

Case Name:

Grupo Torras S.A. v. Al Sabah

Between

- (1) Grupo Torras S.A.
- (2) Torras Hostench London Limited plaintiffs d
- (1) Sheikh Fahad Mohammed Al Sabah
- (2) Chemical Bank and Trust (Bahamas) Limited
- (3) Private Trust Co oration Limited
- (4) Allyson Gibson
- (5) Archway Limited
- (6) Willow Investments Limited
- (7) Fasab Investments Limited
- (8) Trout Co oration Lim4ed defendants

[1995] BHS J. No. 86
1994 No. 72

**Bahamas Supreme Court, Common Law Side
Sawyer S.**

September 1, 1995.

Counsel:

P Dunkley with O.N. Johnson Jr. for t he plaintiffs.
RD. Seligman with Arthur Seligman for the third, fifth and eighth defendant.
Colin Callender with Lester r Mortimer, for the second defendant.
T. North for the sixth and seven defendants.
P.E. Davis on behalf of Mr. Mishal Al Sabah d Mrs. Barbara Al Sabah as contingent beneficiaries under the Bluebird Trust.

RULING

¶ 1 **SAWYER J.:** -- On 27 June, 1995 on the hearing of an ex parte application which lasted approximately two hours and in which eleven volumes (some inner than others) of printed matter (Exhibits N.PP.1 to 11 to Mr. Nicholas P. Pearson's second affidavit) were before the court, I gave leave to amend the specially indorsed writ of summons which had originally been filed January 24, 1994, by the addition of the names of five corporations and individual as defendants. Leave was also granted to re-amend that writ to include prayers for two declarations in respect of property, title to which is vested in entities other than the first defendant.

¶ 2 At that hearing I granted a Mareva injunction and discovery/disclosure orders in respect of the second to eighth defendants.

¶ 3 The first defendant ("Sheikh Fahad") on 2nd February, 1994, by his counsel, had given an undertaking to this court which had the same effect as the world-wide Mareva injunction and disclosure order granted by Saville J. in proceedings in the English Nigh Court on 26 November, 1993. That

constant order was subsequently amended (also by consent) on 2nd June 1994 to extend Sheikh Fahad's undertaking until "final judgment in the English proceedings or until further order".

¶ 4 By a summons dated 12 July 1995, the third, fifth and eighth defendants (whom I shall collectively call "the defendants") seek, among other things, the discharge of the Mareva injunction on various grounds as well as consequential orders as to damages occasioned to them by that order if I should accede to their application. That is the only part of the summons with which I shall deal in this ruling.

¶ 5 That summons was heard on the 17th and 18th August, 1995 and at the close of arguments Mr. Seligman reserved arguments on the question of discovery orders to await the outcome of the application to discharge a Mareva injunction. I shall deal with Mr. Seligman's arguments on behalf of the defendants in due course.

¶ 6 Mr. Callender, for the second defendant, adopted the arguments of Mr. Seligman insofar as they apply to second defendant and Mr. Davis also adopted those arguments on behalf of Mishal Al Sabah and Mrs. Barbara Al Sabah. In addition Mr. Davis tendered additional written submissions.

¶ 7 Mr. North for the sixth and seventh defendants kept a watching brief on their behalf.

¶ 8 While the defendant's summons was heard in Chambers, this ruling is being given in open court at the invitation of counsel for all parties present who seemed to think that it may be of some importance.

Background

¶ 9 The factual background to this action - especially as it relates to Sheikh Fahad has been dealt with at some length in the judgments of the Court of Appeal handed down on the 16th February, 1994 and 26th May 1995, and three judgments of Mance, J. given on the 19th May, 1994, 29th July, 1994, and 6th October, 1994. There is no need for me to deal with those facts in any greater detail than I am about to do. In addition in referring to any entity or transaction, I shall use the same names as are used for that entity or transaction by Mance, J.

¶ 10 These proceedings are ancillary to proceedings commenced in the Commercial Court of the Queen's Bench Division of the High Court of Justice in England on 14th April, 1993 ("the English proceedings") in which Sheikh Fahad along with twenty-one other persons and corporations are alleged to have conspired to defraud the plaintiffs of some US\$450 million by a series of transactions which appeared genuine but which in fact were not and of a massive cover-up of that fraud by among others, Sheikh Fahad. The plaintiffs in that action also seek damages for breach of fiduciary duty and breach of duty as constructive trustee against Sheikh Fahad in particular and some of the defendants in general. Against Sheikh Fahad the legal and equitable remedy of tracing is also being sought. The number of defendants in the English proceedings now number fifty-six.

¶ 11 Grupo Torras S.A. ("GT") the first plaintiff, is a company incorporated in Spain and Torras Hostench London Limited ("THL") the second plaintiff is subsidiary of GT. incorporated in England. THL appears to be the main plaintiff.

¶ 12 The majority of the shares in GT. are owned either directly or through nominees by the Kuwait Investment Authority ("K.I.O.") situated in London which in turn was an emanation of a Kuwait Investment Authority ("K.I.A.") an agency of the Government of Kuwait.

¶ 13 Sheikh Fahad, a member of the Royal Family of Kuwait, was employed by the K.I.O. from 1964 to 1992 when he retired.

¶ 14 It is alleged that it was during the period May 1988 to May 1992, that the defalcation of the funds of G.T. was perpetrated, i.e., during the period when Sheikh Fahad held the offices of Chairman of the K.I.O., director and president of G.T. as well as director of two companies incorporated in Holland whose shares were owned indirectly by the K.I.A. and which are alleged to have been among the vehicles used to perpetrate the alleged misappropriation of those funds. I will refer to the period 1982 to 1992 as “the material time”.

¶ 15 During the material time Sheikh Fahad established or contributed funds to trusts in various jurisdictions outside Europe, including The Bahamas and Cayman Islands.

¶ 16 Among such trusts established in The Bahamas are the Roger Trust (which later became the Chester Trust and later still the Comfort Trust) of which the second defendant was trustee, the second such trust established in The Bahamas is the Bluebird Trust which was established by a Declaration of Trust dated 17th December, 1992, (“the Bluebird Trust”)

¶ 17 The Bluebird Trust, either directly or through nominees, owns the shares in Archway Limited (“Archway”) and Trout Corporation (“Trout”). Archway was incorporated on 17th December, 1992 as an International Business Company under the provisions of the International Business Companies Act, 1989 (No. 4 of 1989). It is not clear when Trout was incorporated.

¶ 18 Under the Bluebird Trust, Sheikh Fahad is the Primary Beneficiary (Article 10.1) and his son, Mishal Al Sabah and his descendants, among others, are members of the class of beneficiaries under that trust. Contrary to Mr. Davis’ position, according to the declaration of trust, Mrs. Barbara Al Sabah cannot be a beneficiary while Sheikh Fahad is alive and if she can be a beneficiary if she survives him, it is not clear how that is to be accomplished.

¶ 19 Some US\$22.50 million from two transactions which are collectively referred to as the “Oakthorn” transaction in the English Proceedings were placed in Sheikh Fahad’s account at Chemical Bank in London. Out of that sum, US\$3 million was transferred to an account at a Bank in Nassau, 01/129041/005 in a Bank in Switzerland which is said by Sheikh Fahad’s London Solicitors Messrs Ashurst and Morris Crisp to “appear to be a collection account” for PTC. This was two days before PTC executed the declaration of the Bluebird Trust.

¶ 20 I think it convenient to set out briefly here the facts on the record before me regarding two properties situate at Lyford Cay, New Providence, title to which is vested in the sixth and seventh defendants, respectively, as it tends to show how Sheikh Fahad regards what is represented as trust property because the sixth and seventh defendants are emanations of Comfort Trust.

¶ 21 The seventh defendant, Fasab Investments Ltd. (“Fasab”) was incorporated in 1987 and title to the house called “the White House” situated at Lyford Cay is vested in it, it is not clear how or when that title became so vested. That house seems to be regarded by Sheikh Fahad as his property.

