

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

CAUSE NO. 430/92

BETWEEN:	Mayer Diamond Interim Receiver/Manager of 160088 Canada Inc. 151095 Canada Inc. and 152931 Canada Inc.	PLAINTIFF
-----------------	--------------------------------------------------------------------------------------------------------------------	------------------

AND:	Socoa International	RESPONDENT
-------------	---------------------	-------------------

For the Plaintiff: Mr. John P. Telfer, instructed by Ritch & Conolly
For the Respondent: Mr. Alan Turner

BEFORE: HARRE CJ

REASONS FOR ORDER

On 3rd May 1994 I made Orders which included the following -

- "1. That Mr. Mayer Diamond (of 345 Victoria Avenue, Suite 400, WestMount, Quebec, Canada) having previously been recognised by order of this Court dated 1st December 1992 as the Interim Receiver/Manager of 160088 Canada Inc., 151095 Canada Inc. And 152931 Canada Inc., be now recognised as the Receiver/Manager of 160088 Canada Inc., 151095 Canada Inc. And 152931 Canada Inc. pursuant to the Order of the Superior Court of the Province of Quebec dated 22nd December 1993.
- 2. That Mr. Mayer Diamond do have all the powers conferred upon him by the final judgment of the Honourable Mr. Justice Roland Tremblay J.S.C. in the Quebec Superior Court of the Province of Quebec in Cause No. 500-05-000930-907 dated 22nd December 1993, a copy of which Judgment is exhibited to the Affidavit of John Parr Telfer sworn on 22nd February 1994."

I shall hereafter refer to the Canadian companies there mentioned as "the three Canadian companies."

1 Those Orders were sought by the Plaintiffs' summons dated 2nd March 1994. There
2 was a third prayer in that summons. It was this -

3
4 "3. That the Register of Socoa International Limited be rectified
5 pursuant to Section 45 of the Companies Law (Revised) and/or
6 the inherent jurisdiction of the Court to record the registration
7 of the transfers of shares in Socoa International Limited from
8 Gaston Pinat, Yvette LeLay Pinat, Pierre Pinat, Philippe Pinat
9 and Frank Pinat to Mr. Mayer Diamond in compliance with and
10 pursuant to the Orders given in Judgment of the Honourable
11 Mr. Justice Roland Tremblay in the Superior Court of the
12 Province of Quebec in Cause No. 500-05-00930-907 dated
13 22nd December 1993."

14
15 The hearing of that part of the summons was adjourned and I found in favour of the
16 defendant. Unfortunately no written reasons were delivered. I am asked to provide
17 them now as the matter is still ongoing. Indeed, a judgment was given on 19th
18 September 1997 by Smellie J (as he then was) in which summary judgment was given
19 in favour of 160088 Canada Inc in respect in the sum of the award in its favour given
20 by the Superior Court of the Province of Quebec, Canada on 22nd December 1993.

21

22 My decision on the prayer that the register of the first defendant ("Socoa") be rectified
23 turned on different issues from those which were considered and determined by
24 Smellie J. However, his judgment not only sets out the background of this case, but
25 also deals with the jurisdiction of the Quebec Court over Socoa and the recognition of
26 its judgment. I respectfully agree with the conclusions of Smellie J in respect of those
27 matters.

28

1 The following is that part of the order made by Mr. Justice Roland Tremblay which
2 relates to the appointment of the plaintiff as receiver-manager and sole director of the
3 three Canadian companies and to the shares of Socoa -

4 “The Court appoints Meyer Diamond, Trustee in bankruptcy
5 residing in the City of Montreal, as receiver-manager and sole
6 director of each of Defendants 160088 Canada Inc., 151095
7 Canada Inc. and 152931 Canada Inc. in order to assure that the
8 amounts to be received by Defendant 160088 Canada Inc. pursuant
9 to this judgment rendered in its favour is paid to it and distributed
10 according to law;

