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Jimmy Wayne Adams & Ors. v Cape Industries Plc & Capasco Ltd.

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the High Court of Justice

Chancery Division

27 July 1989

1989 WL 651250

Lord Justice Slade Lord Justice Mustill and Lord Justice Ralph Gibson

Thursday, 27th July 1989

Representation

MR. T. MORISON Q.C. AND MR. C. FALCONER (instructed by Messrs Oppenheimer Nathan & Vandyke) appeared on behalf of the Appellants (Plaintiffs).

SIR GODFRAY Le QUESNE Q.C. , MR. J. PLAYFORD Q.C. and MR. A. BRUNNER (instructed by Messrs Davies Arnold & Cooper) appeared on behalf of the Respondents (Defendants).

JUDGMENT (Revised)

LORD JUSTICE SLADE:

I INTRODUCTION

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

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

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

The plaintiffs in these proceedings are persons, or the personal representatives of persons, in whose favour awards of damages were made by the judgment, dated 12th September 1983, of the Honourable Judge Steger, a United States Federal District Court judge, in the District Court for the Eastern District of Texas, U.S.A. ("the Tyler Court"). The judgment was a default judgment against Cape Industries PLC ("Cape") and Capasco Ltd. ("Capasco"), companies registered in England and the sole defendants in all the actions before this court. They had taken no part in the proceedings in which the judgment was made. The judgment was for the specific sums payable to individual plaintiffs set out in an appendix to the judgment: $37,000 each for 67 plaintiffs; $60,000

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

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

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

Summary of the Proceedings in the Tyler Court

Different sets of proceedings with reference to claims arising from the processing of asbestos in the Owentown factory had extended over many years. An account of what took place is necessary for a proper understanding of the course of the present proceedings. The first action was commenced in the Tyler Court in January 1974 and was framed as a “class” action in which the plaintiffs sued “on behalf of themselves and all other: similarly situated” . A second action was commenced in the same month. They were assigned to Judge Steger. Cape was one of the defendants. Capasco was added as a defendant in 1976. Egnep (Proprietary) Ltd. (“Egnep”), a wholly owned South African subsidiary of Cape, engaged in mining asbestos, was also a defendant. All filed motions to quash service on the ground of lack of jurisdiction.

By July 1974 it was apparent that hundreds of claimants, alleging injury caused by the amosite asbestos used in the Owentown plant, were intending to pursue claims. Judge Steger in December 1974 ruled that the actions should not proceed as class actions; that they should be conducted under the Federal “Rules for complex and multi-district litigation” ; and that intervention in the proceedings should be allowed freely for those claimants who wished to join. In consequence a large number of claimants were added. In December 1974 a third action with reference to asbestos from the Owentown plant was commenced in the Tyler Court in which the only defendant was the USA. All these proceedings together have been known as the Tyler 1 proceedings. They were separate and distinct from the proceedings in which the appellants, now before this court, obtained their judgment in September 1983.

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

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

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

Upon prohibition by the order of Judge Steger of further interventions in the Tyler 1 proceedings, new actions were commenced by claimants in what have been called the Tyler 2 proceedings. There were 8 separate actions. They were assigned to Judge Steger. The first was commenced on 19th April 1978 and the last on 19th November 1979. There followed intervention by a very large number of claimants. Cape, Egnep and NAAC were defendants in all the actions. Capasco was a defendant in three only. PCC, PPG, Corning Glassworks Inc. and OCAW, a trade union to which some claimants had belonged, were also defendants in all actions. The United

States Government was a defendant in some actions and third party defendant in others.

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

Cape, Capasco and Egnep took the decision to play no part in any of the Tyler 2 actions. They had initially regarded the Tyler 1 actions as having little more than nuisance value. They could not understand how tortious liability to the Owentown workers could be imposed upon the Cape companies merely on the ground that Cape subsidiary companies had mined the asbestos and sold it into the United States of America. They had had expectations of success on their jurisdiction objection. They had, however, succumbed to the pressure for settlement. They were unwilling to be left as the only defendants in a large and expensive jury trial. Having joined in the settlement of the Tyler 1 actions they decided, since they had no assets in the United States of America, to take no part in the Tyler 2 proceedings; to allow default judgments to be obtained against them; and to defend any actions brought in this country for enforcement of any such judgment on the ground that, under the law of this country, the Tyler Court had no jurisdiction over Cape, Capasco or Egnep with reference to the claims of the claimants.

The Settlement Against some Defendants of the Tyler 2 Proceedings

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

That settlement was complicated by a “device” devised by Mr. Bailey, who was the attorney negotiating the settlement on behalf of the claimants and which was intended, it was said, to give the claimants the chance of additional recovery against the United States. The form of this device, and the part which it was alleged to have played in the formulation of the terms of the default judgment against the Cape companies, was important to the allegations of fraud put forward against Mr. Bailey, which, as stated below, were rejected by Scott J. It is necessary to describe what happened to render intelligible some of the matters discussed later in this judgment. The device was described by Scott J. at page 21 of his judgment as follows:

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

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

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

The consolidated actions in this country

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

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

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

The circumstances in which our courts will recognise a foreign court as competent to give a judgment in personam capable of enforcement in this country are stated thus in Dicey & Morris The Conflict of Laws (11th Edition) (" Dicey & Morris ") Volume 1, pp. 436-437:

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

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

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

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

The defendants further contended that, even if any grounds of jurisdiction in the Tyler Court had existed, yet the judgment should not be enforced because (i) the judgment had been obtained by the fraud of Mr. Blake Bailey, the attorney who had represented some of the plaintiffs before Judge Steger in the proceedings upon the making

of the default judgment and who had drafted the terms in which the default judgment was finally expressed; and (ii) it would be contrary to the standards of natural justice required by our law, and contrary to the principles of public policy applied by our law, to enforce the judgment having regard to the circumstances in which, and the procedures by which, it came to be made. Scott J. considered these issues again on the assumption that, contrary to his conclusion, the plaintiffs had made out a ground for jurisdiction in the Tyler Court over Cape and Capasco. He acquitted Mr. Bailey of having had any intention to deceive and of having deceived anyone with reference to the terms and form of the judgment. The allegations that the judgment had been obtained by fraud accordingly failed. However, the defendants succeeded before Scott J. on the natural justice point. The Judge found that the judgment was not such that it could be enforced in the courts of this country. The primary ground of that finding was that the procedure adopted in this particular case by the Judge of the Tyler Court offended against the principles of substantial justice contained in our law.