¶ 22 Willow Investments Limited (“Willow”) the sixth defendant, was only incorporated on 6th January, 1993 and on 1st February, 1993, the title to the house called “Fairview” in which Sheikh Fahad and his family reside, also situate at Lyford Cay was transferred by Sheikh Fahad to Willow.

¶ 23 There is as yet no evidence to suggest that any consideration passed from either Fasab or Willow

to Sheikh Fahad for these properties and the fact that Sheikh Fahad and his family reside at Fairview is evidence to the contrary. It may well be that even if a nominal consideration passed, a resulting trust of those properties will be found to exist in favour of Sheikh Fahad - see e.g. Rochefoucauld v. Boustead [1897] 1 Ch. 196 at p. 205 - 207 per Lindley, L.J.

¶ 24 The attitude of Sheikh Fahad to those two properties which technically form part of the corpus of the Comfort Trust does not appear all that different from his attitude to the Esteem Settlement as described by Mance J. in his judgment of 29th July, 1994.

¶ 25 As to the corpus of the Bluebird Trust, the trust document mentions only that Sheikh Fahad contributed US\$ 10.00 to the corpus of the trust fund. Clearly a considerably larger sum must have been contributed to the corpus of that fund by Sheikh Fahad by reason of the following facts.

¶ 26 Between the 30th June, 1993 and 12th August, 1993, Archway indicated it wanted to “loan” some US\$2 million to Tee Finance Limited of Jersey, Channel Islands which sum, I infer, was to be on-lent to another Jersey company called “Gary Player Founders Limited” the latter company was to establish or had established - it is not clear what the position is or was at that time an exclusive club for golf enthusiasts to be known as the “Player Club”.

¶ 27 According to Archway’s letter of 30th June, 1993, in particular, which was exhibited to Sheikh Fahad’s seventh affirmation, Tee Finance Limited (“Tee”) was only to repay the US\$2 million “loan” –

“3... (2) If and to the extent that [Tee] received payment of the premium (as defined in the Secured Loan Facility letter) (which was not before me or the English Court). “[Tee] shall as soon as reasonably practicable, pay to [Archway] fifty percent (50%) of the amount received”.

(3) If and to the extent the [Gary Player Founders Limited] pays [Tee] amounts received by it from the Club in respect of the “Sales Commission” presumably this refers to “Sales” of membership in the Player Club [Tee] shall, as soon as reasonably practicable, pay to [Archway] fifty per cent (50%) of the amount received by [Tee] in accordance with the Second Loan Facility Letter.”

¶ 28 According to Sheikh Fahad’s seventh affirmation, at paragraph (vii)(a) on p. 10, the Player Club to which I have just referred was -

“... intended to be a club whose members would enjoy preferential rights to play golf and to enjoy the facilities at leading golf courses throughout the world, The initial subscribers of whom Archway was one, were to enjoy privileges not extended to other members. Membership was intended to become a valuable investment which could be traded ...“ (Emphasis mine)

¶ 29 While I accept that as a matter of law a company like Archway has a legal persona separate and distinct from that of those of the Owners of its shares, it seems clear to me, that a legal. persona like Archway cannot “enjoy playing golf nor can it ‘enjoy’ the other amenities which membership in the Player Club was intended to bring in its train.

¶ 30 In addition, if Archway was investing US\$2 million by way of a genuine loan to the Gary Player Founders Limited, it is at Least surprising that Sheikh Fahad would describe Archway funds as a “subscription” for membership rather than a loan with an expected rate of return. A loan is essentially different from a subscription for membership in a club.

¶ 31 Since, in my view Archway could not have been intended to benefit from the subscription or loan of US\$2 million unless its membership in the Player Club became a valuable asset which could be traded, it is a logical inference that that US\$2 million was spent for the benefit of Sheikh Fahad and perhaps other members of his family although those funds, apparently, came from the corpus of the Bluebird Trust Fund.

¶ 32 As to Trout, some 34,000 bonds of a Spanish traded company called “Grand Tibidabo S.A.” (“Grand Tibidabo”) were purchased on its behalf in October 1993 at a cost of some 340 million pesetas. The English translation of the order to purchase those bonds on behalf of Trout reads:

“Dear Sirs:

By means of this letter I transfer you our order to purchase in the name of the Company TROUT CORPORATION do THE PRJVATE TRUST CORPORATION, Nassau, Bahamas, of 34,000 (thirty four thousand) bonds of GRAND TIBIDABO. S.A. issuance 12/1991, 12%, redemption 12/1995 at 100% market value, for a total amount of 340,000,00 pesetas (three hundred forth million).

Signed: TROUT CORPORATION
c/o THE PRIVATE TRUST
CORPORATION
NASSAU
BAHAMAS

pp: Fernando Huidobro”

¶ 33 Again Skeikh Fahad in his seventh affirmation at p.10 describes the signatory of that document as “my Spanish lawyer, Fernando Huidobro” (emphasis mine). Now while it is quite possible that Trout, the Bluebird Trust as well as Sheikh Fahad, each acting independently of the others, could decide to retain the same lawyer, there is no suggestion on the evidence before me, both at the ex parte stage and on the hearing of the defendants’ summons of 12th July, 1995, that is what happened with regard to Trout’s purchase of the bonds in Grand Tibidabo. Presumably, if Fernando Huidobro is Sheikh Fahad’s Spanish lawyer, he (Huidobro) would act on Sheikh Fahad’s instructions despite the fact that Trout is an emanation of the Bluebird Trust of which Private Trust Corporation Limited (“PTC”) the third defendant is the trustee and even though there is no indication that the funds used to purchase the bonds of Grand Tibidabo came from any source other than the Bluebird Trust fund.

The Application

¶ 34 Against that factual background Mr. Seligman submits that the Mareva injunction against the defendants should be discharged because there was non-disclosure of material facts and circumstances as well as a limitation defence of which the plaintiffs were aware at the ex parte stage or could have been made aware if they had made the necessary inquiries.

¶ 35 The first alleged omission is the omission. to draw the attention of the court to the provisions of the Fraudulent Dispositions Act, 1991 (No. I of 1991) (“the Act”) which came into force in April 1991, ie., long before the Bluebird Trust was established.

¶ 36 By section 4 of the Act, a disposition of any property made with intent to defraud and made at an undervalue is voidable at the instance of a creditor thereby prejudiced. That section also places the onus of proving an intent to defraud on the person seeking to set aside an impugned disposition and provides in subsection (3) that “No action or proceedings shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition”.

¶ 37 Section 2 of the Act defines an “obligation” as follows-

“Obligation” means an obligation or liability (which shall include a contingent liability) which existed on or prior to the date of a relevant disposition and of which the transferor had actual notice;” (Emphasis mine)

¶ 38 While there can be little or no doubt that the transfer of funds to the Bluebird Trust by Sheikh Fahad would have taken place more than two years before the plaintiffs applied to join the other defendants as parties to the Bahamian action, it seems clear to me that the avoidance of the trust would be a matter mainly between the plaintiffs and Sheikh Fahad rather than between the plaintiffs and PTC and the other defendants who, I would presume, are quite innocent of any wrongdoing as none is alleged against the defendants other than Sheikh Fahad. If I am right about that it would mean that the plaintiffs’ action, assuming it was being brought under the provisions of the Act, as against Sheikh Fahad was commenced well before the two-year period had elapsed and the amendment seeking declaratory relief in respect thereof would relate back to the date of the original filing of the writ as it is not a new cause of action.

¶ 39 Even if I am wrong and the plaintiffs had pleaded some cause of action against PTC and the other defendants (which they have not done) which would fall within the ambit of the Act, it is far from clear that the Act would apply to the plaintiffs’ causes of action as pleaded since, unless it is alleged that Sheikh Fahad had actual notice of their claims against him prior to the establishment of the Bluebird and other trusts, the Act would not apply on the Facts as pleaded and in light of the fiduciary relationship of Sheikh Fahad to GT there could have been no actual notice to Sheikh Fahad of a possible claim against him emanating from anyone other than himself and perhaps some one or more of the other alleged conspirators.

