and procedure of the State Court: Rule 69 of the Rules of Civil Procedure.

Where execution is sought out of state, the position differs as between State and District Courts. There is no doubt that one State Court is entirely foreign to another, in the sense that the judgments of one create the basis of a cause of action in another, in the same way as a cause of action is created in England by the judgment of a court overseas: unless the enforcing state has adopted the uniform code relating to the enforcement of the judgments of sister states, in which case the mechanism is less cumbersome. The judgment of a District Court is more compelling. Under Title 28, section 1963, a judgment in an action for the recovery of money entered in a District Court may be registered in any other district by filing a certified copy of the judgment, in which event it has the same effect as a judgment of the District Court of the district where registered and may be enforced accordingly. Proceedings to judgment in one district are not however completely assimilated to proceedings in another, as they would if judgment were given in (say) London and enforcement were sought in Manchester. If the defendant comes into the proceedings in the rendering court and unsuccessfully objects to the jurisdiction the objection cannot be repeated in the court where enforcement is sought. On the other hand, if the defendant abstains from any participation in the action and judgment is given in default, he may challenge the judgment in the receiving court by means of

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

collateral proceedings raising procedural objections.

In addition to the procedural rules thus far summarised, it is necessary to say something about the substantive law which the Federal Courts must apply when sitting in diversity. So far as concerns matters of substance, as distinct from pure procedure, it is now clear that the District Court must apply the law of the forum state, subject to any countervailing federal policy. Until Erie Railroad Company v. Tompkins 304 U.S. 64 (1938) it had for many years been conceived that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute", so that State court decisions were not the law "but merely someone's opinion - to be sure an opinion to be respected - concerning the content of this all-pervading law" (see Guaranty Trust Co. v. York 326 U.S. 99 (1945)). In the Erie case this notion of a federal common law was decisively repudiated. The precise basis of the decision is a matter of controversy. Undoubtedly, it involved an element of judicial policy, the intent being (in the words of the Supreme Court in Guaranty Trust, supra, page 319) "to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in the State Court." It may be that this motive did no more than reinforce a much more fundamental constitutional decision concerning the extent of the powers of a federal judicial organ, delegated to it by the constitution, to create rights conflicting with those existing under the laws of individual States. Erie certainly reads like a case on constitutional law, but the

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

reasoning of the court on this aspect of the decision has been called in question, and it seems that there is a controversy here which has yet to be resolved. We need not trouble with this for present purposes, since it is now clearly established that the District Court sitting in diversity must apply the law of the forum State, whether declared by the State's legislature or by its highest court. If we correctly understand the evidence, when so acting the District Court does not apply a body of federal law, into which is read the local law of the particular state in which the court is sitting. Instead, it directly applies the law of the State in precisely the same way as would a State Court hearing the same matter.

The substantive law of the forum State which the District Court is obliged to apply when sitting in diversity includes the choice of law rules of that State. Ideally, if the choice of law rules of the various States were homogeneous, the same State substantive law would apply, no matter what court was first seized of the matter. So also if the State's laws were themselves homogeneous. But they are not. It follows that, although it should make no difference to the outcome whether, within a given State, the action is tried by a State Court or by the District Court, it may make a difference in which State the action is commenced.

What do these various detailed rules add up to, in terms of the present issue? It is hard for an English lawyer to make a general appreciation of the American system. In part, because the real similarities between the jurisprudence and modes of process prevailing in different parts of the common law world tend to mask the fact that the American system is much more complex than anything which exists here: so that the ideas of

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

"the country" (in the legal sense) and "the local court", which work well enough when referred to a unitary judicial structure like that of England and Wales, are too broad to be applied without qualification to the state of affairs in the United States. In part also, because the system appears to involve a devolution of powers in the fields of law-making and law-enforcement by the individual States to the federal organs of Government; a further devolution to the Supreme Court and the rule-making agencies; and a voluntary borrowing in some degree from the States of their individual substantive laws and jurisdictional rules. This is a subtle process, hard to grasp simply by reading the evidence and the written sources which the parties have naturally had to select from a large bulk, the more so since, even on the materials which we have seen, it is evident that the constitutional mechanisms are neither static nor straightforward enough to be stated without controversy even by the American courts and jurists themselves.

Nevertheless, hazardous as the task may be of catching the essence of the American judicial system, it is one which we are bound to attempt. As it seems to us, the spectrum of possible judicial regimes may have at one extreme, a mosaic of individual courts, local in jurisdictions and jurisprudence, each "foreign" to the other; and at the other extreme, a truly national court, in which the courts and judges, although perhaps localised for administrative convenience, nevertheless are the courts and judges of the whole country, indistinguishable parts of an integrated structure, applying an integrated national law. Considered in isolation, the legal systems of England and Wales, Scotland and Northern Ireland lie close to the latter end of the system, since they comprise courts of unlimited jurisdiction

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

applying a homogeneous law. Nevertheless, they are not at the furthest extreme, since none of them has a jurisdiction co-existive with the dominion of the sovereign power by which they are established. The United Kingdom is not a legal and judicial unit.

If one sets out to measure the institutions of the United States against this scale, it seems quite clear that there exists within each State a juridical entity which is almost as close to one extremity of the spectrum as it is possible to be, whilst still being part of a single political design. The State Courts are not perfectly autonomous, being subject to an appeal to the Supreme Court of the United States, and the law which they apply is in the course of harmonisation through the voluntary adoption of model codes. Nevertheless, the State courts are local courts in the fullest sense, created and empowered by the Government of the State. They apply the local law, created by the State legislature and by the superior courts of the State. Their judges are local judges, selected and maintained in office by methods peculiar to each State, and having no powers outside the boundaries of the State, except through the exercise of the "exorbitant" long-arm powers of service which every national court claims to exercise. The judgment of each such court is, vis à vis the courts of other States, a foreign judgment. It is recognised as creating an enforceable obligation, but not one which is self-executing in the sense that a judgment in one part of England and Wales is directly enforceable in another.

Turning to the federal system, the evidence suggests that, Congress had thought it appropriate to create a unitary federal court comprising a fully collegiate bench of judges,

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

ExhibitB-2 (Part ii)
Judgment with Statement of Primary Facts

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

> colony, each of the American and the Australian states and each of the Canadian provinces is a separate country in the sense of the conflict of laws, though not one of them is a State known to private international law ... A state may or may not coincide with a country in the sense of the conflict of laws. Unitary States like Sweden, the Netherlands and New Zealand, where the law is the same throughout the State, are 'countries' in this sense. But composite States like the United Kingdom, the United States, Australia and Canada are not."

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

Thus far, as the learned judge acknowledged, the discussion had been hypothetical, since the Tyler Court was sitting in diversity not in a federal question case. Nevertheless, the judge attached great weight to the rebuttal of what he saw as the main plank of the defendants' case, namely that the United States could not be a "country" for private international law purposes. Having concluded that it could, he went on to consider and reject the argument which he attributed to the defendants, namely that the District Court when sitting in

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

diversity was part of the system for the administration of justice in the State in which it sat.

The learned judge then stated his own view as to the basis on which the English Court recognises the judgment of a foreign court:

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

Founding on this principle, the learned judge concluded:

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

ny 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 uch judgments are recognised at all. Unfortunately, the cases ive virtually no guidance on this essential question. Underying it all must be some notion of comity, but this cannot be omity on an individual nation-to-nation basis, for our courts ave never thought it necessary to investigate what reciprocal ights of enforcement are conceded by the foreign country, or to

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

limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of positive law first identified in Schibsby v. Westenholz, supra, must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found. But this tells one nothing of practical value about how to identify the foreign judgments which have this effect.

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

Nor in our judgment can this concept be made to seem more persuasive by re-writing it in modern terminology. A foreigner who is physically present in a country does thereby acquire rights and duties expressed in terms of the local law, although not necessarily the same as those which apply to the local

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

citizens; but these are not rights and duties which in any sensible way can be described as arising reciprocally with the sovereign. The foreigner does not owe duties to The Queen, or to the United States of America. Rather, by making himself present he contracts-in to a network of obligations, created by the local law and by the local courts.

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

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

hard indeed to acknowledge that in Imperial times, all persons present in one part of the Empire could properly be regarded as present everywhere else in the Empire, notwithstanding the immense variety of laws courts and constitutional systems which then prevailed, simply because as the ultimate source of power there was to be found a single sovereign.

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

It is convenient to mention at this stage three suggested anomalies, relied upon as pointing to one answer rather than another. The first is that the need for the Tyler court in this case to have recourse to the Texan long-arm statute in order to entertain the suit demonstrates that the overseas defendants were not within the "country". We do not think that this helps. The use of the long-arm statute shows no more than we already know, namely that the direct personal jurisdiction of a district court

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

is not for American purposes recognised as extending beyond the boundaries of the State within which that particular court happens to sit. The same can be said of another apparent anomaly on which stress was laid, namely that if the plaintiffs' submissions are correct, a judgment which would be unenforceable in some other State such as Illinois might nevertheless be effective to give recourse against the defendants' assets in England. We do not regard this as a surprising result, or one which points to any particular solution of the present problem, for if (contrary to the defendants' contentions) the whole of the United States is to be regarded as the territory within which the District Court had jurisdiction, the infraction of what must on this view be regarded as an internal procedural rule is not something of which the English court should take account.

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

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

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

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

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

For the defendants, one might begin with the example of a foreigner who has set himself up in Scotland. Such a person could properly be regarded as having done so, and having been allowed to do so, on terms that his rights and duties were to be governed by the laws of Scotland. But not by English law, or by decisions of the English courts, even though the latter might without procedural impropriety purport to exercise a jurisdiction over him. Equally, an Englishman who has gone to live in France and engaged in transactions there, might find himself sued on

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

those transactions in Texas. Any resulting judgment would be unenforceable here, not because the Texas court had broken its own rules, or indeed had broken any rules of international comity, but simply because the Englishman had done nothing to bring himself into a relationship with the court in Texas and the law which it administered.

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

Let us now make the one alteration necessary to bring the example home to the present case: namely by assuming the court in Texas to be a federal District Court of the Tyler Division of the Eastern Division of the State of Texas. This is not a state court but (so the defendants can argue) a local court in a real sense, administering local law. The juridical identity of the Tyler court might have been different if those invested with constitutional powers had chosen to exercise them differently, but we must take the facts as they are. On these facts, the defendants can submit, there was no sufficient connection between the defendants, resident/ as for present purposes we assume they were in Chicago, and the Federal

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

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

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

of the United States, which, as is common ground, would not be regarded as a legitimate jurisdiction for our private international law. Nevertheless, there seems no doubt that Congress has established a system of Federal Courts of which each one has jurisdiction, in the terms defined by the various long arm statutes of the forum states (where no specific Federal statute provides otherwise) to exercise in personam jurisdiction over any person or corporation present in any State of the Union.

More detailed arguments available in support of the plaintiffs' proposition may be summarised as follows -

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

(ii) Our law sets no standard with which the network of local law is required to comply other than that of natural justice and public policy. Within those limits, the foreign law, substantive and procedural, may be harsh, antiquated and unskillfully operated by the foreign court but the foreign resident must put up with the consequences.

(iii) Our law, faced with a Federal system of two networks of local laws as administered by two sets of local courts, should, if it is to be consistent, favour that course which will leave the resident visitor in Illinois subject to the two local networks,

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

both State and Federal, to the same extent as any other resident of Illinois so far as concerns the validity of judgments rendered in the courts of either system, unless there is some clear reason to do otherwise.

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

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

(vi) Finally, if in personam jurisdiction is given by United States law to Federal Courts to be exercised,

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

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

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

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

IV THE "NATURAL JUSTICE" ISSUE

The assumptions upon which we consider this defence are that our decision on the presence issue is wrong and that the assumed presence of Cape/Capasco in Illinois at the commencement of the Tyler 2 proceedings rendered them subject to the jurisdiction of the Tyler Court in those proceedings for the purpose of our law of enforcement of foreign judgments.

The conclusion of Scott J. on the issue of natural justice was expressed thus: J.48G:

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

The facts relevant to the defence of breach of natural justice were stated in detail by Scott J. and no issue of primary fact has been raised by either side. We shall, therefore, state the most material facts shortly and substantially in his words.

The facts relevant to natural justice

1. Mr. Bailey who had been involved in the Tyler 1 proceedings on behalf of some of the plaintiffs, took over the management of the claims of some 2000 plaintiffs in the Tyler 2 proceedings. He weeded out, with the help of a doctor, and upon examination of X-rays, those claims which seemed unsustainable for want of evidence of any condition attributable to exposure to asbestos. Those claims were dismissed "without prejudice". There then remained, out of the 2000 plaintiffs, only 18 who had manifested a physical condition capable of having been caused by exposure to

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

asbestos. This process was carried out in response to the order of Judge Steger of 28th December 1981 directing pre-trial statements: see page 6 of this judgment.

2. The other plaintiffs in the Tyler 2 proceedings were represented by Mr. Clark and Mr. Yarborough. Presumably they carried out a similar process, with the assistance of a doctor, of weeding out.

3. At an early stage in Tyler 2, Mr. Bailey was appointed by Judge Steger to be "liaison counsel". That meant that Judge Steger would deal only with him as representing all the plaintiffs. A defence liaison counsel was also appointed for the defendants taking part in the proceedings.

4. The plaintiffs who, in the view of their counsel, had arguable claims, filed depositions containing details of the physical condition or injury alleged to have been caused by their exposure to asbestos. On the application of some Tyler 2 defendants (those taking part in the proceedings), Judge Steger, on 8th July 1982 summarily dismissed the claims of some plaintiffs and, as to others, adjourned the application for further medical reports. The claims of the remainder of the plaintiffs were left to proceed. This did not signify that Judge Steger had reviewed medical evidence relating to the physical condition of the plaintiffs. He had had no occasion to do so. There was no contested hearing on the defendants' application. Those plaintiffs who remained in the proceedings were still there because counsel for the defendants did not press the applications for summary dismissal against them. Thus Judge Steger knew, without reviewing any evidence, that the remaining plaintiffs were those considered by their own counsel to have viable cases for recovery of damages; and were considered by counsel for the defendants taking part in Tyler 2 to be persons against

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

whom applications for summary dismissal were not worth pressing. Further, in the course of his dealings with Judge Steger, Mr. Bailey informed the judge of the general nature of the physical condition of the remaining plaintiffs. The number of the remaining plaintiffs was 133.

5. Once the process of weeding out and of summary dismissal was completed, pressure was applied to bring the parties into settlement negotiations. (J.2/4H). The result has been described earlier in this judgment. Some of the details of that process must be added. On 25th January 1983, on the direction of Judge Steger, there was a conference of counsel for plaintiffs and defendants. Mr. Bailey was there. The initial proposal for the plaintiffs was settlement at an average of $40,000, a total of $5.32 m. among the 133 plaintiffs. That was later reduced to $30,000 average, a total of $3.99 m. The offer of the defendants was then $614,000 in total. (J.2/5F) Negotiations continued with assistance from the judge. On 2nd February 1983 the average figure of $10,000 producing a total of $1.33 m. was agreed. As appeared from the evidence of Mr. Bailey, that conclusion was reached, after discussion by Judge Steger separately with defendants' counsel, and separately with Mr. Bailey. Mr. Bailey was told by the judge that "Mr. Bailey needed to take $10,000 average per plaintiff and to tell the defendants that... they needed to take ... it". (J./6E).

6. Features of the manner in which that settlement of February 1983 was reached threw light on later events in connection with the default judgment, namely (a) there was no significant discussion of the value for settlement of any individual case; and (b) the judge added his weight to the negotiations, on the footing that he

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

was aware of the overall value of the 133 cases, his knowledge coming only from what he had been told in general terms by counsel for the plaintiffs, and from the fact that the 133 plaintiffs, together with the Unarco plaintiffs not included in the settlement, had survived the weeding out process; and (c) the judge had neither seen nor heard any evidence in the ordinary sense. (J.2/6F to 7B).

7. On 2nd February 1983 Mr. Bailey proposed the scheme or device regarding "contingent" recovery from the US Government: see pages 7 and 8 of this judgment: with the settlement figure expressed as $6.65 m. made up as to $1.33 m. by immediate payment and as to $5.32 m. by a payment contingent on recovery from the United States Government. The only negotiated figure and the only possible liability of the settling defendants was the $1.33 m. (J.2/8A to B) On the same day Judge Steger was informed by counsel in open court that a settlement figure had been reached. No figure was mentioned but the transcript showed the judge saying that he was aware of "the negotiations ... and the amounts ... and ... it is a fair settlement at this point".

8. On 29th March 1983 the Judge made an order approving the settlement on behalf of certain infant plaintiffs. The form of his order, though approving the infants' share of the settlement figure of $1.33 m., purported to extinguish their share of the $5.32 m. which was contingent on recovery from the US Government. This suggests, though it is not clear, that Judge Steger was unaware of the device regarding "contingent" recovery. There was no evidence that there was any legal basis for this device under the law of Texas. However, it seems very unlikely that the liability of the US Government under the supposed third party claims could possibly have exceeded the $1.33 m. that the settling defendants had agreed to pay to the plaintiffs. We cannot attribute any

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

rational purpose to the incorporation of the device in the settlement, other than that of being able later to assert that the average on which the settlement was based was $50,000 instead of the $10,000 which alone the settling defendants agreed and were liable to pay.

9. The settlement of the claims against the US Government was described at page 8 above. Judge Steger was informed of the negotiations including the fact that it was intended to enforce a default judgment against Cape/Capasco by proceedings in this country: J.2/10A. To that end in June 1983 Mr. Bailey and Mr. Nowinski of the Justice Department had consultations in London with Messrs Oppenheimers, the solicitors acting for the plaintiffs. J.2/10B.

10. The default judgment, which was in due course signed on 12th September 1983, was drafted by Mr. Bailey and was probably approved by Mr. Nowinski. Mr. Bailey had informal discussions with Judge Steger about it.

11. The rules of Federal Practice, which are similar to those in force in this country, provide by Rule 8(d) to the effect that, in such a case as this, averments, other than those as to the amounts of damages, are admitted when not denied. J.2/10G. The effect of the default of Cape/Capasco was that the allegations of negligence, and the allegation that such negligence was a cause of injury to the plaintiffs, stood admitted but not the allegations as to amount of damage. By Rule 55 (Judgment by Default) it was, in effect, provided that where there is a tort claim for unliquidated damages, the quantum of damage in a default case must be assessed by the court: J.2/12D. Contrary to the evidence of Mr. Bailey, it was established by the evidence of other expert witnesses that it was not open to the judge to

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

dispense with evidence in the strict sense, or to receive unauthenticated statements from counsel as to the plaintiffs' medical condition and circumstances. The judge was not entitled to act otherwise than on evidence, including authenticated medical reports, and oral or affidavit evidence: J.2/13A to D.

12. The form of the default judgment as drafted by Mr. Bailey after consultation with Judge Steger was irregular and unusual, in that it contained in one document not only the order made but also recitals of findings of fact directed to a supposed connection between the Tyler 1 and Tyler 2 proceedings, which it represented as being one comprehensive continuous action. This was done with a view to assisting enforcement of the judgment in the English Courts. From the start, Judge Steger had co-operated with Mr. Bailey in this objective.

13. There were two further informal meetings between Mr. Bailey and Judge Steger prior to 12th September 1983, the date of the default judgment. (J.2/15D). At the second meeting Mr. Bailey was told by Judge Steger that the judge needed "...the necessary medical evidence so that he could make a decision on what kind of damages should be awarded". At the third informal meeting Judge Steger, when he heard the suggested average figure of $120,000 put forward by Mr. Bailey, was initially inclined to grant judgment for no more than $10,000 average per case because Mr. Bailey had accepted that amount in settlement from other defendants; but Mr. Bailey explained that he had actually settled the other cases for $50,000 average against "peripheral defendants" and that the more deserving Unarco plaintiffs were included in the application for default judgment against the Cape companies. Mr. Bailey, reporting this discussion to Mr. Nowinski, said that he believed that Judge

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

Steger would now award $75,000 average per case: J.2/16B to E. (The allegations of fraud were based, as to an important part, on what Mr Bailey told Judge Steger on this occasion.) The figure of $120,000, had come "from the top of Mr. Bailey's head in order to see what Judge Steger's reaction might be". When the judge referred to the settlement at $10,000, Mr. Bailey then attempted, "as an advocate would", to justify his figure. The conversation was informal and in no sense equivalent to a hearing in court. J.2/18C.

14. The figure of $75,000, which came from the judge, must have been based upon what he had been told in the course of settlement negotiations in 1983 and, possibly, upon the fact, reported in legal journals, that in 1983 the average settlement figure for asbestos related personal injury suits was $75,000. J.2/19.

15. There was no misrepresentation, (quite apart from there being no fraudulent intent on the part of Mr. Bailey), by Mr. Bailey in referring to the settling defendants as "peripheral" and to the "Unarco plaintiffs as more deserving". They were expressions of opinion fairly within the bounds of tolerance reasonably to be allowed to an advocate. J.2/20G. No false impression of the terms of the settlement was given by Mr. Bailey. J.2/21G.

16. On 29th July 1983 Messrs Oppenheimers, as solicitors for the plaintiffs, served on Cape in London notice in the Tyler 2 proceedings entitled "Application by Plaintiffs for entry of Default Judgment". It read in part: "Plaintiffs ... therefore move the court to enter default judgment ... against defendants ... and further to hold hearing to determine the amount of relief entitled to the plaintiffs ... this motion is based on the records and files herein". The date for hearing in the Tyler Court was 12th September 1983. In August 1983 a similar notice was served upon Capasco.

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

There was some error in this in that Capasco was not party to all the Tyler 2 actions but nothing turns on that. J.2/22E.

17. Before the application for judgment on 12th September 1983 there was discussion between the counsel for the 206 plaintiffs: Mr. Bailey representing 18, Mr. Yarborough 4 and Mr. Clark the remaining 184 plaintiffs. The sum to be sought at the default hearing was agreed at £120,000 average: there was no other basis of discussion: J.2/23A to B. These counsel also agreed that the plaintiffs would be listed in four separate levels for allocations to each individual plaintiff of his or her share of the total. The levels were £150,000; £115,000; £85,000 and £60,000. This came from Mr. Clark who had obtained advice from a Dr. Spivey who had identified four broad categories of injury. Dr. Spivey swore an affidavit on 8th March 1988 in which he described those categories. The affidavit was admitted before Scott J. under the Civil Evidence Act but nothing from Dr. Spivey was before Judge Steger. J.2/23C to G.

18. The "medical documentation" for each plaintiff was agreed between counsel to be prepared by the counsel who represented him or her and counsel was to place each plaintiff in the category thought appropriate by counsel. The overall claim was to represent an average of £120,000 per plaintiff: J.2/24A. The medical material prepared for submission to the court included a summary in respect of each plaintiff, in form agreed by plaintiffs' counsel, containing the name, address and date of birth, a statement of the plaintiff's medical examination and the amount of damages sought. J.2/24E. With each summary there was a collection of medical records relating to that plaintiff. They were of various types. Some were questionnaires completed by plaintiffs. Some were letters

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

from doctors after examination of the plaintiffs. In respect of each of the 18 plaintiffs represented by Mr. Bailey there was a short report from Dr. Kurt expressing a view as to the cause of that plaintiff's symptoms and the likely prognosis. There was no such report in respect of the other plaintiffs. The bulk of the material was large. In respect of the 184 plaintiffs represented by Mr. Clark there were nine boxes each about 18 inches by 12 by 12 inches. J.2/25. Each plaintiff was listed alphabetically in an Appendix A prepared by counsel: one list for the plaintiffs represented by Mr. Bailey and Mr. Yarborough, and another for those represented by Mr. Clark. J.2/26A.

19. On 12th September 1983 Mr. Bailey attended court at Marshall, Texas, where Judge Steger was sitting. Mr. Bailey handed in the draft judgment together with his Appendix A. He also delivered to the room of Judge Steger the medical material for those plaintiffs. Mr Clark was not present having been delayed. The hearing lasted for less than ten minutes. There was little discussion save that the judge said he would review the medical material. Later Mr. Clark arrived, delivered his material to the judge's room, and lodged his own Appendix A. J.2/26.

20. In the afternoon of 12th September 1983, or perhaps the next day, Mr. Bailey was told by Judge Steger's law clerk that Judge Steger was not willing to award damages based on an average of $120,000 but was willing to award damages on an average of $75,000 per plaintiff. Thereupon Mr. Bailey and Mr. Clark altered their four levels down to $120,000, $85,000, $60,000 and $37,000. Two plaintiffs were moved into a different category. Mr. Bailey could not explain the reason for that to Scott J. The amended Appendices were lodged at the Tyler Court house. J.2/26G-27B.

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

21. Judge Steger signed the judgment and dated it 12th September 1983. The total amount of the individual sums listed in the two amended Appendices, namely $15.654 m. was added in typescript to the judgment, and on 14th September 1983 a note was entered on the docket sheet in respect of each of the Tyler 2 actions. J.2/27C-D.

22. The total of $15.654 m. was not based upon an average of $75,000 per plaintiff. Such an average would have produced a total of $15.45 m. The excess of $200,000 shows that the typed figure of $15.654 m. could not have been typed on the judgment until after the amended Appendices had been lodged. The probability is that Judge Steger signed the completed judgment on 13th September or on 12th September before the lodging of the amended Appendices and with the total amount left blank. J.2/27E to H.

23. As to whether Judge Steger had had an opportunity for reviewing the medical material lodged, and whether the quantum of damages awarded to the plaintiffs could have owed anything to that review, it was accepted by Mr. Bailey that Judge Steger had played no part in the placing of any plaintiff into his or her category or level of damages. The only input from Judge Steger was his requirement that an average of $75,000 be produced, and despite that requirement the total based on the total judgment exceeded that average by $200,000. There was no review of the medical material by Judge Steger because it was impossible for him to have reviewed it in the time available.

24. The form of the default judgment upon which these proceedings are based, was, as stated above, irregular and unusual. It contained the statement referred to above directed to showing that the Tyler 2 proceedings were part of a continuing process of litigation which began with the filing of complaints in the Tyler 1 litigation and which "continued under new cause numbers and styles"

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

as Tyler 2. It also contained statements that "the court after receiving evidence and hearing arguments of counsel makes the following findings of fact"; and "the court having reviewed the medical records as to each plaintiff hereby awards damages as to each plaintiff as set forth in Appendix A of this judgment which this court has determined were proximately caused by the ... (negligence) ... of defaulting defendants and which would properly compensate plaintiffs for reasonable cost of necessary medical treatment, pain and anguish, and physical disability which each has incurred in the past and which in probability they will suffer in the future."

25. In all the circumstances the default judgment served upon Cape/Capasco did not accurately describe the nature of the court hearing that led to the judgment because:

(a) There was no evidence, in the strict sense, that the court received;

(b) Counsel put no arguments to the court;

(c) The court had not and could not have "reviewed the medical records as to each plaintiff";

(d) The court had no material before it from which a determination of proximate cause could have been made;

(e) The court had no material before it from which an assessment of the "necessary medical treatment; pain and anguish; and physical disability" of the individual plaintiffs could have been made; and

(f) The implied representation that there had been a hearing at which damages were assessed was false. J.2/31B-32B.

26. The circumstances in which the judgment was obtained justified three conclusions:

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

(a) No judicial hearing, worthy of the name, at which quantum of damages was assessed, took place.

(b) The attribution of specific damages to the individual plaintiffs was not the result of a judicial assessment of the individual entitlements of the respective plaintiffs.

(c) The total sum of damages awarded was based on the judge's opinion as to what would represent an appropriate average award. J.2/39C-E.

27. The procedure leading to the damages award of 12th September 1983 was not in accordance with the Federal Rules. J.2/39F.

The law applied by Scott J.

In the view of Scott J. the fundamental criterion for the success of a natural justice objection to the enforcement of a foreign judgment was to be found in the judgment of Lord Lindley MR in Pemberton v Hughes [1899] 1 ChD 781 where he said:

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

Thus in the opinion of Scott J. if the natural justice objection were to succeed, the proceedings in the foreign court must "offend against English views of substantial justice": J.2/43E. With reference to that broad criterion he considered the procedure which led to the default judgment of 12th September 1983. The

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

route which led him to his conclusion on this issue was very briefly as follows:

(i) Cape/Capasco were in default and had forfeited any entitlement to a hearing save on the issue of damages. There was no injustice in that. J.2/45H.

(ii) Cape/Capasco were given sufficient notice of the application for the default judgment but the application for relief of which notice was given was for a judicial assessment of damages at a judicial hearing: J.2/46A-C.

(iii) The effect of the notice given to Cape/Capasco could not be divorced from the context of the Federal Rules for default judgments. Having regard to that context a defendant in default in an action for unliquidated damages in the Tyler Court was entitled to expect that his liability to the plaintiff would be assessed by the judge in the light of evidence which the judge had considered and which, in the judge's opinion, justified the award which was made. J.2/46C-47F.

(iv) "The requirements of substantial justice in a particular case cannot be divorced from the legitimate expectation of both the plaintiff and the defendant in the context of the procedural rules applicable to the case..." J2/47G.

(v) Since there was no judicial assessment of the damages the proceedings offended our principles of substantial justice. J.2/48A-H.

(vi) The fact that the default judgment might have been set aside on application to the judge, or on appeal, because of the breaches of local rules of procedure, did not as a matter of principle make the judgment enforceable notwithstanding the breach of natural justice. J.2/49B-49G.

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

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

Principles not in issue on this appeal: some general observations

In the context of the natural justice issue certain principles are common ground and appear to us to be indisputable. The first is that, upon proof of private international law jurisdiction in the Tyler Court, Cape/Capasco would have come under an obligation to obey that judgment unless they should be able to impeach it on the ground of fraud, or breach of natural justice, or breach of the requirements of public policy. For the proof of these grounds of defence, all are to be judged in the courts of this country according to the law in force in England and Wales and to the principles of that law. Further, whether any alleged breach of natural justice based on procedural irregularity is such as to render the foreign judgment unenforceable, the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles.

The basis of the obligation, which our law would enforce against Cape/Capasco upon proof of jurisdiction in the Tyler Court, is that, because Cape/Capasco were present within the territorial jurisdiction of that court at the date of service of the proceedings, the command contained in the document or process served upon them is regarded by our law as validly and effectively made. It would regard Cape/Capasco as obliged to make such answer as they could put forward against the claims of the plaintiffs, and to make it in the Tyler Court. If they chose not to make any answer, they would not be permitted to dispute in our courts the judgment of the Tyler Court upon the merits. Subject to the defences of fraud, breach of natural justice, and public policy, Cape/Capasco would be liable upon the judgment.

It is clear that a corporate defendant, and those called upon to advise it, may thus be placed in great difficulty by the working of our rules of private international law. The directors of a defendant corporation may reasonably believe, upon competent advice, that the corporation was not, at the date of service of the proceedings present within the jurisdiction of the foreign court. If they are right, they can safely ignore the proceedings so far as concerns the assets of the corporation within the jurisdiction of our courts. If they are wrong, - and the judgments of Scott J. and of this court show that the question may be of considerable complexity - they may be sued in this country upon a judgment which cannot be questioned as to the merits and substance of the decision upon which the judgment is based. In particular, with reference to the quantum of a judgment, whether for damages for tort or for breach of contract, the corporate defendant is placed in difficulty. Not infrequently plaintiffs, who are claiming damages, exaggerate their injuries and their losses. When the defendant does not appear, and no evidence is presented to answer the plaintiff's case, the court, which has the task of assessing damages, can normally do no more than consider the evidence put before it and base the assessment upon that evidence. In adversarial systems, the court cannot normally do no 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

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

sued in this country upon that judgment. In the result, if the corporation is to be able effectively to maintain its contention that it was not subject to the jurisdiction of the foreign court, it must leave the plaintiff there to present a wholly uncontested claim (as the defendants did in the present case). It will have no defence to an action upon the ensuing judgment, if it is held by the courts of this jurisdiction to have been in fact subject to the jurisdiction of the foreign court, unless it can rely upon fraud, breach of natural justice or public policy.

The plaintiff, too, in such a case may face the risk of an unjust result. The defendant may have no answer on the merits to the plaintiff's claim, and the judgment as entered in default may be in amount wholly in accordance with substantial justice. Yet if, through no personal fault of the plaintiff, the defendant can point to a sufficient breach of our principles of natural justice simply in the procedure by which the judgment was obtained, the plaintiff can recover nothing on the judgment. He may, if the procedure of the foreign court permits him to do so, start again at some point in the existing proceedings and continue in a way which avoids the procedural defect. If the wrong is actionable in this country, and the claim is not statute barred here, he could sue here. What he cannot do is to enforce the foreign judgment here to the extent that it is unobjectionable and claim the assistance of our courts as to the rest, unless, perhaps, some part of the judgment is clearly severable and unaffected by the defect in procedure. Thus, in these proceedings, upon the assumption that Cape/Capasco were present within the jurisdiction of the Tyler Court, it would not be open to this Court to enter judgment for the plaintiffs for damages to be assessed under the procedures of our court, although such an order would, if the plaintiffs cannot effectively start again in the Tyler Court, get

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

closer to substantial justice than dismissal of their claims. Nor was it suggested that this court could direct that judgment be entered for the plaintiffs on liability, with a direction that the plaintiffs be at liberty to apply to enter judgment for such amount as may hereafter be assessed by the Tyler Court. These are partial or alternative remedies which could only be provided by the terms of a statute, presumably to be based upon a treaty or convention. The position therefore is that, if through the adoption of the procedure by which Judge Steger directed judgment to be entered for these 206 plaintiffs, there occurred a denial of the requirements of substantial justice, the plaintiffs would fail entirely although (as we assume for present purposes) Cape/Capasco were properly subject to the jurisdiction of the Tyler Court. If, on the other hand, there was no such denial according to the established principles of our law, then (on the same assumption) Cape/Capasco 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.

<u>The plaintiffs' submissions on natural justice</u>

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 <u>Jacobson v Frachon</u> [1928] 138 LT 386. The underlying basis or reason for this limitation is that our law requires only that the judgment debtor be afforded by the foreign court a fair trial or the opportunity for a fair trial if the defendant chooses to take it. If the defendant is shown to

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

have been deprived irremediably of a fair trial then the judgment is unenforceable here.

2. The defendant will be held to have been irremediably deprived of a fair trial by reason of defective procedure in two cases:

(i) if the rules of procedure of the foreign court are themselves by our standards unfair, because, in that case, there can be no prospect of the foreign court correcting what has been done under its rules; and,

(ii) if the rules of procedure of the foreign court are by our standards fair; and the defective procedure was caused by departure from those rules, but it is impossible or impracticable for the defect to have been corrected within the foreign system: e.g. because the defendant only learned of the judgment too late to advance an effective appeal or procedure for setting the judgment aside.

3. If the procedural defect was reasonably capable of remedy within the procedure of the foreign court, whether by application to set aside the judgment, or by appeal, the defendant is not released from the obligation to obey the judgment by reason of the procedural defect because, being subject to the jurisdiction of the foreign court, he may properly be required to have resort to the remedies provided by the foreign system.

4. The basis and substance of those submissions for the plaintiffs were said to be in accordance with justice, with practicality and with the principles of our law in that:

(i) our law recognises that all courts make procedural mistakes: the fact that a mistake is made, for which the foreign court's procedure provides a remedy, should not

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

release the defendant who chose not to avail himself of the remedy;

(ii) the argument is based upon the connection between the foreign court and the defendant created by the voluntary act of the defendant in being present within the foreign jurisdiction, or by submission thereto, etc.;

(iii) it is desirable that our courts should not be required to act as a court of error for the examination and assessment of procedural defects within the foreign system for which that system provides an effective remedy;

(iv) the submissions provide a framework of reasonable certainty and clarity for the decision of pleas of breach of natural justice. By contrast, the "broad criterion" applied by the judge, is too wide and too uncertain a test.

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

6. Upon the evidence and upon the findings of Scott J. the procedural rules applicable in the Tyler Court were fair and just. The defendants could have applied to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would

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

have been allowed if made in due time. Further, an appeal to the Circuit Court was open to Cape/Capasco. Since they took no step to correct the procedural defect, and the consequences of it, they cannot rely upon it as a defence in these proceedings.

The defendants' submissions on natural justice

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

The decision in Jacobson v Frachon

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

In Jacobson's case, this Court applied rigorously the principle that our courts will not impeach the judgment of a foreign court having competent jurisdiction on its merits. However, the

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

crucial passage in that case particularly relied upon by Mr. Falconer was a statement of Atkin LJ., who, after referring to the judgment of Lord Lindley in Pemberton v Hughes, said (at p.392) that a judgment could be impeached "if the proceedings, the method by which the court comes to a final decision" are contrary to English views of substantial justice, and continued:

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

We have had the benefit of very careful and detailed analyses in argument and judgments in Jacobson's case. We intend no disrespect to such arguments if we do not prolong an already very long judgment (in which we have already decided that the defendants succeed on the presence issue) by recapitulating these analyses. We will summarise our conclusions in relation to Jacobson's case as follows:

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

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

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

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

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

R. p. 3654

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

"No judicial assessment of damages"

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

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

We recognise, further, that the Federal Courts have been required to determine, and to develop methods for the effective control and management of, civil litigation in product liability cases in which large numbers of plaintiffs have made claims against numerous defendants arising out of similar classes of injury and having broadly similar consequences but with differing degrees of severity. We have had some experience in this country

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

of such litigation but in smaller volume. Our own procedures have to an extent been modified to deal with the preparation and settlement of such cases but we have not, to the same extent, developed the techniques of a class action or the role of the judge in procuring settlements. We are aware that our present system has been subjected to criticism in having failed, as it has been said, to respond sufficiently to the requirements of such litigation.

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

In reply to that contention Mr. Playford pointed out that the indication by Judge Steger of an average basis of award for all plaintiffs was based on nothing in the way of evidence as to

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

the fair sums due for compensation for any of them. It may be that an average figure for settlement of such claims was known by the judge to be $75,000 but that provided no basis for a holding that the condition of these 206 plaintiffs was such as to justify a total award of $15.45 m. or any other total award. If the judge had had before him, and had considered, evidence, perhaps from one expert, to the effect that, by reference to the listed apparent injuries suffered by the plaintiffs, they properly belonged in certain categories of gravity of injury; and if he had, by reference thereto, estimated a figure for general damages for each category; and, then, by reference to the numbers of plaintiffs in each category calculated a total award which would be fair to the defendants, we could see no valid objection, which the defendants could have put forward, if the judge had then left it to plaintiffs' counsel to allocate precise sums within the total award to individual plaintiffs. But we agree with Mr. Playford's submission that that was not what happened. The defect 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.

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

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

proper figure, was that, if the defendants had been present and taking part, they would in probability have refused to settle for $24.72 m., so as to avoid the risk of having to pay more after individual assessment, but would, in probability, have agreed to pay $15.45 m. so as to avoid that risk. If that was the basis of his decision, there is nothing to show that he was in fact wrong upon the hypothesis upon which he acted and nothing to show that he was right; but, as Scott J. observed (J.2/48C), while damages calculated on an average per plaintiff basis may make very good sense for the purposes of a settlement, because defendants are not concerned with how the total will be divided up, a judicial award so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs.

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

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

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

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

The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the Federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed

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

objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

We do not find it necessary to decide whether, if the local rules provide for service by the plaintiff of notice of a specific sum claimed for damages, a default judgment may be entered for such a sum without proof of judicial assessment and without there being breach of any requirement of natural justice. Scott J. thought that there could be no objection to such procedure and we think that in most cases that would be right. The matter does not arise for decision in this case and we express no concluded view. We would however not exclude the possibility of a defence being upheld if the facts justified the conclusion that, making due allowance for different levels of awards and of substantive law, the 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 claimed by the plaintiff. It was submitted that such a claim had in effect been made by the 206 plaintiffs in these proceedings because their pleading placed a limit upon the damages claimed in the sum of $100 m./We see no force in that point. The maximum of $100m. would, as we understand it, prevent the court from entering judgment for any larger sum but there is nothing to show that the limit was intended to mean, or would be understood by any person familiar with procedure in the Federal Courts as meaning, that the $100 m. represented a sum which the plaintiffs asserted to be the total

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

of their estimated claims and for which the court would be empowered to give judgment without proof of the amount of injury and loss suffered.

The "legitimate expectation" point

At first sight there appeared to us to be some force in Mr. Falconer's criticism of the relevance of this concept in this case. It was accepted by Mr. Playford that reliance by the defendants had not been pleaded or proved with reference to any subjective expectation on their part that the assessment of damages on the application for the default judgment would proceed according to any particular method. We would also accept that the adoption of a particular method of assessment of damages by the foreign court, would not per se amount to an effective defence, as a breach of natural justice under our law, merely because it was shown that, by reference to the procedural rules of the foreign court, the defendant might (on an objective basis) reasonably have expected that a different method would be used. So to hold would be to introduce, under the concept of reasonable expectation, a rule that breach by the foreign court of its own rules of procedure renders the foreign judgment unenforceable as offending our concepts of substantial justice. It is clear law that mere procedural irregularity, on the part of the foreign court and according to its own rules, is not such a ground of defence. Pemberton v Hughes itself was an example of mere procedural irregularity.

In our view, however, Scott J. did not so regard or use the point of reasonable expectation. He made reference to it in dealing with the question whether what had happened amounted to a breach of the requirements of substantial justice, and after reference to the fact that the rules of a court might, in his

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

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 arount in the absence of opposition on the part of the defendant. The question was to be decided, in the view of Scott J., by reference to the context in which the alleged procedural defect had occurred. He was, in our view, not in error in this regard. The fact was that the system of legal procedure in which Judge Steger had signed the default judgment had not contained any provision for converting an unliquidated damages claim to a potentially fixed sum for the entry of a default judgment. His reference to the fact that the defendant in a default action was entitled to expect that his liability to the plaintiff would be assessed by the judge on the evidence was not a reference to actual expectation on the part of these defendants but to the requirements of natural justice against the background of a system which contains no such provision.

We therefore conclude that the defendants have demonstrated, as Scott J. held, that the method by which Judge Steger came to a decision as to the amount of the default judgment was by itself contrary to the requirements of substantial justice contained in our law. If that fact is regarded as a sufficient and conclusive description of the proceedings of the Tyler Court then, according to the judgment of Atkin LJ in Jacobson's case cited above, that finding would serve to invalidate the judgment. But, as noted above, the Court of Appeal in Jacobson's case was not required to consider whether, as Mr. Falconer submits, an opportunity to correct such a defect, provided by the foreign system of procedure, may either cause such a defect to cease to be in our law an effective breach of natural justice or, if there is any difference, cause the defendant to be unable to rely upon it for purposes of impeaching the judgment.

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

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

Requirement of use of remedy in foreign court

Mr. Playford submitted that proof of this defect in the proceedings of the Tyler Court is a conclusive defence for the defendants, and he submitted that it is just that it should be so. It is not exorbitant, he said, to require that a default judgment, designed and intended for enforcement in this country, should comply with so basic a principle as that the amount of a judgment for personal injuries be fixed in substance by the court upon the evidence and not in substance by the plaintiff. No authority establishes, he said, the requirement of use by a defendant of any local remedy.

We accept that no authority binding this court has been cited to us establishing the proposition for which Mr. Falconer has contended. It is at least clear that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts: (see Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295; Jet Holdings Inc. v. Patel (1988) 3 W.L.R. 295). The position may well be the same in cases where there has been a breach of natural justice of the two primary kinds considered by Atkin L.J. in Jacobson v. Frachon namely absence of notice of the proceedings or failure to afford the defendant an opportunity of substantially presenting his case.

In this judgment, however, we are dealing with a case where, although there was in our view a departure from the basic principles of natural justice in the assessment of the amount of a default judgment, nevertheless (a) the error which led to this departure was an honest error on the part of all concerned;

(b) the defendants had proper notice of the proceedings and could have presented their case on its merits if they had chosen to do so, but chose not to do so; (c) the procedural rules applicable in the Tyler Court were themselves fair and just; (d) the defendants had the right to apply to set aside the judgment on the grounds that the procedure for the assessment of damages was irregular under the relevant rules and such application would presumably have been allowed if made in due time.

Against this background, we are not persuaded that possession of and failure to exercise this right by the defendants can be disregarded as being wholly irrelevant in determining whether the proceedings in the Tyler Court, which we think must be viewed as a whole, offend against English views of substantial justice, within the principles stated by Lord Lindley in Pemberton v. Hughes, as the plaintiffs would submit.

It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is "manifestly wrong": (Godard v. Grey (1870) L.R. 6 Q.B. 139; Castrique v. Imrie (1870) L.R. 4 H.L. 414; Robinson v. Fenner (1913) 3 K.B. 835, 842). In any such case it could be said that there has been a breach of natural justice, but it is not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as

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

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 existance of a perfectly good remedy under a foreign system of procedure in considering whether the defective operation of that procedure has led to a breach of natural justice. And, indeed, from some of the cases on procedural defects, support can be derived from the proposition that, at least with reference to defects known to the defendant before judgment, the defendant can be required to have made use of any remedy available in the foreign court: (see, for example, Reynolds v. Fenton (1846) 8.C. 16 L.J.C.P. 15 and Crawley v. Isaacs (1867) 16 L.T. 529, see particularly at page 531 where Bramwell B. said (obiter):

> "If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but on the other hand, if the procedure be in accordance with natural justice, the foreign court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained."

Mr. Falconer relied strongly not only on that passage but on dicta of Fry J. in Rousillon v. Rousillon (1880) 14 Ch.D. 351 at page 370 and of Bray J. in Jeannot v. Fuerst (1909) L.T. No. C. 816 at page 818.

Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of

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

a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances.

We return then to the circumstances of this case, of which the most relevant seem to us to be the following. First, the defendants who, for present purposes, we assume were subject to the jurisdiction of the Tyler Court, were duly served with the proceedings; they chose to take no part in them; they were given notice of the application for the default judgment; they chose not to attend the hearing of that application; and they were thereafter served with the default judgment.

Secondly, on service of the judgment, the defendants knew the amount of the award to each plaintiff. It seems that they could have obtained access to the medical records as to each plaintiff referred to in the judgment, and advice as to the question whether, upon such material, the awards appeared excessive according to the law in force in the Tyler Court.

Thirdly, by not attending the application for the default judgment, the defendants deprived themselves of information as to what occurred before the court. If they had attended before Judge Steger, the nature of the proceedings would have been largely apparent. The proceedings took place in public before the judge, and, at least so far as concerned the facts that there was no evidence received by the judge in court on the

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

hearing and no arguments presented to the court, the defendants would have discovered those facts.

Fourthly, it would have been open to them to apply for the judgment to be set aside if they had formed an intention to contest the amount of the awards. It seems to us to be probable at least that, since the method of assessment adopted by Judge Steger was contrary to the Federal Rules, an application of this nature made promptly to the Tyler Court would have succeeded.

Fifthly, however, the defendants, when the judgment was served upon them, could not and did not know the method by which damages had been assessed from anything stated in the judgment. The recitals in the judgment were, as Scott J. held, false and misleading: there had been no hearing at which damages had been assessed. The facts as to what happened in the Tyler Court became known to the defendants at latest when evidence was given in the proceedings before Scott J. There was, as we understand it, no evidence from the defendants directed to the question when they first had knowledge of the method adopted by Judge Steger for assessing damages. There is, however, nothing to indicate that they were aware of the method adopted at any time before the date when, after claims were made on them in this country on the basis of the default judgment, the circumstances in which the judgment was made were investigated for the purposes of these proceedings.

Conclusion on the natural justice issue

Giving full force to all these facts, we find it impossible to say that, because the defendants did not apply to set the default judgment aside, they could not rely upon the substantial injustice in the proceedings constituted by the failure of the court to assess the damages judicially upon the evidence. They

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

did not wish to dispute the amount of the damages award by presenting a case to the Tyler Court. We cannot have regard, as an excuse available to them, to the reason why they chose not to appear, namely their unwillingness to submit to the jurisdiction of the Tyler Court. However, it cannot, in our view, be required of them that they should have applied to the Tyler Court to contest the amount of damages awarded when they were necessarily content to leave the amount of the damages to be assessed by the court. The only complaint which the defendants could thereafter make would be as to procedural irregularity. As to that, as we have stated, they had at the time of service of the judgment no knowledge. The defendants were not told before the application for the default judgment that plaintiffs' counsel intended to invite Judge Steger to accept the view of plaintiffs' counsel as to the total value of the claim, based upon an average of £120,000 per plaintiff, and that the plaintiffs would accept in substitution for the assessment of the damages by the judge, such counter-proposal based upon an average sum per plaintiff as the judge might be minded to make, from his general knowledge of the proceedings and of the settlement in the Tyler 2 proceedings to that date and from his knowledge of national average settlement figures in asbestosis cases.

