

**HESS v. LINE TRUST CORPORATION LIMITED**

COURT OF APPEAL (Neill, P., Russell and Waite, JJ.A.): March 20th,  
1998

*Conflict of Laws—forum conveniens—trusts—Gibraltar not proper forum for action impugning validity of trust of foreign assets allegedly created to defeat claim in foreign divorce proceedings when matrimonial property governed by foreign law—no declaration on status of trust possible unless assets within reach of execution in Gibraltar*

The appellant sought to challenge the validity of a trust created by her husband.

The appellant's husband ("the settlor"), a Swiss citizen resident in the United Kingdom, built up valuable business interests, prior to his marriage to the appellant, consisting of shares in a Swiss company which were registered in Switzerland. The settlor later also started a business in the United States, to which the appellant alleged she had substantially contributed. Around this time their marriage ran into difficulties and they decided to live apart, the appellant (a US citizen) residing in New Mexico.

Allegedly seeking to minimize his UK and US tax exposure, the settlor created a discretionary trust in Gibraltar, of which the respondent company was the trustee, to which he transferred the bulk of his shares. Very shortly afterwards, he began divorce proceedings in New Mexico, which the appellant contested, claiming that the trust was void because it was created merely to defraud her by reducing the assets which could be considered in calculating alimony. The New Mexico court held that the previously-acquired property of the settlor was not in any case available to satisfy the appellant's alimony claim, either under New Mexico law or under a Swiss pre-marital agreement entered into by the parties.

The appellant then instituted the present proceedings in Gibraltar, seeking a declaration that the trust created by her husband was invalid on the ground of fraud, under the Fraudulent Conveyances Act 1571. She also obtained an interim injunction restraining the respondent from dealing with the shares pending the outcome of the proceedings. On the respondent's application to the Supreme Court (Pizzarello, Ag. C.J.), the proceedings were stayed but not struck out, on the ground that the appellant had no arguable case; however, the injunction was maintained and leave to appeal was granted.

On appeal, the appellant submitted, *inter alia*, that (a) the short time span led to the inevitable inference that the settlor had intended to reduce the assets available to her in the calculation of alimony, since at that time

the status of the parties' property had not yet been determined by the New Mexico court; (b) alternatively, the trust was a sham, because the respondent's discretion could be exercised by making the settlor a beneficiary, and because he exercised influence over the respondent trustee, he effectively retained control of the assets; (c) Gibraltar was the proper forum in which to challenge the validity of the share transfer, because the trust had been created here; and (d) it remained open to a New Mexico court to declare that the trust was invalid, and at that stage the appellant would be entitled to execution, either in Switzerland, where the shares were registered, or in Gibraltar, where the trust was registered, and accordingly the disposition was within the scope of the 1571 Act.

The respondent submitted in reply that (a) the 1571 Act was inapplicable, applying as it did only to dispositions of property within the reach of execution in Gibraltar, which was not the case here, since (i) the appellant was not a creditor of the settlor and even if she had been, she would not be entitled to a declaration regarding her husband's assets; and (ii) in the absence of any reciprocal enforcement arrangements, even if the appellant had obtained judgment against her husband in New Mexico, she would not be able to enforce it in Gibraltar; and (b) Gibraltar was clearly the wrong forum for the present proceedings, because the settlor did not live here, the property to which the trust related was located in Switzerland and the disposal of the shares was governed by Swiss law.

**Held**, dismissing the appeal:

The proceedings in Gibraltar were fundamentally flawed. Even if the appellant were a creditor of her husband, which she was not (having no existing quantifiable claim against him), she would not be entitled to levy execution in Gibraltar in respect of the judgment of a foreign court in the absence of a reciprocal enforcement agreement with that country, and accordingly the 1571 Act did not apply. Nor was she entitled to a declaration concerning her husband's financial arrangements, which even a creditor in Gibraltar would not be entitled to obtain. It would have been more appropriate for the appellant to question those arrangements in New Mexico, where her matrimonial claim was being made. In any case, whether the disposition of the shares had been effective was governed by Swiss law and the shares had at all material times been held in Switzerland. For these reasons, the appellant's proceedings had clearly been brought in the wrong forum and the action would be struck out and the injunction discharged (page 280, line 18 – page 281, line 30).

