IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 1 of 2010

BEFORE

The Rt Hon Sir John Chadwick, President

The Hon Ian Forte, Justice of Appeal

The Hon Dr Abdulai Conteh, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

FINANCIAL SERVICES DIVISION

(FSD 54 of 2009)

BETWEEN

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

Plaintiff

-and-

(1) SAAD INVESTMENTS COMPANY LIMITED
(2) MAAN A SANEA
and others

Defendants

Mr Lawrence Cohen QC instructed by Mr Peter Hayden of Mourant for Ahmad Algosaibi and Brothers Company
Mr Stephen Phillips QC instructed by Mr Crispian Lynch of Maples and Calder for the 5th to 7th, 9th to 12th, 21st to 29th and 38th to 43rd Defendants

Hearing dates: 4th and 5th March 2010
Handed down: 15th February, 2011

JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from an order made on 18 December 2009 by Justice Anderson, sitting as a judge of the Grand Court, on the *inter partes* hearing of a summons dated 30 July 2009 seeking the continuation of worldwide freezing injunctions made by Justice Henderson on 24 July 2009.

2. The proceedings are brought by Ahmad Hamad Algosaibi and Brothers Company ("AHAB"), a partnership established in the Kingdom of Saudi Arabia, against Maan Al Sanea, Barclays Private Bank and Trust (Cayman) Ltd (as trustee of a settlement) and forty one Cayman registered companies (which Mr Al Sanea is said to have owned or controlled) in respect of monies in excess of US$5 billion alleged to have been misappropriated from one of its divisions, known as the Money Exchange. A full description of the claims in the proceedings has been set out by this Court in judgments handed down on 1 December 2010 in appeal CICA 15 of 2010, and related applications.

3. The proceedings were commenced by writ of summons issued on 27 July 2009. The order of 24 July 2009 was made *ex parte* shortly before the issue and service of the writ; and upon the plaintiff's undertaking to do so as soon as practicable. The writ was served on the Cayman companies at their registered offices.

4. The order of 24 July 2009 imposed worldwide freezing injunctions on the assets of Mr Al Sanea and each of the defendant companies up to a limit ("the Amount Frozen") of US$ 9.2 billion. Paragraph 9 of the order was in these terms, so far as material:

   "Until after the return date or further order of the Court in the meantime the defendants must not, except or permitted or required by this Order:
   (a) Remove from the Cayman Islands any of their assets which are in the Cayman Islands up to the value of the Amount Frozen;
   (b) In any way dispose of, deal with or diminish the value of any of their assets whether they are in or outside the Cayman Islands up to the Amount Frozen."

   Paragraph 10 provided that, for the purposes of paragraph 9, assets of a defendant included:

"(a) Assets whether or not they are in the name of that Defendant, whether they are solely or jointly owned and whether the Defendant is interested in them legally beneficially or otherwise;
(b) Any asset which the Defendant has the power, directly or indirectly, to dispose of or deal with as if it were his own; and the Defendant is to be regarded as having that power if a third party holds the asset as nominee or holds or controls the asset in accordance with his direct or indirect instructions (or habitually does so, even if under no enforceable legal obligation);
(c) Any interest under any trust or similar entity (wherever constituted) including any interest which can arise by virtue of the exercise of any power of appointment, exercise of discretion, expression of wishes or otherwise."

The return date (for the purposes of paragraph 9 of the order) was the date fixed for the hearing of the summons dated 30 July 2009: that is to say, 16 December 2009.

5. The summons of 30 July 2009, seeking continuation of the freezing order, came before Justice Anderson for hearing on 16 December 2009. By that date seventeen of the Cayman companies were in liquidation. By paragraph 1 of the order of 18 December 2009 the judge adjourned the return date in respect of those companies and ordered that the order of 24 July 2009 ("the Freezing Order") should continue until that adjourned hearing. Paragraph 1 of the order of 18 December 2009 is not the subject of this appeal; and the companies in liquidation have taken no part in the appeal.

6. The present appellants - that is to say, the fifth to seventh, ninth to twelfth, twenty-first to twenty-ninth and thirty-eighth to forty-third named defendants - are twenty two of the remaining twenty four Cayman companies. By paragraph 3 of the order of 18 December 2009 the judge directed that in respect of those defendants – and, also in respect of the third and twentieth named defendants (who are not appellants) - the Freezing Order should continue until trial or further order.

7. The reasons which led Justice Anderson to make the order that he did in respect of the twenty four Cayman companies not in liquidation are set out in a written judgment which he handed down on 18 December 2009. Put shortly, he took the

view that the submission which he thought had been made to him on behalf of the present appellants – that no freezing order should have been made against them under what is commonly known as the *Mareva* jurisdiction because (on the evidence) they had no assets (and so no assets at risk of dissipation) – should be rejected on the ground that (as he put it at paragraph 10 of his judgment):

> ". . . it must be logically consistent that if a restraint can be placed on a non-cause of action party, that the alleged, though not proven lack of resources on the part of some defendants, ought not to be in and of itself a bar to the grant and/or the continuation of the *Mareva.*"

8. In that context, the judge's reference to "a non-cause of action party" is to a party who is named as a defendant to the proceedings but against whom no cause of action is alleged in the pleaded claim. The defendants who fall within that category, in the present case, have been referred to (for convenience) on this appeal as "NCADs". It is common ground that the fifth to seventh, twenty-first to twenty-ninth and thirty-eighth to forty-third named defendants are NCADs. The ninth to twelfth named defendants are not NCADs; they are defendants against whom a cause of action is alleged in the pleaded claim.

9. Whatever may have been the position when submissions were made to Justice Anderson at the hearing on 16 December 2009, it has not been contended on this appeal that none of the present appellants have assets capable of dissipation. The position taken by the appellants in this Court has been that six of them – the fifth, twenty-first, twenty-third, twenty-seventh, twenty-eighth and forty-third named defendants – do each have some assets. It is contended (but not accepted by the respondent, AHAB), that the other appellants have no assets.

10. In those circumstances, the position for the purposes of this appeal may be summarised as follows: (i) eighteen out of the twenty two appellants are NCADs; (ii) sixteen out of the twenty two appellants are said to have no assets; and (iii) twelve of the appellants fall into both categories. The third and twentieth defendants fall into neither category; and it is, I think, for that reason that they have not been joined as appellants in this appeal.

The grounds of appeal

11. The appellants rely (so far as they are respectively able to do so) on one or more of three grounds of appeal:

    (1) That Justice Anderson erred in law in granting or continuing *Mareva* relief against those eighteen defendants (the NCADs) against whom no cause of action is alleged in the pleaded claim.

    (2) That the judge erred in law in granting or continuing *Mareva* relief against those sixteen defendants (described as "the Shell Defendants") who – on the evidence before him – had not been shown to have assets capable of dissipation.

    (3) That, in any event, the judge was wrong in exercising his discretion to grant *Mareva* relief against those twelve defendants against whom no cause of action was alleged and who had not been shown to have assets.

The first ground: NCADs

12. Justice Anderson did not find it necessary to address the question whether, in principle, *Mareva* relief could be granted against defendants against whom no cause of action was alleged. It is clear that he took the view that that question had already been decided, in favour of the plaintiff, by Justice Henderson in an earlier judgment in these proceedings.

13. The application on which Justice Henderson had given judgment had been made by summons issued on 21 September 2009 on behalf of the third, fifth to seventh, ninth to thirtieth and thirty-eighth to forty-third named defendants for the discharge of the order obtained *ex parte* on 24 July 2009 (the Freezing Order). That application was heard on 29 and 30 September 2009. Justice Henderson handed down his judgment in draft on 18 November 2009. He defined the primary question for decision in these terms:

    > "In what circumstances may a plaintiff obtain Mareva injunction relief against a party where no cause of action is asserted against that party?"

14. In the course of that judgment Justice Henderson observed (at paragraph 36) that:

> "It is now well accepted that the Court has jurisdiction to grant a *Mareva* injunction against a defendant against which no cause of action is asserted where there is a good arguable case that assets apparently vested in that defendant are in fact owned beneficially by another defendant against whom a cause of action is asserted. If this can be shown, it demonstrates that the assets may be available to satisfy the plaintiff's claims if established at trial. This is the so-called *Chabra* jurisdiction, first recognised in *TSB Private Bank International SA v Chabra and another* [1992] 1 WLR 231. The non-cause of action defendants do not dispute this. They argue that there is no good arguable case that any present defendant against which a cause of action is asserted can be shown to own a beneficial interest in the assets of the non-cause of action defendants."

