IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 15 of 2010
CICA 20 of 2010
CICA 21 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

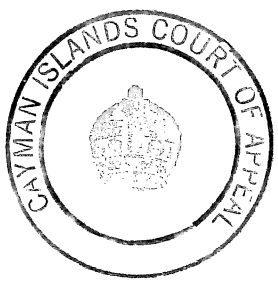
(2) MAAN AL SANEA
and others

Defendants

Mr Ewan McQuater QC and **Mr David Quest** instructed by Mr Peter Hayden of Mourant for Ahmad Algosaibi and Brothers Company
Mr T A G Beazley QC and **Mr Brian Kennelly** instructed by Mr Jeremy Walton of Appleby for Mr Al Sanea
Mr Stephen Phillips QC instructed by Mr Jan Golaszewski of Maples and Calder for the 3rd, 9th to 12th and 20th Defendants

Hearing dates: 8th to 11th November 2010
Handed down: 1 December 2010

JUDGMENT



Sir John Chadwick, President:

1. In these proceedings Ahmad Hamad Algosaibi and Brothers Company ("AHAB"), a partnership established in the Kingdom of Saudi Arabia, claims against Maan Al Sanea and against twenty two companies said to have been owned or controlled by Mr Al Sanea in respect of monies in excess of US$ 5 billion alleged to have been misappropriated. Mr Al Sanea is resident in Saudi Arabia. The defendant companies are incorporated and registered in the Cayman Islands.

2. The proceedings were commenced by the issue of a writ of summons on 27 July 2009. Leave to serve the writ on Mr Al Sanea out of the jurisdiction was granted by Justice Henderson on 28 July 2009. By summons dated 6 October 2009 Mr Al Sanea sought an order, pursuant to Order 12 rule 8 of the Grand Court Rules ("the GCR") that that order be discharged; and that service, or purported service, of the writ upon him be set aside. The grounds relied upon in support of that application were (a) that AHAB's claim did not fall within GCR Order 11 rule 1(1) – and, in particular, did not fall within either of the paragraphs, paragraphs (c) or (j), of that sub-rule on which AHAB had relied – so that the court had no jurisdiction to give leave for service of the writ out of the jurisdiction; (b) that, having regard to all the circumstances, the case was not a proper case for service out of the jurisdiction within GCR Order 11 rule 4(2); and (c) that the order had been obtained by material misrepresentation and non-disclosure. In the alternative Mr Al Sanea sought an order that the proceedings against him be struck out on the ground that the Cayman Islands was not an appropriate forum for the trial of the action: it was said that the proper and appropriate forum for the trial was Saudi Arabia.

3. The proceedings were served on the defendant companies at their respective offices in the Cayman Islands. By summons dated 1 December 2009, the third, ninth to twelfth and twentieth defendants sought an order that the proceedings against them be stayed or struck out on the same ground; that is to say, that Saudi Arabia, rather than the Cayman Islands was the proper and appropriate forum for the trial of the action. Those defendants have been

represented in the proceedings by Maples and Calder and, for convenience, have been referred to as "the Maples defendants". It is said that those defendants remain under the control of Mr Al Sanea.

4. Following the commencement of the proceedings, the other sixteen companies against which relief is claimed in the proceedings went into liquidation in the Cayman Islands. By summonses dated 9 December and 16 December 2009 AHAB sought leave to proceed against those defendants in liquidation (and one other defendant in liquidation, Saad Cayman Limited, against which no relief was sought in the proceedings) notwithstanding the statutory stay which had been imposed by section 97 of the Companies Law (2009 Revision). Those summonses (and other matters) came before the Chief Justice for hearing in January 2010. By an order dated 20 April 2010 the Chief Justice granted AHAB the leave to proceed which it had sought. He did so for reasons which are set out in his Ruling dated 19 April 2010.

5. The two jurisdiction summonses – that is to say, Mr Al Sanea's summons of 6 October 2009 and the Maples defendants' summons of 1 December 2009 - came before the Chief Justice for hearing on 26 April 2010. For reasons which he set out in a Ruling dated 25 June 2010 the Chief Justice indicated that he would dismiss those summonses; but that he would impose what he described as a temporary case management stay in relation to all defendants, including the defendants in liquidation, which had not been before him at the hearing and who had not sought such a stay. The terms of the order were further spelt out at a hearing on 22 and 23 July 2010 at which the Chief Justice refused AHAB leave to appeal from the case management stay. The order itself is dated 30 July 2010.

6. Paragraph 1 of the order of 30 July 2010 is in these terms:

> "A temporary case management stay of the action as pleaded against the Second Defendant shall be imposed, allowing time until the Saudi Committee (as identified at paragraph 165 of the Judgment) declares its results and/or to allow the Plaintiff to petition the Sharia Courts or the Board of Grievances (as identified

at paragraph 143 of the Judgment) for the resolution of its fraudulent breach of duty claim against the second Defendant.

The Temporary case management stay shall operate in relation to all defendants and to extend time for the filing of Defences but shall not suspend any obligation under the Worldwide Freezing Order ("the WFO"), including the process of disclosure.

The temporary case management stay is intended to allow this Court to have ongoing direction and control of this action, including as this action may relate to any proceedings which may be appropriately instituted in Saudi Arabia, in particular, the proceedings now before the Saudi Committee.

While AHAB is not now positively directed to institute separate proceedings in Saudi Arabia in respect of its fundamental allegations of fraudulent breach of duty against Mr Al Sanea, it retains an evidential burden to demonstrate that there is no suitable and available forum there in which those allegations may be distinctly resolved, in seeking to persuade this Court to lift the case management stay.

It follows that there will be liberty to apply available to all parties for the purposes of the ongoing case management of the action."

The Worldwide Freezing Order, restraining disposal, dealing or disposition by Mr Al Sanea and any of the twenty two other defendants against which relief is claimed in the proceedings (and a further twenty Cayman Island companies which he was said to control) of his and their assets up to a limit of US$ 9.2 billion had been granted by Justice Henderson on 24 July 2009; and had been confirmed and continued following an *inter partes* hearing before Justice Anderson in December 2009.

7. The "Saudi Committee" to which reference is made in that paragraph, had been formed by Royal Order of the King of Saudi Arabia in May 2009; but, as the Chief Justice observed at paragraphs 165 and 166 of the June judgment, there was "an abundance of conflicting evidence" as to what were the remit and objectives of that Committee. The Chief Justice analysed that evidence at paragraphs 167 to 176 of his judgment. He concluded, at paragraph 177, that:

"While I may not at this juncture answer the question just what kind of disposition might be expected of the King on the advice of

> the Saudi Committee, I have a sufficient understanding of the nature of the Committee's work to allow me to conclude that it does not constitute a *lis alibi pendens* in the strict sense (see Dicey op. cit. para 12-035 – 12-036) such as might itself help to persuade me that Saudi Arabia is already the appropriate forum for the trial of the dispute as fully engaged in AHAB's Statement of Claim in this action."

8. Paragraph 2 of the order of 30 July 2010 dismissed the applications by Mr Al Sanea and the Maples defendants for orders that the proceedings against them be struck out or stayed on *forum non conveniens* grounds. Paragraph 3 dismissed Mr Al Sanea's application that the order of 29 July 2009 by which Justice Henderson had granted leave to serve the writ out of the jurisdiction be discharged.

9. Paragraph 7 of the order of 30 July 2010 records the Chief Justice's refusal, on 23 July 2010, of AHAB's application for leave to appeal against the imposition of the temporary case management stay. On 13 September 2010 Mr Al Sanea applied to the Chief Justice for leave to appeal from paragraphs 2 and 3 of the order of 30 July 2010. The Chief Justice refused that application for reasons which he set out in a Ruling dated 29 September 2009.

10. By notice of appeal dated 30 July 2010 (CICA No 15 of 2010) AHAB seeks to appeal to this Court from paragraph 1 of the order of that date. By notice of appeal dated 13 October 2010 (CICA No 20 of 2010) Mr Al Sanea seeks to appeal from paragraphs 2 and 3 of that order. By notice of appeal also dated 13 October 2010 (CICA No 21 of 2010) the Maples defendants seek to appeal from paragraph 2 of the order. This Court directed that those notices be treated as applications for leave to appeal; and that the applications be listed for hearing at a special session of the Court with the appeals to follow if permission were granted. In the event we have heard full argument on the applications; and it is accepted that, if and to the extent that we think it appropriate to grant leave to appeal, no further argument would be required in order to enable us to dispose of the appeals.

11. We have had very much in mind – as the Chief Justice had in mind when refusing leave to appeal – the observations of Lord Templeman in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. As he pointed out, at 465F-G, "the solution of disputes about the relative merits of trial in England [or, in the present case, in the Cayman Islands] and trial abroad is pre-eminently a matter for the trial judge. . . . An appeal should be rare and the appellate court should be slow to interfere". Regrettably, it has proved impossible to give effect to his exhortation that "submissions should be measured in hours not days". The hearing before the Chief Justice in April extended over five days; and the matter has occupied this Court for some four days. But the amounts at stake in these proceedings are very substantial; and it may be assumed that the principal parties have deep pockets.

The applicable principles of law

12. There is little dispute as to the applicable principles of law. GCR Order 11 rule 1(1) provides, so far as material, that service of a writ out of the jurisdiction is permissible with the leave of the Court if, in the action begun by the writ:

> 1(1)(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto; [or]
>
> . . . .
>
> (j) the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status, rights or duties of any trustee thereof in relation thereto;..."

Rule 4(2) provides that:

> "4(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

In a case where the jurisdictional threshold under Order 11 rule 1(1) has been established, the task for the court, under rule 4(2), is to "identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice": *per* Lord Goff of Chieveley in *Spiliada* (*supra*) at 480G; adopting the observations of Lord Kinnear in *Sim v Robinow* (1892) 19 R 665, 668.

13. As Lord Goff pointed out in *Spiliada,* the "fundamental principle" that the appropriate forum is that in which the case can be suitably tried for the interests of all the parties and for the ends of justice, emerged, at first in Scots law, in cases where the jurisdiction had been founded as of right: that is to say, it emerged in cases where it was the defendant who was seeking a stay of proceedings which had been properly served upon him. But it had become part of English law by, at the latest, the decision of the House of Lords in *The Abidin Daver* [1984] AC 398: see Lord Goff's analysis of the development of English law in *Spiliada* at 475C-H and his summary of the approach now to be adopted in "stay" cases at 476C-478E. Nevertheless, after analysing what had appeared to be a difference of view in the speeches of Lord Diplock and Lord Wilberforce in *The Abidin Daver* as to the applicability of that "fundamental principle" to "service out" cases under Order 11 rule 1(1) – where jurisdiction was not founded as of right and it was for the plaintiff to satisfy the Court that a foreign defendant should be required to submit to what Lord Diplock had described as "an exorbitant jurisdiction" – Lord Goff concluded ([1987] AC 460, 480G) that "the question in both groups of cases must be, at bottom, the same".

