IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 8 of 2010

BEFORE

The Rt Hon Sir John Chadwick, President

The Hon Ian Forte, Justice of Appeal

The Hon Elliott Mottley, 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-

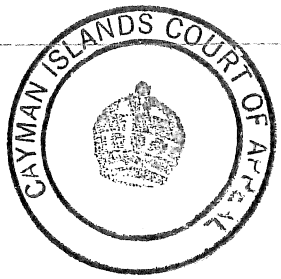
(1) SAAD INVESTMENTS COMPANY LIMITED

(2) MAAN AL SANEA
and others

Defendants

Mr Ewan McQuater QC and **Mr David Quest** instructed by Mr Peter Hayden of Mourant for Ahmad Algosaibi and Brothers Company
Mr Thomas Beazley QC and **Mr Brian Kennelly** instructed by Mr Jeremy Walton of Appleby for Mr Al Sanea

Hearing dates: 16th and 17th November 2010
Judgment handed down: 1st December 2010



JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from an order made on 27 April 2010 by Justice Anderson, sitting as a Judge of the Grand Court, on an application for declarations that the appellant, Maan Al Sanea, was in contempt of court in failing to comply with certain provisions in an order made in these proceedings 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 Mr Al Sanea and a number of Cayman registered companies (which he 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, the Money Exchange. A full description of the claims in the proceedings is set out by this Court in its judgments in appeal CICA 15 of 2010, and related applications, which have been handed down with this judgment.

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. Mr Al Sanea is resident in Saudi Arabia. The writ was to be served on Mr Al Sanea out of the jurisdiction, pursuant to orders dated respectively 28 July 2009 (giving leave to serve out) and 24 August 2009 (authorising substituted service).

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 as permitted or required by this Order:
> (a) . . . ;
> (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 41 of the order provided that a defendant which was not an individual and which was ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

5. Paragraphs 14 to 19 of the order of 24 July 2009 required the defendants to provide information in aid of the worldwide freezing injunctions. The following paragraphs are material in the context of this appeal:

> "14. Each Defendant must, within 10 working days after service of this Order upon him and to the best of his ability, inform the Plaintiff's attorneys of all of its worldwide assets exceeding US$10,000 in value, whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets."
>
> "16. Each Defendant must, within 21 working days after service of this order upon him, swear and serve on the Plaintiff's attorneys an affidavit setting out the above information".
>
> "17. Each Defendant must, within 21 working days after service of this affidavit upon him and to the best of his ability, inform the Plaintiff's attorneys of all and any monies or assets which have been transferred to him or to it or to any person or entity under his or its control from the Plaintiff since 1 January 2004, whether such transfer was made directly or indirectly or was made by loan or otherwise, stating in each case (i) the date and amount of any such transfer or the assets transferred (ii) the location, bank account, account holder and account into which any sums were received (iii) what has become of such monies or assets and (iv) identifying all assets which are now represented by the monies or assets transferred from the Plaintiff, giving their location and value."
>
> "19. Each defendant must, within 28 working days after service of this Order upon him, swear and serve on the Plaintiff's attorneys an affidavit setting out the above information."

At some later date the amount specified in paragraph 14 of the order was increased to US$100,000; but nothing turns on that.

6. Paragraph 46 provided that the order would affect (*inter alios)* the following persons outside the jurisdiction of the court: "(a) the Defendants, their officers and their agents appointed by power of attorney". The order was endorsed with a penal notice in these terms:

"If you, being one of the named Defendants to this Order, disobey this Order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

Any other person who knows of this Order and does anything which helps or permits any of the Defendants to breach the terms of this Order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized."

7. As I have said, leave to serve the writ on Mr Al Sanea out of the jurisdiction was granted by Justice Henderson on 28 July 2009. On 24 August 2009 Justice Anderson, being satisfied on the evidence before him that Mr Al Sanea was seeking to evade personal service, made an order for substituted service of the writ and of any further documents in the proceedings. That order provided that delivery of a sealed copy of the writ, together with a sealed copy of the order itself, to the offices of Saad Trading Contracting and Financial Services Company ("STCC"), Salahadin, Al Ayoubi Street, Golden Belt Area, PO Box 3250, Al-Khobar 31952, Kingdom of Saudi Arabia, addressed to Mr Al Sanea and the insertion and publication once of a notice in the terms set out in the schedule to the order in the "Al Watan" newspaper should be deemed good and sufficient service of the writ upon him three working days after delivery or publication. Service of any further documents on Mr Al Sanea was deemed to have been effected three working days after the delivery of such documents to the offices of STCC at the same address addressed to Mr Al Sanea: there was no requirement as to the publication of notice in the newspaper in relation to the service of documents other than the writ.