15. After a full and careful analysis of the authorities following the decision in *Chabra*, Justice Henderson concluded (at paragraph 51 of his judgment) that:

> "(i) The *Chabra* jurisdiction is part of the law of the Cayman Islands;
>
> 48. The jurisdiction is most often exercised where there is a good arguable case that a cause-of-action defendant is the beneficial owner of assets in the possession of a non-cause-of-action defendant, but it is not confined to that situation;
>
> 49. The jurisdiction is available against a non-cause-of–action defendant where a freezing order is ancillary and incidental to the effective enforcement of a prospective judgment because that defendant's assets may become available to satisfy the judgment;
>
> 50. This may be so where the non-cause of action defendant has become mixed up in an attempt by the cause-of-action defendant to make himself judgment proof and the assets or their proceeds are not readily identifiable in his hands (*Yucong, supra*) [*Yucong Line Ltd v Rendsburg Investments Corporation and others* [2001] 2 Lloyd's Rep 113 (CA)];
>
> 51. The important question is whether there is good reason to suppose that the cause-of–action defendant exercises substantive control over the assets in question of the non-cause-of-action defendant (*Dadourian Group, supra*) [*Dadourian Group International and others v Azuri Limited* [2005] EWHC 1768 (Ch)];
>
> 52. The law in this area is evolving significantly and it is undesirable to deprive it of the necessary flexibility to address complex corporate relationships whose purpose (in whole or in part) may be to put

assets beyond the reach of legitimate creditors (see the remarks of Robert Walker J in *International Credit and Investment Co (Overseas) Ltd v Another v Adham and Others* [1998] BCC 134 (Ch D);

53. The limitation proposed in *C Inc, supra* [*C Inc PLC v L and another* [2001] 2 Lloyd's Rep 459] (that there must be a causal link between the cause of action and the subsequent right to claim against the non-cause-of-action defendant) has not found support in later decisions and does not represent the current state of the law;

54. On an application of this sort, one question of importance is the degree to which those challenging the injunction have complied with their disclosure obligations under it;

55. Uncertainty about the true ownership of assets or whether they might be available to satisfy a future judgment may count against an applicant where it could have, but did not, shed light upon the question of ownership by making appropriate and credible disclosure."

16. At paragraphs 52 to 54 of his judgment Justice Henderson set out the basis for his finding that the assets of each of the four groups of NCADs who were applicants before him – that is to say (i) the third, fifth, ninth to twelfth, twenty-eighth, twenty-ninth and forty-third named defendants (together, Awal Trust Company Limited and the Saadgroup companies), (ii) the thirteenth to nineteenth named defendants (together, the Awal group of companies), (iii) the twentieth and twenty-first to twenty-seventh named defendants (together, the Saad Air group of companies) and (iv) the thirtieth, thirty-eighth and fortieth to forty-second named defendants (Saad Cayman Limited and three of the Saadgroup Finance companies) – were under the control of Mr Al Sanea. He summarised that finding at paragraph 54:

   "In summary, Mr Al Sanea is shown on the available evidence to be in control of the corporate empire of which these applicants are a part. The risk of dissipation of assets by Mr Al Sanea and by entities under his control is obvious."

17. At paragraph 57 of his judgment Justice Henderson went on to say this:

   "In general terms, the unchallenged evidence before me demonstrates that the cause-of-action defendants have been the recipients of large

sums of money from the Money Exchange and have benefitted in other ways from the allegedly fraudulent conduct of Mr Al Sanea. The non-cause-of-action defendants are part of a complex corporate structure owned and controlled by Mr Al Sanea, either directly or through his indirect ownership of the cause-of-action defendants. It is not unreasonable to infer, as I do, that one purpose for which the non-cause-of-action defendants came into existence is to protect Mr Al Sanea's assets from potential creditors. They assist in making him judgment proof and were likely intended for that purpose."

And, at paragraph 59, this:

> "It seems probable that when the dust has settled and the true picture has emerged, the assets of many of the non-cause-of action defendants may become available to satisfy a judgment against Mr Al Sanea personally."

18. At paragraph 58 of his judgment, Justice Henderson had referred to "breaches of my *ex parte* order mentioned above". The extent to which there had been a failure of those who were seeking a discharge of the Freezing Order to comply with their disclosure obligations under that order was a matter on which AHAB had relied and which the judge had accepted (at point (viii) of his conclusions in paragraph 51) was "of importance". He said this:

> ". . . SICL [the first named defendant, Saad Investments Company Limited] transferred US $60,000,000 dollars to another entity in Saudi Arabia owned by Mr Al Sanea after service of the order [of 24 July 2009]. The required disclosure, which might have shed further light on the beneficial ownership of money misappropriated from the Money Exchange, has been incomplete. . . ."

19. On the basis of those findings, Justice Henderson concluded (at paragraph 59 of his judgment) that:

> "As a result of all those factors, I am satisfied that the injunction is indeed ancillary and incidental to the effective enforcement of any judgment the plaintiff may obtain and it should be maintained in effect for that purpose."

According he dismissed the application to set aside his order of 24 July 2009.

20. There was no appeal from Justice Henderson's decision of 18 November 2009. The question whether he had been right to dismiss the application to set aside his

ex parte order was overtaken by events: in that the *ex parte* order was, by its terms, to expire on the return date which, as I have said, was fixed for hearing on 16 December 2009. But, given that, in his judgment of 18 December 2009, Justice Anderson adopted the reasoning in the draft judgment which Justice Henderson had handed down on 18 November 2009, the appellants now challenge the reasoning in that draft judgment.

21. The basis of that challenge is set out in the memorandum and grounds of appeal filed on behalf of the appellants on 16 February 2010. It is said that Justice Anderson:

> "1.1 erred in law in holding that the assets of the Non Cause of Action Defendants may become available to satisfy a judgment against the Second Defendant [Mr Al Sanea], notwithstanding that there was no evidence (and no case was advanced by the Plaintiff) that the Non Cause of Action Defendants hold assets which are beneficially those of the Second Defendant, or that there was otherwise some other route or mechanism by which their assets might become so available;
>
> 1.2 accordingly erred in law in holding that the Court had '*Chabra* jurisdiction' to grant a *Mareva* injunction against the Non Cause of Action Defendants;
>
> 1.3 wrongly inferred that one purpose for which the Non Cause of Action Defendants came into existence was to protect the Second Defendant's assets from creditors, when there was no evidence or insufficient evidence from which such inference could be drawn and evidence filed by the Plaintiff which demonstrated the contrary;
>
> 1.4 wrongly took into account, as though they had been established when they had not been, allegations that the First Defendant had breached the terms of the order dated 24 July 2009 and that the Defendants had not complied with their obligations therein to give disclosure; and
>
> 1.5 accordingly and in any event erred in law and exercised his discretion on incorrect principles in granting a *Mareva* injunction against the Non Cause of Action Defendants on the sole basis that they were members of a group of companies owned and controlled by the Second Defendant, notwithstanding that the Plaintiff did not seek to pierce the corporate veil. . . ."

These points were developed in written submissions filed on behalf of the appellants on 16 February 2010; and in oral submissions made at the hearing of the appeal.

22. It can be seen (from point 1.1 of the memorandum and grounds of appeal) that the appellants do not challenge the conclusions of law set out by Justice Henderson in sub-paragraphs (i), (ii) and (iii) of paragraph 51 of his judgment of 18 November 2009. In particular, the appellants do not challenge the proposition that there is jurisdiction to grant a *Mareva* injunction against an NCAD in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there is a pleaded cause of action (a "cause-of-action defendant" or "CAD") because the assets of the NCAD – that is to say, assets to which the NCAD is itself entitled beneficially (as well as assets in which the CAD has a beneficial interest) - may become available to satisfy a judgment against the cause-of-action defendant.

23. In my view the appellants are right to accept that proposition. It finds expression in the judgments of the majority (Justices Gauldron, McHugh, Gunmow and Callinan) in the High Court of Australia in *Cardile v Led Builders Pty Ltd* [1999] HCA 18; 198 CLR 380; 162 ALR 294; 73 ALJR 657 at paragraph 57 (cited by Justice Henderson at paragraph 44 of his judgment):

> "What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word 'may', be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:
>
> i. the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies', of the judgment debtor or potential judgment debtor; or
>
> ii. some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to

> the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor."

24. In *HM Revenue and Customs v Egleton* [2006] EWHC 2313 (Ch); [2007] BCC 78, Mr Justice Briggs, observed, at paragraph [29], that:

> "It will readily be apparent that the literal application of the second limb of the principle set out in paragraph 57(ii) of the judgment of the majority of the High Court [in *Cardile*] is potentially of extremely wide application. It appears to contemplate that jurisdiction exists to make a freezing order against any potential debtor of an individual or company against whom the claimant has a cause of action, upon the footing that since enforcement of a judgment against the defendant may lead to its liquidation or (if an individual) bankruptcy, and since a liquidator or trustee in bankruptcy may then be able to pursue claims against third parties, then jurisdiction exists to enable the plaintiff to seek a freezing order against any such third parties, always assuming that the other discretionary considerations, such as a risk of dissipation of assets, are satisfied."