14. But he went on (*ibid*, 480H-481E) to identify the distinctions between the two groups of cases:

> "The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases the burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its

discretionary power to permit service on a defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power *may be* exercised, but leaves it to the court to decide whether to exercise its power in a particular case, while providing that leave shall not be granted 'unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:' see R.S.C., Ord. 1 r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rashid* case [1984] AC 50, 65, that the jurisdiction exercised under Order 11 may be 'exorbitant'. This has long been the law. In *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch.D. 239, 242-243, Pearson J said:

> 'It becomes a very serious question . . . whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.'

That statement was subsequently approved on many occasions, notably by Farwell LJ in *The Hagen* [1908] P 189, 201, and by Lord Simonds in your Lordships' House in *Tyne Improvement Commissioners v Armement Anversois S/A (The Brabo)* [1949] AC 326, 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."

It is pertinent to have these distinctions in mind in the present case. It was for AHAB to persuade the court that this was a proper case for service of the writ on Mr Al Sanea out of the jurisdiction: but it was for the Maples defendants to persuade the court that this was a case in which a stay of proceedings against them should be ordered on *forum non conveniens* grounds. And, I would add, it was for Mr Al Sanea and the Maples defendants to persuade the court that a case management stay should be ordered.

The claims in the proceedings

15. Before turning to the reasons which led the Chief Justice to make the orders that he did it is necessary to examine the statement of claim, and the evidence filed on behalf of Mr Al Sanea, in order to identify the claims in the action and the issues that are likely to require determination at a trial.

16. The statement of claim is a substantial document. It comprises twelve sections: Introduction; AHAB and the Financial Businesses; Mr Al Sanea and the Saad Group; Mr Al Sanea's control of the Financial Businesses; Misappropriations from the Money Exchange; Unauthorised borrowing in the name of AHAB; Use of the Money Exchange to manipulate accounts of Saad Group companies; Concealment of the fraud; Receipt of misappropriated money; Collapse of the Financial Businesses; Claims; Relief claimed.

17. The Introduction (Section A) contains a convenient summary:

> "1. The Second Defendant ('Mr Al Sanea') was until May 2009 the person exercising complete managerial control of 'The Money Exchange', a division of the Plaintiff ('AHAB') formed to provide cash remittance services and to hold investments. Over many years he used his position to defraud AHAB by misappropriating very large amounts of money from the Money Exchange. AHAB presently estimates that over US$ 5bn was misappropriated, principally in the period 2000 to 2009.
>
> 2. The misappropriated money, or a large part of it, was received with full knowledge of the fraud by the 1st Defendant ('SICL') and the 8th Defendant ('Singularis'), both being companies incorporated in the Cayman Islands, and Awal Bank BSC ('Awal Bank'). SICL, Singularis and Awal Bank are in the ultimate beneficial ownership of Mr Al Sanea. They are now in liquidation or administration but at the material time they were under his complete control and acted at his instance and in concert with him.
>
> 3. Mr Al Sanea funded the fraud by using his control of the Money Exchange, and other financial businesses associated with AHAB, to obtain massive unauthorised borrowing. The majority of this borrowing was obtained by the forgery of the signatures of the chairmen of AHAB by or at the direction of Mr Al Sanea. AHAB estimates that the balance of the unauthorised borrowing, including accrued interest, commitment fees and related charges, was over

US$ 9.2bn as at the end of May 2009. The amount is likely to increase as further interest and penalties are accrued. A number of lenders have brought proceedings to enforce the loans; . . .

4. The fraud was not discovered by the AHAB partners until May 2009 when the Money Exchange could no longer service the unauthorised borrowing and defaulted on it."

18. It is said, at paragraphs 15, 16 and 17 in section B (AHAB and the Financial Businesses), that the general manager of the Money Exchange was a United Kingdom national, Mr Mark Hayley; that the management and other senior staff were all English-speaking expatriates; and that the business of the Money Exchange was almost entirely carried out in English. The "other financial businesses" to which reference is made in paragraph 3 are The International Banking Corporation ("TIBC"), a bank incorporated and licensed in Bahrain, Algosaibi Investment Holdings EC ("AIH"), a company incorporated in Bahrain and its wholly owned subsidiary, Algosaibi Trading Services Bermuda Ltd ("ATS"), a company incorporated in Bermuda which traded from offices in Bahrain. It is said, at paragraph 21 of the statement of claim, that both ATS and TIBC were used principally as vehicles by Mr Al Sanea to borrow money which he then misappropriated, by way of covert transfer to the Money Exchange. The Money Exchange, TIBC, AIH and ATS are, together, referred to in the statement of claim as the "Financial Businesses". It is said that, other than Mr Al Sanea and Mr Hayley, the senior executives of the Financial Businesses were Mr Glenn Stewart, Mr Martyn Ebbs and Mr John Potter (together, with Mr Hayley, referred to as "the Senior Executives"). Mr Ebbs was a United Kingdom National; Mr Stewart and Mr Potter were nationals of the United States of America.

19. Mr Al Sanea established and carried on his own business through the Saad group of companies. Section C of the statement of claim (Mr Al Sanea and the Saad Group) describes relevant companies in that group. It is said that Mr Al Sanea's business interests within Saudi Arabia are held principally by or through Saad Trading Contracting and Financial Services Company (formerly

Saad Trading and Contracting Company) ("STTC"), a general partnership owned and controlled by Mr Al Sanea. STTC is not a defendant to these proceedings. But, as appears from paragraph 2 of the statement of claim, it is said that much of the moneys alleged to have been misappropriated, was received by the first and eighth named defendants, Saad Investment Company Limited ("SICL") and Singularis Holdings Limited ("Singularis"). The position in respect to those companies is set out in sub-sections C.3 (SICL) and C.4 (Singularis) of the statement of claim.

20. SICL is said to be the principal holding company in the Saad Group outside Saudi Arabia. It is incorporated in the Cayman Islands and is now in liquidation here. Its financial statements disclose that it was established for the purpose of holding and managing the personal assets of Mr Al Sanea and his immediate family. It holds (or held) a large portfolio of investments, including cash, real estate, equities and private equity investments. Net assets as at 31 December 2008 were shown to be US$ 4.469 billion. Mr Al Sanea is said to be the ultimate beneficial owner through his control of a Cayman Island trust (the Saad Star Trust) of which the third named defendant, Awal Trust Company, is trustee. He is, or was, chairman of the board of directors: the other directors are his wife and his daughter. It is said that, between 2004 and 2008 (during which period the alleged misappropriations were taking place), Mr Al Sanea contributed some US$ 2.318 billion to the capital of SICL. The thirty first to thirty seventh defendants ("the SIFCos"), Cayman Island companies in liquidation, are direct or indirect subsidiaries of SICL.

21. Singularis is incorporated in the Cayman Islands and is now in liquidation here. It is said to have been established for the purpose of investing on behalf of Mr Al Sanea in shares in HSBC Holdings plc ("HSBC") and other equities. It is alleged that, in early 2007, Mr Al Sanea purchased though Singularis about 3.1 per cent of the issued capital in HSBC at a price of US$ 6.6 billion or thereabouts. As at 30 April 2008 Singularis reported net assets of US$ 5.994 billion (of which US$ 4.5 billion were said to be on deposit with the

Money Exchange). It is further alleged that Mr Al Sanea is the ultimate beneficial owner of Singularis; the shares in which were, until January 2009, held by the Saad Star Trust, but which, since that date, have been held in his own name. Until liquidation, Singularis, of which he was a director, was under his control. It is said that, between 2006 and 2008 (during which period the alleged misappropriations were taking place), Mr Al Sanea contributed some US$ 3 billion to the capital of Singularis. The ninth to twelfth defendants (which are not in liquidation) are direct or indirect subsidiaries of Singularis.

22. The thirteenth to nineteenth defendants ("the AwalCos"), Cayman Island companies now in voluntary liquidation, are direct or indirect subsidiaries of Awal Bank. Awal Bank is not, itself, a defendant to these proceedings. It was incorporated in Bahrain and was placed in administration there on the application of the central Bank of Bahrain. Its shares are held by Mr Al Sanea (as to 47 per cent), SICL (as to 48 per cent) and STCC (as to 5 per cent). Mr Al Sanea is, or was, chairman of the board of directors and (it is said) exercised complete control over it until the administration. It is alleged that, between 2007 and 2008 (when the alleged misappropriations were said to have been taking place) Mr Al Sanea contributed some US$ 1.25 billion to the capital of Awal Bank.

23. Section D of the Statement of Claim describes how Mr Al Sanea controlled the Money Exchange and the other financial businesses. It is said that he controlled the Money Exchange through Mr Hayley, to whom he made substantial payments; that he excluded the partners of AHAB from any knowledge of or participation in the Financial Businesses (to the extent of withholding from them mail which was addressed to them); and that, latterly, when he had purported to resign from the office of managing director, he took steps to conceal from the AHAB partners his continued involvement in and control of the Financial Businesses.

24. In the first paragraph of Section E (Misappropriations from the Money Exchange) there is a Table in which the monies alleged to have been misappropriated are set out:

	Estimated amount/ US$ million
Cheques drawn on Money Exchange accounts payable to Saad Group companies	2,155
Payments received for the benefit of the Saad Group under letters of credit (LCs) issued for the account of the Money Exchange	2,030
Withdrawal of cash from Money Exchange branches	560
Payments to Awal Bank	196
Other	300+
Total	5,200+

It is said that "there was no honest or proper reason for the Money Exchange to be making such payments to or for the benefit of Mr Al Sanea or the Saad Group".