8. There was evidence that the writ and the order for substituted service had been despatched on behalf of the plaintiff from the offices of Deloitte Corporate Finance Limited in the Dubai International Financial Centre on 30 August 2009 by courier (DHL) for delivery to the offices of STCC in Al-Khobar, together with a number of other documents, including the worldwide freezing injunction. Whether or not those documents were, in fact, delivered to the offices of STCC was a matter in issue before the judge on the present application.

9. The present application - on which the judge made the order of 27 April 2010 which is the subject of this appeal – was made by summons dated 4 November 2009. So far as

now material, the plaintiff sought declarations that Mr Al Sanea was in breach of paragraphs 9, 14, 16, 17 and 19 of the order of 24 July 2009; and was "thereby in contempt of the Grand Court". Further, "in the event that those breaches and/or contempts are not rectified or purged by the hearing of the application", the plaintiff sought orders that the court impose on Mr Al Sanea "such sanctions by way of fine, sequestration of assets or otherwise as the Court thinks fit" and require him "to provide such security for his good conduct as the Court thinks fit". The application does not seek orders that Mr Al Sanea be committed to prison for the alleged contempts.

10. The application was heard by Justice Anderson from 15 to 18 December 2009. His judgment on the application is dated 15 March 2010. In his order of 27 April 2009 the judge made declarations in these terms:

> "1. The Second Defendant [Mr Al Sanea] is in contempt of the Grand Court in that, having been made aware of the Freezing Order [dated 24 July 2009];
>
> (1) He instructed the transfer of US$60,000,000 from the First Defendant ("SICL") to Saad Specialist Hospital Company in breach of the Freezing Order;
>
> (2) He dealt with his shares in the Eighth Defendant ("Singularis") by voting them to place the Eighth Defendant into liquidation and thereby wilfully prevented it from complying with its obligations under the Freezing Order to give disclosure of its assets;
>
> 2. In further contempt of the Grand Court, the Second Defendant failed to disclose details (a) of his worldwide assets or (b) transfers of assets to him or to any person or entity under his control, and to swear and serve an affidavit accordingly, by the dates specified in the file Freezing Order."

11. Paragraph 4 of the order of 27 April 2010 required Mr Al Sanea to provide security in the amount of US$500,000 for the due performance by 28 April 2010 of his and Singularis's obligations to provide information under the Freezing Order, as it might be amended. The information was to include:

> "(1) Details of the shares held in Singularis's equity portfolios as at 31 December 2008, 24 July 2009 (the date of the Freezing Order) and the date on which the Second Defendant dealt with the shares by voting the company into liquidation ("the dealing date");

(2) Details of any dispositions of those shares on or after 31 December 2008, including details of the counterparties, and the amount and destination of any consideration received by Singularis;

(3) Details of the deposits and placements held by Singularis as at 31 December 2008, 24 July 2009 and the dealing date, including details of the bank and the amount and terms of the deposit and bank statements for the relevant account as at those dates;

(4) Details of any moneys paid by Singularis to any third party on or after 31 December 2008, identifying the recipient and the purpose of the transfer."

Paragraph 5 of the order required the security to be provided by 29 April 2010 in a form acceptable to the court and to the plaintiff; or by way of a pledge over certain wines owned by Mr Al Sanea and held by merchants in London. In the event security was provided by way of the pledge for which the order provided. Paragraph 6 required Mr Al Sanea to pay the plaintiff's costs of the summons dated 4 November 2009 (and issued on 5 November 2009) on the indemnity basis.

12. Notice of appeal from the whole of the order made on 27 April 2010 was filed on behalf of Mr Al Sanea on 14 September 2010. No point has been taken challenging that notice on the grounds that it is out of time. The grounds of appeal are set out in a memorandum dated 10 September 2010. They were developed in a lengthy skeleton argument dated 15 October 2010; and were further developed in oral argument. But, for present purposes, the salient points may, I think, fairly be summarised as follows:

(1) The evidence before the judge did not establish beyond reasonable doubt that Mr Al Sanea was aware of the freezing injunctions imposed by the order of 24 July 2009 at the time that he gave instructions for the transfer of US$60 million out of the assets of the first named defendant, Saad Investments Company Limited (SICL): paragraphs 2.1 to 2.5 of the First Ground of Appeal.

(2) The application made by summons dated 4 November 2009 ("the Contempt Application") was procedurally defective in that the summons had not been served on Mr Al Sanea in the manner required by the Grand Court Rules: paragraph 2.12.2 of the First Ground of Appeal.

(3) In voting his shares in Singularis (to put that company into voluntary liquidation) Mr Al Sanea was not "dealing" with his assets in a manner restrained by the freezing injunction: paragraph 3.1 of the Second Ground of Appeal.