The fact that information as to the procedural defect would probably have emerged if Cape had made an application to set the default judgment aside on other grounds, seems to us to be of no relevance. Cape are not to be treated as having information which they did not have because, if they had made an application which they had no reason to make, they could have obtained that information.

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

A harsh but accurate summary of what happened is, in our judgment, that those acting for the plaintiffs failed to give prior notice to the defendants of the unusual course which they intended to pursue; they chose not to try to prevent Judge Steger from adopting that method of assessment; and they drew up and served a form of judgment which did not reveal what had taken place. That was all done in good faith. There was no dishonest purpose. But the effect upon the defendants was, in our view, that they had at no material time knowledge of any basis for seeking relief from the Tyler Court in respect of the defect which Scott J. rightly held to have been demonstrated by them to have occurred in the proceedings in the Tyler Court.

The only basis for attributing to the defendants constructive knowledge of the defect, upon which they could reasonably be required to have used any available remedy in the Tyler Court, would be that a defendant who has been given notice of the proceedings will be fixed with knowledge of everything which he would have learned if he had attended those proceedings. That, in our judgment, is not an acceptable basis for considering proof of procedural injustice. Plaintiffs can, we think, fairly be left to avoid such procedural errors as will prevent enforcement of a judgment in this country.

Accordingly, on the natural justice issue, although for somewhat different reasons, we would uphold the decision of Scott J.

V CONCLUSION

In the result, while we have some doubts as to whether the learned judge reached the right conclusion on the country issue, we are satisfied that he reached the right conclusions on the

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

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.

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

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

APPENDIX

In this Appendix we will set out and deal seriatim with the allegations of fact made in the 25 paragraphs of the "Schedule of facts which ought to have been found" included in the plaintiffs' amended notice of appeal. We will refer to the section of this judgment headed "The facts on 'presence' as found by Scott J." as "the primary facts section".

> "(1) Cape was incorporated in 1893 to take over blue asbestos mining operations in the Orange river valley and thereafter it gradually expanded its blue mining division and in 1925 acquired a number of amosite asbestos mines in the Transvaal including the mines at Penge."

This was not disputed by the defendants.

> "(2) (i) Egnep did not have a sales organisation of its own.
>
> (ii) Cape and Casap acted as clearing house and bankers within the Cape Group for transactions relating to the sale and marketing of asbestos."

As to (i), the defendants did not dispute that Egnep had no sales organisation which solicited business, but they contended that, on the evidence, it clearly had officers and servants who handled the fulfilling of orders and the handling of shipping and invoicing, and financial matters relating thereto. That contention was plainly made good.

As to (ii) above, the evidence of Dr. Gaze, upon which the plaintiffs relied (Dep. pages 34-36), showed that Casap acted as a clearing house in South Africa and that Cape so acted in London. The sense of what he said was not that in this respect Cape and Casap acted as bankers, but that they rendered a central banking or clearing house service to the subsidiaries to avoid the sending of a large number of separate cheques for each obligation arising between the subsidiaries or

between a subsidiary and Cape.

"(3) (i) NAAC was incorporated in the State of Illinois in October 1953 as the 'medium' by which Cape carried on its business of marketing and selling asbestos in the USA."

It was agreed that NAAC was incorporated in 1953. For the rest, on this point the plaintiffs made reference to the documents at Vol. 3 page 1, Mr. Morgan Dep. 3 page 146, Mr. Morgan Dep. 1, pages 197 and 217-9. That evidence does not by itself show anything inconsistent with Scott J.'s finding set out in paragraph 14 of the primary facts section.

"(3) (ii) From 1970 NAAC's President was Mr. Meyer, a lawyer, a partner in Cape's attorneys in the USA who ostensibly ran NAAC from his law offices."

For this the plaintiffs referred to Mr. Morgan Dep. 3(iii) page 148. It was agreed that Mr. Meyer was President of NAAC from 1970 until Mr. Morgan became President on 1st July 1974. The position of President of this corporation was substantially the same as that of managing director in a similar English company. As the person immediately in charge of the day to day work of NAAC, Mr. Morgan succeeded a Mr. Cryor. From the phrase "ostensibly ran NAAC from his law offices" nothing more can be derived than that Mr. Meyer held the position of President or Managing Director of NAAC from his law offices. There is nothing to show that he held himself out as running NAAC from his law offices. The person in day to day charge of the business done by NAAC was firstly Mr. Cryor and then Mr. Morgan.

"(3) (iii) Mr. Morgan joined NAAC on December 1st 1970 having been interviewed in London by Dr. Gaze and took over as President on July 1st 1974 when Mr. Meyer became its Vice-President."

It was agreed that Mr. Morgan started with NAAC on 1st December 1970, that he was interviewed in London by Dr. Gaze

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

and that Mr. Meyer became Vice-President in July 1974. Mr. Morgan was, however, as submitted for the defendants, "head hunted" in the USA where he lived; the job was advertised in the USA: Mr. Morgan was interviewed on two occasions by Mr. Meyer in America and then once in London by Dr. Gaze. His appointment was effected by Mr. Meyer, then President of NAAC, in Illinois. (Mr. Morgan Dep. 3 pages 144-147.)

"(3) (iv) NAAC was virtually a one man organisation in the sense that Mr. Morgan himself was the only person who had customer contact."

For this the plaintiffs referred to Morgan Dep. 1 page 124, documents Vol. 4 page 262, and Vol. 3 page 198. The evidence shows, however, that Mr. Morgan had an important and long-serving assistant, Mrs. Holtze. She had started with NAAC in 1953 as assistant to Mr. Cryor. She became secretary of NAAC and assistant treasurer and remained with NAAC until its dissolution. Mrs. Holtze contacted customers with regard to documentation and shipping; see her Deposition 2 page 210. She also communicated with customers if there was a shortfall in their requirements from Egnep and arranged supply from the US Government's stocks.

"(4) NAAC's involvement in the sale of Cape's asbestos took two forms:

(i) sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from Casap. The stocks it purchased were kept in a warehouse in Philadelphia. This represented in terms of tonnage about 25 per cent of NAAC's business; and

(ii) organising and arranging the completion of contracts between US customers and Egnep. NAAC received a commission from Casap."

The proposed findings must be compared with the detailed findings of Scott J. set out in paragraphs 13 to 23 of the primary facts section. The defendants did not dispute that the direct purchases by NAAC for sale by NAAC to customers in the USA

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

represented about 25 per cent of NAAC's business in terms of tonnage; or that, as the judge found, NAAC rented and paid for warehouse facilities and also organised and arranged the completion (in the sense of performance) of contracts between UB customers of Egnep; and that NAAC received a commission from Casap (J. 59G). The point at issue here is the allegation that NAAC bought directly from Casap and not from Egnep and, as Mr. Morison explained, it is directed to the main submission for the plaintiffs that Cape did not regard it as significant which subsidiary sold, or was treated as selling, and that thus it is clear that Cape's entire commercial operation was run as one integrated business project. The plaintiffs relied upon brief statements of account between NAAC and Casap for February 1975 and March 1975 (Vol. 4 pages 250-1) in which reference was made to shipments, commission and in one case to a remittance; and they relied upon the accounts of NAAC which referred to trading with Cape and Casap. For the defendants, Sir Godfray submitted that on the evidence all the sales of asbestos from Egnep mines were made by Egnep in the sense that Egnep were the vendors; and the proceeds, less expenses and commission, were received by Egnep; but to that Mr. Morison retorted that the judge had not so found and the evidence left uncertain whether sales were always made by Egnep: see the findings of the judge concerning CPC set out in paragraph 33 of the primary facts section. Thus the judge (J. 60) referred to purchases by NAAC from Egnep or Casap. Again (at J. 76) the judge said that the seller of asbestos in NAAC's time was Egnep or Casap.

The true position appears on the evidence to be that, as the judge found, NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. In so

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

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

far as the asbestos originated from Egnep's mines there is no ground for supposing that Egnep, by its own officers and servants, did not make and record the sales either direct to customers in the USA, including NAAC, or to another subsidiary, in particular Capasco or Casap, from which NAAC on occasions purchased.

> "(5) NAAC as a sideline, imported asbestos goods from Japan which it sold to the textile industry."

The plaintiffs relied upon a statement by Mr. Morgan at Deposition 1, page 157 to the effect that such sales were "a sort of sideline". The point is directed to the contention that such business as was carried on by NAAC which was not concerned with Cape asbestos, was either trivial or subordinate to NAAC's business of servicing the contracts under which Egnep, or other subsidiaries, sold asbestos into the US and of buying asbestos direct from a Cape subsidiary for sale on. The purchase by NAAC of asbestos goods was subordinate to its business with or for Cape's subsidiaries, as the judge found: see paragraph 14 of the primary facts section, for the dominant purpose of NAAC. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial: reference was made to accounts showing that such sales amounted to $466,845 in 1975 and $239,957 in 1976 out of total sales of $4.09 million and $3.54 million in those respective years: see Vol. 4 page 423; and to the accounts for 1972 at Vol. 3 page 117; for 1973 Vol. 3 at page 161; for 1974 at Vol. 3 page 242; and for 1977 at Vol. 4 page 578. That submission, to the effect that such sales were not trivial having regard to the turnover of NAAC, appears upon all the evidence to be correct.

> "(6) NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco."

This was not in dispute save that the defendants submitted that NAAC did deal with Casap. For the purposes of the main submissions which the plaintiffs make, an answer to this point requires definition of the words "deal with". The passage in the evidence of Mr. Morgan on which the plaintiffs relied indicates that, when NAAC was concerned with assisting the performance of direct contracts between Egnep or Casap and a United States customer, NAAC passed any information which NAAC received as to the requirements of the customer not direct to Egnep but to Egnep through Capasco. He referred to such matters as shipping schedules, "setting up the boat", and notifying the customers when a shipment would be arriving. The customer - he was referring to PCC - paid Egnep directly. NAAC got commission from Egnep through the running account in which commission was set against NAAC's purchases from Egnep. NAAC's orders for asbestos from Egnep were placed through Capasco. Egnep then shipped the asbestos to NAAC. It was in this context that Mr. Morgan said that NAAC was never permitted to deal directly with Egnep: Deposition 1 page 150. It seems clear that NAAC did deal directly with Egnep in the sense that the contracts of sale were made in which Egnep and NAAC were principals but that, as a matter of Group policy, which Cape could enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense NAAC was not permitted to deal with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC's dealings with Casap.

"(7) (i) Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed";

R. p. 3676

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

(Vol. 3: pages 90 and 94; Dr. Gaze, pages 16 to 19; Mr. Higham, page 274).

> "(ii) And for deciding when asbestos should be supplied free of charge to one of its USA customers";

(Vol. 3, page 95).

> "(iii) Capasco accepted as their responsibility the contamination of supplies."

(Vol. 3, pages 80-1.)

As to (i) above, the defendants did not dispute that Capasco within the Cape Group had the function of allocations of asbestos worldwide, in the sense that Capasco had information as to existing stocks and probable quantities of production of different sorts and quantities of asbestos from the South African mines owned by Cape subsidiaries, and determined, when supplies were less than demand, how those supplies should be allocated among the customers of Capasco and of the mining companies throughout the world. That function was part of the responsibility for the "supply, marketing and sales promotion throughout the world" as found by Scott J.: see paragraph 5 of the primary facts section. Cape itself, it was submitted, did not allocate, market or sell asbestos but held the shares in its subsidiaries. Upon consideration of the passages in the evidence to which we were referred, the true position appears to us to have been substantially as submitted by the defendants. The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for co-ordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions.

As to (ii) and (iii) above, the submission is based upon

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

the account of certain events in 1971 set out in the documents mentioned above. PCC had been informed by Mr. J. R. Owens of Capasco that during 1971 amosite grade D-11 would be in short supply but that a quantity of asbestos of inferior grades would be available. PCC asked for and received from Capasco technical aid to enable the lower grades to be used. Later, in a letter of 9th June 1971, Mr. Holman of PCC complained to Dr. Gaze at Cape that the quantity of asbestos allocated to PCC for 1971 was less than "their fair share": Vol. 3 page 92. In the same letter Mr. Holman asserted that PCC's claim, previously made in December 1970 by PCC to Capasco, for $7,765 for costs incurred as a result of tramp metal and other foreign material in asbestos supplied, should be honoured. As to that claim, PCC had received an unsatisfactory reply from Capasco. Mr. Hauser, Manager of Production Planning at PCC, had written to Mrs. Holtze of NAAC on 15th December 1970 (Vol. 3 page 82) sending copies of the correspondence, with a complaint that PCC's problems were "making no impact upon them" (i.e. Capasco). The most important thing was to ensure further supplies from the mines which were trouble free. He asked that "if NAAC have a magic wand that you can wave to instil in them a sense of urgency ... please use it". PCC had been told in December 1970 by Capasco (Vol. 3 page 85) that Mr. Morgan, the newly appointed General Manager of NAAC, would be visiting PCC shortly to discuss the present situation and the outstanding claim. Mr. Morgan had made his visit in January 1971 (Vol. 3 page 89). He had told PCC in January that, on his return from London in March, he hoped he would be in a position adequately to discuss the availability of desired grades of asbestos but that "NAAC had its work cut out ... in persuading the Cape Group in London to supply us with sufficient

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

tonnage to satisfy your requirements".

The reply to the complaint of Mr. Holman was written by Dr. Gaze (Vol. 3 page 93) on 15th June 1971. Dr. Gaze was a director of Cape and of Capasco and was responsible for all scientific matters within the Group. He explained the nature, extent and causes of the supply problem for various grades and asserted "our intention to supply you with the maximum amount of long amosite that we can ..." but "... this will depend upon the extent to which the mines can produce extra tonnage ..." and "... Mr. Morgan at NAAC, Chicago, will be kept fully posted on the position." The letter concluded with a reference to the claim for $7,765 as follows: "I consider that we should accept your claim and I am requesting the fibre selling company to supply you with 46 tons of the next consignment free of charge (f.o.b. Africa) in settlement of this": Vol. 3 page 95.

This incident has been examined in some detail so that the decision of Dr. Gaze to request that Egnep supply 46 tons free of charge in compensation for PCC's claim on Egnep can be seen in its context. By itself it seems to show each Cape subsidiary acting and being asked or directed to act in accordance with its proper role, within the transactions which were being carried out, having regard to the corporate structure of the Group. Capasco was not accepting responsibility for contamination of asbestos supplied. It seems to us that Capasco was acknowledging, in the commercial situation which had arisen, the good sense of making sure that PCC's claim on Egnep was accepted by Egnep, and Capasco therefore "requested" Egnep to make the allowance with confidence that the request would be followed. There is, accordingly, nothing in this incident which by itself casts doubt upon the conclusion of Scott J. set out at paragraph 34

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

of the primary facts section. Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.

"(8) (i) Cape and Capasco provided assistance and personnel to advise the USA customer as to his manufacturing process;

(ii) Officers of Cape and Capasco visited the USA and met with the customers; and were visited in London by the customers;

(iii) It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler;

(iv) In relation to price and allocation of asbestos, Cape, through Dr. Gaze, dealt direct with the main US customers."

As to these matters the relevant findings made by the judge are set out at paragraph 20 of the primary facts section.

As to (i), (ii) and (iii) above, reference was made for the plaintiffs to documents at Vol. 3 pages 32, 58, 73 and 78 and to the evidence of Mr. Buckley at Deposition page 21. Again, for the proper understanding of these additional primary facts, it is necessary to place them in their context. In July 1968 (Vol. 3 page 32) NAAC by Mr. Cryor wrote to PCC with reference to Mr. Stout of PCC having discussed Grade D-3 amosite with Dr. Gaze in London. It was by that letter that Mr. Cryor informed PCC that Grade D-3 would no longer be available as a separate grinding for use by PCC.

In May 1970 (Vol. 3 page 58) Mr. Baumann, Manager of Production Planning at PCC, in a letter to Mrs. Holtze of NAAC, referred to a visit by Mr. Owens (of Capasco) to PCC in April 1970 when he had requested a sample of D-11 amosite after the fibre had been opened in the PCC mills. After examination at "Cape's laboratory in London", Mr. Owens might be able to offer

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

suggestions for improvement in PCC's production process. NAAC was asked by Mr. Baumann to forward to Cape, as requested by Mr. Owens, sample fibres from two PCC plants and samples of foreign material found in asbestos supplied to PCC. The assistance of NAAC in "channelling these problems to the responsible parties at Cape Asbestos" would be appreciated. Mrs. Holtze replied that NAAC had sent the samples along "to our people at Uxbridge in order that their laboratory may examine them": Vol. 3 page 59. Later, NAAC reported to PCC the results of investigations as to the cause of metal contamination and the actions taken at the mines to avoid recurrence.

In October 1970 Capasco replied to a letter from PCC to Mr. Owens and informed PCC that Dr. Gaze would be meeting Mr. Bierer, President of PCC, on Mr. Bierer's visit to London in November to discuss such matters as PCC's request for technical aid and on the use of different grades of fibre, foreign material contamination, etc. The technical aid was later supplied by Capasco. PCC thanked Dr. Gaze for his assistance and commented that "Mrs. Holtze of NAAC did her usual excellent job in co-ordinating" the visit of the two technical experts sent by Capasco to PCC.

The evidence of Mr Buckley of PCC described the manufacture of Unibestos by PCC from 1962 until 1972. Unibestos was a high temperature insulation product. PCC had purchased the Tyler plant in 1962. PCC had known that Unarco had been producing Unibestos and had planned to make something similar. PCC had also known that Unarco's contact for asbestos was NAAC. PCC therefore told NAAC that PCC were interested in discussing the possibility of, and the conditions for, making a product similar to Unibestos. As their discussions with NAAC progressed, PCC

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

had heard that Unarco would sell both the process and the plant for making Unibestos and PCC had bought them. PCC had dealt with Mr. Cryor at NAAC. Mr. Buckley had understood that there was some business connection between NAAC and Cape Asbestos. He did not know precisely what it was. Mr. Cryor at NAAC had conveyed word of PCC's interest to Cape Asbestos - there were so many corporate entities beginning with "Cape Asbestos" that Mr. Buckley had made no effort to distinguish between them. He understood that, in dealing with Cape Asbestos, he was dealing with the parent corporation. In the result Dr. Gaze contacted PCC in about 1961. Dr. Gaze visited PCC and described in detail the manufacturing process, the character of the material and the physical properties which could be obtained with the technology then existing, the make up of the factory and equipment required. Dr. Gaze told PCC that supply of the material would be available. His visit lasted two days. He arranged a visit by PCC officials to a Canadian company which manufactured a similar product.

As to (8)(iv) above (Dr. Gaze dealing direct with the main US customers), the plaintiffs relied upon the evidence of Mr. Buckley at pages 42-45 of his deposition, and upon Mr. Morgan's second deposition at page 109. From these passages it appears that Mr. Buckley said that from 1962 to about 1971 Dr. Gaze visited PCC about once a year. The discussions on his visits were for the most part of "the goodwill generality type of discussion" (page 43): including general business conditions, whether there would be an ample supply of fibre in the coming years, etc. Dr. Gaze was well informed on conditions of supply and on price and he gave assurances that any problems about the product would be corrected as well as they could be by seeing that the complaints were registered with the supply - the proper

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

people. (Page 45.) Mr. Buckley understood that any questions which PCC had with reference to the product could be discussed productively with Dr. Gaze. Mr. Morgan, for his part, said that Dr. Gaze visited another US customer, Johns-Manville, once a year.

The picture derived from the evidence relied on under (8) (i) to (iv) is, again, as it seems to us, in accordance with Scott J.'s conclusions as to how the subsidiaries of Cape operated, i.e. with each one carrying out its own function. Capasco was responsible for worldwide marketing and co-ordination of sales and also had the laboratory resources, scientists and technicians to provide technical advice and assistance to customers throughout the world. NAAC, whose functions included assisting and encouraging sales in the USA (paragraph 14 of the primary facts section) had no such technical resources. There is no basis for inferring that it was the holding company Cape, as opposed to Capasco, which was providing the advice and assistance to PCC, or that the visits made by Dr. Gaze were made otherwise than as a director of Capasco. Reference was also made to evidence of visits to customers in the USA by Mr. Higham who was managing director of Cape. He had never visited the United States on any occasion with reference to asbestos, either the sale or problems connected with it: page 301. He had been to the office in Chicago (the office of NAAC) not more than once a year and he did not go there otherwise than in the course of going to the United States for some other purpose. This evidence is also consistent with the learned judge's finding (paragraph 20 of the primary facts section) that Mr. Higham's visits were made as a director of Cape and not as a representative of NAAC.

"(9) (i) When corresponding with US customers Cape

R. p. 3683

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

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

referred to NAAC as 'our Chicago office' and NAAC referred to Cape and Capasco as 'our London office'.

(ii) NAAC held itself out to a large US customer as being part of the Cape selling organisation.

(iii) NAAC was treated by the major customer as the channel between them and Cape and Capasco."

As to (i) above, reference was made for the plaintiffs to two letters. By a letter of 20th March 1970 (Vol. 3/53) Dr. Gaze, writing as a director of Cape, informed Mr. Holman of PCC that Mr. Owens, as managing director of Capasco, and responsible for the administration of the supply and marketing of "our fibres" would visit PCC in April. Mr. Owens would be ready to discuss questions raised on Dr. Gaze's visit in December 1970. "Our Chicago office", i.e. NAAC, would be in touch with PCC in order to make more precise arrangements for the visit of Mr. Owens. It was that visit of Mr. Owens to PCC which led to the sending of samples by PCC to NAAC for onward transmission to Capasco in connection with the complaints of PCC mentioned under (7)(ii) and (8)(i), (ii) and (iii) above. The second letter was dated 20th October 1970 (Vol. 3 page 67) from NAAC, signed by Mrs. Holtze, to Mr. Hauser of PCC and was to the effect that "our London office" needed certain information for the purposes of Mr. Bierer's intended visit in November 1970: see under (8)(i), (ii) and (iii) above.

There were some other references of this nature: Mrs. Holtze in November 1970 in writing to Mr. Hauser about shipments of Grade M asbestos referred to "our mines in South Africa". There was a similar reference in the same month by Mrs. Holtze to steps being taken "by our mines" to deal with various complaints.

These letters show that the writers were able respectively in the context described to refer naturally to NAAC as "our

Chicago office" and to Cape or Capasco as "our London office" and to the South African mines as "our mines". That evidence is relevant to the way in which the relationship between NAAC and Cape/Capasco appeared to the writers, Dr. Gaze and Mrs. Holtze, in the context in which they were writing. It is, therefore, possibly some evidence of what that relationship was. The letters were to senior officers of PCC, Mr. Holman, who was Vice-President, technology and manufacturing, and to Mr. Hauser, manager of Production Planning. The commercial relationships between PCC and the Cape subsidiaries, including NAAC, had been continuing for some nine years at the date of these letters. The writers of the two letters were writing to a long standing customer which, as it seems to us, is shown to have known in general terms the structure of the Cape Group in which separate corporate members performed distinct functions: see in particular the evidence of Mr. Buckley, of which parts are set out under (8)(i), (ii) and (iii) above. The writers of the letters were not trying to inform persons to whom they were writing as to the relationship between Cape and its subsidiaries or between those subsidiaries. The matters demonstrated in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to the roles and functions of the Cape subsidiaries.

As to (ii) and (iii) above, reference was made by the to Mrs. Holtze's letters to Mr. Hauser of PCC in November 1970 (Vol. 3 pages 76-77) mentioned above and to Dr. Gaze's long letter of 15th June 1971 to Mr. Holman of PCC (Vol. 3 page 93) mentioned under (7)(i), (ii) and (iii) above; to passages in the judgment (see the fourth sentence of paragraph 14 and also paragraph 17 of the primary facts section; and to

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

two further letters. By a letter of 27th May 1970 Mr. Bauman, manager of Production Planning at PCC, asked Mrs. Holtze to forward, pursuant to the request of Mr. Owens of Capasco, certain samples to Cape's laboratory in London. The other letter was dated 29th September 1970 and was from Mr. Hauser of PCC to Mrs. Holtze. By it PCC communicated to NAAC the request of PCC for technical assistance from Cape Asbestos as to PCC's manufacturing process.

This evidence shows what, in these particular instances, was done and the context in which it was done. NAAC was performing, and holding itself out to PCC as performing, the role in the Cape Group which Scott J. held was part of its function: i.e. as intermediary in respect of sales by Egnep to US customers (see paragraph 15 of the primary facts section) and as the channel of communication between customers, such as PCC and Capasco or Casap.

"(10) Capasco advertised asbestos in North America and gave both the address of NAAC and Capasco."

The plaintiffs referred to the evidence of Mr. Morgan, Deposition 1 pages 218-219. On this matter there was no dispute. The substance of the evidence was that Capasco had advertised in the United States only in a magazine called "Asbestos Magazine" which was distributed throughout the world including the United States of America. Asbestos was offered for sale and the addresses of both NAAC and Capasco were given in that advertisement. NAAC itself advertised in the yellow pages of the Chicago Directory and in the Thomas Register, a catalogue of manufacturers in the USA, listing addresses and products.

"(11) (i) Dr. Gaze, who was at all material times a Director of Cape, a Director of Casap, the Chairman of Capasco and, until July 1975, a Director of NAAC, was in overall control of

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

the selling and distribution of Cape's asbestos.

(ii) After Cape had, because of the asbestos litigation, ceased to have any directors on the Board of NAAC, Dr. Gaze nevertheless continued to run NAAC.

(iii) Mr. Morgan's authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Mr. Meyer or Dr. Gaze."

These proposed findings were directed, as Mr. Morison explained, to the submission that Cape's control over NAAC's activities did not depend upon the corporate form.

As to (i) above, reference was made to Mr. Morgan's evidence: Deposition 1 pages 166-169. The defendants, as stated above, have not questioned the correctness of Scott J.'s finding as to the role of Capasco, of which company Dr. Gaze was Chairman, within the Cape Group: see under (7)(i) above. The substance of this part of Mr. Morgan's evidence was that he dealt primarily with Dr. Gaze for discussion of allocations of asbestos for NAAC to be purchased by NAAC through Capasco from Egnep and Casap. Mr. Morgan co-ordinated the overall purchases by NAAC through Dr. Gaze. Mr. Morgan understood Dr. Gaze to have been the ultimate authority in connection with the sale of asbestos. NAAC's dealings on a day to day basis were through Capasco and that company was directed or managed by Dr. Gaze. It was pursuant to the instructions of Dr. Gaze that Mr. Morgan of NAAC dealt through Capasco and left Capasco to deal with Egnep. Mr. Morgan understood that Dr. Gaze could give instructions which would be followed so far as concerned the distribution of fibre.

There is nothing in this evidence inconsistent with or of significant addition to the findings of Scott J. as to the role of Capasco or of NAAC within the Cape Group.

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

As to (ii) above, there was no dispute as to the circumstances in which or as to the reasons for which Cape ceased to have directors on the Board of NAAC: see paragraph 18 of the primary facts section. Nor was it disputed that the resignations in July 1975 produced no significant change in the method of operation of NAAC or the responsibilities of individuals concerned. The question is whether Dr. Gaze "ran NAAC" before or after July 1975 and, if yes, in what sense.

The plaintiffs for this contention referred to Mr. Morgan's evidence, 4th Deposition at page 414. The substance of that part of Mr. Morgan's evidence was as follows. He had not made proposals as to what dividends should be paid by NAAC - that was done by Mr. Meyer at Board meetings; he could not recall Mr. Meyer conferring with him before any meeting about the dividend; Mrs. Holtze had told him that the amount of dividend was calculated by a kind of formula but she did not know what it was; after July 1975 he continued to have contacts with Dr. Gaze by letter, by telex, by telephone and personally when Dr. Gaze visited the United States or when Mr. Morgan visited England. After Dr. Gaze resigned from the Board of NAAC, Mr. Morgan had considered Dr. Gaze to be his superior so far as concerned the discharge of Mr. Morgan's duties at NAAC. Mr. Morgan was then asked the question: "Dr. Gaze in fact ran NAAC, didn't he?" And Mr. Morgan replied: "It would seem he did."

Sir Godfray submitted that upon all the evidence that answer of Mr. Morgan was rightly rejected by Scott J. as an accurate description of the relationship between Capasco, through Dr. Gaze, and NAAC. Scott J. held that "Mr. Morgan was in executive control of NAAC's conduct of its business".

This one answer of Mr. Morgan is incapable of bearing the

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

weight that Mr. Morison's submissions would place upon it. Mr. Morgan knew that he had to defer, in carrying out the business activities of NAAC, to the policy requirements of Cape as the controlling shareholders of NAAC. Within those policy limits - such as the requirement that NAAC's orders for asbestos for sale by NAAC in the USA be placed through Capasco on behalf of Egnep and Casap - the day to day running of NAAC was left to him as he himself substantially acknowledged in his evidence summarised under (11)(i) above. Dr. Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business, namely purchase and sale of textiles: see (5) above; or the obtaining of orders for asbestos which NAAC would carry out as principal in buying and selling, which orders amounted to about 20 per cent of NAAC's business in terms of tonnage: see (4) above. Nor did Dr. Gaze, or any representative of Cape, "run NAAC" with reference to the internal affairs of NAAC such as (i) staff, dealing with direct customers, and its own sources of supply - such as US Government stocks; (ii) NAAC's own office premises and warehouse premises; (iii) NAAC's arrangements for insurance; (iv) NAAC's pension scheme; (v) the formulation of NAAC's accounts; (vi) NAAC's payment of US taxes on NAAC's profits.

> "(12) Cape decided on the salaries of the staff and made the senior appointments."

For the plaintiffs reliance was placed upon a series of letters. The substance of the evidence to be derived from those letters can be stated as follows. The letter of 7th December 1964 (Vol. 3 page 12) from Mr. Dent of Cape went to Mr. Cryor, the predecessor of Mr. Morgan. It referred to the question of "remuneration of senior officers in the Group" which "naturally included ... your own situation". Details were requested of

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

Mr. Cryor's full remuneration because Cape did not have them. In May 1969, Mr. Cryor wrote to Mr. Dent in response to a proposal that his salary be increased from $38,000 to $43,000. He acknowledged that his remuneration must bear a proper relationship to what NAAC "can do for the Group". After a statement of what NAAC had achieved in the way of selling asbestos and of his forecasts for future trading, the letter continued with a statement, much relied upon by the plaintiffs, that "all of the Board members (of NAAC), I believe, have always considered this to be a question for you in London to raise, consider and decide at your own pleasure".

By the letter of 23rd February 1972 (Vol. 3 page 100) Mr. Meyer wrote to Dr. Gaze with reference to the level of personal expenses incurred by Mr. Morgan in his work for NAAC, and to whether or not Mr. Morgan should be elected President of NAAC at the annual meeting. Mr. Meyer had no definite recommendation. He was himself President of NAAC at that time. After further intervening letters Mr. Dent of Cape by the letter of 2nd May 1974 (Vol. 3 page 210) invited Mr. Meyer to accept the position of Chairman of the Board of NAAC to make way for Mr. Morgan to be appointed President. Mr. Dent wanted it understood that "if the nature of our business in the United States changed substantially, say through the acquisition of a manufacturing organisation, or for any other reason, we would not necessarily use NAAC as the vehicle for managing such a venture, nor would we necessarily feel that Mr. Morgan should head it up".

The letter of 20th May 1974 (Vol. 3 page 215) was also from Mr. Dent to Mr. Meyer: Mr. Dent accepted Mr. Meyer's proposal that Mr. Meyer become Vice-President instead of Chairman. Mr. Dent thought that Mr. Morgan's salary should be $40,000 upon

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

his becoming President.

By the letter of 18th June 1974 (Vol. 3 page 221) Dr. Gaze congratulated Mr. Morgan on his appointment; noted that Mr. Higham had taken over from Mr. Dent as Chairman of NAAC but asked Mr. Morgan "to continue to correspond with me on business questions exactly as has been the practice in the past". Mr. Morgan was also asked to keep "closely in touch with Mr. Meyer on finance ... and in general touch with day to day affairs".

Finally, the letter of 23rd November 1974 (Vol. 3 page 235) was from Mr. Meyer to Dr. Gaze about the directors' meeting of NAAC to be held on 5th December. (Dr. Gaze was a director of NAAC until July 1975.) Mr. Meyer reported his discussion with Mr. Morgan about "compensation for everyone except Mr. Morgan" and suggested increases in salary were set out for four members of the staff of NAAC including Mrs. Holtze.

Upon this evidence the additional finding sought by the plaintiffs cannot be made. Cape as the parent company appears to have been exercising its potential authority through its corporate relationship with NAAC to determine the remuneration of Mr. Cryor and Mr. Morgan as the persons successively in executive control of NAAC and to determine the election by the Board of Mr. Morgan as President and of other senior officers of NAAC. The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr. Morgan was placing his suggestions before the Board which included the Cape representatives.

> "(13) Cape effectively decided what NAAC was allowed to spend or borrow."

The finding of Scott J. is set out at paragraph 19 of the primary facts section. The issue is as to "what NAAC was allowed

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

to spend". The defendants acknowledge that Cape, as the parent company, required and received information as to the commercial performance of NAAC and the general cost of its operation. Further, Cape indicated to NAAC the maximum level of total expenditure which NAAC should incur and Cape considered such matters as the level of expenses incurred by Mr. Morgan. But the defendants contended that, on the evidence, Cape did not interfere with day to day expenditure or with particular borrowings by NAAC provided that total expenditure and borrowings stayed within the limits laid down. We have considered the documents to which we were referred by the plaintiffs - Vol. 3 pages 13-18, Vol. 4 pages 261, 264, 350, 379-381 - and in this instance do not find it necessary to set out the substance of what can be derived from those documents. On this matter the submissions for the defendants fairly reflect the facts revealed in the evidence.

[(14), (15), (16) and (17): The next four headings of additional primary facts will be stated and then considered together. They are concerned with the purposes and motives of Cape with reference to the asbestos litigation and to the formation of CPC in the United States.]

> "(14) From the start of the Tyler 1 proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America without the risk of enforceable judgments against Cape.
>
> (15) As part of its plan to attempt to appear to distance itself from NAAC, the Cape directors on the Board of NAAC resigned in July 1975.
>
> (16) After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler 1 (April 1977), Cape then formulated and put into operation, as from February 1978, a four point plan:
>
> (i) the dissolution of NAAC and the creation of a substitute organisation;

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

(ii) the formation, at Cape's expense, of the Liechtenstein Corporation (AMC) as an intermediary for invoicing purposes;

(iii) the formation of a new Illinois Corporation (CPC) to be operated by Mr. Morgan and to be set up with Cape money;

(iv) no further appearances in any US asbestos litigation.

(17) In order to set up AMC and liquidate NAAC, Cape required Exchange control permission from The Bank of England. This was sought by letter dated December 23 1977 which discloses the purpose for the formation of AMC and CPC. The plan was executed with secrecy."

The findings of the judge on these aspects of the case are set out in paragraphs 8 to 10 and 24 to 27 of the primary facts section. There is little "additional" in the findings put forward by the plaintiffs but they are relevant to their contention based upon the motives of Cape. We deal with this contention in the section of this judgment concerning the "corporate veil" argument.

As to (14) above, the plaintiffs relied upon a number of documents: Vol. 3 pages 171-172, 173, 174, 213, 215; Vol. 4 pages 268, 273, 279, 289-290, 324-329, 344-345. It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974. The first Tyler 1 action was commenced in January 1974. The extent to which any substitute company was intended to be "seemingly unconnected", and the means by which that seeming lack of connection was to be achieved, are of importance.

As to (15) above, reference was made for the plaintiffs to Vol. 4 page 279. There is nothing additional in this so far as concerns any primary fact: see paragraph 18 of the primary facts section.

As to (16) above, there is also nothing additional, so far as concerns primary fact, in sub-paragraph (ii) or (iv) ~~thereof~~. For the matters set out under (16) the plaintiffs relied upon the documents at Vol. 4 pages 462, 492-495, 504-505, 507-510,

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

511-518, 529-532.

As to (17) above, there was, of course, no issue as to the writing/the letter to the Bank of England by Mr. Penna. Reference was made to Vol. 4 pages 517-518 and 557 and to Vol. 5 page 625.

The extent of any remaining issue of primary fact under this heading is small. The submissions for the defendants were that the formulation by Cape of its plans for alternative marketing arrangements proceeded in stages. The means through which alternative marketing arrangements would be made depended upon decisions of people who were not employed by Cape, or in their control, in particular Mr. Morgan. It was, as the judge found, always the intention of Cape that asbestos produced by its subsidiaries should continue to be sold into the United States of America. The decision to liquidate NAAC was taken on 11th November 1977, as the judge found: see Vol. 4 pages 454, 498. The purpose of Cape, when Mr. Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr. Morgan, which would be operated by him, and through which some of NAAC's trading functions would be performed.

As to the evidence under these headings, reference is required only to some few parts of it.

The first document listed by the plaintiffs was a Preliminary Fact Memorandum of 2nd March 1974 (Vol. 3 page 171) prepared by Mr. Milwid of Lord Bissel and Brook, attorneys in the USA for Cape. References in it were made to the extent of public knowledge of the hazards associated with asbestos; to the jurisdictional motion filed in Tyler 1; and to the status of NAAC and Egnep as "separately organised corporations" as compared with some of Cape's subsidiaries which became "agents" of Cape. (That

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

appears to be a reference to the sort of agency agreement mentioned by Scott J.-see paragraph 21 of the primary facts section). In a letter of 21st March 1974 (Vol. 3 page 173) Mr. Hubbard of Cape referred to the fact that Cape had no place of business or assets in Texas, or in the USA, and to a possible project (not connected with asbestos), in which Cape would acquire a factory near Boston, Mass., and which might "proceed through the device of a subsidiary holding company ..." Next, by the letter of 29th March 1974 (Vol. 3 page 174) Mr. Meyer tendered advice which included the statement that "organising a separate subsidiary to own and operate the plant, whether a US or foreign corporation, maybe more of smokescreen than an actual deterrent to anyone who obtains a judgment against Cape".

By June of 1975 Cape was more directly concerned about NAAC. By letter of 20th June (Vol. 4 page 268) Dr. Gaze told Mr. Morgan of "our thoughts about the future operations of NAAC" and sent the letter to Mr. Morgan's home address "to avoid ... speculation in the office". Cape, he wrote, "may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily ..." but "... was determined to do everything possible to maintain a successful selling operation in the United States". Dr. Gaze added that Mr. Penna (Cape Group solicitor) was getting advice from Mr. Meyer. The immediate purpose of the letter concerned "inventory at your warehouse ..." because "... in the present uncertainty, it is clearly desirable that we should operate with the minimum of assets of this type and I should therefore like you to take all possible steps to see that this stock is reduced to the lowest possible level". By letter of 25th June 1975 Mr. Penna explained to Mr. Meyer the need for advice much as Dr. Gaze had

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

expressed it in the letter last mentioned. Mr. Penna continued (Vol. 4 page 273): "we do want however to maintain Mr. Morgan in his current role to sell and service contracts in North America and Dr. Gase has asked me to take your advice ..."

Mr. Meyer's reply was a long letter of advice, dated 3rd October 1975 (Vol. 4 page 324). "The objective under consideration" was "... an attempt to limit NAAC's and Cape's exposure to future US litigation". After references to insurance, to the statute of limitations and to legal considerations relating to the possible liquidation of NAAC, Mr. Meyer dealt with "replacement for NAAC". He considered various possibilities and the consequences in terms of taxation and continued: "If it were possible to operate without an office or employee in the United States it would seem to be better to operate directly from some company in England, a mining company in South Africa, or, if an office is needed near North America, from some Caribbean or Central American country that has very low income tax rates: e.g. Netherlands Antilles. Mr. Morgan's predecessor, Robert Cryor, and I used to talk occasionally about such an operation and we considered the tax savings that might result; however, it was always decided that it was not possible to operate in the United States without an office here, or at least without an employee travelling regularly in the United States with authority to negotiate contracts. This would result in the profits being subject to US taxes and therefore there appeared to be nothing to be gained by operating from a country outside the United States". Finally, by way of summary, Mr. Meyer added: "It is possible that some protection as to future actions could be obtained by liquidating NAAC and operating in the future through a Canadian or other foreign corporation; however, no protection would be

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

obtained if it were necessary to have an office or employees in the United States, or even to have a non-resident employee who continually travels in the US with authority to conclude contracts". It is to be noted, of course, that Mr. Meyer was advising on the exposure of a Cape subsidiary and of Cape to the jurisdiction of the US courts, whether State or Federal, according to the law there in force, and not on the exposure of Cape to enforcement of a judgment of those courts against Cape in this country.

By a letter of 23rd December 1975 (Vol. 4 pages 344-346) Mr. Milwid was tendering further advice to Mr. Penna. Judge Steger had not yet ruled on the jurisdictional motions submitted by Cape and Egnep. The questions addressed included what action should be taken in the event that Cape, Egnep or Capasco should be involved in any other US litigation. It is sufficient to note that Mr. Milwid advised (and thus probably indicated the scope of the questions set to him by Cape) that, even if a UK court should judge a default judgment to be unenforceable against Cape, nevertheless under Texas law a judgment is valid (subject to certain conditions) for ten years. He continued (page 346): "On the ultimate question as to whether Cape itself might be held liable in this litigation for any tort committed by either of its subsidiaries NAAC or Egnep the holding of the Texas Supreme Court in the case of National Hotel Co. v. Motley 123 SW 2nd 461 1938 is most helpful. There the Texas Supreme Court stated on this point: 'It may be stated as a general rule that the fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity, and unless it is shown that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth or

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

perpetrating fraud, or where the organisation and control of the subsidiary are shown to be such that it is but an instrumentality or adjunct of the dominant corporation, no liability may be imposed upon the latter for the torts of the subsidiary corporation'". Mr. Milwid closed with the expression of his opinion that Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

A telex of 4th July 1977 (Vol. 4 pages 462-3) from Mr. Penna to Mr. Milwid shows that Cape was taking advice in this country upon "withdrawal from Texas proceedings". It continued: "We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Capasco should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult".

We would observe that in the view thus expressed by Mr. Penna he was not only wrong but showed a misunderstanding of the law of this country. The enforceability of a foreign judgment at common law does not turn upon such matters; it is a question solely for the court and not the government.

The document at Vol. 4 pages 492-495 is a copy of the minutes of a Board meeting of Cape on 1st November 1977: see paragraph 8 of the primary facts section. It recorded the decision as to "Future claims" that, having regard to legal advice obtained, it was proposed in respect of any future US claims not to contest the proceedings in the American courts and to accept the risk of a default judgment ... it being considered

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

most unlikely that such a judgment would be enforced by an English court.

By a letter of 11th November 1977 (Vol. 4 page 504) Mrs. Holtze of NAAC reported to Mr. Penna advice and information received from Mr. Sarabia of Lord Bissel and Brook, a specialist in multi-national corporate procedures, on the consequences of trading by or through a new Liechenstein corporation and of the probable need for a second corporation if warehouse facilities would be required so as not to expose the Liechenstein corporation to US taxation. Mr. Morison referred to this exchange as the origin of the idea for AMC.

There was a further letter of 23rd November 1977 (Vol. 4 page 507) from Mr. Meyer to Mr. Penna concerned with the "problems of the liquidation of NAAC". He advised that it was essential that NAAC's assets be held in a liquidating trust in Illinois pending settlement of claims against it. There was a reference to taxation of any capital gain. He had had a number of conversations with Mr. Morgan and Mrs. Holtze "regarding the new corporation". He continued: "With respect to helping Gerry Morgan finance the organisation of the new corporation, the only way I know is to have NAAC pay him termination compensation. There would be two questions. How much to pay, and when to pay; as to how much, he estimated that the book value of NAAC's fixed assets will be $8,545 on January 31st 1978. In addition, he has estimated $2,000 for an initial supply of stationery and printing ... Then there would be legal fees and expenses ... including some amount for drafting and having approved by the Internal Revenue Service, a pension plan ... which takes over the assets of the present plan ... perhaps $1,500 would be sufficient. I would suggest a termination payment of somewhere between $20,000

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

and $25,000, which will be taxable to Gerry Morgan at close to a 50 per cent rate and would leave approximately half thereof for him to put into the new corporation in order to acquire NAAC's fixed assets, pay for the new corporation's legal expenses and fees and for the start up ... costs. This leaves open the question of what the new corporation will need in the way of income to operate, the amount of commissions or guaranteed income to provide necessary amounts and when and how the income should be paid. Gerry Morgan tells me it is proposed that he come to London early in December to discuss this latter subject but I am sure all of the above matters will be open for discussion ..."

The document at Vol. 4 page 511 was a memorandum dated 2nd December 1977 and prepared by Mr. Penna on the subject of "NAAC liquidation - substitute company" and addressed by name to some five senior officials in Cape with copies to Dr. Gaze and Mr. Tanner, who was, we were told, a South African director of Egnep. The memorandum began with reference to Mr. Meyer's letter of 23rd November. Mr. Tanner had had discussion on the formation of the new Liechenstein "invoicing company", and formation was proceeding. In the memorandum Mr. Penna referred to the new corporation as "LC" and to the proposed new Gerry Morgan company as "GMC". The implications which needed to be discussed within Cape included: (i) Mr. Penna's wish, from a legal viewpoint, to mask Cape's identity completely and for the shares to be held by nominees; (ii) LC acting just like Botswana Fibres - no detailed accounts and the US customer will pay direct into the Chase Manhattan central account; (iii) all contracts which GMC arranges for fibre supplies to small US customers (the current NAAC marketing operations will be in the name of the LC. Whether the

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

large contracts ... will continue direct from South Africa or through the LC depends on whether South African legal advice confirms there is no risk - Mr. Penna would think it logical to maintain the camouflage by contracting these through the LC: (iv) GMC's business will be financed, as with NAAC, from commission on sales, with the commission coming from the LC and not from South Africa; (vii) any risk of the mining company's profits being subjected to US tax. The memorandum closed with the following: "We need to get our thinking straight before Gerry Morgan's visit on December 12th."

By the letter to the Bank of England of 23rd December 1977 Cape sought permission to carry out its plans. Some passages (Vol. 4 page 517) should be noted. Cape were seeking approval for the liquidation of NAAC and the use of foreign currency to start the new Liechenstein corporation, AMC. The second paragraph read: "In view of the size of the recent settlement (see the settlement of 28th September 1977 described earlier in this judgment) and the probability of this type of litigation continuing far into the future ... we consider it appropriate to liquidate our abovementioned US subsidiary company to avoid having a recognised permanent wholly owned presence in the United States". Later the letter continued: "... Our Group wishes to continue to sell asbestos fibre in the United States after liquidating NAAC ... we are advised that this may best be achieved for the protection of our UK and US assets by using a Liechenstein company as an intermediary for invoicing purposes ... Liechenstein has been chosen under advice from our lawyers because it enables the shareholders to be disguised under a bearer share certificate arrangement. The Lichtenstein company will be managed by the management of Capasco, a wholly owned UK subsidiary

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

of Cape ... and for reasons explained above we wish to disguise this fact from any would be inquirers." After reference to the costs of establishing the Liechenstein corporation the letter continued: "In reality we will be merchanting the asbestos fibre using the Liechenstein company to disguise Cape's existence. The Liechenstein company will pay South Africa for the fibre and in turn will be paid by the United States customers. The price it pays South Africa will be the price it is paid by its US customers. It will be non-profit making and the commission will accrue to the United Kingdom direct from South Africa."

Some of the passages in that letter are, as we understand it, included within those referred to by Scott J. as having "conspiratorial flavour": see paragraph 25 of the primary facts section.

AMC was formed on 25th January 1978 and the new arrangements were ready to operate. CPC sent out an announcement (Vol. 4 page 537) signed by Mr. Morgan as President, and dated January 1978, to the effect that CPC had been appointed as agent to handle "your requirements for Amosite and Crocidolite asbestos fibre for the United States, Canadian and Mexican markets, effective February 1st 1978." The announcement continued: "Although operating as a new organisation, both Jean Holtze and I will endeavour to maintain the same service to our many customers and friends as previously offered by NAAC".