**Cases cited:**

- (1) *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1; [1886–90] All E.R. Rep. 797, followed.
- (2) *Oliver v. McLaughlin* (1893), 24 O.R. 41.
- (3) *Perry v. Zissis*, [1977] 1 Lloyd's Rep. 607, followed.
- (4) *Wall v. Wall*, 1978 Gib LR 69, considered.

**Legislation construed:**

Fraudulent Conveyances Act 1571 (13 Eliz. I, c.5), s.1: The relevant terms of this section are set out at page 279, lines 6–9.

*P.J. Isola* and *C.C. Hernandez* for the appellant;

*J.M. Grundy*, *L.E.C. Baglietto* and *G. Licudi* for the respondent.

**NEILL, P.**, delivering the judgment of the court: This case has generated a very large amount of paper. As will become apparent later, however, the first issue for the court's determination, which is an issue which I regard as of crucial importance, can be put in a few words. I should start by giving a summary of the background facts. 10

Mr. Donald Hess, who is now aged about 60, is a wealthy businessman. He is a Swiss citizen but he has been living in London since August 1991. His father died in 1957 and thereafter he devoted himself to building up the family businesses. In addition, he established a mineral-water company which was very successful and is now the second largest in Switzerland. On December 5th, 1968, Mr. Hess formed a new company, Hess Holding A.G., as a parent company to hold the shares in his various businesses. The registered office of Hess Holding is in Berne in Switzerland. The nominal capital of the company is SFr. 1.5m., divided into 1,500 shares of SFr. 1,000 each. On the formation of the company and for many years thereafter, Mr. Hess was the legal and beneficial owner of all the shares in Hess Holding. 15 20

On December 27th, 1972, Mr. Hess married the plaintiff in the present proceedings, Mrs. Joanna Hess, then Mrs. Joanna Caruso. Mrs. Hess, who is and was an American citizen, had been previously married. On December 23rd, 1972, four days before the marriage, the parties entered into a Swiss separate property pre-marital agreement. I shall refer to this agreement again later. In Germany, such an agreement is called an *Ehevertrag*. The agreement was governed by Swiss law. 25 30

After the marriage, Mr. and Mrs. Hess lived in Switzerland and they remained there until they moved to England in 1991. They had a daughter, Alexandra, who was born on November 1st, 1973.

In 1989, the marriage began to run into difficulties and the relationship between Mr. and Mrs. Hess began to change. At about the same time, Mr. Hess added to his business interests in the United States by starting a winery known as the Hess Collection Winery. The shares in this winery are owned by Hess Holding. Attempts were made to resolve the marital difficulties between Mr. and Mrs. Hess but they were unsuccessful. The parties began to live apart. 35 40

In about 1992, Mr. Hess bought Mrs. Hess a house in Santa Fe in New Mexico and from September 1992 she made her home there. She had become involved in charitable work in Santa Fe and their daughter was at school there. 45

5 In October 1994, Mr. Hess went to Santa Fe for the celebration of his daughter's 21st birthday on November 1st, 1994. During the course of November 1st, Mr. and Mrs. Hess had a discussion about their future. Mr. Hess proposed that he and his wife should enter into some form of legal separation, but Mrs. Hess refused. Mr. Hess then decided to institute divorce proceedings in the Supreme Court of New Mexico. The proceedings were commenced on the following day, November 2nd, 1994.

10 Meanwhile, Mr. Hess had made some financial dispositions to which I must now turn. By 1991, he had become concerned at the impact of the Swiss net wealth tax on his financial position. In an affidavit which he swore in these proceedings on September 23rd, 1996, he explained the matter: "The payment of the net wealth tax consumed the majority of the annual pre-tax profits of the Hess Group of companies." He therefore moved to England and, after taking advice, signed a will dated March 15 26th, 1992, whereby his estate was left to two testamentary trusts which were intended to avoid both United States estate tax and United Kingdom inheritance tax and thus preserve the Hess businesses for future generations.