¶ 40 Secondly, there is no allegation that the Bluebird Trust was established with the intent to defraud as defined in the Act; rather the pleadings allege and that the fraud took place prior to the establishment of that Trust and that the corpus of the trust fund includes part of the proceeds of the fraud.

¶ 41 Further, if Mr. Seligman is right about his interpretation of the Act, that Act may render nugatory other pre-existing statutory provisions such as the Reciprocal Enforcement of Judgments Act (Ch. 67) although they are not expressly referred to therein.

¶ 42 In this regard section 7 of the Act is important. That section reads:

“7. Nothing in this Act -

- (a) shall validate any disposition of property which is neither owned by the transferor nor the subject of a power in that behalf vested in the transferor;
- (b) shall affect the recognition of a foreign law in determining whether the transferor is the owner of such property or the holder of such power.”

¶ 43 As to whether the limitation defence of section 4(3) of the Act should have been mentioned by Mr. Dunkley at the ex parte stage, I incorporate herein the reasons which I am about to deliver for my dismissal of Sheikh Fahad's application on a similar ground, to strike out subparagraphs 1 (vi) and (viii) of the re-amended statement of claim.

¶ 44 Mr. Seligman urged me to construe the Act so as to give effect to the underlying public policy of The Bahamas to preserve and enhance its position as a leading off-shore tax haven.

¶ 45 Aside from the fact that there is no evidence that the Bluebird Trust was established to avoid or minimise Sheikh Fahad's or his family exposure to taxes either in England or in Kuwait. It seems to me that it is one thing to ascribe to the Parliament of The Bahamas ("Parliament") an intention to make The Bahamas more attractive as a "tax haven" by encouraging the establishment in this jurisdiction of what are referred to in some commercial circles as "asset protection trusts" but it is quite a different matter to attribute to Parliament an intention of allowing The Bahamas' position as a legitimate tax haven to be used as a cover for fraudulent activity which has little or nothing to do with the minimisation of taxes or the protection of honestly acquired assets from the sometimes unreasonable demands placed on those assets eg., as a result of an award of damages against a professional person.

¶ 46 Another area of material non-disclosure, Mr. Seligman says, is the failure of the plaintiffs' counsel to draw the court's attention to the good reputation of PTC as well as the fact that PTC would not risk jeopardising its licence by acting as a "sham trustee" or by exercising its discretion as trustee of the Bluebird Trust according to Sheikh Fahad's instructions or without considering the interests of other beneficiaries under that trust nor would it "dance to Sheikh Fahad's tune".

¶ 47 That submission must be looked at in light of the facts which I have already set out, particularly with regard to the Player Club transaction by Archway (of which Mr. Peter B. Evans ("Mr. Evans") the managing director of PTC is a director and who also, incidentally, signed the letter of 30th June, 1993 to which I have also referred) and the Grand Tibidabo transaction.

¶ 48 Against those facts, Mr. Seligman drew attention to Mr. Evans' first affidavit sworn on 19th July, 1995 in paragraph 4 of which the deponent states: -

"4. I have read, inter alia., the second affidavit of Nicholas Paul Pearson filed herein on 28th June, 1995 and the exhibits thereto, especially exhibits NPP4, NPP6, NPP7, NPP8 and NPP10; insofar as the same pertain to PTC and the fifth and eighth defendants or to the Bluebird Trust or its assets I say that the Bluebird Trust (Exhibited in NPP7 at pages 117 to 119 (i) was and is a genuine trust declared on 17th December, 1992 (ii) I am not in a position to know whether or not the allegations of fraud against the first defendant in this case are well founded or not (iii) That at the time the Bluebird Trust was declared on 17th December, 1992 I personally knew the first defendant and that he was a member of the Royal Family of Kuwait, The first defendant has a Bahamian residence at Lyford Cay which is not very far from my own residence (iv) when the Bluebird Trust was declared on 17th December 1992 I regarded it as a normal discretionary trust established for the benefit of a father, son and other family members and not intrinsically different from many other family trusts of which PTC is the trustee. (v) When the Bluebird Trust was declared in December 1992 at no time was it suggested to or agreed with me or any of my Co-Directors by the first defendant or by anybody on his behalf, either at any time prior to 17th December 1992, or at any time thereafter, that the Bluebird Trust was to be a sham trust or that PTC was to dance to the tune of the first defendant or that the first Defendant was to be in de facto control of the said trust. (vi) On accepting the trusteeship of the Bluebird Trust I regarded it

and still do regard it as the duty and responsibility of PTC as Trustee to manage the trust not for the sole benefit of the first defendant but also for the benefit of his son Mishal Al Sabah and any others who might become concerned. (vii) It is the normal practice of PTC to pay due regard to the wishes of any settlor or beneficiary of the trusts PTC manages but such wishes are not regarded by PTC as legally binding.”

¶ 49 That paragraph in particular, coupled with Mr. Evans’ and PTC’s reputation as well as the fact that Mr. Evans had been represented in the Banco Ambrosiano case by Mance, J before he ascended to the Bench, were relied on by Mr. Seligman to show the independence and spotless reputation of PTC as an ethical trustee and to distinguish PTC’s and Bluebird Trust’s position from that of the Esteem Settlement and the trustees thereof in light of Mance, J’s comments in his judgment of 29th July, 1994.

¶ 50 In this connection, I think it may be convenient at this point to set out some excerpts from the Roger Trust document and then some excerpts from the Bluebird Trust which is later in time.

¶ 51 The Roger Trust document provides, inter alia --

“FIRST: The Trustee shall, during the lifetime of the Grantor, hold, manage, invest and reinvest the trust fund (except as hereinafter provided in relation to the stock or securities of any company designated as a Special Company) in such manner as the Grantor shall from time to time direct in writing. In the event the Trustee shall request such directions and shall not receive them within thirty (30) days beginning with the date of such request, or in the event the Grantor is under a disability, or in the event the Trustee shall receive conflicting directions, then the Trustee shall hold, manage, invest and reinvest the trust fund in such manner as the Trustee shall, in its sole and absolute discretion, deem wise and proper, until such time as the Trustee shall receive directions in writing.

The Trustee may act without inquiry upon any direction which it receives from the Grantor with respect to any Special Company. In the event the Trustee shall request directions and shall not receive them within thirty (30) days or shall receive conflicting directions, or in the event of the death or disability of the Grantor, the Trustee shall hold, manage, invest and reinvest the stock or securities, or the proceeds from the sale or exchange thereof of any Special Company in such manner as the Trustee shall in its sole and absolute discretion., deem wise and proper. The Trustee shall incur no liability for actions taken pursuant to the directions of the Grantor or, in the absence of such directions or receipt of conflicting directions for actions which it shall take or fail to take in the exercise of its discretion.”

¶ 52 Articles 1.1,4.1,4.1.15,4.2 and 4.3 of the Bluebird Trust provide:

“1 .1 The Trustee shall, during the term of the trust, invest and reinvest the trust fund in such manner as the Trustee, in its sole discretion, considers advisable, but subject to the written consent of the Primary Beneficiary, or such person or persons as the Primary Beneficiary may from time to time designate by written instrument delivered to the Trustee. If, however, (i) the Trustee tequests and does not receive written consent within thirty (30) days beginning with the date of the request; (ii) the Primary Beneficiary or the designee, as the case may be, is under a disability; or (iii) if the Primary Beneficiary is riot then living and no designee is acting, the Trustce shall invest and reinvest the trust fund in such manner as the Trustee, in its sole discretion, considers advisable. The

Trustee shall not incur any personal liability for actions taken pursuant to the consent of the Primary Beneficiary or his designee.”

“4.1 In addition to such other powers as may be granted to it by law, the Trustee shall, as to any trust fund hereunder, subject to the powers reserved to the Primary Beneficiary or any other person hereunder, have full power in its discretion:”

“4.1.15 Without obligation to diversify, retain, sell, exchange and invest in any stocks, bonds, notes, precious metals, currencies in spot or forward exchange market, coins commodities, debt mortgages, certificates of deposit, investment trusts, comm trust funds including the obligations and stock of any corporate Trustee or of its parent or any affiliate or any subsidiary, and any other property, real and personal, whether or not foreign or in foreign corporations or other enterprise whether or not productive or wasting, whether or not generally permitted by law for investments by fiduciaries, it being the intention that the Trustee shall have the same full and unrestricted powers of investment as a beneficial owner.”