11
12 Orders Defendants Gaston Pinat, Yvette Lelay Pinat, Pierre Pinat,
13 Philippe Pinat and Frank Pinat to assign and remit to Mr. Meyer
14 Diamond any and all shares which they hold in Socoa International
15 or which they control directly or indirectly, the whole within a delay
16 of ten (10) days from the date of this judgment and to sign the form
17 annexed to the present judgment;

18
19 In the event that these Defendants fail to respect this order, the present
20 judgment will avail instead of their signatures and will effect the
21 transfer of their shares as designated above;

22
23 Orders same Defendants to also sign the proxy forms annexed to this
24 judgment permitting and authorizing Mr. Meyer Diamond to act in the
25 place and stead of Defendants Gaston Pinat, Yvette Lelay Pinat, Pierre
26 Pinat, Philippe Pinat and Frank Pinat in their capacity as shareholders
27 and directors of Socoa International;

28
29 To remit to Mr. Meyer Diamond within a delay of ten (10) days from
30 the date of this judgment, all assets, books, registers, and
31 correspondence of Socoa International and to remit to Mr. Meyer
32 Diamond a detailed statement of account of their administration of the
33 affairs of Socoa International since its incorporation;

34
35 Defendants Gaston Pinat, Yvette Lelay Pinat, Pierre Pinat, Philippe
36 Pinat, Frank Pinat and Jean-Guy St-Georges are hereby ordered to
37 refrain, directly or indirectly from:

- 38
39 a) convoking, attending or participating in any meeting of the
40 shareholders or directors of Socoa International, whether
41 personally or by proxy;
- 42
43 b) exercising any rights, prerogatives or privileges in their capacity
44 as shareholders or directors of Socoa International;
- 45

- 1 c) withdrawing, disposing or transferring any funds whatsoever
2 in any bank accounts of Socoa International or disposing or
3 transacting in any way with the shares of Socoa International
4 or giving instructions to any person to such effect;
5
- 6 d) transferring or disposing of any right to hold or control the
7 shares of Socoa International in favour of any person other than
8 Meyer Diamond;
9
- 10 e) communicating in any way with whomsoever who may be in
11 possession of or may control directly or indirectly any asset of
12 Socoa International including, without limitation, the bankers of
13 Socoa International, or to give instructions to any person to do so;
14
- 15 f) contesting any demand or petition which may be made by Meyer
16 Diamond in the Cayman Islands with respect to Socoa International,
17 including, without limitation, any request for possession of the assets
18 or their repatriation to the Province of Quebec or to exercise any right
19 or privilege which these Defendants may have as directors,
20 shareholders, officers or representatives of Socoa;”
21

22 The statutory jurisdiction of the Grand Court with regard to rectification of the
23 register of members rests on S. 45 of the Companies Law which reads as follows -

24

25 “45. If the name of any person is, without sufficient cause,
26 entered in or omitted from the register of members of any
27 company, or if default is made or unnecessary delay takes
28 place in entering on the register the fact of any person having
29 ceased to be a member of the company, the person or member
30 aggrieved or any member of the company or the company itself
31 may, by motion to the Court, apply for an order that the register
32 be rectified; and the Court may either refuse such application
33 with or without costs to be paid by the applicant or it may, if
34 satisfied of the justice of the case, make an order for the
35 rectification of the register, and may direct the company to pay
36 all the costs of such motion, application or petition, and any
37 damages the party aggrieved may have sustained. The Court
38 may, in any proceeding under this section, decide any question
39 relating to the title of any person who is a party to such
40 proceeding to have his name entered in or omitted from the
41 register, whether such question arises between two or more
42 members or alleged members, or between any members or
43 alleged members and the company, and generally, the Court
44 may, in any such proceeding, decide any question that it may
45 be necessary or expedient to decide for the rectification of the

1 register:

2 Provided that the Court may direct an issue to be tried, on which
3 any question of law may be raised.”

4
5
6 S. 47 provides that the register of members shall be prima facie evidence of any
7 matters by the Companies Law directed or authorised to be inserted therein.

