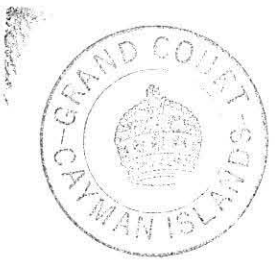

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

BETWEEN **AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB")**

PLAINTIFF

AND **SAAD INVESTMENTS COMPANY LIMITED ("SICL")**

SINGULARIS HOLDINGS LIMITED, ("SHL")

AND 7 OTHERS

DEFENDANTS

IN CHAMBERS
THE 1ST OCTOBER, 2013; 16TH OCTOBER, 2013
BEFORE THE HON. ANTHONY SMELLIE QC, CHIEF JUSTICE

APPEARANCES: **Mr. Marcus Haywood, instructed by Ms. Shelley White of Walkers for the liquidators of SICL, SHL, and 7 others (together the "GT JOLs" and "the Companies"; respectively)**

Mr. Peter Hayden and Mr. George Keightley of Mourant for AHAB

RULING

1. This is the application of the GT JOLs for leave to appeal against my judgment of 22nd February 2013 ("the Judgment"), by which I refused the GT JOLs' application to strike out AHAB's proprietary tracing claims against the assets of the Companies. Leave to appeal is required in keeping with Section 6(f) of the Court of Appeal Law and rule 11(5)

of the Court of Appeal Rules because of the interlocutory nature of the strike out application and of the Judgment which arises from it.

2. The GT JOLs say it is important that they should be allowed to appeal for three main reasons:

   (i) AHAB's proprietary tracing claim is "a cloud over all the assets of the liquidation estate" and prevents any prospect of dividend distributions in the foreseeable future. This is so because the claim purports to rank AHAB ahead of all other claimants to the assets of Companies.

   (ii) In refusing to strike out, the Court has directed the GT JOLs to give discovery and the costs of discovery will be very significant. These are costs which would be avoided if the appeal were to succeed.

   (iii) The general disruption already caused to the estates and which has already been recognized in previous judgments of the Court.

"Realistic prospects of success"

3. Mr. Haywood acknowledges that the showing of a realistic prospect of success is the primary test imposed by the Law and rules to be satisfied now in order to get leave to appeal. He also, however, argues that the Judgment involves issues of law which should be examined by the Court of Appeal in the public interest. For this secondary reason also leave should be given.

4. He relies upon the judgment of this Court given in *Telesystem International Wireless and T.I.W. De Brasil v CVC Opportunity and others*[1] which recognizes that those are indeed the two separate bases upon which leave to appeal may be given.

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[1] *2001 CILR Note 21*

5. It is equally well established however, that leave to appeal from an interlocutory judgment or order will be refused, even when the appellant shows a realistic prospect of success, in three circumstances:

(a) if the point raised by the appeal is not sufficiently significant to justify the resulting costs;

(b) if the significance of the point is outweighed by the procedural consequences; or

(c) if it will be more convenient to determine the point at or after the trial. See *CVC Opportunity v DeMarco*[2] citing Lord Woolf: *Practice Directions, Court of Appeal*: *Leave to Appeal [1999] 1 WLR 2.*

6. In those Practice Directions at para. 2.11, the following further guidance is noted when leave is sought to appeal against an interlocutory decision taken as a matter of discretion:

> *"The Court of Appeal does not interfere with the exercise of discretion by a judge unless satisfied the judge was wrong. The burden on the appellant is a heavy one...It will be rare therefore, for a trial judge to give permission (leave to appeal) on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required."*

7. This dictum gave rise to the debate before me whether the Judgment was one decided in the exercise of discretion and so unlikely to be interfered with by the Court of Appeal or whether it turned on questions of fact and law, going in a substantive way to the viability of AHAB's proprietary tracing claim. If the former, then according to the principles, no leave to appeal should be given. If the latter, then the presumption against leave to appeal implicit in Lord Woolf's dictum, would not apply. Leave should then be given on the

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[2] *2001 CILR Note 20*

basis that notwithstanding the interlocutory nature of the Judgment, important points of law arise on which the GT JOLs have a realistic prospect of success.

8. It becomes important therefore that the Judgment be properly characterized – did it turn simply on the exercise of discretion or did it decide substantive issues of fact or law?

9. The Judgment answered the substantive question whether AHAB's claim should be struck out for lack of adequate pleadings. And, specifically as to that aspect relating to the proceeds of fraudulent letters of credit, the argument that AHAB's claim should be struck out for lack of any legal proprietary basis was refused.