(4) The inclusion, in the declaration made in paragraph 1(2) of the order of 27 April 2010, of the words "and thereby wilfully prevented it from complying with its obligations under the Freezing Order to give disclosure of its assets" was procedurally unjust, in that no such allegation had been made in the Contempt Application: paragraph 4.1 of the Third Ground of Appeal.

(5) The evidence before the judge did not establish beyond reasonable doubt that the order of 24 July 2009 had been served on Mr Al Sanea: without proof of service of that order, there was no date from which the time periods specified in paragraphs 14, 16, 17 and 19 could be reckoned: accordingly, there was no date after which Mr Al Sanea could be said to be in breach of the obligations to provide information imposed by those paragraphs: paragraphs 6.1 and 6.2 of the Fifth Ground of Appeal.

In identifying these as the salient points, I do not overlook the many other points taken in the memorandum and the skeleton argument. It is unnecessary to address those other points: it is sufficient, for the disposition of this appeal, to address the points that were pursued in oral argument.

Procedural irregularity

13. Order 45, rule 5(1) of the Grand Court Rules (1995 Revision) provides that where a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or disobeys a judgment or order requiring him to abstain from doing an act, then, subject to the provisions of those Rules, the judgment or order may be enforced by (*inter alia*) an order of committal against that person or, where that person is a body corporate, against any director or other officer of that body. GCR Order 52, Part I, contains the rules which apply where an order for committal is sought. As I have said, no order for the committal of Mr Al Sanea was sought in the present case. But it is important to have in mind GCR Order 52, rule 9, which is in these terms:

"O. 52, r. 9

9. Nothing in the foregoing provisions of this Order shall be taken as affecting the power of Court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any enactment in like manner as if he had been guilty of contempt of the Court, to pay a fine or to give security for his good behaviour, *and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal.*" [emphasis added].

14. The effect of that rule cannot be in doubt: where an application seeks an order that the court impose a fine on a person said to be in contempt of court – or an order that the court require a person said to be in contempt to provide security for his good behaviour – the earlier provisions of Order 52 apply (so far as applicable and with the necessary modifications) as they would if the application sought an order for the committal to prison of the person said to be in contempt. As I have said, the Contempt Application in the present case – that is to say, the summons dated 4 November 2009 – did seek orders against Mr Al Sanea for the payment of fines and the provision of security. In those circumstances it was necessary for the applicant to comply with the procedural requirements of GCR Order 52. Those requirements are intended to provide safeguards for the alleged contemnor; those safeguards are not to be ignored.

15. The provisions of Order 52 include rules 4 and 6(3):

"4. (1) An application to the Court for an order of committal must be made by notice of motion in Form No. 48 of Appendix I and be supported by an affidavit.

(2) Subject to paragraph (3), the notice of motion stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be committed.

(3) Without prejudice to its power under Order 65, rule 4, the Court may dispense with the service of the notice of motion under this rule if it thinks it just so to do."

"6 . . .

(3) Except with the leave of the Court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the notice of motion under rule 4.

The foregoing provision is without prejudice to the powers of the Court under Order 20, rule 8."

16. It is not in dispute that there was no personal service of the summons dated 4 November 2009 on Mr Al Sanea. Nor is it in dispute that, whether or not the summons could properly have been served by way of substituted service in the manner for which the order of 24 August 2009 had provided, it was not served in that manner. There is no doubt that Mr Al Sanea knew of the Contempt Application: he was represented by leading counsel at the hearing in December 2009. But it is well established by authority in England that the appearance of the alleged contemnor at the hearing of the motion to commit does not, of itself, constitute waiver of objection of want of personal service or of any other procedural irregularity: *Mander v Falke* [1891] 3 Ch 488, 493.

17. The objection taken in this Court to the lack of the personal service required by the Grand Court Rules – point (2) in the summary set out in paragraph 12 of this judgment – had been taken before the judge at the hearing in December 2009: see paragraphs 3.3 and 51, 52, 55 and 56.1 of the skeleton argument filed on behalf of Mr Al Sanea at that hearing. The judge was referred to the decision in *Mander v Falke* (at paragraph 55 of the skeleton): indeed, the judge himself refers to that decision at paragraph 80 of his judgment of 15 March 2010. Nevertheless, his order of 27 April 2010 recites only that the court was satisfied that Mr Al Sanea was duly and properly served with the order of 24 July 2009 "and with the Plaintiff's summons".