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

The issues on this appeal

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

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

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

(A) the presence issue ;

(B) the country issue ; and

(C) the natural justice issue .

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

II THE PRESENCE ISSUE

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

There was put before Scott J. at the hearing a large amount of written material, some of it consisting of the depositions taken in the course of pre-trial discovery in the Tyler 1 and in other proceedings. The plaintiffs put in under the Civil Evidence Act : (i) four depositions of Mr. G. Morgan who had worked for NAAC from 1970 and had been the President (or Managing Director) of NAAC from 1974 until its dissolution in 1978: these depositions were dated 20th May 1975; 19th May 1982; 20th February 1981; and 18th September 1986; (ii) one deposition of Mr. Higham, Managing Director of Cape from the beginning of 1972, made on 4th June 1975; (iii) one deposition of Dr. Gaze, Chief Scientist of the Cape Group, a Director of Capasco since 1961 and later Chairman, and executive director of Cape, and on the Board of NAAC from a date in the late 1960s until July 1975, made on 5th

June 1975; (iv) one deposition of Mr. Buckley, Vice-President of PCC, made on 9th September 1975; (v) four depositions of Mrs. J. Holtze, who had started with NAAC on its formation in 1953 as general factotum and as a secretary to Mr. Cryor, then the President of NAAC. Later, Mrs. Holtze in the 1960s, became Secretary and Assistant Treasurer of NAAC until its dissolution, and thereafter Mrs. Holtze continued with CPC. Her depositions were made on 12th April 1979, 7th November 1980, 20th February 1981 and 17th May 1982. There were, in addition to the depositions, many documents including those disclosed by Cape/Capasco in the course of the consolidated actions in this country. The only witness called for Cape and Capasco on the issue of presence was Mr. A.J. Penna, a solicitor who had entered the employment of Cape in 1973 as Group Solicitor and remained in their employment until June 1985.

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

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

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

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

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

4. NAAC did not at any time have authority to make contracts, in particular for the sale of asbestos, which would bind Cape or any other subsidiary of Cape. (J61).

5. On a date before 1960 Capasco, an English company, was incorporated. (J.4). Its shares had at all times been held by Cape. It was responsible for the supply, marketing and sales promotion throughout the world of Cape's asbestos or asbestos products but, since in 1960 NAAC was already at work, marketing in the USA was left in the main to NAAC. (J.5A).

6. In 1975 there was a change in the organisation of the Cape Group. Cape International and Overseas Ltd. ("CIOL"), an English company, was incorporated as a wholly owned subsidiary of Cape. The shares in Casap (the South African company which owned the shares in the mining subsidiaries) and the shares in NAAC (the marketing subsidiary in Illinois) were transferred to CIOL. This insertion of CIOL between Cape, on the one hand, and Casap and NAAC on the other, did not materially alter the way in which the subsidiaries carried on business and managed their affairs. The sale by Cape to TCL in June 1979 (see para 1 above) was effected by sale of the shares in CIOL. (J.5).

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

8. When the settlement of the Tyler 1 proceedings was concluded in September 1977 Cape, as stated above, decided to take no part in the Tyler 2 proceedings. (J.16B). The further decision was made at a Board meeting of Cape in November 1977 to reorganise the group's asbestos selling arrangements in the USA which would in future be more closely controlled from South Africa; and as part of this reorganisation, NAAC should be wound up. (J.16). Part of the reason for that decision was to counter an argument that under English law Cape's interest in NAAC's business sufficed to give the Tyler Court jurisdiction over Cape. (J.17).

9. Cape, however, did not intend to abandon the USA as a market for Cape's asbestos. To accompany the liquidation of NAAC, alternative marketing arrangements were made. Associated Mineral Corporation ("AMC"), a Liechtenstein corporation, was formed, the bearer shares in which were held by Dr. Ritter, a lawyer, on behalf of CIOL. All sales into the USA of Cape's asbestos were to be sales by AMC. (J.17).

10. A new marketing entity in the United States was on 12th December 1977 created, namely Continental Products Corporation ("CPC"). CPC was not a subsidiary of Cape. The shares were held by Mr. Morgan, a US citizen and resident of Illinois, who had for four years been President of NAAC. By an agency agreement in writing dated 5th June 1978, between CPC and AMC (see para 28 below), CPC were to act as agent for AMC in the USA for the purpose of the sale of asbestos. CPC would be remunerated by commission but had no authority to contract on behalf of AMC or any other Cape company. CPC was to act as a link between AMC and the US purchasers in connection with shipping arrangements, insurance etc. (J.17).

11. As from 31st January 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets. (J.68E-H). (This finding is challenged by the appellants. The cessation of NAAC's business occurred, it is said, on 18th May 1978. It is to be remembered that the Tyler 2 actions were commenced on dates between 19th April 1978 and 19th November 1979. If presence of Cape/Capasco could be proved through the office and actions of NAAC but not through the office and actions of CPC under the new marketing arrangements, the point could be of importance). NAAC executed articles of dissolution on 18th May 1978. (J.68).

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

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

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

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

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

16. In addition, NAAC also carried on business as principal on its own account in buying asbestos textiles, mainly from Japan, and selling the textiles to US customers; and, from time to time, in buying asbestos from Casap or Egnep for sale on to US customers. (J.60A). Further, for storing asbestos which

it had purchased, whether from US Government stocks or from Egnep or Casap, NAAC rented in its own name and paid for warehousing facilities. (J.60C).

17. NAAC was the channel of communication between US customers, such as PCC, and Capasco or Casap. There was undoubtedly "a sense in which NAAC was, if the Cape Group of companies is viewed as a whole, part of the selling organisation of the group and Cape's agent in the US" . (J.61C-D).