20 In September 1994, however, Mr. Hess took some further steps with regard to his shares in Hess Holding. The reason for taking these further steps is a matter of dispute. It will be convenient to start by stating the explanation given by Mr. Hess. He said in his September 1996 affidavit that by late 1993, he had formed the intention of spending up to seven months a year in California. He was advised, however, that if he spent 25 that length of time in the United States each year, he would have "a US estate tax exposure of 55% of the value of Hess Holding." He therefore decided to establish the Hess Foundation Trust (the "HF Trust").

30 He said in later paragraphs of the affidavit that a number of legal clearances had to be obtained before the Trust could be set up and that the Trust was therefore not finally settled until September 13th, 1994. In the affidavit, Mr. Hess explained that Gibraltar had been chosen as the jurisdiction in which to create the Trust for several reasons. One of the reasons which he gave was that Gibraltar had recently amended its 35 legislation to create clearly defined statutory rules protecting trusts established by non-resident settlors.

40 On September 5th, 1994, a few days before the establishment of the HF Trust, Mr. Hess transferred 1,380 shares in Hess Holding to Line Trust Corporation Ltd., a Gibraltar company. These shares represented 92% of Mr. Hess's holding in the company. The HF Trust was established by Line Trust Corporation as trustee and by Mr. Hess as the settlor. I shall have to refer to some of the terms of the trust deed later.

45 By a further assignment dated September 13th, 1994, Mr. Hess assigned all his "right, title and interest" in 92% of the shares of Hess Holding to Line Trust as trustee of the HF Trust. It seems that this further

assignment was a precautionary measure taken because the HF Trust was not yet in existence on September 5th, the date of the earlier transfer. On October 10th, 1994, Line Trust transferred the 1,380 shares in Hess Holding to Blist Investments Ltd., another Gibraltar company. It was provided that the shares would be held by Blist as nominees for Line Trust. Following the creation of the HF Trust, it was registered in accordance with the Bankruptcy (Register of Dispositions) Regulations, 1990. It will be seen, therefore, that the contention of Mr. Hess is that the transfer of the shares and the establishment of the HF Trust were transactions effected by him as part of his overall tax planning, which was designed to prevent the sale or break-up of the Hess businesses on his death.

Mr. Hess's explanation of the establishment of the HF Trust and the transfer of the shares has, however, been strongly disputed by Mrs. Hess. It is and has been her contention that the purpose of these transactions was to reduce Mr. Hess's estate and thus to reduce the assets available for the payment of alimony to her.

On June 23rd, 1995, Mrs. Hess served a response and counter-petition in the divorce proceedings in New Mexico. In this pleading, it was alleged that the Trust had been established in contemplation of commencing the divorce proceedings on November 2nd, 1994 and that the creation of the HF Trust was intended to "hinder, delay and defraud" her. In addition, Mrs. Hess sought a declaration that the transfer of the shares was null and void, at least to the extent necessary to satisfy her claims against Mr. Hess under the applicable law, and the appointment of a receiver of all property currently owned by Mr. Hess and the HF Trust.

Meanwhile, on April 7th, 1995, Judge Vigil in New Mexico had awarded Mrs. Hess interim alimony at the rate of \$16,000 a month. As well as serving the cross-petition, Mrs. Hess also brought proceedings in New Mexico contesting the validity of the pre-marital agreement to which I referred earlier.

New Mexico is a community property State, which is based on the concept that spouses are partners and that all property which they acquire during the marriage belongs equally to both of them, subject to certain exceptions. It is not altogether clear to me, however, what these proceedings would have achieved even if they had been successful. Thus it is clear that Mr. Hess had acquired the shares in Hess Holding some years before the marriage took place in December 1972 and in New Mexico property acquired before marriage is treated as the separate property of the relevant spouse.

However that may be, Mrs. Hess's challenge to the validity of the pre-marital agreement proceeded to trial. In his admirably clear decision dated January 9th, 1996, Judge Vigil in the District Court in the County of Santa Fe set out his findings of fact and conclusions of law. The judge held that the agreement was valid and enforceable under New Mexico

law, both at the date of execution in 1972 and in 1995. He also held that the agreement was valid and enforceable under Swiss law in 1972. In the result, he held that Mrs. Hess had failed to meet the burden on her of showing that there was any impropriety or unfairness in the agreement under New Mexico law. He further held that the agreement was governed  
5 by Swiss law when it was made, that it had been entered into voluntarily and that all the legal requirements under Swiss law had been met.