Nevertheless, it is clear that he accepted that the principle, with its second limb, should be recognised in England and Wales. At paragraphs [41] and [42] of his judgment he said this:

> "The conclusions to which I have come on the question of jurisdiction are as follows. First, that the time has come for the English Courts to recognise, consistently with the carefully considered conclusion of the High Court of Australia, that the jurisdiction to grant freezing orders against third parties is not rigidly restricted by the *Chabra* requirement to show that, at the time when the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant. However attractive that test is as a bright and focused boundary-line, it does not seem to me to accord with the dictates of justice and commonsense. . . ."
>
> "Secondly, it seems to me that once the relatively clear *Chabra* boundary line is breached, there is no wider boundary which has any sufficient clarity to serve as a workable condition to the existence of jurisdiction, than the broad confines of the second limb of the principle in paragraph 57 of the main judgment in *Cardile*. . ."

25. In reaching the conclusion that the Courts of England and Wales should follow the guidance given by the second limb of principle stated in *Cardile*, Mr Justice Briggs declined to follow the limitation which Mr Justice Aikens had suggested in *C Inc PLC v L and another* [2001] EWHC 550 (Comm); 2 Lloyd's Rep 459, [75].

In expressing his conclusions as to the court's power to grant freezing orders over the assets of a non–party against whom there was no claim for substantive relief, Mr Justice Aikens had said this (so far as material in the present context):

> "(1) The purpose of a freezing order is to ensure that the orders of the Court are effectively enforced. (2) A freezing order will usually be granted against a defendant against whom there is a claim for substantive relief. The order will cover assets of which he is the beneficial owner. But the Court has the power to grant freezing orders against third parties. . . . (5) If there is a claim for substantive relief by A against B . . . or A has obtained a judgment against B (in the English Court), then the English Court can grant a freezing order against the assets of C. But, generally, it must be arguable that those assets, even if in C's name, are, in fact, beneficially owned by B. (6) The crucial question is whether the Court can go one stage further. Does it have the power to grant a freezing order against the assets of C when: (i) A has a substantive right against B (eg. in the form of a judgment); (ii) the assets of C are not, even arguably, beneficially owned by B. The answer, to my mind, depends on how one interprets the phrases '*ancillary*' and '*incidental to and dependent upon*' used by Lords Browne–Wilkinson and Mustill in the *Channel Tunnel case* [*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334] In the *Cardile case* the High Court of Australia has, effectively, given those phrases a broad interpretation. But, critically, the High Court of Australia held that the right of A to a freezing order against C is dependent upon A having a right against B and that right itself giving rise to a right that B can exercise against C and its assets. Therefore the freezing order sought by A against C is '*incidental to*' A's substantive right against B and it is also '*dependent upon*' that right."

In *HMRC v Egleton* (*supra,* [41], Mr Justice Briggs expressed the view that:

> ". . . a rigid causation test is too narrow and potentially unjust, in particular because it would protect third party fraudsters who had in reality caused the claimant's loss from exposure to a freezing order while exposing honest third parties such as Mr L in the *C Inc.* case because the claimant's claim was the cause of their exposure. . . ."

And he went on (*ibid*):

> ". . . By contrast, the supposed 'sufficient connection' test which [counsel] sought to extract from the minority judgment in *Cardile,* while having much to say for it in terms of justice and commonsense, and being similar to the test which identifies the circumstances in which a third party may, because he has become mixed up in the defendant's wrong doing, be obliged to assist the claimant with the provision of information, is by its nature so subjective and unfocused as to make it quite unsuitable as the boundary for the existence of

> jurisdiction. It may however be a valuable tool in the analysis of the question of discretion."

Justice Henderson was, I think, correct to hold (at sub-paragraph (vii) of paragraph 51 of his judgment of 18 November 2009) that it was unnecessary that there should be a causal link between the cause of action against defendant 'B' (the cause-of-action defendant) and the subsequent right of 'B' to claim against 'C' (the non-cause-of action defendant).

26. But, as it seems to me, Justice Henderson went beyond the proper scope of the second limb of the principle in paragraph 57 of the majority judgment in *Cardile* if he intended to hold (at paragraph 51(iv) of his judgment) that the assets of the NCAD were, or might become, "available" to satisfy the judgment debt of the CAD – within the meaning of the second limb – simply because the NCAD "has become mixed up in an attempt by [the] cause-of-action defendant to make himself judgment proof". And, again as it seems to me, he went beyond the proper scope of the second limb in *Cardile* if he intended to hold (at paragraph 51(v) of his judgment) that the relevant test for "availability" was whether there was good reason to suppose that the CAD defendant exercises "substantive" - as distinct from legally enforceable – control over the assets in the possession of the NCAD.

27. Justice Henderson found support for the proposition in sub-paragraph 51(iv) of his judgment in the passage which he cited (at paragraph 47 of his judgment) from the judgment of Lord Justice Potter in *Yucong Line Limited v Rendsburg Investments Corporation and others* [2000] EWCA Civ 358; [2001] 2 Lloyd's Rep. 113, [44]. But there is nothing to suggest that the *Cardile* case was considered by the Court of Appeal in *Yucong*; and it is clear from the passage cited that Lord Justice Potter (with whom the other members of the Court, Lord Justice Thorpe and Lady Justice Hale agreed) was not addressing his observations to a case where the assets held by the NCAD were not assets to which the CAD was beneficially entitled. He said this:

> "Although it is plain that the court's *Chabra*-type of jurisdiction will only be exercised where there are grounds to believe that a co-

> defendant is in possession or control of assets to which the principal defendant is beneficially entitled, it does not seem to me that the jurisdiction is limited to cases where such assets can be specifically identified in the hands of the co-defendant."

And it was in that context that he went on to say:

> "Once the court is satisfied that there are such assets in the possession or control of the co-defendant, the jurisdiction exists to make a freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant. Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant's assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it."

28. The proposition in paragraph 51(iv) of Justice Henderson's judgment of 18 November 2009 seems to have its origin in the sentence which follows the passage just set out, in which Lord Justice Potter had said this:

> "However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their proceeds are not readily identifiable in his hands it is open to the court, where it is just and convenient to do so, to make an order which catches the co-defendant's general assets up to the amount of the principal defendant's assets of which he appears to have possession and control."

To treat that observation as authority for the proposition that it is enough – in order to found jurisdiction to grant *Mareva* relief over the assets of a NCAD – to assert that the NCAD "is mixed up in" an attempt by a CAD to make himself judgment proof is to take the observation out of context. The context – as Lord Justice Potter went on to make clear – was a case in which there were good reasons to think that assets (not capable of specific identification at the time of the application) held in the name of the NCAD were in fact beneficially the property of the CAD:

> "That was in fact the position in *TSB -v- Chabra* itself. In that case, Mr Chabra, the original defendant was alleged to be the alter ego of the co-defendant company against which the plaintiff had no direct cause of

action, but in respect of which there was a good arguable case that assets vested in its name were in fact beneficially the property of Mr Chabra, in particular the proceeds of sale of recently completed hotel and restaurant interests and the house in which Mr and Mrs Chabra lived. Because of the difficulty in ascertaining which assets of the company were in fact assets to which Mr Chabra was beneficially entitled, the Mareva Order made against the company was one which applied generally to prevent it from disposing or dealing with any of its assets within the jurisdiction, albeit it also covered 'in particular' the proceeds of sale from the hotel and restaurant businesses. Mummery LJ observed at p.242F:

> 'In brief, the most realistic and practical form of relief in this case is to restrain the company from disposing of, or dealing with, assets until it is established whether the plaintiff is entitled to a judgment against Mr Chabra and until it is established which, if any, of the assets apparently vested in the company are available to satisfy any judgment obtained against Mr Chabra.'

29. Justice Henderson cited the decision of Mr Edward Bartley Jones QC, sitting as a Deputy Judge of the Chancery Division in the High Court of England and Wales in *Dadourian Group International Inc and others v Azuri Limited* [2005] EWHC 1768 (Ch), as authority for the proposition in paragraph 51(v) of his judgment of 18 November 2009. Mr Bartley Jones had said this:

> "For my part, I do not believe it is necessary to establish beneficial ownership in a strict trust law sense. Clearly, if assets are held on a bare trust then the *Chabra* jurisdiction can be exercised. But, in my judgment, even if the relevant defendant to the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the Chabra jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to, the assets. The important issue, to my mind, is substantive control. . . . What needs to be considered is the substantive reality of control, not a strict trust law analysis as to whether the third party is a bare trustee. Thus, in my judgment, placing assets in a discretionary trust would not prevent the *Chabra* jurisdiction being exercised against that discretionary trust if the substantive reality were that the relevant defendant controlled the exercise of the discretionary trust."