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

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

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

21. There was no agency agreement between Cape and NAAC comparable to that which had existed at one time between Cape and Capasco under which all of Capasco's business had been carried on by Capasco as agent for Cape so that, in effect, until termination of the agreement in the mid 1970s, Capasco's business had been Cape's business. The annual accounts of NAAC were drawn on the footing that NAAC's business was its own business and there was nothing to suggest that the accounts were drawn on a false footing: (J.79D-H).

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

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

24. The arrangements for the dissolution of NAAC and the formation of AMC and CPC (see paras 8 to 10 above) over the period November 1977 to February 1978 were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the USA while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries. (J.70C). This arrangement was associated with the decision to take no part in the Tyler 2 proceedings and to resist enforcement of any default judgments on the ground that the Tyler Court had no jurisdiction over Cape or its subsidiaries other than NAAC. The defence on those lines would require the trading connection between Cape and its subsidiaries on the one hand and the United States on the other to be kept to a minimum. Hence the need to liquidate NAAC, a Cape subsidiary, and to allow at least some of NAAC's trading functions to be assumed by an Illinois corporation which was not a Cape subsidiary, i.e. CPC. (J.70-71).

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

26. As to the formation of AMC:- The cost of forming this Liechtenstein corporation, in which the bearer shares were held by Dr. Ritter on behalf of CIOL, was borne within the Cape Group. The intention was that all sales of Cape asbestos to US customers would be made by AMC. The exact nature of the arrangements between AMC and Egnep/Casap, whereby AMC became the owner of the asbestos so as to be able to resell it into the USA, was not disclosed in the evidence. That was not surprising since the relevant documentation had, since the sale of CIOL and Casap to TCL in 1979 been under the control of TCL but it was clear that AMC was no more than a corporate name. It was an "invoicing company" with no employees of its own and it probably acted through employees or officers of Casap or Egnep. (J.72A).

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

28. The agency agreement of 5th June 1978 between AMC and CPC: see para 10 above: Mr. Morgan was also a party to this agreement. By it AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of USA, Canada and Mexico for a period of 10 years from 1st February 1978 to 31st January 1988. There was a proviso for termination on 12 months' notice. The duties imposed on CPC were to carry out the appointment diligently and in particular (a) to keep AMC advised… as to competitor products… and market conditions… (b) to… facilitate or expedite delivery of products contracted to be sold by AMC in the territory; (c) to seek out and promote prospective business on behalf of AMC and to forward to AMC requests for supplies of products provided always that supplies should only be at prices and upon terms and conditions determined by AMC. It was expressly provided that nothing in the agreement should be construed so as to give CPC any authority to accept any orders, to make any sales, or to conclude any contracts on behalf of AMC. CPC was left free to sell material and products other than asbestos fibre and to involve itself in other commercial activities. CPC was required to provide, maintain and operate at its own cost office accommodation and staff for running an efficient advice and consultancy bureau. Remuneration for CPC was to be by commission upon the cost of all asbestos sales by AMC in the territory. (J.72-73).

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

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

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

32. As to the cost of CPC's commencement in business:–CPC had an immediate need for funds for rent, furniture, and payment of staff but commission under the agency agreement with AMC would not be payable immediately. The sum of $12,000 was paid by and on behalf of Cape to CPC to assist in

meeting the cost of establishing itself. In addition a sum of $160,000 was paid to CPC on 4th January 1978 to enable CPC to set up in business and to perform the agency obligations expected of it: (J.74-75).

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

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

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

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

37. In August 1984, according to the evidence of Mr. Summerfield, a solicitor acting for the plaintiffs, there was at 150 North Wacker Drive a noticeboard giving the names of both CPC and AMC as the occupants of the offices on the 12th Floor. There was no evidence whether the board was there in 1979 when the sale of the subsidiaries was made by Cape to TCL: (see para 1 above). There was no evidence to suggest that AMC was an occupant of the offices at the time of the commencement of the Tyler 2 actions in the period 19th April 1978 to 19th November 1979. (J.78-79).

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

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

On the basis of the findings of fact made by Scott J. and the further facts which they submit he ought to have found, the plaintiffs in their amended notice of appeal submit that he was wrong to conclude that

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

Two important inferences of fact made by the Judge (numbers (1) and (2)) and two important findings of primary fact (numbers (3) and (4)) are thus challenged on this appeal. We shall consider contention (4) in the section of

this judgment dealing with the “single economic unit” argument and in the Appendix. We shall consider the contention that CPC was “not an independently owned company” in the section dealing with the “corporate veil argument” . We shall consider contention (3) and the contentions that NAAC's business was not “its own business” and that CPC's business was not “its own business” in the section dealing with what we will call the “agency” argument.

Some leading authorities relevant to the presence issue

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

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

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

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

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

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

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

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

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

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

Nearly 120 years ago in Schibsby v. Westenholz the “residence” of an individual in a foreign country at time of

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

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

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

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

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

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

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

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

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

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

We will have to revert to the third question in the section of this judgment dealing with the "country" issue; in the present section we will assume in favour of the plaintiffs that the U.S.A., rather than the state of Texas, is to be regarded as the relevant country. As to the first and second questions, we think that the most helpful guidance is to be obtained from the decision of the Privy Council in Sirdar Gurdval Singh v. Rajah of Faridkote (1894) A.C. 670 (" Singh "), the decision of Lord Russell of Killowen in Carrick v. Hancock (1895) 12 T.L.R. 59 and the decision of the House of Lords in Employers' Liability Assurance Corporation v. Sedgwick Collins & Co. (1927) A.C. 95 (" Employers' Liability ").

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

> "Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('Actor sequitur forum rei'); which is rightly stated by Sir Robert Phillimore (International Law, Vol. 4, s. 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur' . Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it and when they are living in another independent country … no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.
>
> In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity".

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

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

> "that the jurisdiction of a Court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its Courts. In his opinion that duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory, It seemed to him that the question of the time the person was actually in the territory was wholly immaterial. This being so it was quite clear that under the facts of this case it was properly and lawfully initiated, and all its subsequent proceedings were lawful and valid, and that the Swedish Courts had ample jurisdiction to enforce the plaintiff's claim against the defendant."