18. Order 52 rule 4(2) is, of course, subject both to the express power, in Order 52, rule 4(3), to "dispense with the service of the notice of motion under this rule if [the Court] thinks it just to do so"; and to the powers of the Court under Order 65, rule 4 as to substituted service. It may well be that service of the summons dated 4 November 2010 could have been served on Mr Al Sanea by way of substituted service in reliance on paragraph 2 of the order of 24 August 2009; but it is unnecessary to decide that question and I do not do so. It is unnecessary to decide that question because, as is common ground, the summons

dated 4 November 2009 was not served on Mr Al Sanea in the manner permitted by that order. Nevertheless, it would have been open to the judge, at the hearing in December 2009 or in his order of 27 April 2010, to dispense with personal service of the summons dated 4 November 2009 *if he thought it just to do so*. But there is nothing in the materials before this Court which suggests either (i) that the judge considered the exercise of his power under Order 52, rule 4(3) or (ii) that he did dispense with service of the summons under the power conferred by that rule. Indeed, it may be said that the recital to the order of 27 April 2010 – that the court was satisfied that Mr Al Sanea had been duly and properly served with the plaintiff's summons (which, in context, must be a reference to the summons of 4 November 2009) – is a clear indication that the judge did not think it necessary (and so did not) dispense with service of that summons. If, as the judge seems to have thought, the summons had been duly and properly served, the question whether service should be dispensed with would simply not arise.

19. The judge addressed the need to afford the alleged contemnor with the procedural safeguards for which the Grand Court Rules provide at paragraphs 73 to 81 of his judgment dated 15 March 2010. At paragraph 73, after reminding himself that procedural safeguards relating to service were "central to any ruling in contempt proceedings", he went on to say this:

> "It is trite law that where an application for committal is made the court will be astute to discover whether the purported contemnor has been served with a copy of the penal order and notice of the committal application. In both cases, the document in question is to be served personally *unless the court otherwise dispenses with personal service*. It is clear therefore that the Court has discretion to do so".

The judge reminded himself of the provisions in Order 65, rule 1; and, in particular, of paragraph (2) of that sub-rule, which expressly preserves the power of the court "under any provision of these rules to dispense with the requirement for personal service". He reminded himself of Order 45, rule 7(7): which empowers the court to dispense with service under rule 7(2) of a copy of an order requiring a person to do or abstain from doing an act "if it thinks it just to do so". He reminded himself of the powers of the court, under Order 65, rule 4, to order substituted service. But he made no reference in his judgment to the power to dispense with service of a committal application conferred by

Order 52, rule 4(3): he contented himself with the observation (at paragraph 78) that "the Rules are consistent in leaving with the court its inherent jurisdiction to regulate and control its own processes and in so doing, to exercise its discretion in the interests of justice".

20. Had the judge purported to dispense with service of the summons of 4 November 2009 under the "inherent jurisdiction [of the court] to regulate and control its own processes" it would have been necessary to consider, in the light of the decision of this Court in *HSH Cayman I GP Ltd and others v ABN AMRO Bank NV London Branch* (CICA 13, 14, 15 and 16 of 2009), whether, and to what extent, that inherent power was exercisable in a circumstance for which the Grand Court Rules made express provision. But, as the judge did not purport to exercise any dispensing power – preferring, instead, to recite in his order of 27 April 2010 that Mr Al Sanea had been "duly and properly served" with the summons – that point does not arise.

21. Faced with the difficulty that the summons of 4 November 2009 had not been served on Mr Al Sanea in the manner required by Order 52, rule 4(2) – and that the order of 27 April 2010 contains nothing which can be construed as a dispensation with personal service – counsel for the applicant, AHAB, sought to persuade this Court that a solution to that difficulty could be found in an order which the judge had made on 24 November 2009. That order contained case management directions for the hearing of the summons of 4 November 2009. Paragraph 1 of the order provided for the hearing of the summons on 15 December 2009. Paragraph 2 deemed the plaintiff's evidence in support of the summons to have been served. Paragraph 3 was in these terms: "The Summons be served on the 2nd Defendant by Friday 20th November 2009". Given that the order was made following a hearing on 18 November 2009, it was said that the judge could not have contemplated personal service on Mr Al Sanea in Saudi Arabia within the time for which paragraph 3 of his order provided; nor, perhaps, could he have contemplated substituted service under his order of 24 August 2009 within that time. There is obvious force in those points. But, whatever the effect of the order of 24 November 2009, it cannot be construed as an order dispensing with the personal service which was required under Order 52, rule 4(2); and, in my view, it is impossible to suggest that, in making the order

in the terms which he did, the judge thought he was exercising his power under rule 4(3). It seems to me impossible to avoid the conclusion that the need for personal service under Order 52 rule 4(2) was simply overlooked at the time.