“4.2 Every discretion or power hereby or by law conferred on the Trustee shall be an absolute discretion or power. Any corporate Trustee may exercise or concur in the exercise of any such discretion or power by a resolution of its board of directors or governing body, or may delegate the right and power to exercise or concur in the exercise of any such discretion or power to any one or more of its directors, officers or employees.”

“4.3 The Trustee in making payments from any trust fund, may in its discretion apply any sum of income or principal for the benefit of any beneficiary of that trust fund by payment in discharge of such beneficiary’s bills, or by payment to anyone with whom such beneficiary resides or who has the temporary or permanent care or custody of such beneficiary, without the intervention of any custodian, guardian, committee or like fiduciary. The written receipt of anyone to whom payment is so made shall be a complete discharge to the Trustee who shall be without obligation to see to the further application of such sum.”

¶ 53 The foregoing extracts show that there is a difference of language used in these two documents which on general principles of interpretation, suggests a change of meaning with the result that while it may almost be unarguable that Sheikh Fahad regarded the Roger Trust as one of his alter egos, it is easier to argue that he did not so regard the Bluebird Trust at least not without evidence. I have already indicated above what evidence (facts) gave rise to my decision in respect of Archway and Trout and therefore of Bluebird Trust so I need not recite those facts here.

¶ 54 If PTC as Trustee of the Bluebird Trust did not “dance to Sheikh Fahad’s tune” in respect of the Player Club and Grand Tibidabo transactions it did, in Mr. Evan’s words, “pay due regard” to Sheikh Fahad’s wishes even though those wishes were not legally binding on PTC.

¶ 55 In addition to those two transactions, it is worthy of note that under Article 4.1 of the Bluebird Trust document. PTC’s discretionary powers of investment are stated to be subject to the “powers reserved to [Sheikh Fahad] or his designee or any other person to whom such power is reserved. That seems to put some limits on the “absolute discretion” mentioned in the same document.

¶ 56 It appears that where the written consent of Sheikh Fahad to an investment contemplated by PTC, is not obtained, PTC will not be excused from its personal liability for any losses incurred on such Investments.

¶ 57 In light of the mentioned provisions of the trust document and the factual evidence regarding the Player Club and Grand Tibidabo transactions it appears to me that at least Sheikh Fahad must have

exercised considerable “influence” in those two instances as to the choice of investment which was made and in respect of the Grand Tibidabo transaction, the instrumentality by which the purchase was made shows that even if Bluebird Trust did not, on its face dance to Sheikh Fahad’s tune, two of its emanations appear to have followed where he led without more and I respectfully adopt the reasoning of Mance, J. in his judgment of 29th July, 1994 at p. 19- 20 -

“So far as concerns the other trusts to which Sheikh Fahad refers unspecifically, there is almost no information. Mr. Falconer submits that there cannot therefore be any good arguable case for identifying them with Sheikh Fahad. I disagree. Once it is demonstrated on the limited information available that a good arguable case exists for identifying the Esteem Settlement with Sheikh Fahad and its assets with his, there seems to me good reason to suppose that this is likely to be typical of all Sheikh Fahad’s trust. There is as yet nothing positive in the evidence to differentiate the trusts which he settled and under which he benefits or the manner of their operation or use. Such information as is to hand suggest that they are likely to fulfil similar functions, providing Sheikh Fahad or his family or friends with further homes. Esteem Limited is already known to own three properties. 97 Dulwich Village, 52 Cadogan Place and 86 Chester Square. Additionally, it is now known that Sheikh Fahad has a home at Edgewater Drive, Nassau, owned according to information supplied by Ashurst Morris Crisp by a company called Fasab Investments Limited, which is in turn owned by a trust. In parenthesis, a reconstructed letter in Sheikh Fahad’s name obtained from Kuwait Investment Office computer back up tapes shows Sheikh Fahad ordering Chase Manhattan to transfer \$100,000 from “my company Esprit Holdings Limited” (apparently a mistake for Esprit Holdings Inc. of Panama, rather than a reference to a company called Esprit Holdings Limited incorporated and managed by Bedell & Crispin in Jersey, with which Ashurst Morris Crisp have confirmed that Sheikh Fahad has no connection). This payment was to be used “for household expenses of my Edgewater Drive home”, and itself throws some light on Sheikh Fahad’s attitude to and use of companies within his control. Further, Sheikh Fahad’s borne at Fairview, Lyford Cay, was on 1st February, 1993 transferred “for tax planning reasons” following his retirement from the Kuwait Investment Office to Willow Investments Limited, another such trust. The description given in Sheikh Fahad’s Fifth Affirmation of the use up to 26th November, 1993 of the US\$3 million transferred to the Bahamas in August 1990 out of the proceeds of the second part of the Oakthorn transaction suggests that monies held in Sheikh Fahad’s name may have been used for insurance, maintenance and upgrading of Sheikh Fahad’s Fairview and Edgewater Drive homes, both of which belong to trusts, albeit in the case of Fairview only since 1st February, 1993. If this is so. it points to Sheikh Fahad in reality regarding his and the trusts’ assets as effectively the same.”

mutatis mutandis as part of my own reason for this ruling.

¶ 58 The situation in regard to the second defendant in respect of the Roger Trust is, in my judgment, clearer even than that of PTC under the Bluebird Trust and I conclude, for the purposes of this ruling, that there is fairly clear evidence that the Roger Trust was an alter ego of Sheikh Fahad. I say nothing about Comfort Trust as that may be a matter for the Cayman Islands Grand Court to decide.

¶ 59 Much time was spent and much argument advanced to show that the plaintiffs have in effect, besmirched the reputation of ETC. In fact there is no pleading nor any evidence from which any such innuendos could be drawn and since it is not unknown in this jurisdiction and other common law jurisdictions for large banks which are also licensees under the Banks and Trust Companies Regulation

Act (Ch.287) to be prevented by injunction from dealing with a particular client's account, the joinder of PTC, of itself, can cast no aspersions on its reputation, nor can the Mareva injunction affect its business unless it is claiming a right of set off against the Bluebird Trust fund. Indeed in *A. Ltd. v. A - Z and AA - LL* [1982] 2 WLR 558, five of the defendants which were enjoined by Mareva injunction were banks trading in London - see also *Bankers Trust Co. v. Shapira* [1982] 1 WLR 1274.

¶ 60 In this case, such allegations of wrongdoing as have been pleaded are specifically aimed at Sheikh Fahad and can only be ascribed to PTC if PTC itself was alleged to be an emanation or an alter ego of Sheikh Fahad, no such allegation has been pleaded or even suggested by the plaintiffs.

¶ 61 Further, while much has been said about PTC not being a "sham trustee" or party to "a sham trust" it would be taking the pleadings too far to say that that is what is being alleged because, again as I understand the pleadings, it is being alleged that the Bluebird Trust either directly or indirectly through Archway and Trout was being manipulated by Sheikh Fahad for his own ends despite the fact of the existence of the discretion, powers and duties of the trustee of that trust.

¶ 62 No one for the plaintiffs have said that the Bluebird Trust is not a trust in the normal sense of that word; what is being sought, I think, is a lifting of the veil of that trust (which is one among others in various jurisdictions) so that the court can determine, if, and to what extent, the corpus of that trust, is traceable to part of the funds allegedly misappropriated from GT and if so, to what extent that corpus is to be considered as Sheikh Fahad's property and therefore subject to a tracing order.

¶ 63 Before leaving the question of the independence of PTC, I should mention that Mr. Seligman drew attention to the fact that PTC removed two protectors of the Bluebird Trust without consulting Sheikh Fahad in August 1994 and refused to disclose the information sought by the disclosure order of the English Court against Sheikh Fahad because of the provisions of section 10 of the Banks and Trust Companies Regulation Act (Ch.287) ("Ch. 287").