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

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

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

From the three last-mentioned authorities read together, the following principles can, in our judgment, be extracted. First, in determining the jurisdiction of the foreign court in such cases, our court is directing its mind to the competence or otherwise of the foreign court "to summon the defendant before it and to decide such matters as it has decided" : (see Pemberton v. Hughes (1899) 1 Ch. at p. 790 per Lindley M.R.). Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit. (We leave open the question whether residence without presence will suffice). From the last sentence of the dictum of Lord Parmoor cited above, and from a dictum of Collins M.R. in Dunlop Pneumatic Tyre Company v. Actiengesselschaft fur Motor Und Motorfahr-Zeugbau Vorm, Cudell & Co. (1902) 1 K.B. 342 at p. 346 it would appear that the date of service of process rather than the date of issue of proceedings is to be treated as "the time of suit" for these purposes. But nothing turns on this point in the present case and we express no final view on it. Thirdly, we accept the submission of Sir Godfray Le Quesne (not accepted by Mr. Morison) that the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress), Some further support for this submission is to be found in dicta of Parke B. in The General Steam Navigation Company v. Guillou (1843) 11 M. & W. 877 .

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

> "It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned. For the court is not likely to be the forum conveniens, in the sense of the appropriate court most adequately equipped to deal with the facts or the law. Moreover, the English case referred to above is open to the comment that the jurisdiction of the foreign court might just as well have been based on the defendant's submission as on his presence."

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

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

We see the force of these points. They highlight the possible desirability of a further extension of reciprocal arrangements for the enforcement (or non-enforcement) of foreign judgments by Convention. Nevertheless, while the use of the particular phrase "temporary allegiance" may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.

In the forefront of his argument on this issue, Mr. Morison submitted that the essential feature of this country's rules relating to the enforcement of foreign judgments is "curial allegiance" , which arises "where there is sufficient connection between the debtor and the rendering court at the date of suit so as to make it 'just' to enforce a judgment of that court". The relevance of residence or presence, in his submission, is that it provides the requisite connection. This, in our judgment, is not quite the correct way to look at the matter. While residence or presence will ex hypothesi give rise to a connection, it is the residence or presence, not the connection as such, which gives rise to the jurisdiction of the court. The question whether residence or presence existed at the time of suit is determined by our courts not by reference to concepts of justice or by the exercise of judicial discretion; it is a question of fact which has to be decided with the help of the guidance given by the authorities.

However, none of the authorities so far referred to was concerned with the question of enforcement of a foreign judgment against a corporate body. The residence or presence of a corporation is a difficult concept. A corporation is a legal person but it has no corporeal existence. It can own property. It can by its agents perform

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

The earliest case cited to us in which this court had to consider the concept of residence or presence of a corporation in the context of a claim to enforce a foreign judgment was Littauer Glove Corporation v. F.W. Millington (1920) Limited (1928) 44 T.L.R. 746 (" Littauer "). In that case the plaintiffs were manufacturers in the State of New York. The defendant company, which conducted the business of clothiers' merchants, had its principal place of business in Manchester. It bought from manufacturers in various parts of the world and sold to wholesalers. On March 17th 1922 its managing director, Mr. Millington, arrived in New York on a business visit with a view to seeing samples and making purchases. He stayed in a New York hotel for 4 or 5 nights, where he did some business for his company. Thereafter he visited various other states where he also did business. On April 1st the plaintiffs took out a summons against the defendant company. On April 3rd Mr. Millington returned to New York. On that date, while he was in the sales office in New York of Union Mills Corporation, the defendant's principal U.S. suppliers, he was served with process in the action. He entered no appearance, took no steps in the proceedings and did not submit to the jurisdiction of the American court. On April 4th he sailed for England. The plaintiffs, having in due course obtained judgment against the defendant company in default of appearance in New York, sought to enforce the judgment against it in England. The defendant contended that (under the rules of private international law) the New York court had no jurisdiction to make the order against it. Many authorities were cited to Salter J. From the report of the argument, it appears to have been common ground that the question turned on the "residence" or otherwise of the defendant company in the State of New York on April 1st 1922 when the proceedings were instituted. Salter J. identified the question for his decision as being whether on 1st April 1922 "the defendant company were resident in the State of New York so as to have the benefit and be under the protection of the laws of that state" . The plaintiffs' counsel had contended that it was not necessary for them to show that the defendant company was carrying on business at a fixed place. In his submission, it was resident in New York because it carried on business there: "the company is resident by its travellers and would be subject to process of the country in which they happened to be" . Salter J. rejected this contention, saying this (at p. 747):

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

Thus, the effect of Salter J.'s decision was that if a foreign judgment is to be enforced in this country against a corporation, it must be shown that at the relevant time (a) the corporation was carrying on business, and (b) it was doing so at a definite and "to some reasonable extent permanent place" . This test is significantly different from that applicable in the case of judgments against individuals. Littauer does not bind this court, but we see no reason to doubt the correctness of this test so far as it goes. It seems to us consistent with authority and to represent a commonsense approach to the question of "presence" in the case of a corporation. The difficulty may be to determine whether it can properly be said in any given case that the corporation is itself carrying on

business in the country concerned.

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

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

He said (at p. 136) that:

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

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

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

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

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

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

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

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

> “I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel: and all that emerges from this case is that there was a man called Kornbluth who sought customers for them, transmitted correspondence to them and received it from them, had no authority whatever to bind the defendants in any shape of form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time.”

On this appeal, in accordance with the approach of the courts in Littauer and Vogel , it has been common ground

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

In considering these features, Salter J. in Littauer and Ashworth J. in Vogel clearly attached great weight to a long line of cases where the English court has considered whether it should allow process to issue to foreign companies as being amenable to is jurisdiction, We will call this line "the Okura line of cases" , because a leading example is the decision of this court in Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag (1914) 1 K.B. 715 (" Okura ").