30. No criticism can be made of the first two sentences in that passage; and the appellants do not seek to do so. But, as it seems to me, the proposition in the third sentence is too widely stated. If the CAD has "some right in respect of, or control

over, or other rights of access to", the assets held by the NCAD", the case will fall within the second limb of the principle expressed in *Cardile* if, but only if, there is "some process, ultimately enforceable by the courts, . . . available to the judgment creditor as a consequence of a judgment against [the CAD], pursuant to which, . . . , [the NCAD] may be obliged to disgorge property or otherwise contribute to the funds or property of [the CAD] to help satisfy the judgment against [the CAD]." In *Cardile*, the High Court of Australia suggested that the process by which the NCAD might be compelled to make its property available to satisfy the debts of the CAD might be "by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise". Plainly, the Court did not think that the enforcement process was confined to the appointment of a liquidator, trustee in bankruptcy or receiver: but that that Court had in mind that there must be some process, ultimately enforceable by the courts, is not in doubt. The point was emphasized by the New South Wales Court of Appeal in *Taggett v Sexton* [2009] NSWCA 91, at paragraph 131.

31. That, too, was the approach of Mr Justice Warren, sitting in the High Court of England and Wales in *Basra and others v Poole and others* [2007] EWHC 3528 (Ch). In commenting upon the decision of Mr Justice Briggs in *Egleton* (*supra*), he said this, at paragraph [9]:

> "The basis for this relief [that is to say, the relief granted in *Egleton*] was that the directors might well be liable to the company at the suit of the yet to be appointed liquidator. It was just and equitable to freeze their assets to prevent their dissipation before such a liquidator had been able to act. Even so, the applicant would need to show a good arguable case for one of the following: (a) assets being held by the third party belonging to the defendant; (b) a disposition of assets by the defendant to the third party liable to be set aside under section 423 of the Insolvency Act 1986, which concerns transactions defrauding creditors; or (c) an impending insolvency in the course of which the trustee in bankruptcy or liquidator would be able to recover for the benefit of creditors, for instance, where the transfer is at an undervalue or constitutes a preference."

32. It is necessary to keep in mind the basis upon which a court exercises the *Mareva* jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to

the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting *Mareva* relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant.

33. The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD) – say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so) – is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (i) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.

34. Some support for the "substantive control" test can be found in the judgments of the Court of Appeal in Hong Kong in *Akai Holdings Limited (in liquidation) and others v Ho Wing On Christopher and others* [2009] HKCU 1451. At paragraph 44 Vice President Tang after referring to the observation of Mr Justice Robert

Walker in *International Credit and Investment Co (Overseas) Ltd and another v Adham and others* [1998] BCC 134, 136, that:

> ". . . it is becoming increasingly clear, as the English High Court regrettably has to deal more and more often with major international fraud, that the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level . . ."

went on to say (at paragraph 44) that:

> "such drastic action may include extending a Mareva injunction over the assets of a non-party if there is good reason to suppose as against the non-party that the assets of the non-party would be susceptible to a procedure which would lead to satisfaction of a judgment: . . ."

That proposition is, of course, consistent with the second limb of the principle set out by the High Court of Australia in *Cardile.*

35. The Vice President then went on – after citing the passage in *Dadourian* to which I have already referred – to observe (at paragraph 48 of his judgment) that:

> ". . . for the present purpose, it is sufficient that there is good reason to suppose that Mr Ho has substantive control over the Ho Family Trust Assets. The nature and degree of control may have to be investigated in due course."

If, by that observation, he intended to suggest that "substantive control" was, of itself, sufficient to found jurisdiction to grant *Mareva* relief – without the need to consider whether (as he had said in paragraph 44) "there is good reason to suppose as against the non-party that the assets of the non-party would be susceptible to a procedure which would lead to satisfaction of a judgment" – he went beyond the second limb of the principle in *Cardile*. It was, I think, unnecessary for him to do so in the circumstances that, as he said in the next sentence of his judgment, it was sufficient for his decision that "for all intents and purposes, Mr Ho has represented to the whole world that he was the beneficial owner of the trust". Be that as it may, for my part, I am not persuaded that the courts in this jurisdiction should treat the decision in the *Akai Holdings* case as a sufficient reason to depart from the need – emphasized in *Cardile*, and in the cases in England and Wales and in Australia in which *Cardile* has been followed - that "substantive control" is not, of itself, sufficient to found jurisdiction to grant

Mareva relief: it is necessary to identify some process of enforcement which would (or might) lead to the assets of the NCAD becoming available to satisfy the judgment which the claimant may obtain against the CAD.

36. In addressing the question whether there is good reason to suppose that the assets of the NCAD can, by some process ultimately enforceable by the courts, be made available to the claimant to satisfy the judgment which the claimant may obtain against the CAD it is pertinent to have in mind the observation of Mr Justice Warren in *Basra v Poole* (*supra*), at paragraph [10]:

> "As I have said, it is important that the case against the defendant is clearly formulated, but more so must the possible claim against a third party be clearly formulated. . . ."

With respect to Justice Henderson, it is not enough to say, as he did at paragraph 59 of his judgment, that:

> "It seems probable that when the dust has settled and the true picture has emerged, the assets of many of the non-cause-of action defendants may become available to satisfy a judgment against Mr Al Sanea personally."

It is necessary to identify, with a degree of specificity appropriate to the evidence before the court, why it is that the court is satisfied that, following a judgment against the CAD, there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will lead to the assets of the NCAD becoming available to satisfy that judgment.

37. As I have said, earlier in this judgment, Justice Henderson set out (at paragraphs 52 to 54 of his judgment) the basis for his finding that the assets of each of the four groups of NCADs who were applicants before him were under the control of Mr Al Sanea. That lead him to the conclusion – to which, as it seems to me, there can be no sensible challenge – that "the risk of dissipation of assets by Mr Al Sanea and by entities under his control is obvious". But the analysis in those paragraphs does not lead to the further conclusion that there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will, in the case of each of the NCADs, enable the claimant to have recourse to its assets to satisfy the judgment which it may obtain against Mr Al

Sanea, or against one of the other cause of action defendants. In particular, it does not follow that a judgment creditor can look to the assets of a Cayman Islands trust over which the judgment debtor (as settler) may have substantive control, but under which he has no beneficial interest, for the satisfaction of his judgment: see the decision of this Court in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* [2009] CILR 474.

38. It is necessary, therefore, for this Court to examine whether there were grounds upon which Justice Henderson could properly reach the conclusion that there was good reason to suppose that AHAB could invoke some process of enforcement against each of the NCAD appellants which would lead to the assets of that NCAD (if any) becoming available to satisfy the judgments which AHAB seeks against the cause of action defendants. In that context, it is convenient to take the NCAD appellants in groups.

(i) The fifth, twenty-eighth, twenty-ninth and forty-third named defendants

39. Justice Henderson found that the twenty-eighth, twenty-ninth and forty-third defendants were owned by Saadgroup Limited, the fifth defendant. He said this (at paragraph 52 of his judgment):

> "The sole owner of Saadgroup Limited is the third defendant, ATCL [Awal Trust Company Limited], the trustee of the Saad Star Trust. This trust was settled by Mr Al Sanea and he has the power to revoke it and cause its assets to revert to him."

40. Given the decision of this Court in the *TMSF* case (*supra)* – which dismissed an appeal against the decision of the Chief Justice which does not appear to have been brought to the attention of Justice Henderson – the fact (if it be so) that Mr Al Sanea had power to revoke the Saad Star Trust and cause the trust assets to revert to his beneficial ownership in June does not, of itself, provide reason to suppose that AHAB could invoke some enforcement process which would lead to those assets becoming available to satisfy AHAB's claims against him. If and so far as Justice Henderson took the view that *Mareva* relief against these four NCADs was incidental or ancillary to the substantive relief sought against Mr Al Sanea, he fell into error.

41. The third named defendant, Awal Trust Company Limited ("ATCL"), is, itself, a defendant against whom a cause of action is pleaded. *Prima facie*, at least, there was good reason to suppose that the assets of the fifth named defendant, Saadgroup Limited (of which ATCL was held to be sole owner) – and the assets of its wholly owned subsidiaries (the twenty-eighth, twenty-ninth and forty-third named defendants) - could become available, in the course of the liquidation of those companies, to satisfy AHAB's claims against ATCL, as trustee; but no good reason to suppose that trust assets could become available to satisfy claims against ATCL otherwise than as trustee. Justice Henderson – and, perhaps more pertinently, Justice Anderson – did not consider whether there was a need to preserve trust assets in order to satisfy claims against ATCL; and there is no respondent's notice seeking to uphold Justice Anderson's order on that basis.

(ii) The twenty-first to twenty-seventh named defendants

42. Justice Henderson found that the twenty-first to twenty-seventh named defendants were owned by the twentieth named defendant, Saad Air Limited: paragraph 54 of his judgment. By the time of the hearing before Justice Anderson there was evidence the twenty-first to twenty-seventh named defendants were wholly owned subsidiaries of Saad Air Limited: see paragraph 9(ii) of the affidavit sworn on 10 December 2009 by Peter Anderson. Justice Henderson found, also, (*ibid*) that Mr Al Sanea owned a controlling interest in Saad Air Limited. He made no finding that Mr Al Sanea's interest in Saad Air Limited was such that a trustee in bankruptcy of Mr Al Sanea (if appointed, following a judgment against Mr Al Sanea) would be able to put that company into liquidation. There was, however, uncontradicted evidence on which such a finding could have been made: see paragraph 34 of the second affidavit (sworn on 28 September 2009) of Simon Andrew Charlton. If Saad Air Limited were put into liquidation, there was good reason to suppose that the net assets (if any) of its wholly owned subsidiaries would become available to meet its liabilities; and, subject to that, for distribution to its shareholders (including, on this hypothesis, a trustee in bankruptcy of Mr Al Sanea).