22. For the reasons which I have set out, I am satisfied that the application made by summons dated 4 November 2009 was procedurally defective, in that the summons had not been served on Mr Al Sanea in the manner required by the Grand Court Rules; and that, given the need to give strict effect to the procedural safeguards which are intended to afford protection to those charged with contempt of court, the present appeal should succeed (on that ground alone) unless this Court were persuaded that it should, itself, exercise the power to dispense with personal service conferred by Order 52, rule 4(2). Whether or not this Court should take that course is a question which I will address after I have considered the other points advanced on behalf of the appellant.

23. A further complaint of procedural irregularity, raised on behalf Mr Al Sanea, is that the words "and thereby wilfully prevented it from complying with its obligations under the Freezing Order to give disclosure of its assets" in paragraph 1(2) of the order of 27 April 2010 was procedurally unjust, in that no such allegation had been made in the summons of 4 November 2009. The relevant charge, in paragraph 1(iii) of that summons, was limited to the allegation that Mr Al Sanea had wrongfully dealt with his assets "by voting his shares in the 8th Defendant [Singularis] to appoint voluntary liquidators". To include the additional words in the declaration was, it is said, to hold Mr Al Sanea in contempt not only in respect of dealing with his own assets (in breach of paragraph 9 of the order of 24 July 2009) but also in respect of his participation in (by helping or permitting) separate and distinct breaches by Singularis of its obligations under paragraphs 14 and 17 of that order to provide information. To take that course denies him the procedural safeguard which Order 52, rule 6(3) is intended to provide: he has been held in contempt on grounds which were not included in the notice served under Order 52, rule 4(2).

24. The judge seems to have had that point in mind when he said, at paragraph 81 of his judgment:

> "I am also of the view that the supposedly 'further procedural safeguard' put forward by [counsel for Mr Al Sanea] in terms of ensuring that the *notice itself* must have the information and the order, the breach of which is at issue with the defendant, is illusory. For it is clear, as the authority of Harmsworth v Harmsworth 1987 1WLR 1676 cited by him states, per Nicholls L.J.:
>
> > 'As I read the Rules and as I understand the decision in Chiltern District Council v Keane, the Rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself.'"

It is unclear why the judge thought the procedural safeguard provided by Order 52, rule 6(3) "illusory". The passage which he cited seems to support, rather than detract from, the point which was being put to him on behalf of Mr Al Sanea. That view is confirmed when it is appreciated, first, that the paragraph from which that passage is taken (*Harmsworth v Harmsworth* [1987] 1 WLR 1676, 1683A-D) begins with the observation that:

> "So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge. . . ."

and that, in the sentences immediately following the passage cited by the judge, Lord Justice Nicholls went on to say this:

> ". . . From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to [in the notice] is an affidavit, which does not set out the particulars in an itemised from, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place."

25. To hold Mr Al Sanea in contempt in relation to "helping and permitting" Singularis in breaches of its obligations to provide information was to find contempt proved in respect of an allegation which had not been made in the summons. It would have been open to the judge either to allow an amendment to the summons, under the power conferred by Order 20, rule 8, or (perhaps) to give leave to introduce the additional allegation under the power in Order 52, rule 6(3). But he took neither of those steps. At paragraph 97 of his judgment the judge said this:

> "I also accept the correctness of the submission that by placing Singularis under the control of the liquidators, Al Sanea effectively prevented that

> defendant from making disclosure and defeated its ability to comply with the orders of the court which affected it. The result is that Mr Al Sanea is also guilty as a director of Singularis of the breach of the WFO by that company, for by his actions, he wilfully prevented its compliance with its obligations under the WFO (see Director General of Fair Trading v Buckland [1990] 1 WLR 920)."

As I have said, that was to hold Mr Al Sanea guilty of a contempt with which he had not been charged. It seems to me that, in this respect, also, the criticism that Mr Al Sanea was denied the protection which the procedural safeguards were intended to provide is well founded.

The transfer of US$60 million from SICL

26. The freezing injunction was made on 24 July 2009. It was served on SICL at its registered office in Grand Cayman on 27 July 2009, shortly before 5.00pm (as appears from a letter dated 7 August 2009 from Maples). It was forwarded to representatives of SICL at approximately 10.40pm (Cayman Islands' time) on the same day. It does not appear from Maples' letter to which individuals (or to where) copies of the freezing injunction was sent; but the eight hour time difference between the Cayman Islands and Saudi Arabia is such that the freezing injunction would not have reached anyone in Saudi Arabia before 6.40 am local time.