The origin of this line requires some brief explanation. After it had been decided in Newby v. Van Oppen (1872) 7 Q. B. 293 that in appropriate circumstances a foreign corporation was capable of being sued in this country, our courts in a number of cases had to consider (a) whether on the facts the foreign corporate defendant was amenable to the jurisdiction of the English court, and if so (b) whether it had been properly served with the process. Most of these cases were concerned with the old Order IX, rule 8 of the Rules of the Supreme Court 1883 , which provided:

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

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

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

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

> "It appears to me that as a consequence of these facts the appellants are resident here in the only sense in which a corporation can be resident – to use the phrase which Mr. Joseph Walton has so constantly referred to, they are 'here' ; and, if they are here, they may be served".

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

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

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

[All the authorities cited to us have been directed, and all the statements later in this judgmentwill be directed, to trading corporations. In the case of non-trading corporations, the same principles would presumably apply, with the substitution of references to the carrying on of the corporation's corporate activities for references to the carrying on of business].

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

(1) Newby v. Van Oppen (supra),

(2) Haggin v. Comptoir d'Escompte (1889) 23 Q.B.D. 519

(3) La “Bourgogne” (1899) P.1 and (1899) A.C. 431 .

(4) Dunlop Pneumatic Tyre Company Limited v. Aktien-Gesellschaft Fur Motor Und Motorfahrzeugbau Verm Cudell & Co. (1902) 1 K.B. 342 (“ Dunlop ”)

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

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

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

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

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

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

great weight to the fact that, in the words of Lord Esher M.R. (at p. 116) “when he gets an order he has no power himself to accept it” . As he put it (at p. 117): “One might as well say that the defendants carry on business in any place through which their goods pass while being sent to their customers” .

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

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

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

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

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

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

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

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

> (1) “The cases establish that jurisdiction on the territorial basis may be taken by an English Court over a foreign company if the foreign company has business premises in England from which or at which its business is carried on” . (J. 50G-51A.)
>
> (2) “There are, however, cases where residence or presence of a foreign company in England has been held established notwithstanding that the foreign company did not itself own or lease any business premises in England. A feature of these cases has been that the foreign company had a resident English agent who had authority to contract on behalf of and thereby to bind the principal. In these circumstances the presence or residence in England of the agent has been treated as the presence or residence of the foreign company, the principal.” (J. 51F-52A.)
>
> (3) “Trading in a country is insufficient, by the standards of English law, to entitle the courts of the country to take in personam jurisdiction over the trader: see The Littauer Glove Co. case. The trading must be

reinforced by some residential feature, be it a branch office or a resident agent with power to contract" . (J.65G-H).

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

Mr. Morison did not challenge these particular findings of fact. However, he submitted that Scott J. erred in law in holding that, in cases other than branch office cases, "the trading must be reinforced by … a resident agent with power to contract " . This conclusion, he pointed out, was based primarily on the learned judge's analysis of the Okura line of cases. However, this line of cases, in Mr Morison's submission, while of some relevance and interest, does not provide the correct yardstick to be applied in the present context. Contrary to the suggestion made by Ashworth J. in Vogel , he said, those authorities do not represent the situation truly converse to the enforcement of a foreign judgment; the true converse would be a foreign court applying its own conflict rules, adjudicating on the enforcement of an English judgment. Comity, as Blackburn J. pointed out in Schibsby v. Westenholz , is not the basis on which our courts enforce foreign judgments. Furthermore, the circumstances in which an English court will assume jurisdiction over a foreign corporation are closely bound up with our own rules of procedure which are derived largely from statute or statutory instrument and will be amended from time to time.

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

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

We would agree with Mr. Morison that the existence of a power in the resident agent to bind the foreign corporation to contracts can be neither an exclusive nor conclusive test of the residence of the corporation itself. As he pointed out, there are many cases in which the corporation has been held not to be carrying on business at the agency notwithstanding the existence of authority of this kind: (see for example The Princess Clementine (1897) P. 13 , The Lalandia (1933) P. 56 , The Holstein (1936) 2 A.E.R. 1660). Conversely, we can conceive hypothetical cases in which it might be absurd to regard the test as conclusive. If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on its behalf; the existence of such a requirement would not by itself prevent the corporation from being present in the country concerned and thus from being amenable to the jurisdiction of its courts.

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

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

General Principles derived from the authorities relating to the “presence” issue

In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the “presence” of an overseas corporation:—

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

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

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

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

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

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

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

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

(ii) the cost of his staff;

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

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

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

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

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

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

(i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it;

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

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

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

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

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation.

The plaintiffs' submissions on the “presence” issue

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

These three main submissions were substantially as follows:

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

Cape. (We will call this “the agency argument”).

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

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

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

The “single economic unit” argument

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

It is thus indisputable that each of Cape, Capasco, N.A.A.C. and C.P.C. were in law separate legal entities. Mr. Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and N.A.A.C. rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities.

In The Roberta (1937) 58 LL. Rep, 159 agents acting on behalf of the Dordtsche Company, had signed bills of lading. It was conceded at the trial that in so doing the agents had made Walford Lines Ltd., the parent company of Dordtsche Company, responsible for the bills of lading. Langton J., who described the concession as properly made, said (at p. 169):

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

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

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

In Scottish Co-operative Wholesale Society Ltd. v. Meyer (1959) A.C. 324 (“ Scottish Co-operative ”) the respondent based his complaint on section 210 of the Companies Act 1948 , which provided that “any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) … may make application to the court by petition for an order under this section” . The appellant society had formed a subsidiary company, of which the respondent was a member. It was submitted on behalf of the Society that even if it had acted in an oppressive manner, yet it had not conducted the affairs of the company in an oppressive manner within the meaning of the section. The House of Lords unanimously rejected this submission. Lord Simonds said (at p. 342):

> “My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent

> of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former."