25. Section E goes on to describe, by reference to each of the rows in the Table, how the misappropriations are said to have been effected. In respect of the cheques drawn in favour of Saad Group companies, it is said (at paragraph 69 of the statement of claim) that blank chequebooks issued to the Money Exchange by its bankers would be collected by a Saad Group driver from the offices of the Money Exchange (at Al Khobar, in Saudi Arabia) and delivered to Mr Al Sanea; that Mr Al Sanea would draw cheques in favour of a Saad Group company (thought, usually, to be STCC) and send them to be collected for the account of the payee; that Mr Al Sanea would complete and initial a Money Exchange debit slip in the amount of the cheque to a Saad Group company account with the Money Exchange; and that the debit would then be processed by Money Exchange staff. It is said that the cheque payments were in large (and irregular amounts); were made frequently

(almost daily in 2008); and were usually drawn on the account of the Money Exchange at Saudi British Bank. Paragraph 71 of the statement of claim is in these terms (so far as material):

> "Pursuant to the debit advices signed by Mr Al Sanea, the cheque payments were accounted for in the Money Exchange's books as if they were advances by the Money Exchange on the Saad accounts. However, in reality the payments represented misappropriations from the Money Exchange by Mr Al Sanea which he had no intention of repaying. . . . Further, it is inherently unlikely and commercially irrational that the Money Exchange would have chosen to make loans to the Saad Group by way of a large number of cheques in irregular amounts drawn on its own accounts."

The matters from which, it is said, the inference that the debit balances on the Saad accounts "did not . . . represent money genuinely loaned by the Money Exchange or the Saad Group" - and that there was no intention that the amounts would be repaid - can and should be drawn are set out at paragraph 67 of the statement of claim. It is said that many of the names in which the accounts were held were not names of existing legal entities (they were made up); that, apart from the entries in the ledgers themselves, there was no documentary record of loans to Mr Al Sanea or the Saad Group; that no monies were, in fact, advanced to the account holder; that no interest was paid, or demanded; that no principal was repaid, or demanded; that the purported loans were not the subject of any evaluation or approval within the Money Exchange; and that the purported loans were not disclosed as related transactions in the Money Exchange financial statements. In short, it is said, that the "the Saad accounts were merely bookkeeping devices intended to disguise the misappropriations while ensuring that the Money Exchange's books balanced".

26. In respect of the payments received under letters of credit it is said, at paragraph 72 of the statement of claim, that:

> "Mr Al Sanea caused the Money Exchange to open LCs as payment for goods purportedly supplied to AHAB. The goods included very large quantities of air conditioning and heating equipment, lift machinery, marble and fabrics. AHAB had no need of these goods, did not order them and did not receive them – they did not exist. The proceeds of the LCs were paid initially to the purported suppliers but then retransferred to Mr Al Sanea or the Saad Group."

And, at paragraph 76, that:

> "An apparently conforming commercial invoice and delivery note purportedly signed on behalf of the supplier/beneficiary would be delivered to the Money Exchange by the Saad Group. The documents were forged or fraudulent: no goods had been sold or delivered to AHAB. At the direction of Mr Al Sanea, staff at the Money Exchange would sign the delivery note purportedly on behalf of AHAB and present the documents to the issuing bank. Payment under the LC would be made to the beneficiary."

And, further, at paragraph 78, that:

> "The moneys paid to the beneficiaries would subsequently be retransferred to the Saad Group. . . . The end result was that the Money Exchange was left with a liability to the issuing bank in respect of moneys received for the benefit of the Saad Group."

At paragraph 79 it is alleged (with particulars) that, as between themselves, Mr Al Sanea and Mr Hayley treated the payments under the LCs as payments to the Saad Group (as they were), rather than as payments for goods supplied to AHAB (as they appeared to be).

27. In respect of the cash withdrawals from branches, it is said that Mr Al Sanea would regularly send a Saad Group driver to collect from the Money Exchange branches the substantial amounts of cash which those branches received from customers (by way of deposit or instructed foreign exchange

remittance) or from the Money Exchange head office. He would keep the cash, leaving the Money Exchange to repay the deposit or complete the remittance. He would complete and initial a debit advice directing a debit to a Saad account in the amount of the money taken from the branches; but, it is said, this did not represent a genuine loan and Mr Al Sanea had no intention of repaying the money.

28. Particulars are given, at paragraph 84 of the statement of claim by reference to a series of memoranda from Mr Hayley, of payments to Awal Bank; and, at paragraph 94, of "other payments". It is, I think, unnecessary to set out the details in this judgment.

29. As appears from the Table in section E (which I have set out) the monies alleged to have been misappropriated in the manner described are said to exceed US$ 5.2 billion. Funds of that magnitude were far beyond the resources of the Money Exchange. Some external source of funds needed to be found. It is alleged that the misappropriations from the Money Exchange were funded by unauthorised borrowings made by the Money Exchange from Saudi, GCC and western (or other international) banks. The plaintiff's case on this unauthorised borrowing is set out in Section F of the statement of claim; and is summarised in the first two paragraphs of that section:

> "In order to fund the misappropriations pleaded above, Mr Al Sanea caused a large number of loan agreements and other related documentation, including guarantees, to be executed in the name of AHAB with various banks and financial institutions. The borrowing was vastly in excess of what the Money Exchange or the AHAB group as a whole required for its genuine business. Mr Al Sanea also caused ATS, AIH and TIBC to borrow large amounts which were then transferred to the Money Exchange and/or misappropriated by him.
>
> In total Mr Al Sanea arranged borrowing from at least 118 different lenders. The balance of that borrowing, including accrued interest, was about SAR 34,600m (US$ 9,200m) as at the end of

May 2009; the amount is likely to rise as further interest accrues. . . ."

Details of what is said to be the unauthorised borrowing by the Financial Businesses are given at schedule 6 to the statement of claim.

30. It is said, at paragraph 100 of the statement of claim, that Mr Al Sanea obtained the unauthorised borrowing by forging or causing to be forged the signatures of the chairman of AHAB (Abdul Aziz Algosaibi until May 2003 and, thereafter, Suleiman Algosaibi until February 2009) on the loan documentation. Particulars of the alleged forgery are set out at paragraphs 101 to 103. It is, I think, sufficient to set out the first of those paragraphs in this judgment:

> "Mr Al Sanea instructed Money Exchange employees that when loan documentation required approval or signature on behalf of AHAB, as it almost invariably did, it should be delivered to his office at the Saad Group (in a different building from the Money Exchange) and not to AHAB's partners or directors (whose offices were on a different floor in the same building). He would then forge or cause to be forged the relevant signatures and return the signed documentation to the relevant lender, sending a copy to the Money Exchange for its files. No loan documentation was sent to the AHAB partners or directors and there was no correspondence concerning the unauthorised borrowing with them. . . . Mr Al Sanea instructed the Money Exchange staff that any mail addressed to the AHAB partners or directors at the Money Exchange . . . should be sent to him and not to the addressees."

It is clear from paragraph 102 of the statement of claim that AHAB intends to make good its allegations of forgery by reliance on the evidence of a forensic document examiner (Dr Audrey Giles). The allegations are serious; and cannot be dismissed as fanciful.

31. Section G (Use of the Money Exchange to manipulate accounts of Saad Group companies) contains the allegations on which AHAB relies in order to

establish that the other defendants against whom relief is claimed in these proceedings (or some of them) were participants in the scheme to misappropriate monies from the Money Exchange and to fund that misappropriation by unauthorised borrowing. The first two paragraphs of the section provide an "overview":

> "As part of his fraud on AHAB, Mr Al Sanea also used the Money Exchange to assist SICL, Singularis, Awal Bank and other Saad Group companies in manipulating their own accounts by causing the Money Exchange (a) to produce records of false profits earned by the Saad Group and false deposits held by the Saad Group at the Money Exchange, and (b) to make large temporary transfers to Saad Group companies, particularly over their accounting year end.
>
> AHAB relies on these matters as demonstrating the participation of SICL, Singularis, Awal Bank and other Saad Group companies in Mr Al Sanea's fraud, . . ."

32. The matters relied upon include false foreign exchange transactions (paragraphs 118 to 121); false recording of deposits and loans (paragraphs 122 to 125); false confirmation of deposits (paragraphs 126 to 138); and temporary deposits with the Saad Group (paragraphs 139 to 140). I need set out only the following:

> *"False FX transactions*
>
> Mr Al Sanea caused there to be entered in the books of the Money Exchange false foreign exchange (FX) transactions with SICL, STCC and Awal Bank. These did not represent actual transactions which had been negotiated and agreed with Money Exchange but were simply accounting entries designed to create a recorded profit in the name of and for the benefit of the relevant counterparties."
>
> *"False recording of deposits and loans*
>
> Mr Al Sanea instructed the Money Exchange to book deposits in accounts for Saad Group companies while simultaneously booking debits of equal value on accounts apparently related to the Saad Group."

"*False confirmation of deposits*

As a further part of his fraud Mr Al Sanea caused the Money Exchange to give false confirmations that it held deposits in the name of the Saad Group companies which thereby benefited from the fraud."

[Singularis is amongst the companies said to have benefited from false confirmations of deposits provided to its auditors].

"Temporary deposits with the Saad Group

Mr Al Sanea and Mr Hayley used Money Exchange funds to place temporary deposits with Saad Group companies. There was no proper commercial purpose for these deposits . . . [which] were intended only to improve the appearance of the relevant Saad Group companies' financial statements."

33. Section H of the statement of claim contains AHAB's explanation of the circumstances in which, it is said, the partners did not learn of the misappropriations and the unauthorised borrowings until May 2009. In paragraph 145 there are set out what are said to be matters which evidence Mr Al Sanea's intention to conceal the misappropriations and the unauthorised borrowings. Those matters are: (i) his widespread forgery of the signatures of AHAB partners on loan documentation; (ii) his manipulation of the Money Exchange's financial records; (iii) his strict control of Money Exchange staff, including his insistence that mail to the AHAB partners received at the Money Exchange must be sent to his office rather than to the addressee; (iv) his secret payments to Mr Hayley through the Saad Group; (v) his use of covert and dishonest schemes to misappropriate money, such as the use of fraudulent LCs and the creation of false deposits; (vi) his, and Mr Hayley's, concern to keep secret the number and identity of the lenders to the Money Exchange. The last of those matters is evidenced by a memorandum dated 11 January 2004 to Mr Al Sanea, in which Mr Hayley wrote:

"The list of banks despatched under cover of your memorandum Ref: MAL/2004/031 dated January 10, 2004 is highly sensitive. In the wrong hands it could be very, very dangerous.

