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IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NUMBER 35 OF 1996 (CIVIL)

BETWEEN:

CHILE HOLDINGS (CAYMAN) LIMITED

PLAINTIFF

- AND -

- (1) SGO DE CHILE HOTEL CORPORATION S.A.
- (2) CONTADORA ENTERPRISES S.A.
- (3) LAITH GHATH PHARAON
- (4) JOHN VAN HUSAN WHITEBECK
- (5) FAIRID DJOUHRI
- (6) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED (IN LIQUIDATION)
- (7) LAITH TRADING & CONTRACTING COMPANY LIMITED

DEFENDANTS

CAUSE NUMBER 36 OF 1996

BETWEEN:

ARGENTINA HOLDINGS (CAYMAN) LIMITED

PLAINTIFF

- AND -

- (1) BUENOS AIRES HOTEL CORPORATION S.A.
- (2) ARGENTINA TRADING HOLDINGS S.A.
- (3) RHONE DEVELOPMENTS S.A.
- (4) LOIRE DEVELOPMENTS S.A.
- (5) LAITH GHATH PHARAON
- (6) JOHN VAN HUSAN WHITEBECK
- (7) FARID DJOUHRI
- (8) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED (IN LIQUIDATION)

DEFENDANTS

APPEARANCES:

For the PLAINTIFF:

Mr. Laurence Cohen, Q.C., instructed by Mr. H. Moses & Miss M. Jafa of Messrs. Hunter & Hunter, Attorneys

For the DEFENDANTS:

Mr. M. Scott, instructed by Mr. N. Levy of Messrs. Neville Levy & Associates, Attorneys

1 The Amended Statement of Claim in Cause Number 35 of
2 1996 is dated the 4th of October, 1996 and seeks in the

3 Prayer:-

4 1(a) A declaration that:-

5 (i) The purported transfer by the
6 Directors of Chile Holdings (Cayman)
7 Limited (CHC), of its 100 percent
8 shareholding in SGO De Chile Hotel
9 Corporation, S. A., (SCH), is void and of
10 no effect and;

11 (ii) that 100 percent of the issued share
12 capital of SCH has at all times been and
13 remains in CHC as absolute owner;

14 (b) Alternatively, an order setting aside
15 such transfer and/or declaring the same to
16 have passed no beneficial title to
17 Contadora, the Second Defendant;

18 2. An order that the Directors compensate
19 CHC for their breach of fiduciary duty.

20 In Cause Number 36 of 1996, Argentina Holdings
21 (Cayman) Limited have sued Buenos Aires Hotel Corporation
22 and Argentina Trading Holdings and as Third and Fourth
23 Defendants Rhône Developments S.A. and Loire Developments
24 S.A. together with Laith Ghaith Pharaon, John Van Husan
25 Whitbeck and Farid Djouhri as Fifth, Sixth and Seventh

1 Defendants respectively. The Eighth Defendant is ICIC
2 (Overseas Limited), now in liquidation. The relief sought
3 in that action is in similar terms to that sought in
4 Cause Number 35 of 1996.

5 On the 30th of January, 1996, Schofield J. (as he
6 then was) gave leave for service out of the jurisdiction
7 on the present Defendants in Causes Number
8 35 and 36 of 1996. Subsidiary orders were made by other
9 judges which have no bearing on this judgment. The two
10 actions mentioned above arise out of Cause Number 389 of
11 1992. ICIC and a subsidiary company obtained judgment on
12 the 22nd of May, 1995 against Pharaon and Pharaoh Holdings
13 to the effect of that FIIL was the beneficial owner of an
14 oil company whose shares had been stolen from it. He held
15 the Defendants in that cause responsible for a conspiracy
16 to defraud.

17 On the 15th of August, 1997, a finding of
18 US\$2.1 billion on one aspect of the damages flowing from
19 the judgment of Schofield J. was made by the Court of
20 Appeal. In addition, there was a judgment of Murphy J.
21 against these Defendants in the sum of US\$2.1 million
22 arising from the same cause.

23 On the 14th of November, 1997, on the application of
24 ICIC and FIIL, Smellie J. found that 100 percent of the
25 issued share capital of CHC and AHC was owned by Pharaoh

1 and ordered recovery by way of equitable execution. A
2 receiver was appointed to recover the shares of CHC and
3 AHC. This order replaced the previous appointment of a
4 receiver.

5 In respect of Cause 35 of 1996, the Directors of
6 SHC purported to transfer the shares of CSH to Contadora
7 in August, 1991. This is a Panamanian company under the
8 control of Pharaon, et al.