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

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

In D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council (1976) 1 W.L.R. 852 ("the D.H.N. case") a group of three companies, "D.H.N." , "Bronze" and "Transport" , all in voluntary liquidation at the relevant time, were seeking compensation under the Land Compensation Act 1961 following a compulsory purchase made by the respondent Council. D.H.N. held all the shares in Bronze and Transport. The business of the group was owned by D.H.N. The land was owned by Bronze. The vehicles were owned by Transport. The Lands Tribunal held that D.H.N. were licensees of Bronze and had no claim to compensation for disturbance beyond that which could be allowed under section 20 of the Compulsory Purchase Act 1965 , which was negligible. This court allowed D.H.N.'s appeal on three separate grounds. We are concerned with only one of them, which Lord Denning N.R, explained (at p. 860) as follows:

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

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

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

In Revlon Inc. v. Cripps & Lee Ltd. (1980) F.S.R. 85 the question (among many other questions) arose as to whether the goods in question were "connected in the course of trade with the proprietor … of the trade mark" within the meaning of section 4(3) of the Trade Marks Act 1938 ". The proprietor of the trade mark was Revlon Suisse S.A., a subsidiary of Revlon Inc. Buckley L.J., in the course of deciding that the goods were connected in the course of trade with Revlon Suisse S.A., said this (at p. 105):

> "Since, however, all the relevant companies are wholly owned subsidiaries of Revlon, it is undoubted that the mark is, albeit remotely, an asset of Revlon and its exploitation is for the ultimate benefit of no one but Revlon. It therefore seems to me to be realistic and wholly justifiable to regard Suisse as

> holding the mark at the disposal of Revlon and for Revlon's benefit. The mark is an asset of the Revlon Group of companies regarded as a whole, which all belongs to Revlon. This view does not, in my opinion, constitute what is sometimes called 'piercing the corporate veil' ; it recognises the legal and factual position resulting from the mutual relationship of the various companies,"

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

> "One starts to my mind from this, that neither Article 85 nor Article 86 anywhere refers to 'persons' . In both Articles the relevant prohibitions are directed to 'undertakings' , a much wider and looser concept. This inaeed is what one would expect, because it would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of Salomon v. Salomon & Co. Ltd . – i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of conveyancing, of contracts and of liability for tort. But to export it blindly into branches of the law where it has little relevance, could, in my opinion, serve only to divorce the law from reality.
>
> Suppose, my Lords, that CSC had traded in Italy through a branch ofice. There could have been no doubt then that it was amenable to the jurisdiction of the Commission and of this Court. Could it have made any difference if CSC has chosen to trade in Italy through a wholly owned subsidiary? The difference would have been one only of legal form, not of reality. Why then should it make any difference that it chose to trade in Italy through a subsidiary that it controlled by a 51 per cent. majority rather than by a 100 per cent. majority? What matters in this field, in my view, is control".

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

> "(1) that there is a presumption that a subsidiary will act in accordance with the wishes of its parent – because according to common experience subsidiaries generally do so act;
>
> (2) that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Article 85 and 86 of the EEC Treaty."

We have some sympathy with Mr. Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one. Mr. Morison referred us to Bulova Water Company Inc. v. Haltori & Co. 508 F. Supp. 1322 (1981) , where the United States District Court held that it had jurisdiction over a Japanese corporation which was expanding into a new market by setting up subsidiaries and dealing with competition, both on the theory that the corporation was "doing business" in New York and under the New York "long-arm statute" . In the course of his judgment, Chief Justice Weinstein said (at p. 1342):

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

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

Mr. Morison described the theme of all these cases as being that where legal technicalities would produce

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

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

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

The plaintiffs further submitted in their notice of appeal that N.A.A.C. “did not deal and was not permitted to deal with Egnep or Casap, but had to go through Cape or Capasco.” It seems clear that N.A.A.C., as principal, made direct purchases of raw asbestos from Egnep. On the balance of probabilities, we accept the plaintiffs' submission that it made similar direct purchases from Casap: (see our observations under item (4) of the Appendix). In referring to the absence of dealing with Egnep or Casap, the plaintiffs were, we understand, intending to submit that as a matter of Group policy, which Cape could and did enforce by its power of control over the boards of Egnep, Capasco and N.A.A.C., the transmission of information and orders to or from customers had to be effected and was effected by N.A.A.C. through Capasco. We accept that submission. We also accept that the matters referred to in this paragraph lend some broad support to the submission that Cape ran a single integrated mining division with little regard to corporate formalities as between members of the Group. However, there has been no challenge to the judge's finding that the corporate forms applicable to N.A.A.C. as a separate legal entity were observed.

As to the plaintiffs' other factual submissions in this context we will deal with the purpose of N.A.A.C.'s creation and existence in considering the “agency” argument. As to the relationship between Cape and N.A.A.C., it is of the very nature of a parent company-subsidiary relationship that the parent company is in a position, if it wishes, to exercise overall control over the general policy of the subsidiary. The plaintiffs, however, submitted that Cape's control extended to the day-to-day running of N.A.A.C. They challenged the finding of fact made by Scott J. that “Mr. Morgan was in executive control of N.A.A.C.'s conduct of its business” . We explore further the facts relative to this finding and to the extent of Cape's control over N.A.A.C.'s activities in the Appendix to this judgment under items (11), (12) and (13). Our conclusion, shortly stated, is that the finding was justified by the evidence. A degree of overall supervision, and to some extent control, was exercised by Cape over N.A.A.C. as is common in the case of any parent-subsidiary relationship – to a large extent through Dr. Gaze. In particular, Cape would indicate to N.A.A.C. the maximum level of expenditure which it should incur and would supervise the level ofexpenses incurred by Mr. Morgan. Mr. Morgan knew that he had to defer in carrying out the business activities of N.A.A.C. to the policy requirements of Cape as the controlling shareholders of N.A.A.C. Within these policy limits, such as Cape's requirement that N.A.A.C.'s orders for asbestos for sale by NA.A.C. in the U.S.A. be placed through Capasco on behalf of Egnep and Casap, the day-to-day running of N.A.A.C. was left to him. There is no challenge to the judge's findings that –

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

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

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

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

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

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

As to C.P.C., in Mr. Morison's submission, the replacement of N.A.A.C. by C.P.C. was simply a substitute arrangement. The creation of C.P.C. was effected and paid for by Cape so that it could perform the same functions on behalf of Cape as N.A.A.C. had previously performed. C.P.C., on behalf of A.M.C. (and thus Cape) made payment arrangements with third parties and received moneys for A.M.C. (Cape). While Mr. Morgan held all the shares in CP.C. for his own benefit, the rights of pre-emption reserved to A.M.C. by the agency agreement of 5th June 1978 left him with little substantial financial interest in C.P.C.'s business, save for the office furniture and a right to an account which would be of little value; effectively, it was submitted, C.P.C.'s business was owned by A.M.C. (Cape).

