

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2  
3 Cause No: G358/2010

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6 IN THE MATTER OF AN EX PARTE APPLICATION PURSUANT TO O.63 r.3(5)

7 AND IN THE MATTER OF AN APPLICATION BY STANDARD CHARTERED BANK  
8 AND STANDARD CHARTERED INTERNATIONAL (USA) LTD. FOR LEAVE TO  
9 INSPECT THE COURT FILE IN FSD 54 OF 2009

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12 **Appearances:**

13 **Mr. David Quest Q.C. instructed by Mr.**  
14 **Peter Hayden and Mr. Charles Moore of**  
15 **Mourant Ozannes on behalf of the**  
16 **Applicant, Ahmad Hamad Algoaibi and**  
17 **Brothers Company – the Applicant**

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19 **Stephen Moverley Smith Q.C. instructed by**  
20 **Steven Barrie of Nelson & Company on**  
21 **behalf of Standard Chartered Bank and**  
22 **Standard Chartered International (USA)**  
23 **Ltd. – the Respondents**  
24

25 **Before:**

**The Hon. Mr. Justice Charles Quin**

26 **Heard:**

**28<sup>th</sup> October 2013**

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29 **JUDGMENT**  
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1 3. As a result of the fraud, AHAB is being pursued by a large number of bank  
2 creditors in different jurisdictions, seeking to recover the monies advanced under  
3 the loan facilities. The Respondent, SCB, is one such creditor of AHAB. SCB  
4 has brought numerous claims and enforcement proceedings against AHAB in  
5 different jurisdictions including the Cayman Islands but it is not a party to the fraud  
6 action.

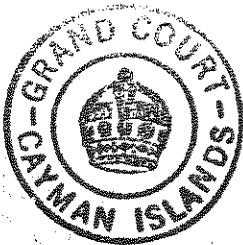
7 4. On the 24<sup>th</sup> September 2010 the Respondents, SCB and SCI filed an Originating *ex*  
8 *parte* application for leave to inspect and take copies of the court file (in FSD 54 of  
9 2009). This *ex parte* application was made pursuant to Grand Court Rule 63 Order  
10 5 which reads:

11 *"The court may give leave in special circumstances on application to any*  
12 *person not a party to the proceedings to inspect the court file or to take a copy*  
13 *of any document on the court file relating to those proceedings".*

14  
15 In support of their *ex parte* Originating Application the Respondents, SCB and SCI,  
16 filed the First Affidavit of Eric France sworn on 2<sup>nd</sup> December 2010 and the First  
17 Affidavit of Tahir Khan sworn on 21<sup>st</sup> September 2010.

18 5. On the 6<sup>th</sup> December 2010 Mr. Justice Smith made the following Order:

- 19 i. The Applicants, SCB and SCI, shall be permitted to inspect the court  
20 file and take copies of any document on the court file relating to the  
21 proceedings in FSD 54 of 2009;
- 22 ii. This order to be served on the attorneys of record for the Plaintiff and  
23 the second named Defendants in FSD 54 of 2009;



1                   iii. That there be liberty to apply by the Plaintiff and/or Second Named  
2                   Defendant in FSD 54 of 2009 within five days of the date of the service  
3                   of the order herein.

4           6.       On the 8<sup>th</sup> February 2013, SCB and SCI applied *ex parte* for an order pursuant to  
5           Smith J's order of 19 April 2010. On the 3<sup>rd</sup> April 2013, Tahir Khan filed an  
6           affirmation supplementary to his First Affidavit dated 21<sup>st</sup> September 2010.

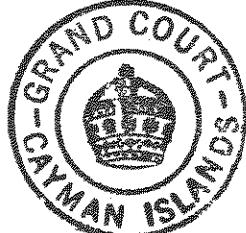
7           7.       On the 19<sup>th</sup> April 2013 the Respondents, SCB and SCI, obtained a second and  
8           supplementary *ex parte* Order for the documents which they had obtained:

9           a.       to assist in the recovery of sums due to SCB under various trades with and  
10           facilities made available to AHAB, the First and Second Defendants in the  
11           AHAB action and related entities ("the debtors"); including in current or further  
12           proceedings against the debtors and/or any third parties within the Cayman  
13           Islands and in other fora worldwide;

14           b.       to assist SCB in defending or responding to any applications that the Debtors of  
15           any third parties that commenced or might commence against SCB.