In the section of our judgment dealing with the "corporate veil"argument we have set out the inferences which we draw from the extracts from the evidence, as set out above, both as to the substance of what the officers of Cape were doing and what they were trying to achieve.

"(18) On January 12th 1978 NAAC's Board approved a plan

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

of complete liquidation for NAAC. Under the plan, the assets of NAAC did not vest in trustees until after May 2nd at the earliest, and at the latest immediately before the filing of articles of dissolution on May 19th 1978.

(19) NAAC continued to trade at least until the end of April from CPC's offices to which its files were transferred."

These two proposed additional findings can be taken together. They are directed to the finding of Scott J. set out in paragraph 11 of the primary facts section. For the plaintiffs reference was made to documents and to evidence, including Vol. 4 pages 533, 536, 551, 603 and 606; to Vol. 5 pages 625, 633, 634-635, 665-666 and 670; and to Mr. Morgan's second Deposition at pages 52 and 90-91. There is, as it seems to us, very little dispute, if any, as to primary fact. The essential submission of Mr. Morison for the plaintiffs was that Scott J. appears to have concluded that, after 31st January 1978 when NAAC "ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets", NAAC could no longer be regarded as carrying on Cape's business; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings were commenced on dates between 19th April 1978 and 19th November 1979. In this, Mr. Morison submitted that Scott J. was in error. The contentions for the plaintiffs were that NAAC continued to trade until it was formally dissolved on May 19th and that the plan for liquidation contemplated that NAAC's business would only cease upon filing of the statement of intent to dissolve which did not occur until 2nd May 1978. It was contended that the fact that NAAC's trade between January and May 1978 was in anticipation of a liquidation does not alter the character of the business during that period. If, therefore, NAAC is to be regarded as

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

carrying on Cape's business in the USA, so that Cape itself was present there before 31st January 1978, then it was submitted that the planned liquidation did not affect the position in any way. The plaintiffs accepted that, after 19th May, Cape could not be said to be present in the USA by or through NAAC. For the defendants, Sir Godfray submitted that the findings of Scott J. as to the cessation of NAAC's business were right in detail and in his conclusion. Scott J., at page 68E-H of his judgment, said: "On 1st November 1977 Cape resolved to place NAAC in liquidation and on 31st January 1978 a liquidating trust agreement for NAAC was signed. NAAC executed articles of dissolution on 18th May 1978 and a certificate of dissolution was issued on 19th May 1978. It was the intention of all concerned that NAAC's functions in the US in respect of the sale of Cape's Amosite asbestos would come to an end on 31st January 1978. They did so. However, NAAC at that date was owner of a quantity of asbestos held in US warehouses. Over the period 31st January to 18th May 1978 sales of this asbestos took place. These sales were not made in the course of NAAC carrying on business as a going concern. They were made for the purposes of the intended liquidation of NAAC." Further, Sir Godfray relied upon evidence which, he submitted, showed that CPC did start business as from 1st February 1978 both in fact and in accordance with the public announcement to that effect: Vol. 4 page 532. There was, he said, no evidence that asbestos was purchased by NAAC after 31st January 1978 from any source. NAAC terminated the employment of its staff at 31st January 1978: Mr. Morgan Deposition 2 pages 50-54; Mrs. Holtze Deposition 1 page 11. NAAC's furniture and office equipment was sold on 1st February 1978. CPC took a lease of premises at 150 North Wacker Drive on 1st February 1978. There

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

was, it was said, no evidence that after 31st January 1978 NAAC performed any function or service for Cape or the Cape Group.

It seems to us that there is under these headings no real issue as to any primary fact. The contest is as to the proper conclusions to be reached and they turn upon the answers to questions of law which are determined in this judgment. Very little in the evidence referred to for the plaintiffs needs to be mentioned. The plan of complete liquidation and dissolution, which was accepted by resolution of the Board of NAAC, with the consent of CIOL as sole shareholders, (Vol. 4 page 536) provided that, upon NAAC filing a "statement of intent to dissolve ... , thereupon NAAC should cease to carry on its business, give any appropriate notice to its creditors, proceed to collect its assets, convey and dispose of its properties, pay, satisfy and discharge or provide for payment of its liabilities and obligations, and do all other acts required to liquidate its business ... and should distribute the remainder of its assets ... to the trustees pursuant to a liquidation trust agreement ..." NAAC was then to file "articles of dissolution pursuant to section 80 of the Business Corporation Act of Illinois". The trustees of the liquidating trust were Mr. Meyer and Mr. Brook, both of Lord Bissel and Brook. The trust agreement was between NAAC, CIOL as sole shareholders, and the two trustees. It recited that NAAC wished to distribute as soon as practicable all of the remaining assets of NAAC as a fund to provide for all claims and unpaid liabilities. The company was to transfer to the trustees all of the distributable assets of NAAC remaining in NAAC immediately prior to the filing by NAAC of articles of dissolution with the Secretary of State of Illinois.

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

The position within NAAC was stated in a memorandum of 1st February 1978 (Vol. 4 page 556) prepared by Mr. Penna. It was there stated that NAAC ceased trading from 31st January 1978; that there was still some $35,000 worth of stock in the warehouse and, because of tax problems, if either AMC or CPC should purchase that stock, it would be sold on by NAAC over the next months. That would hold up the date of the actual formal winding up until the end of February. AMC, formed on 25th January 1978, was now (the date of the memorandum) the supplier to US customers; specific powers of attorney were to be drawn up for those authorised to act in various capacities for AMC; and a letter of request to the Companies Registry was to be lodged for consent to exclude reference to AMC on the Cape file.

On 2nd February 1978 Dr. Gaze sent a memorandum to certain officials of the Cape Group: it was said that NAAC had ceased to trade at the end of January 1978; Mr. Morgan had set up his own company, CPC, and "is being appointed agent for sale of blue and Amosite fibre in the USA, Canada and Mexico by AMC". (Vol. 4 page 557.)

On 8th March 1978 (Vol. 4 page 603) Mr. Milwid sent a telex to Mr. Penna which included the following: "Mr. Meyer advises NAAC not yet formally in liquidation. It still has Philadelphia warehouse material. To the extent not sold by mid-April, proposed to write it off and then liquidate for completion by 30th April".

The document at Vol. 4 page 606 included a statement of account for NAAC including figures for the two months ended February 28th 1978. Sales by NAAC totalled $406,640, showing a gross profit of $66,133. The net earnings were $19,442. The figure for the same period of 1977 showed that the sorts of sales being made in January and February 1978 appear not to be

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

materially different from those being made in 1977 and, in the absence of other evidence, we infer that they were the same.

By letter of 19th April 1978 (Vol. 5 page 625) Mrs. Holtze, as a servant of CPC, wrote to the Group financial controller of Cape: "Officially, NAAC closed on 31st January 1978. We are keeping the books for the liquidating trustees through April 30th ... We have sent you the January and February statements (i.e. the document at Vol. 4 page 606 mentioned above) ... even though we are performing these functions, we are not supposed to be receiving any mail that would tie us into Cape after the January 31st 1978 deadline: however, Mr. Morgan and myself are still receiving accounting memoranda from you. I believe, for safety sake, these should be stopped immediately".

We need not refer to any more of the evidence under these headings. It seems clear to us that Scott J. was right in every respect on the primary facts. It was the intention that NAAC should cease trading on 31st January 1978 and NAAC did so cease so far as concerned all parts of its business save for the disposal of stock for the purposes of liquidation. The stock was disposed of for that purpose. The business of disposing of NAAC's stock continued until the end of April 1978. CPC commenced trading on 1st February 1978. All or most of NAAC's files were transferred to CPC's offices.

> "(20) The respondents'only purpose for the incorporation of CPC was a substituted company for the sale of the respondents' asbestos in the USA."

It is not necessary to refer to any evidence under this heading. It was not in dispute that the only purpose which Cape had in supporting and in providing financial assistance for the incorporation of CPC, apart from any wish to assist the provision of continued employment for long serving servants of NAAC, was to

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

bring into existance the alternative marketing arrangements for asbestos in the USA.

> "(21) AMC was incorporated on January 25th 1978. Its nominal Director was Dr. Ritter; it had an issued share capital of 50 x 1000 Swiss Frank shares."

There was no issue upon any of these matters as is apparent from evidence and contentions already set out above.

> "(22) AMC's bank account was operated by Cape personnel and its address for accounts was that of Cape."

Again, there was no issue upon these facts: see (2)(ii) above.

> "(23) CPC carried on business from the same address as NAAC with the same telephone number. It employed the same staff as had NAAC. It dealt with the same customers as had NAAC and CPC advised those customers that it was 'business as usual'."

Any factual issues under this heading are of no significance. CPC's offices were on a different floor but in the same building as that in which NAAC had last had its office. The public announcement of January 1978 was considered with the evidence referred to under (14), (15), (16) and (17) above.

> "(24) The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC's account at the New York branch of the Chase Manhattan Bank and transferred to AMC's account at the London branch of the bank. AMC would then pay Casap (not Egnep). CPC wrote to customers and shippers 'on behalf of AMC' and at least on one occasion a customer wrote to AMC and CPC at North Wacker Drive."

For the plaintiffs reference was made to documents at Vol. 5 pages 657 and 682, 646-1 as an example, and 658.

For the defendants it was submitted that, on the evidence, it is clear that AMC's bank account was in London at Chase Manhattan and not at the New York branch, and that the paying in facility in New York was for transferring the money. It was not disputed that, in assisting the performance of contracts by AMC, CPC wrote to customers on behalf of CPC but (and this was common

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

ground) CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts. It was accepted that AMC paid Casap. The document sent to AMC and CPC at North Wacker Drive was dated 8th March 1978 (Vol. 5 page 658) and was a statement of sums due to Davis Turner & Co., Customs House Brokers and Foreign Freight Forwarders, of New York. The amount due was $79.50 in respect of customs entry brokerage, and other services, in respect of one container of asbestos. The container was the fourth shipment (see Vol. 5 page 657) against the purchase order placed by Mead Paper with AMC. Nothing of significance can be derived from the form of address used by Davis Turner & Co. on this occasion. The submissions for the defendants with reference to these matters appear to us to be correct.

> "(25) In the light of the facts referred to and of the absence of any evidence to the contrary, the proper inference to be drawn from the evidence of Mr. Summerfield (namely that in August 1984 AMC's name was given as one of the occupants of the offices at North Wacker Drive) was that AMC had their plate up in 1978/9."

The plaintiffs on this matter relied upon the findings of the judge and upon their submissions as to the onus of proof. Scott J. at page 78G referred to the evidence of Mr. Summerfield and continued: "Whether this notice board was in the same state in 1979 when the sale to TCL took place is not known. ... (It was submitted) ... that since the onus was on Cape to satisfy me that it was not present in the United States, it was for Cape to establish that AMC was not present in the United States at any material time. I do not accept this approach. There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices at the time that the Tyler 2 actions were commenced." The suggestion made to us is that, although this

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

point derived from the evidence of Mr. Summerfield was not pleaded within the particulars of matters relied upon, there must have been persons within the Cape organisation, for example Mr. Pearn, who could have dealt with the matter when the evidence was given at the trial.

In our view, the conclusion of Scott J. on this point was right. There was no evidence to suggest that AMC was an occupant of CPC's offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979 when the Tyler 2 actions were commenced. On 29th June 1979 Cape sold its mining division to ECL (see paragraph 1 of the primary facts section). That sale involved the sale of the shares in Egmp and AMC and much of Capasco's business: see the text of the agreement at Vol. 5 pages 758-887. It is, in our view, improbable, having regard to the purpose of Cape in assisting in the formation of CPC, as found by Scott J. and considered above, and having regard to the evident care taken by the officers of Cape/Capasco in matters of corporate form and function (see Scott J.'s finding set out at paragraph 15 of the primary facts section) that any officer of Cape would have caused or permitted the display of AMC on one of the occupants of the offices at North Wacker Drive, or that any officer of CPC would have permitted such a display while AMC was a subsidiary of Cape and a source of commission earnings for CPC. As to the onus of proof as a matter of law, our conclusions have been stated in the section of our judgment dealing with that topic.

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

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

Exhibit B-3

Amended Appeal Notice

IN THE HIGH COURT OF JUSTICE CH 1986 A. 7144

CHANCERY DIVISION

BETWEEN

Jimmy Wayne Adams & Others Plaintiffs

- and -

(1) Cape Industries plc

(2) Capasco Limited Defendants

TAKE NOTICE that the Court of Appeal will be moved as soon as Counsel can be heard on behalf of the above-named Plaintiffs on Appeal from the whole of the Judgment of The Honourable Mr. Justice Scott given at the trial of this Action on the 3rd day of August 1988 whereby it was judged that there be judgment for the Defendants and that the Plaintiffs do pay to the Defendants 80% of their taxed costs.

FOR AN ORDER that the said Judgment may be set aside and that the judgment may be entered for the Plaintiffs for the sums claimed in each Writ (less those sums already recovered by certain of the Plaintiffs in the United States of America) and interest (to be assessed) and that the Defendants may be adjudged to pay to the Plaintiffs their costs (to be taxed) of the Action and of this appeal.

AND FURTHER TAKE NOTICE that the grounds of this appeal are that:-

1. The learned Judge misdirected himself in law in holding:-

(a) that the Defendants were not present in The United

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

States of America, at the relevant dates;

(b) that it would be contrary to natural justice for the Judgment of the US Federal Court of the Tyler District, Texas, dated 12th September, to be enforced in this Country.

The Defendants' presence in the USA

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 USA and that the Defendants were present there:-

(a) by their wholly owned subsidiary, NAAC

(b) by a Company called CPC which was set up to replace NAAC in such a way as to disguise the Defendants' continued involvement in the marketing of the Group's asbestos in the USA.

3. The learned Judge failed to apply the correct test to determine whether the presence of a third party may constitute the presence of the Defendant, namely whether or not

"For a substantial period of time business is carried on

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

by a [corporation] at a fixed place of business in [the foreign country], through some person who carries on the corporation's business as their representative and not merely his own business ...." (per Romer LJ in Dunlop v Pneumatic Tyre Co. Ltd. (1902) 1 KB 342 at 349).

Instead, the learned Judge asked himself "the fundamental question ... whether the United States Court was entitled, on territorial grounds, to take jurisdiction over Cape".

4. The learned Judge erred in law in rejecting the approach of the European Court to the question of jurisdiction where a parent outside the Market sets up a subsidiary within it and, in particular, the approach of the Advocate General Warner in Commercial Solvents v EEC Commission (1974) CMLR 309.

5. The learned Judge misdirected himself as to the burden of proof. The learned Judge held that the Plaintiffs had the burden of proving that Cape were present in the United States, whereas the burden was upon the Defendants to prove that the Judgment of the Federal Court was not enforceable.

6. On the facts as found, in particular that NAAC "was the marketing agent of the Cape Group in the United States" and that "NAAC's dominant business purpose was to assist

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

and encourage sales in the United States of asbestos mined by the Cape subsidiaries ..." the learned Judge ought to have held that the Defendants were present through NAAC, which was carrying on the Group's business and not, in any real sense, its own business.

7. As to CPC, the learned Judge correctly concluded that: "the arrangements made regarding NAAC, AMC [a Liechtenstein Anstalt, "the creature of Cape"] and CPC were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the United States while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries".

However, the learned Judge thereafter wrongly concluded on the basis of the primary facts that CPC was "an independently owned company"; even if this conclusion were correct, on a proper application of the test referred to above, CPC was Cape's presence in the United States of America. Further, the learned Judge was wrong to conclude that CPC and NAAC were carrying on their own business rather than the business of Cape. Further the learned Judge was wrong to hold that the motive behind the new arrangement was irrelevant. In fact, the motive of the Defendants, as revealed in the documentary evidence, is consistent only with an acceptance by Cape that they were present in the United States through NAAC and CPC.

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

7A. The learned Judge was wrong to conclude on the findings of fact which he made and the proper inferences to be drawn therefrom and from the additional findings of fact [set out in the Schedule below] and the proper inferences to be drawn therefrom that:-

(1) NAAC's business was its own business and not the business of Cape or Capasco - Judgment page 68C;

(2) CPC ... was ... an independently owned company and carried on its own business - Judgment page 76 G-H, 77 B;

(3) As from January 31st 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets - Judgment page 17H and 68 F-H;

(4) Mr. Morgan was in executive control of NAAC's conduct of its business - Judgment page 62 A-B.

7B. The learned Judge ought to have concluded on the facts which he found or should have found, the proper inferences to be drawn therefrom:-

(1) that the Respondents were present and/or carried on

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

business and/or resident within the USA through NAAC until 19th May 1978 and or CPC or AMC until June 1979 because:-

(a) NAAC and/or CPC were the Respondents' agents

(b) NAAC and/or CPC and the Respondents were part of a single commercial unit or economic unit

(c) the corporate structure involving CPC AMC and the Respondents should be put aside

(2) The Respondents were in executive control of NAAC's and CPC's business at all material times.

Schedule of facts which ought to have been found

[The First Respondents are referred to as Cape and the Second as Capasco]

1. Cape is a company incorporated in London in 1893 to take over blue asbestos mining operations in the Orange River Valley and thereafter it gradually expanded its blue mining division and in 1925 acquired a number of Amosite asbestos mines in the Transvaal including the mines at Penge.

2. Egnep did not have a sales organisation of its own. Cape

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

and CASAP acted as clearing houses and bankers within the group for transactions relating to the sale and marketing of asbestos.

3. NAAC was incorporated in the State of Illinois in October 1953 as the "medium" by which Cape carried on its business of marketing and selling asbestos in the USA. From 1970 NAAC's president was Max Meyer, a lawyer, a partner in Cape's attorneys in the USA who ostensibly ran NAAC from his law offices. Morgan joined NAAC on December 1 1970 having been interviewed in London by Gaze and took over as President on July 1 1974 when Meyer became its vice president. It was virtually a one man organisation in the sense that Morgan himself was the only person who had customer contact.

4. NAAC's involvement in the sale of Cape's asbestos took two forms:-

(1) sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from CASAP. The stocks it purchased were kept in a warehouse in Philadelphia. This represented, in terms of tonnage, about 25% of NAAC's business;

(2) organising and arranging the completion of contracts between US customers and Egnep. NAAC received a commission from CASAP.

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

5. NAAC as a sideline, imported asbestos goods from Japan which it sold to the textile industry.

6. NAAC did not deal, and was not permitted to deal with Egnep or Casap but had to go through Cape and Capasco.

7. Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed and for deciding when asbestos should be supplied free of charge to one of its USA customers. Capasco accepted as their responsibility the contamination of supplies.

8. Cape and Capasco provided assistance and personnel to advise the USA customer as to his manufacturing process; officers of Cape and Capasco visited the USA and met with the customers and were visited in London by the customers. It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler. In relation to price and allocation of asbestos, Cape, through Gaze, dealt direct with the main US customers.

9. When corresponding with US customers Cape referred to NAAC as "our Chicago office" and NAAC referred to Cape and Capasco as "our London office". NAAC held itself out to a large US customer as being part of the Cape selling

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

organisation. NAAC was treated by the major customer as the channel between them and Cape and Capasco.

10. Capasco advertised asbestos in North America and gave both the address of NAAC and Capasco.

11. Gaze, who was at all material times a director of Cape, a director of CASAP, the Chairman of Capasco and until July 1975 a director of NAAC, was in overall control of the selling and distribution of Cape's asbestos. After Cape had, because of the asbestos litigation, ceased to have any directors on the Board of NAAC, Gaze nevertheless continued to run NAAC. Morgan's authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Meyer or Gaze.

12. Cape decided on the salaries of the staff and made the senior appointments.

13. Cape effectively decided what NAAC was allowed to spend or borrow.

14. From the start of the Tyler I proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America without the risk of enforceable judgments against Cape.

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

15. As part of its plan to attempt to appear to distance itself from NAAC, the Cape directors on the Board of NAAC resigned in July 1975.

16. After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler I (April 1977), Cape then formulated and put into operation, as from February 1978, a four point plan:-

(1) the dissolution of NAAC and the creation of a substitute organisation;

(2) the formation, at Cape's expense, of a Liechtenstein Corporation (AMC) as an intermediary for invoicing purposes;

(3) the formation of a new Illinois corporation (CPC) to be operated by Morgan and to be set up with Cape money;

(4) no further appearances in any US asbestos litigation.

17. In order to set up AMC and liquidate NAAC, Cape required Exchange control permission from The Bank of England. This was sought by letter dated December 23 1977 which discloses the purpose for the formation of AMC and CPC. The plan was executed with secrecy.

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

18. On January 12th 1978 NAAC's Board approved a plan of complete liquidation for NAAC. Under the plan, the assets of NAAC did not vest in trustees until after May 2nd at the earliest, and at the latest immediately before the filing of Articles of Dissolution on May 19th, 1978.

19. NAAC continued to trade at least until the end of April, from CPC's offices to which its files were transferred.

20. The Respondents' only purpose for the incorporation of CPC was as a substitute company for the sale of the Respondents' asbestos in the USA.

21. AMC was incorporated on January 25th, 1978. ITs nominal director was Dr. Ritter; it had an issued share capital of 50 x 1000 Swfr. shares.

22. AMC's bank account was operated by Cape personnel and its address for accounts was that of Cape.

23. CPC carried on business from the same address as NAAC with the same telephone number. It employed the same staff as had NAAC. It dealt with the same customers as had NAAC and CPC advised those customers that it was "business as usual".

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

24. The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC's account at the New York Branch of the Chase Manhattan Bank and transferred to AMC's account at the London Branch of the Bank. AMC would then pay CASAP (not Egnep). CPC wrote to customers and shippers "on behalf of AMC" and at least on one occasion a customer wrote to AMC and CPC at North Wacker Drive.

25. In the light of the facts referred to an of the absence of any evidence to the contrary, the proper inference to be drawn from the evidence of Mr. Summerfield (namely that in August 1984 AMC's name was given as one of the occupants of the offices at North Wacker Drive) was that AMC had their plate up in 1978/9.

Natural Justice

8. The learned Judge erred in law in his approach to the question whether it would be contrary to natural justice to enforce the Judgment. He 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 this criterion permitted him to investigate and make findings in relation to:-

(a) the procedural rules relevant to the entering of the Judgment and

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

(b) the circumstances in which the Judgment was entered.

He then applied this criterion, without qualification or limit, to the facts. The correct approach is 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 has had notice of the hearing or of the intention to enter Judgment and a fair opportunity of presenting his case: Jacobson v Frachon (1927) 138 LT 386 at 392 per Atkin LJ. If the Judge has 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 this 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 first instance. In any event, therefore, substantial justice did not require that the Judgment be not enforced in England when the Defendants had failed to avail themselves of the opportunity of remedying those defects in the United States.

AND FURTHER TAKE NOTICE that the Plaintiffs propose to apply to set down this Appeal in the Chancery Division Final and New

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

Trials List.

Dated the 22nd day of September, 1988.

.....

~~Herbert Oppenheimer, Nathan & Vandyk~~

~~of 20 Copthall Avenue, London EC2~~

Nabarro Nathanson

50 Stratton Street, London W1

Plaintiff's Solicitors

To the above-named Defendants and to Davies Arnold and Cooper of 12 Bridewell Place, London EC4V 6AD

Defendants' Solicitors

No notice as to the date on which this Appeal will be in the list for hearing will be given: it is the duty of solicitors to keep themselves informed as to the state of the lists. A respondent intending to appear in person should inform the Appeal Clerk, Room 136, Royal Courts of Justice, London WC2A 2LL, of that fact and give his address; if he does so he will be notified by telegram to the address he has given of the date when the Appeal is expected to be heard.

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

CH 1986 A. 7144

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN

Jimmy Wayne Adams & Others

Plaintiffs

- and -

(1) Cape Industries plc

(2) Capasco Limited

Defendants

AMENDED NOTICE OF APPEAL

~~Herbert Oppenheimer, Nathan~~
~~& Vandyk~~
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ELECTRONICALLY FILED - 2024 Nov 22 6:07 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Exhibit B-4

Appendix

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

APPENDIX

In this Appendix we will set out and deal seriatim with the allegations of fact made in the 25 paragraphs of the "Schedule of facts which ought to have been found" included in the plaintiffs' amended notice of appeal. We will refer to the section of this judgment headed "The facts on 'presence' as found by Scott J." as "the primary facts section".

> "(1) Cape was incorporated in 1893 to take over blue asbestos mining operations in the Orange river valley and thereafter it gradually expanded its blue mining division and in 1925 acquired a number of amosite asbestos mines in the Transvaal including the mines at Penge."

This was not disputed by the defendants.

> "(2) (i) Egnep did not have a sales organisation of its own.
>
> (ii) Cape and Casap acted as clearing house and bankers within the Cape Group for transactions relating to the sale and marketing of asbestos."

As to (i), the defendants did not dispute that Egnep had no sales organisation which solicited business, but they contended that, on the evidence, it clearly had officers and servants who handled the fulfilling of orders and the handling of shipping and invoicing, and financial matters relating thereto. That contention was plainly made good.

As to (ii) above, the evidence of Dr. Gaze, upon which the plaintiffs relied (Dep. pages 34-36), showed that Casap acted as a clearing house in South Africa and that Cape so acted in London. The sense of what he said was not that in this respect Cape and Casap acted as bankers, but that they rendered a central banking or clearing house service to the subsidiaries to avoid the sending of a large number of separate cheques for each obligation arising between the subsidiaries or

between a subsidiary and Cape.

"(3) (i) NAAC was incorporated in the State of Illinois in October 1953 as the 'medium' by which Cape carried on its business of marketing and selling asbestos in the USA."

It was agreed that NAAC was incorporated in 1953. For the rest, on this point the plaintiffs made reference to the documents at Vol. 3 page 1, Mr. Morgan Dep. 3 page 146, Mr. Morgan Dep. 1, pages 197 and 217-9. That evidence does not by itself show anything inconsistent with Scott J.'s finding set out in paragraph 18 of the primary facts section.

"(3) (ii) From 1970 NAAC's President was Mr. Meyer, a lawyer, a partner in Cape's attorneys in the USA who ostensibly ran NAAC from his law offices."

For this the plaintiffs referred to Mr. Morgan Dep. 3(iii) page 148. It was agreed that Mr. Meyer was President of NAAC from 1970 until Mr. Morgan became President on 1st July 1974. The position of President of this corporation was substantially the same as that of managing director in a similar English company. As the person immediately in charge of the day to day work of NAAC, Mr. Morgan succeeded a Mr. Cryor. From the phrase "ostensibly ran NAAC from his law offices" nothing more can be derived than that Mr. Meyer held the position of President or Managing Director of NAAC from his law offices. There is nothing to show that he held himself out as running NAAC from his law offices. The person in day to day charge of the business done by NAAC was firstly Mr. Cryor and then Mr. Morgan.

"(3) (iii) Mr. Morgan joined NAAC on December 1st 1970 having been interviewed in London by Dr. Gaze and took over as President on July 1st 1974 when Mr. Meyer became its Vice-President."

It was agreed that Mr. Morgan started with NAAC on 1st December 1970, that he was interviewed in London by Dr. Gaze

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

and that Mr. Meyer became Vice-President in July 1974. Mr. Morgan was, however, as submitted for the defendants, "head hunted" in the USA where he lived; the job was advertised in the USA: Mr. Morgan was interviewed on two occasions by Mr. Meyer in America and then once in London by Dr. Gaze. His appointment was effected by Mr. Meyer, then President of NAAC, in Illinois. (Mr. Morgan Dep. 3 pages 144-147.)

"(3) (iv) NAAC was virtually a one man organisation in the sense that Mr. Morgan himself was the only person who had customer contact."

For this the plaintiffs referred to Morgan Dep. 1 page 124, documents Vol. 4 page 262, and Vol. 3 page 198. The evidence shows, however, that Mr. Morgan had an important and long-serving assistant, Mrs. Holtze. She had started with NAAC in 1953 as assistant to Mr. Cryor. She became secretary of NAAC and assistant treasurer and remained with NAAC until its dissolution. Mrs. Holtze contacted customers with regard to documentation and shipping; see her Deposition 2 page 210. She also communicated with customers if there was a shortfall in their requirements from Egnep and arranged supply from the US Government's stocks.

"(4) NAAC's involvement in the sale of Cape's asbestos took two forms:

(i) sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from Casap. The stocks it purchased were kept in a warehouse in Philadelphia. This represented in terms of tonnage about 25 per cent of NAAC's business; and

(ii) organising and arranging the completion of contracts between US customers and Egnep. NAAC received a commission from Casap."

The proposed findings must be compared with the detailed findings of Scott J. set out in paragraphs 13 to 23 of the primary facts section. The defendants did not dispute that the direct purchases by NAAC for sale by NAAC to customers in the USA

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

represented about 25 per cent of NAAC's business in terms of tonnage; or that, as the judge found, NAAC rented and paid for warehouse facilities and also organised and arranged the completion (in the sense of performance) of contracts between US customers of Egnep; and that NAAC received a commission from Casap (J. 59G). The point at issue here is the allegation that NAAC bought directly from Casap and not from Egnep and, as Mr. Morison explained, it is directed to the main submission for the plaintiffs that Cape did not regard it as significant which subsidiary sold, or was treated as selling, and that thus it is clear that Cape's entire commercial operation was run as one integrated business project. The plaintiffs relied upon brief statements of account between NAAC and Casap for February 1975 and March 1975 (Vol. 4 pages 250-1) in which reference was made to shipments, commission and in one case to a remittance; and they relied upon the accounts of NAAC which referred to trading with Cape and Casap. For the defendants, Sir Godfray submitted that on the evidence all the sales of asbestos from Egnep mines were made by Egnep in the sense that Egnep were the vendors; and the proceeds, less expenses and commission, were received by Egnep; but to that Mr. Morison retorted that the judge had not so found and the evidence left uncertain whether sales were always made by Egnep: see the findings of the judge concerning CPC set out in paragraph 33 of the primary facts section. Thus the judge (J. 60) referred to purchases by NAAC from Egnep or Casap. Again (at J. 76) the judge said that the seller of asbestos in NAAC's time was Egnep or Casap.

The true position appears on the evidence to be that, as the judge found, NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. In so

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

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

far as the asbestos originated from Egnep's mines there is no ground for supposing that Egnep, by its own officers and servants, did not make and record the sales either direct to customers in the USA, including NAAC, or to another subsidiary, in particular Capasco or Casap, from which NAAC on occasions purchased.

> "(5) NAAC as a sideline, imported asbestos goods from Japan which it sold to the textile industry."

The plaintiffs relied upon a statement by Mr. Morgan at Deposition 1, page 157 to the effect that such sales were "a sort of sideline". The point is directed to the contention that such business as was carried on by NAAC which was not concerned with Cape asbestos, was either trivial or subordinate to NAAC's business of servicing the contracts under which Egnep, or other subsidiaries, sold asbestos into the US and of buying asbestos direct from a Cape subsidiary for sale on. The purchase by NAAC of asbestos goods was subordinate to its business with or for Cape's subsidiaries, as the judge found: see paragraph 14 of the primary facts section, for the dominant purpose of NAAC. The business of buying textiles or other asbestos goods was, it was submitted for the defendants, not trivial: reference was made to accounts showing that such sales amounted to $466,845 in 1975 and $239,957 in 1976 out of total sales of $4.09 million and $3.54 million in those respective years: see Vol. 4 page 423; and to the accounts for 1972 at Vol. 3 page 117; for 1973 Vol. 3 at page 161; for 1974 at Vol. 3 page 242; and for 1977 at Vol. 4 page 578. That submission, to the effect that such sales were not trivial having regard to the turnover of NAAC, appears upon all the evidence to be correct.

> "(6) NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco."

This was not in dispute save that the defendants submitted that NAAC did deal with Casap. For the purposes of the main submissions which the plaintiffs make, an answer to this point requires definition of the words "deal with". The passage in the evidence of Mr. Morgan on which the plaintiffs relied indicates that, when NAAC was concerned with assisting the performance of direct contracts between Egnep or Casap and a United States customer, NAAC passed any information which NAAC received as to the requirements of the customer not direct to Egnep but to Egnep through Capasco. He referred to such matters as shipping schedules, "setting up the boat", and notifying the customers when a shipment would be arriving. The customer - he was referring to PCC - paid Egnep directly. NAAC got commission from Egnep through the running account in which commission was set against NAAC's purchases from Egnep. NAAC's orders for asbestos from Egnep were placed through Capasco. Egnep then shipped the asbestos to NAAC. It was in this context that Mr. Morgan said that NAAC was never permitted to deal directly with Egnep: Deposition 1 page 150. It seems clear that NAAC did deal directly with Egnep in the sense that the contracts of sale were made in which Egnep and NAAC were principals but that, as a matter of Group policy, which Cape could enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense NAAC was not permitted to deal with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC's dealings with Casap.

"(7) (i) Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed";

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

(Vol. 3: pages 90 and 94; Dr. Gaze, pages 16 to 19; Mr. Higham, page 274).

> "(ii) And for deciding when asbestos should be supplied free of charge to one of its USA customers";

(Vol. 3, page 95).

> "(iii) Capasco accepted as their responsibility the contamination of supplies."

(Vol. 3, pages 80-1.)

As to (i) above, the defendants did not dispute that Capasco within the Cape Group had the function of allocations of asbestos worldwide, in the sense that Capasco had information as to existing stocks and probable quantities of production of different sorts and quantities of asbestos from the South African mines owned by Cape subsidiaries, and determined, when supplies were less than demand, how those supplies should be allocated among the customers of Capasco and of the mining companies throughout the world. That function was part of the responsibility for the "supply, marketing and sales promotion throughout the world" as found by Scott J.: see paragraph 5 of the primary facts section. Cape itself, it was submitted, did not allocate, market or sell asbestos but held the shares in its subsidiaries. Upon consideration of the passages in the evidence to which we were referred, the true position appears to us to have been substantially as submitted by the defendants. The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for co-ordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions.

As to (ii) and (iii) above, the submission is based upon

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

the account of certain events in 1971 set out in the documents mentioned above. PCC had been informed by Mr. J. R. Owens of Capasco that during 1971 amosite grade D-11 would be in short supply but that a quantity of asbestos of inferior grades would be available. PCC asked for and received from Capasco technical aid to enable the lower grades to be used. Later, in a letter of 9th June 1971, Mr. Holman of PCC complained to Dr. Gaze at Cape that the quantity of asbestos allocated to PCC for 1971 was less than "their fair share": Vol. 3 page 92. In the same letter Mr. Holman asserted that PCC's claim, previously made in December 1970 by PCC to Capasco, for $7,765 for costs incurred as a result of tramp metal and other foreign material in asbestos supplied, should be honoured. As to that claim, PCC had received an unsatisfactory reply from Capasco. Mr. Hauser, Manager of Production Planning at PCC, had written to Mrs. Holtze of NAAC on 15th December 1970 (Vol. 3 page 82) sending copies of the correspondence, with a complaint that PCC's problems were "making no impact upon them" (i.e. Capasco). The most important thing was to ensure further supplies from the mines which were trouble free. He asked that "if NAAC have a magic wand that you can wave to instil in them a sense of urgency ... please use it". PCC had been told in December 1970 by Capasco (Vol. 3 page 85) that Mr. Morgan, the newly appointed General Manager of NAAC, would be visiting PCC shortly to discuss the present situation and the outstanding claim. Mr. Morgan had made his visit in January 1971 (Vol. 3 page 89). He had told PCC in January that, on his return from London in March, he hoped he would be in a position adequately to discuss the availability of desired grades of asbestos but that "NAAC had its work cut out ... in persuading the Cape Group in London to supply us with sufficient

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

tonnage to satisfy your requirements".

The reply to the complaint of Mr. Holman was written by Dr. Gaze (Vol. 3 page 93) on 15th June 1971. Dr. Gaze was a director of Cape and of Capasco and was responsible for all scientific matters within the Group. He explained the nature, extent and causes of the supply problem for various grades and asserted "our intention to supply you with the maximum amount of long amosite that we can ..." but "... this will depend upon the extent to which the mines can produce extra tonnage ..." and "... Mr. Morgan at NAAC, Chicago, will be kept fully posted on the position." The letter concluded with a reference to the claim for £7,765 as follows: "I consider that we should accept your claim and I am requesting the fibre selling company to supply you with 46 tons of the next consignment free of charge (f.o.b. Africa) in settlement of this": Vol. 3 page 95.

This incident has been examined in some detail so that the decision of Dr. Gaze to request that Egnep supply 46 tons free of charge in compensation for PCC's claim on Egnep can be seen in its context. By itself it seems to show each Cape subsidiary acting and being asked or directed to act in accordance with its proper role, within the transactions which were being carried out, having regard to the corporate structure of the Group. Capasco was not accepting responsibility for contamination of asbestos supplied. It seems to us that Capasco was acknowledging, in the commercial situation which had arisen, the good sense of making sure that PCC's claim on Egnep was accepted by Egnep, and Capasco therefore "requested" Egnep to make the allowance with confidence that the request would be followed. There is, accordingly, nothing in this incident which by itself casts doubt upon the conclusion of Scott J. set out at paragraph 34

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

of the primary facts section. Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos.

"(8) (i) Cape and Capasco provided assistance and personnel to advise the USA customer as to his manufacturing process;

(ii) Officers of Cape and Capasco visited the USA and met with the customers; and were visited in London by the customers;

(iii) It was Cape rather than NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler;

(iv) In relation to price and allocation of asbestos, Cape, through Dr. Gaze, dealt direct with the main US customers."

As to these matters the relevant findings made by the judge are set out at paragraph 20 of the primary facts section.

As to (i), (ii) and (iii) above, reference was made for the plaintiffs to documents at Vol. 3 pages 32, 58, 73 and 78 and to the evidence of Mr. Buckley at Deposition page 21. Again, for the proper understanding of these additional primary facts, it is necessary to place them in their context. In July 1968 (Vol. 3 page 32) NAAC by Mr. Cryor wrote to PCC with reference to Mr. Stout of PCC having discussed Grade D-3 amosite with Dr. Gaze in London. It was by that letter that Mr. Cryor informed PCC that Grade D-3 would no longer be available as a separate grinding for use by PCC.

In May 1970 (Vol. 3 page 58) Mr. Baumann, Manager of Production Planning at PCC, in a letter to Mrs. Holtze of NAAC, referred to a visit by Mr. Owens (of Capasco) to PCC in April 1970 when he had requested a sample of D-11 amosite after the fibre had been opened in the PCC mills. After examination at "Cape's laboratory in London", Mr. Owens might be able to offer

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

suggestions for improvement in PCC's production process. NAAC was asked by Mr. Baumann to forward to Cape, as requested by Mr. Owens, sample fibres from two PCC plants and samples of foreign material found in asbestos supplied to PCC. The assistance of NAAC in "channelling these problems to the responsible parties at Cape Asbestos" would be appreciated. Mrs. Holtze replied that NAAC had sent the samples along "to our people at Uxbridge in order that their laboratory may examine them": Vol. 3 page 59. Later, NAAC reported to PCC the results of investigations as to the cause of metal contamination and the actions taken at the mines to avoid recurrence.

In October 1970 Capasco replied to a letter from PCC to Mr. Owens and informed PCC that Dr. Gaze would be meeting Mr. Bierer, President of PCC, on Mr. Bierer's visit to London in November to discuss such matters as PCC's request for technical aid and on the use of different grades of fibre, foreign material contamination, etc. The technical aid was later supplied by Capasco. PCC thanked Dr. Gaze for his assistance and commented that "Mrs. Holtze of NAAC did her usual excellent job in co-ordinating" the visit of the two technical experts sent by Capasco to PCC.

The evidence of Mr Buckley of PCC described the manufacture of Unibestos by PCC from 1962 until 1972. Unibestos was a high temperature insulation product. PCC had purchased the Tyler plant in 1962. PCC had known that Unarco had been producing Unibestos and had planned to make something similar. PCC had also known that Unarco's contact for asbestos was NAAC. PCC therefore told NAAC that PCC were interested in discussing the possibility of, and the conditions for, making a product similar to Unibestos. As their discussions with NAAC progressed, PCC

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

had heard that Unarco would sell both the process and the plant for making Unibestos and PCC had bought them. PCC had dealt with Mr. Cryor at NAAC. Mr. Buckley had understood that there was some business connection between NAAC and Cape Asbestos. He did not know precisely what it was. Mr. Cryor at NAAC had conveyed word of PCC's interest to Cape Asbestos - there were so many corporate entities beginning with "Cape Asbestos" that Mr. Buckley had made no effort to distinguish between them. He understood that, in dealing with Cape Asbestos, he was dealing with the parent corporation. In the result Dr. Gaze contacted PCC in about 1961. Dr. Gaze visited PCC and described in detail the manufacturing process, the character of the material and the physical properties which could be obtained with the technology then existing, the make up of the factory and equipment required. Dr. Gaze told PCC that supply of the material would be available. His visit lasted two days. He arranged a visit by PCC officials to a Canadian company which manufactured a similar product.

As to (8)(iv) above (Dr. Gaze dealing direct with the main US customers), the plaintiffs relied upon the evidence of Mr. Buckley at pages 42-45 of his deposition, and upon Mr. Morgan's second deposition at page 109. From these passages it appears that Mr. Buckley said that from 1962 to about 1971 Dr. Gaze visited PCC about once a year. The discussions on his visits were for the most part of "the goodwill generality type of discussion" (page 43): including general business conditions, whether there would be an ample supply of fibre in the coming years, etc. Dr. Gaze was well informed on conditions of supply and on price and he gave assurances that any problems about the product would be corrected as well as they could be by seeing that the complaints were registered with the supply - the proper

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

people. (Page 45.) Mr. Buckley understood that any questions which PCC had with reference to the product could be discussed productively with Dr. Gaze. Mr. Morgan, for his part, said that Dr. Gaze visited another US customer, Johns-Manville, once a year.

The picture derived from the evidence relied on under (8) (i) to (iv) is, again, as it seems to us, in accordance with Scott J.'s conclusions as to how the subsidiaries of Cape operated, i.e. with each one carrying out its own function. Capasco was responsible for worldwide marketing and co-ordination of sales and also had the laboratory resources, scientists and technicians to provide technical advice and assistance to customers throughout the world. NAAC, whose functions included assisting and encouraging sales in the USA (paragraph 14 of the primary facts section) had no such technical resources. There is no basis for inferring that it was the holding company Cape, as opposed to Capasco, which was providing the advice and assistance to PCC, or that the visits made by Dr. Gaze were made otherwise than as a director of Capasco. Reference was also made to evidence of visits to customers in the USA by Mr. Higham who was managing director of Cape. He had never visited the United States on any occasion with reference to asbestos, either the sale or problems connected with it: page 301. He had been to the office in Chicago (the office of NAAC) not more than once a year and he did not go there otherwise than in the course of going to the United States for some other purpose. This evidence is also consistent with the learned judge's finding (paragraph 20 of the primary facts section) that Mr. Higham's visits were made as a director of Cape and not as a representative of NAAC.

"(9) (i) When corresponding with US customers Cape

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

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

referred to NAAC as 'our Chicago office' and NAAC referred to Cape and Capasco as 'our London office'.

(ii) NAAC held itself out to a large US customer as being part of the Cape selling organisation.

(iii) NAAC was treated by the major customer as the channel between them and Cape and Capasco."

As to (i) above, reference was made for the plaintiffs to two letters. By a letter of 20th March 1970 (Vol. 3/53) Dr. Gaze, writing as a director of Cape, informed Mr. Holman of PCC that Mr. Owens, as managing director of Capasco, and responsible for the administration of the supply and marketing of "our fibres" would visit PCC in April. Mr. Owens would be ready to discuss questions raised on Dr. Gaze's visit in December 1970. "Our Chicago office", i.e. NAAC, would be in touch with PCC in order to make more precise arrangements for the visit of Mr. Owens. It was that visit of Mr. Owens to PCC which led to the sending of samples by PCC to NAAC for onward transmission to Capasco in connection with the complaints of PCC mentioned under (7)(ii) and (8)(i), (ii) and (iii) above. The second letter was dated 20th October 1970 (Vol. 3 page 67) from NAAC, signed by Mrs. Holtze, to Mr. Hauser of PCC and was to the effect that "our London office" needed certain information for the purposes of Mr. Bierer's intended visit in November 1970: see under (8)(i), (ii) and (iii) above.

There were some other references of this nature: Mrs. Holtze in November 1970 in writing to Mr. Hauser about shipments of Grade M asbestos referred to "our mines in South Africa". There was a similar reference in the same month by Mrs. Holtze to steps being taken "by our mines" to deal with various complaints.

These letters show that the writers were able respectively in the context described to refer naturally to NAAC as "our

Chicago office" and to Cape or Capasco as "our London office" and to the South African mines as "our mines". That evidence is relevant to the way in which the relationship between NAAC and Cape/Capasco appeared to the writers, Dr. Gaze and Mrs. Holtze, in the context in which they were writing. It is, therefore, possibly some evidence of what that relationship was. The letters were to senior officers of PCC, Mr. Holman, who was Vice-President, technology and manufacturing, and to Mr. Hauser, manager of Production Planning. The commercial relationships between PCC and the Cape subsidiaries, including NAAC, had been continuing for some nine years at the date of these letters. The writers of the two letters were writing to a long standing customer which, as it seems to us, is shown to have known in general terms the structure of the Cape Group in which separate corporate members performed distinct functions: see in particular the evidence of Mr. Buckley, of which parts are set out under (8)(i), (ii) and (iii) above. The writers of the letters were not trying to inform persons to whom they were writing as to the relationship between Cape and its subsidiaries or between those subsidiaries. The matters demonstrated in the evidence considered under this heading do not by themselves show anything inconsistent with the findings of Scott J. as to the roles and functions of the Cape subsidiaries.

As to (ii) and (iii) above, reference was made by the to Mrs. Holtze's letters to Mr. Hauser of PCC in November 1970 (Vol. 3 pages 76-77) mentioned above and to Dr. Gaze's long letter of 15th June 1971 to Mr. Holman of PCC (Vol. 3 page 93) mentioned under (7)(i), (ii) and (iii) above; to passages in the judgment (see the fourth sentence of paragraph 14 and also paragraph 17 of the primary facts section; and to

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

two further letters. By a letter of 27th May 1970 Mr. Bauman, manager of Production Planning at PCC, asked Mrs. Holtze to forward, pursuant to the request of Mr. Owens of Capasco, certain samples to Cape's laboratory in London. The other letter was dated 29th September 1970 and was from Mr. Hauser of PCC to Mrs. Holtze. By it PCC communicated to NAAC the request of PCC for technical assistance from Cape Asbestos as to PCC's manufacturing process.

This evidence shows what, in these particular instances, was done and the context in which it was done. NAAC was performing, and holding itself out to PCC as performing, the role in the Cape Group which Scott J. held was part of its function: i.e. as intermediary in respect of sales by Egnep to US customers (see paragraph 15 of the primary facts section) and as the channel of communication between customers, such as PCC and Capasco or Casap.

"(10) Capasco advertised asbestos in North America and gave both the address of NAAC and Capasco."

The plaintiffs referred to the evidence of Mr. Morgan, Deposition 1 pages 218-219. On this matter there was no dispute. The substance of the evidence was that Capasco had advertised in the United States only in a magazine called "Asbestos Magazine" which was distributed throughout the world including the United States of America. Asbestos was offered for sale and the addresses of both NAAC and Capasco were given in that advertisement. NAAC itself advertised in the yellow pages of the Chicago Directory and in the Thomas Register, a catalogue of manufacturers in the USA, listing addresses and products.

"(11) (i) Dr. Gaze, who was at all material times a Director of Cape, a Director of Casap, the Chairman of Capasco and, until July 1975, a Director of NAAC, was in overall control of

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

the selling and distribution of Cape's asbestos.

(ii) After Cape had, because of the asbestos litigation, ceased to have any directors on the Board of NAAC, Dr. Gaze nevertheless continued to run NAAC.

(iii) Mr. Morgan's authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Mr. Meyer or Dr. Gaze."

These proposed findings were directed, as Mr. Morison explained, to the submission that Cape's control over NAAC's activities did not depend upon the corporate form.

