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December 23, 1975

A. J. Penna, Esq.
Group Solicitor
Cape Industries Limited
114 Park Street
London W1Y 4AB England

Re: Yandle/Kay Actions

Dear Tony:

At the meeting that Max Meyer and I had with Dr. Gaze and Mr. Dougherty several months ago, we informed them that Judge Steger at the resumption of the Fall Term of court indicated that he had taken the jurisdictional issues presented by the motions that we filed on behalf of Cape Industries and Egnep and the motions filed by certain other defendants under advisement and that he further informed all counsel that if any further documentary information or briefing were desired it should be done promptly. To date no one has filed any additional information. However, Judge Steger has not as yet indicated when he will rule on the pending motions. Dick Bernays and I have discussed the status of the matter recently and we agreed that steps should be taken after the first of the year to inquire as to when a ruling by the court on the jurisdictional issues may be expected.

We have given further consideration to the matters raised in your letters of November 4 and June 16, particularly as to what action should be taken in the event the Cape Egnep or Cape Fibres should be involved in any other U. S. litigation.

With reference to the Yandle/Kay suits, if the court should sustain the motions only on the ground of insufficient and improper service, while this would be tantamount to restarting the actions for purposes of effecting service of summonses it would not have, in our opinion, any limitation consequences, for the date of the initial filing of the complaints rather than the date of proper service governs any limitations questions. However, if such a ruling is handed

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down and subsequent service is properly effected, both Cape and Egnep would then be before the court properly for the first time and would be faced with the decision of whether or not default judgments should be permitted.

With reference to the other questions raised in your letter of June 16 be advised as follows:

1. Although Cape is 63% owned by Charter Consolidated Limited it is our opinion that there is no valid basis to join Charter in the pending litigation or that there would be any valid basis of enforcing against Charter or any of its U. S. subsidiaries or U. S. assets any judgment entered against Cape, Egnep or NAAC. Nothing has come to our attention which would indicate complete control or dominance by Charter as to the activities of Cape, Egnep or NAAC.
2. It is also our opinion that the directors of any of the Cape Companies or of Charter would not be subject to any civil or criminal liability by reason of any U. S. default judgments entered against such Companies or their subsidiaries. Under Texas law a corporation itself cannot be found criminally liable. Fletcher's Cyclopedia of the Law of Private Corporation, Vol. 10, 1970, §4942 p. 459. A fortiori the directors of such a corporation would not be subject to any criminal liability. The only exception to civil liability would be under the laws of Great Britain if their Companies might be subject to respond in damages to satisfy any default judgments and if it were improper to allow default judgments to be entered.
3. If Cape in the future should set up or acquire any U. S. Company or business, then such Company or business would be deemed to be an asset of Cape, even though acquired after the entry of any default judgments. Such new Company or business would be considered an asset of Cape in the U. S. and subject to garnishment to satisfy the default judgments.
4. If default judgments were awarded against Cape and/or Egnep, such judgments would be ordinarily considered final. However, if the action continued against NAAC who would subsequently be successful in its own defense, then under Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure a remedy may be available for setting aside even a default judgment under specified circumstances. The granting of such relief, however, would be entirely in the discretion of the court.

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5. It is our opinion that even if a U. K. Court should judge a default judgment unenforceable, under Texas law (Articles 3773 and 5532 of Vernon's Civil Statutes of Texas) a judgment is valid for 10 years and it may be revived by the issuance of execution against a defendant within the 10 year period. Mingus v. Kadane, 125 SW 2d 630 (Tex. Civ. App. 1939). Of course, if a judgment is allowed to be dormant without issuance of execution it cannot be revived after 10 years from the date of the judgment.

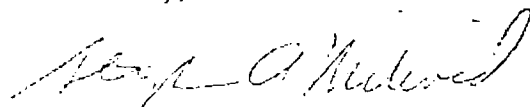
On the ultimate question as to whether Cape Industries itself might be held liable in this litigation for any tort committed by either of its subsidiaries NAAC or Egnep the holding of the Texas Supreme Court in the case of National Hotel Co. v. Motley, 123 SW 2d 461 (Tex. 1938) is most helpful. There the Texas Supreme Court stated on this point:

"It may be stated as a general rule that the fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity, and unless it be shown that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth or perpetrating fraud, or where the organization and control of the subsidiary are shown to be such that it is but an instrumentality or adjunct of the dominant corporation, no liability may be imposed upon the latter for the torts of the subsidiary corporation."

Certainly on the basis of the discovery to date and based on our knowledge of the operations of Cape and its subsidiaries, none of the exceptions stated by the Texas Supreme Court would be applicable. Cape Industries and each of its subsidiaries should be considered separate and distinct legal entities.

If any further clarification of our foregoing views is required, please advise.

Sincerely,



Stephen A. Milwid

SAM/w

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