27. The circumstances in which the transfer of US$60 million was made from SICL's account at UBP Geneva appear from Maples' letter of 7 August 2009:

> "On 27 July 2009, before being served with or notified of the Order, SICL's back office service provider in Switzerland (the 'Swiss Offices') on instructions from SICL prepared for approval and execution by SICL a Swift payment order to transfer US$64 million from SICL's account at UBP Geneva . . . to an account at Albllad Bank KSA held in the name of Saad Specialist Hospital Company (the 'Saad Hospital') . . .
>
> At approximately 8.30 am Swiss time on 28 July UBP Geneva contacted the Swiss Offices and advised that the US$64 million Swift payment could not be processed because an incoming payment of US$4 million had not yet arrived in SICL's account. UBP Geneva advised the Swiss Offices that US$60 million was available for transfer from the SICL account, and a replacement Swift payment order for US$60 million (the 'Payment Order') was prepared by the Swiss Offices, approved by SICL, and submitted by SICL to UBP Geneva at 1.37pm Swiss time. UBP Geneva processed the

Swift payment of US$60 million from SICL to the Saad Hospital on 28 July 2009. . . ."

That account was supported by contemporaneous documents passing between Switzerland and Saudi Arabia. It was common ground that the time difference was one hour. The relevant payment order, for approval, was received by SICL in Saudi Arabia at 10.24 local time; and returned to the Swiss Offices at 14.30 local time (13.30 Swiss time).

28. It is accepted that the approved payment order bears Mr Al Sanea's signature. It was accepted by Maples in the letter of 7 August 2009, that at the time the Payment Order (of US$60 million) was prepared by the Swiss Offices and approved and executed by SICL, SICL had been served with the freezing injunction and representatives (un-named) of both the Swiss Offices and SICL had been notified of that injunction; so that, at the relevant time, SICL was bound by paragraph 9(b) of the order of 24 July 2009). But, it is said:

> ". . . the existence and/or nature and effect of the Order was not, at the time the Payment Order was prepared, approved and executed, known or understood by those who prepared, approved and executed the Payment Order. Thus the non-compliance with paragraph 9(b) of the Order was inadvertent."

29. It was accepted on behalf the plaintiff, and by the judge, that Mr Al Sanea would not be in contempt unless, at the time he signed the payment order (or, perhaps, at the later time when it was transmitted from SICL in Saudi Arabia to the Swiss Offices), he knew of the terms of the freezing injunction. That must be correct, given the terms of the second paragraph of the penal notice. Mr Al Sanea's evidence is that he did not know of the freezing injunction at the relevant time. In an affirmation made on 2 December 2009, at paragraph 52, he said this:

> "Whilst I authorised the transfer of $60 million from an account of SICL to a [Saad Specialist Hospital Company] account, my actions took place before I was aware of the existence of the Cayman Freezing Order or indeed any legal action by AHAB in the Cayman Islands, and the transfer had, or I believed it had, already been executed by the time I was notified of the existence of the Cayman Freezing Order."

He went on to confirm, at paragraph 54 of that affirmation, that the usual practice when a transfer from SICL was to be made, was that the SWIFT payment order would be prepared by Saad Financial Services SA in Geneva and sent to SICL Head office in Al Khobar, Saudi Arabia. Once he had authorised the transfer in Al Khobar, it was then executed electronically at Head Office in Saudi Arabia. He then said this (at paragraphs 56 and 57):

> "In the early afternoon (Saudi Arabian time) of 28 July 2009, I authorised the execution of an amended transfer to the value of $60 million, having been informed that there were insufficient funds to satisfy the original 27 July 2009 $64 million transfer. The documents show that this payment was processed by Saad Geneva at the latest at 13:37:32 Swiss time. The cut-off time for such transfers to take place is 15:00 Swiss time. On 28 July, I also authorised a subsequent transfer for 03 August 2009 of $4 million (which did not in fact take place).
>
> I was first made aware of the substance of the Cayman Freezing Order by the Saad Group's Group Legal Counsel, some time after 19:00 (Saudi Arabian time) on 28 July 2009. I therefore had no knowledge of the existence or effect of the Cayman Freezing Order or even the Cayman proceedings until some time after I had authorised the amended payment instructions for execution and, so far as I knew, it had been executed. . . ."

30. There was no evidence before the judge to contradict Mr Al Sanea's statements in his affirmation. The plaintiff's case, to which the judge referred at paragraph 15 of his judgment, was that it was "inconceivable" that news of a US $9.2 billion freezing order would not have been passed immediately to Mr Al Sanea; and that the "irresistible" inference was that he must have known of it before he approved the transfer on 28 July 2009. The judge noted (at paragraph 18 of his judgment) that it was submitted on behalf of Mr Al Sanea that it had not been established to the relevant criminal standard – beyond reasonable doubt – that Mr Al Sanea did, in fact, know of the freezing injunction at the time he authorised the transfer. The judge accepted (at paragraph 60 of his judgment), citing the decision of Mr Justice Lewison in *Great Future International Limited and others v Sealand Housing Corporation and others* [2004] EWCA 124 (Ch), that:

> "The burden of proof is, of course, on the applicant. The standard of proof is a criminal standard – that is proof beyond reasonable doubt."