As to (i) above, reference was made to Mr. Morgan's evidence: Deposition 1 pages 166-169. The defendants, as stated above, have not questioned the correctness of Scott J.'s finding as to the role of Capasco, of which company Dr. Gaze was Chairman, within the Cape Group: see under (7)(i) above. The substance of this part of Mr. Morgan's evidence was that he dealt primarily with Dr. Gaze for discussion of allocations of asbestos for NAAC to be purchased by NAAC through Capasco from Egnep and Casap. Mr. Morgan co-ordinated the overall purchases by NAAC through Dr. Gaze. Mr. Morgan understood Dr. Gaze to have been the ultimate authority in connection with the sale of asbestos. NAAC's dealings on a day to day basis were through Capasco and that company was directed or managed by Dr. Gaze. It was pursuant to the instructions of Dr. Gaze that Mr. Morgan of NAAC dealt through Capasco and left Capasco to deal with Egnep. Mr. Morgan understood that Dr. Gaze could give instructions which would be followed so far as concerned the distribution of fibre.

There is nothing in this evidence inconsistent with or of significant addition to the findings of Scott J. as to the role of Capasco or of NAAC within the Cape Group.

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

As to (ii) above, there was no dispute as to the circumstances in which or as to the reasons for which Cape ceased to have directors on the Board of NAAC: see paragraph 18 of the primary facts section. Nor was it disputed that the resignations in July 1975 produced no significant change in the method of operation of NAAC or the responsibilities of individuals concerned. The question is whether Dr. Gaze "ran NAAC" before or after July 1975 and, if yes, in what sense.

The plaintiffs for this contention referred to Mr. Morgan's evidence, 4th Deposition at page 414. The substance of that part of Mr. Morgan's evidence was as follows. He had not made proposals as to what dividends should be paid by NAAC - that was done by Mr. Meyer at Board meetings; he could not recall Mr. Meyer conferring with him before any meeting about the dividend; Mrs. Holtze had told him that the amount of dividend was calculated by a kind of formula but she did not know what it was; after July 1975 he continued to have contacts with Dr. Gaze by letter, by telex, by telephone and personally when Dr. Gaze visited the United States or when Mr. Morgan visited England. After Dr. Gaze resigned from the Board of NAAC, Mr. Morgan had considered Dr. Gaze to be his superior so far as concerned the discharge of Mr. Morgan's duties at NAAC. Mr. Morgan was then asked the question: "Dr. Gaze in fact ran NAAC, didn't he?" And Mr. Morgan replied: "It would seem he did."

Sir Godfray submitted that upon all the evidence that answer of Mr. Morgan was rightly rejected by Scott J. as an accurate description of the relationship between Capasco, through Dr. Gaze, and NAAC. Scott J. held that "Mr. Morgan was in executive control of NAAC's conduct of its business".

This one answer of Mr. Morgan is incapable of bearing the

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

weight that Mr. Morison's submissions would place upon it. Mr. Morgan knew that he had to defer, in carrying out the business activities of NAAC, to the policy requirements of Cape as the controlling shareholders of NAAC. Within those policy limits - such as the requirement that NAAC's orders for asbestos for sale by NAAC in the USA be placed through Capasco on behalf of Egnep and Casap - the day to day running of NAAC was left to him as he himself substantially acknowledged in his evidence summarised under (11)(i) above. Dr. Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business, namely purchase and sale of textiles: see (5) above; or the obtaining of orders for asbestos which NAAC would carry out as principal in buying and selling, which orders amounted to about 20 per cent of NAAC's business in terms of tonnage: see (4) above. Nor did Dr. Gaze, or any representative of Cape, "run NAAC" with reference to the internal affairs of NAAC such as (i) staff, dealing with direct customers, and its own sources of supply - such as US Government stocks; (ii) NAAC's own office premises and warehouse premises; (iii) NAAC's arrangements for insurance; (iv) NAAC's pension scheme; (v) the formulation of NAAC's accounts; (vi) NAAC's payment of US taxes on NAAC's profits.

> "(12) Cape decided on the salaries of the staff and made the senior appointments."

For the plaintiffs reliance was placed upon a series of letters. The substance of the evidence to be derived from those letters can be stated as follows. The letter of 7th December 1964 (Vol. 3 page 12) from Mr. Dent of Cape went to Mr. Cryor, the predecessor of Mr. Morgan. It referred to the question of "remuneration of senior officers in the Group" which "naturally included ... your own situation". Details were requested of

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

Mr. Cryor's full remuneration because Cape did not have them. In May 1969, Mr. Cryor wrote to Mr. Dent in response to a proposal that his salary be increased from $38,000 to $43,000. He acknowledged that his remuneration must bear a proper relationship to what NAAC "can do for the Group". After a statement of what NAAC had achieved in the way of selling asbestos and of his forecasts for future trading, the letter continued with a statement, much relied upon by the plaintiffs, that "all of the Board members (of NAAC), I believe, have always considered this to be a question for you in London to raise, consider and decide at your own pleasure".

By the letter of 23rd February 1972 (Vol. 3 page 100) Mr. Meyer wrote to Dr. Gaze with reference to the level of personal expenses incurred by Mr. Morgan in his work for NAAC, and to whether or not Mr. Morgan should be elected President of NAAC at the annual meeting. Mr. Meyer had no definite recommendation. He was himself President of NAAC at that time. After further intervening letters Mr. Dent of Cape by the letter of 2nd May 1974 (Vol. 3 page 210) invited Mr. Meyer to accept the position of Chairman of the Board of NAAC to make way for Mr. Morgan to be appointed President. Mr. Dent wanted it understood that "if the nature of our business in the United States changed substantially, say through the acquisition of a manufacturing organisation, or for any other reason, we would not necessarily use NAAC as the vehicle for managing such a venture, nor would we necessarily feel that Mr. Morgan should head it up".

The letter of 20th May 1974 (Vol. 3 page 215) was also from Mr. Dent to Mr. Meyer: Mr. Dent accepted Mr. Meyer's proposal that Mr. Meyer become Vice-President instead of Chairman. Mr. Dent thought that Mr. Morgan's salary should be $40,000 upon

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

his becoming President.

By the letter of 18th June 1974 (Vol. 3 page 221) Dr. Gaze congratulated Mr. Morgan on his appointment; noted that Mr. Higham had taken over from Mr. Dent as Chairman of NAAC but asked Mr. Morgan "to continue to correspond with me on business questions exactly as has been the practice in the past". Mr. Morgan was also asked to keep "closely in touch with Mr. Meyer on finance ... and in general touch with day to day affairs".

Finally, the letter of 23rd November 1974 (Vol. 3 page 235) was from Mr. Meyer to Dr. Gaze about the directors' meeting of NAAC to be held on 5th December. (Dr. Gaze was a director of NAAC until July 1975.) Mr. Meyer reported his discussion with Mr. Morgan about "compensation for everyone except Mr. Morgan" and suggested increases in salary were set out for four members of the staff of NAAC including Mrs. Holtze.

Upon this evidence the additional finding sought by the plaintiffs cannot be made. Cape as the parent company appears to have been exercising its potential authority through its corporate relationship with NAAC to determine the remuneration of Mr. Cryor and Mr. Morgan as the persons successively in executive control of NAAC and to determine the election by the Board of Mr. Morgan as President and of other senior officers of NAAC. The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr. Morgan was placing his suggestions before the Board which included the Cape representatives.

> "(13) Cape effectively decided what NAAC was allowed to spend or borrow."

The finding of Scott J. is set out at paragraph 19 of the primary facts section. The issue is as to "what NAAC was allowed

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

to spend". The defendants acknowledge that Cape, as the parent company, required and received information as to the commercial performance of NAAC and the general cost of its operation. Further, Cape indicated to NAAC the maximum level of total expenditure which NAAC should incur and Cape considered such matters as the level of expenses incurred by Mr. Morgan. But the defendants contended that, on the evidence, Cape did not interfere with day to day expenditure or with particular borrowings by NAAC provided that total expenditure and borrowings stayed within the limits laid down. We have considered the documents to which we were referred by the plaintiffs - Vol. 3 pages 13-18, Vol. 4 pages 261, 264, 350, 379-381 - and in this instance do not find it necessary to set out the substance of what can be derived from those documents. On this matter the submissions for the defendants fairly reflect the facts revealed in the evidence.

(14), (15), (16) and (17): The next four headings of additional primary facts will be stated and then considered together. They are concerned with the purposes and motives of Cape with reference to the asbestos litigation and to the formation of CPC in the United States.

> "(14) From the start of the Tyler 1 proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America without the risk of enforceable judgments against Cape.
>
> (15) As part of its plan to attempt to appear to distance itself from NAAC, the Cape directors on the Board of NAAC resigned in July 1975.
>
> (16) After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler 1 (April 1977), Cape then formulated and put into operation, as from February 1978, a four point plan:
>
> (i) the dissolution of NAAC and the creation of a substitute organisation;

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

(ii) the formation, at Cape's expense, of the Liechtenstein Corporation (AMC) as an intermediary for invoicing purposes;

(iii) the formation of a new Illinois Corporation (CPC) to be operated by Mr. Morgan and to be set up with Cape money;

(iv) no further appearances in any US asbestos litigation.

(17) In order to set up AMC and liquidate NAAC, Cape required Exchange control permission from The Bank of England. This was sought by letter dated December 23 1977 which discloses the purpose for the formation of AMC and CPC. The plan was executed with secrecy."

The findings of the judge on these aspects of the case are set out in paragraphs 8 to 10 and 24 to 27 of the primary facts section. There is little "additional" in the findings put forward by the plaintiffs but they are relevant to their contention based upon the motives of Cape. We deal with this contention in the section of this judgment concerning the "corporate veil" argument.

As to (14) above, the plaintiffs relied upon a number of documents: Vol. 3 pages 171-172, 173, 174, 213, 215; Vol. 4 pages 268, 273, 279, 289-290, 324-329, 344-345. It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974. The first Tyler 1 action was commenced in January 1974. The extent to which any substitute company was intended to be "seemingly unconnected", and the means by which that seeming lack of connection was to be achieved, are of importance.

As to (15) above, reference was made for the plaintiffs to Vol. 4 page 279. There is nothing additional in this so far as concerns any primary fact: see paragraph 18 of the primary facts section.

As to (16) above, there is also nothing additional, so far as concerns primary fact, in sub-paragraph (ii) or (iv) thereof. For the matters set out under (16) the plaintiffs relied upon the documents at Vol. 4 pages 462, 492-495, 504-505, 507-510,

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

511-518, 529-532.

As to (17) above, there was, of course, no issue as to the writing/the letter to the Bank of England by Mr. Penna. Reference was made to Vol. 4 pages 517-518 and 557 and to Vol. 5 page 625.

The extent of any remaining issue of primary fact under this heading is small. The submissions for the defendants were that the formulation by Cape of its plans for alternative marketing arrangements proceeded in stages. The means through which alternative marketing arrangements would be made depended upon decisions of people who were not employed by Cape, or in their control, in particular Mr. Morgan. It was, as the judge found, always the intention of Cape that asbestos produced by its subsidiaries should continue to be sold into the United States of America. The decision to liquidate NAAC was taken on 11th November 1977, as the judge found: see Vol. 4 pages 454, 498. The purpose of Cape, when Mr. Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr. Morgan, which would be operated by him, and through which some of NAAC's trading functions would be performed.

As to the evidence under these headings, reference is required only to some few parts of it.

The first document listed by the plaintiffs was a Preliminary Fact Memorandum of 2nd March 1974 (Vol. 3 page 171) prepared by Mr. Milwid of Lord Bissel and Brook, attorneys in the USA for Cape. References in it were made to the extent of public knowledge of the hazards associated with asbestos; to the jurisdictional motion filed in Tyler 1; and to the status of NAAC and Egnep as "separately organised corporations" as compared with some of Cape's subsidiaries which became "agents" of Cape. (That

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

appears to be a reference to the sort of agency agreement mentioned by Scott J.-see paragraph 21 of the primary facts section). In a letter of 21st March 1974 (Vol. 3 page 173) Mr. Hubbard of Cape referred to the fact that Cape had no place of business or assets in Texas, or in the USA, and to a possible project (not connected with asbestos), in which Cape would acquire a factory near Boston, Mass., and which might "proceed through the device of a subsidiary holding company ..." Next, by the letter of 29th March 1974 (Vol. 3 page 174) Mr. Meyer tendered advice which included the statement that "organising a separate subsidiary to own and operate the plant, whether a US or foreign corporation, maybe more of smokescreen than an actual deterrent to anyone who obtains a judgment against Cape".

By June of 1975 Cape was more directly concerned about NAAC. By letter of 20th June (Vol. 4 page 268) Dr. Gaze told Mr. Morgan of "our thoughts about the future operations of NAAC" and sent the letter to Mr. Morgan's home address "to avoid ... speculation in the office". Cape, he wrote, "may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily ..." but "... was determined to do everything possible to maintain a successful selling operation in the United States". Dr. Gaze added that Mr. Penna (Cape Group solicitor) was getting advice from Mr. Meyer. The immediate purpose of the letter concerned "inventory at your warehouse ..." because "... in the present uncertainty, it is clearly desirable that we should operate with the minimum of assets of this type and I should therefore like you to take all possible steps to see that this stock is reduced to the lowest possible level". By letter of 25th June 1975 Mr. Penna explained to Mr. Meyer the need for advice much as Dr. Gaze had

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

expressed it in the letter last mentioned. Mr. Penna continued (Vol. 4 page 273): "we do want however to maintain Mr. Morgan in his current role to sell and service contracts in North America and Dr. Gaze has asked me to take your advice ..."

Mr. Meyer's reply was a long letter of advice, dated 3rd October 1975 (Vol. 4 page 324). "The objective under consideration" was "... an attempt to limit NAAC's and Cape's exposure to future US litigation". After references to insurance, to the statute of limitations and to legal considerations relating to the possible liquidation of NAAC, Mr. Meyer dealt with "replacement for NAAC". He considered various possibilities and the consequences in terms of taxation and continued: "If it were possible to operate without an office or employee in the United States it would seem to be better to operate directly from some company in England, a mining company in South Africa, or, if an office is needed near North America, from some Caribbean or Central American country that has very low income tax rates: e.g. Netherlands Antilles. Mr. Morgan's predecessor, Robert Cryor, and I used to talk occasionally about such an operation and we considered the tax savings that might result; however, it was always decided that it was not possible to operate in the United States without an office here, or at least without an employee travelling regularly in the United States with authority to negotiate contracts. This would result in the profits being subject to US taxes and therefore there appeared to be nothing to be gained by operating from a country outside the United States". Finally, by way of summary, Mr. Meyer added: "It is possible that some protection as to future actions could be obtained by liquidating NAAC and operating in the future through a Canadian or other foreign corporation; however, no protection would be

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

obtained if it were necessary to have an office or employees in the United States, or even to have a non-resident employee who continually travels in the US with authority to conclude contracts". It is to be noted, of course, that Mr. Meyer was advising on the exposure of a Cape subsidiary and of Cape to the jurisdiction of the US courts, whether State or Federal, according to the law there in force, and not on the exposure of Cape to enforcement of a judgment of those courts against Cape in this country.

By a letter of 23rd December 1975 (Vol. 4 pages 344-346) Mr. Milwid was tendering further advice to Mr. Penna. Judge Steger had not yet ruled on the jurisdictional motions submitted by Cape and Egnep. The questions addressed included what action should be taken in the event that Cape, Egnep or Capasco should be involved in any other US litigation. It is sufficient to note that Mr. Milwid advised (and thus probably indicated the scope of the questions set to him by Cape) that, even if a UK court should judge a default judgment to be unenforceable against Cape, nevertheless under Texas law a judgment is valid (subject to certain conditions) for ten years. He continued (page 346): "On the ultimate question as to whether Cape itself might be held liable in this litigation for any tort committed by either of its subsidiaries NAAC or Egnep the holding of the Texas Supreme Court in the case of National Hotel Co. v. Motley 123 SW 2nd 461 1938 is most helpful. There the Texas Supreme Court stated on this point: 'It may be stated as a general rule that the fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity, and unless it is shown that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth or

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

perpetrating fraud, or where the organisation and control of the subsidiary are shown to be such that it is but an instrumentality or adjunct of the dominant corporation, no liability may be imposed upon the latter for the torts of the subsidiary corporation'". Mr. Milwid closed with the expression of his opinion that Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

A telex of 4th July 1977 (Vol. 4 pages 462-3) from Mr. Penna to Mr. Milwid shows that Cape was taking advice in this country upon "withdrawal from Texas proceedings". It continued: "We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Capasco should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult".

We would observe that in the view thus expressed by Mr. Penna he was not only wrong but showed a misunderstanding of the law of this country. The enforceability of a foreign judgment at common law does not turn upon such matters; it is a question solely for the court and not the government.

The document at Vol. 4 pages 492-495 is a copy of the minutes of a Board meeting of Cape on 1st November 1977: see paragraph 8 of the primary facts section. It recorded the decision as to "Future claims" that, having regard to legal advice obtained, it was proposed in respect of any future US claims not to contest the proceedings in the American courts and to accept the risk of a default judgment ... it being considered

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

most unlikely that such a judgment would be enforced by an English court.

By a letter of 11th November 1977 (Vol. 4 page 504) Mrs. Holtze of NAAC reported to Mr. Penna advice and information received from Mr. Sarabia of Lord Bissel and Brook, a specialist in multi-national corporate procedures, on the consequences of trading by or through a new Liechenstein corporation and of the probable need for a second corporation if warehouse facilities would be required so as not to expose the Liechenstein corporation to US taxation. Mr. Morison referred to this exchange as the origin of the idea for AMC.

There was a further letter of 23rd November 1977 (Vol. 4 page 507) from Mr. Meyer to Mr. Penna concerned with the "problems of the liquidation of NAAC". He advised that it was essential that NAAC's assets be held in a liquidating trust in Illinois pending settlement of claims against it. There was a reference to taxation of any capital gain. He had had a number of conversations with Mr. Morgan and Mrs. Holtze "regarding the new corporation". He continued: "With respect to helping Gerry Morgan finance the organisation of the new corporation, the only way I know is to have NAAC pay him termination compensation. There would be two questions. How much to pay, and when to pay; as to how much, he estimated that the book value of NAAC's fixed assets will be $8,545 on January 31st 1978. In addition, he has estimated $2,000 for an initial supply of stationery and printing ... Then there would be legal fees and expenses ... including some amount for drafting and having approved by the Internal Revenue Service, a pension plan ... which takes over the assets of the present plan ... perhaps $1,500 would be sufficient. I would suggest a termination payment of somewhere between $20,000

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

and $25,000, which will be taxable to Gerry Morgan at close to a 50 per cent rate and would leave approximately half thereof for him to put into the new corporation in order to acquire NAAC's fixed assets, pay for the new corporation's legal expenses and fees and for the start up ... costs. This leaves open the question of what the new corporation will need in the way of income to operate, the amount of commissions or guaranteed income to provide necessary amounts and when and how the income should be paid. Gerry Morgan tells me it is proposed that he come to London early in December to discuss this latter subject but I am sure all of the above matters will be open for discussion ..."

The document at Vol. 4 page 511 was a memorandum dated 2nd December 1977 and prepared by Mr. Penna on the subject of "NAAC liquidation - substitute company" and addressed by name to some five senior officials in Cape with copies to Dr. Gaze and Mr. Tanner, who was, we were told, a South African director of Egnep. The memorandum began with reference to Mr. Meyer's letter of 23rd November. Mr. Tanner had had discussion on the formation of the new Liechenstein "invoicing company", and formation was proceeding. In the memorandum Mr. Penna referred to the new corporation as "LC" and to the proposed new Gerry Morgan company as "GMC". The implications which needed to be discussed within Cape included: (i) Mr. Penna's wish, from a legal viewpoint, to mask Cape's identity completely and for the shares to be held by nominees; (ii) LC acting just like Botswana Fibres - no detailed accounts and the US customer will pay direct into the Chase Manhattan central account; (iii) all contracts which GMC arranges for fibre supplies to small US customers (the current NAAC marketing operations will be in the name of the LC. Whether the

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

large contracts ... will continue direct from South Africa or through the LC depends on whether South African legal advice confirms there is no risk - Mr. Penna would think it logical to maintain the camouflage by contracting these through the LC: (iv) GMC's business will be financed, as with NAAC, from commission on sales, with the commission coming from the LC and not from South Africa; (vii) any risk of the mining company's profits being subjected to US tax. The memorandum closed with the following: "We need to get our thinking straight before Gerry Morgan's visit on December 12th."

By the letter to the Bank of England of 23rd December 1977 Cape sought permission to carry out its plans. Some passages (Vol. 4 page 517) should be noted. Cape were seeking approval for the liquidation of NAAC and the use of foreign currency to start the new Liechenstein corporation, AMC. The second paragraph read: "In view of the size of the recent settlement (see the settlement of 28th September 1977 described earlier in this judgment) and the probability of this type of litigation continuing far into the future ... we consider it appropriate to liquidate our abovementioned US subsidiary company to avoid having a recognised permanent wholly owned presence in the United States". Later the letter continued: "... Our Group wishes to continue to sell asbestos fibre in the United States after liquidating NAAC ... we are advised that this may best be achieved for the protection of our UK and US assets by using a Liechenstein company as an intermediary for invoicing purposes ... Liechenstein has been chosen under advice from our lawyers because it enables the shareholders to be disguised under a bearer share certificate arrangement. The Lichtenstein company will be managed by the management of Capasco, a wholly owned UK subsidiary

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

of Cape ... and for reasons explained above we wish to disguise this fact from any would be inquirers." After reference to the costs of establishing the Liechenstein corporation the letter continued: "In reality we will be merchanting the asbestos fibre using the Liechenstein company to disguise Cape's existence. The Liechenstein company will pay South Africa for the fibre and in turn will be paid by the United States customers. The price it pays South Africa will be the price it is paid by its US customers. It will be non-profit making and the commission will accrue to the United Kingdom direct from South Africa."

Some of the passages in that letter are, as we understand it, included within those referred to by Scott J. as having "conspiratorial flavour": see paragraph 25 of the primary facts section.

AMC was formed on 25th January 1978 and the new arrangements were ready to operate. CPC sent out an announcement (Vol. 4 page 537) signed by Mr. Morgan as President, and dated January 1978, to the effect that CPC had been appointed as agent to handle "your requirements for Amosite and Crocidolite asbestos fibre for the United States, Canadian and Mexican markets, effective February 1st 1978." The announcement continued: "Although operating as a new organisation, both Jean Holtze and I will endeavour to maintain the same service to our many customers and friends as previously offered by NAAC".

In the section of our judgment dealing with the "corporate veil"argument we have set out the inferences which we draw from the extracts from the evidence, as set out above, both as to the substance of what the officers of Cape were doing and what they were trying to achieve.

"(18) On January 12th 1978 NAAC's Board approved a plan

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

of complete liquidation for NAAC. Under the plan, the assets of NAAC did not vest in trustees until after May 2nd at the earliest, and at the latest immediately before the filing of articles of dissolution on May 19th 1978.

(19) NAAC continued to trade at least until the end of April from CPC's offices to which its files were transferred."

These two proposed additional findings can be taken together. They are directed to the finding of Scott J. set out in paragraph 11 of the primary facts section. For the plaintiffs reference was made to documents and to evidence, including Vol. 4 pages 533, 536, 551, 603 and 606; to Vol. 5 pages 625, 633, 634-635, 665-666 and 670; and to Mr. Morgan's second Deposition at pages 52 and 90-91. There is, as it seems to us, very little dispute, if any, as to primary fact. The essential submission of Mr. Morison for the plaintiffs was that Scott J. appears to have concluded that, after 31st January 1978 when NAAC "ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets", NAAC could no longer be regarded as carrying on Cape's business; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings were commenced on dates between 19th April 1978 and 19th November 1979. In this, Mr. Morison submitted that Scott J. was in error. The contentions for the plaintiffs were that NAAC continued to trade until it was formally dissolved on May 19th and that the plan for liquidation contemplated that NAAC's business would only cease upon filing of the statement of intent to dissolve which did not occur until 2nd May 1978. It was contended that the fact that NAAC's trade between January and May 1978 was in anticipation of a liquidation does not alter the character of the business during that period. If, therefore, NAAC is to be regarded as

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

carrying on Cape's business in the USA, so that Cape itself was present there before 31st January 1978, then it was submitted that the planned liquidation did not affect the position in any way. The plaintiffs accepted that, after 19th May, Cape could not be said to be present in the USA by or through NAAC. For the defendants, Sir Godfray submitted that the findings of Scott J. as to the cessation of NAAC's business were right in detail and in his conclusion. Scott J., at page 68E-H of his judgment, said: "On 1st November 1977 Cape resolved to place NAAC in liquidation and on 31st January 1978 a liquidating trust agreement for NAAC was signed. NAAC executed articles of dissolution on 18th May 1978 and a certificate of dissolution was issued on 19th May 1978. It was the intention of all concerned that NAAC's functions in the US in respect of the sale of Cape's Amosite asbestos would come to an end on 31st January 1978. They did so. However, NAAC at that date was owner of a quantity of asbestos held in US warehouses. Over the period 31st January to 18th May 1978 sales of this asbestos took place. These sales were not made in the course of NAAC carrying on business as a going concern. They were made for the purposes of the intended liquidation of NAAC." Further, Sir Godfray relied upon evidence which, he submitted, showed that CPC did start business as from 1st February 1978 both in fact and in accordance with the public announcement to that effect: Vol. 4 page 532. There was, he said, no evidence that asbestos was purchased by NAAC after 31st January 1978 from any source. NAAC terminated the employment of its staff at 31st January 1978: Mr. Morgan Deposition 2 pages 50-54; Mrs. Holtze Deposition 1 page 11. NAAC's furniture and office equipment was sold on 1st February 1978. CPC took a lease of premises at 150 North Wacker Drive on 1st February 1978. There

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

was, it was said, no evidence that after 31st January 1978 NAAC performed any function or service for Cape or the Cape Group.

It seems to us that there is under these headings no real issue as to any primary fact. The contest is as to the proper conclusions to be reached and they turn upon the answers to questions of law which are determined in this judgment. Very little in the evidence referred to for the plaintiffs needs to be mentioned. The plan of complete liquidation and dissolution, which was accepted by resolution of the Board of NAAC, with the consent of CIOL as sole shareholders, (Vol. 4 page 536) provided that, upon NAAC filing a "statement of intent to dissolve ... , thereupon NAAC should cease to carry on its business, give any appropriate notice to its creditors, proceed to collect its assets, convey and dispose of its properties, pay, satisfy and discharge or provide for payment of its liabilities and obligations, and do all other acts required to liquidate its business ... and should distribute the remainder of its assets ... to the trustees pursuant to a liquidation trust agreement ..." NAAC was then to file "articles of dissolution pursuant to section 80 of the Business Corporation Act of Illinois". The trustees of the liquidating trust were Mr. Meyer and Mr. Brook, both of Lord Bissel and Brook. The trust agreement was between NAAC, CIOL as sole shareholders, and the two trustees. It recited that NAAC wished to distribute as soon as practicable all of the remaining assets of NAAC as a fund to provide for all claims and unpaid liabilities. The company was to transfer to the trustees all of the distributable assets of NAAC remaining in NAAC immediately prior to the filing by NAAC of articles of dissolution with the Secretary of State of Illinois.

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

The position within NAAC was stated in a memorandum of 1st February 1978 (Vol. 4 page 556) prepared by Mr. Penna. It was there stated that NAAC ceased trading from 31st January 1978; that there was still some $35,000 worth of stock in the warehouse and, because of tax problems, if either AMC or CPC should purchase that stock, it would be sold on by NAAC over the next months. That would hold up the date of the actual formal winding up until the end of February. AMC, formed on 25th January 1978, was now (the date of the memorandum) the supplier to US customers; specific powers of attorney were to be drawn up for those authorised to act in various capacities for AMC; and a letter of request to the Companies Registry was to be lodged for consent to exclude reference to AMC on the Cape file.

On 2nd February 1978 Dr. Gaze sent a memorandum to certain officials of the Cape Group: it was said that NAAC had ceased to trade at the end of January 1978; Mr. Morgan had set up his own company, CPC, and "is being appointed agent for sale of blue and Amosite fibre in the USA, Canada and Mexico by AMC". (Vol. 4 page 557.)

On 8th March 1978 (Vol. 4 page 603) Mr. Milwid sent a telex to Mr. Penna which included the following: "Mr. Meyer advises NAAC not yet formally in liquidation. It still has Philadelphia warehouse material. To the extent not sold by mid-April, proposed to write it off and then liquidate for completion by 30th April".

The document at Vol. 4 page 606 included a statement of account for NAAC including figures for the two months ended February 28th 1978. Sales by NAAC totalled $406,640, showing a gross profit of $66,133. The net earnings were $19,442. The figure for the same period of 1977 showed that the sorts of sales being made in January and February 1978 appear not to be

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

materially different from those being made in 1977 and, in the absence of other evidence, we infer that they were the same.

By letter of 19th April 1978 (Vol. 5 page 625) Mrs. Holtze, as a servant of CPC, wrote to the Group financial controller of Cape: "Officially, NAAC closed on 31st January 1978. We are keeping the books for the liquidating trustees through April 30th ... We have sent you the January and February statements (i.e. the document at Vol. 4 page 606 mentioned above) ... even though we are performing these functions, we are not supposed to be receiving any mail that would tie us into Cape after the January 31st 1978 deadline: however, Mr. Morgan and myself are still receiving accounting memoranda from you. I believe, for safety sake, these should be stopped immediately".

We need not refer to any more of the evidence under these headings. It seems clear to us that Scott J. was right in every respect on the primary facts. It was the intention that NAAC should cease trading on 31st January 1978 and NAAC did so cease so far as concerned all parts of its business save for the disposal of stock for the purposes of liquidation. The stock was disposed of for that purpose. The business of disposing of NAAC's stock continued until the end of April 1978. CPC commenced trading on 1st February 1978. All or most of NAAC's files were transferred to CPC's offices.

> "(20) The respondents'only purpose for the incorporation of CPC was a substituted company for the sale of the respondents' asbestos in the USA."

It is not necessary to refer to any evidence under this heading. It was not in dispute that the only purpose which Cape had in supporting and in providing financial assistance for the incorporation of CPC, apart from any wish to assist the provision of continued employment for long serving servants of NAAC, was to

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

bring into existence the alternative marketing arrangements for asbestos in the USA.

"(21) AMC was incorporated on January 25th 1978. Its nominal Director was Dr. Ritter; it had an issued share capital of 50 x 1000 Swiss Frank shares."

There was no issue upon any of these matters as is apparent from evidence and contentions already set out above.

"(22) AMC's bank account was operated by Cape personnel and its address for accounts was that of Cape."

Again, there was no issue upon these facts: see (2)(ii) above.

"(23) CPC carried on business from the same address as NAAC with the same telephone number. It employed the same staff as had NAAC. It dealt with the same customers as had NAAC and CPC advised those customers that it was 'business as usual'."

Any factual issues under this heading are of no significance. CPC's offices were on a different floor but in the same building as that in which NAAC had last had its office. The public announcement of January 1978 was considered with the evidence referred to under (14), (15), (16) and (17) above.

"(24) The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC's account at the New York branch of the Chase Manhattan Bank and transferred to AMC's account at the London branch of the bank. AMC would then pay Casap (not Egnep). CPC wrote to customers and shippers 'on behalf of AMC' and at least on one occasion a customer wrote to AMC and CPC at North Wacker Drive."

For the plaintiffs reference was made to documents at Vol. 5 pages 657 and 682, 646-1 as an example, and 658.

For the defendants it was submitted that, on the evidence, it is clear that AMC's bank account was in London at Chase Manhattan and not at the New York branch, and that the paying in facility in New York was for transferring the money. It was not disputed that, in assisting the performance of contracts by AMC, CPC wrote to customers on behalf of CPC but (and this was common

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

ground) CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts. It was accepted that AMC paid Casap. The document sent to AMC and CPC at North Wacker Drive was dated 8th March 1978 (Vol. 5 page 658) and was a statement of sums due to Davis Turner & Co., Customs House Brokers and Foreign Freight Forwarders, of New York. The amount due was $79.50 in respect of customs entry brokerage, and other services, in respect of one container of asbestos. The container was the fourth shipment (see Vol. 5 page 657) against the purchase order placed by Mead Paper with AMC. Nothing of significance can be derived from the form of address used by Davis Turner & Co. on this occasion. The submissions for the defendants with reference to these matters appear to us to be correct.

> "(25) In the light of the facts referred to and of the absence of any evidence to the contrary, the proper inference to be drawn from the evidence of Mr. Summerfield (namely that in August 1984 AMC's name was given as one of the occupants of the offices at North Wacker Drive) was that AMC had their plate up in 1978/9."

The plaintiffs on this matter relied upon the findings of the judge and upon their submissions as to the onus of proof. Scott J. at page 786 referred to the evidence of Mr. Summerfield and continued: "Whether this notice board was in the same state in 1979 when the sale to TCL took place is not known. ... (It was submitted) ... that since the onus was on Cape to satisfy me that it was not present in the United States, it was for Cape to establish that AMC was not present in the United States at any material time. I do not accept this approach. There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices at the time that the Tyler 2 actions were commenced." The suggestion made to us is that, although this

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

point derived from the evidence of Mr. Summerfield was not pleaded within the particulars of matters relied upon, there must have been persons within the Cape organisation, for example Mr. Penna, who could have dealt with the matter when the evidence was given at the trial.

In our view, the conclusion of Scott J. on this point was right. There was no evidence to suggest that AMC was an occupant of CPC's offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979 when the Tyler 2 actions were commenced. On 29th June 1979 Cape sold its mining division to CPC (see paragraph 1 of the primary facts section). That sale involved the sale of the shares in Egnep and AMC and much of Capasco's business: see the text of the agreement at Vol. 5 pages 758-887. It is, in our view, improbable, having regard to the purpose of Cape in assisting in the formation of CPC, as found by Scott J. and considered above, and having regard to the evident care taken by the officers of Cape/Capasco in matters of corporate form and function (see Scott J.'s finding set out at paragraph 15 of the primary facts section) that any officer of Cape would have caused or permitted the display of AMC as one of the occupants of the offices at North Wacker Drive, or that any officer of CPC would have permitted such a display while AMC was a subsidiary of Cape and a source of commission earnings for CPC. As to the onus of proof as a matter of law, our conclusions have been stated in the section of our judgment dealing with that topic.

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

SCHEDULE 1

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

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

[1] *Cape PLC v. Anglo American PLC, et al.*, C/A No. 2023-CP-40-01759, Court of Common Pleas for the Fifth Judicial Circuit, State of South Carolina, County of Richland.
[2] Paragraph and page references to the Third-Party Complaint, filed June 30, 2023, ("TPC") and Proposed Amended Third-Party Complaint, which the Receiver has asked for permission to file ("Proposed Am. TPC"), are the same unless otherwise indicated.
[3] The 37 primary facts by Scott J were considered by the Court of Appeal in *Jimmy Wayne Adams & Others v. Cape Industries Plc & Capasco Limited* [1990] Ch. 433 ("*Adams v. Cape*"). *See* Ex. B-2, pages 15–25). This statement of primary facts is unreported.
[4] This proposed "Schedule of facts which ought to have been determined" is contained in the Amended Notice of Appeal in *Adams v Cape* (filed by the plaintiffs as non-prevailing parties in the court of first instance). *See* Ex. B-3.
[5] The Appendix to the judgment in *Adams v Cape* deals seriatim with the allegations of fact made in the 25 paragraphs of the "*Schedule of facts which ought to have been found*" included in the plaintiffs' Amended Notice of Appeal. *See* Ex. B-4. It too is unreported.
[6] These are page and accompanying paragraph (as indicated in the margins) references.

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

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

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

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from South African mines into the United States."					enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense NAAC was not permitted to deal with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC's dealings with Casap."		own, it is, in our judgment, entitled to do so." "It is indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities."	532E
"To facilitate this, NAAC had both marketing and distribution roles:	TPC ¶ 72							
(i) serving as Cape's sales agency in the United States, with sole authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines; and		"NAAC's dominant purpose was to assist and encourage sales in the US of asbestos mined by the Cape subsidiaries, of which one was Egnep. Contracts with US customers for the supply of asbestos were made by Egnep or Casap…The US customer would, through NAAC, notify Casap or Egnep of the quantity required and the time for delivery... Shipping arrangements and delivery date would be arranged by Casap or Egnep and passed to the US customer through NAAC. Egnep could not always provide the full amount of asbestos ordered. If that happened NAAC would, if it could, purchase asbestos from US Government stocks in order to supply it to the US customers." "In respect of these transactions NAAC contracted, both in purchasing the asbestos and in selling on to the US customers, as principal. … NAAC also, it seems from the evidence, from time to time purchased asbestos from Egnep or Casap and sold on to US customers. These purchases and sales it transacted as principal." (emphasis added)	Primary Facts ¶ 14 *See also* Ex. B-1, at 473A-C.	**"[Schedule of Appealed Facts] 4.** NAAC's involvement in the sale of Cape's asbestos took two forms:- Sales by NAAC to customers in the USA of asbestos which NAAC itself had bought from CASAP… Organising and arranging the completion of contracts between customers and Egnep. NAAC received a commission from CASAP."	**"[Schedule of Appealed Facts 4].** The true position appears on the evidence to be that, as the judge found, NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. In so far as the asbestos originated from Egnep's mines there is no ground for supposing that Egnep, by its own officers and servants, did not make and record the sales either direct to customers in the USA, including NAAC, or to another subsidiary, in particular Capasco or Casap, from which NAAC on occasions purchased."	Pages 4 & 5	"It seems clear that NAAC, as principal, made direct purchases of raw asbestos from Egnep…it made similar purchases from Casap." (emphasis added)	537F-G
		"NAAC thus had two main forms of business which it carried on; first, as intermediary in respect of sales by	Primary Facts ¶¶ 15–17.	**"[Schedule of Appealed Facts] 9.** When corresponding with US customers Cape referred to NAAC	"**[Schedule of Appealed Facts 9].** NAAC was performing, and holding itself out to PCC as performing, the	Pages 13 & 16	"In the face of these facts, now unchallenged, it is in our judgment clear beyond argument that NAAC was	546D-G/H

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

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

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

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

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

Facts Alleged by Receiver (purportedly on behalf of CIHL/Cape PLC)[1]	Third-Party Complaint [& Proposed Am. Third-Party Complaint][2] Reference	Determinations of primary fact by Scott J in the court of first instance [*see* Ex. B-2, "Statement of Primary Facts"][3]	Statement of Primary Facts Reference [Ex. B-2]	"Schedule of Facts which ought to have been determined" [*see* Ex. B-3, "Schedule of Appealed Factual Findings"][4]	Determinations of fact in the Appendix to the Judgment in Adams v Cape [*see* Ex. B-4, "Appendix"][5]	Appendix Reference [Ex. B-4]	Determinations of fact by the Court of Appeal in Adams v Cape [*see* Ex. B-1, "*Adams* Judgment"]	*Adams* Judgment Reference [Ex. B-1]
		NAAC as was exercised in respect of its corporate activities. Mr Morgan was in executive control of its business…The business carried on by NAAC was its own business". "Mr Morgan was…in charge. He had however, an important assistant, a Mrs Holtze. In addition, there were two or three other office staff."	*See also* Ex. B-1, at 472D-E	Morgan himself was the only person who had customer contact." "**[Schedule of Appealed Facts] 11.** Gaze, who was at all material times a director of CASAP, the Chairman of Capasco and until July 1975 a director of NAAC, was in overall control of the selling and distribution of Cape's asbestos. After Cape had, because of the asbestos litigation, ceased to have any directors on the Board of NAAC, Dr Gaze nevertheless continued to run NAAC. Mr Morgan's authority was limited to day to day matters of routine; anything regarding policy he was required to discuss with Meyer or Gaze."	as assistant to Mr Cryor. She became secretary of NAAC and assistant treasurer and remained with NAAC until its dissolution. Mrs Holtze contacted customers with regard to documentation and shipping…She also communicated with customers if there was a shortfall in their requirements from Egnep and arranged supply from the US Government's stocks." "**[Schedule of Appealed Facts 11].** There is nothing in this evidence inconsistent with or of significant addition to the findings of Scott J as to the role of Capasco or of NAAC within the Cape Group." "Scott J held that "Mr Morgan was in executive control of NAAC's conduct of its business…Dr Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business, namely purchase and sale of textiles…Nor did Dr Gaze, or any representative of Cape "run NAAC" with reference to the internal affairs of NAAC."	*See also* page 13 *See also* pages 18–19	if it wishes, to exercise overall control of the general policy of the subsidiary. The plaintiffs however submitted that Cape's control extended to the day-to-day running of NAAC…. [The Plaintiffs] challenged the finding of fact made by Scott J that "Mr Morgan was in executive control of NAAC's conduct of its business…." Our conclusion shortly stated, is that the finding was justified by the evidence. A degree of overall supervision and to some extent control was exercised by Cape over NAAC as is common in the case of any parent-subsidiary relationship …In particular, Cape would indicate to NAAC the maximum level of expenditure it should incur and would supervise the level of expenses incurred by Mr Morgan. Mr Morgan knew that he had to defer in carrying out the business activities of NAAC to the policy requirements of Cape as the controlling shareholders of NAAC. Within these policy limits, such as Cape's requirements that NAAC's orders for asbestos for sale by NAAC in the United States of America be placed through Capasco on behalf of Egnep and Casap, the day to day running of NAAC was left to him."	