I do not find it necessary to set out all the other findings and conclusions stated by Judge Vigil. It is sufficient to say that Mrs. Hess's  
10 challenge to the validity of the pre-marital agreement was wholly unsuccessful. On August 30th, 1996, Mrs. Hess issued her writ in the present proceedings. By the writ, she sought a declaration that the deed of settlement dated September 13th, 1994 whereby the HF Trust was established was void and that it should be set aside. The ground for  
15 seeking relief was that the settlement had been made with intent to defraud her.

Also on August 30th, 1996, Mrs. Hess applied *ex parte* for an injunction. On September 5th, Pizzarello, Ag. C.J. made an order in chambers restraining Line Trust until trial or further order from disposing  
20 or otherwise dealing with any of the shares held by it in Hess Holding. By the order, Line Trust was given liberty to apply, on 72 hours' notice to Mrs. Hess, for the discharge or variation of the order .

Line Trust then applied by summons to strike out the writ and to discharge the injunction. The basis of the application was that the writ  
25 disclosed no reasonable cause of action. On October 2nd, 1996, however, Pizzarello, Ag. C.J. rejected the application to strike out the writ. He further held that in the circumstances, the injunction should stand.

Meanwhile, on September 24th, 1996, on the application of Mrs. Hess, Judge Vigil had stayed the New Mexico proceedings. The pleadings in  
30 the present action were then served. On August 18th, 1997, Line Trust issued summonses seeking an order that the statement of claim should be struck out and that the action should be dismissed, and also an order that Mrs. Hess should provide security. These summonses came on for hearing before Pizzarello, Ag. C.J. on October 20th, 1997.

In order to understand the arguments which were addressed to  
35 Pizzarello, Ag. C.J. and later to this court, it is necessary to explain the basis of the case advanced on behalf of Mrs. Hess. Mr. Isola put forward two main submissions: (a) that the disposition of the shares should be set aside by virtue of the provisions of the Fraudulent Conveyances Act  
40 1571; and (b) in the alternative, that the creation of the Trust and the disposition of the shares was a façade and a sham which was designed to defeat the claims by Mrs. Hess for marital support and a property award. It was said that even after the creation of the HF Trust and the disposition of the shares, Mr. Hess continued in effect to be the beneficial owner of  
45 the shares and in full control of the assets of Hess Holding.

These submissions were elaborated in the statement of claim. Mr. Isola drew attention to the provisions of the HF Trust Deed and to the short period which elapsed between the transfer of the shares and the creation of the HF Trust in September 1994, and the launch of the divorce proceedings on November 2nd, 1994—a period of only a few weeks. It was an irresistible inference that when Mr. Hess transferred the shares and created the HF Trust, he had already decided to divorce his wife. The important date was September 13th, 1994, when the HF Trust was established. On that date, Mr. Hess must have been aware that in New Mexico, which was the jurisdiction in which he intended to institute his divorce proceedings, the principle of community property was established and that in addition, the courts there had power to make orders in respect of a husband’s separate property. At that time, there had been no decision of any court upholding the validity of the pre-marital agreement and the status of the agreement was therefore still uncertain.

Moreover, it was submitted, it was very significant that in the HF Trust, “the settlor’s spouse” was defined as meaning “such person, if any, to whom the settlor is for the time being lawfully married and from whom the settlor is not for the time being legally separated.” It was to be remembered that on November 1st, 1994, Mr. Hess had suggested that he and Mrs. Hess should be “legally separated.” This suggestion was admitted by Mr. Hess in his September 1996 affidavit. It was therefore to be inferred that the real purpose of the transfer and the creation of the HF Trust was to defeat or hinder the claims of Mrs. Hess in her proceedings in New Mexico. Any award by the court in New Mexico in favour of Mrs. Hess would depend on the value of the assets owned by Mr. Hess. If his assets included only 8% of the shares in Hess Holding, with a value of about US\$16m., any award to Mrs. Hess would be likely to be much smaller than if he was in fact the owner of 100% of the shares in Hess Holding with a value of about US\$200m.