43. Saad Air Limited is, itself, a defendant against whom a cause of action is pleaded. As I have explained, there was good reason to suppose that the net assets of its wholly owned subsidiaries would become available to meet its liabilities. But neither Justice Henderson nor Justice Anderson based the grant of *Mareva* relief over the assets of the twenty-first to twenty-seventh named defendants on the need to preserve assets to meet AHAB's claims against Saad Air Limited; and, again, there is no respondent's notice seeking to uphold Justice Anderson's order on that basis.

(iii) The thirty-eighth to forty-second named defendants

44. Justice Henderson found that the thirty-eighth and fortieth to forty-second named defendants were owned directly by Mr Al Sanea: paragraph 54 of his judgment. He made no express finding as to the ownership of the thirty-ninth named defendant (Saadgroup Finance Company (No 2) Limited); but there was no reason, on the evidence before him, to distinguish between that defendant and the other Saadgroup Finance companies. He made no finding that Mr Al Sanea's interest in any of those companies was such that a trustee in bankruptcy of Mr Al Sanea would be able to put them into liquidation.

(iv) The sixth and seventh named defendants

45. Justice Henderson made no finding as to the ownership of the sixth and seventh defendants (Golden Belt 2 Limited and Golden Belt 3 Limited).

The second ground: Shell Defendants

46. It seems that the question whether *Mareva* relief should be granted against defendants who were not shown to have assets capable of dissipation was not argued before Justice Henderson in September 2009: in any event, he did not address that question in his draft judgment of 18 November 2009. That question was, however, addressed by Justice Anderson in his judgment of 16 December 2009. As I have said, he answered the question in a sentence, at paragraph 10 of his judgment:

> "It seems to me that it must be logically consistent that if a restraint can be placed on a non-cause of action party, that the alleged, though not proven lack of resources on the part of some defendants, ought not to be in and of itself a bar to the grant and/or the continuation of the *Mareva.*"

In reaching that conclusion he had observed (at paragraph 9), that:

> ". . . the conceptual and philosophical underpinnings of the *Mareva* are that (a) it is likely that a litigant will be successful in its claim, and (b) that his success will be defeated by the defendant having dissipated his assets. It is, in my view, very instructive that the common law has developed the so called *Chabra* jurisdiction to which Henderson J made considerable reference in his judgment . . ."

47. In the course of argument before him, Justice Anderson had been referred to a passage in *Gee: Commercial Injunctions (Fifth Edition, 2004),* at paragraph 2.044, where the view is expressed that, in a case where there is no real evidence of the defendant having assets, there should be no *Mareva* injunction, even after the claimant has obtained judgment:

> "This is because the injunction will serve no purpose and is likely to cause substantial hardship to the defendant."

In support of that view, the editor cited passages from an article in the European Intellectual Property Review: *The Mareva Injunction: A Cruel Tyranny* (1997) EIPR 479, 480.

48. The judge considered the passage in *Gee* at paragraphs 13 and 14 of his judgment. He said this:

> ". . . the question it seems to me which must arise on a reading of that paragraph [*Gee, paragraph 2.044*] is, what is the hardship which would purportedly be caused to these non-asset holding defendants? It seems to me that it would be an exposure in costs, and further seems to be that that can be protected against with appropriate orders. . . ."

And he went on, at paragraph 16, to say this:

> ". . . I then go back to the question of the article which was cited from the European Intellectual Property Review, and the three paragraphs under identifiable assets . . . In particular the third paragraph which talks about, and it is a quote, '*Granting a Mareva injunction without identified assets should be as inconceivable as granting an Anton Piller without evidence that the Defendant has in his possession, incriminating documents or things, The purpose of a Mareva is to*

> *protect the Plaintiff's position in respect of any judgement which it may obtain, not to punish the Defendant for being a wrongdoer. This fundamental principle is lost with the assumption that a rogue must necessarily be rich."* It is clear that that is not the underlying assumption upon which this application to continue the order proceeds. It is not under the assumption that these so called asset poor, for want of a better term, companies, are rogues who have assets. That is not the philosophical, not the conceptual framework within which we are operating."

49. The judge was referred, also, to a passage in the judgment in *Leisure Data v Bell* (unreported, 3 November 1987, High Court of England and Wales), cited in *Goldrein and Wilkinson: Pre-emptive Remedies (Second Edition, 1991)* at page 179, where it was said:

> "There was a *Mareva* order too but nothing really turns on that. That was discharged on the basis that it was ridiculous to grant a *Mareva* order against a defendant who was so impecunious that on the face of it he had not got any assets in the jurisdiction that may be worth preserving and indeed I'm bound to say that I find it difficult to understand why the *Mareva* order was ever sought."

The judge observed, at paragraph 15 of his judgment, that:

> "It seems to me that on the face of it this is not the case with these non-asset-holding companies, if we accept, if the Court accepts that these companies do not hold any assets. Clearly, there must be some understanding behind them, because they have retained Counsel, and they are pursuing their remedies in other areas, and they will continue to do so. It seems to me that to suggest that they are in a position as described in *Leisure Data*, as being so impecunious that it is worthless, must not be the situation in these circumstances."

And he went on, at paragraph 17, to say this:

> "What we are operating on is what Henderson J clearly describes as a complex corporate structure. At the end of the day, the person behind the structure, and I do not think this can be disputed even on the limited evidence that we have had, we have been exposed to, that in a very real sense standing behind the corporate structure, is Mr Al Sanea, and whether through directly or indirectly held companies. So that the position of these defendants, as it seems to me, is not the same as the position in *Leisure Data*, and not the same as the position described in this article [that is to say, in the article in the European Intellectual Property Review]."

50. The judge expressed his conclusion at paragraph 18 of his judgment:

> "So for these reasons, additionally to my own view that the *Chabra* jurisdiction may itself be extended, however narrowly to encompass the circumstance, that for those reasons, practical and convenient reasons, the discretion of the Court, which is ultimately what this is about, ought to be exercised to allow the *Mareva* injunction to continue until trial or further order. . ."

51. In the memorandum and grounds of appeal filed on 16 February 2010 the appellants submit that Justice Anderson erred in law and/or exercised his discretion on incorrect principles and/or reached conclusions that were not available on the evidence before him in granting *Mareva* relief against the Shell Defendants in circumstances that (i) the claimant had failed to adduce any evidence that those defendants had any assets and (ii) there was uncontradicted evidence that they had no, or minimal, assets. In particular, it is said:

    2.1 that the judge erred in law in holding that it was unnecessary for the claimant to establish that the Shell Defendants had assets "when he should have held that it was necessary for the claimant to adduce solid evidence that each of the Shell defendants against which an injunction was to be granted had assets";

    2.2 that the judge erred in law in holding that '*the conceptual and philosophical underpinning of the Mareva*' included that the success of a claimant will be defeated by a defendant having dissipated his assets "when he should have held that the purpose of a *Mareva* injunction is to prevent the future dissipation of existing assets in the hands of a defendant so as to reduce the risk of a judgment obtained by a plaintiff being unsatisfied";

    2.3 that the judge erred in law and/or misdirected himself in holding that the jurisdiction to grant *Mareva* injunctions against non-cause-of-action defendants was consistent with it being unnecessary for a claimant to demonstrate that a defendant held assets: he should have held that "solid evidence that a defendant held assets was a pre-condition of the grant of a *Mareva* injunction against that defendant, whether or not a cause of action was alleged";

2.4 that the judge erred in law and/or misdirected himself and/or exercised his discretion on incorrect principles in holding that the relevant question in considering whether to grant a *Mareva* injunction against defendants with no assets was whether they would be caused hardship;

2.5 that the judge erred in law and/or misdirected himself and/or exercised his discretion on incorrect principles in holding that the fact that the Shell Defendants "*had an understanding behind them*" and had retained Counsel and were "*pursuing remedies in other areas*" entailed that the grant of a *Mareva* injunction against the Shell Defendants was not worthless and was accordingly justified; and

2.6. that the judge erred in law and/or misdirected himself and/or exercised his discretion on incorrect principles in holding that the fact that the Shell Defendants were part of a complex corporate structure, behind which was Mr Al Sanea, justified the grant of a *Mareva* injunction regardless of their lack of assets.

