25-05-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)
AND IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED

AND 16 OTHER LIQUIDATIONS

BETWEEN AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

PLAINTIFF

AND SAAD INVESTMENTS COMPANY LIMITED (IN LIQUIDATION) AND OTHER COMPANIES OF THE SAAD GROUP (IN LIQUIDATION)

MAAN AL-SANEA AND OTHERS

DEFENDANTS

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 29TH DAY OF MARCH 2011

Appearances: Mr. Keightley and Mr. Hayden OF Mourant for the Plaintiff ("AHAB")
Mr. Jan Golaszewski of Maples for the 3rd, 5th, 7th, 9th – 12th, 20th – 29th and 28th – 43rd Defendants (the "Maples Defendants")
Mr. Haynes of Walkers for the Saad Investment Company (In Liquidation) and other companies of the Saad Group (In Liquidation) ("the Defendants in liquidation")

RULING

1. The Maples Defendants apply for an order directing the disclosure to them of the schedule to the order for security for costs made in this action on the 24th February 2011 ("the Security Schedule"). The Security Schedule lists the assets which the plaintiff AHAB has agreed to provide as security for the costs of the Defendants in liquidation. The Security Schedule was ordered to be kept

confidential when the Order of 24 February 2011 was settled by the Court with the consent of AHAB and the Defendants in liquidation.

2. AHAB and the Defendants in liquidation object to the disclosure of the Security Schedule to the Maples Defendants. The only other party to the action, the 2nd defendant Mr. Maan Al Sanea, may be described as being of the same interests as the Maples Defendants as they remain under his direction and control, although he is not represented and takes no part in this application by the Maples Defendants. He is however, along with AHAB, a main protagonist in the action in which he is sued by AHAB for fraud and breach of fiduciary duties and in which sums in the order of $9.2 billion are claimed by AHAB. The Maples Defendants are also sued by AHAB along with the Defendants in liquidation on the basis that they were all, as members of Mr. Al Sanea's Saad Group of Companies, instrumentalities of his fraud.

3. AHAB and the Defendants in liquidation object to the disclosure of the Security Schedule on the ground, essentially, that it contains the description of the assets which provide the security for the costs in terms which were negotiated and agreed between them and which they require and have agreed should remain confidential.

4. Being satisfied that the immediate parties had agreed among themselves as to the value and suitability of the scheduled assets as security for costs, the Court did not itself see the need to consider the terms of the Security Schedule and granted the Security Order without sight of it. The confidentiality of the Security Schedule was therefore ordered on the basis of the agreement of the

parties but, it must also be recognised, only after the Court considering it appropriate to make the order.

5. The Maples Defendants were, for those reasons, not party to the Security Order. Though present as observers at the hearing, they had not joined in the application brought by the Defendants in liquidation. The Security Order was therefore not made for their benefit and it is acknowledged that they have no right of recourse under it.

6. Indeed, it is now acknowledged by Mr. Golaszewski that if the Maples Defendants wish to obtain security for their costs of the litigation from the plaintiff AHAB, they would need to bring their own separate application.

7. It seems that at least one of the reasons why they have not brought such an application and had not sought to join in the application brought by the Defendants in liquidation is the sum of $2 million already paid into Court by AHAB as fortification for its undertaking in damages already given to the Maples Defendants. This was a requirement of the Worldwide Freezing Order in the action ("WFO") which restrains, among others, the assets of the Maples Defendants. This is therefore a sum against which they would have recourse for any damages suffered (arguably including legal costs) if the WFO were to be discharged without AHAB having succeeded in its claim against them.

8. The primary thrust of Mr. Golaszewski's argument is nonetheless that as parties to the action in which the Security Order was made, the Maples Defendants are entitled, in keeping with the principles of open justice, to be informed of the terms of all orders made in the action so that they may consider whether and if so, how, the orders may affect or be of assistance to them. The general and

ordinary rule is that parties to an action are entitled to see all orders made in the action.

9. More specifically, Mr. Golaszewski argues that sight of the Security Schedule will inform his clients as to the value of the security and this could be relevant to further inform his clients as to any application they may wish to bring for an order specifically for security for their own costs. In that sense therefore, his clients have an "interest" to be met by disclosure of the Security Schedule.

10. He cited and relied upon dicta from ***R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*** *[2010] 4 All. E.R. 91*, a case concerned with the difficult issue whether the right to open justice and the concomitant right to disclosure of classified intelligence material probative of the commission of torture and contained in an earlier judgment of the Court, should be redacted from the judgment in deference to the State's interest in the confidentiality of such matters, and in order to secure the State's ability to respond effectively in the war against terrorism.