He directed himself, at paragraph 62, that, as in criminal proceedings, it was possible "to reach legitimate conclusions objectively, from the circumstances or the occurrence of a set of circumstances which point inexorably to a particular direction". Nevertheless, there is no analysis in his judgment of the factors which would, or would not, lead to a conclusion that the plaintiff had established beyond reasonable doubt that Mr Al Sanea did know of the freezing injunction at the time he authorised the transfer on 28 July 2009. There is no more than a statement (at paragraph 92 of the judgment) that the judge was prepared to hold "that the terms of the WFO . . . did come to the attention of the 2nd Defendant" – a proposition that was not in dispute (the issue being "when") – and the finding (at paragraph 94) that:

> "Having considered the evidence in the respective affidavits before me, I am of the view that the 2nd Defendant, having been made aware of the WFO, was in breach in relation to the transfer of US$60 million transferred from SICL on his instructions from that company to Saad Specialist Hospital and that he is guilty of contempt personally as well as in his capacity as a director of SICL for breach of the Order."

31. In my view it was not open to the judge – without explaining why the evidence before him led "inexorably" to the view that, despite Mr Al Sanea's statement on oath to the contrary, Mr Al Sanea must have been informed of the freezing order on the morning of 28 July 2009, before he authorised the transfer to the Saad Specialist Hospital Company - to reach the conclusion that he did. Whether or not the whole contempt application should be set aside for procedural irregularity, I would allow the appeal against the finding of contempt made in paragraph 1(1) of the order of 27 April 2010.

The voting of the Singularis shares

32. The declaration in paragraph 1(2) of the order of 27 April 2010 held Mr Al Sanea in contempt, first, for voting his shares in the eighth defendant, Singularis Holdings Limited (Singularis) to place that company into liquidation; and, second, for "thereby" wilfully preventing Singularis from complying with its obligations under the order of 24 July 2009 to provide information in aid of the freezing orders. For the reasons which I have already explained, I would allow the appeal from the second limb of paragraph 1(2) on the ground of procedural irregularity.

33. It is necessary, therefore, to consider whether, in the context of a freezing order which injuncts the party affected not "in any way [to] dispose of, deal with or diminish the value of" any of his assets, exercising the right to vote shares with the object of putting the company into voluntary liquidation is so plainly intended to be within the scope of the restraint that a party who does so should be held to be in contempt. I put the issue in those terms because it is well established that a party should not be held in contempt unless the terms of the order of which he is said to be in breach are clear and unambiguous. As Mr Justice Jenkins put it in *Redwing Limited v Redwing Forest Products Limited* (1947) 177 Law Times Reports 387, 390:

> ". . . a defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken his undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."

And see observations to the like effect in the judgment of Lord Justice Mummery in *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695, 1705C-D. If there is ambiguity, the order should be construed in favour of the alleged contemnor: *per* Mr Justice Blackburne in *Tajik Aluminium Plant v Ermatov and others* [2006] EWHC (Ch) 7, [12].

34. The judge addressed this point at paragraph 98 of his judgment. He said this:

> "Further, despite the protestations of the 2nd Defendant that the order is not clear as to the meaning of 'deal' as used in the order, and that the 2nd Defendant's submission that placing the probably illiquid company under the control of liquidators was an appropriate response to that liquidity, I hold that voting the shares to place the company into liquidation was, in fact, a 'dealing' with the assets. . . ."

It is difficult to find, in that passage, the reasoning which led the judge to that conclusion. For my part, if it were necessary to reach a concluded view, I would be inclined to think that a restraint on "dealing", in the context of a freezing order, was directed towards acts which had the effect that the asset was less available (or of less value) than it otherwise would be to meet whatever relief by way of damages the plaintiff (if successful in the action) might obtain: and I would not think it at all self-evident that voting shares with the object of preserving a company's assets was an act of that nature. But it is unnecessary to

reach a concluded view: it is enough to hold, as I do, that the meaning of the order, in this respect, is not clear and unambiguous.

35. It follows that I would allow the appeal from the first limb of paragraph 1(2) also.

The failure to provide information

36. As I have explained, paragraphs 14, 16, 17 and 19 of the order of 24 July 2009 each require the provision, or verification on affidavit, of information within a specified number of days "after service of this Order upon [the relevant defendant]". The effect of a requirement in that form, as Lord Justice Morritt pointed out in *Davy International Ltd and another v Tazzyman and others* [1997] 1 WLR 1256, 1261, citing an observation of mine in *Moerman-Lenglet v Henshaw,* (unreported, 23 November 1992), is that, if the order is not served, the obligation would never commence and the defendant could not be said to have been in breach of it. It is for that reason that, notwithstanding that Mr Al Sanea came to know of the order of 24 July 2009 no later than the evening of 28 July (as appears from paragraph 57 of the affirmation which he made on 2 December 2009, to which I have referred at paragraph 29 of this judgment) it is necessary for the plaintiff to establish, to the standard of proof appropriate in a contempt application, that the order was served upon him and when it was so served.