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

The "corporate veil" point

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

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

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

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

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

> "But the question whether C.P.C.'s presence in Illinois can, for jurisdiction purposes, be treated as Cape's presence, must, in my view, be answered by considering the nature of the arrangements that

> were implemented, not the motive behind them. The documentary evidence I have seen has made clear that the senior management of Cape, including Mr. Penna, were very anxious that Cape's connections with C.P.C. and with A.M.C. should not become publicly known. Some of the letters and memoranda have a somewhat conspiratorial flavour to them. But this too, although interesting to notice, is not, in my opinion, relevant to the main question."

If and so far as the learned judge intended to say that the motive behind the new arrangements was irrelevant as a matter of law, we would respectfully differ from him. In our judgment, as Mr. Morison submitted, whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant, and indeed this no doubt is the reason why the question of motive was examined extensively at the trial. The decision in Jones v. Lipman (1962) 1 W.L.R. 832 referred to below was one case where the proven motive of the individual defendant clearly had a significant effect on the decision of Russell J.

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

> (a) erred in concluding that C.P.C. was an "independently owned company" ; and
>
> (b) failed to make a number of findings of fact which are relevant in the context of the "corporate veil" point.

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

On analysis, much of the new naterial does little more than amply support the judge's finding quoted above as to the purpose of the composite arrangement. In this court Mr. Morison made it clear that the plaintiffs were not alleging any unlawful purpose or impropriety on the part of Cape in the sense of any intention to deceive or to do any unlawful act, either in Illinois or in this country. It was, however, asserted for the plaintiffs that A.M.C. and C.P.C. together constituted a façade which concealed the real activities of Cape. We understand that to mean that the purpose bf Cape was to conceal, so far as it lawfully could having regard to the requirements of the law in Illinois and this country, any connection of Cape with A.M.C. or C.P.C.

Before expressing our own views as to Cape's purpose, we will state our conclusions as to Mr. Morgan's position. It is, in our judgment, right to infer, substantially as submitted by Mr. Morison, that the assistance derived from the presence of Mr. Morgan in Illinois, undertaking the task through C.P.C. of marketing agent for the Cape subsidiaries in the United States, was regarded as being at least of great importance to the general purposes of the Cape Group, and possibly essential for those purposes, because, if it was not so regarded, there is no apparent reason why Cape should assume the cost and such risk as might have arisen from setting up C.P.C. Sir Godfray, however, was in our view plainly right in submitting that the agreement of Mr. Morgan was required for the creation of the alternative marketing arrangements by means of a new independent Illinois company and that his agreement, when given, was real. Cape had obligations of a moral nature to Mr. Morgan and to the long serving staff of N.A.A.C. Cape also, for its own purposes, wanted Mr. Morgan and Mrs. Holtze to continue with the work previously done by them for N.A.A.C. If Mr. Morgan decided to take on the task of providing services to the subsidiaries of the Cape Group through C. P.C., on the terms available to him as owner of the shares in C.P.C., Cape would get the benefit of his knowledge and experience as the person in charge of C.P.C. Nothing in the material to which our attention was drawn under these headings, however, causes us to doubt the correctness of Scott J.'s conclusion that the shares in C.P.C. belonged both at law and in equity to Mr. Morgan. It is clear that Cape intended C.P.C. to be in reality Mr. Morgan's company because that was part of their purpose. Such as it was, and dependent for almost all of its business on the Cape subsidiaries, C.P.C. was Mr. Morgan's company. We therefore reject the challenge to the judge's finding that C.P.C. was an independently owned company.

As to Cape's purpose in making the arrangements for the liquidation of N.A.A.C. and the creation of A.M.C. and C.P.C., we think that the extracts from the evidence set out in the Appendix to this judgment (particularly under item (17)), sufficiently reveal both the substance of what the officers of Cape were doing and what they were trying to achieve. The allegation of impropriety was, in our view, rightly abandoned. The inference which we draw from all the evidence was that Cape's intention was to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement

therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for U.S. taxation or subject to the jurisdiction of the U.S. courts, whether State or Federal, and the risk of any default judgment by such a court being held to be enforceable in this country. Inference (a) was also made by the learned judge. Inference (b) is our own addition.

The question of law which we now have to consider is whether the arrangements regarding N.A.A.C., A.M.C. and C.P.C. made by Cape with the intentions which we have inferred constituted a façade such as to justify the lifting of the corporate veil so as that C.P.C.'s and A.M.C.'s presence in the U.S.A. should be treated as the presence of Cape/Capasco for this reason if no other.

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

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

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

Rather greater assistance on this point is to be found in Jones v. Lipman (1962) 1 W.L.R. 832 . In that case the first defendant had agreed to sell to the plaintiffs some land. Pending completion the first defendant sold and transferred the land to the defendant company. The evidence showed that this company was at all material times under the complete control of the first defendant. It also showed that the acquisition by him of the company and the transfer of the land to the company had been carried through solely for the purpose of defeating the plaintiff's right to specific performance (see at p. 836). Russell J. made an order for specific performance against both defendants. He held that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed. As to the defendant company, he described it (at p. 836) as being "the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity" . Following Jones v. Lipman , we agree with Mr. Morison that, contrary to the learned judge's view, where a façade is alleged, the motive of the perpetrator may be highly material.

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

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

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

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

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in Woolfson . We will not attempt a comprehensive definition of those principles.

Our conclusions are these. In our judgment, the interposition of A.M.C. between Cape and C.P.C. was clearly a facade in the relevant sense. Scott J. (J. pp. 71H-72A) said it seemed clear that A.M.C. was "no more than a

corporate name" and that he would expect to find, if all the relevant documents were available, that "A.M.C. acted through employees or officers of either Casap or Egnep" . He rejected (p. 76A) Mr. Morgan's evidence that he understood A.M.C. to be an independent South African trading company, and was satisfied that he knew very well that it was a "creature of Cape" . "The seller in C.P.C.'s time was, nominally, A.M.C. but in reality still, I think, Egnep or Casap" : (p. 77A). In our judgment, however, the revelation of A.M.C. as the creature of Cape does not suffice to enable the plaintiffs to show the presence of Cape/Capasco in the U.S.A., since on the judge's undisputed findings, A.M.C. was not in reality carrying on any business in the U.S.A.