ELECTRONICALLY FILED - 2024 Nov 22 6:07 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001756

		"Mr Morgan in December 1970 had been appointed Vice-President of NAAC. He was made President on 1st July 1974 and so continued until dissolution of NAAC in 1978. At all material times the Vice-President of NAAC was Mr Meyer, an attorney and partner in the firm Lord Bissell and Brook of Chicago. That firm acted for the Cape Group of companies as their US attorneys. NAAC had offices on the 5th floor of 150 North Wacker Drive, Chicago. NAAC was the lessee; paid the rent; owned the office furniture and fittings; and employed staff of some 4 people. Mr Morgan was in charge."	Primary Facts ¶ 13	"**[Schedule of Appealed Facts] 3.** […] It was virtually a one man organization in the sense that Morgan himself was the only person who had customer contact."	"**[Schedule of Appealed Facts 3].** The person in day to day charge of the business done by NAAC was firstly Mr Cryor and then Mr Morgan." "Mr Morgan was, however, as submitted for the defendants, "head hunted" in the USA where he lived; the job was advertised in the USA: Mr Morgan was interviewed on two occasions by Mr Meyer in America and then once in London by Dr Gaze. His appointment was effected by Mr Meyer, then President of NAAC, in Illinois."	Pages 2 & 3		
"All key decisions … including with respect to the fulfilment of specific purchase orders, were closely coordinated with and directed by other Cape entities, or made by a board comprised of Cape executives and lawyers…"	TPC ¶ 77	"Contracts with US customers for the supply of asbestos were entered into by Egnep or Casap – I am not clear which and it does not matter. The contracts tended to be long term but did not usually specify the quantity of asbestos to be sold. The practice was for the US customer to specify from time to time the quantity of asbestos it wished to purchase and the time when it desired delivery to be made. This information would be conveyed via NAAC to Casap and Egnep. Whether the information went directly from NAAC to Casap and Egnep or whether it went via Capasco is not clear. Shipping arrangements and delivery dates would be arranged by Casap or Egnep and communicated to the US customer via NAAC. The vagaries of production in the mines had the consequence that Egnep was not always able to provide the US customer with the full amount of asbestos that had been ordered. When a shortfall between the customers' requirements and Egnep's delivery capacity emerged, NAAC would endeavor to fill the gap by purchasing asbestos from US Government stocks and selling the asbestos to the US customers."	Primary Facts ¶¶ 14, 15 & 19 *See also* Ex. B-1, at 472E-H	"**[Schedule of Appealed Facts] 3.** […] It was virtually a one man organization in the sense that Morgan himself was the only person who had customer contact." "**[On Schedule of Appealed Facts] 6.** NAAC did not deal, and was not permitted to deal, with Egnep or Casap but had to go through Cape and Capasco." **"[Schedule of Appealed Facts] 7.** Cape and Capasco were ultimately responsible for marketing and selling the mined asbestos and for deciding how the supplies should be rationed."	"**[Schedule of Appealed Facts 3].** The person in day to day charge of the business done by NAAC was firstly Mr Cryor and then Mr Morgan." "**[Schedule of Appealed Facts 6].** It seems clear that NAAC did deal directly with Egnep in the sense that the contracts of sale were made in which Egnep and NAAC were principals but that, as a matter of Group policy, which Cape could enforce by its power of control over the Boards of Egnep, Capasco and NAAC, the transmitting of information and orders was done through Capasco. In that sense NAAC was not permitted to de with Egnep directly and it can properly be assumed that a like prohibition applied to NAAC's dealings with Casap." "**[Schedule of Appealed Facts 7].** …The role of Capasco within the Group was assigned to it because of the geographical position of the mines and the need for coordination of sales by a subsidiary in London. Capasco was also responsible for advertising and for advising the mines on marketing questions."	Pages 3 & 6 *See also* pages 37–38	"There is no challenge to the Judge's findings that (a) the corporate financial control exercised by Cape over NAAC in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be expected in a group of companies such as the Cape group… ; (b) the annual accounts of NAAC were drawn on the footing that NAAC's business was its own business and there was nothing to suggest that the accounts were drawn on a false footing."	538E-F
"NAAC's operations and decision making were wholly dominated by Cape …How dominated was NAAC? The company could not	TPC ¶ 79	"There is also evidence, as perhaps might be expected, that the corporate, as opposed to commercial activities of NAAC were controlled by Cape as to the dividend that NAAC was to declare….and subject to compliance	Primary Facts ¶¶ 19 & 20 *See also* Ex. B-1, at 473H-474C	"**[Schedule of Appealed Facts] 12.** Cape decided on the salaries of the staff and made the senior appointments." "**[Schedule of Appealed Facts] 13.** Cape effectively decided what	"**[Schedule of Appealed Facts 12].** The salaries of other staff were matters left to the Board of NAAC and upon those matters Mr Morgan was placing his suggestions before	*See* pages 21–22.	"There is no challenge to the Judge's findings that (a) the corporate financial control exercised by Cape over NAAC in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be	538E-F *See also* Ex. B-2, Primary Facts ¶ 21

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

"borrow one dollar without [Cape's] approval"		with Illinois law, the parent company was in a position to and did direct the level of the dividend. In addition, the financial controllers in London were consulted about the level of borrowing permitted by NAAC in each financial year. This corporate financial control exercised by a parent company over its subsidiary is … no more and no less than one would expect to find in a group of companies such as the Cape group. There is, however, no evidence of any like control exercised by Cape and Capasco over the conduct by NAAC of its commercial activities." (emphasis added)		NAAC was allowed to spend or borrow."	the Board which included the Cape representatives." "**[Schedule of Appealed Facts 13].** Cape indicated to NAAC the maximum level of total expenditure which NAAC should incur and Cape considered such matters as the level of expenses incurred by Mr Morgan. But the defendants contended that, on the evidence, Cape did not interfere with day to day expenditure or with particular borrowings by NAAC provided the total expenditure and borrowings stayed within the limits laid down."		expected in a group of companies such as the Cape group… ; (b) the annual accounts of NAAC were drawn on the footing that NAAC's business was its own business and there was nothing to suggest that the accounts were drawn on a false footing."	
Cape's domination also influenced and controlled NAAC's risk management decision-making including its purchase of insurance…Cape directed NAAC to buy wholly inadequate insurance coverage..."	TPC ¶ 80	*See* above		"**[Schedule of Appealed Facts] 11.** After Cape had, because of the asbestos litigation, ceased to have any directors on Board of NAAC, Dr Gaze nevertheless continued to run NAAC."	**"[Schedule of Appealed Facts 11].** Nor did Dr Gaze, or any representative of Cape, "run NAAC" with reference the internal affairs of NAAC such as…NAAC's arrangements for insurance."	Page 19	*See* above	
"Cape went through tortured machinations to make it *appear* it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination. And these changes were the result of careful assessments by Cape officials… regarding how to minimize the liability exposure of… Cape…"	TPC ¶ 81	*See* above in relation to oversight		"**[Schedule of Appealed Facts] 11.** After Cape had, because of the asbestos litigation, ceased to have any directors on Board of NAAC, Dr Gaze nevertheless continued to run NAAC." "**[Schedule of Appealed Facts] 19.** NAAC continued to trade at least until the end of April, from CPC's offices to which its files were transferred." "**[Schedule of Appealed Facts] 20.** The Respondents' only purpose for the incorporation of CPC was a substitute company for the sale of the Respondents' asbestos in the USA."	"**[Schedule of Appealed Facts 11].** Mr Morgan coordinated the overall purchases by NAAC through Dr Gaze. Mr Morgan understood Dr Gaze to have been the ultimate authority in connection with the sale of asbestos. NAAC's dealings on a day to day basis were through Capasco and that company was directed by Dr Gaze." "Mr Morgan knew that he had to defer, in carrying out the business activities of NAAC, to the policy requirements of Cape as the controlling shareholders of NAAC. Within those policy limits – such as the requirement that NAAC's orders for asbestos for sale by NAAC in the USA be placed through Capasco on behalf of Egnep and Casap – the day to day running was left to him…Dr Gaze plainly did not run NAAC so far as concerned the separate parts of NAAC's business." "**[Schedule of Appealed Facts 19].** It was the intention of all concerned that NAAC's functions in the US in respect of the sale of Cape's	Page 17 *See also* pages 34, 37–38	"There is no doubt that the services rendered by NAAC in acting as intermediary in respect of contracts between the United States customers and Egnep or Casap were active and important services which were of great assistance to Cape/Capasco in arranging the sales of their group's asbestos in the United States of America. Nevertheless. For all the closeness of the relationship between Cape/Capasco and NAAC, strictly defined limits were imposed on the functions which NAAC were authorised to carry out as their representative."	547B-C

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

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

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

				NAAC who played a significant role in advising a US customer about commencing asbestos operations in Tyler."	having regard to the corporate structure of the Group…Each corporate member was carrying out its own well defined commercial function for serving the overall commercial purpose of mining and marketing asbestos." **"[Schedule of Appealed Facts 8].** The picture derived from the evidence relied on under (8) (i) to (iv) is, again, as it seems to us, in accordance with Scott J's conclusions as to how the subsidiaries of Cape operated, i.e. with each one carrying out its own function."		within the United States of America." (emphasis added)	

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

(2) Sham transactions to feign exits.								
"For decades, certain of these Third Party Defendants created sham transactions to feign exits of the asbestos industry in the United States."	TPC "Introductory Statement" (p.10)						See above: Scott J and the Court of Appeal's findings are inconsistent with the allegation of the inter-company transactions being shams. See also below in respect of the purpose in making the arrangements for liquidation of NAAC and creation of AMC and CPC.	
"Cape's historic operations involved a complex scheme to sell… while intentionally depleting its U.S.-based subsidiary of attachable assets. Executing on that scheme, Cape allowed default judgments against it in asbestos lawsuits across the United States and simply absconded, leaving no assets for recovery…"	TPC ¶ 41						"…we do not accept that as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used as to ensure that he 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 Gorup 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."	544D-E

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

(2)(a) Liquidation of NAAC								
"Ultimately, to avoid liability…Cape decided to liquidate NAAC, effective January 31, 1978."	TPC ¶ 94	"The arrangements for the dissolution of NAAC and the formation of AMC and CPC…over the period November 1977 to February 1978 were part of the 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 of Cape or its subsidiaries.". "… there can really be no doubt but that the decision to wind up NAAC was taken in order to try and avoid the danger of an argument that under English law Cape's interest in NAAC's US business sufficed to give the Tyler court jurisdiction over Cape. It was not however, desired that the US, as a market for Cape's asbestos should be abandoned. The liquidation of NAAC was accompanied by the devising and implementation of alternative marketing arrangements."	Primary Facts ¶ 24 Ex. B-1, at 450B-C/D; *see also id.* at 478F-H *See also* Primary Facts ¶¶ 8 & 9	"**[Schedule of Appealed Facts] 14.** From the start of the Tyler I proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America without the risk of enforceable judgments against Cape." "**[Schedule of Appealed Facts] 16.** After the jurisdiction issue had been determined against them at an interlocutory stage in Tyler I (April 1977), Cape then formulated an put into operation, as from February 2018, a four point plan: (a) The dissolution of NAAC and the creation of a substitute organization; (b) The formation, at Cape's expense, of a Lichtenstein Corporation (AMC) as an intermediary for invoicing purposes; (c) The formation of a new Illinois corporation (CPC) to be operated by Morgan and to be set up with Cape money; (d) No further appearances in any US asbestos litigation." "**[Schedule of Appealed Facts] 17.** In order to set up AMC and liquidate NAAC, Cape required control permission from the Bank of England…the plan was executed with secrecy."	"**[Schedule of Appealed Facts 14].** It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974." "**[Schedule of Appealed Facts 16].** There is nothing additional, so far as concerns primary fact." "**[Schedule of Appealed Facts 17].** It was, as the judge found, always the intention of Cape that asbestos produced by its subsidiaries should continue to be sold into the United States of America. The decision to liquidate NAAC was taken on 11th November 1977, as the judge found…The purpose of Cape, when Mr Morgan agreed to the idea, was that a new Illinois Corporation, namely CPC, should be set up of which the shares would be owned by Mr Morgan, which would be operated by him, and through which some of NAAC's trading functions would be performed."	Pages 23–24	"As for Cape's purpose in making the arrangements for the liquidation of NAAC and the creation of AMC and CPC, we think that the ...evidence … sufficiently reveal[s] the substance of what the officers of Cape were doing and what they were trying to achieve. The allegation of impropriety was, in our view, rightly abandoned. The inference which we draw from all the evidence was that Cape's intention was to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement therein of Cape or its subsidiaries and (b) 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 court being held to be enforceable in this country. Inference (a) was also made by the Judge. Inference (b) is our own." (emphasis added)	541F-H
		"The decision to put NAAC 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 US brought against Cape by plaintiffs complaining of injury caused by exposure to asbestos dust presented a very real problem."	Ex. B-1, at 478A-B	"**[Schedule of Appealed Facts] 14.** From the start of the Tyler I proceedings Cape were considering the possibility of replacing NAAC with a seemingly unconnected substitute company so that they could continue with the benefit of trade into North America without the risk of enforceable judgments against Cape." "**[Schedule of Appealed Facts] 16.** The dissolution of NAAC and	"**[Schedule of Appealed Facts 14].** It was not in dispute that Cape was giving thought and obtaining advice as to the possibility of replacing NAAC for the purpose stated from a date in 1974." "**[Schedule of Appealed Facts 16].** There is nothing additional, so far as concerns primary fact."	Pages 23–24	*See* above in relation to the liquidation of NAAC	

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

				the creation of a substitute organization"				
		"As from 31 January 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets. NAAC executed articles of dissolution on 18 May 1978."	Ex. B-1, at 450F-G	"**[Schedule of Appealed Facts] 19.** NAAC continued to trade at least until the end of April, from CPC's offices to which its files were transferred."	"**[Schedule of Appealed Facts 19].** After 31st January 1978…NAAC could no longer be regarded as carrying on Cape's business; and therefore Cape could not be regarded as resident in the USA through NAAC at the time when the Tyler 2 proceedings commenced on dates between 19th April 1978 and 19th November 1979."	Pages 33 & 37	"…it is in our judgment clear beyond argument that NAAC was carrying on business of its own."	541C-D
		"It was the intention of all concerned that NAAC's functions in the US in respect of the sale of Cape's amosite asbestos would come to an end on 31 January 1978. They did so."	Ex. B-1, at 477G-H *See also* Primary Facts ¶ 11	"**[Schedule of Appealed Facts] 19.** NAAC continued to trade at least until the end of April, from CPC's offices to which its files were transferred."	"**[Schedule of Appealed Facts 19].** …Scott J appears to have concluded that, after 31st January 1978 when NAAC "ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets", NAAC could no longer be regarded as carrying on Cape's business". "It seems clear to us that Scott J was right in every respect on the primary facts. It was the intention that NAAC should cease trading on 31 January 1978 and NAAC did so cease so far as concerned all parts of its business save for the disposal of stick for the purposes of liquidation. The stock was disposed of for that purpose…CPC commenced trading on 1st February 1978. All or most of NAAC's files were transferred to CPC' offices."	Pages 33 & 37	"…it is in our judgment clear beyond argument that NAAC was carrying on business of its own."	541C-D
"NAAC's liquidation was central to Cape's liability-avoidance strategy…"	TPC ¶ 97	"[The arrangement for dissolution of NAAC] was associated with the decision not to take part in the Tyler 2 proceedings and to resist enforcement of any default judgments on the ground that the Tyler Court had no jurisdiction over Cape or its subsidiaries. The defence on those lines would require the trading connection between Cape and its subsidiaries on the one hand and the United States on the other to be kept to a minimum. Hence the need to liquidate NAAC, a Cape subsidiary, and to allow at least some of NAAC's trading functions to be assumed by an Illinois corporation which was not a Cape subsidiary, i.e. CPC."	Primary Facts ¶ 24	"**[Schedule of Appealed Facts] 16.** The dissolution of NAAC and the creation of a substitute organization… No further appearances in any US asbestos litigation." "**[Schedule of Appealed Facts] 17.** …the purpose for the formation of AMC and CPC. The plan was executed in secrecy."	"**[Schedule of Appealed Facts 16].** There is nothing additional, so far as concerns primary fact." "**[Schedule of Appealed Facts 17].** The objective under consideration was …an attempt to limit NAAC's and Cape's exposure to future US litigation."	Pages 23 & 24		

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

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

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

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

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

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

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

(2)(c) Creation of AMC								
"CPC acted with South African mines to sell through….AMC associated with Cape..."	TPC ¶ 99	"AMC, a Liechtenstein corporation was incorporated by a Dr Ritter, a well-known Liechtenstein lawyer. The bearer shares in AMC were held by Dr Ritter upon trust for CIOL. … The intention was that all sales of Cape asbestos to US customers would be made by AMC."	Ex. B-1, at 479C-D/E *See also* Primary Facts ¶ 26	"**[Schedule of Appealed Facts] 21.** AMC was incorporated on January 25th 1978. Its nominal Director was Dr Ritter; it has an issued share capital of 50 x 1000 Swiss Franc shares. "**[Schedule of Appealed Facts] 24.** The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC's account at the New York Branch of the Chase Manhattan Bank and transferred to AMC's account at the London Branch of the Bank." "**[Schedule of Appealed Facts] 25.** In the light of the facts referred to an[d] of the absence of any evidence to the contrary, the proper inference to be drawn from the evidence of Mr. Summerfield (namely that in August 1984 AMC's name was given as one of the occupants of the offices at North Wacker Drive) was that AMC had their plate up in 1978/9."	"**[Schedule of Appealed Facts 21].** There was no issue upon any of these matters as is apparent from evidence and contentions already set out above." "**[Schedule of Appealed Facts 24].** CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts." (emphasis added) "**[Schedule of Appealed Facts 25].** There is no positive evidence to suggest that AMC was an occupant of the 150 North Wacker Drive offices … The conclusion of Scott J on this point was right. There was no evidence to suggest that AMC was an occupant of AMC's offices at North Wacker Drive in the period 19th April 1978 to 19th November 1979…It is, in our view, improbable, having regard to the purpose of Cape in assisting in the formation of CPC, as found by Scott J and considered above, and having regard to the evidence care taken by the officers of Cape/Capasco in matters of corporate form and function…"	Page 38	"In our judgment, …the revelation of AMC as the creature of Cape does not suffice to enable the plaintiffs to show the presence of Cape/Capasco in the United States of America, since ….AMC was not in reality carrying on any business in the United States of America."	543G
		"An agency agreement dated June 1978 was entered into. The parties were AMC, CPC and Mr Morgan. This is an important agreement...I conclude…that the terms of the agreement are a reliable guide to the nature of the relationship between CPC and AMC and, hence between CPC and Cape." "By [the agency agreement] AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of US, Canada and Mexico for the period of 10 years form 1st February 1978 to 31st January 1988…It was expressly provided that nothing in the agreement should be construed so as to give CPC any authority to accept any orders, to make any sales, or to conclude any contracts on behalf of	Ex. B-1, at 479H-481A. *See also* Primary Facts ¶ 28	"**[Schedule of Appealed Facts] 24.** The US customers sent their payments to CPC for the account of AMC and those sums were paid into AMC's account at the New York Branch of the Chase Manhattan Bank and transferred to AMC's account at the London Branch of the Bank."	"**[Schedule of Appealed Facts 24].** CPC had no authority to make contracts so as to bind AMC or any other member of the Cape Group and did not in fact make any such contracts." (emphasis added)	Page 39	"The interposition of AMC in the new arrangements made in 1978 cannot one way or the other affect the question whether Cape/Capasco were present in the United States of America thereafter. For all relevant purposes, as we have already indicated, we are prepared to treat Cape and AMC as one. The functions performed by CPC and its relationship with Cape through AMC are the relevant considerations or present purposes. Since Mr Morgan held all the shares in CPC beneficially, Cape had no control as a shareholder over the activities of CPC similar to the control which it had exercised over NAAC. Mr Morison did not dispute the judge's finding that the terms of the agency agreement of 5 June 1978 were a reliable guide to the nature of the relationship between CPC and AMC and hence between CPC and Cape.	548E-G

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

		AMC. CPC was left free to sell material and products other than asbestos fibre and to involve itself in other commercial activities."					Under the terms of this agreement, CPC 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 NAAC 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."	
		"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."	Primary Facts ¶ 12				*See* above	
(3) Hiding behind byzantine company structures.								
"… they hid behind (or within) byzantine collectives of limited liability and other holding companies and other holding companies…"	TPC "Introductory Statement" (p.10) *See also* TPC ¶ 140.b. & c.	"The arrangements for the dissolution of NAAC and the formation of AMC and CPC…over the period November 1977 to February 1978 were part of the 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 of Cape or its subsidiaries.".	Primary Facts ¶ 24	*See* above in relation to liquidation of NAAC and formation of AMC.			The Court of Appeal held that the corporate structure should be respected "in the ordinary way".	543G-544C
"...a select few entities and individuals dominating the management of Cape…"	TPC ¶ 43	*See* above					Inconsistent with the findings of Scott J and the Court of Appeal as to the management of NAAC, CPC and AMC.	See above.
"Creating and operating a byzantine web of entities with the deliberated purpose of avoiding public scrutiny and escaping the liabilities…"	TPC ¶ 43	*See* above					*See* above	
(4) Avoiding Responsibility while reaping profits								
"…avoiding responsibility while continuing to reap the profits from the sales of asbestos and asbestos-containing products…"	TPC "Introductory Statement" (p.10)	*See* above in relation to the alleged avoidance of liability		*See* above in relation to the alleged avoidance of liability.			"Mr Morrison 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…Cape was in law entitled to organise the group's	544F-G

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 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., et al., Third-Party Defendants.	C/A No. 2023-CP-40-01759 In Re: Asbestos Personal Injury Litigation Coordinated Docket

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

NEW DECISION ENJOINING THE RECEIVER FROM ACTION 1

I. PRELIMINARY STATEMENT 4

II. LEGAL STANDARD 7

III. ARGUMENT 8

A. The Receiver's Evidence by Itself Demonstrates Issues of Fact That Preclude Summary Judgment. 8

1. The Receiver's evidence does not support the assertions in the Motion. 9

2. Press would not be qualified to even offer expert testimony at trial. 17

B. It Has Already Been Decided That Cape Is Not The Alter Ego Of NAAC—Another Finding Sufficient By Itself To Defeat The Motion. 19

1. Background on *Adams* decision 19

2. *Adams* is dispositive of the entirety of the Receiver's claims. 21

3. *Adams* is binding or otherwise should be recognized and enforced. 25

C. The Receiver's Argument That Charter Is The Alter Ego Of Cape Has Been Refuted And Previously Decided By Numerous Courts Across The United States. 28

D. There Are Genuine Issues Of Material Fact As To Whether Charter Is The Alter Ego Of Cape Or Whether The Corporate Veil Can Be Pierced. 32

1. The Receiver fails to address, much less establish, the required showing for alter ego liability with admissible evidence 33

2. There are genuine issues of material fact regarding piercing the corporate veil. 40

a. Cape was adequately capitalized. 41

b. All corporate formalities were observed. 43

c. Cape paid dividends to Charter 44

d. Cape was not insolvent. 44

e. Charter did not siphon funds from Cape..... 45

f. Cape had independent officers and directors that controlled the operations of the company. 46

g. Absence of corporate records. 49

h. Cape was not a façade for Charter's operations and both had independent business operations..... 50

i. There are material questions of fact with respect to the "fundamental unfairness" prong of the Sturkie test. 51

E. The Motion Must Further Be Denied Because There Are Genuine Issues of Material Fact Related to ESAB's Liability. 54

1. Genuine issues of material fact preclude granting summary judgment as the Receiver has obfuscated and misinterpreted the evidence relied upon against ESAB. 55

2. ESAB is not the successor-in-interest to Charter's liabilities..... 56

a. There is no agreement for ESAB to assume Charter's debts..... 57

b. ESAB's spinoff did not amount to a consolidation or merger of ESAB and Charter..... 59

c. ESAB is not a "mere continuation" of Charter..... 59

d. ESAB's spinoff was not entered into for the purpose of wrongfully defeating Charter's creditors' claims. 60

3. The Receiver has failed to demonstrate sufficient domination of ESAB over Charter to pierce the corporate veil or to find ESAB as the alter ego of Charter. 61

F. The Motion is Procedurally Improper and Premature. 66

IV. CONCLUSION..... 72

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975) 70

Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924) 57

Campbell v. Campbell, 367 S.C. 209, 625 S.E.2d 233 (Ct. App. 2006) 70

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Richland Cty. Sch. Dist. 2 v. Lucas, 434 S.C. 299, 862 S.E.2d 920 (2021)..... 70

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ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Rule 702, SCRE 17

S.C. Code Ann. § 14-1-50 25

S.C.R. Evid. 106 9

S.C.R. Evid. 401 69

S.C.R. Evid. 403 69

S.C.R. Evid. 801 69

S.C.R. Evid. 901 69

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Third-Party Defendants Charter Consolidated Ltd. ("Charter") and ESAB Corporation ("ESAB" and, together with Charter, the "Charter Third-Party Defendants"), by and through their undersigned counsel, submit this Memorandum in Opposition to the Motion for Summary Judgment Against the Charter and Altrad Third-Party Defendants (the "Motion") by the purported receiver ("Receiver") for Cape plc[1] ("Cape").[2]

NEW DECISION ENJOINING THE RECEIVER FROM ACTION

Earlier today, the High Court of Justice in the Business and Property Courts of England and Wales ("UK Court") issued an Order and Judgment ("UK Order and Judgment") finding the

[1] The Receiver was appointed over an entity named Cape plc. Although an active Jersey entity exists with that name, the Receiver has since indicated that the Cape entity intended to be placed into receivership was a United Kingdom entity named Cape Intermediate Holdings Ltd. ("CIHL"). At the Receiver's request, the Court agreed to extend the "Cape plc" receivership to include CIHL. While the Charter Third-Party Defendants believe the receivership and subsequent modification thereto are improper and have challenged them on appeal, for purposes of this Opposition and without waiver of any defenses, the Charter Third-Party Defendants' references to "Cape" herein are intended to encompass CIHL as well as Cape plc except where otherwise specified.

[2] The Charter Third-Party Defendants incorporate by reference and adopt the arguments advanced by any other party, as applicable to them, in opposition to the Receiver's Motion.

Further, by filing this Opposition, the Charter Third-Party Defendants do not waive, but instead specifically preserve, their objections to personal jurisdiction in South Carolina, for the reasons explained in the Motions to Dismiss for Lack of Personal Jurisdiction filed on September 1, 2023 and Memorandums in Support filed on October 23, 2023, as well as the Responses and Objections to Third-Party Plaintiff's Proposed Order Denying Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction filed on December 4, 2023. The Charter Third-Party Defendants maintain their objections to personal jurisdiction in South Carolina, notwithstanding the Court's denial of their Motion to Dismiss on December 6, 2023. Moreover, the Charter Third-Party Defendants do not waive, but instead specifically preserve, all other objections previously made regarding these proceedings through their written motions, oral arguments, and in responsive pleadings, including that the Court lacks subject matter jurisdiction, that the purported Receiver was unlawfully appointed, that the purported Receiver lacks standing, and that all third-party claims against the Charter Third-Party Defendants should be dismissed for failure to state a claim.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Receiver has no authority to act on behalf of Cape anywhere in the world, depriving him of the ability to bring third-party claims against the Charter Third-Party Defendants or pursue the Motion.

The UK Order and Judgment, which was issued after a three-day trial in an action brought by Cape challenging the Receiver's appointment and seeking to enjoin him from acting on its behalf, provides as follows:

> 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 [Cape] ("**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 [Cape] in England and Wales or worldwide and has no power to or authority in respect of [Cape] 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 [Cape] remain unaffected by the appointment of Mr Protopapas as receiver of [Cape] pursuant to the Receivership Order.
>
> 4. Mr Protopapas has and had no power or authority on behalf of [Cape] to act for or to bind [Cape] 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 [Cape] 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 [Cape] 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 [Cape] in the South Carolina Court or worldwide.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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 [Cape] 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 [Cape].
>
> 8. Mr Protopapas be restrained from acting or purporting to act on behalf of [Cape] 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 [Cape] 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 [Cape] in the South Carolina Court or worldwide.[3]

In reaching this decision, the UK Court considered: (1) witness statements from [Cape] 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 judgment, appeal, appendix, and other related materials in *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA); (5) and other related documents, including filings and correspondences from the *Park* matter, subpoenas to expert witnesses, threatening correspondences to the Winston & Strawn law firm in connection with its representation of Cape, filings related to Locke Lord, LLP, removal

[3] *See* Notice of Judgment and Order, dated November 22, 2024, attached hereto as Exhibit A, at pp. 5-6.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

filings, and other material relevant to the Receiver's conduct as relates to Cape.[4] The Receiver elected not to participate in the proceedings before the UK Court.[5]

By virtue of the UK Order and Judgment, the Receiver is now enjoined and restrained from: (1) on a worldwide basis, acting in any way related to Cape; (2) on a worldwide basis, in any way interfering with or usurping the rights of Cape; (3) acting in relation to *Tibbs* and *Park*; (4) prosecuting the Third-Party Complaint (and, thereby, this Motion); and (5) acting on behalf of Cape in Civil Action No. 2024-CP-40-06639 or any other legal proceedings. 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 Cape, that Cape is unaffected by the purported appointment, and that the Receiver has no authority in *Park*, *Tibbs*, or otherwise relative to any of the named parties, including to accept service or otherwise act. Accordingly, the immediate effect of the UK Order and Judgment is that the entire Third-Party Complaint must be dismissed. For this reason, in addition to the legal impediments, issues of fact, and procedural defects described herein, the Motion should be denied.

I. PRELIMINARY STATEMENT

The Motion speaks in hyperbolic absolutes, weaving together snippets of exhibits to spin a sordid tale of corporate shell games and subterfuge that the Receiver argues precludes any finding but that the Charter Third-Party Defendants are Cape's alter ego and must answer for decades of Cape's alleged misdeeds pursuant to principles of veil-piercing. But when examined, the very "evidence" upon which the Motion relies reveals a drastically different story. While the Motion's

[4] *See id.,* generally.

[5] *See id.* at p. 7.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

characterizations of the exhibits appear at first glance to support allegations of Charter's control and domination of Cape (which the Receiver alleges should be imputed to ESAB), the documents themselves actually demonstrate that Charter and Cape maintained appropriate corporate separations and formalities – and in some instances, the documents even explicitly contradict the propositions for which they are cited. These striking discrepancies between the Motion's arguments and its proffered evidence create significant issues of material fact within the Receiver's own submissions that prevent entry of summary judgment.

In addition, decades-old case law directly addressing the same Cape-related alter ego allegations that are now before the Court precludes the Motion. Although the Receiver, purporting to speak for Cape, now argues that there can be no dispute that Cape is the alter ego of NAAC (which he must prove in order to establish liability against the Charter Third-Party Defendants), Cape itself has previously disputed that it is the alter ego of NAAC – and won on this issue in *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA), an action in the United Kingdom, after a 34-day trial and a 17-day appeal. Cape's prior litigation position that it is *not* the alter ego of NAAC and the 140-page *Adams* decision conclusively agreeing with Cape on this point should by themselves be sufficient to defeat the Motion, and at a minimum create issues of material fact precluding summary judgment on whether Cape is the alter ego of NAAC, and therefore whether the Charter Third-Party Defendants are the alter ego of Cape.

Numerous decisions from United States courts also prevent summary judgment holding that the Charter Third-Party Defendants are Cape's alter ego. While the Motion represents that "several courts have found that Charter 'controlled' Cape," *see* Motion, pp. 17-18, the decision cited for this proposition by the Receiver, *Craig v. Johns Manville*, No. 82-0321, 1987 WL 10191 (E.D. Pa. Apr. 23, 1987), was reversed by the Third Circuit Court of Appeals. Significantly, the

Receiver never discloses this critical, dispositive subsequent history to the Court. Indeed, as discussed more fully herein, after reviewing the *Craig* record from a two-day trial on the very issue of whether Charter was the alter ego of Cape, the Third Circuit found as a matter of law that Charter did not exercise a great enough degree of domination over Cape to hold Charter responsible for Cape's asbestos liability. *Craig* was not the only Court to decide this very issue in Charter's favor; courts in a wide range of jurisdictions that include Alaska, Mississippi, Pennsylvania, Illinois, and New Jersey have reached the same conclusion. Again, the Receiver fails to make this Court aware of these decisions on his Motion, ignoring a collection of binding judicial precedent, all standing for the proposition that Charter is not the alter ego of Cape—the issue that is at the very heart of the Motion. This too creates issues of fact that preclude summary judgment.

The Motion is further defective in that it fails to establish the elements of alter ego liability under South Carolina law. Even setting aside the issues of fact arising out of the Receiver's own evidence and the abundance of case law contradicting the Motion's assertions (any of which are already sufficient to defeat the motion), the Receiver has not adduced evidence demonstrating that Charter had total domination and control over Cape. At best, the Motion's exhibits show that, notwithstanding the Motion's characterizations otherwise, Charter was an indirect parent of Cape. The Motion does not provide the veil piercing analysis necessary for each entity in the chain of ownership in order to get from Cape to Charter, nor does it establish the requisite connections and control as between Charter, ESAB, and NAAC.

Finally, the Motion is procedurally improper and premature, as it in effect seeks sanctions against the Charter Third-Party Defendants equivalent to striking the pleadings and entering default judgment in the Receiver's favor while multiple appeals are pending, the Receiver has moved to amend the Third-Party Complaint, the close of discovery is still several months away,

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

and the Court has not yet heard evidentiary challenges to the Receiver's proffered evidence and expert.

In short, there are numerous legal impediments and questions of material fact warranting a denial of the Motion. Equally fatal to the Motion is the Receiver's failure to provide evidence establishing the elements of the Receiver's alter ego and veil piercing claims against the Charter Third-Party Defendants. As a result, and for the reasons set forth herein, the Motion should be denied.

II. LEGAL STANDARD

Summary judgment should only be granted when the evidence indicates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party.[7] When evidence is susceptible to more than one reasonable inference, the issue cannot be resolved at the summary judgment stage.[8]

Because it is a drastic remedy, summary judgment should be cautiously invoked so no persons would be improperly deprived of a trial of the disputed factual issues.[9] Indeed, "[s]ummary

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[6] Rule 56(c), SCRCP.

[7] *See Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

[8] *See Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) (reversing an award of summary judgment and stating "the evidence is susceptible to more than one reasonable inference, and therefore should be submitted to the jury").

[9] *See Murphy v. Tyndall*, 384 S.C. 50, 681 S.E.2d 28 (2009 Ct. App.).

judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."[10]

Importantly, Rule 56 does not mandate that a court grant a plaintiff's summary judgment motion if it agrees with the plaintiff that there is evidence to support the plaintiff's position. Instead, the standard of review under Rule 56, as set forth above, is quite different and requires a Court to determine whether or not the moving party has satisfied its burden to demonstrate that there are no genuine issues of fact. If a genuine issue of material fact exists, then the court *must* deny the summary judgment motion even if there is factual support for the plaintiff's position.

III. ARGUMENT

The Motion should be denied because the Receiver has failed to carry his summary judgment burden, as the party with the burden of proof on piercing the corporate veil and alter ego, to adduce the requisite admissible evidence that would entitle the Receiver to judgment.

A. The Receiver's Evidence by Itself Demonstrates Issues of Fact That Preclude Summary Judgment.

The Motion should be denied because it relies on evidence that by itself demonstrates the myriad issues of material fact that preclude summary judgment. By cherry-picking language from only portions of the evidence, the Motion presents a one-sided, supposedly ironclad record that claims to be free from dispute. But that could not be further from the truth. Indeed, the "evidence" cited by the Receiver highlights the many factual issues in dispute with respect to issues central to the Receiver's claim.

[10] *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

1. The Receiver's evidence does not support the assertions in the Motion.

The Receiver baldly asserts that "Cape had no true control over its own operations" when, in fact, the evidence demonstrates just the opposite.[11] At their cores, Charter and Cape "were very different" businesses which at times "did not blend well together" and led to them being "managed quite independently."[12] As a result, Cape never became the "main channel for the expansion of Charter's industrial activities."[13] In an attempt to get around this, the Receiver cites evidence that typically does not support his positions and often entirely contradicts those positions. For example, the Receiver suggests repeatedly that Charter's presence on the Cape board allowed it to control Cape, even going so far as to include a "table of interconnected board memberships across NAAC, Cape, and Charter."[14] The table, however, does not support, and actually contradicts his position, as it shows, consistent with the other evidence in the record, merely that the Cape board had at

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[11] Certain documents excerpted by the Motion are attached hereto in their entirety pursuant to the Rule of Completeness. *See* S.C.R. Evid. 106 ("When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."); *Dukes v. Smoak*, 181 S.C. 182, 186 S.E. 780 (1936) (in South Carolina, when a part of a document or writing is introduced into evidence, the remainder may be introduced by the other party).

[12] Trial Testimony of Anthony Evelyn Hepper, dated Oct. 6, 1986 ("Hepper Trial Tr. I"), attached hereto as Exhibit B, at Cape_Receiver_00095537-38.

[13] Deposition of Ronald Henry Dent, dated Apr. 7–10, 1981 ("Dent Dep."), attached hereto as Exhibit C, at Cape_Receiver_00098828; *see also* Trial Testimony of Geoffrey A. Higham, dated Jan. 14, 1987 ("Higham Trial Tr."), attached hereto as Exhibit D, at Cape_Receiver_00003572 ("Q. . . . could you please tell us whether Charter's purpose was ever achieved, that is, the use of the wide experience of Cape's management, so that Cape can become the main channel for the expansions of Charter's industrial activities? Was that purpose ever achieved? A. No."); *Craig*, 843 F.2d at 152.

[14] Motion, at p. 12.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

most three Charter representatives at any one time.[15] And despite the Receiver's suggestions to the contrary, those representatives acted "in a conventional way;" "[t]here was nothing special about them, nor were they treated any differently from anybody else."[16] This minority, passive representation on the Cape board comported with Charter's practice of monitoring its investments by seeking the appointment of Charter employees as non-executive, *i.e.*, non-managerial or outside, directors on the boards of those companies.[17]

At a more granular level, the evidence the Receiver cites fails to show control and in fact suggests the opposite. Take, for instance, the Receiver's claim that Charter controlled Cape's decision-making concerning its dividends and the evidence cited in support, including Mr. Howard's testimony that "[t]he directors of Cape, who were in the employment of Charter, would discuss with its executive committee that recommendation. There was no involvement of Cape personnel."[18] While this quote on its face reads as if Charter controlled Cape's dividends without

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[15] Motion, at p. 12; *see also* Deposition of Geoffrey A. Higham, dated Oct. 17, 1986 ("Higham Dep."), attached hereto as Exhibit E, at Cape_Receiver_00096872 ("Q. How has the Cape board been composed as between inside and outside directors? A. . . . [A]round twelve directors . . . Of whom six or so would be executive and the others non-executive. Of the non-executives, two . . . were . . . Charter. . . . [W]hen Cape became a subsidiary of Charter, they had I think three most of the time.").

[16] Ex. E (Higham Dep.), at Cape_Receiver_00096874.

[17] *See* Trial Testimony of Lionel Geoffrey Stopford-Sackville, dated Jan. 13, 1987 ("Stopford-Sackville Trial Tr."), attached hereto as Exhibit I, at Cape_Receiver_00003551 ("Charter's view of running companies was what we call in England hands off at that particular stage of our development"); Ex. E (Higham Dep.), at Cape_Receiver_00096872 (explaining that makeup of the Cape board included non-executive Charter nominees).

[18] Motion, at p. 15 (citing Ex. 10, Deposition of Francis John Adrian Howard, Nov. 13, 1980 at Cape_Receiver_00100270). *But see* Deposition of Francis John Adrian Howard, dated Jan. 13, 1987 ("Howard Dep. I"), attached hereto as Exhibit G, at Cape_Receiver_00002838-2839 ("Q. And who recommended the dividends declared by Cape? A. The management. Q. Did you ever disagree with the dividend recommended by Cape's management? A. Not that I can recollect, no. . . . Q. Did you ever hear somebody express a Charter view about the dividend at Cape? A. No,

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

any involvement by Cape, Mr. Howard's testimony makes clear that, whatever Charter's thoughts or opinions on the Cape dividend, the ultimate decision rested entirely with the Cape board:

> Q. And after you were all done with your discussion on the board of Cape Asbestos, you agreed to do what Charter told you to do about a dividend, didn't you?
>
> A. No.
>
> . . . .
>
> Q. So that it was agreed that Cape personnel should report dividend recommendations to Charter before those recommendations were made to the board of Cape?
>
> A. No, not at all.
>
> . . .
>
> A. The directors of Cape, who were in the employment of Charter, would discuss with its executive committee that recommendation. There was no involvement of Cape personnel.[19]

The same is true with respect to the Receiver's selective citations to Richard Dent's testimony: "that Charter discussed and decided the Cape dividend before the issue was discussed

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certainly not. Q. Did anyone at Charter instruct you to oppose a dividend recommendation? A. No. Q. That's of Cape. A. No.").

[19] Deposition of Francis John Adrian Howard, dated Nov. 13, 1980 ("Howard Dep. II"), attached hereto as Exhibit H, at Cape_Receiver_00100270. The Receiver also misleadingly quotes from Mr. Howard's testimony regarding certain minutes from a Charter executive committee meeting that stated, "It was agreed that in the future Cape dividend recommendations would be discussed with Charter before being presented to the board." *See* Motion, at p. 15. Yet, the Receiver fails to inform the Court that no such discussions actually occurred. *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003522-3523 ("A. . . .This is an extract from the Charter executive committee meeting on the 28th of October 1969. . . . the last paragraph states that it was agreed that the Cape dividend should be discussed with Charter before being presented to the board. . . . Q. Did that ever occur, any such discussions? A. No, sir, never.").

at Cape board meetings."[20] However, portions of Mr. Dent's testimony that the Receiver omits make clear that, while he was the Chairman and Managing Director of Cape, he had "no doubt that the initial suggestion [for the dividend] would have come from [him] personally."[21] He further testified that "the operative decision" over its dividend was made "at an open meeting of the [C]ape board with all directors present."[22] Mr. Hepper offered nearly identical testimony at his deposition—another exhibit the Receiver offers to support his claim.[23] Similarly, Mr. Stopford-Sackville also testified that Cape's management (not Charter) proposed the amount of the dividend and that the Charter nominees in Cape's board never disagreed with Cape's management's dividend recommendation.[24] This is consistent with the documentary evidence. Contrary to the Receiver's argument that "Charter's financial department was responsible for" recommending

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[20] Motion, at p. 16 (citing Motion, Ex. 11 (Dent Dep.), at Cape_Receiver_00098922).

[21] Ex. C (Dent Dep.), at Cape_Receiver_00098953 ("Q. . . .whether the initial [dividend] recommendation to the board members would come from management as opposed to the outside directors, even at the informal meetings, just giving a range of what management might wish to consider? A. During the time I was Chairman and Managing Director I have no doubt that the initial suggestion would have come from me personally.").

[22] Ex. C (Dent. Dep.), at Cape_Receiver_00098922; *see also id.*, at Cape_Receiver_00098921-22 (explaining that the decision on the Cape dividend was discussed "individually or jointly amongst [members of the Cape board] ourselves, including Charter, before the [pertinent] board meeting").

[23] Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095529-30 (explaining that the "[d]ividend was proposed by the Cape management" and "the Charter nominees" on the Cape board never "opposed management's proposed dividends").

[24] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003502-3503 ("Q. And who recommended the amount of the dividend? A. The management of Cape recommended the dividend. Q. And to your knowledge did you or other members of Charter nominees ever disagree with the dividend recommendation of Cape, Cape's management? A. No, not at all.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape's dividend, the evidence demonstrates just the opposite.[25] Indeed, the memorandum to which the Receiver cites shows only that Charter had a minority representation on the Cape board, suggesting that much of any decision would come from its non-Charter members.[26]

The setting of dividends, however, is just one of the many examples in which the Receiver relies on exhibits that contradict a claim. For example, the Receiver purports to rely on the testimony of Geoffrey A. Higham to demonstrate that Charter participated in "Cape's decisions related to [NAAC's] continued sale of asbestos" after the "Tyler, Texas litigation against Cape[.]"[27] At most, however, Mr. Higham's testimony suggested a general knowledge by Charter of Cape's decisions related to the continued sale of asbestos.[28] And general knowledge is not control.

These examples are illustrative of the countless others in the exhibits cited by the Receiver illustrating Charter's lack of control over Cape and, in turn, Cape's independence from Charter, including with respect to decisions concerning "the prospecting, the mining development or [the]

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[25] Motion, at p. 16 (quoting Ex. 12, Memorandum, "The Cape Asbestos Company Limited," Oct. 25, 1971, at Cape_Receiver_00002569-70).

[26] *See* Motion, Ex. 12, Memorandum, "The Cape Asbestos Company Limited," Oct. 25, 1971, at Cape_Receiver_00002569-70.

[27] Motion, at p. 37 (citing Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096935).

[28] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096935 (Q . . . "Were you aware . . . that during the fall, 1977, that at the same time NAAC was being liquidated, that your management was engaged in discussions . . . to eliminate or reduce as much as possible the exposure of cape in the United States?" A. Well, not of the detail, but I mean clearly I would have known generally that it was being done and it was clearly necessary that it should be done."); *see also* Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095535-36 (explaining that neither Charter nor its nominees to the Cape board had "anything to do with the winding up of NAAC").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

technical advice regarding asbestos;"[29] decisions concerning "capital expenditure;"[30] decisions concerning "the budget of Cape or its subsidiaries;"[31] and decisions concerning "the pricing of asbestos."[32] Ultimately, and despite the Receiver's suggestion to the contrary, this independence extended to even Cape's most significant decisions, including its decision to sell its mining subsidiaries.[33]

The report authored by the Receiver's supposed "expert," Dr. Steven Press ("Press"), is yet another example of incompetent evidence.[34] Indeed, Press devotes much of his report to establishing that the Third-Party Defendants—including Charter and Anglo American Corporation

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[29] Ex. C (Dent Dep.), at Cape_Receiver_00098955.

[30] Ex. C (Dent Dep.), at Cape_Receiver_00098958; *see also* Ex. C (Dent Dep.), at Cape_Receiver_00098956 (explaining that Charter never assisted Cape in obtaining loans); Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095531 (explaining Charter never loaned money to Cape and never guaranteed a loan to Cape).

[31] Ex. C (Dent Dep.), at Cape_Receiver_00098957; *see also* Ex. C (Dent. Dep), at Cape_Receiver_00098956 (explaining Charter had no control outside the boardroom over the organization of Cape or its subsidiaries).

[32] Ex. C (Dent Dep.), at Cape_Receiver_00098959; *see also* Ex. E (Higham Dep.), at Cape_Receiver_00096877 (explaining that "subsidiary company managements," not Cape or Charter, made decisions concerning marketing and distribution of products).

[33] Ex. C (Dent Dep.), at Cape_Receiver_00098857 (explaining that the "directors [on the Cape board] from Charter" took "a detached position, detached from Charter" concerning the sale of Cape's mining subsidiaries); *see also* Ex. E (Higham Dep.), at Cape_Receiver_00096895-96 (explaining that none of the "Charter nominees on the Cape board suggest, recommend, or have anything to do with the dissolution of NAAC"); Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095535-36 (explaining that none of the Charter nominees on the Cape board had anything to do with the winding up of NAAC).

[34] *See* Motion, Ex. 8, Expert Report of Dr. Steven Press, dated Nov. 8, 2024 (the "Press Rep."). The Charter Third-Party Defendants object to this report for many reasons: 1) the report is unsworn hearsay and, therefore, does not constitute admissible evidence; and 2) the 300+ referenced exhibits are not attached and thus it is impossible to determine reliability, authenticity, or admissibility.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

of South Africa—were affiliated entities in what Press refers to as a "group system."[35] That Cape, Charter, and Anglo were affiliated, however, is undisputed. And it in no way helps the Receiver establish his claim, much less suggests the absence of issues of material fact. The "group system" is commonplace in today's economy.[36] And courts have consistently recognized that the companies which comprise a group system are legally distinct entities such that the mere existence of the system does not justify piercing the corporate veil.[37] Indeed, courts have reached this conclusion with respect to Charter and Cape—the exact companies which comprise the very group system in dispute here.[38] Despite its extraordinary length, Press's report fails to even mention these conclusions.[39] Instead, Press's account of the group system involving Cape, Charter, and Anglo demonstrates the absence of the control that is so crucial to the Receiver's claims. He states, for example, that "[t]he [Anglo America] executive committee effectively managed the Oppenheimer interests, wielding control over all companies in the Anglo American/De Beers Group **despite not**

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[35] *See id.* at ¶¶ 39-46.

[36] *See* Blumberg on Corp. Grps., §§ 1.01, 1-3 (2d ed., 2018-1 Supp.).

[37] *See id.* at § 10.01, 10-4.

[38] *Craig*, 843 F.2d 145 (finding that "there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to-day. Moreover, and significantly, the district court found that '[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.'"); *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987) ("Manville Plantworker Cases Only"), attached as Exhibit J; *Barber v. Pittsburgh Corning Corp.*, No. GD79-21544 (Pa. C.P. Allegh. Co. Oct. 11, 1984) (granting Charter summary judgment as there was insufficient evidence to establish alter ego or veil-piercing liability with respect to Cape); *Culbreth v. Amosa (PTY) Ltd.*, 898 F.2d 13 (3rd Cir. 1990) (affirming summary judgment in Charter's favor as there was insufficient evidence to establish alter ego or veil-piercing liability with respect to asbestos marketed by NAAC).

[39] *See generally* Motion, Ex. 8 (Press Rep.).

running them day-to-day."[40] This quote standing alone demonstrates lack of total control and does not support veil piercing.

As to any alleged control by Charter over Cape and Cape over NAAC, Press does not cite any evidence that even begins to approach the level of control required for veil piercing as a matter of law. Apart from conclusory allegations[41] concerning an "amalgamated" relationship between the entities in the group system, Press does not assert a level of day-to-day control between Charter and Cape sufficient to pierce the corporate veil. Likewise, Press's assertion that the group system at issue was "highly secretive"[42] is belied by the public record. For example, a cursory review of Charter's annual reports from the relevant period confirms that it disclosed the relationships among companies with the group – a far cry from being "highly secretive."[43] Finally, Press incorrectly suggests that Charter's ability to limit or avoid liability for torts committed by Cape and its subsidiaries favors veil piercing. Liability avoidance is simply not a sufficient basis to pierce the corporate veil; the law endorses corporate organizations designed to do exactly that.[44]

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[40] *Id*. at ¶ 42 (emphasis added).

[41] *See id*. at ¶ 51 ("Rand Mines/Central Mining were the same thing, despite formally being two companies. They were amalgamated.").

[42] *Id.* at ¶¶ 24, 38.

[43] Annual Report of Charter Consolidated PLC, dated 1982, attached hereto as Exhibit K, Cape_Receiver_00076050 (disclosing that "the outcome of all the [asbestos-related] actions against Cape and Charter and the obligations retained by Cape are unlikely to have any material effect on Charter's financial position").

[44] *See Pertuis v. Front Roe Restaurants, Inc.*, 817 S.E.2d 273, 280-81 (S.C. 2018) ("[C]orporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

At bottom, like the rest of the Receiver's "evidence," Press fails to support the Motion's argument that there is no question of material fact over Charter's alleged control over Cape—a key element of the Receiver's claim—which is either unsupported by the very evidence upon which the Motion relies or outright contradicted by it. At a minimum, this demonstrates the numerous issues of material act that exist precluding summary judgment.

2. Press would not be qualified to even offer expert testimony at trial.

Press would not be able to offer expert testimony at trial because he will not be testifying on subject matter beyond the ordinary knowledge of a factfinder and his testimony is unreliable. Under South Carolina law, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[45] Expert testimony is inadmissible unless the proponent establishes that "the subject matter is beyond the ordinary knowledge of the" factfinder, that the expert has the "requisite knowledge and skill to qualify as an expert," and that the testimony "is reliable."[46]

Press's supposed opinions satisfy none of these requirements and are plainly inadmissible. First, Press does not discuss "subject matter [that] is beyond the ordinary knowledge" of the factfinder.[47] Indeed, it is difficult to ascertain what his "opinions" are at all; his report instead appears to serve as a repository, consisting largely of publicly available documents, of "evidence"

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[45] Rule 702, SCRE.

[46] *Watson v. Ford Motor Co.*, 389 S.C. 434, 448, 699 S.E.2d 169, 176 (2010) (finding witness who lacked knowledge, skill, experience, training, or education related to cruise control systems, concept central to product liability dispute, unqualified as expert).

[47] *Id.*

the Receiver may use as support any otherwise-unsupported allegations. That is hardly the role of an expert under South Carolina law.

Second, Press himself either offers nothing to support his statements, offers statements contrary to well-established law, or offers statements based on a strained interpretation of the record. As an initial matter, his statements drawing upon the "significant body shop scholarship" developed by others are based on inadmissible hearsay.[48] Finally, on the substance, Press devotes a large portion of his "report" to establishing that Charter, Cape, and Anglo were affiliated entities but cites nothing to support any suggestion that such affiliation somehow justifies piercing the corporate veil. Indeed, it does not—something both the law and modern-day business reality recognize.[49] And his own statements within his report directly refute any suggestion of control exercised by Charter over Cape or Cape over NAAC.[50] At bottom, Press's opinions would be inadmissible if offered at trial and thus his conclusions should be disregarded in connection with the Motion.

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[48] Motion, Ex. 8 (Press Rep.) at ¶ 8. Although an "expert may testify to evidence even though it is inadmissible under the hearsay rule, . . . allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception." *Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (holding that injured individual's statement that doctors failed to treat her timely despite her requests, though relied upon by expert, was not admissible for its truth as to doctors' knowledge of injury)

[49] *See Craig*, 843 F.2d 145 (finding that "there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to-day. Moreover, and significantly, the district court found that '[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.'"); *see also* Ex. J (*In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987)); *Barber v. Pittsburgh Corning Corp.*, No. GD79-21544 (Pa. C.P. Allegh. Co. Oct. 11, 1984); *Culbreth*, 898 F.2d 13.

[50] *See* Motion, Ex. 8 (Press Rep.) at ¶ 42 (stating that the Anglo executive committee managed the Oppenheimer interests "despite not running them day-to-day").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

B. It Has Already Been Decided That Cape Is Not The Alter Ego Of NAAC—Another Finding Sufficient By Itself To Defeat The Motion.

Every claim brought by the Receiver requires the Court to either pierce the corporate veil between Cape and NAAC or find that Cape is the alter ego of NAAC, prior to determining whether the veil can be pierced farther up the line to reach other entities such as the Charter Third-Party Defendants. This issue, however, has been previously decided after an extensive 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) ("*Adams*"). The Court should therefore deny the Motion because (a) *Adams* is dispositive of the entirety of the Receiver's claims; (b) *Adams* is binding precedent or should otherwise be recognized and enforced by this Court; (c) the Receiver is barred or otherwise estopped from pursuing this unlawful and *ultra vires* campaign to negate *Adams*, counter to the best interests of Cape; and (d) at a minimum, the facts relied on by the UK Court create genuine issues of material fact that preclude summary judgment on whether Cape is the alter ego of NAAC.[51]

1. Background on *Adams* decision.

In *Adams*, 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 Cape[52] and related entities based on the actions of and relationship with NAAC.