¶ 64 The removal of the two protectors was done on the advice of counsel after the English disclosure/discovery orders were made. I am not therefore quite clear as to how that shows the independence of Bluebird Trust from the influence of Sheikh Fahad.

¶ 65 As to section 10 of Ch. 287, that section puts in statutory form the well-known principles of confidentiality between a bank and its customer set out by Bankes, L.J. in *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 at p.473 and extends those principles to trust companies and others. The section itself does not derogate from the common law rights and duties which arise between a licensee under Ch.287 and its customers.

¶ 66 For case of reference, I set out the whole of section 10 of Ch.287 here.

"10. - (1) No person who has acquired information in his capacity as

- (a) director, officer, employee or agent of any licensee or former licensee;
- (b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, or as an employee or agent of such counsel and attorney, consultant or auditor;
- (c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or

- liquidator;
- (d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;
- (e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except -

- (i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or
 - (ii) for the purpose of the performance of his duties within the scope of his employment; or
 - (iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.
- (2) Nothing contained in this section shall -
- (a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or
 - (b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.
- (3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.”

¶ 67 The effect of section 10(2) of Ch.287 on the issue raised by Sheikh Fahad in his seventh affirmation is that the claim of confidentiality may have been cast to widely because in the case of *In Re Londonderry's Settlement* [1965] 1 CH. 918 at p. 933 - 934, Harman, L.J. indicated that the beneficiary under a trust has a common law right to see documents such as the accounts of the trust and correspondence between solicitors and the trustees but not eg., correspondence between the trustees inter se. Here there was no suggestion that the documents sought were considered to belong to a privileged class of documents as in the *Londonderry* case.

¶ 68 Again, I am not quite clear on how the stance adopted by PTC as trustee of the Bluebird Trust in reliance on section 10 of Ch. 287 becomes evidence of the Jack of influence of Sheikh Fahad over the disposition of the assets of the Bluebird Trust.

¶ 69 Mr. Seligman also submits that unlike the plaintiffs' claim in the proceedings in the Grand Court of the Cayman Islands where the plaintiffs are claiming that the funds in the trust belong to them, in this action, they seek declarations that the property of the trusts belong in equity or at law to Sheikh Fahad. Perhaps if this action and the Cayman action were one and the same, it might be said that two such causes of action cannot normally be pleaded in the same statement of claim. On the pleading and evidence in this case it seems clear to me that the plaintiffs have a strong prima facie case against Sheikh Fahad on the substantive claim and it therefore follows that if they succeed in proving that claim then in equity they would have a strong claim to follow the proceeds of the defalcation into Sheikh Fahad's hands and beyond, i.e. into the hands of anyone who received the funds from Sheikh Fahad.

¶ 70 Mr. Seligman says that unlike the pleading in the Cayman case, there is no claim, to trace the plaintiffs' (as opposed to Sheikh Fahad's money) in this case.

¶ 71 Subparagraph 1(vii) of the re-amended statement of claim seeks:

“(vii) ... such tracing and/or proprietary remedies and/or other equitable remedies against Sheikh Fahad as constructive trustee as shall to the court seem just and equitable.”

¶ 72 That seems to me to be a tracing claim especially when viewed against the background of the earlier pleadings in respect of Sheikh Fahad as constructive trustee of GT.

¶ 73 It must not be forgotten that where the property allegedly misappropriated by a fraud consists of cash the wrongdoer may in fact have a legal title to it which is defeasible at the instance of true owner and the actual notes misappropriated are not what may be traced but their value,

¶ 74 I therefore do not find anything inimical to the plaintiffs' pleading in this case when compared with the pleading in the Cayman case. Further, Sheikh Fahad is not resident in that jurisdiction so the court there would have no personal jurisdiction over him.

¶ 75 Mr. Seligman also submits that while this court has the power under Order 15 rule 17 of the Rules of the Supreme Court, 1978, to make binding declarations of right whether or not any consequential relief is or could be claimed, it is a power to be exercised circumspectly especially where no other relief is claimed. He supported that submission by reference to a number of well-known authorities which need not be considered here since there is no difference of view between the counsel for the plaintiffs and counsel for the defendants or the court on that point.

¶ 76 However, while declarations are the only relief being sought against the defendants except Sheikh Fahad, insofar as the declarations would affect property under the control of any of the oilier defendants, declarations seem to be all that would be required since no allegations of wrongdoing are made against any of the other defendants. In any case, the declarations sought are really against Sheikh Fahad and when so viewed they are not being sought without other consequential relief,

¶ 77 Before leaving the issue of the alleged non-disclosure of material facts and matters at the *ex parte* stage of these proceedings, this seems a convenient point at which to deal with the invitation of counsel on both sides to state the general principles which should be borne in mind in applying *ex parte* for *mareva* relief in this jurisdiction.

¶ 78 This I will attempt to do as briefly as possible because I am aware that there have been a number of judgments and/or rulings in this jurisdiction in which some, if not all, of the principles were set out. In fact, in my own ruling in the case of *Century Properties Ltd v Bomar Investments Ltd and Others* Eq. 1203 of 1988 delivered on 26th June, 1989, I had to deal in some detail with those principles. I should also say that the principles are the same subject to any contrary statutory provision in this jurisdiction of which I am not presently aware - to those applicable to such applications in England, since this court's jurisdiction and power to make such orders are the same as those of the English High Court - see e.g., section 17 of the Supreme Court Act (Ch.41).

¶ 79 As adapted from the English Supreme Court Practice 1991, those principles may be summarised thus;

- “(1) on ex parte application, the plaintiff should make full and frank disclosure of all matters within his knowledge or which he could have found out by reasonable inquiries and which are material for the judge to know. - see eg. *Rex v. Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac* [1917] 1 KG 486 *Brink’s Mat Ltd. v. Elcombe* [1988] 1 WLR 1350
- (2) The plaintiff should give particulars of his claims against the defendant, stating the grounds of his claim and the amount thereof and fairly stating any points made against it by the defendant - see eg. *Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft MBH & Co. KG. “The Niedersachsen”* [1984] 1 All E.R. 398 but see also *T.S.B. Private Bank International v. Chabra* [1992] 1 WLR 231.
- (3) While the plaintiffs should usually give some grounds for thinking that the defendant has some assets here which can or may be removed, it may be sufficient to show that the defendant may take steps to remove assets from this jurisdiction or to remove control of such assets from this jurisdiction before the judgment or award can be satisfied.
- (4) An undertaking in damages should be given by or on behalf of the plaintiff and where necessary such undertaking should be supported by a bond or other security.

A mareva injunction may now be given in respect of property or assets within the jurisdiction if it is felt that a defendant’s dealing with those assets or property may defeat the ends of justice - see eg. *Rahman (Prince Abdul) bin Turk al Sudaiy v. Abu Taha* [1980] 1 WLR 1268 at p. 1263 per Lord Denning M.R. and *Barclay - Johnson v. Yuill* [1980] 1 WLR 1219 per Megarry, V.C.”

¶ 80 Similar principles apply to an application for an Anton Piller Order.

¶ 81 With regard to non-disclosure, it is for not every non-disclosure that a mareva injunction obtained ex parte will be discharged - see eg. *Arab Monetary Fund v Hashim* [1993] 1 Lloyds Rep. 543, [1987] 3 AER 466 and *Tate Access Floors Inc. et al v. Boswell et al* [1990] 3 AER 303.

¶ 82 I should say here, also, that at the ex parte stage of these proceedings, Mr. Dunkley was most careful about drawing my attention to anything which he thought may have been in the defendant’s favour.