11. In deciding in the particular circumstances of that case – in which the absolute prohibition of the abhorrent practice of torture was reaffirmed – that the right to open justice must prevail; the sweeping breadth of the dicta employed by the Court of Appeal is hardly surprising. It explains beyond doubt that the principle of open justice is deeply embedded in the common law. Per LCJ Judge at paragraph 42:

> *"The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the Court) is undiminished either by the possible exercise by the*

Intelligence and Security Committees of its responsibilities to inquire into possible wrong doing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who may have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice."

12. And, per Lord Neuberger MR, reflecting on whether the Court's judgments should be redacted to protect the confidentiality of the intelligence material (at paragraph 178):

"...like any other litigant, (Mr. Mohamed) is entitled to know what findings the court made in a case in which he was a party. That point is particularly strong in the case of a litigant who credibly claims in proceedings against the UK Government to have been seriously mistreated and where the court's findings [(sought to be suppressed from disclosure)] concern the UK Government's knowledge and participation in his mistreatment."

13. However dissimilar the circumstances of this case, the fundamental principle remains applicable nonetheless: the starting point as identified also in ***R (on the application of Mohamed)*** (above) is that *"the open justice principle [includes] the ordinary rights of all the parties to litigation to know the reasons for the decision of the Court"* (per Lord Judge CJ at para 42).

14. This applies equally in the context of civil as in criminal or public law proceedings and the tenor of the more recent decisions lead to the conclusion that the principles of open justice apply fully also in the context of interlocutory proceedings. A careful examination of the case law (both in England and Wales and before the European Court of Human Rights) leading to that conclusion, was recently undertaken by Justice Lewison in ***ABC Ltd. v Y 2010 EWHC 3176 Ch.;*** (at page 11 para. 33). It is a conclusion with which I readily agree.

15. ***ABC Ltd. v Y*** was a case in which the question before the Court was whether a person "X", who was not a party to the proceedings, should be allowed access to certain documents which were on the Court file. The Court file had been ordered by the Court to be sealed to protect the confidentiality of certain documents filed in the proceedings and relied upon at the interlocutory stage in the proceedings which had not yet concluded.. The proceedings had been between five companies and Mr. Y in which the five companies sought injunctions against Mr. Y restraining him from disclosing or misusing confidential information. As Mr. X was a stranger to the proceedings having no direct interest in them, Justice Lewison found the need to examine the principle of open justice as it had been expressed in its widest terms throughout its development in the case law. This included the most authoritative expression of the principle in ***Scott v Scott [1913] A.C. 417*** in the House of Lords, a case in which the question was whether a petition for nullification of a marriage on the sensitive grounds of impotence, should be heard in private. As the history shows, such limitations as could be placed upon the general principle of open justice derive from the inherent power of the Court to determine that its

deliberations may be conducted in private but only if the interests of justice so require.

16. Justice Lewison relied upon the following quotes from the opinion of Viscount Haldane LC (at page 435) as do I:

> *"...the power of an ordinary court of Justice to hear in private cannot vest on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge."*

17. Viscount Haldane proceeded to examine the reasons for the exceptions to the broad principle as follows a(at p.487):

> *"While the broad principle is that the Courts of this country must, as between the parties, administer justice in public, the principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative and the disposal of*

controverted questions is an incident only in the jurisdiction. It my often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

18. I do not understand the law and practice in our jurisdiction to have departed from those fundamental principles described by Lord Haldane LC. While the law and practice recognise that in exceptional circumstances the judge may determine that proceedings are taken in private, the general rule is that court proceedings are conducted in public. There are of course already some well

recognised types of proceedings which the rules of court will allow to be taken in private (Lord Haldane LC identified three types in the passage quoted above). Where, however, other types of proceedings are sought to be taken in private, the judge will decide not according to what seems convenient or subjectively in his view to be appropriate, but having regard to what is necessary for the proper administration of justice.