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[51] *See* Third-Party Defendants Mohed Altrad & Altrad Investment Authority SAS's Legal & Procedural Opposition to the Purported Receiver's Motion for Summary Judgment ("Altrad Opposition"), which the Charter Third-Party Defendants incorporate by reference herein.

[52] The Cape entity at issue was CIHL, which at that point in time, was named Cape Industries plc. They are the same entity, and in the below-defined *Adams* Opinion and accompanying materials, CIHL is often referred to simply as "Cape."

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

The ultimate 140-page *Adams* reported opinion,[53] a copy of which is attached to the Altrad Third-Party Defendants' Opposition as Exhibit B-1 ("Altrad Exhibit B-1") and incorporated herein by reference (the "*Adams* Opinion"), was the product of (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 Cape in all relevant and material respects and dismissing the plaintiffs' appeal.[54]

The *Adams* Opinion and the accompanying, compiled materials (Altrad Exs. B-1 through B-4 to the Altrad Opposition) are of paramount importance and consequence with respect to this case and this Court's purported jurisdiction thereunder; the faulty foundations of the Cape receivership(s) and the Receiver's authority (or lack thereof) thereunder; and the Receiver's Third-Party Complaint and Proposed Amended Third-Party Complaint and the claims asserted therein. As detailed 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 taking action inconsistent with and inapposite to *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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[53] *Adams v. Cape Industries plc* (1990) 1 Ch 433 (CA).

[54] The decision of Justice Scott (Scott J) for the trial court is set forth on pages 441G–502H, while the appellate judgment—issued by Lord Justice Slade (Slade L.J.) on behalf of a panel of three Lord Justices of the Court of Appeal—is set forth on pages 504H–572F. *See* Altrad Ex. B-1 (paragraph references are located in the margins and run alphabetically from A through H).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

2. *Adams* is dispositive of the entirety of the Receiver's claims.

The core issues in *Adams* were: (i) whether Cape was present in the United States (in Illinois), directly or indirectly via NAAC or another such that jurisdiction could be exerted over Cape, and (ii) as extensions thereof, (A) whether NAAC or another was Cape's agent / alter-ego, (B) whether NAAC, Cape, and others were part of a single-business enterprise or amalgamated unit, and (C) whether the corporate structure of Cape should be pierced or otherwise disregarded. Cape 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.

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.[55] As exemplified in the "Schedule of Factual Findings" attached to the Altrad Opposition as Altrad Schedule 1 and incorporated herein by reference,[56] 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

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[55] *See, e.g.*, Altrad Ex. B-2, Statement of Primary Facts (listing 37 primary factual determinations, developed after extensive testimony and evidence, as to the lack of Cape "presence" in the United States (and, specifically, in Illinois where NAAC was incorporated and had its principal place of business); Altrad Ex. B-3, Schedule of Appealed Factual Findings (listing 25 factual findings challenged or otherwise cited as support for the plaintiffs' appeal of the Cape-favored decision); and Altrad Ex. B-4, Appendix (addressing, seriatim, the entirety of the plaintiffs' Schedule of Appealed Factual Findings as part of the appellate court's affirmance of the judgment in favor of Cape).

[56] This Schedule of Factual Findings depicts the complete overlap between the factual allegations of the Receiver's Third-Party Complaint and Proposed Amended Third-Party Complaint and those addressed in the Statement of Primary Facts (trial court, Scott J), the *Adams* plaintiffs' Schedule of Appealed Factual Findings, and the *Adams* Opinion and accompanying Appendix (appellate court, Slade LJ).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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* is wholly dispositive.

As additional highlighting on this point, both the *Adams* court of first instance and the appellate court found that Cape was *not present* within the United States of America directly or indirectly through NAAC under any theory[57] and further found, *inter alia*:

1. NAAC and Cape were separate legal entities.[58]

2. NAAC had no authority to behave or act on behalf of Cape or any of its related entities.[59]

3. NAAC carried on its own business.[60]

4. NAAC was the direct purchaser of asbestos fibers, not from Cape, but instead from Egnep Pty. Ltd ("Egnep") and Cape Asbestos

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[57] *See, e.g.*, Altrad Ex. B-1, *Adams* Opinion, at 547E ("[O]ur conclusion is that [Scott J] was right to hold that the business carried on by [NAAC] was exclusively its own business, not the business of Cape . . . ., and that Cape [was] not present within the United States of American, through [NAAC] at any material time. We see no sufficient grounds for disturbing this finding of fact.").

[58] *See* Altrad Ex. B-1, *Adams* Opinion, at 474G, 477E, 532E, 545A–546C; *see also* Altrad Ex. B-2, Statement of Primary Facts, at p. 20A–21 (affirmed Cape-favorable primary facts #s 20–22); Altrad Ex. B-4, Appendix, at p. 13 ("The picture derived from the evidence relied on . . . is, again, as it seems to us, in accordance with Scott J.'s conclusions as to how the subsidiaries of Cape operated, i.e., with each one carrying out its own function."). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 3–9 (rejected grounds of plaintiffs' appeal #s 6, 7, 7A, 7B; rejected plaintiffs-proffered facts #s 3, 9, 11).

[59] *See* Altrad Ex. B-1, *Adams* Opinion, at 477E–F, 527G; *see also* Altrad Ex. B-2, Statement of Primary Facts, at pp. 15–16, 20A–21 (affirmed Cape-favorable primary facts #s 4, 20–21). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 8–9 (rejected plaintiffs-proffered facts # 9).

[60] *See* Altrad Ex. B-1, *Adams* Opinion, at 477F, 482E, 484A, 545G, 547E; Altrad Ex. B-4, Appendix, at p. 13; *see also* Altrad Ex. B-2, Statement of Primary Facts, at p. 20A–21 (affirmed Cape-favorable primary facts #s 20–23). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 3–6, 7–9 (rejected grounds of plaintiffs' appeal #s 3, 6, 7, 7A, 7B; rejected plaintiffs-proffered facts #s 3, 9, 11).

South Africa (Pty.) Ltd. ("Casap")—entities that were sold to a South African entity, Transvaal Consolidated Exploration Co. Ltd in 1979.[61]

5. All NAAC did was assist in sale of asbestos. That was not enough to find action on behalf of Cape.[62]

6. There was no evidence of any control by Cape over NAAC's commercial activities.[63]

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.[64]

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[61] *See* Altrad Ex. B-1, *Adams* Opinion, at 443D–E, 537F–G; *see also* Altrad Ex. B-2, Statement of Primary Facts, at pp. 19, 25 (affirmed Cape-favorable primary facts #s 14–15, 33); Altrad Ex. B-4, Appendix, at pp. 4, 7, 16 ("The true position appears on the evidence to be that . . . NAAC, so far as concerned its direct purchases and sales of asbestos, bought both from Egnep and Casap. . . . Cape itself . . . did not allocate, market or sell asbestos . . . . NAAC was performing, and holding itself out . . . as performing, the role . . . as intermediary in respect of sales by Egnep to US customers . . . ."). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 7–9 (rejected plaintiffs-proffered facts #s 3, 6, 7, 9).

[62] *See* Altrad Ex. B-1, *Adams* Opinion, at 443F, 472E–473C, 482H, 505H, 545F, 546D–G; Altrad Ex. B-4, Appendix, at p. 13; *see also* Altrad Ex. B-2, Statement of Primary Facts, at pp. 15, 19 (affirmed Cape-favorable primary facts #s 3, 14). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 3–6, 7–9 (rejected grounds of plaintiffs' appeal #s 6, 7, 7A, 7B; rejected plaintiffs-proffered facts #s 3, 9, 11).

[63] *See* Altrad Ex. B-1, *Adams* Opinion, at 473H, 474B; Altrad Ex. B-4, Appendix, at pp. 10, 22; *see also* Altrad Ex. B-2, Statement of Primary Facts, at p. 20, 20A, 25 (affirmed Cape-favorable primary facts #s 19, 20, 36). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at pp. 6, 7–9 (rejected grounds of plaintiffs' appeal # 7B; rejected plaintiffs-proffered facts #s 3, 6, 7, 11–13).

[64] *See* Altrad Ex. B-1, *Adams* Opinion, at 474F–H, 482H–483A, 546C; Altrad Ex. B-4, Appendix, at p. 10; *see also* Altrad Ex. B-2, Statement of Primary Facts, at pp. 20–21, 25 (affirmed Cape-favorable primary facts #s 19–22, 36). *Contra* Altrad Ex. B-3, Schedule of Appealed Factual Findings, at p. 9 (rejected plaintiffs-proffered facts #s 11–13).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

8. Any allegation of impropriety by the plaintiffs that the liquidation of NAAC was intentionally and "rightly abandoned."[65]

The conclusions reached and affirmed in *Adams* are crystal clear as to Cape 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.[66]
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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*."[67]
>
> ***
>
> 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

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[65] Altrad Ex. B-1, *Adams* Opinion, at 541F–H (Slade LJ) (explaining the legitimate purposes behind the liquidation of NAAC); *see also* Altrad Ex. B-4, Appendix (addressing the facts and rationale as to the NAAC liquidation).

[66] *Adams* Opinion, at 474F (Scott J) (emphasis added) (rejecting "alter ego" argument for finding Cape presence in the United States).

[67] *Id.* at 538G–H (Slade LJ) (emphasis added) (quoting *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45, 64 as part of rejection of "single economic unit" argument for finding Cape presence in the United States).

> 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*.[68]
>
> ***
>
> [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.[69]

In sum, these factual findings and conclusions of law in *Adams* are wholly dispositive of the Receiver's claims. Put simply, the Charter Third-Party 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 Cape responsibility in the first place.[70] Not only should the Motion be denied, but this illusory and unlawful case—based on issues that have already been fully litigated and decided—should be dismissed.

3. *Adams* is binding or otherwise should be recognized and enforced.

Statutorily, the *Adams* judgment and the principles of law relied on therein as well as created as a result—a part of the common law of England—are already "in full force and effect" in South Carolina by virtue of the "Reception Statute."[71] Accordingly, the Court should enforce

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[68] *Id.* at 544G–H (Slade LJ) (emphasis added) (rejecting "piercing the corporate veil" argument for finding Cape presence in the United States).

[69] *Id.* at 545G (Slade LJ) (emphasis added) (rejecting "agency argument" for finding Cape presence in the United States).

[70] *See* Motion, at pp. 67–75.

[71] 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.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Adams 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 *Adams* 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.[72] In the seminal *Hilton* case, the United States Supreme Court enunciated the standards to be assessed and applied relative to the recognition and enforcement of 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.[73]

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)

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[72] *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))).

[73] 159 U.S. at 202–03.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> the judgment was not obtained by fraud; and (4) enforcement will not contravene important public policy.[74]

Each of these four factors is clearly satisfied here with respect to *Adams*. *First*, Cape 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 Cape, a defendant) in *Adams* had adequate notice and a full opportunity to be heard,[75] 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 Cape 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 Cape entity over which the Receiver purports to act and the 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

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[74] 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).

[75] The Receiver was likewise provided with notice of the recent UK proceedings brought by CIHL and Cape PLC but chose not to participate in that forum, instead seeking to continue his unauthorized endeavor in this case.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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 a well-established and decades-old English judgment, which was the product of a lengthy trial and a long appeal pursued by United States plaintiffs against Cape concerning the very same facts and circumstances upon which the Receiver (for Cape) now seeks billions-of-dollars as part of a self-proclaimed "reckoning."

C. The Receiver's Argument That Charter Is The Alter Ego Of Cape Has Been Refuted And Previously Decided By Numerous Courts Across The United States.

Since the 1980s, courts across the United States have held that Charter is not the alter ego of Cape and therefore is not responsible for the asbestos liabilities of Cape or its subsidiaries. These decisions bar the relief requested in the Motion and at the very least create an issue of material fact preluding summary judgment here.

For instance, in *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d. Cir. 1988), attached as Exhibit X, the Third Circuit found as a matter of law that Charter did not exercise a great enough degree of domination over Cape to hold Charter responsible for Cape's asbestos liability.[76] In reaching this determination, the Third Circuit relied on the full record from a two-

[76] *Craig*, 843 F.2d at 152.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

day trial on the merits focused on the sole issue of whether Charter was the alter ego of Cape and found the evidence so compelling that it reversed the district court's decision.[77]

Acknowledging the "district court's sensitivity" to the allegations of Cape's evasion of tort liability and the impact of same on asbestos victims, the Third Circuit nevertheless found such concerns insufficient to disregard corporate separateness. Instead, the Third Circuit concluded that Charter's involvement with Cape, including statements of intent to "control" Cape, participation in Cape's financial and management affairs, the presence of three Charter nominees on Cape's board, and Charter's majority ownership of Cape did not "rise to the high standard of domination necessary to pierce the corporate veil," especially given the district court's finding that "[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers." [78] The same types of arguments that the Third Circuit rejected are before this Court now.[79]

Similarly, in *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987), attached as Exhibit J, after a bench trial on the merits as to whether Charter could be held responsible for Cape's acts, Charter was determined not to be the alter ego of Cape. The court recognized that "whether *alter ego* liability will be imposed is 'heavily fact specific'" and explained that in order for Charter to be liable to United States asbestos plaintiffs, the plaintiffs

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[77] *See id*. Significantly, the Receiver misleadingly cites to the lower court's decision to argue that courts have found Charter "controlled" Cape but fails to alert the Court that this exact decision was reversed by the Third Circuit. Motion, at p. 18.

[78] *Craig*, 843 F.2d at 150-152.

[79] *See, e.g.*, Third-Party Compl., at ¶ 55 (purporting to equate majority share ownership with dominance or control); ¶ 59, 66 (arguing that seconding personnel and certain board membership establishes the requisite control).

must "'pierce the corporate veil' twice: first Cape's veil must be pierced to Charter, and second, Cape's former subsidiaries in the asbestos business [i.e., NAAC] 'veils' must be pierced to get to Cape."[80] Analyzing facts such as the number of Charter executives on Cape's board and Charter's majority ownership of Cape at certain times, the court determined that Charter did not exercise the requisite control over Cape to pierce Cape's veil, given that, among other things, (a) "Cape's finances were managed, and operated independently of Charter"; (b) "the companies have never integrated their offices, operations, or businesses"; (c) "Charter's nominees to Cape's Board lacked the expertise to manage Cape"; (d) "the Charter nominees have always been removed from the management structure of Cape because the Cape Board does not participate in the day-to-day business affairs of Cape or of any of Cape's subsidiaries"; (e) "Cape's management historically has been fiercely independent and has deliberately maintained an arm's-length relationship with Charter"; and (f) "Charter and Cape have never had a business relationship, and have never engaged in a joint venture or consolidated any aspect of their respective operations or businesses."[81]

Other courts have granted summary judgment in Charter's favor on alter ego allegations involving Cape. In *In re Charter Defendants*, attached as Exhibit Y, the court granted summary judgment and dismissed with prejudice hundreds of claims asserted against Charter in every asbestos action pending in the Eastern District of Pennsylvania, finding that "there are no genuine issues of material fact as to whether Charter is the *alter ego* of Cape and that the Charter defendants

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[80] *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79, at Cape_Receiver_00002606–2607.

[81] *In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79, at Cape_Receiver_00002629–2638.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

are entitled to judgment as a matter of law" on this point.[82] Looking to *Craig* ("which definitively resolved the *alter ego* issue"), a multitude of other cases finding that Charter was not the alter ego of Cape, and additional evidence adduced by the plaintiffs, the court held that Charter could not be the alter ego of Cape. Multiple other courts across the United States have reached the same conclusion. *See, e.g., Barber v. Pittsburgh Corning Corp.*, No. GD79-21544 (Pa. C.P. Allegh. Co. Oct. 11, 1984) (granting Charter summary judgment as there was insufficient evidence to establish alter ego or veil-piercing liability with respect to Cape); *Culbreth v. Amosa (PTY) Ltd.*, 898 F.2d 13, 15 (3rd Cir. 1990) (affirming summary judgment in Charter's favor as there was insufficient evidence to establish alter ego or veil-piercing liability with respect to asbestos marketed by NAAC). Courts have also declined to hold that Charter was the alter ego of Cape for jurisdictional purposes. *See Dillman v. Celotex*, No. A87-599 Civil (D. Alaska Aug. 22, 1988) (holding that, for personal jurisdiction purposes, the evidence did not establish that Charter was the alter ego of Cape), attached as Exhibit L; *Kessinger v. North American Asbestos Corp.*, No. 87-L-120 (11th Cir. McLean Co., Ill. Dec. 1, 1988) (dismissing complaint against Charter for lack of personal jurisdiction because Charter was not the alter ego of Cape or any of Cape's subsidiaries), attached as Exhibit M; *A.J. Adams, et al v. A. W. Chesterton, et al.*, No. 251-95-905CIV (Cir. Ct. Hinds County, 1st Judicial Dist., July 10, 1995) (dismissing complaint against Charter for lack of personal jurisdiction and rejecting alter ego argument with respect to Cape), attached as Exhibit N; *Simmons v. A C & S, Inc., et al.*, NO. 84-1170 (W.D. Ark. June 4, 1985) (dismissing complaint against Charter for lack of personal jurisdiction as Charter's indirect majority stock interest in Cape is insufficient to subject Charter to in personam jurisdiction); *Denham v. Unarco Industries,*

[82] 1989 U.S. Dist. LEXIS 15591, at *4, *15 (E.D. Pa. May 18, 1989).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Inc., No. 85-L-360 (11th Cir. McLean Co., Ill. Dec. 1, 1988) (dismissing complaint against Charter for lack of personal jurisdiction because Charter was not the alter ego of Cape or any of Cape's subsidiaries), attached as Exhibit O; *Mohn v. Int'l Vermiculite Co.*, 147 Ill. App. 3d 717, 718, 498 N.E.2d 375, 376 (App. Ct. Ill. 1986) (dismissing complaint for lack of personal jurisdiction because Charter was not alter ego of Cape); *Gray v. Crown Cork & Seal Co., et al.*, No. 84-6067 (W.D. Ark. Jan. 7, 1986) (same), attached as Exhibit P. At a minimum, these cases and the various courts' conclusions after reviewing the evidence in same create an issue of fact precluding summary judgment here.

D. There Are Genuine Issues Of Material Fact As To Whether Charter Is The Alter Ego Of Cape Or Whether The Corporate Veil Can Be Pierced.

As set for the more fully below, there are many genuine issues of material fact related to the Receiver's claim to pierce Cape's corporate veil and/or find Charter is the alter ego of Cape. As an initial matter, despite the Receiver's conclusory statements to the contrary, Charter was not the direct parent of Cape but was only an indirect parent through various other subsidiaries.[83] Yet the Receiver does not discuss the other companies that actually owned Cape and, instead, tries to get the court to make the blatant and obvious inaccurate factual finding that Charter was Cape's

[83] *Compare* Motion, at pp. 15, 59 ("For Cape, its immediate parent Charter"), with Ex. H (Howard Dep. II), at Cape_Receiver_00100186-87 (testifying that any dividends Charter received from Cape Industries would be received by "Central Mining Finance Ltd. and Charter Consolidated Investments, Ltd, which hold the stock which [Charter] own[s] in the Cape Industries"); Annual Report of Charter Consolidated Ltd. (1976), attached hereto as Exhibit Q, at Cape_Receiver_00075747 (noting that Charter's "shares in the [Cape Industries group] are held through subsidiaries"); Annual Report of Charter Consolidated Ltd. (1977), attached hereto as Exhibit R, at Cape_Receiver_00075798 (noting that Charter's "shares in the [Cape Industries group] are held through subsidiaries"); *see also Craig*, 843 F.2d at 147 (listing undisputed fact that Charter acquired interest in Cape "through a subsidiary"); *In re Charter Defs. Mot. for Summ. Judg. in All Cases Pending in the E. Dist. of Pennsylvania in Which They Are Parties*, 1989 U.S. Dist. LEXIS 15591, at *2 (identifying "Cape [as] a partially -owned, publicly-held subsidiary of Charter").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

"immediate parent" so that the Receiver does not have to pierce each of the corporate veils to get to Charter—a continuation of the Receiver's repeated mischaracterizations and omissions of material facts that have peppered the Motion. The Court should not countenance the Receiver's attempts to get the Court to rush to judgment without a substantive analysis of the evidence, which makes it clear that there are numerous questions of material fact warranting a denial of the Motion.

As discussed more fully herein, the Receiver's argument that there is no question of material fact that Charter's control of Cape was sufficient to pierce the corporate veil or find Charter was Cape's alter ego is unsupported by the exhibits cited by the Receiver, and has been refuted by the numerous other courts addressing the issue of Charter's control. Nor is there any evidence whatsoever that Charter caused or dictated the so-called "wrongful" acts by NAAC or Cape. Given the lack of evidentiary support for the Receiver's claim and the abundant disputed material facts demonstrating Charter's lack of domination over Cape, the Court should deny the Motion.

1. The Receiver fails to address, much less establish, the required showing for alter ego liability with admissible evidence.

The "evidence" relied on by the Receiver does not establish that Charter had the requisite domination over Cape required to find that Charter was Cape's alter ego. In South Carolina, to hold a party responsible under an alter ego theory, a plaintiff must show both "(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby."[84] Importantly, the level of control must be such that the "subservient entity manifests no separate

[84] *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012).

interest of its own and functions solely to achieve the goals of the dominant entity."[85] Here, the Receiver does not present sufficient admissible evidence to establish that Charter controlled Cape and certainly does not present sufficient admissible evidence to even remotely prove that Charter had "total domination and control" over Cape such that Cape "manifest[ed] no separate interest of its own."[86]

Indeed, as discussed elsewhere herein, the Receiver's bald assertion that "Cape had no true control over its own operations" is belied by the very exhibits the Receiver relies upon and the Receiver's purported "expert," Press. The assertion is also contrary to well established facts from multiple cases throughout the country.[87] Time after time, courts have found Charter did not control the finances, management, or operation of Cape and that there is no evidence that Charter disregarded the corporate form of Cape.[88]

For example, in the United Kingdom, where the "relationship between a board and the management of an English company is one which is established by the board,"[89] Cape's board

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[85] *Id.*; *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006).

[86] *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Colleton Cnty. Taxpayers Ass'n.*, 371 S.C. at 237, 638 S.E.2d a 692.

[87] *See* Section III.C; *see, e.g.*, *Craig*, 843 F.2d 145 (finding that "there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to-day. Moreover, and significantly, the district court found that '[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.'"); Ex. J (*In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987)); *Barber v. Pittsburgh Corning Corp.*, No. GD79-21544 (Pa. C.P. Allegh. Co. Oct. 11, 1984); *Culbreth*, 898 F.2d 13.

[88] *See* Section III.C.

[89] Ex. J (*In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987)), at Cape_Receiver_00002614–15.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

"delegated nearly all its authority to management. [Importantly, t]he Cape board was a supervisory one, the function of which was to monitor progress."[90] Indeed, it was Cape's management, not its board, who ran the day-to-day operations of the Cape,[91] including, for example, making decisions on Cape's finances;[92] the hiring and firing of employees;[93] and the advertising and promotions of Cape's products.[94] Although Cape management advised the board on these types of issues, Cape's board did not control or even approve of Cape's actions on these matters. Instead, the type of activity where Cape's board actually made decisions was "the interim and final financial

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[90] *Id*., at p. 10.

[91] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 ("Q. How about day-to-day operations and decisions regarding the running of the business of Cape or its subsidiaries? A. No, and indeed day-to-day hardly in the boardroom. It was a matter for the Managing Director [of Cape], whomever he was."); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003566 ("Q. Who made the decisions concerning the daily operations of Cape Industries business? A. Well, the executive directors of Cape, of Cape Industries."); Trial Testimony of Tony Hepper, dated Jan. 14, 1987 ("Hepper Trial Tr. II"), attached hereto as Exhibit BB, at Cape_Receiver_00003588 ("Q. Was the Cape board involved in any matters involving the day-to-day management of Cape? A. No. The Cape board was not involved in any day-to-day management matters.").

[92] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096876 ("Q. Who made the decisions concerning the daily operation of Cape's business including its finances? A. The executive directors of Cape.").

[93] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096877 ("Q. But who made the decisions concerning the hiring and firing of those [at] headquarters? A. Well, that would have been done by . . . the finance director if it was one of his people in the finance department."); Ex. C (Dent Dep.), at Cape_Receiver_00098954–56 ("Q. Aside from the board representation of Charter on the board of Cape Industries Ltd. did Cape involve Charter or consult Charter about the following matters, relating either to Cape Industries Ltd. or any of its subsidiaries: first, the hiring or dismissal of Cape or Cape subsidiary officers or employees? A. No, they did not.").

[94] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098954–56 ("Q. Aside from the board representation of Charter on the board of Cape Industries Ltd. did Cape involve Charter or consult Charter about the following matters . . . . The advertising or promotion of Cape's products? A. A. No, other than the correspondence which originated with Charter which we have discussed earlier.").

statements of Cape to be published to Cape's shareholders; the interim dividend declaration and the amount the final dividend to be recommended to the shareholders by the Board; any major capital projects, disposal or acquisitions, guarantees; and issues of shares by Cape, either in connection with an acquisition or to raise capital."[95]

Although there were a small number of Charter nominees on Cape's board, no employee of Charter was part of the management or executive leadership within Cape.[96] Thus, without any management representation, Charter could not exert day-to-day control over Cape such that would satisfy the alter ego test. Indeed, when Mr. Stopford-Sackville, the senior Charter nominee on Cape's board and Cape's non-executive Deputy Chairman, requested the ability to attend meetings with Cape's executives (*i.e.*, the individuals making the decisions for Cape), he was "politely but firmly refused."[97] Furthermore, irrespective of the specific Charter nominees on Cape's board, no one within Charter controlled or even participated in managing the day-to-day business affairs of

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[95] Ex. J (*In re Asbestos Litig. Venued in Middlesex Co.*, No. L-37243-79 (N.J. Super. Ct. July 10, 1987)), at Cape_Receiver_00002614–15.

[96] *See* Aff. in Supp. of the Mot. of Def. Charter Cons. P.L.C. to Dismiss the Compl. for Lack of Pers. Jurisd. ("Rudland Aff."), attached hereto as Exhibit S, at ¶ 14; *see also* Ex. E (Higham Dep.), at Cape_Receiver_00096875 (testifying that no "employee of Charter [has] ever acted as an officer of Cape"); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003565 ("Q. Has any employee of Charter ever acted as an officer or executive of Cape? A. No.").

[97] Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003498-3499 ("Q. Did you ever seek that position [with Cape's executive committee]? A. Yes. I did once, yes. Q. And could you tell us how that came about and what the result was? A. . . . I asked Mr. Dent whether he thought that this would be appropriate at the time, and he said it wouldn't be appropriate, and my request was politely but firmly refused.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape,[98] including the hiring or firing of employees;[99] the advertising or sale of Cape's products or its subsidiaries' products;[100] or the mining or marketing of asbestos and asbestos fibers.[101] In other words, although nominees of Charter may have advised on certain decisions as part of their duties for Cape's board, Charter did not and could not have day-to-day control over Cape. The Receiver's "expert," Press, even admits that under the group system, the parent organizations did not run the subsidiaries "day-to-day."[102]

Having an overlap in members of the board—especially in light of the advisory role of Cape's board and the Charter nominees general lack of active involvement in the board[103]—does

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[98] *See* Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003585 ("Q. After the tender offer, did you ever become aware of any efforts by Charter to manage the business affairs of Cape? A. No. On the contrary. Not at all.").

[99] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003509 ("Q. Has anyone employed by Charter ever participated in decisions by Cape or its subsidiaries concerning the hiring of employees? A. No. Q. The firing of employees? A. Not to my knowledge.")

[100] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003509 ("Has anyone employed by Charter ever participated in the decisions by Cape or its subsidiaries concerning its advertising or sale of any product of Cape or a Cape subsidiary? A. No.")

[101] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003509-3510 ("Q. Has anyone employed by Charter ever participated in decisions by Cape or its subsidiaries concerning the mining or marketing of asbestos products or asbestos fibers? A. No, never.").

[102] Motion, Ex. 8 (Press Rep.) at ¶ 42.

[103] *See, e.g.*, Ex. E (Higham Dep.), at Cape_Receiver_00096911 ("Q. . . . We were told [by other witness] that [the Charter nominees'] attendance [at Cape board meetings] was irregular; is that your recollection? Not all of them came to every meeting? A. That's correct."); at Cape_Receiver_00096874–75 ("Q. Could you describe the contribution of the Charter nominees to the Cape board? A. Well, they acted I think as non-executive directors in a conventional way. There was nothing special about them, nor were they treated any differently from anybody else. I think it's fair to say they were very passive as directors. They didn't ask very many questions, and they didn't take any initiatives."); at Cape_Receiver_00096874 ("Q. Do you recall when you were MD from 1971 to 1980 if the Charter nominees ever opposed a recommendation of management?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

not rise to the level of Charter having the "constant" or day to day control over Cape required to find Charter is the alter ego of Cape. This is especially true given that South Carolina courts have repeatedly held that "[c]ommon officers and/or directors and public identification of one corporation as the other's subsidiary do not, without more, support the conclusion the subsidiary is its parent's alter ego or agent for the transaction of its business."[104]

Instead of demonstrating how Charter actually controlled Cape, the Receiver spends an inordinate amount of time describing how Charter had the *potential* to control Cape because of its status as an ultimate parent in a group setting. However, it is not Charter's ability to control, but whether control in fact was exercised, that determines whether Charter is Cape's alter ego.[105] If the mere potential for control was sufficient, it would, in effect, eliminate corporate liability protection, which the South Carolina Supreme Court has unequivocally stated is a legitimate objective,[106] as almost all parent companies have the potential to control their subsidiaries.[107]

A. No."); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003564 (explaining how the Charter nominees on the Cape board were "fairly passive directors. They didn't take many initiatives.").

[104] *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980); *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267, 678 S.E.2d 819, 823–24 (Ct. App. 2009).

[105] *See Toney v. SSC Sumter East Operating Co., LLC*, 3:19-cv-3226, 2020 WL 12744577, at *6 (D.S.C. Apr. 29, 2020) (explaining that "[e]ven if either defendant had the ability to control" partially owned entity, the plaintiff "would still be required to allege specific facts indicating [the defendants] actually exercised that power within South Carolina" in finding the defendants not subject to personal jurisdiction); *Craig*, 843 F.2d at 150 (explaining that parent's mere "potential to exercise control" over subsidiary is insufficient as a matter of law as "[i]t is assumed to be the norm that a parent will have" that ability).

[106] *See Pertuis v. Front Roe Restaurants, Inc.*, 817 S.E.2d 273, 280–81 (S.C. 2018) ("corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.").

[107] *See Wright v. Waste Pro USAC Inc.*, 2:17-cv-02654, 2019 WL 3344040, at *6 (D.S.C. July 25, 2019) (explaining that "the mere fact that a parent corporation provides support services for its

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Not only are there abundant genuine issues of material fact pertaining to whether Charter exercised "total domination and control" over Cape, genuine issues of material also remain with respect to whether this purported "control" was exercised *by Charter* to "produce inequitable results."[108] The Receiver's conclusory assertions that Charter was responsible for certain alleged inequitable actions have no support in the record and are directly contracted by the Receiver's own documents. Indeed, the Receiver's argument regarding this prong of the alter ego test contains next to no citations to evidence and the lone evidence cited merely shows that Charter reported to its shareholders what actions Cape was taking in ongoing litigation, not that Charter was somehow responsible for Cape's actions.

The reason—a plethora of evidence directly contradicts the Receiver's unsupported alleged facts, which at a minimum create genuine issues of material fact requiring a denial of the Motion. For example, ample evidence demonstrates that: (1) Charter was *not* responsible for the decision to close and liquidate NAAC;[109] (2) Charter was *not* responsible for Cape's litigation avoidance

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subsidiaries does not create agency or demonstrate an alter ego for jurisdictional purposes" as such provisions "are part and parcel of the normal incidents of a parent-subsidiary relationship").

[108] *Colleton Cnty. Taxpayers Ass'n*, 371 S.C. at 237, 638 S.E.2d at 692.

[109] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003514 ("Q. Did you participate in any way in the decision to dissolve NAAC? A. No way whatsoever. Q. Did Charter or any of Charter's nominees on the board of Cape participate in the decision to dissolve NAAC? A. To my knowledge, no, sir. . . . Q. Was the winding up of NAAC ever discussed at a meeting of ***Charter's*** board or ***Charter's*** executive committee? A. No, never.") (emphasis added); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003574 ("Q. . . . Was the reorganization and the dissolution of NAAC a proposal that was put to [Cape's] board for approval, or was it a report to the board? A. It was a report to the board."); Ex. E (Higham Dep.), at Cape_Receiver_00096895-96 (explaining that none of the "Charter nominees on the Cape board suggest, recommend, or have anything to do with the dissolution of NAAC"); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003595 ("Q. Did you know whether Charter or its nominees on the board of Cape had anything to do with the winding up of NAAC? A. Not as far as I know.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

strategy;[110] and (3) Charter was *not* responsible for designing new ways to sell asbestos in the U.S. after NAAC liquidated.[111]

2. There are genuine issues of material fact regarding piercing the corporate veil.

Similar to the Receiver's alter ego claim, Charter's actions do not rise to the level of domination and control required to pierce the corporate veil. At a minimum, there at least remain numerous questions of material fact that would preclude granting the Receiver summary judgment on this issue. In order to pierce the corporate veil, courts employ a two-prong test, looking first at an eight-factor analysis to determine if corporate formalities were sufficiently observed and then

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[110] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003511 ("Q. Did you or any other Charter nominee have anything to do with the decision by Cape not to defend asbestos related lawsuits in the United States. A. No. Q. Had you or any other Charter nominee on the board of Cape recommended such a course of action? A. No. Do you know whether Charter had recommended such a course of action? A. I'm sure it hadn't. Q. Did anyone from Cape seek your advice or, to your knowledge, the advice from anyone at Charter regarding what course Cape – regarding what course Cape should follow regarding asbestos lawsuits in the United States? A. No."); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003593 ("Q. Do you recall whether the Charter nominees instigated the idea that Cape should not appear in the United States? A. No, they did not.").

[111] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003521-3522 ("Q. At or about the time of the dissolution of NAAC, do you recall a discussion, any discussion with respect to the continued sale of Cape fiber into the United States? . . . . A. I wasn't party to any discussion on that particular subject. Q. Did you have any impression at all from any source whether or not Cape would continue, that is Cape subsidiaries would continue to sell fiber into the United States? A. No, I had nothing to do with it whatsoever."); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003566 ("Q. Did any of the Charter nominees on the Cape board suggest, recommend, or have anything to do with the formation of Associated Minerals Corporation, to your knowledge? A. Not to my knowledge. Q. Did anyone from Charter suggest, recommend, or have anything to do with the formation of Associated Minerals Corporation? A. Not to my knowledge. Q. What would be your answer if I asked it with respect to [Continental Products Corporation or "CPC"], would Charter or any nominees have anything to do with CPC, creation or formation of that company? A. Not to my knowledge."); Ex. E (Higham Dep.), at Cape_Receiver_00096895-96 ("Q. Do you know whether any [of the] Charter nominees on the Cape board suggest, recommend, or have anything to do with the formation of AMC? A. No.").

second on the element of injustice or unfairness.[112] The eight factors are: "(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder" (the "*Sturkie* Factors").[113]

Although the Receiver only addresses four of the *Sturkie* Factors (Nos. 1, 5, 6, and 8), it is clear from an application of the *Sturkie* Factors to the actual evidence—as opposed to the Receiver's unsupported conclusions with no citation to any evidence, selective citations to testimony and documents, and blatant misrepresentations of the evidence—that the record is devoid of any evidence that Cape's veil should be pierced to reach Charter.

a. Cape was adequately capitalized.

Although the Receiver states that this factor supports piercing the corporate veil between Cape and Charter, the Receiver does not actually assert or proffer any evidence or argument that Cape was undercapitalized.[114] Instead, the Receiver appears to argue that NAAC was undercapitalized—without citation to any factual support whatsoever—and therefore the Court should find that Cape was undercapitalized sufficient to pierce the corporate veil up to Charter.

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[112] *See Sturkie v. Sifly*, 280 S.C. 453, 456–57, 313 S.E.2d 316, 318 (Ct. App. 1984).

[113] *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 598, 649 S.E.2d 135, 141 (Ct. App. 2007); *Sturkie*, 280 S.C. at 456–57, 313 S.E.2d at 318. For purposes of this Motion, Charter Consolidated does not address the fraud or injustice prongs of either test as the Third-Party Complaint fails, as a matter of law, to allege facts showing sufficient domination and control over Cape.

[114] *See* Motion, at p. 62.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

However, the fact that NAAC was undercapitalized—regardless of whether that is actually true or not—has no bearing on whether Cape itself lacked adequate capital. For that matter, the Receiver's unsubstantiated assertion that Cape ensured NAAC was undercapitalized at "Charter's direction" is belied by the very evidence the Receiver selectively cited from.[115]

Cape has historically been adequately capitalized, producing profits and operating within its budget.[116] Indeed, throughout the time period when Charter had an indirect ownership interest in Cape, Cape was independently financed and paid its own operating expenses.[117] It had sufficient capital that Charter never needed to loan money to Cape and did not need to guarantee any bank

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[115] *See e.g.*, Ex. C (Dent Dep.), at Cape_Receiver_00098957 (testifying that Charter never had "a representative on the board of any subsidiary of Cape;" never "ratif[ied] or approve[d] the appointment of other Cape directors or the directors or managers of Cape subsidiaries;" and never had "influence with respect to the budget of Cape or its subsidiaries").

[116] *See, e.g.*, Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003552 ("Cape at that particular stage was performing adequately, it was producing profits, it was operating within it's laid down budgets, except for a few little hiccups which we've seen referred to in some of these notes. And it was not necessarily to do with Cape's management. It was perhaps the industrial scene that was operating in the United Kingdom at that particular time."); Cape Annual Report and Accounts (1965), attached hereto as Exhibit T, at Cape_Receiver_00070428 (reporting on a "substantial profit on the year's operations"); Cape Annual Report and Accounts (1970), attached hereto as Exhibit U, at Cape_Receiver_00070567 (reporting on profits and recommending final dividends to shareholders); Cape Annual Report and Accounts (1975), attached hereto as Exhibit V, at Cape_Receiver_00070745-747 (reporting on more than 4.6 million pounds of retained profit to be used on further investments in Cape's business and demonstrating how Cape is cash flow positive); Cape Annual Report and Accounts (1980), attached as Exhibit W, at Cape_Receiver_00070908 (even though it was a "difficult trading year," reporting on profits before tax in excess of 6 million pounds).

[117] *See* Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003588 ("Q. Was Cape financially independent? A. Yes. It was completely independent financially. It had its own financial structure. It had its own equity and its own borrowings. It had its own financial advisors . . . . It had its own merchant bankers . . . its own brokers . . . and it had its own lawyers. . . . Furthermore, it had its own financial director who was responsible for the management of – financial management of the company.").

loans to Cape.[118] Cape's status as an ongoing operating business today, decades after Charter's ownership interest in Cape ended, certainly also indicates that Cape has adequate capital.

b. All corporate formalities were observed.

This factor clearly supports a refusal to pierce the corporate in this case. The Receiver has not, and cannot, present any evidence that the corporate formalities between Charter and Cape were not observed. Importantly, Charter maintained separate offices from those of Cape.[119] Charter and Cape maintained separate books and records in separate locations.[120] Cape held shareholders meetings separately from those of Charter.[121] Cape and Charter had separate boards and held their respective board meetings separately.[122] Although Charter was required by UK law to consolidate Cape's earnings with its own for statutory accounting purposes, Cape and Charter employed different auditors and made separate reports to their shareholders.[123]

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[118] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096877 (testifying that Charter never "loaned money to Cape" and never "guaranteed a loan to Cape").

[119] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Charter and Cape's "offices" were "separate").

[120] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Charter and Cape's "books and records" were "maintained separately"); *see also* Ex. E (Higham Dep.), at Cape_Receiver_00096876; Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095531; Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003504 ("Q. Did Charter and Cape ever maintain corporate and financial books or records in common? A. Not that I know of.").

[121] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Charter and Cape would "hold separate shareholders' meetings"); Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003504 ("Q. Were shareholders meetings held separately or together? A. No, they were held separately.").

[122] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Charter and Cape would "hold separate directors' meetings").

[123] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098836 (testifying that Charter consolidated Cape's earnings with its own "[a]ccording to the law" which "required [Charter] to provide [Cape] "with the information do this and other information to enable [Cape] to do [its] financial planning

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

c. Cape paid dividends to Charter.

There is no evidence that Cape failed to pay dividends to Charter. To the contrary, as the Receiver acknowledges, such dividends were paid to Charter.[124] Indeed, typically twice a year, Cape's management would propose a dividend to its board, which would then approve the dividend to be voted on by the shareholders.[125]

d. Cape was not insolvent.

There is no evidence that Cape was insolvent. To the contrary, Cape was routinely profitable, was able to pay dividends to shareholders, and operated within its budget.[126]

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and [its] cashflow planning"); Deposition of John Neil Clarke, dated Apr. 21, 1983 ("Clarke Dep."), attached as Exhibit F, at Cape_Receiver _00100727-28 (testifying that Charter does not "audit into the affairs of Cape" but rather Cape's "auditors are an entirely separate firm from the two firms who were then Charter's auditors").

[124] *See* Motion, at p. 59 ("As a holding company, Charter conducted virtually all of its business through subsidiaries like Cape, such that it made money through dividends and other diverted funds, payments, or returns from such investments"); *see, e.g.*, Ex. U (1970 Cape Annual Report and Accounts), at Cape_Receiver_00070567 (recommending final dividends to shareholders); Ex. V (1975 Cape Annual Report and Accounts), at Cape_Receiver_00070745-747 (same); Ex. W (1980 Cape Annual Report and Accounts), at Cape_Receiver_00070908 (same).

[125] *See* Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003585-3586 ("Q. How often were dividends declared by Cape? A. Twice a year. . . . Q. Who proposed the dividend? A. The dividend was proposed to the board by Cape management. Q. Did the Charter nominees ever oppose management's proposal for a dividend? A. No.").

[126] *See, e.g.*, Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003552 ("Cape at that particular stage was performing adequately, it was producing profits, it was operating within it's laid down budgets, except for a few little hiccups which we've seen referred to in some of these notes. And it was not necessarily to do with Cape's management. It was perhaps the industrial scene that was operating in the United Kingdom at that particular time."); Ex. U (1970 Cape Annual Report and Accounts), at Cape_Receiver_00070567 (reporting on profits and recommending final dividends to shareholders); Ex. V (1975 Cape Annual Report and Accounts), at Cape_Receiver_00070745-747 (reporting on more than 4.6 million pounds of retained profit to be used on further investments in Cape's business and demonstrating how Cape is cash flow positive); Ex. W (1980 Cape Annual Report and Accounts), at Cape_Receiver_00070908 (even

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

e. Charter did not siphon funds from Cape.

There is no evidence that Charter siphoned or diverted funds from Cape. For example, there is no evidence that Charter ever borrowed money from Cape, improperly removed funds from Charter's account, or otherwise took money rightfully belonging to Cape. All transactions involving Cape and Charter were handled as arms-length transactions.[127] Charter's subsidiaries only received a dividend based on their ownership interest in Cape, the same as the thousands of other owners of Cape.[128] And Charter never attempted to influence the financial policies of Cape.[129]

Interestingly, despite the fact that a failure to pay dividends would support piercing the corporate veil under the *Sturkie* Factors, the Receiver tries to argue that the veil should be pierced because dividends were paid as that somehow constituted "siphoning" of funds. This is directly contradictory to the standard set out in *Sturkie* and subsequently applied in South Carolina.

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though it was a "difficult trading year," reporting on profits before tax in excess of 6 million pounds).

[127] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003503 ("Q. During your directorship of Cape covering the period from 1970 to 1980, what did you observe to be the relationship between Charter and Cape? A. Well, as I think I mentioned before, they're independent minded and independent people, and wanted to remain independent. And the relationship was an arm's length relationship. . . . there was complete wish of total independence as far as Cape decision making process was concerned.").

[128] *See*, *e.g.*, Ex. U (1970 Cape Annual Report and Accounts), at Cape_Receiver_00070567 (recommending final dividends to shareholders, several of which were Charter's subsidiaries).

[129] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003507 ("Q. Did Charter ever attempt to influence the financial policies of Cape? A. No.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

f. Cape had independent officers and directors that controlled the operations of the company.

Without citation to any support—because there is none—the Receiver concludes that this factor supports piercing the corporate veil because "Charter leadership" directed Cape's and NAAC's employees. The Receiver, however, is flatly incorrect. Charter was an investment company that used non-managerial roles in boards to monitor its investments and was "hands off" in connection with their investments.[130] Although Charter had two to three nominees on Cape's board, the nominees had poor attendance, made minimal contributions, and appeared to be "in no way interested in trying to control the company."[131] At no time did anyone from Charter ever hold an executive or management position at Cape,[132] or make any management or business decisions on behalf of Cape.[133] Additionally, at no time did anyone from Charter ever hold an executive or management position at any of Cape's subsidiaries,[134] nor did anyone from Charter ever make

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[130] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003551 ("Charter's view of running companies was what we call in England hands off at that particular stage of our development").

[131] Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003584 ("Q. Could you now describe the participation of the nominee directors of Charter on the board of Cape? A. Yes. There was very little change. There were three nominee directors. . . . They appeared to be in no way interested in trying to control the company. They, their contribution was minimal. Their attendance was poor. Such contribution as they made was of a financial character, and they gave the impression that they were entirely satisfied with the way that Cap management was managing Cape.").

[132] *See*, *e.g.*, Ex. E (Higham Dep.), at Cape_Receiver_00096876 (testifying that no "employee of Charter [has] ever acted as an officer of Cape").

[133] *See* Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003584-3585 ("Q. To your knowledge, after the '69 tender offer, did the Charter nominee directors make any management or business decisions on behalf of Cape? A. No.").

[134] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003507 ("Q. And has anyone employed by Charter ever had executive or managerial responsibilities for the operations of any of Cape's subsidiaries? A. No.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

decisions concerning the daily operations of Cape's subsidiaries.[135] Certainly Cape was never somehow intimidated into making business decisions because the possibility of Charter's control was "always in the background of" Cape's mind, as asserted by Press.[136]

Indeed, Mr. Stopford-Sackville described Cape as "violently independent" and that Cape "wanted to retain their independence" throughout the time he was associated with the company. He indicated that "there was no chink in [Cape's] armor at all. There was no member of the board who ever sought to be cooperative as far as Charter was concerned. In fact, they were fundamentally uncooperative in relation to their relationships with Charter."[137]

Indeed, Cape was operated by their own management, who were not employees of Charter, and these individuals ran the day-to-day operations of the Cape,[138] including, for example, making

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[135] Ex. D (Higham Trial Tr.), at Cape_Receiver_00003567 ("Q. Who made the decisions concerning the daily operations of the business of the Cape subsidiaries? A. The subsidiaries' managers.").

[136] *Compare* Motion, Ex. 8 (Press Rep.) at ¶ 156 with Ex. D (Higham Trial Tr.), at Cape_Receiver_00003573 ("Q. . . . in your ten years as managing director of Cape, did you ever feel intimidated by the presence of Charter directors on the board of Cape? A. No. Q. Did you ever feel that they were presenting a Charter view on the board of Cape? A. No. They spoke as independents, giving their views. It didn't seem a - - a Charter view was never put forward. Q. Did you ever feel frightened for your position that if you didn't take into consideration Charter's view, you might be fired? A. No."); *see also Craig*, 843 F.2d at 150 (rejecting district court's conclusion "that Charter's majority share of stock ownership gave it an 'omnipresence in the minds of the Cape Board members' such that Cape was nothing more than an 'operating division' of Charter" as "potential control is not enough") (citing *Scalise v. Beech Aircraft Corp.*, 276 F. Supp. 58, 62 (E.D. Pa. 1967)).