I suggest that in future, sensitive documents should not be in general circulation, but should be restricted to senior executives only." [emphasis as in original]

34. Section I sets out AHAB's case as to the receipt by Saad Group companies of the monies alleged to have been misappropriated. A Table shows contributions by shareholders as disclosed by SICL's financial statements:

Year	Contribution/ US$ m
2004	75
2005	98
2006	143
2007	858
2008	1,145
Total	2,318

It is said that those funds must have been provided by Mr Al Sanea as the ultimate beneficial owner of SICL. Further, it is said that the SIFCos hold substantial investments as subsidiaries of SICL; and that the equity capital of the SIFCos used to purchase those investments must have been provided by Mr Al Sanea through SICL, as the parent company of the SIFCos.

35. Paragraph 162 contain assertions that, in the period 2006 to 2008, at least US$ 3 billion was contributed to Singularis by way of shareholders funds; and that that contribution must have come from Mr Al Sanea as the ultimate beneficial owner.

36. Paragraphs 163 and 164 contain assertions that, in the period 2007 to 2008, US$ 1.25 billion was contributed to Awal Bank by way of shareholders funds; and that those funds must have been provided by Mr Al Sanea and SICL. It is further said that the AwalCos hold substantial investments as subsidiaries of Awal Bank; and that the equity share capital of the AwalCos used to purchase or finance those investments must have been provided by Mr Al Sanea through Awal Bank, as the parent company of the AwalCos.

37. It is pointed out, at paragraph 165 of the statement of claim, that total cash contributions to SICL, Singularis and Awal Bank in the period 2004 to 2008 were about US$ 6.568 billion: and it is said, at paragraph 166, that:

> "Mr Al Sanea's only (or at least principal) source of such large amounts of cash during this period was the money misappropriated from the Money Exchange, which exceed US$4,735 million by the end of 2008 . . ."

AHAB invites the inference that the money contributed to SICL, the SIFCos, Singularis, Awal Bank and the AwalCos was part of the proceeds of the fraud on AHAB.

38. Section J of the statement of claim sets out an account of the collapse of the Financial Businesses. It is, I think, unnecessary to refer to the detailed allegations in this judgment. Section K (Claims) is arranged under eight heads: Duties owed to AHAB by Mr Al Sanea; Breach of fiduciary duty; Knowing receipt and dishonest assistance; Conspiracy; Damages and/or compensation; Restitution; Proprietary and tracing claims; and Interest. Under the first two of those heads there are set out the fiduciary duties which Mr Al Sanea is said to have owed to AHAB as the person having complete managerial control of the Money Exchange and the full trust and confidence of AHAB; and the manner in which he is said to have acted in breach of those fiduciary duties. Under the third head (Knowing receipt and dishonest assistance) the allegation, made in section I, that SICL, the SIFCos, Singularis, Awal Bank and the AwalCos received the proceeds of the misappropriation, or a large part of them, as cash and capital contributions - and the allegations, made in paragraph 94, that SICL, Saad Air (the twentieth defendant) and Awal Trust Company, received "other payments" directly from the Money Exchange - are repeated. Paragraphs 182 and 183 are in these terms:

> "The knowledge of Mr Al Sanea is to be attributed to SICL, Singularis, Awal Bank, Saad Air and Awal Trust Company since at all material times he was the principal director of those companies and/or exercised complete effective control over them.

> He also exercised complete effective control over their subsidiaries, the SIFCos and the AwalCos. Accordingly all these companies knew through Mr Al Sanea that the money received by them was traceable to a dishonest breach of fiduciary duty by him.
>
> Further, SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company dishonestly assisted Mr Al Sanea in his breach of fiduciary duty by acting as repositories for the misappropriated money and/or investing it for him."

39. The fourth head under section K is "Conspiracy". It is said that the misappropriations and unauthorised borrowing "were effected pursuant to a conspiracy between Mr Al Sanea, SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company". The conspiracy alleged "was orchestrated by Mr Al Sanea" and involved the following elements: (i) Mr Al Sanea's use of his control of the Financial Businesses, and of the Senior Executives, to obtain unauthorised borrowing in the name of AHAB (section F); (ii) Mr Al Sanea's misappropriation of monies from the Money Exchange (section E); (iii) the participation of SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, SAAD Air and Awal Trust Company (which, it is said, acted at all times under the control of Mr Al Sanea and in concert with him) as repositories for the proceeds of the fraud, or a large part of them, (section I) or as recipients of payments directly from the Money Exchange (paragraph 94); and (iv) the use of the Money Exchange by SICL, Singularis and Awal Bank to manipulate their own accounts and records for their own benefit (section G) by way of false FX transactions, false confirmations of deposits and temporary deposits.

40. Under the fifth head of section K (Damages and/or compensation) it is alleged that - by reason of (i) Mr Al Sanea's dishonest breach of fiduciary duty, dishonestly assisted by SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company, (ii) the knowing receipt by SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company of money misappropriated by Mr Al Sanea in dishonest

breach of fiduciary duty; and (iii) the conspiracy between Mr Al Sanea, SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company – AHAB has suffered loss in the amounts of (1) the money misappropriated by Mr Al Sanea (estimated to be in excess of US$ 5 billion) and (2) its liability (if any) in respect of the unauthorised borrowing, including interest, penalties and the costs of defending proceedings brought by the lenders, in an amount which exceeded US$ 9.2 billion as at May 2009. It is accepted that, in so far as the unauthorised borrowing funded the misappropriations, there is an element of double counting in that loss under (2) may be expected to include most (if not all) of loss under (1).

41. The sixth head under section K asserts a claim for restitution on the basis that Mr Al Sanea, SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company have been unjustly enriched at the expense of AHAB by receipt of the monies paid out of the Money Exchange. The seventh head asserts proprietary and tracing claims against, and a claim to accounts from, Mr Al Sanea, SICL, the SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company. It is said, in particular, that at the time of payment and receipt, AHAB was the equitable owner of (i) the US$ 2.318 billion paid to SICL as shareholder contributions; (ii) the US$ 3 billion (or thereabouts) paid to Singularis as shareholder contributions; (iii) the US$ 1.25 billion paid to Awal Bank as shareholder contributions; and (iv) the sums alleged, in paragraph 94, to have been paid out of a Bank of America account. It is said that all those monies were received subject to a constructive trust in favour of AHAB.

42. The seventh head asserts a claim to interest under section 34 of the Judicature Law (2007 Revision); alternatively to interest at a compounded rate pursuant to the equitable jurisdiction of the court.

43. Section L of the statement of claim contains a summary of the relief claimed: (1) against Mr Al Sanea for damages and/or compensation for breach of fiduciary duty; (2) against SICL, the SIFCos, Singularis, the AwalCos, Saad

Air and Awal Trust Company for damages and/or compensation for dishonest assistance in Mr Al Sanea's breach of fiduciary duty; (3) against Mr Al Sanea, SICL, the SIFCos, Singularis, the AwalCos, Saad Air and Awal Trust Company for damages for conspiracy; (4) against the same defendants, in relation to the monies misappropriated by Mr Al Sanea in breach of his fiduciary duty, accounts, declarations, restitution and damages and/or compensation for knowing receipt; (5) interest; (6) further or other relief; and (7) costs.

44. Mr Al Sanea has not, of course, served a defence in these proceedings: the time for that has been awaiting the determination of his challenge to the court's jurisdiction. But, without submitting to that jurisdiction, he has sworn and filed a number of affirmations supported by substantial documentation. It is possible to identify, from that evidence, what the principal issues in the proceedings would be likely to be.

45. The Chief Justice set out, at paragraphs 45 to 65 of his judgment (under the heading "Mr Al Sanea's counter-allegations"), his understanding of Mr Al Sanea's case in answer to the allegations in the statement of claim. He noted, by way of introduction: (i) that the partners of AHAB have always been and are members of the Algosaibi family; (ii) that there have been two generations of inter-marriage between the Algosaibis and the Al Saneas - Mr Al Sanea himself being married to one of the Algosaibi partners – and (iii) that Mr Al Sanea and all the AHAB partners live and work in Al Khobar, in the Eastern province of Saudi Arabia. Both AHAB itself (including the Money Exchange) and Mr Al Sanea's own principal operating company, STCC, are based in and operate from Al Khobar. In the paragraphs which follow, I draw heavily upon the Chief Justice's synopsis of Mr Al Sanea's case.

46. The present chairman of AHAB, Yousef Algosaibi, succeeded his uncle , Suleiman Hamad Algosaibi, in that office. Suleiman's predecessor as chairman was Abdul Aziz Hamad Algosaibi. While Mr Al Sanea was never a member of AHAB's board, he was highly regarded and favoured by Abdul

Aziz and Suleiman. They are no longer living. He originally had a senior role at the Money Exchange as appointed by Abdul Aziz and came to be a highly valued advisor to both Abdul Aziz and Suleiman. While performing that role at the Money Exchange, Mr Al Sanea claims to have worked closely with Abdul Aziz and Suleiman; and to have gained intimate knowledge of AHAB's business. He was granted a 25 per cent share in the capital of the Money Exchange and 15 per cent share in its profits. It is from that background of longstanding and intimate knowledge of the affairs of AHAB and of its interrelationship with the Money Exchange as an integral AHAB division that Mr Al Sanea asserts the proposition – crucial to his defence to AHAB's claims – that the Money Exchange was, for all practical purposes, used as the "central treasury" and clearing house for all major AHAB borrowings and external financing and for the personal borrowings of AHAB Partners. More especially, so he says, that has been the position with the current generation of male Algosaibi partners: Yousef, Saud and Dawood Algosaibi.

47. On that basis, Mr Al Sanea asserts that the AHAB partners are and have always been fully aware of the true extent of the massive borrowings of the Money Exchange, much of which was for AHAB's or the partners' direct use and benefit.

48. Mr Al Sanea accepts that he and his companies in Saudi Arabia had had, over many years, a banking relationship with the Money Exchange. But this, he asserts, was by way of both borrowing and lending. Monies were paid into the Money Exchange by him and his Saad companies; and monies were withdrawn or borrowed by them from the Money Exchange. All Saad Group Accounts with the Money Exchange were documented. From time to time there were large deposits with the Money Exchange by him and his companies and the balance of account between them and the Money Exchange varied from time to time. Overall, he asserts that, on a full

accounting, the balances will be found to be in favour of himself and his companies; but in any event, if there is an overall balance in favour of AHAB, that is an ordinary debt owed to AHAB by him and the Saad Group as customers of AHAB's Money Exchange, and the balance in favour of AHAB is far less than US$ 9.2 billion – the amount claimed by AHAB in these proceedings. Mr Al Sanea further insists that his and the Saad Group's banking relationship with AHAB through the Money Exchange - including its deposit making and borrowing - was known to and approved by the AHAB partners; including Abdul Aziz and Suleiman Algosaibi and, in the current generation, Yousef, Saud and Dawood Algosaibi.