19. For practical reasons of necessity, proceedings of the kind engaged in this case are routinely taken in chambers, pursuant to GCR Order 32 and so are treated as taken in private. That fact does not, however, automatically cloak them in secrecy. Indeed, on the contrary, while the public has no right to attend hearings in chambers, they may apply to do so subject to the practical restraints of the accommodation and the nature of the proceedings; and the disclosure what occurred in chambers, absent an order prohibiting disclosure, is neither a breach of confidence nor a contempt of court, provided any such disclosure does not prejudice the administration of justice: ***Hudgson v Imperial Tobacco Ltd. (1998) The Times, February 13th, CA***. Indeed, the fact that judgments given in chambers proceedings are nonetheless to be regarded as public judgments unless otherwise so ordered by the Court, was explained some time ago in ***Practice Directions (Publication of Chambers Proceedings) 1997 CILR Note 1***.

20. That being the general legal context in which the present application arises, the answer to the question whether the Security Schedule should be disclosed would be axiomatically affirmative, but for the fact that the Court did specifically order that the Security Schedule should be kept confidential. That restriction against

disclosure was imposed by the consent of the immediate parties without the opposition of the Maples Defendants.

21. I consider therefore that the justification for the restriction must be taken as having been established.

22. In coming to this conclusion, I do not rely on Mr. Keightley's argument that, because I happened, as the judge, not to have read the Security Schedule (seeing no need at the time to become acquainted with its details), it can be said that the Security Schedule formed no part of the decision-making process and so was not actually a part of the Court's Order – leaving it to be governed entirely as a matter of contract between the immediate parties. To be clear, I regard the Security Schedule as part of the Court's order, albeit made by consent of the immediate parties.

23. But that fact by itself is not determinative because what we have here is an application by the Maples Defendants for an order by which the Court will be revisiting its earlier order which, for reasons already explained, was an order regularly and properly made.

24. There is some helpful dicta from Moore-Brick J. in ***Dian AO v Davis Frankel & Mead [2005] 1 WLR 295***, also relied upon by Justice Lewison in ***ABC Ltd. v Y***. Moore Brick J. discusses the deferring approaches that might be properly taken to an application for disclosure of documents which formed part of the judicial decision-making process and those which did not and so became no part of the record in the proceeding.

25. Then (at paragraph 56 of the Judgment) he said:

"In this present case, although Alfa [(the party seeking disclosure)] is not interested in whether justice was properly administered (in the case) I think it does have a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the [collateral] litigation in the Caribbean. I did not accept the submission that the link is too tenuous to make it appropriate to allow any access to those records at all. Moreover, I think that in the case of documents that were read by the court as part of the decision-making process the court ought generally to lean in favour of allowing access in accordance with the principles of open justice as currently understood, notwithstanding the view that may have been taken in the past about the status of hearings in chambers."

26. And at paragraph 57:

"On the other hand, I do not consider that the Court should be as ready to give permission to search for, inspect or copy affidavits or statements that were not read by the Court as part of the decision-making process, such as those filed in support of, or in opposition to, the application for summary judgment in this case. These were filed pursuant to the requirements of the rules but only for the purposes of the administration. The principle of open justice does not come into play at all in relation to these documents. I do not think that the court should be willing to give access to documents

of that kind as a routine matter, but should only do so if there are strong grounds for thinking that it is necessary in the interest of justice to do so."

27. Accordingly, in ***Dian***, it was deemed appropriate to allow the third party Alfa to search for, inspect and copy the pleadings and certain affidavits but not those affidavits or witness statements relating to the application for summary judgment which had been disposed of by order of the consent of the parties without a hearing. Here, I have already indicated above that the fact that the Security Schedule was not read by the Court is, by itself, no reason for its non-disclosure.

28. The present case is obviously also distinguishable from the ***Dian case*** on the further basis that here the Maples Defendants were and remain parties to the action in which the Security Schedule was filed, although not parties to the particular application. One might therefore accept that their position, in the usual case, would be stronger than that of strangers to the action seeking disclosure of documents filed in the action, such as Alfa was in the ***Dian*** case.

29. Under our Rules, the entitlement to disclosure of strangers (third parties) to actions, is dealt with by GCR Order 63 Rule 7(3) and Rule 8(3) which provide that –

"7(3) *Any person shall be entitled, upon payment respectively of the prescribed fee, to obtain from the Clerk of the Court a certified copy of any judgment or order contained in the Register of Judgments."*

And, by Rule 8(3):

"Any person shall be entitled, upon payment of the prescribed fee, to obtain from the Clerk of Court a certified copy of any writ, originating summons, originating motion

or petition contained in the Register of Writs and other Originating Process."