37. The plaintiff's case is that the order of 24 July 2009 was served on Mr Al Sanea, by way of substituted service pursuant to Justice Anderson's order of 24 August 2009, by delivery to the offices of STCC on 31 August 2009. The evidence relied upon in support of that case is at paragraph 6 of the affidavit of William Asante sworn on 24 September 2009 (his second affidavit) and two documents (a DHL Shipment Air Waybill dated 30 August 2009 and a DHL Tacking Record) which are in exhibit WKWA-2 to that affidavit. Mr Asante's affidavit, and the DHL Shipment Air Waybill), read with a letter of 25 August 2009 from Peter Hayden (of Mourant, the plaintiffs' attorneys) addressed to Mr Al Sanea are evidence that a package, containing (amongst other documents) a sealed copy of the order of 24 July 2009, was consigned to DHL in Dubai for delivery to Mr Al Sanea at "Saad Trading Contracting and Financial Services Co, PO Box 3250, Alkhobar 31952, Saudi Arabia". They are not, of themselves, evidence that that package was

delivered by DHL to the offices of STCC at Al Ayoubi Street. For that the plaintiff must seek to rely on the Tracking Record.

38. The DHL Tracking Record records that the package of documents which had been consigned under the Shipment Air Waybill) was in the hands of a delivery courier by 08:36 on the morning of Monday 31 August 2009; and was delivered (and signed for by "Sulaiman") at 10:30 that day. The location is said to be "Dharan – Saudi Arabia". There is nothing on the Tracking Record (other than through the Air Waybill, the reference number of which is shown) to indicate where the delivery package was actually delivered.

39. Mr Al Sanea did not accept that the package which Mr Asante consigned to DHL in Dubai was delivered to the offices of STCC in Al Khobar. In paragraph 38 of his affirmation dated 2 December 2009 (to which I have already referred) he said this:

> "I . . . cannot accept, whatever Mr Asante says, that any box has ever been delivered to the offices of Saad Trading. If it has been, I have never received it personally, despite my asking whether it exists and to be provided with it. I do not know the full proper name of the person who is supposed to have received it. I cannot estimate how many persons named Suleiman work for the Saad Group, much less migrate around our office complex looking for work. Further, I have, at the very least, grave doubts as to whether the address given on the exhibited DHL document would have resulted in delivery at Saad Trading's offices because Saad trading is not in Dharan, and the P.O. Box is a post office box, not a street location."

40. The judge did not, in his judgment, undertake any analysis of the evidence in support of the plaintiff's case that the order of 24 July 2009 had been delivered in accordance with the provisions of his own order of 24 August 2009. He said only this, at paragraph 92 of his judgment:

> ". . . There is no doubt that this Court may make a valid order for substituted service of its various processes and that the order for substituted service made on August 24, 2009 was validly given and once its terms were complied with, service has been duly effected. . . ."

41. I should emphasise that the question for the judge on the application before him was not – as it might be in another context – whether he was satisfied on the balance of probabilities that a package consigned to DHL on 30 August 2009 had been delivered to

the offices of STCC on 31 August 2009: the question on this application was whether he could be satisfied beyond reasonable doubt that a package containing a sealed copy of the order of 24 July 2009 had been delivered (and when) to the destination and in the manner for which his order of 24 August 2009 had stipulated. In my view - on the basis of the evidence which was before him and having regard to the need to be satisfied beyond reasonable doubt – it was not open to the judge to reach the conclusion that he did.

42. It follows that I would allow the appeal from paragraph 2 of the order of 27 April 2009.

Should this Court exercise the power conferred by GCR Order 52, rule 4(3) to dispense with service of the summons dated 4 November 2009?

43. For the reasons which I have set out, I am satisfied that the appeal would succeed even if this Court were, itself, to exercise the power conferred by GCR Order 52, rule 4(3) and direct that personal service of the summons dated 4 November 2009 be dispensed with in the circumstances that, plainly, the summons had come to the notice of Mr Al Sanea. It follows, in my view, that it would serve no purpose for this Court to take the unusual step of making an order which, if it were to be made, ought to have been sought and made when the matter was before the judge for directions on 24 November 2009 and which, even now, has not been sought by the respondent on this appeal.

Conclusion

44. I would allow the appeal and set aside the whole of the order dated 27 April 2010.

Justice Forte JA

I agree.

Justice Mottley JA

I also agree.