49. Mr Al Sanea asserts, further, that his companies' borrowings from AHAB were well known to and reported upon by El Ayouty, AHAB's external auditors; and were fully recorded in the books of AHAB. El Ayouty is the Saudi branch of the well-known international accountancy practice, Moore Stephens. Mr Al Sanea points out that much of AHAB's borrowing took place in the financial market from Saudi banks and financial institutions. The sums involved are in the billions of dollars. Suleiman and Saud Algosaibi were (or are) important figures in the Saudi Arabian financial world: they were (for example) senior officers of Saudi American (now SAMBA) Bank, one of AHAB's major lenders. Large amounts of the (allegedly) unauthorised borrowings are from SAMBA. It is, he suggests, fanciful to think that unauthorised loans could have been obtained from SAMBA, or from other major banks; or that such loans, if made, would have remained unknown to AHAB partners. Further, there are a number of documents signed by the current AHAB partners showing their own knowledge and approval of certain of the allegedly unauthorised loans.

50. For these, and other reasons set out in his affirmations, Mr Al Sanea contends that the claim that he could have treated the Money Exchange as his exclusive fiefdom - from which he was able to manipulate the affairs of AHAB and through which he was able to borrow and misappropriate the enormous sums

of money alleged in this case – all without the AHAB partners' knowledge will be found to be simply incredible.

51. While his role at the Money Exchange was not as alleged by AHAB, Mr Al Sanea argues that whatever duties he owed to AHAB would be governed by the laws of Saudi Arabia. Whether or not he breached such duties would be a matter for Saudi law and jurisdiction. He claims to have been granted releases by AHAB which would absolve him from liability in any event. Such releases, it is said, are governed by and must be construed according to Saudi law.

52. Mr Al Sanea accepts that some of the Saad Cayman companies did receive some funds from him and other Saad Group companies; but he asserts that they had no involvement in the alleged unauthorised borrowings or alleged misappropriations. He contends that the allegations by AHAB of conspiracy with the Cayman Saad companies and of knowing assistance by the Cayman Saad companies are no more than devices to seek to give some justification for bringing these proceedings against him in the Cayman Islands, when it is plain that the appropriate forum for the trial of AHAB's claims against him is Saudi Arabia.

Is Mr Al Sanea a necessary and proper party to the proceedings brought against the Cayman companies?

53. There can be no dispute that the Cayman companies have been duly served within the jurisdiction. Nor has it been disputed that, on the material before the Cayman court, there is a serious question to be tried against those companies in this jurisdiction. The first question, therefore, is whether grounds for service of the proceedings on Mr Al Sanea out of the jurisdiction have been established under GCR Order 11 rule 1(1). Little, if any, reliance has been placed on paragraph (j) of that order. Although the claims against the Cayman companies are founded (in part, at least) on a constructive trust which is said to arise under the laws of the Cayman Islands, it is not at all

clear that any constructive trust or fiduciary claim that there may be against Mr Al Sanea personally would be governed by those laws. The real question in this context, as the Chief Justice appreciated, was whether Mr Al Sanea is a necessary and proper party to the claims made in the proceedings against the Cayman companies.

54. The Chief Justice reminded himself, at paragraph 76 of his judgment, of the observations of Lord Goff of Chieveley in *Seaconsar Far East Ltd. v Bank Markozi Jomhouri Islami Iran* [1994] 1 A.C. 438, 456H–457A:

> " . . . .a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable case laid down in Korner's case [*Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] A.C. 869], under one of the paragraphs of (Order 11) rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion with particular reference to the issue of forum conveniens." (emphasis added by the Chief Justice).

55. The Chief Justice was satisfied that Mr Al Sanea was a necessary and proper party to the claims made in the proceedings against the Cayman companies: indeed, he thought that obvious. That appears from paragraph 101 of his judgment:

> ". . . not only has AHAB brought its action as of right against the Cayman Saad Corporate defendants here, AHAB had to commence substantive proceedings here in order to secure its claims against those Defendants, 17 of which are now in liquidation in this jurisdiction. . . . It is obvious that the liability of Mr. Al Sanea and the Saad Corporate defendants depend on the same investigation and that he is a proper party to the claims against them. . . . Service out upon Mr. Al Sanea may . . . be regarded as essential for the proper determination of the issues joined in the action as so defined."

Although the point was not conceded in this Court, counsel for Mr Al Sanea did not seek to persuade us that the Chief Justice was wrong to take that view.

Nor did he seek to persuade us that there were no serious claims against Mr Al Sanea to be tried in these proceedings.

Is the case is a proper one for service out of the jurisdiction?

56. The Chief Justice accepted AHAB's submission that the conclusion that Mr. Al Sanea was a necessary or proper party in Cayman proceedings should weigh very heavily in the consideration, under Order 11 rule 4(2), whether the case was a proper one for service out of the jurisdiction. He referred to the observations of Mr Justice Cooke in *Credit Agricole Indosuez v Unicof Ltd. and others* [2003] EWHC 2676 (Comm), [19]:

> "Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and lis alibi pendens cases make this clear."

57. Observations to much the same effect can be found in the judgment of Mr Justice Waller in *Societe Commerciale de Reassurance* v *Eras International Ltd and others (The Eras Eil Actions)* (referred to in the judgment of Lord Justice Mustill in the Court of Appeal, [1992] 1 Lloyd's Rep 570, 591):

> "It is further clear that the plaintiff must satisfy both the test of necessary or proper party *and* O. 11, r.4 that the case is a proper one for service out. . . . That brings into play the discretion and application of the principles enunciated by Lord Goff in the *Spiliada* case but, having said that, I would think that necessary and proper party cases will often be just those type of cases referred to by Lord Goff in *Spiliada* at 481G, where leave will normally be given once a judge is satisfied on the high test of O. 11 that a person is a proper party. Since the forum is already chosen, it will normally be a case when the discretion is exercised in favour of service, but the question must be posed in two distinct stages, I accept: Is the defendant a necessary or proper party to the application? Is it right to bring him here to be a party?"

58. On appeal, Lord Justice Mustill (giving the judgment of the Court of Appeal) said this (*ibid*, 591):

> "The appellants treat this as a statement of principle to the effect that there is a presumption in favour of granting leave in a case falling within par. (c) [of Order 11, Rule 1(1)], and they complain that it is an unjustified fetter on the free exercise of the Court's discretion. If this had indeed been what the Judge meant we would have thought the criticism well-founded, but we do not so read the passage quoted. The Judge was saying only that, in practice, the factors which make the party served a necessary or proper party within par. (c), will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive. So understood, the Judge's statement is obviously right."

59. The Chief Justice said this, at paragraph 104 of his judgment:

> "While the circumstances of each case will be different and must be considered in their own light for the identification of the most appropriate forum and while the circumstances of this case may be far more complex than those before Justice Cooke in that case [*Credit Agricole Indosuez v Unicof Ltd*], the fact that there will, in any event, be related Cayman proceedings to which Mr. Al Sanea is a necessary or proper party goes a long way to "virtually (concluding)" the issue here as well."

The Chief Justice was criticised, by counsel on behalf of Mr Al Sanea, for treating his finding that Mr Al Sanea was a necessary or proper party as "virtually conclusive" of the question which he needed to address under Order 11, rule 4(2). In my view that criticism is not well founded. The Chief Justice had directed himself (at paragraph 23 of his judgment) that the fact that:

> ". . . .many of [Mr Al Sanea's] Saad companies are to be sued in the Cayman Islands, as the proper forum for the determination of the claims against them, is an important factor for consideration in deciding on the appropriate forum for the primary allegations against Mr Al Sanea himself (see *Credit Agricole Indosuez v Unicof Ltd and Others* (below). But it is not, by itself, the decisive factor in the circumstances of this case."

He had qualified his observation (at paragraph 102 of his judgment) - that "the fact that Mr Al Sanea is a necessary or proper party in Cayman proceedings . .

. weighs very heavily in any consideration of the appropriate forum" - by explaining that that factor "is not in and of itself a sufficient reason for exercising the 'exorbitant' jurisdiction over him". And he had gone on, at paragraph 105, to remind himself that:

> "What Mr. Al Sanea says nonetheless, and what it seems to me I must now consider most closely, is whether it is wrong to allow AHAB to seek to litigate in the Cayman Islands the dispute as between himself and AHAB, based on the allegations of fraud committed by him in Saudi Arabia. He asserts that Saudi Arabia is the natural and indeed the only appropriate forum for the trial of that dispute. But I stress, even if that is correct – and I must examine the competing factors – that may not by itself detract from the conclusion that Mr. Al Sanea is a necessary or proper party to AHAB's action against his Saad Companies brought as of right in this jurisdiction."

It is clear, in my view, that the Chief Justice did not fall into the error of thinking that, having determined the "necessary or proper party" issue in favour of AHAB, he was relieved of the need to address the issue, posed by Order 11, rule 4(2), whether the Cayman Islands was the forum "in which the case may be tried more suitably for the interests of all the parties and the ends of justice": see *Spiliada*, (*ibid*), 476C, 480G.

The Chief Justice's determination of that issue is found at paragraphs 116 and 130 of his judgment. At paragraph 116 he said this:

> "For reasons to be expanded upon below, the decision at which I have arrived is to affirm that Cayman is the appropriate forum for the trial of AHAB's claims against Mr. Al Sanea and the Saad Corporate Defendants taken as a whole as it is presently framed, . . ."

And, at paragraph 130, after considering the competing factors advanced, respectively, on behalf of AHAB and Mr Al Sanea, he said this:

> "There are, however, the other equally important factors which, together, in my view, bring the scales down heavily in favour of AHAB's choice of Cayman as the appropriate forum: . . ."

60. The Chief Justice examined the competing factors at paragraphs 125 and 126 of his judgment. He introduced that examination with the following observation (at paragraph 125):

> "A consideration of these will help to explain my decision. There are several connecting factors to Saudi Arabia (including for these purposes, access to neighbouring Bahrain) even while there are several to the Cayman Islands, but it must be accepted on an objective assessment of the situation, that those which naturally connect the underlying allegations of fraud against Mr. Al Sanea (and his counter-allegations against the AHAB Partners) to Saudi Arabia, would collectively outnumber and outweigh those connecting those allegations to Cayman. That simple approach of seeking to compare the competing factors would not however by itself, resolve the forum dispute in this complex case. As the following exercise will show, there are also several other considerations of practice, procedure and principle to be considered but in the end those supervening factors connecting the underlying allegations of fraud to Saudi Arabia informed the decision at which I arrive."