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

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

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

We reject the "corporate veil" argument.

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

We now proceed to consider the agency argument in relation to N.A.A.C. on the footing, which we consider to be the correct one, that N.A.A.C. must for all relevant purposes be regarded as a legal entity separate from Cape/Capasco. In an earlier section of this judgment we summarised three propositions which we derived from the authorities relating to the "presence" of an overseas corporation. There we stated that, save in a "branch office" case (which the instant case is not), the English court will be likely to treat an overseas trading corporation as present within the jurisdiction of the courts of another country only if a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business. In the present case N.A.A.C., as representative of Cape/Capasco, unquestionably carried on business at a fixed place of business in the U.S.A., 150 North Wacker Drive, for a substantial period of time. So no difficulty arises on that score. The crucial question is whether it can fairly be said that Cape's business has been transacted by N.A.A.C. at or from 150 North Wacker Drive. The judge's answer to it was that "N.A.A.C.'s business was its own business and not the business of Cape or Capasco" : (J. 68C). The plaintiffs challenge the correctness of this answer to the question.

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

The factual material which we have principally in mind in considering whether Cape's business was being

transacted at or from 150 North Wacker Drive is to be found in the section of this judgment headed “The facts on ‘presence’ as found by Scott J.”, and in our observations on items (1) to (13) in the Appendix to this judgment. We summarise below what we consider the most material facts in context, having regard to the list of potentially relevant factors set out in an earlier section of our judgment.

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

(1) Though we were referred to no evidence relating to the original acquisition by N.A.A.C. of its premises at 150 North Wacker Drive, we know that N.A.A.C. itself was the lessee of the premises and paid the rent for them. Furthermore, it owned the office furniture and employed there its own staff of 4 persons for whom it ran its own pension scheme.

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

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

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

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

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

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

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

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

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

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

There was no evidence that N.A.A.C. reserved any part of its office premises or any part of its staff exclusively for performing its agency functions.

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

There is no doubt that the services rendered by N.A.A.C. in acting as intermediary in respect of contracts between the U.S. customers and Egnep or Casap were active and important services which were of great assistance to Cape/Capasco in arranging the sales of their Group's asbestos in the U.S.A. Nevertheless, for all the closeness of the relationship between Cape/Capasco and N.A.A.C., strictly defined limits were imposed on the functions which N.A.A.C. were authorised to carry out or did carry out as their representative. First, N.A.A.C. had no general authority to bind Cape/Capasco to any contractual obligation. Secondly, as Mr. Morison expressly accepted, there is no evidence that N.A.A.C., whether with or without prior authority from Cape/Capasco, ever effected any transaction in such manner that Cape/Capasco thereby became subject to contractual obligations to any person. This significant factor renders the arguments in favour of "presence" , at least in some respects, even less strong than they were in cases such as The Lalandia (1933) P. 56 and The Holstein (1936) 2 A.E.R. 1660 where the argument failed. Having regard to the legal principles stated earlier in this judgment, and looking at the facts of the case overall, our conclusion is that the judge was right to hold that the business carried on by N.A.A.C. was exclusively its own business, not the business of Cape or Capasco, and that Cape and Capasco were not present within the U.S.A. through N.A.A.C. at any material time. We see no sufficient grounds for disturbing this finding of fact.

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

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

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

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

The interposition of A.M.C. in the new arrangements made in 1978 cannot one way or the other affect the question whether Cape/Capasco were present in the U.S.A. thereafter. For all relevant purposes, as we have already indicated, we are prepared to treat Cape and A.M.C. as one. The functions performed by C.P.C. and its relationship with Cape through A.M.C. are the relevant considerations for present purposes. Since Mr. Morgan held all the shares in C.P.C., beneficially Cape had no control as a shareholder over the activities of C.P.C. similar to the control which it had exercised over N.A.A.C. Mr. Morison did not dispute the judge's finding that the terms of the agency agreement of 5th June 1978 were a reliable guide to the nature of the relationship between

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

It is thus quite plain that at least a substantial part of C.P.C.'s business was in every sense its own business. As with N.A.A.C., the only question is whether, in performing the functions which it performed on behalf of Cape/Capasco, it was carrying on its own business or their business. As the terms of the agency agreement show, these functions were very similar to those which had been performed by N.A.A.C. The services rendered by C.P.C. to Cape /Capasco were similarly active and important. Again, however, strictly defined limits were imposed on the functions which C.P.C. was authorised to carry out or did carry out as the representative of Cape/Capasco (through A.M.C.). C.P.C. had no authority to bind A.M.C. or Cape or Capasco to any contractual obligation. Again too, there is no evidence that C.P.C., whether with or without prior authority from any of those three companies, ever carried out any transaction in such manner as to subject any of them to contractual obligations to any person. In the light of the legal principles stated above and of the facts of the case looked at as a whole, we see no sufficient grounds for disturbing the judge's finding that the business carried on by C.P.C. was exclusively its own business and that Cape and Capasco were not present within the U.S.A through C.P.C. (or A.M.C.) at any material time.

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

The onus of proof

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

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

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

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

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

However, as all the authorities show, it is only the judgment of a foreign court recognised as competent by English law which will give rise to an obligation on the part of the defendant to obey it. As a matter of principle it seems to us that in the first place the onus must fall on the plaintiff seeking to enforce the judgment of a foreign court to prove the competence (in this sense) of such court to assume jurisdiction over him. None of the authorities cited to us establish the contrary.

No doubt, in any case, the evidentiary burden may shift at the trial. However, we agree with the judge that the presence of A.M.C.'s name on a notice board at the office at 150 North Wacker Drive in 1984 did not give rise to any presumption that it had been there in 1979.

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

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