52. AHAB accepts – and, to the extent that it does not, I would hold - that it needed to adduce "solid evidence" to support its assertion that (absent the grant of *Mareva* relief against the individual defendant in question) there was a real risk that a judgment (whether against that, or some other, defendant) would not be satisfied by some process of enforcement. But it asserts – in reliance on a passage from *Gee* (*supra*) at paragraph 12.039 – that each case depends on its own facts and so it is impossible to lay down any general guidelines on satisfying that evidential burden. In particular, it is said that, in appropriate cases, the solid evidence may take the form of evidence of surrounding circumstances from which the relevant risk can be inferred; and that the court is not obliged to accept the *'mere say-so'* of a party seeking to contradict the claimant's case by adducing evidence in response, but is entitled to investigate the underlying merits of that evidence.

53. I would accept those propositions as correct. Nevertheless, as it seems to me, it was necessary for AHAB to adduce some evidence from which the court could properly conclude – in relation to each defendant against whom *Mareva* relief was

to be continued – either (i) that there was reason to suppose that defendant had some assets which (absent such relief) were at risk of dissipation or (ii) that there was a real prospect that assets would be transferred to, or otherwise acquired by, that defendant in the future which (a) would then become available to satisfy a judgment (whether against that, or some other, defendant) and (b) would (absent *Mareva* relief) be at risk of dissipation while held by that defendant. In addressing the question whether there was a real prospect that assets would be transferred to a defendant in the future, the court needs to have in mind that – if it were to grant *Mareva* relief at a time when that defendant had no assets – the relevant question is whether there was a real prospect that assets would be transferred to a defendant who was already subject to a freezing order.

54. AHAB appears to accept that it needed to satisfy the judge that there was reason to suppose that a defendant against whom *Mareva* relief was sought had some assets; or that there was a real prospect that assets would be transferred to that defendant in the future. At paragraph 59 of the skeleton argument filed on its behalf in this Court, AHAB asserts that ". . . there is ample evidence in this case that . . . the Appellants may now or may in the future have assets hidden in them which may be available to satisfy any judgment obtained by AHAB. . .". The matters relied upon are set out in paragraph 60 of the skeleton, under nine sub-paragraphs. But they can be summarised more shortly. It is said that there is uncontested evidence that Mr Al Sanea moves very substantial sums around the companies in his corporate empire with little or no regard for their status as separate entities; that a substantial proportion of the approximately US $5 billion misappropriated by Mr Al Sanea cannot be located; that Mr Al Sanea's assertions (in affidavits sworn by his employee, Mr Al Zayer, on 4 December 2009), as to the asset position of the Saad Group simply cannot be believed; and that no support for those assertions can be found in the affidavit sworn on behalf of the former receivers.

55. Justice Anderson did not find it necessary to consider – in detail or at all – the evidence in relation to the individual defendants. He seems to have been content

to assume that there was no direct evidence that any of the defendants within the scope of paragraph 3 of his order of 18 December 2009 had assets. Examination of the evidence in this Court confirms that, in relation to the Shell Defendants, that assumption was substantially correct. As in the case of the NCADs, it is convenient to take the Shell defendants in groups.

(i) The ninth to twelfth named defendants

56. In his first affidavit, sworn on 24 July 2009, Mr Charlton explained (at paragraph 31) that the ninth to twelfth named defendants (together with the eighth named defendant, Singularis Holdings Limited) were created for the purpose of holding shares purchased by Mr Al Sanea in HSBC. He stated that "The purchase was made through Singularis Holdings Limited". At paragraph 133 of the same affidavit he stated that he had located "five transactions that were performed on the instructions of Mr Al Sanea where funds were transferred through the Money Exchange to Saad accounts for onward transfer to Singularis Holdings Limited". There is no direct evidence that the HSBC shares (or any of them) or the funds transferred to Saad accounts by the transactions which Mr Charlton had located (or any of them) found their way into the other Singularis companies.

57. The circumstances in which, and purposes for which, Cayman Island companies were incorporated was addressed by Joseph Andrew Consolo, a United States Attorney and International Legal Adviser practising in London, in an affidavit sworn on 3 December 2009. At paragraph 34 of that affidavit Mr Consolo confirmed that the ninth to twelfth named defendants "were incorporated to hold portfolios of shares, other securities, hedge funds and private equity funds". But he went on to say (at paragraph 35) that he had seen no document and knows of know fact to indicated that any of those Singularis companies was ever used for any purpose; and that ". . . as far as I am aware, the Singularis companies remain shell companies with no assets".

58. Mr Maan Hani Al-Zayer made two affirmations on 4 December 2009, in order to comply (as he said) with the disclosure orders made against (*inter alios*) the ninth

to twelfth named defendants. Exhibit "MHAZ-2" to the second of those affirmations purports to be a statement of assets. In relation to each of the ninth to twelfth named defendants it is stated that "This Defendant has no assets which are responsive to paragraph 14 of the Order [of 24 July 2009]".

59. Mr Anderson, with his partner, Mr Richard Douglas, was appointed as a Joint Court Appointed Receiver of the first, fifth and eighth to forty-third named defendants under the order of 24 July 2009. In the affidavit which he swore on 10 December 2009 (at sub-paragraphs (iv) to (vii) of paragraph 9) he stated, in respect of each of the ninth to twelfth named defendants, that "This company does not appear to have any assets".

(ii) The twenty-second and twenty-fourth to twenty-seventh named defendants

60. Mr Charlton's evidence (at paragraphs 33 to 35 of his first affidavit) was that the Saad Group owned two large aircraft, an Airbus A-340 and an Airbus A-320. The Airbus A-340 was owned by the twenty-first named defendant (Saad Air (A340-600) Limited) and the Airbus A-320 by the twenty-third named defendant (Saad Air (A320-No 2) Limited). As to the twenty-second and twenty-fourth to twenty-seventh named defendants, Mr Charlton said this:

> "Saad Air (A320) Limited, Saad Air (A320 No 3) Limited, Saad Air (A320 No 4) Limited and Saad Air (A320 No 5) Limited are also Cayman companies that appear to have been set up for aircraft ownership. However, I do not know whether these separate companies relate to different individual aircraft or whether they were all set up in connection with the A320 aircraft referenced above.
>
> Saad Air (A380) Limited is a Cayman company that was, I presume, set up to own an A-380 double-decker jumbo aircraft. . . . "

61. Mr Consolo confirmed, at paragraph 39 of his affidavit, that the Saad Air companies had been incorporated "for the purposes of the establishment of an aircraft-related business". He went on to say this, at paragraph 40:

> "As far as I am aware, the Saad Air companies were used for the following purposes:
>
> a. Saad Air Limited was incorporated to serve as the overall holding company of the remaining Saad Air companies.

b. Saad Air (A340-600) was incorporated for the purpose of the acquisition of an Airbus A340-600 aircraft. As far as I am aware, Saad Air (A340-600) Limited remains the owner of an Airbus 340-600 aircraft subject to security held by HSH Nordbank.

c. Saad Air (A320) Limited was incorporated as a shelf company and, so far as I am aware, was not used for any purpose until it was used for the purchase of an Airbus A320 aircraft. I understand that this aircraft was converted for use as an executive jet and was sold in September 2008. As far as I am aware, this company does not currently own any aircraft.

d. Saad Air (A320 No 2) Limited was incorporated for the purpose of a proposed acquisition of an Airbus A319 aircraft. As far as I am aware, that transaction did not proceed. The company was then used, as far as I am aware, for the acquisition of an Airbus A320 aircraft. I understand that Saad Air (A320 No 2) Limited remains the owner of an Airbus A320 aircraft subject to security held by HSH Nordbank.

e. Saad Air (A320 No 3) Limited was incorporated for the purpose of a proposed acquisition of an Airbus A340 aircraft. As far as I am aware, this transaction did not proceed. The company was then used, as far as I am aware, for the acquisition of an Airbus A320 aircraft, which was resold on the same day as it was purchased. As far as I am aware, this company does not currently own any aircraft.

f. Saad Air (A320 No 4) Limited was incorporated as a shelf company for the purpose of being available in connection with the future acquisition of an aircraft. As far as I am aware, this company has not yet acquired any aircraft.

g. Saad Air (A320 No 5) Limited was incorporated as a shelf company for the purpose of being available in connection with the future acquisition of an aircraft. As far as I am aware, this company has not yet acquired any aircraft.

h. Saad Air (A380) Limited was incorporated for the purpose of a proposed acquisition of a Dassault Falcon 2000 aircraft. As far as I am aware, that transaction did not proceed. The company was then to be used for the purpose of a proposed acquisition of an Airbus A319 aircraft. As far as I am aware, that transaction did not proceed. The company was then to be used for the purpose of a proposed acquisition of an Airbus A380 aircraft. As far as I am aware, that transaction did not proceed. As far as I am aware, this company has not yet acquired any aircraft."

62. The statement of assets which is exhibit "MHAZ-2" to Mr Al Zayer's affirmation is consistent with Mr Consolo's evidence. In particular, it is stated, in relation to

each of the twenty-second and twenty-fourth to twenty-seventh named defendants that: "This Defendant has no assets which are responsive to paragraph 14 of the order".