[137] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003551.

[138] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098956 ("Q How about day-to-day operations and decisions regarding the running of the business of Cape or its subsidiaries? A. No, and indeed day-to-day hardly in the boardroom. It was a matter for the Managing Director [of Cape], whomever he was."); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003566 ("Q. Who made the decisions concerning the daily operations of Cape Industries business? A. Well, the executive directors of Cape, of Cape Industries."); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003588 ("Q. Was

decisions on Cape's finances;[139] the hiring and firing of employees;[140] and advertising and promotions of Cape's products.[141] Indeed, when Mr. Stopford-Sackville, the senior Charter nominee on Cape's board and Cape's non-executive Deputy Chairman, requested the ability to attend meetings with Cape's executive management (*i.e.*, the individuals actually making the decisions for Cape), he was "politely but firmly refused."[142]

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the Cape board involved in any matters involving the day-to-day management of Cape? A. No. The Cape board was not involved in any day-to-day management matters.").

[139] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096876 ("Q. Who made the decisions concerning the daily operation of Cape's business including its finances? A. The executive directors of Cape.").

[140] *See* Ex. E (Higham Dep.), at Cape_Receiver_00096877 ("Q. But who made the decisions concerning the hiring and firing of those [at] headquarters? A. Well, that would have been done by . . . the finance director if it was one of his people in the finance department."); Ex. C (Dent Dep.), at Cape_Receiver_00098954-55 ("Q. Aside from the board representation of Charter on the board of Cape Industries Ltd. did Cape involve Charter or consult Charter about the following matters, relating either to Cape Industries Ltd. or any of its subsidiaries: first, the hiring or dismissal of Cape or Cape subsidiary officers or employees? A. No, they did not.").

[141] *See* Ex. C (Dent Dep.), at Cape_Receiver_00098954-55 ("Q. Aside from the board representation of Charter on the board of Cape Industries Ltd. did Cape involve Charter or consult Charter about the following matters . . . . The advertising or promotion of Cape's products? A. A. No, other than the correspondence which originated with Charter which we have discussed earlier.").

[142] Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003498-3499 ("Q. Did you ever seek that position [with Cape's executive committee]? A. Yes. I did once, yes. Q. And could you tell us how that came about and what the result was? A. . . . I asked Mr. Dent whether he thought that this would be appropriate at the time, and he said it wouldn't be appropriate, and my request was politely but firmly refused.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

g. Absence of corporate records.

There is no evidence that Cape had an absence of corporate records. Cape was legally incorporated in 1893 under the laws of the United Kingdom.[143] Cape maintained corporate minutes and corporate records as evidenced by the records included as exhibits to the Motion.[144] These records were separate from those of Charter, as evidenced by Charter's minutes and other records the Receiver attached to the Motion.[145] Cape had separate board of directors meetings at which minutes were kept independent of Charter.[146] Indeed, the Receiver identifies dozens of separate Cape and Charter corporate records in its trial exhibit list, and attached multiple unique and separate corporate records as alleged "evidence" for the Motion.

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[143] *See* Ex. S (Rudland Aff.), at ¶ 11; *see also* Motion, Ex. 71, Cape_Receiver_00244898-9, *Cape Website: Our History* (May 17, 2013) ("Cape was founded in 1893[.]"), Motion, Ex 8 (Press Rep.) at ¶ 65 (explaining the origins of Cape in the 1890s and before).

[144] *See*, *e.g.*, Motion, Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132232 (testifying as to "minute of the Cape Board on 1st November 1977"); Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Cape maintained separate "records" and "directors' meetings").

[145] *See*, *e.g.*, Motion, Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132232 (testifying as to "minute of the Cape Board on 1st November 1977"); Ex. C (Dent Dep.), at Cape_Receiver_00098956, at Cape_Receiver_00098956 (testifying that Cape maintained separate "records" and "directors' meetings"); Motion, Ex. 13, Charter Consolidated Limited Executive Committee Minute No. 51/67, Apr. 25, 1967, at Cape_Receiver_00002539 (indicating that Pollen suggested an executive committee to be formed on Cape board).

[146] *See*, *e.g.*, Ex. C (Dent Dep.), at Cape_Receiver_00098956 (testifying that Charter and Cape held "separate directors' meetings" and "maintained [records] separately"); *see also* Ex. E (Higham Dep.), at Cape_Receiver_00096876 (testifying that Charter nominees to Cape board were "non-executive directors" who were "passive").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

h. Cape was not a façade for Charter's operations and both had independent business operations.

Despite the Receiver's sweeping assertion, without citation to anything in the record, that Cape was a "mere instrumentalit[y]" for Charter, there is absolutely no evidence that Cape was a mere "façade" for the operations of Charter. The businesses and expertise of Charter and those of Cape are entirely dissimilar.[147] Charter was an investment and finance holding company, and was engaged in the finance, banking, leasing, trading, and investment business.[148] Cape was an industrial company, and owns shares of stock in companies engaged in, among other things, industrial contracting, and the manufacture of building productions.[149] Charter has never made use of the name or trademarks of Cape in its advertising or other dealings with the public, and Cape

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[147] *See* Ex. D (Higham Trial Tr.), at Cape_Receiver_00003566 (explaining that, with respect o Cape and Charter, the "businesses were really in very, altogether different businesses"); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003598-3599 ("Q. From your perspective as a board member of Cape from 1969 to the present [in 1987], would you describe the relationship between Charter and Cape? A. Cape was an old established industrial company, established at the end of last century, whose business was in mining, in manufacturing, and marketing. Cape was – Charter, I'm sorry, was a recently established finance house, started operations I think in 1965, and had a number of subsidiary companies in unrelated activities. It followed that the executives of Cape were industrialists, and the executives of Charter were financially oriented people. The two did not blend well and, indeed, in a number of cases the personalities did not blend well. ***Result of this was that both the companies went their own way, and were independently managed***.") (emphasis added).

[148] *See* Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095537-38; *see also* Ex. H (Howard Dep. II), at Cape_Receiver_00100183-84 (testifying that Charter was "in the business of investment, which is why it has many companies" and "interests in many companies"); Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003467 ("in 1965, Charter's main business was that of holding investments in various companies, and the investment department responsible for monitoring and obtaining information about these investments.").

[149] *See* Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095537-38; *see also* Ex. Q (Charter, Annual Report (1976)), at Cape_Receiver_00075747 (noting that Charter's "shares in the [Cape Industries group] are held through subsidiaries"); Ex. R (Charter, Annual Report (1977)), at Cape_Receiver_00075798 (noting that Charter's "shares in the [Cape Industries group] are held through subsidiaries").

has never used the name or trademarks of Charter.[150] Indeed, Charter has always maintained a separate corporate identification from Cape.

Even after 1969, when Charter indirectly owned a majority of Cape's shares, there was no integration of the operations between Cape and Charter.[151] The couple of times that suggestions were made by a Charter nominee on the Cape board, to share certain operations between Cape and Charter, the suggestions were "firmly and stoutly refused" by Cape's management.[152] At no point did Cape and Charter have any joint agreement or operations with respect to personnel matters, public relations, management trainee programs, any administrative matters.[153] Nor did Cape and Charter use the same accountants, stockbrokers, or investment bankers.[154]

i. There are material questions of fact with respect to the "fundamental unfairness" prong of the Sturkie test.

The second prong of the *Sturkie* test, and "the heart of a piercing the corporate veil analysis," is whether fraud or fundamental injustice will occur if the corporate entity is

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[150] *See* Ex. S (Rudland Aff.), at ¶ 20.

[151] *See, e.g.*, Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003489 ("Q. Was there any integration of the operations of the business of the two companies, of Cape and Charter after 1969? A. No, none whatsoever.").

[152] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003505-3506 ("Q. Did you ever make any suggestions regarding joint efforts between the two companies? A. Yes, I did. Q. And what were they and what was the result? A. . . . the two instances I recall most . . . [were] firmly and stoutly refused.").

[153] Ex. D (Higham Trial Tr.), at Cape_Receiver_00003569.

[154] Ex. D (Higham Trial Tr.), at Cape_Receiver_00003569 ("Q. Have Charter and Cape ever used the same accountants? A. No. Q. The same stockbrokers? A. No. Q. Same investment bankers? A. No.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

recognized.[155] Within this second prong there is a two-part test. A plaintiff seeking to pierce the corporate veil must prove that: (1) the defendant was aware of the plaintiff's claim against the corporation; and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property.[156]

As an initial matter, Charter could not have been aware of the claims brought against Cape by the *Tibbs* plaintiffs at the time of its alleged bad acts, as Charter sold Cape in 1996, fourteen years before Mr. Tibbs was diagnosed with an asbestos-related disease. Moreover, there is no evidence that Charter has taken any action whatsoever with regard to Cape's property, much less acted in a "self-serving manner with regard to the property," in response to the Receiver's claim and/or in response to any claims by a plaintiff alleging exposure to asbestos. Contrary to the Receiver's completely unsupported factual assertion that Charter prioritized its own profits in the form of subsidiary dividends, Charter in fact did not control Cape's dividends.[157] Similarly, despite the Receiver's unsupported allegation to the contrary, Charter did not participate in or direct

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[155] *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318.

[156] *Sturkie*, 313 S.E.2d at 319.

[157] *See* Ex. H (Howard Dep. II), at Cape_Receiver_00100270 (testifying that Cape did not "report dividend recommendations to Charter before those recommendations were made to the board of Cape"); Ex. C (Dent Dep.), at Cape_Receiver_00098922 (testifying that "operative decision" over Cape's dividend was made "at an open meeting of the [C]ape board with all directors present); Ex. B (Hepper Trial Tr. I), at Cape_Receiver_00095529-30 (explaining that the "[d]ividend was proposed by the Cape management" and "the Charter nominees" on the Cape board never "opposed management's proposed dividends"); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003563 ("Q. Could you explain how the amount of dividends to be declared by Cape was determined. A. Yes. The management would think about that and come to a view and put it before the board as a proposal for the board to agree or disagree. Q. Did a Charter nominee ever propose the final amount at a Cape board meeting? A. No. Q. Did a Charter nominee ever oppose the amount recommended by Cape management? A. I don't recall that specifically.").

NAAC to shutter.[158] Nor did Charter participate in or direct a "scheme to continue selling Cape raw asbestos fiber to the U.S. market through a new company."[159] Furthermore, Charter did not participate in or direct the decision by Cape to not defend asbestos related lawsuits in the United States.[160]

There is no evidence that Charter "actively concealed [its] knowledge of the dangers associated with the high volume of asbestos fibers"—as asserted by the Receiver without citation

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[158] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003514 ("Q. Did you participate in any way in the decision to dissolve NAAC? A. No way whatsoever. Q. Did Charter or any of Charter's nominees on the board of Cape participate in the decision to dissolve NAAC? A. To my knowledge, no, sir. . . . Q. Was the winding up of NAAC ever discussed at a meeting of ***Charter's*** board or ***Charter's*** executive committee? A. No, never.") (emphasis added); Ex. D (Higham Trial Tr.), at Cape_Receiver_00003574 ("Q. . . . Was the reorganization and the dissolution of NAAC a proposal that was put to [Cape's] board for approval, or was it a report to the board? A. It was a report to the board."); Ex. E (Higham Dep.), at Cape_Receiver_00096895-96 (explaining that none of the "Charter nominees on the Cape board suggest, recommend, or have anything to do with the dissolution of NAAC"); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003595 ("Q. Did you know whether Charter or its nominees on the board of Cape had anything to do with the winding up of NAAC? A. Not as far as I know.").

[159] *Compare* Motion, at p. 37 *with* Ex. D (Higham Trial Tr.), at Cape_Receiver_00003566 ("Q. Did any of the Charter nominees on the Cape board suggest, recommend, or have anything to do with the formation of Associated Minerals Corporation, to your knowledge? A. Not to my knowledge. Q. Did anyone from Charter suggest, recommend, or have anything to do with the formation of Associated Minerals Corporation? A. Not to my knowledge. Q. What would be your answer if I asked it with respect to [Continental Products Corporation or "CPC"], would Charter or any nominees have anything to do with CPC, creation or formation of that company? A. Not to my knowledge.").

[160] *See* Ex. I (Stopford-Sackville Trial Tr.), at Cape_Receiver_00003511 ("Q. Did you or any other Charter nominee have anything to do with the decision by Cape not to defend asbestos related lawsuits in the United States. A. No. Q. Had you or any other Charter nominee on the board of Cape recommended such a course of action? A. No. Do you know whether Charter had recommended such a course of action? A. I'm sure it hadn't. Q. Did anyone from Cape seek your advice or, to your knowledge, the advice from anyone at Charter regarding what course Cape – regarding what course Cape should follow regarding asbestos lawsuits in the United States? A. No."); Ex. BB (Hepper Trial Tr. II), at Cape_Receiver_00003593 ("Q. Do you recall whether the Charter nominees instigated the idea that Cape should not appear in the United States? A. No, they did not.").

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

to any document, testimony, or other evidence. Although the Receiver, in an apparent attempt to obfuscate his complete lack of evidence, refers back to "Section II.F.1"[161] as support for his assertions about Charter's knowledge, there is absolutely nothing referred to in Section II.E.1, or any other portion of the Motion, that evidences ***Charter's*** purported knowledge and concealment of the hazards of asbestos. Indeed, the word "Charter" appears nowhere in Section II.E.1, where knowledge of the hazards of asbestos is actually discussed. The Receiver, instead, merely points to Charter's knowledge about ongoing litigation about asbestos exposure. That, however, does not equate to active concealment of the hazards of asbestos.

In sum, there is nothing in the relationship between Charter and Cape that would justify piercing the corporate veil to reach Charter. The Receiver's evidence does nothing more than show a relationship of an investor to an investment and is woefully insufficient to find that there is no question of material fact with respect to piercing the corporate veil.

E. The Motion Must Further Be Denied Because There Are Genuine Issues of Material Fact Related to ESAB's Liability.

As an initial matter, despite moving for summary judgment as to its alter ego and/or veil piercing claim, the Motion instead argues that ESAB is liable because it is the corporate successor to Charter.[162] Critically, the Receiver fails to address a single element of South Carolina's test for piercing the corporate veil or alter ego and instead posits that ESAB must be liable because it is the "corporate successor-in-interest to Charter and has assumed the historical liability associated

[161] Presumably, the Receiver intended to refer to Section II.**E**.1 as Section II.F.1 relates to the allegations regarding Altrad acquiring an ownership interest in Cape.

[162] Indeed, the first time that ESAB appears in the Receiver's argument section in on page 76.

with their asbestos-related activities."[163] That is simply untrue, and the Receiver has produced not a scintilla of evidence that actually supports his assertion, much less sufficient admissible evidence that would demonstrate no genuine issues of material fact exist.

Furthermore, successor-in-interest liability is a separate and distinct legal theory from piercing the corporate veil or alter ego, and the Receiver should not be allowed to move for summary judgment on a legal theory that was never pled.[164]

1. Genuine issues of material fact preclude granting summary judgment as the Receiver has obfuscated and misinterpreted the evidence relied upon against ESAB.

In an attempt to obfuscate his failure to adduce anything resembling real evidence related to the actual party in this litigation, the Receiver repeatedly refers to various "ESAB" entities that existed prior to 2021. Put simply, however, no matter whether those entities used the word "ESAB" in their name, they are ***not*** the entity sued in this case, which is ESAB Corporation. Black letter law does not allow the Receiver to attribute one entity's actions with another entity simply because they both have the same word in the name of the company. The Receiver clearly admits that the defendant in this case, ESAB Corporation, is a Delaware corporation that did not exist until it was

[163] *See* Motion, at p. 77.

[164] *See Doe v. Keel*, 3:20-cv-2755, 2023 WL 6450622, at *5 (D.S.C. Sept. 29, 2023) ("Inasmuch as Doe failed to raise this claim in his complaint, granting summary judgment to him on the claim would be inappropriate.") (citing *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004)); *compare Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018) (setting forth four factors for finding liability via successor-in-interest theory) *with Sturkie*, 280 S.C. at 456–57, 313 S.E.2d at 318 (setting forth eight factors for finding liability via veil piercing theory).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

formed in 2021.[165] And at no point does the Receiver argue that ESAB Corporation is a successor-in-interest to the prior entities that had "ESAB" as part of their name.[166]

In yet another example of the Receiver's gamesmanship with the evidence, the Receiver misleadingly interprets a statement in Colfax's "prospectus"—related to certain subsidiaries[167] potential exposure for asbestos liability—to be referring to "Cape's monopoly over amosite."[168] However, this tortured reading of Colfax's prospectus requires the Court to ignore the very words Colfax uses to describe this potential liability. Indeed, Colfax explicitly states that the subsidiaries being referred to in the prospectus were ***not*** "producers or direct suppliers of asbestos." Instead, Colfax described that the asbestos liability related to "Colfax's Fluid Handling ('FH') and Air and Gas Handling ('AGH') businesses" and that the components alleged to have contained asbestos were "acquired from third-party suppliers and were not manufactured by any of these subsidiaries."[169] Nothing in this wording in any way describes Cape's purported "monopoly over amosite."

2. ESAB is not the successor-in-interest to Charter's liabilities.

Looking past the Receiver's misunderstanding and misquoting of various corporate documents, it uses as exhibits, there is simply no evidence that ESAB is the successor-in-interest

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[165] *See* Motion, at p. 77 ("In 2021, Colfax Parent formed ESAB Corporation, a Delaware corporation").

[166] *See generally*, Motion.

[167] The Receiver misleadingly omits the word "Certain" before its quote "subsidiaries to be contributed" in an apparent attempt to broaden the scope of Colfax's prospectus. *Compare* Motion, Ex. 129 at p. 78, *with* Motion, at p. 77.

[168] *See* Motion, at pp. 77-78.

[169] *See* Motion, Ex. 129.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

to Charter's liabilities. Although the Charter Third-Party Defendants acknowledge that ESAB is the *indirect* parent of Charter, that does not equate to being the successor-in-interest to Charter's liabilities, much less Cape's liability.[170] To the contrary, an entities' status as a parent is not the same thing as being a successor-in-interest and is flatly contracted by the strict standard for "successor-in-interest" liability in South Carolina, which "disfavors successor liability."[171] In South Carolina, a successor corporation is not liable for the debts of a predecessor unless "(1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to a consolidation or merger of the two corporations; (3) the successor company was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims."[172] Here, none of these criteria are met.

a. There is no agreement for ESAB to assume Charter's debts.

The Receiver's claim—that an unsigned Form of Separation and Distribution Agreement constitutes an agreement for ESAB to assume Charter's debts—must be rejected based on a plain reading of that agreement.[173] The clear purpose of the Form Separation Agreement, once actually

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[170] *See Gourdine v. Karl Storz Endoscopy-America, Inc.*, 223 F. Supp. 3d 475, 496 (D.S.C. 2016) (refusing to impute liability to parent where "level of control" alleged was "not untypical of a normal parent-subsidiary relationship").

[171] *Nationwide Mut. Ins. Co.*, 424 S.C. at 269, 818 S.E.2d at 454 (acknowledging that South Carolina "corporate law generally favors the free transfer of assets and disfavors successor liability").

[172] *Nationwide Mut. Ins. Co.*, 424 S.C. at 263, 818 S.E.2d at 451; *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) (successor corporation which purchased part of predecessor's assets was not liable for lost shipment by predecessor, where successor did not assume liability for such debts and predecessor remained a live and going concern with substantial assets).

[173] *See* Motion, Ex. 91 (Form Separation Agreement).

signed by the parties, was to separate and spin off Colfax's "fabrication technology business" from its "specialty medical technology business" so that the businesses were under two different corporate *parents*.[174] It was not intended to be and did not constitute an agreement for the parent, ESAB, to suddenly become the guarantor of all of its subsidiaries' liabilities and debts. Nor did the Form Separation Agreement "memoralize[] ESAB's assumption of liabilities and provision of financial guarantees to its new Charter subsidiaries" as argued by the Receiver. Instead, the provision discussed by the Receiver demonstrates that the proposed parties to the Form Separation Agreement intended that the liabilities and assets of ESAB's subsidiaries would remain with those subsidiaries and, importantly, would not belong to any of Colfax's subsidiaries.

For that matter, a careful reading of the provisions in the Separation and Distribution Agreement makes it clear that a further written agreement was contemplated (and required under the law) to effectuate any assignment of liabilities, if a liability needed to be transferred.[175] In other words, if the parties "shall . . . cause" a party to take a particular action, by necessity the agreement obligating the parties to take an act cannot effectuate the act itself. The Form Separation Agreement, therefore, cannot constitute an assignment of any liabilities if the parties still needed to take a further action in order to "cause" the ESAB Group to be liable for the ESAB Liabilities. The Receiver's interpretation of the Form Separation Agreement further borders on the ridiculous as it would mean that every single subsidiary within the ESAB Group was automatically liable for each and every liability of all the other subsidiaries, without any further documentation or writing

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[174] *See* Excerpts from ESAB Corporation, Form 8-K, dated April 4, 2022, attached hereto as Exhibit AA, at Item 1.01 "Entry into a Material Definitive Agreement."

[175] *See* Motion, Ex. 91 ("the Parties ***shall***, to the extent necessary, ***cause***, and shall, to the extent necessary, cause the members of their respective Groups to cause . . . the ESAB Group to be liable for, to the extent it is not already liable for, all of the ESAB Liabilities") (emphasis added).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

required, by virtue of its parent subsequent execution of the Form Separation Agreement. No spin-off agreement has ever been interpreted in such an expansive and patently absurd manner.

Accordingly, even assuming the Court can rely on an unsigned Form Separation Agreement, the Receiver has still not brought forward any evidence that an agreement for ESAB to assume Charter's debts was ever entered into.

b. ESAB's spinoff did not amount to a consolidation or merger of ESAB and Charter.

There is simply no evidence to suggest that Colfax's spinoff of ESAB in 2022 amounted to a consolidation or merger of ESAB and Charter. To the contrary, the exhibits the Receiver cites explicitly demonstrate that ESAB and Charter are two different ongoing companies that are incorporated in different jurisdictions, file different financial statements, and have separate assets.[176]

c. ESAB is not a "mere continuation" of Charter.

The Receiver failed to meet its burden that ESAB is a "mere continuation" of Charter and, instead, has proffered evidence of the exact opposite. Charter holds its own investments,[177] has its own balance sheet of assets and liabilities,[178] and acts primarily as an "investment holding company."[179] ESAB, on the other hand, is a "global fabrication and specialty gas control technology company."[180] The Receiver has not—because he cannot—presented any evidence that

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[176] *See, e.g.*, Motion, Exs. 91, 92.

[177] *See, e.g.*, Motion, Ex. 92, at Cape_Receiver_00172504.

[178] *See, e.g.*, *id.*, at Cape_Receiver_00172497.

[179] *Id.*, at Cape_Receiver_00172489.

[180] *Id.*

ESAB is holding itself out as a continuation of Charter; that ESAB is manufacturing the same product line as Charter; that ESAB has retained Charter's managers, employees, or sales force; that ESAB is using Charter's equipment, suppliers, dealers, or customer lists; that ESAB is maintaining the normal business operations of Charter; or that ESAB's officers, directors, or shareholders are substantially the same as Charter's.[181]

d. ESAB's spinoff was not entered into for the purpose of wrongfully defeating Charter's creditors' claims.

Similarly, the Receiver has failed to adduce sufficient evidence to meet his burden to demonstrate that the 2022 spinoff was entered into for the purpose of wrongfully defeating Charter's creditors' claims. To meet this exception to successor liability, the Receiver must prove that the purported successor, ESAB, "knowingly participate[d] in a fraudulent asset transfer."[182] The Receiver, however, makes no effort to demonstrate that there were claims made against Charter at the time of the spin off or that the spinoff was done in a manner to that would wrongfully defeat Charter's creditors' claims. There is absolutely no evidence that a fraudulent asset transfer occurred, much less that anyone at ESAB "knowingly" participated in a fraudulent asset transfer. To the contrary, the evidence cited by the Receiver demonstrates that Charter is a "going concern" that has more assets than liabilities.[183]

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[181] *See Nationwide Mut. Ins. Co.*, 424 S.C. at 266, 818 S.E.2d at 452 (outlining factors used to determine if a successor is a "mere continuation" such that liabilities could be assessed against the alleged successor).

[182] *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008).

[183] *See, e.g.*, Motion, Ex. 92 at Cape_Receiver_00172497 (showing Charter has significantly more assets than creditors and/or liabilities).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Accordingly, the limited evidence submitted by the Receiver does not meet his burden to prove that ESAB is the successor-in-interest to Charter's liabilities. Certainly, at a minimum, there are substantial questions of material facts regarding whether the scant evidence presented by the Receiver demonstrates that ESAB is the successor-in-interest to Charter and, therefore, the Court must deny the Motion.

3. The Receiver has failed to demonstrate sufficient domination of ESAB over Charter to pierce the corporate veil or to find ESAB as the alter ego of Charter.

Notwithstanding the Motion's assertions to the contrary, the Receiver's purported "evidence" of domination and control over Charter by ESAB is woefully insufficient and, at a minimum, there are numerous questions of material fact requiring a denial of the Motion. There appears to be no dispute that ESAB is *not* the immediate parent of Charter.[184] Charter is instead owned directly by "Charter Limited," who Charter also lists as the "controlling party" in its financial statements.[185] Accordingly, the Receiver must first pierce the corporate veil between Charter and Charter Limited, and then pierce the corporate veil between ESAB and Charter Limited. Alternatively, the Receiver must first find that Charter Limited is the alter ego of Charter, before then finding that ESAB is the alter ego of Charter Limited.[186] Given the Receiver's complete

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[184] *See e.g.*, Ex. 92, Charter Consolidated Ltd. Report (2022), at Cape_Receiver_00172489 ("ESAB Corporation is the ultimate parent and not immediate parent company.").

[185] *See id.*, at Cape_Receiver_00172503.

[186] *See Alexander v. Bayerische Motoren Werke AG*, 2020 WL 2098108, at *6 (D.S.C. May 1, 2020) (rejecting argument that BMW AG was the alter ego of BMW Manufacturing Co., LLC because, as the head of a large group of entities, BMW AG "exerts complete control over its subsidiary entities" and, instead, finding that there was no proof that BMW Manufacturing Co., an indirect subsidiary with four intermediary entities, actually exercised control under an alter ego theory); *see also Hofferth v. Janssen Pharms., Inc.*, 3:17-cv-01560-MGL, 2020 WL 1536218, at *8-*9 (D.S.C. Mar. 31, 2020) (granting summary judgment for parent entity where plaintiff argued that parent entity "effectively control[led] all its subordinate corporate entities," including indirect

failure to even mention Charter Limited—outside of a single acknowledgement in footnote 220 that Charter Limited is Charter's "immediate parent"—the Court cannot find that the Receiver has met his burden of proof on this issue.

Even if the Court pretends Charter Limited does not exist—it should not—the Receiver still fails to meet its burden with respect to ESAB. Importantly, the Receiver fails to provide any evidence that ESAB ***actually exercised control*** over Charter in any manner, much less that ESAB had "total domination and control" over Charter such that Charter "manifest[ed] no separate interest of its own." Although the Receiver appears to acknowledge that South Carolina requires him to show control and to show a failure to observe corporate formalities,[187] the Receiver does not even attempt to discuss those factors in relation to ESAB and Charter.

For example, there is no evidence presented that shows (1) Charter was grossly undercapitalized; (2) since 2022, Charter failed to observe corporate formalities; (3) non-payment of dividends; (4) Charter is insolvent; (5) ESAB siphoned funds from Charter; (6) Charter's officers and directors are not functioning; (7) there are not Charter corporate records; and (8) Charter was merely a façade for the operations of ESAB. The scant evidence presented by the Receiver demonstrates that Charter has more assets than liabilities and is not operating as a façade for ESAB's operation.[188]

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subsidiary, as "[i]t is commonplace for companies to establish multiple corporate entities, who maintain individual corporate identity despite close collaboration between the different entities").

[187] *See* Motion, at pp. 61-62.

[188] *See* Motion, Ex. 92, at Cape_Receiver_00172490 (stating that "[n]o dividends will be distributed for the year ended 31 December 2022"), at Cape_Receiver_00172490 (showing positive net assets on balance sheet).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Indeed, the only "evidence" presented by the Receiver is that (a) Charter lists ESAB as the "ultimate parent and controlling party" in Charter's Report of the Directors and Audited Financial Statements; (b) ESAB wrote some sort of "comfort" or "support" letter stating ESAB's willingness to support Charter with respect to meeting Charter's liabilities through the end of this year; and (c) ESAB is participating in a "litigation avoidance scheme." None of these items are sufficient to meet the Receiver's burden of proof on this issue.

First, the Receiver misconstrues a legal reporting requirement, under United Kingdom's regulations, to disclose the "ultimate parent" and "controlling party" of a subsidiary[189] with whether that parent controls the subsidiary to such a degree and fashion that the subsidiary "manifests no separate interest of its own."[190] If such disclosures in financial statements were sufficient to demonstrate "total domination and control" over a subsidiary, that would virtually eliminate corporate separateness for any United Kingdom parent company because every United Kingdom company must disclose an "ultimate parent" and/or "controlling party."[191] Instead, what courts actually look at is not the mere theoretical possibility of control but whether "total domination and control" was actually asserted by one entity over another.[192] There has not been a

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[189] *See, e.g.*, FRS 102, attached hereto as Exhibit Z, at Section 33.5 (requiring an entity to "disclose the name of its parent and, if different, the ultimate controlling party. If neither the entity's parent nor the ultimate controlling party produces financial statements available for public use, the name of the next most senior parent that does so (if any) shall also be disclosed"); *Id.*, at Section 9 (requiring consolidated financial statements for any subsidiary controlled by the parent, but presuming control exists if the parent owns, directly or indirectly, more than half of the voting power of an entity).

[190] *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465.

[191] *See, e.g.*, Exhibit Z (FRS 102), at Sections 9 and 33.5.

[192] *See Oskin v*, 400 S.C. at 400, 735 S.E.2d at 465 (refusing to pierce corporate veil); *see also Toney*, 2020 WL 12744577, at *6 (explaining that "[e]ven if either defendant had the ability to control" partially owned entity, the plaintiff "would still be required to allege specific facts

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

single piece of evidence, however, demonstrating that ESAB has exercised any control whatsoever over Charter since it became a subsidiary of ESAB in 2022.

Second, the statement in Charter's financial statement that ESAB "will support the company to meet all liabilities for a period to 21 December 2024," which has not actually been included as an exhibit, supports the idea that ESAB and Charter are keeping the corporate identities separate.[193]

Finally, the Receiver's argument that ESAB in continuing a "litigation avoidance scheme" has no factual support and is, in fact, belied by what has happened in this very case. The Receiver essentially argues that because ESAB and Charter are contesting liability in this action instead of simply agreeing to liability, that this is a "continuation of a litigation avoidance scheme." However, under no interpretation of the words can vigorously defending legal rights in a litigation equate to "litigation avoidance."[194] For that matter, the Receiver fails to identify a single case, at any point in time, where ESAB or Charter participated in a "litigation avoidance scheme to deny U.S. claimants redress." To the contrary, the public record evidences case after case after case

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indicating [the defendants] actually exercised that power within South Carolina" in finding the defendants not subject to personal jurisdiction).

[193] *See, e.g., Garner v. Bumble Inc.*, 2023 WL 6065481, at *8 (N.D. Ill. Sept. 18, 2023) (holding that letters of support from a parent to subsidiaries did not "look like a use of funds that disregards the entities' separate identities, especially given that the various entities observe corporate formalities and do not control each other's operations").

[194] As the Receiver repeatedly points out, ESAB has filed multiple motions and appeals in this case seeking to defend its statutory and constitutional rights. *See Tibbs v. 3M Co., et al.*, 2023-002009 (appealing order denying motion to dismiss for lack of personal jurisdiction and to dissolve receivership); *Tibbs v. 3M Co., et al.*, 2024-001423 (appealing order denying motion for injunction); *Tibbs v. 3M Co., et al.*, 2024-001065 (appealing order granting motion for adverse inferences); *Tibbs v. 3M Co., et al.*, 2024-001446 (appealing order setting mode of trial); *Tibbs v. 3M Co., et al.*, 2024-001862 (appealing order entering scheduling order).

where Charter participated and was ultimately found not liable for any asbestos liability because they were not the alter ego of Cape.[195] Certainly, the Receiver cannot argue that any failure to appear by Cape after being served since 2021 can somehow be attributed to ESAB given that, since 2021, ESAB has absolutely no direct or indirect ownership interest in Cape.[196]

How can "ESAB's control over Charter" been exercised to continue a "litigation avoidance scheme" when there have been **no** claims asserted since ESAB was created where an entity owned by ESAB "avoided" litigation by failing to appear? Contesting liability, including insisting on statutory and constitutional rights, is simply not the same thing as a "litigation avoidance scheme." The Receiver may disagree with the positions ESAB and Charter have taken in litigation, but that does not mean ESAB and Charter are avoiding litigation. Indeed, even a cursory review of the docket in this action or in the five separate appeals by ESAB and Charter stemming from this action, demonstrably demonstrate that ESAB and Charter are actively and vigorously defending themselves in litigation.

Not only are there significant and substantial questions of fact remaining as to whether ESAB is the alter ego of Charter or whether the corporate veil can be pierced, the scant evidence the Receiver does refer grossly fails to meet the Receiver's burden to show his entitlement to relief as a matter of law. Furthermore, as discussed above, the Receiver has failed to show his entitlement as a matter of law that Charter is the alter ego of Cape, or even that Cape is the alter ego of NAAC. The Receiver's failure to meet his burden, as well as the numerous questions of material facts discussed herein, require a denial of the Motion.

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[195] *See* Section III.C.

[196] To be clear, the Receiver in fact fails to identifies any cases since 2021 where Cape failed to appear after being served.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

F. The Motion is Procedurally Improper and Premature.

Although styled as a summary judgment motion, the Motion is a wolf dressed in sheep's clothing, in effect seeking sanctions against the Charter Third-Party Defendants equivalent to striking the pleadings and entering default judgment in the Receiver's favor. The Motion would have the Court decide *now* – while multiple appeals are pending and the discovery cutoff is several months away – that the Third-Party Defendants can never identify a genuine issue of fact or rebut any adverse inferences in this case.[197] Depriving the Charter Third-Party Defendants at this interim juncture of the opportunity to mount any defense, assert any evidentiary challenges, or rebut any of the inferences in the 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, filed May 23, 2024 (the "Adverse Inference Order"), (in opposition to the Motion or otherwise) is no different than striking their answers and holding them in default. Rule 56, SCRCP does not provide for such draconian punishment, nor is such a drastic finding supported by the Court's orders to date or the procedural status of this case.

Certainly, the Adverse Inference Order (which is the subject of a pending appeal) makes clear that its "find[ing of] certain adverse inferences to be warranted…against the Altrad and Charter Third-Party Defendants on facts and matters underlying the Receiver's claims,"[198] should *not* be construed as preventing the Charter Third-Party Defendants from challenging those inferences. In so holding, the Adverse Inference Order cites to *Kershaw Cnty. Bd. Of Educ. v. U.S.*

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[197] *See* Motion, at pp. 51-52 (arguing that the Charter Third-Party Defendants should be deemed to "have failed to adduce any evidence to contest their liability, much less evidence sufficient to create a genuine issue of material fact or otherwise rebut the record evidence (or the adverse inferences made by this Court in its May 23 Order).").

[198] *See* Adverse Inference Order, p. 15.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), which specifically provides that a party against whom an adverse inference is drawn is nevertheless permitted to "explain the circumstances" and "mount a defense."[199] Following *Kershaw*, the Adverse Inference Order makes clear that "the[] rebuttable inferences are subject to evidentiary challenge by these parties in these proceedings" and are only "an intermediate form of relief, which stops short of more severe sanctions, such as striking [the Charter Third-Party Defendants'] pleadings or holding them in default," cautioning the Receiver from interpreting the Adverse Inference Order "as tantamount thereto."[200] Accordingly, contrary to the Motion's characterizations, the Adverse Inference Order does not pave the way to now take action equivalent to striking the Charter Third Party Defendants' pleadings or holding them in default.

Nor is such action warranted. Numerous matters that affect the entire action, such as the mode of trial and the validity of the Receiver's appointment and his authority to act,[201] are at various stages of appeal. Unless and until these appeals have been remitted, Rule 205, SCACR vests the appellate court with exclusive jurisdiction, rendering further activities in this Court – including the Motion – improper. Additionally, the Charter Third-Party Defendants' abstention from active participation during the pendency of the appeals is not an act of rebellion or petulance deserving of punitive measures as the Motion incorrectly suggests; rather, it is good-faith adherence to and invocation of the South Carolina Appellate Court Rules.

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[199] *See id.*

[200] *See* Adverse Inference Order, p. 16.

[201] In addition to the challenges to the Receiver's appointment and authority asserted in the South Carolina courts, Cape itself is challenging the propriety of the receivership in an action filed in the High Court of Justice, Business and Property Courts, of England and Wales. *See Cape Interm. Holdings. Ltd., et al. v. Protopapas* [2024] EWHC 2999 (ch), [134]—[137] (Eng.).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Even if Rule 205, SCACR did not apply, the *Tibbs* third party action is far from over, with multiple events impacting the Motion still in flux. First, the Receiver has moved for leave to amend its third-party complaint to plead a separate claim for purported "amalgamation," rendering the instant Motion, seeking summary judgment on its "various successorship or veil piercing theories," seemingly prematurely inclusive of the proposed, not-yet-live amalgamation claim. Additionally, pursuant to the Court's October 2, 2024 Scheduling Order (which itself has been appealed), discovery continues until January 3, 2025, further rendering the Motion and the relief sought by the Receiver premature – a fact underscored by the Court's dispositive motion deadline set *after* the close of discovery.[202]

Furthermore, the exhibits, deposition excerpts, and expert reports upon which the Motion depends are still subject to evidentiary challenges by the Charter Third-Party Defendants. The October 2, 2024 Scheduling Order provides that motions relating to the admissibility of evidence are not due until January 6, 2025; deposition page/line designations, counter designations, and objections are to be submitted between January 10, 2025 and January 22, 2025; and motions in limine (which would include challenges to experts) are not due until January 27, 2025.[203]

Moreover, simply because certain of the materials accompanying the Motion have been "pre-admitted" in connection with the Court's May 23, 2024 Order Granting the Receiver for Cape plc's Motion to Pre-Admit Exhibits ("Pre-Admission Order") does not mean that they are admitted wholesale and immune from any evidentiary challenges whatsoever. Even if the Pre-Admission

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[202] *See* October 2, 2024 Scheduling Order, ¶¶ 1-2 (setting fact and expert discovery deadlines of January 3, 2025); ¶ 3 (setting a dispositive motion deadline of January 6, 2025).

[203] *See* October 2, 2024 Scheduling Order, ¶¶ 3, 5-6.

Order is deemed valid (which it may not be, as it is the subject of a pending appeal, its effect is to authenticate and *pre*-admit the items on the Receiver's trial list.

While authentication is a prerequisite to admissibility, it does not equate to admissibility.[204] Even if proffered evidence has been authenticated, and even if "pre-admitted," the trial court as gatekeeper must still make a final determination as to admissibility. Such a determination includes analyses and objections as to relevance, prejudicial effect, risk of confusion, waste of time, and hearsay.[205]

The Motion is further procedurally improper because alter ego and veil piercing liability[206] – the issues on which the Receiver seeks summary judgment – are remedies, not causes of action, and thus are not the proper subject of a dispositive motion. Accordingly, as the ruling requested

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[204] *See* S.C.R. Evid. 901.

[205] *See* S.C.R. Evid. 401 (determining relevance via an analysis of whether evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); S.C.R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); S.C.R. Evid. 801 *et seq.* (hearsay).

[206] "Although often used interchangeably, the terms "alter ego" and "piercing the corporate veil" are not one and the same. Whereas "alter ego" describes a theory of procedural relief, "piercing the corporate veil" refers to the relief itself. *See* 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (per. ed., rev. vol. 2006) In other words, "[t]he alter ego doctrine is merely a means of piercing the corporate veil." 18 C.J.S. Corporations § 23 (2008); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

by the Receiver is not tied to any liability asserted by Cape in the Third-Party Complaint, the Court does not have jurisdiction to provide what is essentially an advisory opinion.[207]

Moreover, the Receiver, standing in the shoes of Cape, is attempting to "self-pierce" Cape's veil in an apparent misunderstanding of or disregard to his duties as a receiver. South Carolina mandates that a receiver must be absolutely fair and impartial, for the receiver not only represents all parties interested, but also is an officer of the court.[208] This renders the Receiver's actions with respect to the Third-Party Complaint additionally improper, as there would never be an appropriate reason for a company to seek to pierce its own veil, especially in a case like this where there are no alleged creditors of Cape (and therefore no actual liability) because the underlying action brought by the *Tibbs* plaintiffs has been dismissed.

Instead, the Receiver appears to be attempting to generate liability by alleging that Cape – the very entity whose interests the Receiver is supposed to protect as a fiduciary – intentionally injured millions of people, and then using those self-allegations of liability to attempt to collect from entities like the Charter Third-Party Defendants. This is a breach of the Receiver's duty to be fair and impartial and provides additional grounds for denial of the Motion.

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[207] "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Richland Cty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 862 S.E.2d 920 (2021) (citing *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975)).

[208] *Penn. Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787 (1934) ("This Court not only has often said that an adjudication of a receivership is a harsh and drastic remedy, one to be granted only with great caution, but it has also, time after time, indicated that the receiver appointed should be untrammelled in his relations, entirely indifferent between the parties, and absolutely fair and impartial, for the receiver not only represents all the parties interested in the estate, but he is an officer of the Court.") (internal citations omitted); *Wrenn v. Wrenn*, 228 S.C. 588, 91 S.E.2d 267 (1956) ("The court erred in the exercise of its discretion. A competent, disinterested and impartial person, or persons, should [have been] appointed receiver...") cited with approval by *Campbell v. Campbell*, 367 S.C. 209, 625 S.E.2d 233 (Ct. App. 2006).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Finally, the Motion is also procedurally improper because it is barred by equitable defenses. In litigation, a receiver stands in the shoes of the corporation in receivership and is subject to equitable defenses. In *Myatt v. RHBT Fin. Corp.,* 370 S.C. 391, 635 S.E.2d 545 (Ct. App. 2006), the South Carolina Court of Appeals held that a party sued by a receiver could assert the defense of *in pari delicto* against the receiver of a corporation that engaged in past wrongdoing.[209] The *Myatt* court specifically relied on the reasoning of the Seventh Circuit Court of Appeals case of *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230 (7th Cir. 2003), which found that "the receiver can only sue in the right of the corporation, and that he is subject to all of the equities which would have been available against it. The receiver of a corporation is bound precisely as it is bound and occupies the relation to the stockholders that the corporation itself, if waging the suit in its own person, would occupy."[210] Relying on *Knauer*, the *Myatt* court held that "in the absence of a fraudulent conveyance case, the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud" and affirmed the trial court's application of the doctrine of *in pari delicto* in granting a third-party defendant's summary judgment motion on those grounds.[211]

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[209] *Myatt*, 370 S.C. 391, 635 S.E.2d 545.

[210] *Knauer,* 348 F.3d at 236.

[211] *Myatt*, 370 S.C. at 397.

IV. CONCLUSION

For the reasons stated above, the Charter Third-Party Defendants respectfully request that the court deny the Motion.

Dated: November 22, 2024

GORDON REES SCULLY MANSUKHANI, LLP

BY: */s/ A. Victor Raw, Jr.*

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Counsel for Third-Party Defendant Charter Consolidated Ltd. and ESAB Corporation

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Exhibit A

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
John A. Tibbs and Margaret B. Tibbs,)	Civil Action No. 2023-CP-40-01759
)	
Plaintiffs,)	
)	
vs.)	
)	
3M Company, *et al.*,)	
)	NOTICE OF JUDGMENT AND ORDER
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,)	
)	
vs.)	
)	
Anglo American PLC, *et al.*,)	
)	
Third-Party Defendants.)	
)	

Please take notice of the attached Judgment and Order of the High Court of Justice, in the Business and Property Courts of England and Wales, issued today in *Cape Intermediate Holdings Limited v. Protopapas* [2024] EWHC 2999. The Court's Judgment finds, among other things, that the basis on which the receivership appointment was made is "flatly contrary to the findings of the courts in *Adams v. Cape*" (Judgment ¶ 90); the Receiver's conduct is "positively damaging to the interests of CIHL" (*id.* ¶ 115(c)); the Receiver is committing the tort of "impostor" because he "is purporting to act as an agent of CIHL without authority recognized in English law" (*id.* ¶ 112.); and therefore the Court enjoins "the receiver, even in South Carolina, from acting or purporting to act for or on behalf of CIHL" (*id.* ¶ 136).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

In light of the extensive reasoning in the judgment, the Court therefore declared as follows:

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.

(Order at 2.) Based on these declarations, the Court ordered as follows:

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.

(*Id.* at 3.)

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

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November 22, 2024

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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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)

…….

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

having to be settled in a narrow timeframe.

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

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

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

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

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

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

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

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

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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)

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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."

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

(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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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)

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

The receivership application and proceedings

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

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

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

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

And then seeks the appointment of Mr Protopapas as receiver.

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

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

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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."

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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".

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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*.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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*

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

[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*:

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

(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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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:

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> ”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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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:

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> "(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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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,

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

> 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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

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

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

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

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

The position of Cape Jersey

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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;

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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).

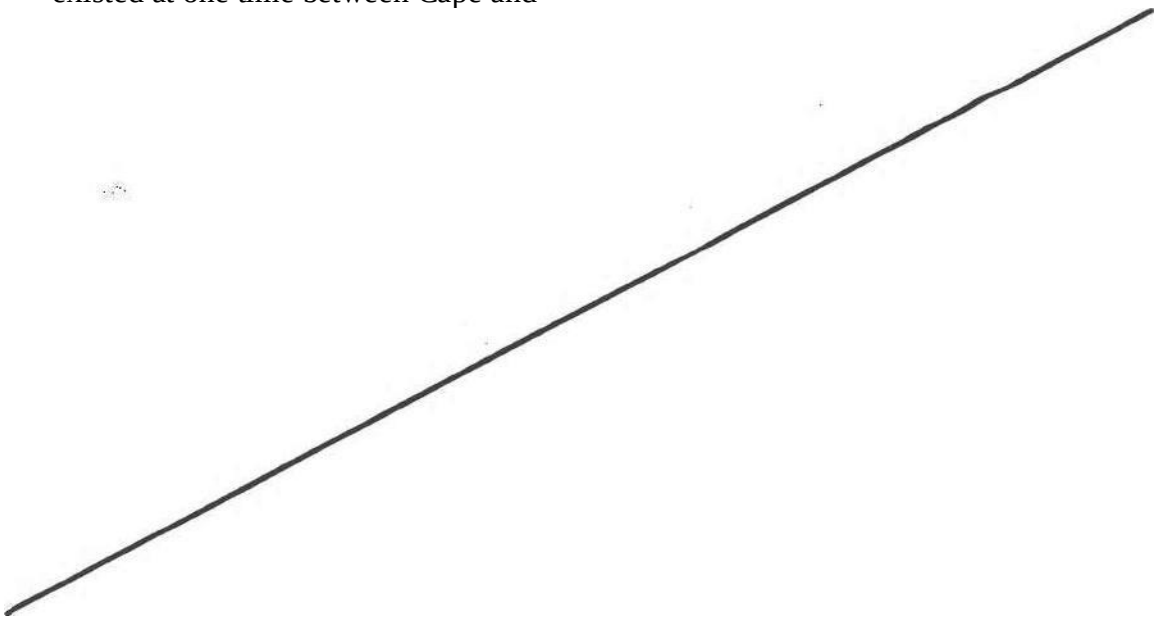
17. Directorships: prior to 11th July 1975 the Board of Directors of NAAC included two senior officers of Cape. Until 1974 Mr. Dent, Chief Executive of Cape, was Chairman of NAAC. In 1975, Mr. Higham succeeded Mr. Dent in both positions. The Other Cape director of NAAC was Dr. Gaze, Chief Scientist of 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).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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



ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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).