61. The Chief Justice identified and addressed the following factors as pointing to Saudi Arabia as the more appropriate forum:

(1) That "the most central and many of the other relevant witnesses are in or near Saudi Arabia". He explained that:

> "While some, such as Mr. Mark Hayley (former G.M. of the Money Exchange) and certain employees or former employees of the Saad Group of Companies have relocated to several places around the world, the central figures including the AHAB Partners and Mr. Al Sanea himself all remain in Saudi Arabia. A list of many witnesses identified by Mr. Al Sanea as required for his case was presented. They are said to reside in Saudi Arabia or nearby in the Middle East. Many will testify in Arabic.
>
> There is moreover, a travel ban imposed by Royal Decree which prevents several of the central figures – the key AHAB Partners, Directors and Mr. Al Sanea himself – from leaving Saudi Arabia without permission. Yet it is the evidence of those central figures that could be most crucial to the resolution of the fraud dispute; and there is no way of knowing now exactly when the ban will be lifted.

> This is not a case which can be resolved simply by reference to the contemporaneous documents (even assuming all the relevant documents become available).
>
> The personal accounts of the central figures will be essential. It is of course to be expected that much of the relevant communications between the central figures would have been in the Arabic language, although it is apparent from the evidence already disclosed, that they are all, to varying degrees, competent in the English language and apparently conducted commercial transactions in English.
>
> There would therefore inevitably be the need for translation from Arabic to English of documentation were Cayman to be the forum for trial of the main allegations of fraud which underlay the dispute. While that is possible, the need for translation and the possible loss of nuance of important documents and oral testimony detracts from Cayman as the appropriate forum."

He observed that there would be practical difficulties in taking evidence by video link: not least, the time difference of eight hours between Saudi Arabia and Cayman and the reluctance (on cultural grounds) of Saudi women to testify by video link. He acknowledged that these factors "affecting convenience or expense (such as the availability of witnesses)" were not only relevant factors when determining jurisdiction; but that, in the present case, constituted "one of the most weighty factors."

(2) The "fundamental right' of Mr Al Sanea to be present at a trial.

(3) That much of the relevant documentary evidence would be in Saudi Arabia or Bahrain.

(4) That AHAB's, Mr Al Sanea's and the Saad Group's lawyers, accountants and other professional advisers were said to be in Saudi Arabia or Bahrain.

(5) The applicability of Saudi Arabian law to "the issues which lie at the heart of the fraud dispute"; although he acknowledged that there was no evidence to contradict AHAB's assertion that Saudi law would view the

allegations of breach of fiduciary duties, fraud and theft in substantially the same light as Cayman law.

(6) The need, in the Cayman courts, for expert evidence as to Saudi law.

(7) The need for evidence of banking regulators in Saudi Arabia and Bahrain as to the results of their investigations.

(8) That the claims against the Cayman companies were "only the tip of the iceberg" in the context of claims against other recipients of the alleged misappropriated funds; and that a trial in this jurisdiction would not resolve the relevant claims that AHAB asserts against those other recipients (including, in particular, STCC).

(9) The non-enforceability of a judgment of the Cayman Islands court against Mr Al Sanea and non-Cayman based corporate defendants.

62. The Chief Justice then identified and addressed the factors which, as AHAB contended, pointed to this jurisdiction as the more appropriate forum:

(1) That the Cayman Islands was the only forum in which all the claims in these proceedings could be tried at the same time. As the Chief Justice observed, that was a fair view of the action "when viewed as AHAB's entire claim, including its proprietary and tracing claim". But he recognised that "a different view may be taken of the underlying allegations of fraud against Mr Al Sanea seen as a distinct and justiciable cause of action in Saudi Arabia in and of itself".

(2) Mr Al Sanea's choice of the Cayman Islands as the base for his offshore operations; including, in particular, his decision to establish SICL (as appeared from its financial statements) specifically for the purpose of holding and managing his personal assets. As the Chief Justice put it: "To allow him to disavow those connections would be to allow him to use the Cayman Islands as a flag of convenience".

(3) That undue importance should not be attached to "mere geography".

(4) That there was no reason to think that the travel ban, to which Mr Al Sanea and the AHAB partners were currently subject, would be other than temporary; or would not be lifted by dispensation for the purposes of attending a trial in the Cayman Islands which would be of such obvious importance to them.

(5) That travel and accommodation costs, although significant if the trial were to be in the Cayman Islands, would be no less significant if the trial were to be in Saudi Arabia (because many of the important witnesses would have to travel to Saudi Arabia); and would be of little or no significance in comparison with the legal costs if the dispute had to be resolved in both Saudi Arabia and the Cayman Islands.

(6) That the relevant documents would as readily be available in the Cayman Islands as they would be in Saudi Arabia: in either case it would be necessary to create a scanned data base. Nor would the translation of those documents be more onerous if the trial were to take place in the Cayman Islands than it would be if the trial were to take place in Saudi Arabia. AHAB had submitted that:

> "The case will be document intensive and, as has been seen from the evidence of Mr. Hayley the former general manager of the Money Exchange, although the Money Exchange, ATS and TIBC were based in Saudi Arabia and Bahrain, they did business almost entirely in English and were staffed almost entirely by English speaking expatriates. They were English language businesses and the documentary records of the Money Exchange and ATS were almost entirely in English. Translating the many thousands of pages of English documents into Arabic, as would likely be required for the Saudi Courts, would be an expensive and colossal task."

(7) That English speaking expert witnesses (in particular, the forensic document examiners and the accountancy experts) could more easily testify in the Cayman Islands courts than through interpreters in the courts of Saudi Arabia

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(8) That, although expert evidence as to Saudi law would be required in respect of the duties which Mr Al Sanea owed to AHAB as managing director of the Money Exchange, there was no persuasive evidence that the position under Saudi law would be materially different from that under the law of the Cayman Islands.

(9) That there were three areas in which (it was said) that the procedure in the Cayman Islands courts would be far more convenient for all the parties and the ends of justice. These were; (i) witness evidence and cross-examination; (ii) discovery; and (iii) compulsion of foreign witnesses. In relation to the first of those matters, the Chief Justice noted that the parties were agreed that, in a case where there were allegations and cross-allegations of fraud and dishonesty, cross-examination of witnesses would be essential; and that their respective Saudi law experts were agreed that there was no provision in the applicable Saudi procedural rules for cross-examination as of right. Indeed, it was the evidence of the expert instructed by AHAB (Mr Vogel) that Islamic law disqualifies from testifying any witness who has a potential or deemed interest in the outcome of the dispute. The disqualification extends to the parties themselves and to their agents and employees, including former employees. That would prevent from testifying almost all of the witnesses identified by AHAB and by Mr. Al Sanea; including witnesses identified by Mr. Al Sanea as critical. In relation to the second matter (discovery) it was said by Mr Vogel that the only form of compulsory document production available in the Saudi courts was "via the Court's discretion during the trial (and not beforehand) to require a party to produce relevant

documents". Such a process, it was said, would be wholly impractical in the present case.

(10) The "Cambridgeshire" factor to which reference had been made by Lord Goff in *Spiliada* ([1987] AC 460, 485). The Chief Justice accepted that Lord Goff's comments (which he set out) were of direct application. He said this (at paragraph 127 of his judgment):

> "Already a great deal of time and money has been spent in familiarising several teams of lawyers for the presentation of this case before this Court. Three members of this Court, as well as the Court of Appeal have already acquired considerable knowledge about this case through the hearing of substantial applications arising from it. There can be no denying that the dispute between AHAB and Mr. Al Sanea now very much feels like (and it appears is reported around the world as being) a Cayman Islands case."

63. The Chief Justice observed that, as the identification and discussion of the competing factors demonstrated, there were "many compelling factors in favour of Saudi Arabia as there are indeed in favour of the Cayman Islands". Some of the logistical concerns about the presentation of evidence – "both testamentary and documentary" fell no more heavily on one side of the scales than the other: for example "just as there may be the need for translation from Arabic to English before the Cayman Courts, there will be the need for translation from English to Arabic before the Saudi Courts". But he then went on to say, at paragraph 130 (in the passage which I have already set out) that there were the other equally important factors, which, taken together "bring the scales down heavily in favour of AHAB's choice of Cayman as the appropriate forum". He identified those factors as:

> ". . . the obvious amenability of the Saad Corporate Defendants established here by Mr. Al Sanea himself and the good arguable case of their involvement in the fraud allegedly committed by him (see *Credit Agricole* (above); the fact that they may well have assets against which a judgment might be enforced; the three (at least) distinct juridical advantages identified (that is: the ability (doubtful in Saudi Arabia) to compel and cross-examine

> witnesses; a full discovery process and compellability of overseas witnesses by Letters Rogatory); the "*Cambridgeshire* factor" and – given that the action here is the first (subject to the discussion below about the Saudi Committee) and only one in which the dispute is fully enjoined – the capacity to avoid the risk of multiple actions and inconsistent outcomes in different jurisdictions."

64. It appears from the analysis thus far that the Chief Justice's judgment is, if I may respectfully say so, a text-book example of the correct approach to the question whether leave to serve out of the jurisdiction should have been granted. He directed himself, correctly, as to the applicable principles of law; he satisfied himself that a relevant condition in GCR Order 11 rule 1(1) had been established; he recognised that that was not, of itself, a sufficient basis for service out of the jurisdiction; and, in going on to address the question, posed by Order 11 rule 4(2), whether this was a proper case for service out, he had in mind that, in order to be satisfied that it was, he must be satisfied that the Cayman Islands was the "appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice" (see paragraph 89 of his judgment). He identified and discussed the competing factors advanced by the parties; weighed those factors; and determined on which side the scales came down. If the matter had stopped there, there could be no basis for an appellate court to interfere with the Chief Justice's exercise of discretion.

65. In reaching that conclusion I have not overlooked the criticisms made on behalf of Mr Al Sanea as to the factors which the Chief Justice should, or should not, have taken into account. But, in my view, those criticisms are properly to be seen as criticisms of the weight which the Chief Justice should have given to the various factors which he identified and addressed. In particular, it seems to me that the Chief Justice was entitled to take account of the *Cambridgeshire* factor for the reasons which he gave; and that he plainly did give substantial weight to the fact that Mr Al Sanea and the AHAB partners were resident in Saudi Arabia. The weight to be given to individual

factors was a matter for him; as the judge exercising the discretion conferred by GCR Order 11 rule 4(2).