8
9 Transfer of shares was at the material time dealt with in S. 32 of the Companies Law,
10 (Revised) subsection (1) of which, as amended by Law 23 of 1993 is this -

11
12 “A share or other interest of a member in a company -

13 (a) is personal estate and not in the nature of real estate.

14 (b) is capable of being transferred if -

15
16
17 (i) a transfer is expressly or impliedly permitted by the
18 regulations of the company; and

19
20 (ii) any restriction or condition on the transfer of the
21 shares or interest set out in the regulations is observed.”

22
23 None of the shares which are the subject of this application are bearer shares. Their

24 ownership is recorded in a register about which I shall have more to say. They are

25 fully paid. In respect of shares other than bearer shares, Article 17 of Sococa provide

26 that the instrument of transfer of any share shall be executed by or on behalf of the

27 transferor and if so required by the Directors shall be executed on behalf of the

28 transferee and the transferor shall be deemed to remain a holder of the share until the

29 name of the transferee is entered in the Register of Members in respect thereof.

30
31 Gaston Pinat was alleged in the Quebec proceedings to be the prime mover in relation

32 to the activities about which complaint was there made. In particular, it was alleged

1 that all the funds of Socoa originated from the funds improperly transferred to it. The
2 attorney for Socoa in Canada testified as trial before the Quebec Superior Court in
3 January 1993, and produced in evidence a 'minute book' of Socoa which indicated
4 that Gaston Pinat and his family had secretly held the controlling shares of Socoa.

5
6 Among the affidavit evidence which was presented in relation to the events preceding
7 and surrounding the order of Mr. Justice Tremblay was an affidavit by one Christian
8 Garcia, a resident of France. In it he deposed that he is the sole director of Socoa and
9 has been a director since 12th August 1988, and that by share transfers during
10 September and October 1993 Gaston Pinat and the members of his family transferred
11 their shares in Socoa to him. Exhibited to his affidavit are copies of share transfers
12 and the register of members and directors of Socoa which are consistent with those
13 assertions. Mr. Garcia goes on to say that as sole director he was present at a directors
14 meeting in France on 2nd March 1994. Minutes of that meeting exhibited to his
15 affidavit contain the following resolutions:

16

17

18 "1. That the Directors recognise the transfer of all issued ordinary
19 shares to Mr. Christian Garcia by Gaston, Yvette, Pierre, Frank
20 and Philippe Pinat and that these transfers be approved.

21

22 2. That the company issue a Share Certificate in favour of
23 Mr. Garcia representing the 7,000 ordinary shares of the
24 company presently issued and that the company cancel
25 Certificates numbered 1,2,6,7,8 and 9."

26

27 The Plaintiff submits that on the evidence the minutes of Socoa appears to have
28 reflected the true position up to 10th August 1988 but that thereafter there was a

1 fraudulent scheme to falsify corporate records for the purpose of defeating court
2 actions and that Gaston Pinat remained the sole owner of the common shares.

3

4 The plaintiff acknowledged that S. 45 of the Companies Law was a provision which
5 provided a jurisdiction which was a summary alternative to the applicants right to
6 institute an action. It is a matter within the court's discretion to determine whether by
7 reason of the complexity of the matter or because there are matters requiring
8 investigation or otherwise the matter is best dealt with by one procedure or the other.