30. No wider general entitlement is given to third parties for access to Court files without leave of the Court. The reasons for this which hold true notwithstanding the principles of open justice, are fully explained by Sir Donald Nicholls V.C. in ***Dobson v Hartings*** *[1992] Ch. 394* in relation to the position under the similar Rules of the Supreme Court as they then stood in England and Wales (at pages 401-402). I see no need to recite those passages here because the applicants, the Maples Defendants, are not third party strangers to the action. They are parties and so the strictures of Order 63 do not, in and of themselves, apply.

31. I consider that the relevant considerations for me now may be summarised as follows in light of the foregoing discussion of the principles.

32. The principle of open justice predisposes towards the disclosure of all the records of proceedings including those taken in chambers, where the interests of justice so require. While for reasons of the proper administration of justice only certain aspects of a case file are routinely made publicly available under the Rules of Court without order of the Court, all aspects may be made available to any person who applies, including non-parties, if the interests of justice or some other public interest (such as investigative journalism) properly so require.

33. These strictures do not, however, in ordinary circumstances apply to parties to the action who are not ordinarily precluded by Rules of Court from access to any aspect of the case file but rather are ordinarily, by virtue of the principle of open justice, entitled to access to all aspects of the file.

34. For due cause shown, the Court can, however, restrict access, even for parties to the action, to specific aspects of the case file and can by so doing impose a requirement that access be only by way of leave of the Court. This the Court can do if necessary for the proper administration of justice.

35. That is primarily what has happened in this case, upon the hearing of the summons for security which was a summons brought by the Defendants in liquidation against the Plaintiff; who were together the parties to the Order. And so the question becomes one, fairly and squarely, whether or not leave should now be given to the Maples Defendants to inspect the Security Schedule, which was ordered in the interest of the administration of justice to be kept confidential and on the basis that they were parties to the action, though not to the application for security for costs.

36. In order finally to answer the question, it is necessary that I now set out the relevant terms of the Order of the 24th February 2011:

> *"6. AHAB (The Plaintiff) shall by 23rd March 2011 provide security in the amount and in the form set out in a confidential schedule signed by the parties on 24th February 2011 ("the Security Schedule").*
>
> *7. The Security shall be by way of:*
>
> *(1) Security for the costs of the Defendants in liquidation up to the close of pleadings; and*
>
> *(2) Fortification of AHAB's undertaking in Schedule B paragraph 3 of the Worldwide Freezing Order*

dated 24 July 2009 (as varied) in relation to the Defendants in liquidation.

8. *For the avoidance of doubt, the provision of security pursuant to this order shall be without prejudice to the ability of the Defendants in liquidation to apply for further security (in any amount or form) for their costs in relation to later stages in the proceedings and/or further fortification under AHAB's undertaking referred to in paragraph 7(12)."*

37. It is indeed clear that this aspect of the order did not address any right or interests of the Maples Defendants. The Security Schedule was not meant to be of benefit to them and did not concern them and the intention of the parties was that, along with the rest of the world, the Security Schedule should be kept confidential vis-a-vis them. All of this was accepted by the Court and is implicit in the order by consent of the parties involving, as it did, the imprimatur of the Court. In this highly fraught and complex litigation where so much is at stake, one does not have to dig too deeply to discover reasons particularly for AHAB's concern to preserve confidentiality: knowledge of the relative financial strengths or weaknesses of the protagonists could become of tactical importance. The approach of the Defendants in liquidation to this action can be expected to be different from that to be taken by the Maples Defendants and by Mr. Al Sanea, in whose control they remain. These are reasonable practical considerations which must also be regarded as being implicit in the order of the court for the preservation of confidentiality.

38. In order to comply with the principles of open justice even such concerns would not, however, preclude access being given to the Maples Defendants now if they could discharge the burden which must in the circumstances be regarded as being upon them, for showing that it is clearly in the interests of justice that the Security Schedule be disclosed.

39. In my view, they have failed to do so. Their argument – that they should know what the Security Schedule contains because they may wish to bring an application of their own against AHAB for security for costs – is facile and insufficient. If such an application were brought, substantiated and justified, it would be irrelevant what assets AHAB already disclosed in the Security Schedule. AHAB would nonetheless and irrespective, be bound to provide security for the Maples Defendants' costs or face the consequences of failing to do so.

40. I repeat that the order sealing the Security Schedule must be regarded as having been made by the Court (albeit with the consent of the parties) as necessary for the proper administration of justice in this case.

41. In the result, as I find that no countervailing good reason in the interest of the proper administration of justice has been shown, I am driven to conclude that the application must be refused and so order.

Hon. Anthony Smellie
Chief Justice

April 4, 2011
(Written reasons released on the 25th May 2011)