¶ 83 In particular, he drew attention to the following facts:

- “(i) More than a year had elapsed since the last step in these proceedings had been taken and no notice of the ex parte application had been given under Order 3 rule 5 of the Rules of the Supreme Court, 1978;
- (ii) the plaintiffs are in liquidation and if the court required security to undergird their undertaking in damages, they would be prepared to give it;
- (iii) no notice of the application for mareva relief had been given because of the Provisions of Article 7.3 of the Bluebird Trust, in particular which was termed a “flea clause

¶ 84 With regard to (i) I indicated then, as I do now, that while Order 3 rule 5 should normally be

complied with, as non-compliance can be waived it is open to the defendants to raise that procedural issue if so minded or to waive it by taking a fresh step in these proceedings. At that time, I also indicated in effect, that it is for consideration whether and how Order 3 rule 5 is to apply to proceedings which are clearly ancillary to proceedings in another jurisdiction I had in mind, the provisions of the Reciprocal Enforcement of Judgments Act (Ch.67) as well as Bayer AG v. Winter and others (No.2)[1986] FSR 357 and House of Spring Gardens v. Waite [1984] F.S.R. 277, as well as the fact that a court always has control of its procedure.

¶ 85 In addition, I was aware that there had been a number of applications by Sheikh Fahad and other defendants to the English proceedings in England, but it is not yet clear whether any defences have been filed by Sheikh Fahad in those proceedings. It is important to note that in the judgment of the Court of Appeal (England) on the appeal of Sheikh Fahad and twenty other defendants against Mance J.'s judgment on the issue of the jurisdiction of the English Court, which was delivered by Stuart-Smith, L.J. on 26th May, 1 995, at p.17 it is stated that

“The appellants have also asserted that their defalcations were authorised and ratified by the controlling shareholders. But they have put forward no case of authorization or ratification beyond alleging that what they did was done with the knowledge and approval of the first defendant, whose own complicity in the fraud is evidenced by a substantial volume of material. It cannot be seriously suggested that there was any informed approval or ratification by the plaintiffs of the payments, the true nature of which was concealed from the plaintiffs and their auditors throughout and which have been pieced together only by the most laborious and time consuming investigations in the course of the present litigation.”

¶ 86 Bearing in mind that the case in England has not yet been tried, these are very strong statements regarding Sheikh Fahad and on the material before me I am unable to distinguish this case from the English proceedings to which it is ancillary. It may well be, however, that steps should be taken to bring the Rules of the Supreme Court, 1978, into conformity with the commercial reality of The Bahamas as a serious offshore financial centre.

¶ 87 As to (ii) above, I did not require any security beyond the plaintiffs undertaking in damages bearing in mind the undisputed fact that at least some US\$3 million of the plaintiffs' money is said to have made its way to this country and also because assets such as “Fairview” and “the White House” may have been purchased with part of the proceeds of the fraud. Also, I bore in mind what Lord Denning, M.R. said in the case of Allen v. Jambo Holdings Ltd. [1980] 1 WLR 1252 at p. 1257 A-B.

¶ 88 With regard to (iii) above, Mr. Seligman submits that there was no urgency which could justify the plaintiffs application for Mareva relief being made ex parte since they knew - by December, 1994 at the latest of the existence of the Bluebird Trust and such assets as it may have. While I accept that some six or more months had elapsed between the time when the existence of the Bluebird Trust was disclosed to the plaintiffs and when the ex parte application for mareva relief was made, it was clear to me that the case is a complex one and that it involves parallel proceedings in jurisdictions as far apart geographically as The Bahamas, England, Singapore and New York as well as the Cayman Islands and possibly Switzerland.

¶ 89 If this were the normal kind of case I would apply the principle that ex parte applications are for cases of real urgency without hesitation - see eg. Bates v Lord Hailsham of St. Marylebone [1 975] 3 AER 1019 and my own ruling in Dennis Gomez v. Neville Smith et alias (No. of). However, urgency must be determined, I think, on the particular circumstances of the case; eg. in the English proceedings the application for Mareva relief was not made until seven months after those proceedings started and

two months after the Norwich Pharmacal-type disclosure/discovery order was made.

¶ 90 The need for speed in making an application for a Mareva injunction must, I think, be balanced against the need to make inquiries so that a full and frank disclosure of all material facts can be placed before the court since a failure to do so, however inadvertent, may result in an injunction granted ex parte being discharged without regard to the real merits of the application, if the omission is serious enough, as in “The Niedersachsen”.

¶ 91 The learned authors of the Supreme Court Practice 1991 Volume I at p.506 507, write: “This jurisdiction [Mareva] has given rise to a number of difficult problems, to be efficacious it must be swift and secret, in the sense that the injunction must always be granted ex parte; without notice to the defendant. Yet, if granted unjustly it may do incalculable damage to the defendant” (Emphasis mine)

¶ 92 While it may be possible to apply inter partes for mareva relief, it is unusual to do so although it was done in these proceedings in 1994 so that the learned author’s suggestion that it “must always be granted ex parte” may be somewhat wide. Be that as it may, the real problem which confronted the plaintiffs at the time when they decided to apply for ex parte mareva relief was the anticipated effect of issuing a summons (which is issued out of this court) directed to the defendants in light of the wording of Article 7.3 of the Bluebird Trust among others.

¶ 93 Article 7.3 reads:

“Notwithstanding the foregoing, the occurrence of any of the following events or circumstances shall forthwith and without further action on the part of anyone terminate the tenure of the then Trustee of the trust hereunder so that it shall thereupon cease to be Trustee of the trust and to act as Trustee, and shall thereby be divested of the trust property and the title to the trust property:

(1) the invasion or occupation by foreign or hostile armed forces of any part of the territory of the jurisdiction in which the trust is then principally administered, or the overthrow of the government of such jurisdiction by force or coup d’etat or other unlawful manner;

(2) the enactment of any law, or any action by or on behalf of any governmental or judicial authority, agency or officer of such jurisdiction or by or on behalf of any person claiming to be such, the purpose or effect of which is:

- (i) to acquire, expropriate or confiscate any trust property or to assume control of the Trustee’s affairs;
- (ii) to restrict, suspend or abrogate, in whole or in part, this Declaration or any contract in relation to the trust to which the Trustee is a party;
- (iii) to compel the Trustee to sell, convert or change investments, or otherwise dispose of trust property;
- (iv) to prohibit, delay or restrict in any manner the free and immediate transfer of trust property into or out of such jurisdiction, as the case may be;
- (v) to abrogate or substantially interfere with the exercise of any power or authority under this Declaration to appoint a successor Trustee or to direct the management and disposition of trust property;
- (vi) to require the exercise of any power or authority under this Declaration, including but not limited to a power or authority to amend or revoke the trust hereunder or to withdraw any of the trust property.”

¶ 94 In that regard, Mr. Seligman says that the law firm of which Mr. Dunkley is a member, and which also advises or advised PTC, had drawn a similar provision to be included in PTC's discretionary trust documents and that such provisions are most probably to be found in every trust document drawn in this country after 1959 when Castro came to power in Cuba and is called a "Cuba Clause".

¶ 95 The comparable provision as drafted by another member of Mr. Dunkley's law firm reads as follows: -

- "20. (i) Any Trustee hereof shall automatically cease to be a Trustee hereof on the happening of any of the following events within the territory where such Trustee is incorporated (in the case of a corporate Trustee) or resident (in the case of a natural person) that is to say:
- (a) The invasion of such territory by military forces
 - (b) The enactment of any law or the taking of any action by or on the part of any governmental authority agency or officer of or within the said territory the aim or purpose or effect of which is or would be had such Trustee sole control of the assets comprising the Trust Fund
 - (i) The acquisition expropriation or confiscation of any of the assets comprising the Trust Fund or any part thereof
 - (ii) To jeopardise or interfere with or hamper the free exercise by such Trustee of its administrative or executive functions in respect of the trusts hereof or the Trust Fund or its discretion in respect thereof
 - (iii) The restriction suspension abrogation withdrawal cancellation or rescission of any exemption relief or contract in relation to the trusts hereby created or the Trust Fund or any part thereof whether in respect of exchange or currency control or any other matter
 - (iv) To levy any tax or duty on the capital of the Trust Fund in excess of live (5) per centum per annum thereof
 - (v) To levy any tax or charge or fee on the income of the Trust Fund or any part thereof in excess of five (5) per centum per annum thereof
 - (c) The nationalisation or attempted nationalisation of a controlling interest in the Trustee or the intervention in its affairs by a government official or a government body or agency in such a way that the Trustee is unable efficiently to carry out its duties and exercise of discretions in accordance with the terms of this Trust."