10. The GT JOLs' overarching objection was that AHAB never had any hope of pleading the necessary proprietary base for any of its claims, having failed to do so for more than three years since instituting its claims and after having had disclosure of massive amounts of documents.

11. My rejection of those arguments and refusal of the GT JOLs' application was both a matter of the application of law and the exercise of discretion. I relied on the *Grupo Torras* case[3] for the legal principle that the Companies, as parties who are shown prima facie to have become mixed up in the fraud committed by Mr. Al Sanea against AHAB, had an obligation to assist AHAB by giving full and frank disclosure of all relevant material within their possession or control. See paras. 107-116 of the Judgment and conclusion on this, at para. 137.

12. As to the exercise of discretion, I regard this as being recorded at paras. 139-140 of the Judgment where, in recognizing that AHAB's claim was still not fully and adequately particularized, nonetheless concluded:

[3] 2000 CILR 441

"Moreover, criticisms of AHAB's case as being still unparticularized despite the passage now of three years since its inception, ring rather hallow when the impediment of the various interlocutory skirmishes to its claim are considered. Rather than striking out AHAB's claim now, it must be right, as Mr. McQuater submits, that the discovery process should be allowed to run its proper course, with all parties doing their reasonable best to comply and so at trial for the Court to determine whether arguments such as those sought to be advanced by Mr. Akers [one of the GT JOL's] in his 8th Affidavit against the practical feasibility of tracing, are correct."

13. Insofar as the Judgment turned upon Grupo Torras (above) (following Arab Montetary Fund v Hashim No. 2[4]), I am not persuaded that there is a real prospect of establishing before the Court of Appeal that it was wrong in principle.

14. That there is an obligation on the part of those who have become mixed up in a fraud committed against a plaintiff to give disclosure for the unraveling of the fraud before the Court, must by now be regarded as incontrovertible: Grupo Torras and Arab Monetary Fund v Hashim No. 2 (and the earlier cases which they followed) have not been criticized for the principles upon which they were decided.

15. I do not accept that the present case can sensibly be distinguished on its facts as Mr. Haywood submitted. The similarities between the allegations against Mr. Al Sanea, including his use of the Companies here and the allegations in Grupo Torras are strong and striking. I do not accept that the Judgment can be criticized for having relied on the legal principles decided in the earlier cases.

[4][1990] 1 All. E. R. 673

16. Likewise, I conclude, there is no real prospect of a successful appeal against the Judgment in its discretionary character.

17. AHAB's claim could have been struck out only if it was plainly and obviously bad: See RSC 1999 Ed. para. 18/19/6, citing, among other cases, *Hubbock v Wilkinson [1899] 1 QB 86 at 91*, per Lindley MR, on this point:

> *"The jurisdiction (to strike out) will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed."*

18. As set out at paragraph 156-164 of the Judgment, both on account of the legal obligation upon the GT Defendants to give disclosure (as established in *Grupo Torras*) and as a matter of the proper exercise of the court's discretion to allow the case to proceed to discovery before AHAB's pleadings must be finally and fully particularized, the strike out application was refused.

19. That there is a discretion in the Court not to strike out pleadings even where they are found to be inadequate, is also a matter of settled principle: See *Kemsley v Foot*[5] and discussed at RSC 1999 Ed. O. 18/17/17.

20. I am not satisfied that my exercise of discretion in not striking out AHAB's proprietary tracing claim, directing instead that the case proceeds to discovery, was so patently wrong as to be interfered with on appeal. Also, not to be overlooked in the exercise of that discretion, was the further consideration that there are other claims for which discovery must be given in any event.

21. The Court of Appeal will not interfere unless satisfied that the exercise of discretion was wrong. See Practice Direction 1999 (above).

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[5] [1951] 1 All.E.R. 331 CA

22. In my view, the GT JOLs have shown no real prospect of success in this regard.

23. The other main ground of appeal is addressed to the conclusion in the Judgment that AHAB has an arguable claim based on the letters of credit which were fraudulently obtained by Mr. Al Sanea on AHAB's account with several banks.

24. This is a matter of law and is said by Mr. Haywood, in and of itself, to be of such public importance that leave should be given on that ground alone, even if I disagree that there is a real prospect of successful appeal against my conclusions on the rest of the merits.

25. It is said that I should have struck out this aspect of its claim because AHAB cannot prove that the proceeds of the letters of credit – although alleged to have been received by Mr. Al Sanea – was ever AHAB's money. AHAB therefore can establish no proprietary base for its tracing claim in respect of those proceeds.