66. As I have said, if the matter had stopped there, there would be no basis for an appellate court to interfere with the Chief Justice's exercise of discretion. And, if he were entitled to take the view that this was a case for service on Mr Al Sanea out of the jurisdiction, there could be no basis for directing a general stay of proceedings against the Maples defendants on *forum non conveniens* grounds.

The temporary case management stay

67. It is, however necessary to keep in mind that the Chief Justice went on to impose what he described as a temporary case management stay. The fact that he did so raises two questions in the context of Mr Al Sanea's challenge to the decision that this was a proper case for service out of the jurisdiction. First, should the reasons which led the Chief Justice to impose a temporary case management stay have led him, instead, to discharge the order for service out of the jurisdiction made by Justice Henderson. Second, was the decision to impose a case management stay so integral to the reasoning which led him to conclude that this was a proper case for service on Mr Al Sanea out of the jurisdiction that, if this Court were to hold that he was wrong to impose a case management stay, it would need to revisit the question whether the order of Justice Henderson should be discharged.

68. The Chief Justice had observed, at paragraph 68 of his judgment (after setting out the allegations made by AHAB and the counter-allegations made by Mr Al Sanea), that the case, as described, presented "a difficult dichotomy". That dichotomy derived "from the circumstance that while AHAB brings its action against the Saad Cayman defendant companies as of right in this, the jurisdiction of their incorporation and domicile, AHAB nonetheless required the leave of this Court before it was entitled to serve the action upon Mr. Al Sanea as a citizen of the foreign sovereign jurisdiction of Saudi Arabia". He

referred, again, to that "difficult dichotomy" at paragraph 96 of his judgment. It arose, he said, because, although the proprietary and tracing claims brought by AHAB in this jurisdiction against the Cayman registered Saad Group companies and against Mr Al Sanea as a necessary and proper party were "inextricably related to the underlying fraud claim, they are not strictly the same thing". He observed that: "to the extent that AHAB has properly sued the Saad Cayman Companies in this jurisdiction seeking to join Mr Al Sanea as a necessary or proper defendant to that action. Mr Al Sanea's objections may seem to acquire the flavour of a defendant seeking to stay an action properly brought within the jurisdiction rather than a challenge to service upon him by way of the Court's 'exorbitant' use of its powers". At paragraph 108 he said this:

> "Thus, when the issues are considered from the point of view of AHAB's claim against the Saad Cayman Companies, I do not perceive the problem to be primarily a competition as between Saudi Arabia and the Cayman Islands as the most appropriate forum for the trial of what is at base, AHAB's proprietary and tracing claim. The real problem, to my mind, is whether it should properly be concluded that this jurisdiction is the appropriate forum for the trial of the related but distinct underlying and complex issues of fraud alleged against Mr. Al Sanea."

69. The Chief Justice answered that question at paragraph 116 of his judgment, in a passage to which I have already referred:

> "For reasons to be expanded upon below, the decision at which I have arrived is to affirm that Cayman is the appropriate forum for the trial of AHAB's claims against Mr. Al Sanea and the Saad Corporate Defendants taken as a whole as it is presently framed, ..."

But he went on, in the same sentence, to say this:

> ". . . but to impose a temporary stay of the proceedings here pending the deliberations of the Saudi Committee or the outcome of any other proceedings which AHAB may seek or may be directed to take (arguably potentially even by the King himself) in Saudi Arabia in respect of the underlying allegations of fraud against Mr. Al Sanea."

That course, he said, resolved:

> ". . . the difficult dichotomy presented by this case, in that it allows AHAB to retain the juridical advantages of bringing its action as of right in this jurisdiction against the Saad Cayman Companies and against Mr. Al Sanea as a necessary or proper defendant thereto, even while allowing the 'action' such as it may be, in respect of the underlying allegations of fraud against Mr. Al Sanea, to proceed in Saudi Arabia; if indeed it may be tried there."

70. At paragraphs 117 to 124 of his judgment, before embarking upon the examination of the competing factors to which I have already referred, the Chief Justice explained why he was satisfied that a case management stay was "now established as a legitimate exercise of the Court's discretion for the resolution of a forum dispute". He found support for that view in the decisions in *Reichhold Norway ASA and another v Goldman Sachs International* [2000] 2 All ER 679 and in *In re SphinX Group of Companies, In re DPM Mellon LLC and DPM Mellon Limited* [2009] CILR 28. In the light of those decisions he observed (at paragraphs 120 to 122 of his judgment) that:

> "An important factor then considered as it must be considered now, is the need to avoid the risk of inconsistent decisions in the two fora in respect of the same issues.
>
> To the extent therefore, that the Saudi Committee or the Saudi Courts may itself or themselves determine – (or, in the case of the Saudi Committee, through the King, refer to the Saudi Courts for determination) – the allegations and counter-allegations of fraud, I must be concerned to avoid the possibility of conflicting decisions there and here in respect of those allegations.
>
> However, I am satisfied that that unwanted outcome will be avoided in this case because the Cayman proceedings are entirely dependent upon a successful outcome in AHAB's allegations of fraud against Mr. Al Sanea."

71. As I have said, after examining the competing factors – including, in particular, the fact that Mr Al Sanea and the AHAB partners were resident in Saudi Arabia and were subject to a temporary travel ban, the location of the

documentary evidence, the applicability of Saudi law and the need for expert evidence as to that law and the advantages of a Saudi judgment in the context of enforcement - the Chief Justice came to the conclusion (at paragraph 130 of his judgment) that, nevertheless, the scales came down heavily in favour of AHAB's choice of the Cayman Islands as the appropriate forum. But he then said this (at paragraph 131):

> "In the end though, I do not think it can be denied as things presently stand, that Saudi Arabia, if it offers an available forum, may be the more appropriate forum for the trial of the underlying allegations of fraud against Mr. Al Sanea. The alleged misconduct took place in Saudi Arabia and the preponderance of the witness testimony and documentary evidence undeniably will have to be obtained there."

And he went on, at paragraphs 136 and 137, to say this:

> "When viewed in that way, the problem condenses into one of how AHAB should be required to prosecute its case. Should it be prosecuted as presently pleaded entirely before this Court? Or should it be prosecuted first based on the allegations of fraud in Saudi Arabia against Mr. Al Sanea for subsequent enforcement of a judgment, including by tracing of assets in this Court (or elsewhere)?
>
> In all the circumstances of this case, I think the answer should, as a matter of proper case management, be in the affirmative to the second of these two propositions; even while concluding that Cayman is the appropriate forum for AHAB's claim viewed as a whole."

72. I have reviewed the reasoning which I have set out – reasoning which led the Chief Justice to impose the temporary case management stay – in order to answer the two questions which I posed in paragraph 67 of my judgment: first, should the reasons which led the Chief Justice to impose a temporary case management stay have led him, instead, to discharge the order for service out of the jurisdiction made by Justice Henderson; and second, was the decision to impose a case management stay so integral to the reasoning which led him to conclude that this was a proper case for service on Mr Al Sanea out of the jurisdiction that, if this Court were to hold that he was wrong to impose

a case management stay, it would need to revisit the question whether the order of Justice Henderson should be discharged? I am satisfied that the answer to each of those questions is "No".

73. It is, I think, clear from the Chief Justice's reasoning that he had identified two distinct questions: (i) which, as between the Cayman Islands and Saudi Arabia, was the more appropriate forum for the trial of the action as a whole in the interests of all the parties and for the ends of justice; and (ii) which, as between the Cayman Islands and Saudi Arabia, was the more appropriate forum for the trial, as against Mr Al Sanea, of the issues of unauthorised borrowing and misappropriation. It is clear, also, that the unequivocal answer which he gave to the first of those questions was that the Cayman Islands was the more appropriate forum. And it is clear that he appreciated that that was the relevant question in the context of his determination whether leave to serve the proceedings on Mr Al Sanea out of the jurisdiction had been properly given.

74. The answer which the Chief Justice gave to the second of those questions was not unequivocal. As he said (at paragraph 139 of his judgment) there remained the question whether Saudi Arabia was an available forum for the trial, as against Mr Al Sanea – let alone as against the Cayman defendants – of the issues of unauthorised borrowing and misappropriation. And, even if it were, it was not the more appropriate forum for the trial of the proprietary and tracing claims against Mr Al Sanea or the Cayman defendants. In my view it is not possible to reach the conclusion that the reasons which led the Chief Justice to impose the temporary case management stay could or should have led him to conclude that Saudi Arabia was the more appropriate forum for the trial of the proceedings as a whole.

75. Nor, in my view is it possible to reach the conclusion that the decision to impose a case management stay was so integral to the reasoning which led the

Chief Justice to conclude that this was a proper case for service on Mr Al Sanea out of the jurisdiction that, if he were wrong to impose a case management stay, the reasoning in relation to service out must be flawed. It can be seen, on analysis of his judgment, that the reasoning which led the Chief Justice to conclude that this was a proper case for service out of the jurisdiction is independent of his decision to impose a case management stay. The advantage of the stay, as the Chief Justice put it in paragraph 116 of his judgment, was that it resolved the "difficult dichotomy" which he had earlier identified; in that "it allows AHAB to retain the juridical advantages of bringing its action as of right in this jurisdiction against the Saad Cayman Companies and against Mr. Al Sanea as a necessary or proper defendant thereto, even while allowing the 'action' such as it may be, in respect of the underlying allegations of fraud against Mr. Al Sanea, to proceed in Saudi Arabia; if indeed it may be tried there."

AHAB's appeal from the temporary case management stay

76. I turn, therefore, to consider AHAB's appeal from the case management stay. It is convenient to have in mind the terms of the stay itself. They are in the first sub-paragraph of paragraph 1 of the order of 30 July 2010:

> "A temporary case management stay of the action as pleaded against [Mr Al Sanea] shall be imposed, allowing time until the Saudi Committee . . . declares its results and/or to allow [AHAB] to petition the Sharia Courts or the Board of Grievances . . . for the resolution of its fraudulent breach of duty claim against [Mr Al Sanea]."

It can be seen that the stay was intended to have two purposes: (i) to suspend the Cayman proceedings until the Saudi Committee had reached some conclusion; and (ii) to suspend the Cayman proceedings until AHAB had petitioned the Sharia'h Courts or the Board of Grievances for the resolution of its fraudulent breach of duty claims against Mr Al Sanea. In relation to the second of those purposes it is made clear that AHAB "is not now positively directed to institute separate proceedings in Saudi Arabia in respect of its fundamental allegations of fraudulent breach of duty against Mr Al Sanea".