16           8.       On 16<sup>th</sup> August 2013, AHAB applied for an order that the *ex parte* order of Quin J  
17           dated 19<sup>th</sup> April 2013 be stayed pending the *inter partes* hearing listed for  
18           November 2013. AHAB's application for a stay was grounded by the First  
19           Affidavit of Eric Lesley Lewis ("Mr. Lewis") sworn on 20<sup>th</sup> August 2013 and the  
20           Respondent, SCB, filed a Second Affirmation of Tahir Khan sworn on 22<sup>nd</sup> August  
21           2013.

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1 9. On 22<sup>nd</sup> August 2013 I granted the Applicant, AHAB, an abridgment of time and  
2 further a stay of my order dated 19<sup>th</sup> April 2013 until the outcome of the *inter*  
3 *partes* hearing which is the subject of this ruling.

4 10. No further affidavits or affirmations have been filed and consequently both parties  
5 relied largely on skeleton submissions and correspondence for the purpose of this  
6 hearing.

7 11. The Applicant, AHAB, submits that the order dated 19<sup>th</sup> April 2013 be set aside on  
8 the basis of procedural irregularities and relies upon the fact that they received no  
9 notice of SCB's application in April 2013. Furthermore, the Applicant submits that  
10 it did not receive any notice of the order nor did the order contain a liberty to apply  
11 provision. AHAB contends that this is a clear breach of the spirit of the rules.

12 The Applicant submits that SCB did not provide full and frank disclosure. The  
13 Applicant contends that SCB did not set out its case fully or fairly nor did it identify  
14 crucial points for or against their application.

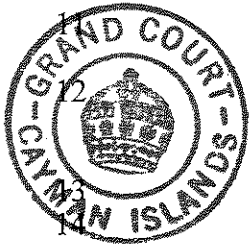
15 Consequently the Applicant submits that SCB's failure to explain the position  
16 properly meant that the court proceeded on the erroneous basis that it was only  
17 asked to provide clarity to the 2010 order and the court was not invited to consider  
18 whether there was a good reason for doing so.

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1 The Applicant complains that the procedural irregularities and the breaches of the  
2 duty of non-disclosure were material and no explanation or excuse has been  
3 provided for them. The Applicant submits that this is not a "plainly deserving  
4 case" where the order should, none the less, be continued or re-granted. The  
5 Applicant submits that it should simply be discharged.

6 12. I take note of the submissions that the Applicant is particularly concerned about the  
7 inspection of sensitive material such as affidavits or witness statements which were  
8 not read by the court as part of the decision making process in April 2013 and SCB  
9 failed to identify the documents with sufficient precision in accordance with the  
10 principles of *Dian AO v Davis Frankel & Mead* [2005] 1 All E R 1074. The  
11 Applicant relies on this case and the case of *Dobson v Hastings* [1992] Ch 392  
12 where Sir Donald Nicholls VC said,



13 *"Speaking generally, the parties are permitted to keep from the public gaze*  
14 *documents such as affidavits produced in preparation for a hearing which did*  
15 *not take place. Likewise with affidavits produced from interlocutory*  
16 *applications which are disposed of in chambers".*

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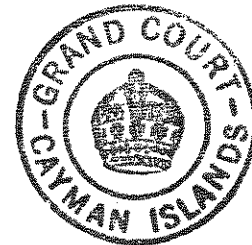
18 The Applicant complains that SCB did not seek to explain with any precision what  
19 documents or classes of documents it wishes to see, therefore making it impossible  
20 for the court to consider whether permission to inspect and use them is justified.

21 Accordingly the Applicant submits that the *ex parte* order dated 19 April 2013  
22 should be discharged because of the above serious procedural irregularities and/or  
23 alternatively it should be discharged because there are insufficient substantive  
24 grounds for making it.