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Exhibit B

3217792

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CLARENCE CRAIG and DUVEEN A. CRAIG,	)	Civil Action 82-0321
Plaintiffs,	)	Philadelphia, Pa. October 16, 1986 1:30 p.m.
v.	)	
LAKE ASBESTOS OF QUEBEC, LTD, ET AL.,	)	
v.	)	
CHARTER CONSOLIDATED P.L.C., ET AL.,	)	
Defendants.	)	

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ANTHONY J. SCIRICA

TRANSCRIPT ORDERED BY: LESLIE A. HAYES, ESQUIRE

APPEARANCES:

For the Plaintiffs: EDWARD W. MADEIRA, JR., ESQUIRE
RICHARD W. FOLTZ, JR., ESQUIRE
123 S. Broad Street
Philadelphia, Pa. 19103

For the Defendants: WERNER L. POLAK, ESQUIRE
MARY ANN JACOBY, ESQUIRE
JOSEPH W. HAGGERTY, ESQUIRE
53 Wall Street
New York, New York 10005
For Defendant Charter

Audio Operator: Carole Conroy

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ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095521

INDEX

WITNESS FOR THE DEFENDANT:	DIRECT	CROSS	REDIRECT
Anthony Evelyn Hepper	3	18	
Geoffrey Willoughby	41	51	79

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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(Call to Order of the Court)

THE COURT: Good afternoon. Be seated please. Mr. Polak?

MR. POLAK: Your Honor, Charter calls as its next witness Anthony Hepper.

ANTHONY EVELYN HEPPER, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please state your name and spell your last name.

MR. HEPPER: My name is Anthony, with an H, Evelyn Hepper, H-E-P-P-E-R.

DIRECT EXAMINATION

BY MR. POLAK:

Q. Mr. Hepper, where do you reside?

A. I reside at 70 Eaton Place, London SW1.

Q. And what is your employment at the present time?

A. At the present time, I am a director of four companies, and I'm involved with two others. Two of the companies are public companies. They are Cape Industries, PLC, and Foreign Colonial Pacific Investment Trust, PLC. The two private companies are High Sales Limited and Lamont & Partners Limited, and I'm a chairman of the two private companies.

Q. Are you an executive or a non-executive director of these companies?

A. I'm a non-executive director of all of them.

Q. How long have you been a member of the board of Cape?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

A. I was appointed to the board of Cape in July, 1968.
Q. Have you been a non-executive of Cape throughout that time?
A. Yes.
Q. What positions did you hold while you were a non-executive director of Cape? In other words, what other positions have you held since 1968?
A. At the time I was appointed to the Cape board, I was chairman of Upper Clyde Ship Builders, and in '72 I became chairman of Henry Sykes, PLC, and in '82 I became chairman of Richardon's Westgarth, PLC.
Q. What were your functions at Upper Clyde Ship Builders Limited?
A. Upper Clyde Ship Builders Limited was formed by the merger of the five companies on the Upper Clyde. They were merged at Government instigation and Government money. I was asked to carry out the merger, and having done so, was asked to take over as chairman. It was a large group of companies employing directly some 14,000 people and indirectly about the same number again. During the time I was there, we delivered a number of ships. Probably the best known ship was the QE2. We also delivered Antrim which faught in the Falklands war. We delivered two survey ships to the U.S. Navy. We delivered a passenger ship to a Fred Olsen Lines, and a number of other ships of lesser importance.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. What were your functions at Henry Sykes Limited?
A. Henry Sykes Limited was the merger of two companies, Lacy Herbert and Sykes Pumps. They were basically a company which manufactured, sold and hired or rented pumps in the U.K. and worldwide. They had some 30 depots in the U.K. and they had overseas companies in the Arabian Gulf, in the United States and Australia, in Belgium and in France.
Q. What were your functions at Richardson's Westgarth, PLC?
A. That was an engineering company consisting of some 18 companies. I was a non-executive chairman.
Q. What is your professional training?
A. I'm a chartered engineer and I'm a fellow of Institution of Mechanical Engineers.
Q. Could you tell us now how you prepare for board meetings at Cape?
A. Yes. I receive the agenda, usually about three days before the board meeting, and I study all the papers carefully and consider any points that I might wish to raise at the Board meeting.
Q. By the way, what is your remuneration from Cape?
A. When I was first appointed, my remuneration was 1,000 pounds a year. It was raised in 1975 to 2,250 pounds a year, and a few years after that to 4,500 pounds a year, and it was raised at the moment to 6,000 pounds.
Q. How often does the board meet throughout your time?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENGAD CO., BAYONNE, N.J. 07002 - FORM 2006

A. The board had regular meetins about 11 times a year, and one or two extra meetings for special purposes.
Q. And how long did the board meetings usually last at Cape?
A. The board meetings normally started at eleven in the morning and finished at lunchtime.
Q. Did you attend most of the board meetings at Cape?
A. Yes, I attended most of them.
Q. Are you aware of a company called Charter Consolidated, PLC?
A. Yes, I am. They're the parent company of Cape.
Q. And the balance of the -- how much shares do they own, do you know?
A. Sixty-seven point three percent.
Q. And the balance?
A. That balance is publicly held.
Q. Are you aware of the number of shareholders, other than Charter?
A. Yes. The last time I looked there were in excess of 2,600 shareholders.
Q. Were you aware that Charter had nominee directors on the board of Cape at the time that you joined Cape?
A. Yes.
Q. And how long -- and how many nominee directors did Charter have when you joined Cape?
A. Two.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Q. Did the number of Charter's nominees to the Cape board change?
A. Yes. Shortly after they acquired the extra shares, there was a third man appointed.
Q. When you refer to the extra shares, would that be tender offer for a majority of the shares of Cape?
A. That's correct.
Q. Can you place that in terms of time?
A. Nineteen sixty-nine.
Q. What do you recall about that tender offer?
A. When the offer was made, Mr. Dent, who was the chairman at that time, called a meeting of the directors and explained the offer being received. He was not in favor of it, didn't like the idea of becoming a Charter subsidiary. He said that he had reviewed the offer with the company's auditors, who were Peat Marwick. Peat Marwick had said that the offer was fair and indeed generous, and there was really very little that could be done. Mr. Dent said that Charter had said that the Cape management would remain independent, and indeed would form the spearhead of the Chartered industrial empire to be built up.
Q. Did Cape management ever become the spearhead of Charter's industrial?
A. No, that didn't happen.
Q. Do you recall the names of the nominee directors of

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Charter on the board of Cape before the 1969 tender offer?
A. Mr. Pollen was one, and I don't recall the other.
Q. Could you describe the participation of the nominee directors before 1969?
A. Yes. There was very little participation. They took notes. Their attendance record wasn't all that good either.
Q. To your knowledge, did the Charter nominee control the board meetings?
A. No.
Q. Who did?
A. Mr. Dent.
Q. Who prepared the agenda for the meetings?
A. The secretary and Mr. Dent.
Q. To your knowledge did the Charter nominee directors make any management or business decisions on behalf of Cape?
A. No.
THE COURT: Excuse me. What is the time period we're talking about here?
MR. POLAK: I'm talking before '69.
THE COURT: All right.
Q. We'll get to that. How would you describe the participation of the nominee directors on the board of Cape after the 1969 tender offer?
A. The participation was very little. They attended, not all that frequently. They took notes. The only contribution

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

they made was of a financial nature. They as well stated -- gave the impression that they were quite satisfied with the way which the Cape management was running the company.

Q. To your knowledge, after the tender offer, did the Charter nominee directors make any management or business decisions on behalf of Cape?

A. No.

Q. Who ran the board meetings after the tender offer?

A. Mr. Dent.

Q. Did you have any discussions with Mr. Dent about his views regarding Charter after the tender offer?

A. Yes, I did.

Q. When was that?

A. Just shortly after the offer was accepted.

Q. And what was that discussion?

A. Mr. Dent said that he perceived it as his role to keep Charter at arm's length and to keep Cape independent.

Q. After the tender offer, have you ever become aware of any effort by Charter to manage the business affairs of Cape?

A. No, never.

Q. How many times are dividends declared by Cape?

A. Twice a year.

Q. And on what basis are the dividends determined?

A. On the basis of the availability of cash, of the earnings cover, and of future prospects.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. And who proposed the dividend?
A. Dividend was proposed by the Cape management.
Q. To your knowledge did the Charter nominees ever oppose management's proposed dividends?
A. No, I don't recall that happening.
Q. Could you now, if you would, just give us a description of how the board meetings proceeded at Cape?
A. The Cape board was of a supervisory character, and it's role was one of monitoring progress. In order to do that, we received at board meetings reports from the executive directors. We received a financial report from the financial director covering the balance sheet, balance sheet ratios. We received a report from the executive directors in charge of their divisions covering the trading activities of those divisions. We received a personnel report. We received a report of capital expenditure and other matters of an administrative nature, such as the use of the seal.
Q. If something came up before the board which required approval, how did that proceed?
A. It was very rarely an occasion arose when Mr. Dent was not able to obtain a concensus. In the event of him not being able to do so, the matter was normally postponed for further discussion, but we never voted at a board meeting.
Q. Do you recall that any Charter nominee ever objected to a proposal by Cape management?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

A. No, never.
Q. Did the Cape board ever make a decision about the pricing and marketing of asbestos mined in South Africa?
A. No, we never became involved in the marketing operations.
Q. Did the Cape board make decisions about salaries of employees of Cape or other personnel decisions such as promotions?
A. No. There was a board committee who were charged with responsibility of making decisions with regard to executive directors' remuneration.
Q. Did the Cape board generally get involved with any operational matters, at all?
A. No, practically not.
Q. Was Cape financially independent?
A. Yes.
Q. To your knowledge did Charter ever loan money to Cape?
A. No.
Q. To your knowledge did Charter ever guarantee a bank loan to Cape?
A. No.
Q. Did there come a time when Mr. Dent relinquished one of his two jobs? I understand he was both a managing director and a chairman in 19 -- pre-1971; is that correct?
A. Yes. In 19 -- the end of 1970, we were told that Mr. Spiro, who had suggested that Mr. Dent should divide the two

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENGAD CO. BAYONNE, N.J. 07002 - FORM 1894

offices of chairman and managing director, and that Mr. Dent should continue as chairman. Mr. Dent told me that the two candidates for the appointment of managing director were a Mr. Parkes and Mr. Higham. And we subsequently had a meeting at Charter, which was attended by all the non-executive directors, where Mr. Dent made the recommendation that Mr. Higham should be appointed, and that was agreed by all of us and there was very little discussion.

Q. Were you ever employed by Charter?

A. No, never.

Q. Are any of the companies with which you have been involved in any way associated with Charter?

A. No, not in any way.

Q. Did there come a time when you learned of asbestos litigation in the United States involving Cape?

A. Yes. That was about 1973.

Q. And how did you learn about that?

A. It was reported to us at a board meeting at the time when the annual report and accounts were being prepared.

Q. And what did you learn?

A. We were told that Cape and others, and subsidiaries of Cape, were being sued in Texas, and that counselor's advice at that time was that we should strenuously resist these actions. We were told that we were being sued by the employees of our employers, and we were -- it was explained

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

to us that in the United States, employees could not sue their employer and therefore they were suing the supplier, which was us. We felt this to be very unfair because it would not be the case in the United Kingdom where we have a responsibility for our own employees, and we were in no position to monitor or control the activities of our customers.

Q. Were you given updates at these annual meetings of the litigation?

A. Yes. The matter came up annually when we were finalizing the report and accounts.

Q. Did there come a time when you were told that this litigation was being settled?

A. Yes, I did.

Q. And when was that and how did you learn?

A. That was the end of '77.

Q. And what did you learn?

A. We were told that a settlement had been reached, that the company was not insured, and that it was going to cost us approximately a million dollars.

Q. Who told you that?

A. We were told by Mr. Dent.

Q. Did you have any discussion about future litigation in the United States?

A. Yes. We were told that management had taken advice of counsel, Mr. Fox Andrews, and he had advised us that we

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095533

should not appear in any future U.S. litigation.
Q. Do you recall anything mentioned by an Charter nominee with respect to either the Texas litigation or the decision not to appear in future litigation?
A. No, not specifically.
Q. Do you recall whether a Charter nominee instigated the idea that Cape should not appear in the United States?
A. No. It was put forward by management on the advice of counsel.
Q. Did you ever have any further discussions on this topic?
A. Yes. I had a discussion outside the board meeting with Mr. Dent to satisfy myself that we were in fact getting the best advice, and that Mr. Fox Andrews was a man who was well versed in this kind of litigation and that the advice he gave us was the best we could get, and that we should follow it. Mr. Dent told me that he had been into this matter very deeply and that he was satisfied it was the right advice and satisfied it was the right course of action for Cape to take.
Q. What, if anything, were you told about the continued sale of asbestos fiber into the United States?
A. It was my understanding at that time that Cape would not in future sell asbestos in the United States.
Q. Were you aware of claims by employees in the U.K. against Cape?
A. Yes.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. And what does Cape do with respect to employee claims in the U.K.?
A. Cape settles those claims in the U.K. We are now paying in addition -- in excess of one million pounds a year in claims, and we expect to continue paying that amount for many years to come.
Q. Did there come a time when you learned that -- well, did there come a time when you learned of a company called North American Asbestos Corporation?
A. Yes.
Q. And what did you know about that company?
A. It was a company based in Chicago, Illinois, whose function was to sell asbestos fibers produced in the mines in South Africa.
Q. Did there come a time when you learned that North American Asbestos Corporation would be wound up?
A. Yes. It was reported to the board shortly after the decision not to appear in U.S. litigation.
Q. And what did you learn about the dissolution?
A. It was just simply reported to the board as part of a reorganization.
Q. Was there any discussion about that item?
A. Very little.
Q. To your knowledge did either Charter of any of its nominees on the board of Cape have anything to do with the

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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winding up of NAAC?
A. Not as far as I'm aware.
Q. Have you ever heard of Associated Minerals Corporation?
A. No.
Q. Have you ever heard of Continental Products Corporation?
A. No.
Q. Have you ever heard of Jerry Morgan?
A. No.
Q. Have you ever heard of Howard Tanner?
A. No.
Q. Have you ever heard of Max Meyer?
A. No.
Q. Did you ever hear that either Associated Minerals Corporation or Continental Products Corporation was going to sell Cape fiber in the United States after NAAC was dissolved?
A. No.
Q. Was anything along these lines ever discussed at the board meeting at Cape?
A. No, not in my presence.
Q. Did there come a time when you learned that Cape's mining subsidiaries were going to be sold?
A. Yes.
Q. How did you learn that and when?
A. About the middle of the '70s, management reported that the political climate in South Africa looked a little uncertain,

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENLAND CO. BAYONNE, N.J. 07002 - FORM 2004

that we had very substantial assets in that country, that the world demand for asbestos was declining, that we were not using asbestos in the mines in our factories in the U.K., and that it would be advisable to do something about these assets. We considered various options, and the management were asked to look into it and make proposals, either for selling the lot or for a partner or for the selling of a minority. Eventually in 1979 we were told by Mr. Higham that there was a deal for selling the mines to TCL.

Q. Did there come a time when you became aware that Cape was going to indemnify TCL in connection with this sale?

A. Yes. We were shown a summary of the sales document and told that TCL required a warranty as part of the sale deal and wouldn't do it without.

Q. Now, from your perspective as a board member of Cape since 1968, would describe the relationship between Charter and Cape during that time as you saw it?

A. Yes. The characteristics of the two companies were very different. Cape was an old established industrial business involved in mining, manufacturing and marketing products, whereas Charter was a recently established finance house with various investments unrelated to each other. It followed that the Cape executives were industrialists and the Charter executives were financially-oriented people. The two did not blend well together, and indeed in some cases the

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

personalities did not blend well together. The outcome of this was that the two businesses were managed quite independently.

MR. POLAK: No further questions, Your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. MADEIRA:

Q. Mr. Hepper, you were employed by Cape from 1953 to '57, I believe?

A. That is correct.

Q. And we met last week, did we not, in Mr. Polak's office where I had the pleasure of taking your deposition?

A. Yes.

Q. And I believe that this is your first involvement with the so-called litigation?

A. That is correct.

Q. Sir, I -- and correct me if I'm wrong, I get the impression from your testimony from Mr. Polak that certainly before '69, the two Cape representatives -- excuse me -- two Charter representatives on the Cape board were irregular in their attendance at the board meetings as you recall, and rarely said anything at such meetings; is that a fair statement?

A. Yes. It was only about one year, of course, this period.

Q. And that was the year in which Mr. Pollen, the Cape -- one of the Charter directors served on the Cape executive

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

committee as I recall it?
A. I believe he did.
Q. And then after the takeover or the acquisition of the majority shares, there was an additional Cape -- I get them mixed up; excuse me -- Charter director ...
A. Yes.
Q. ... appointed to the Cape board?
A. Yes.
Q. So there were a total of five outside directors on the Cape board?
A. That's correct.
Q. Three Charter representatives and yourself and Mr. Caine?
A. Right.
Q. Okay. And yourself and Mr. Caine remained on the Cape board up until -- at least until 1980?
A. Yes, absolutely.
Q. And at all times during that period, 1970 to 1980, there were three Charter outside directors and two non-Charter outside directors?
A. I don't think the -- I think at one short period there were only two Charter directors.
Q. But for the most part, there were three ...
A. For the most part, there were three.
Q. ... and two?
A. Correct.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Q. So you and Mr. Caine were the minority of outside directors on the board?
A. Yes.
Q. And as I understand it from our talk last week, you are here because the chairman of Charter asked whether you would cooperate and at least talk to Mr. Polak?
A. That's correct.
Q. And as a result of Mr. Polak's persuasion, you are here to ...
A. I'm here today.
Q. ... tell us about the relationship? Do you know, to your knowledge, whether Mr. Caine has been asked to appear in the litigation?
A. I have no knowledge of that.
Q. Now, during the period of time when the three and two relationship occurred, after the takeover, do I again understand that the attendance of the Charter directors was irregular?
A. Yes, it was.
Q. Sometimes one of them, sometimes two of them, rarely three of them?
A. Well, sometimes there were three, yes.
Q. And I also get the impression from your testimony and from the prior testimony here today that it was rare, if at all, that a Charter director said anything at these meetings?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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A. They said very little.
Q. And to the extent they said anything, it had to do with finances?
A. The contributions mainly in the financial field, yes.
Q. Who had Mr. Spiro been, sir?
A. I'm sorry?
Q. Mr. Spiro?
A. Yes.
Q. What had his role been? You mentioned him earlier.
A. He was on the board in the early '70s. He was a deputy chairman.
Q. Executive ...
A. He was a deputy chairman.
Q. Of Cape?
A. Of Cape. He was an executive of Charter.
Q. And did you attend the luncheon meeting in, I believe, 1971 at Charter with Mr. Caine and some Charter folks and Mr. Dent to discuss whether Mr. Higham or Mr. Parks was going to succeed Mr. Dent as the director?
A. Yes, I did. It was actually at the end of 1970.
Q. And I take it from the testimony that everybody seemed to be in agreement with Mr. Dent's recommendation that Mr. Higham take on that role?
A. That's correct.
Q. Do you recall the Charter people at that meeting saying

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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anything?
A. Not specifically.
Q. They served the lunch?
A. Yes. It was a good lunch.
Q. They sound like an agreeable bunch to me, sir. Going to your statement that as of 1973 in your capacity as a Cape director, the American asbestos litigation involving Cape first came to your attention, and as I recall your testimony, you said that at that point the thought was that this was basically unfair to Cape? Is that a ...
A. Yes.
Q. As of '73?
A. Yes.
Q. And it was unfair to Cape because under the U.K. system -- legal system, basically employers took care of their employees, and in the United States, for whatever reason, suits against the suppliers were allowed and the employers stood on the sidelines; is that a fair statement?
A. Yes.
Q. The annual reports for that period of time, 1973, the Cape annual report says that these actions are being strenuously contested and in the opinion of the company's American legal advisors, the amounts claimed are highly speculative and conjectural, and have no basis in law or in fact. That's, I believe, the statement said. That information was

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

reported to the board of directors?
A. Yes. Yes, it was.
Q. And is it a fair statement that while the board felt that the litigation was itself unfair to Cape that nevertheless it was your conclusion that the litigation insofar as Cape's liability was concerned had no basis in law or in fact?
A. That was the legal advice which we had.
Q. Advice which was taken and accepted?
A. Yes.
Q. And the decision, continue to contest the actions?
A. Yes.
Q. In 1974, the note reads that in the opinion of the company's American legal advisors, the amounts claimed are highly speculative and conjectural, and "have only a tenuous basis in law or in fact," that the actions were being strenuously contested. Do you recall picking up on the change in the language from the year before where it was reported they had no basis in law or in fact to the statement of a tenuous basis in law or in fact?
A. No, I don't recall -- I don't recall this difference.
Q. But was it a fair statement that your interpretation of the advice received by the company was that these claims were defensible?
A. At that time, yes.
Q. And similarly, into '75 and '76, there would be an annual

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

discussion and the -- your thought as a board member that although unfair, they were defensible?

A. That's -- yes. We reviewed it each year and that was the situation.

Q. Now, sir, coming to 1977, and I believe by now you're familiar with the excerpts from the minutes of the November '77 board meeting, which are before you, you attended that meeting?

A. Yes, I did.

Q. And we had a full house of Charter directors at that meeting?

A. Yes.

Q. Unusual?

A. A bit unusual, yes.

Q. Now, looking back insofar it's difficult to remember matters that happened yesterday, let alone nine years ago, do recall any Charter representative on the board saying anything at that minute -- at that meeting?

A. No, I don't recall the Charter representatives saying anything, or Charter directors saying anything.

Q. Had you been advised prior to that meeting as to the subject matters which are included in minutes 7A, 7B or 9?

A. Really just before the meeting when I was making myself aware of what we were coming to discuss.

Q. And who would have made you aware of what you were going

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENGAD CO BAYONNE N.J. 07002 - FORM 2004

to discuss?
A. Mr. Dent.
Q. What did he tell you?
A. He told me what the situation was, that we had settled, and that the legal advice was that in the future we should not appear in any future U.S. litigation.
Q. Did he say why?
A. He said that the legal situation had changed.
Q. Did he say now?
A. It's to do with the jurisdiction of the United States, I understand, but I don't know the technicality of it, but we were told that the advice from Fox Andrews has now changed, and that was what he was now advising us.
Q. Were you told that the company had received advice that the claims were not defensible?
A. We were told that they would not be -- the claims in the United States.
Q. Sir.
A. We were told that we should not appear in future litigations.
Q. Now, at that time, that's apparently the item that is included in 7B of the minutes. Now, you were told this by Mr. Dent informally before the meeting?
A. Yes, and it was reported to the board at the meeting.
Q. And who made the report at the meeting?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENLAB CO BAYONNE N.J. 07002 - FORM 2004

A. Mr. Dent, and Mr. Higham together.
Q. I believe the minute reads ...
A. Mr. Higham -- Mr. Dent and Mr. Higham together.
Q. Okay. But the minute reflects that the managing director made this report?
A. Yes. It was a report from management.
Q. Now, do you recall a general discussion of that?
A. No. There was really very little discussion of that.
Q. Did anybody ask whether such action was in the best interest of the shareholders?
A. I don't -- at a board meeting, one would naturally be endeavoring to act in the best interests of the shareholders, so I don't suppose that would arise.
Q. Excuse me. At the board ...
A. It didn't -- at a board meeting we would be expected to be acting in the best interests of the shareholders. I don't recall anyone specifically raising that point.
Q. Well, that's of somewhat of a curious item to have discussed at the board meeting in the first place; is it not?
A. It was reported to the board.
Q. Well, are you suggesting that by the silence that that was acting in the best interest of the board meeting?
A. I think the board was satisifed that the action which management had taken and which management were proposing in the future was in the best interests of the shareholders and

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PINCAD CO BAYONNE N.J. 07002 - FORM 2004

nothing -- there was no further discussion.
Q. What was your understanding as to why it was in the best interests of the shareholders?
A. I don't think the company were in a -- the company felt that they were not responsible for other people's employees. They were responsible for employees in the United Kingdom and they were adopting a responsible attitude in that regard. They were not in a position financially to withstand claims the size that were being mounted in the United States.
Q. And I understand, drawing your attention to the minute numbered number 9, that while there was some intervening item of business regarding Cookson, that included in the discussion at that board meeting was a reorganization of the marketing of asbestos?
A. Yes, it was reported to the board.
Q. And it was reported to the board that this North American Asbestos was about to be wound up? You have to say yes or no.
A. Yes, it was.
Q. And that I gather from your answer to Mr. Polak's question it was your understanding that Cape would not continue to sell asbestos fiber in the United States?
A. That's correct. That was my understanding.
Q. What was the basis of that understanding?
A. I don't recall specifically being told, but certainly I went away from that board meeting understanding that, and

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PINCUS CO BAYONNE NJ 07002 - FORM 2004

that was my understanding ever since.
Q. Had Cape management been implementing a plan for a substitute method of marketing Cape asbestos in the United States at that time, would you have expected that to have been reported to the board in connection with either item 7A, 7B or 9?
A. I don't think we would expect it to be reported to the board any investigations that management were doing. We would only expect to be reported to us if it came out as a report item or a proposal. I was not aware of any explorations going on to that -- of that nature.
Q. I believe it was your reaction at that time at the November 1st meeting that while the pulling out of the United States was good for all of the stockholders, that you regretted the loss of the American market?
A. Well, we had to face up to the fact that we had -- we could no longer trade in the United States, yes.
Q. And that that was a good and profitable market for Cape -- had been a good and profitable market for Cape asbestos and Cape industrial products?
A. As far as the sales of fiber are concerned, it had been in the earlier days, but becoming increasingly less sale at that stage.
Q. Have you since that time come to the conclusion that that decision reported to the board and apparently approved by the

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENROD LD BAYONNE, N.J. 07002 - FORM 2054

board was in the best interests of the Cape shareholders?
A. It seemed to me to be a perfectly natural decision to make in the light of the decision not to go on selling in the United States. If we're not selling, there's no need to have a company.
Q. If as we will introduce evidence there was a plan of foot to continue promptly selling and to do almost business as usual, would that have been pertinent to your decision at that board meeting?
A. Well, I have absolutely no knowledge of anything of that kind. I think had there been, if the management felt it was relevant, it would have been reported to the board, but it certainly wasn't.
Q. Well, I would suggest, sir, that what is relevant for board consideration may be in the mind of the board member, not the one that reports to the board; would you agree with that?
A. Yes. I think if we had had any suspicion, we might have asked a question.
Q. And you would have -- who was the management to whom you would look for a full disclosure on matters of that kind at that time?
A. Well, the management was headed up by Mr. Higham at that time, and if he had thought it was appropriate that we should know, I think he would have told us.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. Would you think it was appropriate from your standpoint as a board member in making that decision to know what the plans were with regard to the continuation of marketing of South African asbestos in the United States?
A. Well, I was not aware there was any plan to continue marketing asbestos in the United States.
Q. Let me suggest to you, sir, that there was.
A. Well ...
Q. Accepting my suggestion, would you consider that information was pertinent to your decision reached at that board meeting?
A. Well, I was not aware of any such plan. Had I been, I think I would have wished to review the things. I might have taken a different attitude. I don't know. It's a speculative ...
Q. Now, sir, I ask you to assume that there will be evidence produced in this proceeding that there was a clear and present intention of Cape management to form through the vehicle of a Lichtenstein Corporation to be named Associated Minerals which company would in turn create a company in Chicago called Continental Products Company, and that Continental Products Company would utilize for the most part the same personnel that had previously run NAAC, and that they would send out notices within two months of that meeting in effect that asbestos is available, business as usual. I ask you to

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

assume those facts, sir. Assuming those facts, and assuming that that was the plan of Cape management as of November 1st, 1977, would you have considered that information material to your decision?

A. I think it's very difficult to say. It's a long time ago. We certainly didn't have that information. I didn't know anything about that. If I had known about it, I'm not quite sure my attitude would have been. I certainly would have had to think very carefully about it.

Q. What would you have thought about?

A. I think one would have looked at the morality of such a move. But it wasn't raised and I didn't have to consider it. I didn't -- I was totally unaware of this plan.

Q. That has never been called to your attention since that day?

A. No.

Q. We were provided yesterday with certain recent correspondence between Charter and Cape, that has been identified as C-377, 378, 379, 380 and 381.

A. Oh, yes.

Q. I hand you copies thereof. Have you ever seen copies of such correspondence?

A. Yes, I have.

Q. When would you have had occasion to see copies of such correspondence?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

PENGAD CO BAYONNE N.J. 07002 FORM 2894

A. At the time this letter was sent to Cape, which was December '85, and we ...
Q. What -- excuse me; go ahead.
A. And we replied in January '86.
Q. And received a further response from Mr. Clarke shortly thereafter?
A. We received a further letter from Mr. Clarke, asking us if full weight had been given to all the factors, especially the inevitable restrictions on trading, yes. And we replied to that.
Q. Now, what -- how did the first letter come to your attention, Mr. Clarke's first letter?
A. We were told at a board meeting of Cape that this letter had been received and that it should be considered by the board, excluding the Charter -- two Charter directors. It was therefore considered by the remaining four directors, of which I was one.
Q. And are there minutes of that meeting? The minutes of the meeting that would have been held to deal with the matter raised in Mr. Clarke's letter.
A. I expect there were minutes. I don't specifically recall the minute, it was certainly discussed by the other directors and that reply was sent.
Q. And what transpired at that meeting?
A. I'm sorry?

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. What was the discussion at that meeting?
A. The discussion was really whether in fact the situation had changed in any way, and we came to the conclusion that it was not changed in any way and the answer really stemmed from the fact that the plaintiffs were not employees of Cape and that was a point that was underlined in the letter. The rest of the reply was very much in line with our previous thinking. So there was no fundamental change in our estimate.
Q. Well, the response to -- I don't have the number in front of me, but the -- Cape's response to Mr. Clarke's letter is -- what exhibit number?
MR. POLAK: Three seventy-eight.
Q. Three seventy-eight. Now, do the views in the 370 -- expressed in 378 represent your views as a Cape director?
A. I subscribed to this as a Cape director, yes.
Q. Now, is it a fair statement that that letter suggests that the Cape board doesn't like this aspect of the American legal system?
A. I think that would be fair to say that, yes.
Q. Was the receipt of the letter in December of 1985 from Mr. Clarke that you have before you the first time since November 1st, 1977 that anybody had suggested a review of the policies established on November 1st, '77, with regard to taking default judgments?
A. Yes, I don't recall anything happening between the two.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. Well, there were reports of mammoth default judgments being taken?
A. Yes. They were reported annually in the report and accounts.
Q. And when you got a report at a board meeting of a 58 million dollar default judgment being taken against you in Illinois or wherever, nobody said are you sure we're right? Or did they just say let's tough it out? Or didn't they say anything?
A. I think the board members were satisfied that we were right. I don't remember anyone specifically raising this. It came up with the annual report and accounts each year, and it was incorporated in the accounts.
Q. Was there any discussion as to whether or not American claimants would come to the U.K. and start suits against Cape in the U.K.?
A. There has been -- yes, there has been reference to that.
Q. And what was the attitude? You mean if that happens, that happens, or what was the reaction to that possibility?
A. It was thought that the claim would not be enforcible in the U.K.
Q. So, it was the thought, and correct me if I'm wrong, of the Cape board that while under the American system in the states where Cape had sold its asbestos and presumably profited, the legal system allowed suits against Cape by

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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employees of Cape's customers?
A. Yes.
Q. That nevertheless there was no obligation to defend those cases in the United States because under U.K. law, you would not have any liability?
A. Yes.
Q. And so therefore it was Cape's view that the claimants would go without remedy?
A. I think we must also remember that Cape had a clear responsibility to pay the claims of the U.K. claimants and would not put themselves in a position where they were financially impossible to do so.
Q. I take it from your answer that you felt some prior obligation to your Cape employees who might have claims for industrial compensation?
A. We felt we had a much greater responsibility to our own employees and no responsibilities to other people's employees.
Q. So that in order to honor the -- this priority, it was the Cape view that the American claimants would go without remedy?
A. We didn't feel we had the same responsibility to other people's customers -- to employees of our customers, as we did to our own employees.
Q. I do not -- I do not want to fence with you, Mr. Hepper, but was it the Cape view ...

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Q. ... that the American claimants would go without remedy?
A. We didn't feel responsible.
(Pause)
MR. POLAK: C-98.
MR. MADEIRA: C-98, sir.
(Pause)
Q. Have you had occasion to see a copy of the document that we have identified as C-98 before today?
A. No, I've never seen this before, no.
Q. Well, take a moment, if you will, to read it.
A. Yes.
Q. Now, sir, amosite and chrocidilite asbestos fiber, was that of a kind that had been marketed by the Cape group?
A. Yes, it was.
Q. C.G. Morgan, would that name -- I gather he's one of the fellows you never heard of from Mr. Polak?
A. I've never heard of him I'm afraid.
Q. Let me suggest to you that he had been the president of NAAC for many years.
A. Yes.
Q. And Continental Products you never heard of?
A. I've never heard of Continental Products, no.
Q. Now, sir, this was a notice that was sent out to all the prior customers of North American Asbestos in January of 1978, which would be two months after the decision to take

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

default judgments. Now I ask you to assume that they are selling Cape group asbestos through this company. Was that the kind of information you feel you should have known as a board member in connection with that decision taken on November 1st or any time thereafter?

A. I think unless it was thought by management to have some particular significance, I don't think I would have expected this to be reported to the board. The board didn't take any part of marketing activities. They were, as I mentioned earlier, a monitoring supervisory board. I wouldn't have expected to have been told about this. And certainly I didn't know anything about it.

MR. MADEIRA: That's all I have. Thank you, sir.

THE COURT: Any further questions, Mr. Polak?

MR. POLAK: No, Your Honor.

THE COURT: Excuse me, Mr. Hepper.

MR. HEPPER: I'm sorry.

MR. POLAK: No.

THE COURT: Thank you, Mr. Hepper.

MR. HEPPER: All right. Sorry.

THE COURT: We give the -- we give your lawyer another opportunity to ask you questions. He declined the opportunity, so you are free to go.

MR. HEPPER: I'm sorry, Your Honor.

THE COURT: Thank you.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

MR. POLAK: Thank you. (Pause). Your Honor, our next witness will be Mr. Geoffrey Willoughby.

THE COURT: Very good. Let's take a short recess at this time.

MR. POLAK: Of course, Your Honor.

MR. MADEIRA: Before we get started with him, when we come back if we could have a brief offer of proof at sidebar, both of us could probably best handle what we are going to ...

MR. POLAK: Oh, sure. We'd be happy to.

THE COURT: Very good. Would you like to do it now?

MR. MADEIRA: Well, sure.

MR. POLAK: What our expert's going ...

MR. MADEIRA: Yeah. I'm not -- I just would like to hear, I guess almost again, exactly what this proposed witness is going to cover?

MR. POLAK: We're going to try to bifurcate the testimony. First ...

MR. MADEIRA: Who is it?

MR. POLAK: Geoffrey Willoughby is a solicitor, and we have, as you know, been charged that somehow or another we have controlled the Cape board through the nominee directors. Mr. Willoughby is a solicitor from Herbert Smith, and he will identify what the law is with respect to the obligations of a charter director, a majority holder on the

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

board of Cape. And so he will simply give you that view, that is, the English view of what the obligation was. Secondly, he is going to testify with respect to the Charter/Cape alter ego issue, but he won't do that today because he could only do that after he has understood all of the testimony and has heard everything, so that will wait until the end of the day. Mr. Higham, unfortunately, didn't come into till very late tonight, so he will testify tomorrrow morning, and then Mr. Willoughby will take the stand, and with your permission, simply testify under English law in the event that we can persuade you that English law applies, and we have one case that says if you're looking at a Charter-Cape situation, where you have two English companies, that in fact you ought to look at English law to determine what the alter ego situation is. And so Mr. Willoughby will then conclude based upon the testimony that he has heard whether or not Charter would be considered the alter ego under English law. But that won't come until after all the testimony is in.

MR. MADEIRA: I bet his conclusion is that it isn't.

MR. POLAK: I'm sorry?

MR. MADEIRA: I bet his conclusion is that it isn't.

MR. POLAK: Well, wait a minute. Now, wait a minute.

MR. POLAK: You're not sure of it.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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MR. POLAK: I don't want to anticipate.

VOICE: Okay.

MR. POLAK: So today's testimony will be simply the -- as he views it, the responsibility of the Charter directors on the Cape board. I got a little flak from Judge Shapiro on that when she said she didn't understand English law on that point. So I said all right. Next time around I will bring an English solicitor. So we have -- his testimony will not be long.

THE COURT: Fine. So is he your last witness for today or do you have ...

MR. POLAK: Yes.

THE COURT: Oh, all right.

MR. POLAK: He will be, and we have only literally Mr. Higham tomorrow and then ...

THE COURT: He could be fairly lengthy though.

MR. POLAK: Yes, I would ...

THE COURT: All the testimony ...

MR. POLAK: We were just suggesting if we could persuade you to even start at 9:00, it would be terrific, but if we couldn't, 9:30 would be fine. I don't know ...

THE COURT: Let me see if I can. I've got a sentencing scheduled for 9:00 I think, but I may be able to postpone it. I'd rather move ahead with this. I'll let you know.

MR. POLAK: Thank you very much, Your Honor.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986 in the United States District Court, Eastern District of Pennsylvania.

Appearing for the plaintiffs was Edward W. Madeira. Appearing for the defendants was Warner L. Polak, for defendant Charter.

Page	Summary
3	Direct Examination of Mr. Hepper by Mr. Polak.
	Witness is director of four companies and is involved with two others. These include Cape Industries, PLC; Foreign Colonial Pacific Investment Trust, PLC; Higs Sales Limited; and Lamont & Partners Limited. Cape Industries and Foreign Colonial are public companies, whereas Higs Sales and Lamont are private companies. Witness is chairman of the two private companies. He is a non-executive director of all of them.
4	Witness was first appointed to the Board of Cape in July 1968. He has been a non-executive of Cape since that time. At the time he was appointed to the Cape Board, witness was chairman of the Upper Clyde Shipbuilders. In 1972, he became chairman of Henry Sykes, PLC. In 1982, he became chairman of Richardson's West Garth, PLC.
	Upper Clyde Shipbuilders Limited was formed by the merger of five shipbuilding companies, under government initiation and with government funding. Witness carried out the merger and subsequently was asked to take over the new company as chairman.
5	Henry Sykes Limited was formed by the merger of two companies which sold, hired, or rented pumps in the U.K. and worldwide.
	Richardson's West Garth, PLC was an engineering company consisting of some 18 companies. Witness was a non-executive chairman of Richardson's West Garth.
	Witness' professional training is as an engineer.
6	The Board of Directors of Cape had regular meetings about 11 times a year and one or two extra meetings a year for special purposes. Witness attended most of the Cape Board meetings.
	Witness is aware of Charter Consolidated, PLC as the parent company of Cape. Charter owns 67.3% of the shares

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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Page Summary

in Cape. The remainder of the shares are publicly held. This includes some 2,600 shareholders.

Witness is aware that Charter had nominee directors on the Board of Cape at the time that he joined Cape. Charter had two directors on the Cape Board when witness joined the company.

7 In 1969, Charter acquired the majority shares of Cape, and was given an extra man on the Board of Directors, raising the number of Charter members on the Cape Board to three.

Witness says that Mr. Dent, chairman of Cape at the time, was not in favor of Charter's offer, but after consulting with the company's auditors, was persuaded that the offer was fair and generous, and that Cape had little choice other than to accept it.

8 Mr. Pollen was one of the Charter nominees on the Cape Board before the 1969 offer. The Charter nominees on the Cape Board did not participate very much in the Board meetings before 1969. They could not be described as controlling the Board meetings. Rather, Mr. Dent controlled the meetings and his secretary prepared the agendas for them. The Charter nominee directors did not make any management or business decisions on behalf of Cape. Also after 1969, the Charter nominees on the Cape Board participated little in meetings.

9 The Charter nominees gave the impression that they were satisfied with the way Cape management was running the company. After the tender offer, the Charter nominee directors did not make any management or business decisions on behalf of Cape. Mr. Dent still ran the Board meetings. Witness says that Mr. Dent told him shortly after Charter's offer was accepted that Dent would try to keep Charter at arm's length and keep Cape independent. Witness says he has not become aware of any effort by Charter to manage the business affairs of Cape since the tender offer.

Dividends are declared twice a year by Cape, on the basis of availability of cash, earnings cover, and future prospects.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095562

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER, continued
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986

Page	Summary
10	Dividend was proposed by Cape management. Witness does not recall that Charter nominees ever opposed management's proposed dividends.
	Witness describes the function of the Cape Board of Directors as primarily supervisory, or a role of "monitoring progress". This was done by reviewing reports from the various directors, covering the divisions of the company or the aspects of its operation they were in charge of.
	Witness says that only "very rarely" was there an occasion when Mr. Dent was not able to obtain a consensus at a Board meeting.
11	Witness does not recall that any Charter nominee ever objected to a proposal by Cape management.
	The Cape Board never became involved in marketing operations. Thus, it did not make any decisions about the pricing and marketing of asbestos mined in South Africa. Nor did the Board make any decisions about salaries of Cape employees or promotions. Nor did the Board get involved in any operational matters.
	Cape was financially independent. To witness' knowledge, Charter never loaned money to Cape. Nor did Charter ever guarantee a bank loan to Cape.
	At the end of 1970, Mr. Dent relinquished his position as managing director, but continued as chairman.
12	Mr. Higham was appointed to replace Dent as chairman.
	Witness was never employed by Charter.
	Witness first learned of U.S. asbestos litigation involving Cape around 1973. He learned about the litigation at a Board meeting. At the meeting, the directors were advised that Cape and some of its subsidiaries were being sued in Texas, and that the company should "strenuously resist" the lawsuits.
13	The Board was given updates at its annual meetings on the litigation. Around the end of 1977, witness learned that

Page	Summary
	the litigation was being settled. The Board was told that because the company was not insured, the settlement would cost it about $1 million. The Board was also told that on the advice of counsel, Mr. Fox Andrews, management had decided that Cape should not appear in any future U.S. litigation.
14	Witness does not specifically recall any comments by a Charter nominee on the Cape Board with respect to the Texas litigation. Witness says that the decision that Cape should not appear in U.S. litigation was not instigated by a Charter nominee. It was witness' understanding at the time that Cape would no longer sell asbestos in the U.S. Witness was aware of claims by employees in the U.K. against Cape.
15	The U.K. claims have been settled. Cape is now paying in excess of one million pounds a year for these claims, and these payments are expected to continue. Witness was aware of North American Asbestos Corporation (NAAC) as a company based in Chicago, Illinois that sold asbestos fibers produced in South Africa. Shortly after the decision not to appear in U.S. litigation was made, it was reported to the Board that NAAC would be shut down. Witness says there was very little discussion about the dissolution of NAAC and that it was reported to the Board as simply part of a reorganization.
16	Witness says he is not aware of any Charter nominees on the Cape Board having anything to do with the dissolution of NAAC. Witness claims he has never heard of Associated Minerals Corporation, Continental Products Corporation, Gerry Morgan, Howard Tanner, or Max Meyer. He never heard that Associated Minerals Corporation or Continental Products Corporation would sell Cape fiber in the U.S. after NAAC was dissolved. He claims nothing along these lines was ever discussed at a Cape Board meeting. Witness learned in the mid-1970s that Cape management was planning to sell its mining subsidiaries in South Africa.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095564

SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER, continued
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986

Page	Summary
17	The motivation for this decision was the uncertain political climate in South Africa, the declining demand worldwide for asbestos, and the fact that asbestos from the South African mines was not used in Cape's factories in the U.K. In 1979, Cape decided to sell the mining subsidiaries to TCL. The Board was told that TCL required a warranty as part of the deal, and thus Cape agreed to indemnify TCL.
	Witness describes Cape as "an old established industrial business involved in mining, manufacturing and marketing products." Charter, on the other hand, was a "recently established finance house with various investments unrelated to each other." Witness claims that because the Charter management were basically financial people and the Cape management were basically industrialists, that management from the two companies did not interact very well,
18	and thus the two businesses were "managed quite independently."
	Cross-Examination of Mr. Hepper by Mr. Madeira.
	Witness was employed by Cape from 1953 to 1957.
19	After Charter acquired the majority of Cape shares, there were a total of five outside directors on the Cape Board. These included three Charter representatives, the witness, and Mr. Caine. Mr. Caine remained on the Cape Board until at least 1980.
20	After the takeover of Cape by Charter, during the time when there were three Charter directors on the Cape Board and two other outside directors, the attendance of the Charter directors at the Cape Board meetings was irregular.
21	The Charter nominees said little at the Board meetings, and most of what they did say had to do with finances.
	Mr. Spiro was on the Cape Board in the early 1970s, and was a deputy chairman of Cape. Spiro was also an executive of Charter.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095565

SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER, continued
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986

Page	Summary
	Witness attended a luncheon meeting at 1971 at Charter, at which Charter management and Mr. Dent discussed who would replace Mr. Dent as the managing director of Cape. Witness says that everybody at the the luncheon seemed to agree with Dent's recommendation that Higham replace Dent as managing director.
22	Witness does not recall any specific comments of the Charter people at the luncheon.
23	Legal advice given to Cape was that there was no basis in law or in fact to establish Cape's liability in the U.S. litigation. This advice was accepted, and thus the actions were contested.
24	As late as 1974 and 1975, the Cape Board was still advised that the U.S. lawsuits were defensible, and it accepted this advice.
	Witness attended the November 1977 Cape Board meeting at which all the Charter directors on the Cape Board were present. Witness does not recall any comments of Charter nominees on the Cape Board at that meeting.
25	Witness was told before this Board meeting, by Mr. Dent, that Cape had settled the U.S. litigation and that it was advised by its legal counselors not to appear in any future U.S. litigation.
26	Witness says there was very little discussion of the advice that in future Cape should not contest any U.S. litigation.
27	Included in the discussion at the Board meeting was a reorganization of the marketing of asbestos. This included a report that NAAC would be dissolved. Witness says that he concluded from what was said at this Board meeting that Cape would no longer sell asbestos fiber in the U.S., and continues to have this belief.
29	Witness says that if the Board had had any suspicion that Cape planned to continue selling fiber in the U.S., it would have questioned management about this. However, he says that if Mr. Higham, who was managing director, had thought it appropriate that the Board should know of this plan, he would have told the Board about it.

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER, continued
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986

Page	Summary
31	Witness says he was "totally unaware" of Cape's plan to sell fiber in the U.S. through a new arrangement, and that this plan has never been called to his attention. Witness is shown copies of correspondence between Charter and Cape, identified as C-377, 378, 379, 380, and 381. Witness has seen copies of this correspondence before.
32	Witness saw the correspondence in December of 1985 and January of 1986. This was the time when the letters were prepared. The first letter came to witness' attention at a Cape Board meeting at which the Board was told about the letter and told it should be considered by the Board members, excluding the two Charter directors.
33	The receipt of the letter in December of 1985 from Mr. Clarke was the first time since November 1, 1977 that a review of the policies established at the Board meeting on that date was suggested (i.e., the policies with regard to taking default judgments). The decision of the Board was that the policy not to appear in the American litigation should be continued, because, according to the witness, Cape felt it was not responsible because the plaintiffs were not Cape employees.
34	During the time between the November 1977 meeting and the 1985 letter from Mr. Clarke, there were reports of huge default judgments against Cape. However, this did not change the Board's mind in regard to the policy of not appearing in the American litigation. There was some discussion about American claimants going to the U.K. to bring suits against Cape there. However, the Board's belief was that such claims would not be enforceable in the U.K.
36	Witness is shown document identified as C-98. He has never seen this document before. The Cape Group marketed amosite and crocidolite fiber.
37	Witness claims to have no knowledge of a notice sent out to prior customers of NAAC two months after the 1978 decision not to appear in the American litigation. Witness says that because the primary function of the

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

Cape_Receiver_00095567

SUMMARY OF TRIAL TESTIMONY OF ANTHONY EVELYN HEPPER, continued
Craig v. Lake Asbestos of Quebec
Taken October 16, 1986

Page	Summary
	Board of Directors was monitoring and supervising, marketing matters would not have necessarily been brought to its attention.

END OF SUMMARY OF TRIAL TESTIMONY

ELECTRONICALLY FILED - 2024 Nov 22 11:49 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759