Furthermore, Mrs. Hess had been advised that if account were taken of the true value of Mr. Hess’s assets, namely about US\$200m., the New Mexico court would be likely to award her a sum much in excess of US\$16m. In addition to any other claim she might have, she was entitled to an equitable lien on the shares of the Hess Collection Winery, which was an enterprise in which she had played an important part since its inception in 1989.

In these circumstances, it was submitted that Mrs. Hess was entitled in the first instance to invoke the provisions of the Fraudulent Conveyances Act 1571. The HF Trust had been established in Gibraltar and the Gibraltar court was the appropriate forum in which to test the validity of the HF Trust and of the disposition of the shares which had been transferred into the Trust. The proceedings in New Mexico had been stayed in September 1996, so that the Gibraltar court could pronounce on the validity of the disposition of the shares before the court in New

Mexico had to reach a final conclusion as to the proper sum to award Mrs. Hess.

5 In the alternative, the HF Trust and the disposition of the shares should be regarded as a sham. It was to be noticed that Mr. Hess, though not included as a beneficiary under the Trust, was not excluded as an “excluded person.” By cl. 4.1 of the HF Trust, the trustees had power to appoint any person other than an excluded person to be an additional beneficiary. It was also to be noticed that by cl. 2.3, the trustees might, in the exercise of their powers in cl. 2.1 and with the prior written consent of the protectors, “transfer the whole or any part of the capital to another settlement created either by the trustees or by any other person in any part of the world.” It therefore followed that Mr. Hess could in the future become a beneficiary and many of the provisions in the HF Trust tended to suggest that during his lifetime he would be in a position to exercise influence over the trustees and over any transfers which they might make. It was to be inferred that he remained in control of the assets of the HF Trust and that accordingly, the HF Trust and the transfer of the shares to it were a sham.

20 I must now turn to explain the basis of the arguments put forward by Line Trust in support of the application to strike out the statement of claim. The arguments fell under two main heads:

25 1. That the statement of claim disclosed no cause of action, (a) because the claim by Mrs. Hess under the Fraudulent Conveyances Act 1571 could not be maintained by her as a matter of law; and (b) because she had no *locus standi* to seek an order to the effect that the HF Trust and the transfer were a sham.

2. That in any event the proceedings should be struck out as an abuse of the process of the court.

30 The summons invoked all the sub-paragraphs of O.18, r.19 of the Rules of the Supreme Court and also the inherent jurisdiction of the court. At the conclusion of the hearing of the summons to strike out, Pizzarello, Ag. C.J. reserved his judgment. He handed his judgment down on December 5th, 1997. It was a substantial judgment, but for present purposes I think it is sufficient if I summarize its main conclusions.

35 The judge first noted that though he had been served with a copy of the summons, Mr. Hess himself had taken no part in the hearings before him. The judge then referred to the facts of the case and to some of the arguments which had been addressed to him. He turned to that part of the argument on behalf of Line Trust which asserted that the statement of claim disclosed no cause of action. He then gave rulings in relation to particular parts of the statement of claim which he concluded should be struck out under this head, either, as I understand it, on the ground of irrelevancy or because of Judge Vigil’s decision that the pre-marital agreement was valid. In the result, however, Line Trust had only a partial success on this part of the case.

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Pizzarello, Ag. C.J. then began his consideration of the claim by Line Trust that the statement of claim was an abuse of process or should otherwise be struck out under O.18, r.19 of the Rules of the Supreme Court. He stated his conclusions as follows:

“The plaintiff argued that the trust was a sham because it can only be avoided if it is set up to defraud her in the sense that he has not kept sufficient assets to meet any prospective or contingent liability. It is only if the plaintiff can show that that the cause of action arises. It is not a sham simply because its effect is that the New Mexico court might not take those assets on board as part of Donald’s estate. This is because the trust is protected by the Bankruptcy (Register of Dispositions) Regulations 1990. The legislature had conceived and protects the trust and so *Wall v. Wall* had to be considered in that context. I am of the opinion that a court can look behind a registered trust in an appropriate case but in this instance, the plaintiff has first to show an arguable case before I can do so. Once that is established, the burden will shift on to the trust, *i.e.* the settlor and the trustee, to show to the court that there has been no fraud, but that stage has not been reached. I am forced in my view to make a value judgment at this stage, because that is the springboard for the plaintiff’s case. The plaintiff has not satisfied me that she had an arguable case to avoid the trust and so the action cannot continue.”