1 13. I turn now to the relief sought in paragraph 2 of the Applicant's summons dated 9<sup>th</sup>  
2 July 2003 that the Respondents, SCB and SCI, provide an account verified by a  
3 signed declaration of an officer thereof detailing the extent to which any material  
4 obtained from the court file in FSD 54 of 2009 has been used, disclosed or  
5 otherwise employed. The Applicant submits that this is a necessary and proper  
6 consequence of the discharge of the order so that AHAB can take any necessary  
7 steps, if necessary, to ensure that SCB does not make use of any documents in  
8 which it was not properly entitled.

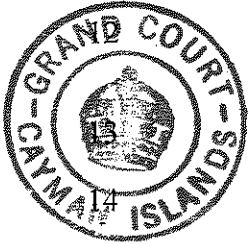
9 I note that the Applicant does not seek to discharge or vary the order dated 6<sup>th</sup>  
10 December 2010 of Smith J in which he granted SCB and SCI permission to inspect  
11 and take copies of any document in FSD 54 of 2009. Smith J did not impose any  
12 restriction in granting the Applicant leave pursuant to Grand Court Rule Order 63  
13 rule 5.

14 14. Having heard the submissions by the Applicant on its Stay Application I confirm  
15 that I was wrong not to make an order that SCB and SCI serve my order dated 19  
16 April 2013 on the attorneys of record for AHAB, and the Second Named Defendant  
17 in FSD 54 of 2009, with the usual liberty to apply provisions.



1           15.     However, I do not accept that SCB should have made their application *inter partes*.  
2                   GCR O.63 r.5(5) does not provide any guidance as to the manner in which an  
3                   application for leave to inspect and take copies of documents from the court file  
4                   should be made. It is an administrative application and no procedure or practice has  
5                   been laid down. It is worth noting that SCB had given AHAB notice of their first  
6                   application in December 2010 and that there was no objection from AHAB to  
7                   Smith J's order nor to the manner in which the application was made. With the  
8                   benefit of hindsight it would have been preferable for SCB and SCI to have adopted  
9                   the same course by giving AHAB notice of their second *ex parte* application.

10           16.     GCR O.63 r.5(5) is an administrative application and could be made either orally,  
11                   by letter or by summons but there is no requirement under the Grand Court Rules to  
                  serve the party or to provide notice.



12                   I agree with Leading Counsel for the Respondents that these proceedings are not  
13                   typical adversarial proceedings. Furthermore, neither AHAB nor any of the  
14                   Defendants to the AHAB action are parties to these proceedings.  
15

16           17.     I note that when the originating summons was issued *ex parte*, no objection at all  
17                   was taken by AHAB and in fact, Mr. Lewis who swore an affidavit dated 20<sup>th</sup>  
18                   August 2013 on behalf of AHAB, simply queried whether it was necessary to make  
19                   the application at all given that AHAB was prepared to make every reasonable  
20                   effort to provide SCB with the requested documents. The originating summons was  
21                   made *ex parte* and no objection was taken or is taken and consequently I fail to see  
22                   why any objection is taken to the second *ex parte* application in April 2013.

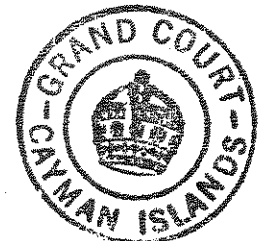
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1 18. As I stated above, these are not adversarial proceedings whereby a party is seeking  
2 a interlocutory injunction or an Anton Piller order where the duty of full and frank  
3 disclosure is high. I accept the Respondents' submissions that the duty and the  
4 gravity of any lack of frankness will depend on the character of the application. At  
5 one end of the scale are the Anton Piller orders and Mareva injunctions, and at the  
6 other end of the scale are the relatively minor administrative and procedural  
7 applications.

8 I am of the opinion that the second *ex parte* application of SCB and SCI was a  
9 minor procedural and administrative application. I receive assistance from the  
10 judgment of Hobhouse J in *Payabi v Armstell Shipping* [1992] QB 907 where he  
11 states at letter 'b' at page 918:

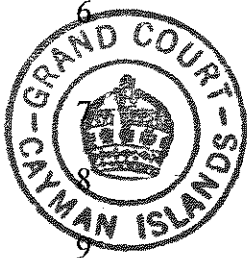
12 *"There is a duty of disclosure on all ex parte applications but the extent of the*  
13 *duty and the gravity of any lack of frankness will depend in any given case on*  
14 *the character of the application. At one end of the scale there are Anton Piller*  
15 *orders and Mareva injunctions where the consequences of the order maybe*  
16 *unpredictable and irremediable and very possibly most serious for the*  
17 *proposed defendant: there the fullest disclosure must be made so as to ensure*  
18 *as far as possible that no injustice is done to the defendant. At the other end of*  
19 *the scale are minor procedural applications where there may be no risk at all*  
20 *of prejudice or at least none that cannot be fully made good by an order in*  
21 *costs. Where the application is, as in the present case, one of a character*  
22 *which would not prejudice the relevant parties' position, i.e. that of Armstell,*  
23 *and would not cause them any loss or inconvenience that would no fully be*  
24 *made good by an order in costs, the duty of disclosure does not have such an*  
25 *extreme extent"*.

26  
27 I cannot find any non-disclosure on the part of SCB and SCI which leads to any  
28 irremediable consequences or prejudice against the Applicant.



1 19. AHAB and all the defendants in the FSD 54 of 2009 action knew about Smith J's  
2 order in 2010 and neither AHAB nor any of the defendants in the FSD 54 of 2009  
3 action have brought any application to challenge Smith J's order.

4 As I stated above, I regret not having provided for service of my order on AHAB  
5 but I cannot see where the Applicant has suffered any irremediable damage or  
6 prejudice.



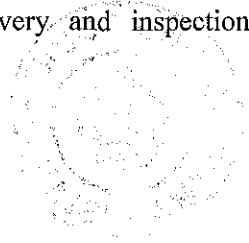
7 Furthermore, I do not find that the Respondents failed to explain the scope of the  
8 Smith J. order. The Smith J order speaks for itself and granted SCB the relief  
9 contemplated by GCR O.63 r.3(5) to inspect and to take any copies of the  
10 documents in the FSD 54 of 2009 action.

11 20. The Applicant has failed to present any sufficient ground for setting aside the order  
12 dated April 2013 and further, even if the order were set aside, Smith J's Order of  
13 December 2010 remains in place.

14 SCB were plainly entitled under the terms of Smith J's order to inspect and copy  
15 documents and to use those documents as it thinks fit. To put it another way, Smith  
16 J. imposed no restrictions on the use of any documents that they inspected and  
17 copied. Moreover, there is no suggestion that Smith J's order was in any way  
18 improperly obtained.

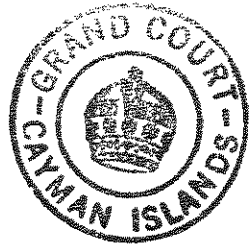
19 21. It is helpful to note that neither SCB nor SCI object to providing the Applicant with  
20 a list of the documents they have copied from the court file in FSD 54 of 2009 or to  
21 the use made of the said documents. Indeed, it was regrettable that both parties  
22 were unable to agree a final order as to how the documents inspected and copied  
23 could be monitored.

1       22.     In conclusion, and having taken into consideration the submissions of both leading  
2             counsel for the parties I feel it is reasonable and fair for SCB and SCI to provide a  
3             full account of what discovery and inspection has taken place and for what purpose.  
4             Furthermore, I find that the Applicant is entitled to an order to ensure that they are  
5             kept abreast of what continuing inspection and discovery is taking place and for an  
6             order that the court will continue to monitor the discovery and inspection  
7             undertaken by SCB and SCI in FSD 54 of 2009

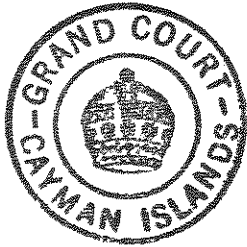


8       23.     Accordingly I make the following order:

- 9                     i.   Subject to this order and to any further order, SCB and SCI shall have  
10                    continuing permission to inspect the court file and to take copies of any  
11                    document on it.
  
- 12                   ii.   To the extent that any document, not the subject of any sealing, non-  
13                    disclosure or similar order, is required to be filed on the court file by  
14                    AHAB and has not been so filed (whether because of its size or  
15                    otherwise), AHAB will, on the payment of its reasonable copying  
16                    charges supply a copy of any such document to SCB. For the purpose  
17                    of this order, any such copy shall be treated as if it were a copy that has  
18                    been filed on the court file and copied by SCB.
  