9 In Cause 36 of 1996, a similar fraud was perpetrated
10 by Pharaon, et al, in respect of the assets of AHC and
11 BAHC on a date which appears to have been the 17th of
12 November, 1992. The shares were first transferred to
13 Loire and then to Rhône. These are not, as one might
14 suppose, major rivers in France, but companies under the
15 direction of Pharaon and his fellow conspirators. These
16 sets of transactions in respect of both CHC and AHC were
17 undertaken in response to the appointment of a receiver by
18 the Court. Smellie J. gave judgment in these matters on
19 the 20th of February and the 25th of March, 1997. He
20 relied upon the affidavit of Mr. Simon Charlton and the
21 evidence of John Van Husan Whitbeck, one of the
22 conspirators. Mr. Whitbeck appears to have what in the
23 criminal jurisdiction of the court would be termed
24 "turning Queen's evidence". Accordingly and in response
25 thereto, no relief was sought by the Plaintiffs against

1 him. This gentleman was a practising attorney in the
2 United States. I do not know whether or not he has been
3 disbarred. The learned judge found that there had been a
4 plan hatched to frustrate the orders of this Court with
5 the declared object of making the transferred assets in
6 both companies judgment-proof. In other words, a civil
7 (and possibly criminal) conspiracy was embarked upon to
8 defeat the course of justice in the Cayman Islands and to
9 defraud creditors. In the light of such a finding, it is
10 no surprise to read that the learned judge ruled that the
11 purported transfers in both causes were void and of no
12 effect. It was, therefore, unnecessary for him to go on
13 to consider whether a mere legal title had passed to the
14 Third or Fourth Defendants.

15 Accordingly, I reject the argument in that respect
16 which has been addressed to me to the effect that part of
17 the Plaintiff's claim was rejected by the learned judge.
18 No judgment was entered against Contadora or Loire/Rhône
19 as those companies had not been served at that stage.

20 Arguments have been addressed to me to the effect
21 that ICIC should not be a Defendant (and should be a
22 Plaintiff) and some suggestion has been made that this is
23 in some way "unsporting". I can dispose of that argument
24 by citing the order of Schofield J., on the 24th of
25 January, 1996 who ordered that ICIC be made a defendant.

1 That order has never been appealed. The fact that a
2 defendant wishes to cooperate with a plaintiff in the
3 interests of justice is not to be complained of by
4 defendants who are proved fraudsman. That order as I have
5 said has never been appealed and I note that until the
6 recent past, ICIC and CHC/AHC were under separate control.
7
8 3. Service was effected on Djouhri on the 21st of
9 October, 1996 on Pharaon on the 9th of November, 1997,
10 Laith Trading on the 20th of June, 1997 and ICIC on the
11 28th of June, 1996.

12 4. On the 20th of August, 1996 actions were
13 commenced by the Plaintiffs in both causes in the
14 Panamanian courts. The object of those proceedings, as I
15 am satisfied is the case, was to initiate substantive
16 actions with a view to obtaining injunctive relief against
17 the Panamanian companies, Contadora, Loire/Rhône. In
18 addition, they wished to be able to enforce any judgment
19 they might obtain from the Cayman Courts against those
20 Panamanian companies.

21 Arguments had been addressed to me that it would be
22 an abuse of process of the Cayman Courts for these matters
23 to proceed when the Plaintiffs have taken action arising
24 out of the same facts in Panama. In my judgment, their
25 actions in Panama were equivalent to the obtaining of
26 Mareva injunctions in other countries where the principal

1 action was and was to remain in the Cayman Islands.

2 Accordingly, I reject that submission.

3 5. These matters came to me on the 20th of March,
4 1998 in the form of two summons in respect of Contadora
5 and Loire/Rhône. Relief is sought under GCR O. 12 R. 8
6 seeking:-

- 7 (1) (i) an order setting aside the service
8 of proceedings on Contadora and;
9 (ii) an order setting aside the service of
10 proceedings on Contadora Loire/Rhône and;
11 (2) an order setting aside the order
12 giving leave to serve those companies out
13 of the jurisdiction;
14 (3) a stay of both proceedings and an
15 order to the effect that the Republic of
16 Panama was the convenient forum for the
17 trial of these actions.

18 6. The Scope of Order 11 Rule 4:

19 The Plaintiffs, upon whom the onus lies in these
20 proceedings, have to demonstrate to me that in respect of
21 Contadora in the first cause and Rhône/Loire in the
22 second:-

- 23 (i) that they have a good arguable case
24 and that the action is founded on "tort
25 fraud or breach of duty".

1 It is my judgment that they pass both those tests
2 with ease in both cases. It is my judgment that damages
3 were sustained in this jurisdiction in both causes. The
4 law does not require that all damages resulting from the
5 fraud were sustained within the Cayman Islands. It is
6 sufficient if some significant damage has resulted here.

7 Vide Metall Rohrstoff vs. Donaldson Loftkin Jennette
8 [1990] 1 O.B., 391. The argument that as the shares of
9 both companies are now held in Panama, as a result of the
10 fraud, demonstrates that no damage could possibly have
11 taken place in the Cayman Islands. I dismiss that
12 argument as egregious. These were both Cayman companies,
13 their shares were stolen and as a result of that theft,
14 their assets do not exist here. Both these companies were
15 administered here and have no other place of business. It
16 is my finding that very substantial damages were inflicted
17 on both Cayman companies as a result of the fraud.

18 7. It is a fact that the former attorneys for the
19 Plaintiff, in apparent ignorance of a change in the Grand
20 Court Rules, Rule 1(i)(c), obtained leave to serve
21 Contradora, Rhône/Loire before serving the other
22 Defendants within and without the jurisdiction.