¶ 96 It will be noticed that whereas Article 7.3 of the Bluebird Trust includes a reference to actions by, inter alia, "any governmental or judicial authority", the comparable clause as drafted by Mr. Dunkley's law firm does not. In my view that is a great difference. Mr. Seligman at first sought to counter that view by saying that the term "governmental authority or agency as used in the draft prepared by Mr. Dunkley's law firm was indecipherable from the term "judicial authority" as used in Article 7.3 of the Bluebird Trust. However, after it was drawn to his attention that the argument on that aspect of the matter raised a more fundamental issue as to the separation of powers under the Constitution of The Bahamas which is based on the unwritten Westminster Model Constitution and that the judiciary under such a constitution cannot be an "agent" of the Executive or Legislative branches of government, he did not pursue that line of argument any further - see eg. *Hinds v. The Queen* [1977] AC 195 and *Commissioner of Police v. Skip Patrick Davis and Another* [1993] WLR.

¶ 97 The Article 7.3 of the Bluebird Trust on its face, is intended to spring into operation as soon as any order is made by a court which has or would have the effect of prohibiting or restricting the free and immediate transfer of trust property out of the jurisdiction or which abrogates or substantially interferes with eg. PTC's power to appoint a successor trustee ie. any order similar to a Mareva injunction.

¶ 98 That in itself seems to me to be ample justification in this case for making the application for the Mareva injunction ex parte without notice to PTC. Mr. Seligman also points out, correctly, that PTC has not sought to rely on Article 7.3 of the Bluebird Trust. In light of the actual wording of that provision, I do not think that matters, It may well be different if there was an indication that Article 7.3 is not to be considered as it is or will be amended so as to bring it more into conformity with the comparable provision as drawn by Mr. Dunkley's law firm.

¶ 99 Mr. Seligman submits that a Mareva injunction issued where a mere declaration is claimed is absurd, impractical and improper. I do not agree. Here, as indicated earlier, the declarations sought are not "mere" declarations but are necessary adjuncts to the substantive reliefs sought against Sheikh Fahad.

¶ 100 Mr. Seligman submits that the plaintiffs do not have a good arguable case since they do not have a cause of action for the mere declaration and therefore did not have a good arguable case at the ex parte stage I have already dealt with the issue as to whether or not the remedy by way of declaration stands alone or is being sought in conjunction with other relief as against Sheikh Fahad.

¶ 101 As to whether or not Bluebird Trust is a "sham trust", Mr. Seligman submits that the plaintiffs do not have a good arguable case as to that where the slender evidence of the obiter dicta of Mance J. quoted earlier is weighed against the sworn evidence and other facts which supports PTC's case. I have already dealt with the evidence as to whether or not Sheikh Fahad regarded the Bluebird Trust and Archway and Trout as his alter egos and whether he had any influence in regard to the trust property, legal title to which is vested in PTC as Trustee of the Bluebird Trust. As indicated earlier, I come to the conclusion on the evidence of the Player Club and Grand Tibidabo transactions which has not been controverted on behalf of the defendants and the manner in which they were effected as well as the provisions of the Bluebird Trust excerpted earlier, 'that Sheikh Fahad, as the primary beneficiary under that Trust, regarded it and its emanations as his alter egos and I therefore conclude that there is a good arguable case for the grant of the Mareva injunction.

¶ 102 In the result, I hold the Mareva injunction will remain.

¶ 103 I will hear counsel as to the discovery orders.

SAWYER 3.

September 1, 1995.

¶ 104 **SAWYER J.:**— The first defendant, who is a resident (at least part-time) of The Bahamas applied by summons filed 20th July, 1995 for the discharge of the leave granted ex parte to the plaintiffs on 28th June, 1995 to further amend their statement of claim so as to include the following additional reliefs:

“Against Sheikh Fahad:

(1)...(vi) a declaration that all of the assets owned, controlled or managed by

- Chemical Trust, Private Trust and/or Mrs. Allyson Gibson in their capacity as Trustee or Protector of any of the Trusts are in equity and/or law the assets of Sheikh Fahad
- (viii) a declaration that all of the assets owned, controlled or managed by Archway Limited, Willow Investments Limited, Fasab Investments Limited and/or Trout Corporation are in equity and/or law the assets of Sheikh Fahad

¶ 105 By that summons the first defendant also sought the discharge of paragraphs 1.2 and 14 of the order of 28th June, 1995 which paragraphs read as follows:

- “12. Philip Dunkley and Oscar Johnson of the firm of Higgs & Johnson be and are hereby appointed to be the agents within The Bahamas of the First Defendant to act jointly or severally on behalf of the First Defendant to request and obtain from any person in The Bahamas (whether or not such person is a licensee under the Banks and Trust Companies Regulation Act) who is or was a trustee, protector or other fiduciary of any of the Trusts any information relating to any of the Trusts to which the First Defendant, as settlor or beneficiary of any of the Trusts or otherwise, is entitled to obtain from such person; and for these purposes Philip Dunkley and Oscar Johnson or either of them may commence and prosecute or cause to be commenced and prosecuted in the name of the First Defendant such proceedings in any of the Courts of the Commonwealth of The Bahamas as they shall deem necessary to obtain such information from any such person.”
- “14. The Defendants and each of them be restrained until further order of the Court from parting with any asset vested in them as trustee or trustees of any trusts or taking any step whereby the assets vested in the trustee or trustees of any of the trusts would or might be transferred to any other person notwithstanding that any claim or purported claim at the making of this Order shall have terminated his or her or their trusteeship.”

¶ 106 At the close of arguments, I indicated that I would not discharge the leave which I had granted ex parte nor would I vary the order by deleting paragraphs 12 and 14 thereof At that time, I indicated that I would put my reasons in writing later which I now do.

¶ 107 As I understood the arguments raised on behalf of the first defendant, they were framed in terms of Order 18 rule 19(1)(a) of the Rules of the Supreme Court 1978 (which is exactly the same as the equivalent provision of the English Rules of the Supreme Court 1965) and were to the effect that subparagraphs (vi) and (viii) of the reliefs sought in the re-amended statement of claim are not referable to any facts or matters pleaded in the statement of claim and therefore do not disclose any reasonable cause of action as against the first defendant.

¶ 108 In addition, it was argued that those paragraphs do not disclose any reasonable cause of action because if they were based on the premise that the trusts had been created with the intent to defraud the plaintiffs claims, they were statute-barred under subsection 4(3) of the Fraudulent Dispositions Act, 1991 (No. 1 of 1991) which, I was later informed, came into force in April 1991, ie., well before any of the trusts referred to in the re-amended statement of claim was created.

¶ 109 Sub-paragraph 32(7) of the statement of claim defines what is meant by the term “Trusts” in the re-amended statement of claim so as to apply not only to a trust established by or under a settlement by the first defendant, but also to any such trust established by the trustees of any of the named trusts and to any such trust where the first defendant not only was the settlor but to which he contributed funds for the benefit of that trust and/or is or was at any time a beneficiary or within a range of potential beneficiaries of any of the trusts and even if he only had any “influence” in respect of the disposition of the property of the trust either under the relevant trust deed or by any understanding or arrangement whatsoever (whether or not such arrangements were legally binding) with a trustee or protector of such a trust.

¶ 110 In addition, there is no dispute that the statement of claim pleads to justiciable causes of action against the first defendant in that it alleges that he acted in breach of his fiduciary duty owed to the plaintiffs, and was a party to a conspiracy to defraud them of some US\$450 million and received some of the funds which resulted from those breaches of fiduciary duty and the conspiracy to defraud which the plaintiffs are seeking to trace see eg. paragraphs 64 to 76 of the re-amended statement of claim, as well as paragraphs 92 and 93 thereof

¶ 111 The sixth and seventh defendants are alleged to be creatures of the Comfort Trust which was established by the first defendant in Cayman and are alleged to be the legal owners of two separate residences at Lyford Cay, New Providence, The Bahamas, one of which is said to be the residence of the first defendant,

¶ 112 By subparagraph 1 (vii) the plaintiffs also seek against the first defendant such “tracing and or proprietary remedies and/or other equitable remedies against Sheikh Fahad, as Constructive Trustee as shall to the court seem just and equitable”.