- 19                   iii.   SBC shall within 28 days of this order, provide AHAB's attorneys with  
20                    a list:



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- a) Identifying the documents it has copied from the court file; and
  - b) Containing, in relation to each such document, the additional information specified in the table set out in Annex 1 to this order/Judgment ("the Additional Information"); and
  - c) Give AHAB's attorneys particulars of how the documents set out in Annex 1 have been used, which are reasonably sufficient for AHAB to determine whether AHAB might have been prejudiced by the use of such particulars or to explain why such particulars cannot be given.
- iv. Liberty to AHAB to apply for further relief or further orders in relation to any misuse of the documents.
- v. If on or after the date of this order in relation to any document copied from the Court File (a "Copied Document") SCB wishes: (a) to disclose that Copied Document to a third party; (b) to refer to that Copied Document in any pleading; or (c) to exhibit that Copied Document to any evidence (each such use being termed in this order a "Specified Use") it shall first provide in writing to AHAB's attorneys, in relation to that Copied Document, the Additional Information ("the Use Notice") and shall not use that Copied Document for any Specified Use (except where SCB is ordered or directed by a court or tribunal of competent jurisdiction or otherwise required by law to produce such Copied Documents) until after the later of: (a) 7 days after service of the Use Notice on AHAB's attorneys; (b) if AHAB serves an Objection Notice in accordance with paragraph 6 below, 14 days after such service; (c) if

1 AHAB applies to court in accordance with paragraph 7 below, the  
2 determination of that application.

3 vi. If AHAB reasonably objects to the Specified Use to which SCB wishes  
4 to put the Copied Document on the grounds that it will cause prejudice  
5 to it, it may within 7 days of service upon its attorneys of the Use  
6 Notice, give written notice to SCB's attorneys that it objects to the  
7 Specified Use ("the Objection Notice") identifying the prejudice it is  
8 alleged the Specified Use will cause AHAB. If no Objection Notice is  
9 made by AHAB within 7 days of the service of the Use Notice, it shall  
10 be deemed to have waived the right to raise an objection to the  
11 Specified Use of the said documents and/or to issue an Objection  
12 Notice.

13 vii. Within 14 days of service of the Objection Notice AHAB may, on the  
14 ground that the specified use will cause it prejudice, apply to Court for  
15 a direction as to whether SCB can use the Copied Document for the  
16 Specified Use ("the Application"). AHAB may only make an  
17 application on the ground that the Specified Use will cause prejudice to  
18 it. If no Application is made by AHAB within 14 days of the service of  
19 the Objection Notice, it shall be deemed to have waived the right to  
20 raise an objection to the Specified Use of the said documents and/or to  
21 issue an Application.



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viii. If AHAB makes an Application it shall use its best endeavours to ensure that it is determined as soon as practicable and by way of telephone hearing if requested by either party. AHAB and SCB shall exchange written submissions ahead of the application hearing as follows:

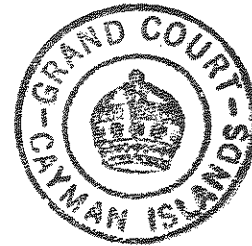
a) By 5pm 3 clear business days in advance by AHAB, and

b) By 5pm 2 clear business days in advance by SCB.

ix. Any information supplied to AHAB in relation to a Copied Document pursuant to this order shall be treated as confidential by AHAB and shall not be disclosed to any third party save for AHAB's attorneys.

x. No order as to costs.

xi. Liberty to apply.



**Dated this the 24<sup>th</sup> December 2013**

A handwritten signature in black ink, appearing to be "Charles Quin", written in a cursive style.

**Honourable Mr. Justice Charles Quin  
Judge of the Grand Court**

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ANNEX 1

Identification of document	Use in Proceedings against AHAB	Use in Proceedings Against 3 <sup>rd</sup> Party	Use in Private or Public Proceedings	Jurisdiction in which Proceedings take place	Disclosure to 3 <sup>rd</sup> Party	Referred to in pleadings or exhibited in evidence
[Name and date of doc]	[yes/no]	[yes/no]	[Public/private]	[jurisdiction]	[yes/no]	[yes/no]

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