26. The decision of the English Court of Appeal in *Group Josi* was relied upon and the Judgment is to be criticized for having sought to distinguish that case. The argument would go as follows (from paragraph 33 of Mr. Haywood's submissions):

> *"The fact that Mr. Al Sanea is here alleged to have obtained the proceeds of the letters of credit by fraudulent breach of his duties owed to AHAB was not a basis upon which the present case could be distinguished from Group Josi. In this regard, the Court was wrong as a matter of law to hold that there was any basis upon which a constructive trust could have arisen in AHAB's favour in respect of any proceeds of the letters of credit recovered by Mr. Al Sanea. There is no basis for the imposition of a constructive trust in circumstances where AHAB held no beneficial interest in the monies advanced by the banks and does not allege the existence of such a beneficial interest."*

27. It is therefore said that the Judgment was wrong as a matter of law to hold that AHAB has an arguable case that it has any proprietary claim in respect of any of the alleged misappropriations under the letters of credit. This is a significant mischaracterization of the Judgment. It did not conclude that AHAB has an arguable case in that regard, only that a strike out application, where there could not be a full examination of the factual and legal premises of the letters of credit claim, was not the appropriate basis for its determination. This is plain from paragraph 201 of the Judgment:

> *"Such a question, as it may well arise in this case (as to whether the proceeds of the Letters of Credit could be impressed with an institutional constructive trust in favour of AHAB) may not properly be addressed by way of a strike out application without the benefit of full legal arguments. For this reason, I do not accede to Mr. Crystal's further argument for the striking out of AHAB's proprietary tracing claim as it is premised upon the proceeds of the LCs."*

28. That too was clearly a decision taken at least partly in the exercise of discretion, to the effect that the appropriate context in which the complex issues of the letters of credit should be decided is within the trial.

29. I am not satisfied that that decision can be sensibly and successfully challenged on appeal. To do so the Court of Appeal would have to be persuaded that that important issue, even if seen only as a discrete question of law, should have been (and can still be) decided ahead of all the other issues in the trial, as if by way of a preliminary issue. This would implicitly involve accepting that the progress of the trial should await the outcome of this issue not only before the Court of Appeal itself, but also possibly before the Privy

Council where, in all likelihood, it would end up given the amounts at stake[6] and the novelty of the arguments which even Mr. Haywood recognizes.

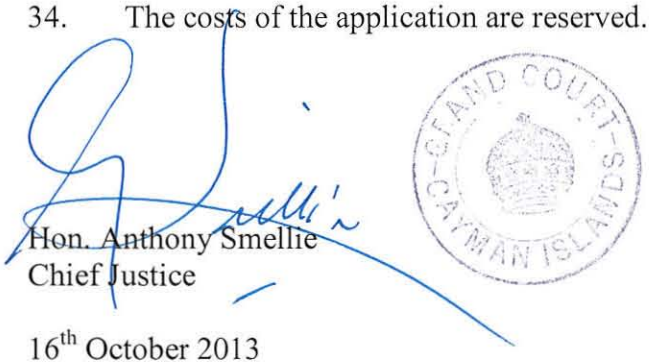
30. That, as a matter of good case management and common sense, would be an unattractive proposition, given that this is a case that must go to trial in any event on other aspects of the claim.

31. It can hardly be said therefore that the Court of Appeal is likely to interfere with the decision not to strike the letters of credit claim allowing it to go to trial instead, where it can be more fully examined both as to the facts and the applicable law. Striking out this aspect of the claim at the interlocutory stage as the GT JOLs proposed, could result in the "treacherous short cut[7]" that the case law firmly discountenances, as this aspect could end up going on appeal, then going to trial then all the way back on appeal again.

32. Such concerns will prevail even if there is a point of law to be argued and settled in the public interest, the further proposition about which I am not persuaded but do not need to decide.

33. So, whether leave to appeal is sought as against the exercise of discretion or on the basis of a misunderstanding of the facts or the law, I conclude that no real prospect of success is shown. Leave to appeal is accordingly refused.

34. The costs of the application are reserved.



Hon. Anthony Smellie
Chief Justice

16th October 2013

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[6] The pleaded value of the letters of credit aspect of AHAB's claim is USD 2030 million; see paras 168-172 of the Judgment and paras 72-79 AHAB's statement of claim.
[7] So described in Tilling v Whiteman [1980] AC 1, per Lord Scarman at 25.