63. Mr Anderson explained, at sub-paragraph (xv) of paragraph 9 of his affidavit of 10 December 2009, that the twentieth named defendant (Saad Air Limited) held 100% of the issued share capital of the twenty-first to twenty-seventh named defendants; but that the value of those shares was likely to be nil. He explained, at sub-paragraph (xvi) that the principle asset of the twenty-first named defendant was an Airbus A340-600 aircraft; but that, on an "where is as is " valuation, the aircraft would be unlikely to realise more than the amount of the company's debts. Further, that the aircraft was unable to fly. He stated, at sub-paragraph (xviii), that the only asset of the twenty-third named defendant appeared to be an Airbus A320 aircraft; but that the value of that aircraft appeared to be significantly less than the company's debts to its financier, for which the aircraft was security.

64. Mr Anderson stated, at sub-paragraph (xvii) of paragraph 9 of his affidavit, that the only asset of the twenty-second named defendant appeared to be a small amount of cash (US$5,129); and that he was aware of a third party claim against that company for an amount of some US$1.5 million. In respect of each of the twenty-fourth to twenty-seventh named defendants, he stated, at sub-paragraphs (xix) to (xxii), that: "This company does not appear to have any assets."

(iii) The thirty-eighth to forty-second named defendants

65. Mr Charlton referred to the thirty-eighth to forty-second named defendants at paragraph 37 of his first affidavit; but, as he said, he had "no information about the role or function of these companies". He attached, as schedule 1 to his affidavit, the information which his investigation team then had as to the assets held by "the Cayman Saad Companies". There is nothing in that schedule to suggest that these defendants own any assets.

66. Mr Consolo stated, at paragraph 51 of his affidavit, that the thirty-eighth to forty-second named defendants were, so far as he was aware, incorporated "for similar reasons to the AWAL companies and the SIFCos as stated above": that is to say, they were incorporated "to hold separate investment portfolios of shares, other securities, hedge funds or private equity funds" (paragraphs 36 and 50 of that affidavit). He said nothing to indicate whether or not those defendants did, or did not, hold any assets.

67. In the statement of assets exhibited to Mr Al Zayer's affirmation it is stated, in relation to each of the thirty-eighth to forty-second named defendants, that: "This defendant has no assets which are responsive to paragraph 14 of the Order".

68. Mr Anderson stated, at sub-paragraphs (xxxiii) to (xxxvii) of paragraph 9 of his affidavit of 10 December 2009 in relation to each of the thirty-eighth to forty-second named defendants, that: "This company does not appear to have any assets".

(iv) The sixth and seventh named defendants

69. Mr Charlton mentioned the sixth named defendant, Golden Belt 2 Limited, at paragraph 30 of his first affidavit. He said this (so far as material):

> "Golden Belt 2 Limited is the issuer of a 3 billion USD Medium Term Note Programme. . . . It was listed in the Prospectus as a wholly owned subsidiary of STCFSC [a Saudi company, Saad Trading, Contracting and Financial Services Company: see paragraph 29 of that affidavit]. The notes programme was also to be guaranteed by STCFSC."

He did not refer to the seventh named defendant, Golden Belt 3 Limited, in that affidavit.

70. Mr Consolo stated, at paragraph 7 of his affidavit that he did not assist in the incorporation of the sixth and seventh named defendants; but that, as far as he was aware, those defendants were "incorporated for the purpose of acting as vehicles for sukuk financings".

71. In Mr Al Zayer's statement of assets it is stated, in relation to each of the sixth and seventh named defendants, that: "This Defendant has no assets which are responsive to paragraph 14 of the Order."

72. The Joint Receivers were not appointed as receivers of either the sixth or the seventh named defendants. Mr Anderson does not refer to those defendants in his affidavit.

73. AHAB submits, correctly in my view, that in cases (such as this) in which the plaintiff has established a good arguable case of fraud, the court should treat any asserted but unproven lack of assets on the part of the defendant with considerable caution. In particular, it is said that the evidence of Mr Al Zayer "simply cannot be believed"; and that Mr Anderson's statements that the Shell Defendants do not appear to have any assets carry little or no weight. There is, it is said, a real risk that relevant information may have been withheld from the former receivers; as (it is said) has been the case in relation to the liquidators of those Cayman companies that are in liquidation. But, as it seems to me, it must be kept in mind that it was AHAB who was seeking the continuation of *Mareva* relief; and it was for AHAB to satisfy the court that there was reason to suppose that each Shell Defendant had some assets which (absent such relief) were at risk of dissipation. If the evidence of Mr Al Zayer were to be wholly discounted and no weight were to be given to Mr Anderson's statements, it would still be necessary to ask whether AHAB had adduced evidence on which the court could have been satisfied in that respect. The answer to that question, as it seems to me, must be "No".

74. It is said that "given the manner in which Mr Al Sanea moves assets around his corporate empire, it cannot sensibly be suggested that the asset position of each appellant much be analysed separately". In effect, it is said that the monies alleged to have been misappropriated must have gone somewhere and that, in granting *Mareva* relief the court should take a "broad brush" approach. In particular, the court should not insist on being satisfied, by evidence, that there is reason to suppose that the monies went to any individual company within "the corporate

empire": it should grant *Mareva* relief against all such companies. That submission, as it seems to me, overlooks the fact that, in so far as AHAB has felt able to allege that monies alleged to have been misappropriated have been transferred to Cayman Island companies, it has sought substantive relief against those companies (as it has done against the ninth to twelfth named defendants); and overlooks the fact that, on the evidence, there were other companies within the "empire" – that is to say companies which were not Cayman Island companies – into which misappropriated monies could have been placed. In my view, whatever may have been the position when the application was made *ex parte* to Justice Henderson in July 2009, by the time the matter was before Justice Anderson in December 2009, there was no basis for the "broad brush" approach for which AHAB contends.

75. It is submitted, further, that the judge was entitled to have regard "to what is just and convenient as between AHAB and the Appellants"; and that the balance of justice and convenience clearly favoured AHAB. In particular, it is said that the judge was correct to take the view that *Mareva* relief should be continued against the Shell Defendants on the ground that, if those defendants were correct in their assertion that they had no assets, then continuation of the relief granted in July 2009 would cause them no hardship. I would reject that submission. I am content to assume for the purposes of this appeal – albeit with some misgivings – that it may be open to a court to take the view, at the stage when it is making an order for disclosure of assets, that justice and convenience favour the imposition of a freezing order against defendants who may or may not have assets which could become available to satisfy the claims made in the proceedings (on the basis that that is a necessary short term expedient); but I am not persuaded that, after disclosure has been made, it is open to a court to continue the freezing order against a defendant whom it has no reason to suppose has (or will have) any assets which could become available to satisfy a judgment obtained in the proceedings simply on the grounds that "that will do no harm".

The third ground: Defendants within both classes

76. The appellants submit that, whether or not there was jurisdiction to continue *Mareva* relief against them, Justice Anderson failed to exercise his discretion properly or at all in continuing that relief against those NCADs who were also Shell Defendants. They are: (i) the sixth and seventh named defendants; (ii) the twenty-second and twenty-fourth to twenty-seventh named defendants; and (iii) the thirty-eighth to forty-second named defendants. The position in relation to those appellants may be summarised as follows:

(i) The sixth and seventh named defendants

77. Justice Henderson made no finding as to the ownership of the sixth and seventh named defendants (Golden Belt 2 Limited and Golden Belt 3 Limited). There was evidence that Golden Belt 2 had been the issuer of a 3 billion USD Medium Term Note Programme; and that it was the wholly owned subsidiary of STCFSC; but no evidence that it held any assets. There was no evidence that Golden Belt 3 held any assets.

(ii) The twenty-second and twenty-fourth to twenty-seventh named defendants

78. At the time of the hearing before Justice Anderson there was evidence that these defendants were wholly owned subsidiaries of Saad Air Limited (the twentieth named defendant); that Mr Al Sanea's interest in Saad Air Limited was such that a trustee in bankruptcy of Mr Al Sanea (if appointed, following a judgment against Mr Al Sanea) would be able to put that company into liquidation; and that, if Saad Air Limited were put into liquidation, there was good reason to suppose that the net assets (if any) of its wholly owned subsidiaries would become available to meet its liabilities and, subject to that, for distribution to its shareholders (including, on this hypothesis, a trustee in bankruptcy of Mr Al Sanea). There was evidence that the twenty-second named defendant appeared to hold a small amount of cash (US$5,129); but that there was a third party claim against that company for an amount of some US$1.5 million. There was no evidence that any of the twenty-fourth to twenty-seventh named defendants held assets.

(iii) The thirty-eighth to forty-second named defendants

79. Justice Henderson found that the thirty-eighth and fortieth to forty-second named defendants were owned directly by Mr Al Sanea. He made no express finding as to the ownership of the thirty-ninth named defendant; but there was no reason, on the evidence before him, to distinguish between that defendant and the other Saadgroup Finance companies. He made no finding that Mr Al Sanea's interest in any of those companies was such that a trustee in bankruptcy of Mr Al Sanea would be able to put them into liquidation. There was no evidence that any of the thirty-eighth to forty-second defendants held assets.