¶ 113 While I accept the law on pleadings to be as Mr. Barnett stated it, apart from the question as to whether or not a plaintiff may claim a declaration that a defendant is the owner in equity and or at law of the corpus of a trust which Mr. Barnett did not argue and which I therefore did not decide at that Juncture (see eg. the reasoning of Chitty, J. in *Price v. Phillips* cited below) it seemed to me that on the pleadings before me as compared with the pleadings before the House of Lords in *Farrell v Secretary of State for Defence* [1980] 1 AER 166 (to which Mr. Barnett drew attention) this case was distinguishable from that case Here the substance of the plaintiffs’ claim against the first defendant has been specifically, and properly, pleaded and it is only the additional remedies which are being attacked. Further, this court has an inherent discretion to grant a declaration (since it has all the powers of the Court of Chancery) even if that remedy is not specifically asked for, if that is the only way justice can be achieved - see also s.29 of the Supreme Court Act, Ch. 41. As indicated during the course of argument, the declarations sought are remedies as opposed to causes of action.

¶ 114 As to whether or not a declaration may be sought by a plaintiff as to a third party’s rights, I had in mind the decision in *New York Insurance Co v. Public Trustee* [1924] 2 Ch. 101, a decision of the Court of Appeal in England which I accept is of persuasive authority. However, I find that decision most persuasive in this case.

¶ 115 With regard to the question as to whether or not the re-amended statement of claim disclosed a reasonable cause of action in respect of the claims for the two declarations because of the provisions of subsection 4(3) of the Fraudulent Dispositions Act, 1991, I had in mind a number of authorities some of which seemed to suggest that a court ought not to assume that a defendant will rely on a limitation defence unless it has been pleaded or it has been made plain that he will rely on that defence or because the plaintiffs title to real property appears on the face of the statement of claim to be time-barred.

¶ 116 In *Dawkins v. Penrhyn* (1878) 4 AC 51 at p. 59, Earl Cairns, L.C. said this with regard to the limitation defence in relation to a claim for real property:

“It cannot be predicated that the Defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The Plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the Plaintiff states that time period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue. It is therefore clearly a case in which a demurrer where the facts appear upon the bill is applicable as a mode of defence, and I repeat that there could have been no surprise in this case, because it is obvious upon the face of the claim itself, that the Plaintiff felt the difficulty by reason of the Statute of Limitations.”

¶ 117 It is clear that when that case was before the House, the view was taken that the defendants would rely on the limitation defence and that that defence appeared from the plaintiffs own pleading because there the title to real property was in question.

¶ 118 In *Dismore v. Milton* [1938] 3 AER 762, an attempt was made to strike out the statement of claim solely on the ground that the action was statute-barred under the Limitation Acts so that the pleading disclosed no reasonable cause of action. Greer and Slesser LJJ held that that application failed.

¶ 119 In the later case of *Ronex Properties v Laing Construction Ltd and others* [1982] 3 AER 961 at p. 965 - 966, [1983] Q.B. 398, Donaldson, U with whom the other two judges agreed dealt with the issue of a limitation defence under Order 18 rule 19(1) of the English Rules of the Supreme Court thus:

“Under RSC Ord 18, r 19(1) the power to strike Out any pleading or the indorsement of any writ in the action or anything contained therein is exercisable -

‘on the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court...’

In the case of an application under para (1)(a), which is the present case, no evidence is admissible.

Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action and there are some provisions of foreign law which can have that effect, it is trite law that the English Limitation Acts bar the remedy and not the right, and furthermore that they do not even have this effect unless and until

pleaded. Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply. Concealed fraud has, we are told, been pleaded by the plaintiffs in this case as against the defendants, but whether the personal representatives will or can adopt a similar attitude vis-a-vis the third parties can only really emerge if ever they get to the stage of delivering a reply in the third party proceedings.

Accordingly, authority apart, I would have unhesitatingly dismissed the application to strike out on this ground. The answer might well have been different if the third parties had relied on any ground other than failure to disclose a reasonable cause of action, but in that event all concerned could have adduced evidence and we would have been able to explore the factual basis on which it is said the Limitation Acts do, or as the case may be do not, apply.

The matter is not in fact free from authority. It was considered in *Riches v DPP* [1973] 2 All ER. 935, [1973] 1, WLR 1019, in which the earlier cases are reviewed. There the grounds put forward in support of the application to strike out included an allegation that the claim was frivolous and vexatious and an abuse of the process of the court. Accordingly, the court was able to consider evidence and it is understandable that the claim could be struck out. Of the cases referred to, it seems that only in *Dismore v Milton* [1938] 3 All ER. 762 was an attempt made to strike out solely on the grounds that the Limitation Acts applied and accordingly no cause of action was disclosed. *Greer and Slesser LJJ* held that such an application must fail for the reasons which I have already indicated and contrasted the effect of the statute of limitations with that of the real property limitation Acts. That being a two-judge court, we are not strictly bound by its decision, but I have no doubt that it was right. Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed. The judge refused to strike out on this ground both for the reasons given in *Dismore v Milton* and because, in the exercise of his discretion, he thought that the application was premature in that at that stage he was not satisfied that no reasonable cause of action was disclosed. In my judgment, he was absolutely right in so refusing.”

¶ 120 Section 4 of the Fraudulent Dispositions Act, 1991 reads as follows.

“4: (1) Subject to the provisions of this Act, every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced.

(2) The burden of establishing an intent to defraud for the purposes of this Act shall be upon the creditor seeking to set aside the disposition.

(3) No action or proceedings shall be commenced pursuant to this Act unless commenced within two years of the date of the relevant disposition.”

¶ 121 The question whether or not that section will operate so as to bar the plaintiffs claim as well as the remedy may well have to be considered at some not too distant future date, but in light of the decisions to which I have referred, I took the view that the limitation defence in the circumstances of this case would have to be pleaded because it raises some difficult points of law as to whether in this jurisdiction, if property is obtained in breach of fiduciary duty and/or breach of trust or by fraud abroad and is then placed in a trust in The Bahamas before any action is taken by the party allegedly defrauded or who complains of breach of trust or fiduciary duty, the 1991 statute bars the claim to avoid the trust as well as any remedy eg. by way of declaration.

¶ 122 In view of the numerous decisions both in this jurisdiction and outside that a statement of claim should not be struck out as disclosing no reasonable cause of action except in the clearest of cases, I decided that I would not strike out subparagraphs 1 (vi) and (viii) of the re-amended statement of claim.

¶ 123 As to the discharge of paragraphs 12 and 14 of the ex parte order, the first defendant may have only himself to blame for that order when his seventh affirmation in the English proceedings (as defined in the statement of claim) is considered for in that affirmation he gives no pertinent information about the “Better Trust” and such information as he gives about some of the other Trusts of which he states he is aware, is deficient as to how those trusts operate in regard to him. In addition, the first defendant was precluded by the orders of the English Court from “... communicating with the trustees” so that I considered it appropriate so as not to require him in affect, to breach the English Court’s order that those paragraphs should be made in that form.

¶ 124 Further and particularly with regard to the Better Trust, as there was no information regarding even who the trustees of that trust are, I felt that orders in the terms of paragraphs 12 and 14 of the ex parte order were justified.

¶ 125 Finally on that point at the hearing of the first defendant’s summons the subject of this ruling, no information was put before me to suggest that the first defendant or his advisers were in any better position to give the required information than they were when the seventh affirmation was made in December, 1994.

¶ 126 For those reasons I dismissed the first defendant’s application with Costs to the plaintiffs.

SAWYER J.

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