23 I have considered the judgment of the Court of
24 Appeal in England in Kuwait Oil Tanker Company versus Al
25 Badder [1997] 2 All ER, 855. I find that I have a

1 discretion which I must exercise with care and caution.
2 The Plaintiff must show good cause for the error. I am
3 satisfied that they were unaware of the change in the
4 Grand Court Rules and had carried on with a procedure
5 which had been adopted by attorneys in the islands for
6 some years.

7 I asked Mr. Scott, who appeared for Contadora and
8 Loire/Rhône, what prejudice his clients had suffered by
9 reason of the error referred to above. His answer was
10 that they were now here. Such an event does not amount to
11 prejudice and I reject his argument that prejudice has
12 taken place. I remind myself of the test to be applied
13 and I am satisfied that I should exercise my discretion in
14 favour of the Plaintiffs by validating ex post facto their
15 error. I do so.

16 8. Rule 1(i)(j) the Plaintiffs must show that the
17 claim is brought:-

18 "For any relief or remedy in respect of
19 any trust, implied or constructive, that
20 is governed by or ought to be executed
21 according to the laws of the Cayman
22 Islands."

23 I have to decide what the proper law of the
24 constructive trust is. This constructive trust resulted
25 from the stripping of both company's assets. I find that

1 the proper law of each constructive trust is the law of
2 the Cayman Islands for the following reasons: The shares
3 in SCH, BAHC and AMH were owned by the Plaintiffs, both
4 Cayman Island companies. They were governed by the laws
5 of the Cayman Islands. They were administered here and
6 have no other place of business. The purpose of each
7 conspiracy was to evade the orders of these Courts and to
8 frustrate the activities of the receiver appointed in
9 Cause Number 389 of 1992. I have dealt with the argument
10 as to the losses sustained by both Cayman companies. I
11 have to ask the critical question as to where the location
12 of the "centre of gravity" lies. The activities of the
13 Defendants may have been in Panama or Paris. What does
14 that matter? The critical questions are: What
15 obligations were they seeking to flout? Which creditors
16 were they seeking to defraud? It is my judgment that the
17 "centre of gravity" was Cayman. See Vide AMF v Hashim
18 [1993], LL. Rep. 54.

19 9. FORUM: It is argued before me that as
20 Panamanian proceedings exist and as there is a lively
21 dispute between experts on the likelihood of the
22 enforcement of Cayman judgments in Panama, I should,
23 therefore, stay these actions and allow the Panamanian
24 proceedings to proceed alone. The Defendants' expert
25 tells me that whatever judgment a Cayman Court makes in

1 respect of shares held in Panamanian companies it will not
2 be enforced by the Panamanian Courts.

3 I have read his affidavit with care and have noted
4 that in several respects it is misleading to a significant
5 degree. I am deeply unimpressed by it and regard its
6 author as having departed from the standard of
7 professional objectivity which the Court demands from an
8 attorney in good standing. I reject his evidence and
9 accept the evidence of the Plaintiff's expert as to
10 enforceability. I remind myself that enforceability is
11 not the test for establishing the most appropriate forum
12 for the trial of the issues between the parties. The most
13 appropriate forum test is in respect of the trial of the
14 action itself rather than the enforceability of its
15 judgments. The fact that a *lis alibi pendens* exists is
16 only an additional factor in determining the most
17 appropriate forum for a cause, as per Lord Diplock in
18 The Abidin Daver [1984] A.C. 398 @ pp. 411 to 412. What

19 the Court has to look to is whether there is a forum which
20 is clearly more appropriate than Cayman, i.e. a forum in
21 which the case may be tried more suitably in the interests
22 of all the parties and the ends of justice: Vide Spilada
23 Maritime Corp. v Cansulex Ltd. [1987] A.C. 460.

24 It is a subsidiary point that the general working
25 language of all the potential participants is English. I

1 am aware that Cayman law could be proved as a fact in
2 Panama but it requires no such proof here. I am also
3 concerned that the concept of a constructive trust is
4 unknown to those systems which derive from the Code
5 Napoléon such as Panama. This underlines the
6 appropriateness of the Cayman Courts for the adjudication
7 of such matters. It is to be noted that these Courts have
8 dealt with all the other cases which have led up to these
9 proceedings and continual and consistent adjudication is
10 essential.

11 I rule that the most appropriate forum in the
12 interests of justice is the Cayman Islands. I make this
13 ruling with no disrespect whatsoever to the learned judges
14 of the First Judicial Circuit in the Republic of Panama.
15 Their assistance may very well be called upon in the
16 future to enforce any judgment this Court may make. I
17 point out that this Court would not hesitate to enforce
18 their judgments over shares held in Cayman companies after
19 the trial of an action.

20 I, therefore, dismiss each summons on behalf of
21 Contadora and Loire/Rhône. After hearing argument, I
22 order that the Plaintiffs receive 90% of their costs in
23 this action. It was reasonable to instruct leading
24 counsel in my judgment. Leave to appeal is rejected in
25 both cases.

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H. J. Graham

The Honourable Mr. Justice Graham

Judge of the Grand Court

*Produced 2/4/98.
H. J. Graham*

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