Conclusions

80. For the reasons which I have set out in this judgment I am satisfied that Justice Anderson erred in principle in continuing the *Mareva* relief against defendants in respect of whom it could not be said:

    (A) that either (i) the claimant had a good cause of action against them or (ii) that, following a judgment against another defendant (against whom the claimant did have a good cause of action) there was reason to suppose that the claimant would be able to invoke some process of enforcement which will lead to the assets (if any) of the non-cause of action defendant NCAD becoming available to satisfy that judgment; and

    (B) that either (i) that there was reason to suppose that the defendant had some assets which (absent *Mareva* relief) were at risk of dissipation or (ii) that there was a real prospect that assets would be transferred to, or otherwise acquired by, that defendant in the future which (a) would then become available to satisfy a judgment (whether against that, or some other, defendant) and (b) would (absent *Mareva* relief) be at risk of dissipation while held by that defendant.

81. In my view, whether or not the first of those two conditions was satisfied in relation to the sixth, seventh, twenty-second, twenty-fourth to twenty-seventh and thirty-eighth to forty-second named defendants, the second of those conditions was not satisfied. In particular, in relation to those defendants (other than the

twenty-second named defendant) there was no reason to suppose that they had some assets which (absent *Mareva* relief) were at risk of dissipation. Nor was there reason to suppose that, if *Mareva* relief were granted, there was a real prospect that assets would be transferred to any of those defendants in the future: the overwhelming probability, as it seems to me, is that assets would not be transferred to a defendant who was already subject to a freezing order. The evidence showed the twenty-second named defendant to have some (minimal) assets; but, given the existence of a substantial third-party claim against that company, there was no reason to suppose that its assets would become available to meet a judgment against Mr Al Sanea (or, so far as relevant, any other cause-of-action defendant).

82. The first of the two conditions was satisfied in relation to the ninth to twelfth named defendants; but, in my view, the second of those conditions was not satisfied. There was no reason to suppose those defendants had some assets which (absent *Mareva* relief) were at risk of dissipation; nor that, if *Mareva* relief were granted, there was a real prospect that assets would be transferred to any of those defendants in the future. In reaching that conclusion I have had regard not only to the evidence that was before Justice Anderson in December 2009 but also to the confidential report filed by the joint liquidators of the eighth named defendant, Singularis Holdings Limited, which (whether or not it was before Justice Anderson) was provided to this Court at the hearing of the appeal.

83. The second of those two conditions was satisfied in relation to the fifth, twenty-first, twenty-third, twenty-eighth, twenty-ninth and forty-third named defendants; but, in my view, the first of those conditions was not satisfied. No cause of action was pleaded against any of those defendants; and there was no reason to suppose that their assets would, by some process of enforcement, become available to satisfy a judgment against Mr Al Sanea.

84. There was, as I have said, good reason (at least, *prima facie)* to suppose that the net assets of the fifth named defendant, Saadgroup Limited (of which the third

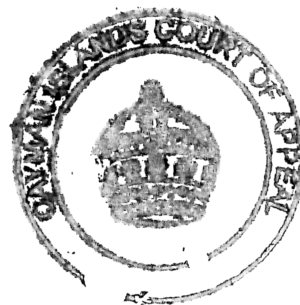
named defendant, Awal Trust Company Limited, was held to be sole owner) – and the assets of its wholly owned subsidiaries (the twenty-eighth, twenty-ninth and forty-third named defendants) - could become available, through some process of enforcement, to satisfy AHAB's claims against ATCL as trustee; but no good reason to suppose that trust assets could become available to satisfy claims against ATCL otherwise than as trustee. And there was good reason to suppose that the net assets (if any) of the twenty-first and twenty-third named defendants could become available to meet the liabilities of the twentieth named defendant, Saad Air Limited. But neither Justice Henderson nor Justice Anderson based the grant or continuation of *Mareva* relief over the assets of these defendants on the need to preserve assets to meet AHAB's claims against ATCL or Saad Air Limited; and there is no respondent's notice seeking to uphold Justice Anderson's order on that basis.

85. It follows that I would allow these appeals and set aside paragraph 3 of the order of 18 December 2009. But, in the circumstances to which I have referred in the immediately preceding paragraph, I would stay that part of the order of this Court – in so far, and only in so far, as it would have the effect that the Freezing Order did not continue in relation to the fifth, twenty-first, twenty-third, twenty-eighth, twenty-ninth and forty-third named defendants – for a period of fourteen days from the date of this judgment so as to enable AHAB, if so advised, to make a further application to the Grand Court for the continuation of *Mareva* relief on the basis of a need to preserve the assets of those defendants on the basis there indicated.

86. In that context, however, I would add this. Paragraph 10 of the Order of 24 July 2009 provides that assets of a defendant include any asset which a defendant has the power to dispose of or deal with as if it were his own; and that a defendant is to be regarded as having that power if a third party holds or controls the asset in accordance with his instructions (even if under no enforceable legal obligation to do so). In those circumstances, given that the finding of Justice Henderson as to the control which Mr Al Sanea exercises, in fact, over the assets of the Cayman

Saad companies has not been challenged, it is for consideration whether freezing orders in relation to each of the individual non-cause-of action companies serve any real purpose. In what was, perhaps, an attempt to meet that point, it was suggested by AHAB in its skeleton argument in this Court that "even if the Appellants' notice of the WFO against the cause of action defendants means that they [the NCADs] will be constrained by it in any case, this counts for little in circumstances where, as outlined above, Mr Al Sanea has demonstrated a willingness to breach the WFO and, additionally, has proffered specious explanations as to the innocence of those breaches". I do not find that submission persuasive. We were not invited to allow the appeal on the ground that the continuation of the freezing order against the NCAD appellants served no useful purpose – and we have not done so – but, on any further application for the continuation of *Mareva* relief against the fifth, twenty-first, twenty-third, twenty-eighth, twenty-ninth and forty-third named defendants, this is a point which ought to be addressed.

87. Subject to any further representations which the parties may wish to make as to the incidence of costs, I would also set aside paragraph 5 of that order and direct that AHAB pay the costs of the appellants of and incidental to the summons of 30 July 2009 (both in this Court and in the Grand Court); such costs to be taxed on the standard basis if not agreed.

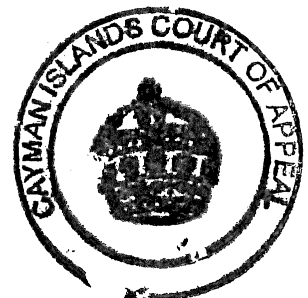


Chadwick P

Forte JA

88. I have had the opportunity of reading in draft the comprehensive judgment of Chadwick P. I agree with the reasoning and conclusions therein and have nothing to add.

Forte JA



Conteh JA

89. The *Mareva* and the subsequent *Chabra* jurisdiction has as its underlying premise the interest of justice, namely to ensure that a successful claimant is not thwarted by a defendant, or others acting in concert with or by the direction of the latter, through the dissipation of assets which would be available to satisfy the claims of the former. It is never the purpose of the exercise of the jurisdiction to effect a freezing order over assets in the hands or control of a defendant or other third parties to punish or cause unnecessary hardship or to be exercised in vain.

90. The jurisdiction itself is based in equity; and equity does not act in vain. Therefore, in the instant case under appeal, where a freezing order is imposed or continued against defendants or against persons or entities against whom no cause of action is claimed or pleaded, who in fact have or hold **no** assets on which the freezing order could bite so as to be available to satisfy judgment in favour of a successful litigant, it would clearly not be a proper case for making the order in the first place, and certainly not for *continuing it.*

91. I therefore agree with the judgment of Chadwick P, in this case, having had the benefit of reading in draft, his detailed analysis of the available evidence and his conclusions thereon.

92. The grant of *Mareva (* and where applicable*, Chabra*), by a court, is an exercise of discretion, guided and informed by the facts of a particular case and the primordial consideration whether it is just and convenient to do so. Therefore as a discretionary exercise, an appellate court as in the instant case, will only charily interfere with that exercise: on the basis, for example, that the court in granting *Mareva* and or extending it by the *Chabra* jurisdiction, erred in law, or exercised its jurisdiction on incorrect principles, and or reached conclusions not borne out by the evidence before the court.

93. From the detailed analysis of the evidence in relation to the assets of the defendants and the non-cause of action defendants (NCADs), as helpfully set out in the judgment of Chadwick P, I am in agreement, that these appeals should be

allowed, subject to the caveat expressed in para. 85 of the judgment. That is to say, to allow AHAB, if so advised, to make an application to the Grand Court within a period of fourteen days from the date of this judgment, for the continuation of *Mareva* in relation to the fifth, twenty-first, twenty-third, twenty-eight, twenty-ninth and forty-third defendants.

____

Conteh JA