It seems to me that the effect of the judge’s decision at that stage was that although he had declined to strike out the statement of claim on the ground that it disclosed no cause of action, he had concluded that it should be struck out on the basis that it was an abuse of process because it was bound to fail.

On December 19th, 1997, however, the matter came back before the court for consideration of the terms of the order which should be made. On that occasion, further argument took place and in the result, the judge decided that he should give leave to appeal to the Court of Appeal and that in the meantime the action should be stayed (rather than being struck out) and that the injunction which had been granted in September 1996 should continue in force.

Both Mrs. Hess and Line Trust have appealed to this court and it has been necessary for us to consider the matter afresh. In the meantime, I should refer to the fact that the stay of the proceedings in New Mexico has been lifted at the request of Mrs. Hess.

*The hearing in the Court of Appeal*

In support of the appeal on behalf of Mrs. Hess, Mr. Isola submitted that the action should be allowed to proceed. The judge had erred in conducting what amounted to a mini-trial of the action in chambers by carrying out a detailed examination of the affidavit evidence without discovery, oral evidence or cross-examination. In addition, Mr. Isola

outlined the other matters raised in his memorandum of appeal.

Mr. Isola referred us to the provisions of the Fraudulent Conveyances Act 1571. It is not necessary for me to set out the provisions of the statute in detail. It is sufficient to note that the statute provided that conveyances that had been—

5 “devysed & contryved of malyce fraude . . . or guile . . . to delaye, hynder, or defraude creditors or others of theyr juste and lawfull actions suites debtes accomptes damages . . . by wryting or otherwyse . . . shalbe . . . as againste that person . . . utterly voyde . . .”

10 Mrs. Hess, it was submitted, was entitled to rely on the provisions of the 1571 statute. It had been applied by the Court of Appeal for Gibraltar in *Wall v. Wall* (4), in which a disposition was set aside under the Act which had been made at a time when the defendant was engaged in writing a defamatory pamphlet about the plaintiff, which had the effect of divesting the defendant of all the assets with which he might be able to meet the damages which the plaintiff was likely to recover.

15 Mr. Isola accepted that the property which came within the protection of the 1571 Act was restricted to property which could be reached by execution at the date of the fraudulent conveyance, and he cited a passage from 6 *Halsbury's Laws of England*, 1st ed. (1909) to this effect. At the present day, however, he submitted that execution could be levied on all types of property. The earlier limits on the property which could be taken in execution had been removed by the Judgments Act 1838. On 20 September 13th, 1994, at the time when the HF Trust was established, a court in New Mexico would have been able to make an order which could be executed against all the assets of Mr. Hess, including his 100% holding of shares in the company.

25 At this stage, submitted Mr. Isola, he was not seeking a money judgment but merely a declaration. The Canadian decision of *Oliver v. McLaughlin* (2) demonstrated that a creditor was entitled to proceed by stages. First he could obtain an order setting aside the fraudulent disposition and later he could apply for a money judgment which could be enforced by execution. In the present case, once the disposition had been set aside by the court in Gibraltar, Mrs. Hess could return to New Mexico and obtain an appropriate order against Mr. Hess which would take account of his total assets of about US\$200m. She would then be able to levy execution in the appropriate forum, which might be Gibraltar, or Switzerland, where the share register was kept. The *locus* of the execution was not of central importance.

40 In addition to his submissions relating to the 1571 Act, Mr. Isola repeated his contentions that the setting up of the HF Trust and the transfer of the shares amounted to a sham. Mr. Hess in effect continued to control the shares and was able to give directions to the trustees. He also vehemently rejected the suggestion that the action brought by Mrs. Hess in Gibraltar was an abuse of process or otherwise objectionable. Gibraltar 45

was the natural forum in which to challenge the HF Trust and the disposition of the shares. Moreover, it was of great importance to the reputation of Gibraltar that if the arrangements made by Mr. Hess were fraudulent, the Gibraltar court should so state. Otherwise it would become apparent that fraudulent persons could set up a trust in this jurisdiction with impunity. 5