9

10 Every person who has agreed to become a member of a Cayman Islands company and
11 whose name is entered on the register of members is deemed to be a member of the
12 company. The register cannot be conclusive, but the following salutary observation
13 by Lord Cairns on the jurisdiction to rectify pursuant to the Companies Act 1862
14 appears in Reese River Silver Mining Co v. Smith (1869) LR4 HL64 -

15

16

17 "It is also, as a matter of policy, of very great importance, in these
18 cases, to make the register of any one of these companies as
19 conclusive as, consistently with the proper interpretation of the
20 Act of Parliament, you are able to do. But it is perfectly clear,
21 my Lords, that you cannot make the register absolutely conclusive.
22 Many cases can be pointed out, without difficulty, in which the
23 register is not conclusive."
24

25 It was, however, submitted by the plaintiff that in cases where share certificates are
26 dealt with outside the place of incorporation of the company one should look at the
27 place of that dealing to determine where effective transfer has occurred. Colonial

1 Bank v. Cady and anor (1890) HL Vol. XV 267 was a case where dealings in the
2 shares of a company incorporated in New York were carried out in England by
3 persons domiciled there. It was held that the respective rights of the parties to those
4 dealings must be determined by English law and that one party was not estopped from
5 setting up its title against the other.

6

7 The following passage from the speech of Lord Herschell shows the ratio decidendi in
8 the case -

9

10 “I agree that the question, what is necessary or effectual to transfer
11 the shares in such a company, or to perfect the title to them, where
12 there is or must be held to have been an intention to transfer
13 them, must be answered by a reference to the law of the State of
14 New York. But I think that the right arising out of a transaction
15 entered into by parties in this country, whether for example, it
16 operated to effect a binding sale or pledge as against the owner of
17 the shares, must be determined by the law prevailing here.”

18

19 So in such a case there are two entirely different questions to be determined - the
20 effect of a transfer s between the parties and as against the company itself. The
21 second question, that is to say the corporate rights of an alleged transferee is
22 determined by the situs of the shares.

23

24 As Bowen LJ had said when the case was before the Court of Appeal in a passage
25 which has been described as being of “terse felicity” -

26

27 “The key to this case is whether the defendants [the bank] have
28 a right to hold these pieces of paper, these certificates. What the
29 effect upon their ulterior rights in America would be, if we were
30 to declare that they were entitled to these pieces of paper, is another

1 question.”
2

3 It is the “ulterior rights” in relation to the register of members of a Cayman company
4 with which I am concerned.

5

6 I will deal at this point with a submission about the proper law which should apply to
7 the issue before me. Mr. Telfer submitted that the situs of the shares was Quebec
8 because the share register and certificates were in Montreal.

9

10 Section 43 of the Companies Law includes the following -

11

12 “The register of members, commencing from the date of registration
13 of the company, shall be kept at the registered office of the company
14 or, in the case of an exempted company, at any other place within or
15 without the Islands.”
16

17 Socoa is an exempted company and I found the evidence as to where the register was
18 in fact kept inconclusive. Questions of fact needed to be determined.

19

20 The rule of private international law is that shares are deemed to be situated in the
21 country where they can be effectively dealt with between the shareholder and the
22 company. There is only one place where issues regarding the perfecting of title to
23 shares by rectification of the register can be dealt with. It is before the Grand Court of
24 the Cayman Islands under S. 45 of the Cayman Islands Company Law. This is
25 intended to be a summary procedure. It is quite inappropriate for the hearing of expert

1 evidence on foreign law and the determination of questions as to rectification in
2 accordance with that law. The proper law is the law of the Cayman Islands.

3

4 Mr. Telfer suggested various approaches which were open to me; first that I should
5 order that the minute book of Socoa to 10th August 1988 be presumed correct and that
6 a share certificate No. 2 be presumed to be transferred to the plaintiff under Canadian
7 law pursuant to the Court Order of 22nd December 1993; that I should declare all
8 other certificates not properly issued and that there are no other common shareholders
9 of Socoa; or, put another way, as did Mr. Telfer, that I should “put Socoa back
10 together” as the simplest way to resolve this matter. Another submission was that I
11 should consider the position in equity arising from the undertakings given to the Court
12 by Gaston Pinat and his associates not to deal in the shares of Socoa. The argument
13 was that in equity the undertaking was to the whole world in and operated as an
14 equitable assignment of which Socoa had notice and that this can now be perfected by
15 rectification of the register. This appears to be bold in the extreme and not as
16 acceptable extension of the established principles to which I was referred.