As the argument proceeded in this court, however, we came to the conclusion that we ought to consider first the contention on behalf of Line Trust that the statement of claim disclosed no cause of action. The arguments relating to the abuse of process were likely to be prolonged and there was, as we saw it, to put the matter at its lowest, a possibility that at the end of the argument, we would conclude that the matter could not be determined on affidavits alone and that the matter should proceed to trial. We therefore invited argument by counsel for Line Trust on the first issue, *i.e.*, whether the statement of claim disclosed a cause of action either under the 1571 Act or on the basis that the disposition of the shares and the establishment of the HF Trust amounted to a sham. 10 15

I can summarize the argument on behalf of Line Trust very shortly by reference to the written submissions with which the court has been provided. It was contended (i) that Mr. Hess had never been resident or domiciled in Gibraltar; (ii) that all the documents relating to the creation of the HF Trust were signed by Mr. Hess in London; (iii) that at all material times the shares had been treated as assets which were located in Switzerland; (iv) that the law governing the question whether Mr. Hess had effectively disposed of the shares was Swiss law; (v) that it was not, never had been and indeed never would be open to Mrs. Hess to levy execution on the shares in Gibraltar, as the shares are in a Swiss company and the share register is kept in Switzerland (we were referred to the definition of the securities which may be charged by a charging order in Gibraltar which is contained in s.2(1) of the Charging Orders Ordinance, 1988 and we were also referred to s.4(2)(b)); (vi) that it would not be open to Mrs. Hess to levy execution on the shares in Gibraltar in reliance upon any judgment of the New Mexico court, because execution is only available in respect of a judgment of the Gibraltar court: counsel referred us to the decision of the Court of Appeal in England in *Perry v. Zissis* (3); (vii) that the 1571 Act only applied to dispositions of property where the property could be taken in execution in Gibraltar; and (viii) that it was not open even to a creditor to seek a declaration as the nature or extent of the assets of an alleged debtor—counsel referred us to the decision in *Lister & Co. v. Stubbs* (1)—and the position was even clearer in the case of a person who was not and could not be treated as a creditor in Gibraltar. 20 25 30 35 40

For my part, I see no answer to the submissions advanced on behalf of Line Trust. It is to be remembered that the primary claim by Mrs. Hess against Mr. Hess is being brought in New Mexico, where she is seeking alimony and other matrimonial relief. Her proceedings in this jurisdiction 45

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are aimed at increasing the size of the assets with which the court in New Mexico can deal. I have come to the conclusion, however, that the Gibraltar proceedings are fundamentally flawed.

5 It is common ground that the only dispositions of property which can be affected by the 1571 Act (which was replaced in England by s.172 of the Law of Property Act 1925) are dispositions of property which can be reached by execution. Execution is a local process. The decision in *Perry v. Zissis* (3) underlines the fact that in the absence of reciprocal provisions for the enforcement of judgments, the judgment of a court in country *A* cannot be enforced by execution in country *B* unless and until a judgment based on the earlier judgment has been obtained in country *B*. But 10 Mrs. Hess faces many other difficulties which seem to me to be insuperable. Even now she is not a creditor of Mr. Hess. She has no money judgment against him. She could not levy execution in Gibraltar against the shares in Switzerland and could not have done so at the date 15 of the relevant disposition.

To put the matter shortly, Mrs. Hess is, in my view, in the wrong forum. It may be that in the divorce proceedings in New Mexico Judge Vigil will wish to question the propriety of the arrangements made by Mr. 20 Hess in September 1994. I am quite satisfied that, certainly at this stage, however, Mrs. Hess cannot challenge the transfer and the creation of the HF Trust by recourse to the 1571 Act, which was designed for the protection of creditors and others who had existing and quantifiable claims against the fraudulent person at the time when the proceedings to 25 impugn the relevant conveyance was started. Nor, in my view, has Mrs. Hess the requisite standing to claim that the transactions were shams. The principle underlying *Lister & Co. v. Stubbs* (1) is quite clear.

In these circumstances and for the reasons which I have endeavoured to outline, I would strike out the statement of claim as disclosing no cause 30 of action and I would discharge the injunction.

*Appeal dismissed.*