17

18 There is in evidence an exchange of letters between the plaintiff and the defendants
19 attorneys dated respectively 18th and 28th January 1994. With his letter of 18th
20 January the plaintiff enclosed a copy and translation of the judgment of the
21 Honourable Judge Roland Tremblay, based on which he made the following claim -

22

23 “This Judgment orders Gaston Pinat, Yvette Lelay Pinat, Pierre Pinat,
24 Phillipe Pinat and Frank Pinat to sign the Form of Transfer that is
25 annexed to the Judgment and further orders that in the event of their
26 failure to comply the Judgment of the Superior Court of the Province

1 of Quebec will avail instead of their signatures.

2
3 Therefore, the Shares of Yvette Lelay Pinat, Pierre Pinat, Philippe
4 Pinat and Frank Pinat have been transferred to , Mayer Diamond.

5
6 The Share Certificates numbered 6, 7, 8 and 9 are now in the custody
7 of the Quebec Superior Court at Montreal and can be produced to you
8 for inspection should you so require.

9
10 I should be grateful if you would register these transfers forthwith.”

11
12 After contesting jurisdiction, Mr. Turner responded to this request as follows -

.3

14 “The transfer of shares in Socoa is subject to Cayman Law since
15 Socoa is a Cayman company. Section 32 of the Companies Law
16 (Revised) provides as follows -

17 “(1) A share or other interest of a member of a company -

18 (2) is capable of being transferred if -

19 (i) a transfer is expressly or impliedly permitted by
20 the regulations of the company; and

21
22 (ii) any restriction or condition on the transfer of the
23 shares or interest set out in the regulations of the
24 company is observed.”

25
26 Pursuant to the Articles of Association of Socoa the shares of Socoa
27 cannot be transferred by Court Order. The transfer must be a voluntary
28 transfer by the registered owner. In these circumstances the Board of
29 Directors of Socoa does not intend to register the purported transfer of
30 shares as outlined in your letter.”

31
32 In relation to the judgment of the Honourable Judge Tremblay I regard that as a

33 correct statement of Cayman law. If the individuals who had been ordered to sign the

34 forms of transfer annexed to the judgment had done so interesting questions as to

35 whether or not these signatures were voluntary might have arisen. As they did not,

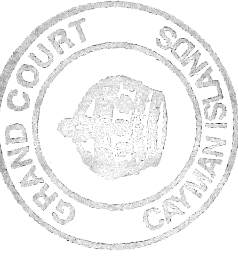
36 they need not be addressed

37

1 There are established procedures for recovering funds alleged to have been wrongfully
 2 hidden in overseas companies. Use of the summary procedures for rectification of the
 3 register of Sococo under compulsion of the order of the Canadian Court is not among
 4 them. I empathise with the words of Sir John Summerfield CJ in one of the “consent
 5 directive” cases where the issue was whether this creature of American law gave rise
 6 to a real consent within the terms of the Confidential Relationship (Preservation) Law
 7 for the disclosure of confidential information. The case was AG v. Bank of Nova
 8 Scotia et al 1985 CILR 418 where he said this -

9
 10 “I do not with respect, think that any useful purpose would be
 11 served by a review and analyses of the authorities cited concerning
 12 the recognition of foreign judgments, public policy in relation
 13 thereto and comity of nations ---In any event I cannot divest my
 14 mind of the thought that we are here dealing with an order of a
 15 foreign court consciously aimed at setting at nought the proper
 16 application of one of our Laws which it is my duty to see correctly
 17 applied.”
 18

19 I do not say that because complicated questions of law such as those in this
 20 application are in issue the procedure under S. 45 is necessarily inappropriate. But it
 21 was on the merits, and for the reasons which I have given, that I dismissed paragraph
 22 3 of the plaintiff’s summons dated 2nd March 1994.



G.E. Harre

G.E. Harre
 Judge

3rd September 1998

23
 24
 25
 26
 27