But it is also made clear that, in order to persuade the court that the case management stay should be lifted, AHAB would need to demonstrate that there was no suitable and available forum, in Saudi Arabia, in which those allegations – "the fundamental allegations of fraudulent breach of duty against Mr Al Sanea" – could be "distinctly resolved". The Chief Justice plainly had in mind that one way in which that might be demonstrated would be for AHAB to seek, unsuccessfully, to commence proceedings in Saudi Arabia against Mr Al Sanea in respect of the breaches of duty alleged in the Cayman proceedings.

77. It is necessary, therefore, to ask, first, what evidence could have led the Chief Justice to an expectation that the Saudi Committee would reach a conclusion (and when) which would or might be determinative of AHAB's claims, in the Cayman proceedings, against Mr Al Sanea for breach of duty as managing director of the Money Exchange; and, second, what evidence there was as to the likelihood that proceedings could be commenced in the Saudi Courts which would lead to a decision (and when) determinative of those claims.

The Saudi Committee

78. The Saudi Committee was formed by the King in May 2009 by Royal Order; but it is a curious feature of this case that no written document recording the terms of that order is known to exist. Neither party has been able to put the terms of the Royal Order before the Cayman courts. The Chief Justice observed (at paragraph 165 of his judgment) that it was a further peculiarity of the applications before him that "the parties are deeply discordant as to what [the] real remit and objectives [of the Royal Order] are".

79. The Chief Justice identified as the issue between the parties "whether the Saudi Committee is an adjudicative or investigative body"; or, as he put it, "Does it have before it and if so, will it pronounce upon the dispute between AHAB and Mr. Al Sanea in a determinative way or will it more narrowly, investigate and advise the King on what steps should be taken either for its

determination or for its reference to a Sharia or other Court or tribunal". On that issue he found the most cogent evidence to be that of Mr Al Fahad, who was representing AHAB before the Committee. But, as he said, "even Mr. Al Fahad's evidence does not yet provide a clear answer to the question what sort of relief AHAB (or Mr. Al Sanea for that matter) might expect to obtain from the Saudi Committee".

80. Mr Al Fahad's evidence was to the effect that the issue of the Royal Order followed an approach to the King made by AHAB in May 2009 to seek the assistance of the King to create, if possible, an arrangement by decree to enable AHAB both to deal with the crisis it was facing (and still faces) as a result of the alleged huge bank debts and to obtain information regarding the debts Mr Al Sanea had allegedly fraudulently incurred in its name. That approach had been made after AHAB had sought, but had been unable to obtain, an explanation of the situation from Mr Al Sanea. The focus of the Committee's investigations had remained on the issue of AHAB's debts to Saudi banks, rather than on AHAB's dispute with Mr Al Sanea. The following passages (cited by the Chief Justice at paragraph 176 of his judgment) appeared in Mr Al Fahad's affidavit:

> "In response to direct questions from me, the Committee has, on a number of occasions, unequivocally told me that it has not made any findings that Mr. Al Sanea has committed any wrong-doing or that AHAB's complaint lacks merit (or indeed any other finding). The last such occasion was at a meeting which I attended on AHAB's behalf on Monday 22 March 2010;
>
> As far as I am aware, the Committee is not investigating the allegations of forgery made by AHAB against Mr. Al Sanea in these proceedings. I am certainly unaware of any finding by it that there is "no truth" in AHAB's allegations, or of any reason why or how it could reach any such conclusion. And nor would the Committee be likely to inform Mr. Al Sanea of any such finding, either at all or without also informing me."

81. As I have said, the Chief Justice concluded that he could not answer the question just what kind of disposition might be expected of the King on the

advice of the Saudi Committee: but that he could say that the proceedings before the Committee did not constitute a *lis alibi pendens* in the strict sense, "such as might itself help to persuade me that Saudi Arabia is already the appropriate forum for the trial of the dispute".

82. On the basis of the evidence which he set out, the Chief Justice had no reason to expect that the Saudi Committee would reach a conclusion which would or might be determinative of AHAB's claims against Mr Al Sanea for breach of duty as managing director of the Money Exchange.

The Sharia'h Courts and the Board of Grievances

83. The Chief Justice explained that, in addition to the ordinary courts of Saudi Arabia – which apply Islamic or Sharia'h law, supplemented by laws and regulations promulgated by the King – there was a separate judicial tribunal ("the Board of Grievances") established to try (*inter alia*) commercial cases.

84. The evidence of Mr Vogel (the expert witness instructed by AHAB) was that the essentially un-Islamic nature of lending at interest (a feature which was central to AHAB's claim to damages in respect of the alleged unauthorised borrowings) gave rise to jurisdictional uncertainty in Saudi Arabia. He pointed out that both the Sharia'h Courts and the Board of Grievances had long been known to refuse jurisdiction over cases involving un-Islamic transactions; and that it was uncertain as to whether those courts would be prepared to overlook the Islamic unlawfulness of the transactions in this case. As the Chief Justice observed, there was some analogy with the refusal of a common law court to overlook an objection based on public policy.

85. It was Mr Vogel's view that the Board of Grievances would ultimately accept jurisdiction, but perhaps only after appeal, and that resolving the jurisdictional uncertainty could easily take several years. Mr Edge (the expert witness instructed by Mr Al Sanea), on the other hand, thought it probable that, if presented as debt claims relating to unsettled loans involving the Money

Exchange or the misappropriation of funds or as claims for compensation for losses, AHAB's claims would be heard by the Board of Grievances.

86. The Chief Justice's conclusion on this issue was that there would be initial uncertainty and delay about the forum in which AHAB's claim could appropriately be brought in Saudi Arabia. As he put it (at paragraph 154 of his judgment): ". . . I must accept, at the very least, that there could be some considerable time and expense taken before AHAB might finally be able to present its case for fraudulent breach of duty and misappropriation, pleaded as specifically as it has been in this jurisdiction, before an appropriate forum in Saudi Arabia".

87. On the basis of that evidence, and his conclusion, it seems to me that it was impossible for the Chief Justice to be confident that proceedings commenced in the Saudi Courts would lead to a decision determinative of AHAB's claims against Mr Al Sanea for breach of duty within any measurable period, if at all.

88. As I have said, the Chief Justice found support for his view (expressed at paragraph 117 of his judgment) that a case management stay was "now established as a legitimate exercise of the Court's discretion for the resolution of a forum dispute" in the decisions in *Reichhold v Goldman Sachs* and in *In re SPhinX Group of Companies*. It was submitted on behalf of AHAB that a case management stay should only be imposed in circumstances where there were existing proceedings pending in another jurisdiction. That, I think, is too narrow a view of the court's powers. But, as it seems to me, the court should only in the most compelling circumstances (if at all) exercise its case management powers to impose a temporary stay on proceedings commenced as of right in its own jurisdiction in order to force the plaintiff to commence parallel proceedings in a foreign jurisdiction in which he would not otherwise choose to litigate.

89. In *Reichhold v Goldman Sachs* [1999] EWCA Civ 1703; [2000] 2 All ER 679, Jotun AS, a Norwegian company, had sold its shares in a subsidiary, Jotun Polymer Holdings AS, to the claimant, Reichhold Norway ASA. Jotun AS had engaged the defendant, Goldman Sachs International, to advise it in connection with the transaction and to obtain interest from prospective purchasers. The sale agreement contained an express choice of Norwegian law and provided for arbitration in Oslo. In December 1997 Reichhold gave notice to Jotun of a possible claim under the sale agreement. In March 1998, before arbitration proceedings had been commenced, Reichhold commenced proceedings in London against Goldman Sachs, alleging negligent misstatements. In May 1998 Goldman Sachs issued a summons in the English proceedings seeking a stay of the action. Subsequently, in September 1998, Reichhold commenced arbitration proceedings under the sale agreement; but no further steps were taken in the arbitration.

90. The summons came before Mr Justice Moore-Bick in November 1998 ([1999] 1 All ER (Comm) 40). He summarised the argument advanced on behalf of Goldman Sachs as follows:

> "First, since the substance of Reichhold's complaint was that it had paid too much for Polymer, the natural and most efficient way of pursuing a remedy was by arbitration against Jotun in Norway under the sale agreement seeking damages. Second, it was suggested that that was a relatively straightforward claim in legal terms and any difficulty about the quantum of damage would be inevitable wherever the claim was pursued. Third, it was suggested that the proceedings in the arbitration could be expected to reach a conclusion quickly and relatively cheaply. Fourth, it was urged that Reichhold could expect to recover in full against Jotun in the arbitration if it had a good claim, and there was no reason to think that Jotun would be unable to honour any award. By that route it was urged, fifth, that Reichhold could expect to obtain justice in a speedy and efficient manner. By contrast, sixth, the present action against Goldman Sachs was more complex, more difficult as a matter of law and was inconsistent with the method contemplated by all parties for resolving disputes of this kind. In those circumstances [it was] argued that the court could and should stay all further

> proceedings in the action until the completion of arbitration proceedings in Norway."

Mr Justice Moore-Bick observed that the argument rested essentially on three propositions, which were summarised in the Court of Appeal at [2000] 2 All ER 679, 683*a-c*:

> ". . . first, that a plaintiff was no longer entitled to exercise unfettered control over the conduct of proceedings, even when they had been commenced in this country as of right; secondly, that the court should take an active role in managing proceedings before it in order to ensure that justice was achieved as between the parties, while at the same time safeguarding the interests of other litigants; and thirdly, that when considering how justice could best be done between the parties, the court should view the matter objectively in order to assess how that might be achieved at least inconvenience and expense to all involved."

He rejected the argument, advanced on behalf of Reichhold, that he had no jurisdiction to order the stay sought. But he accepted that, where proceedings had been commenced as of right in England, it would not be proper for the court to stay those proceedings pending the outcome of foreign arbitration proceedings to which the defendant in England was not party "unless there were very strong reasons for doing so and the benefits which were likely to result from doing so clearly outweighed any disadvantage to the plaintiff." After weighing the factors for and against a stay, Mr Justice Moore-Bick came to the conclusion that a stay was appropriate in the circumstances. He said (in a passage cited at [2000] 2 All ER 279, 287*f-g*): "Considerations of cost and convenience and the interests of justice generally seem to me to weigh heavily in favour of granting a stay".

91. In the course of his judgment, Mr Justice Moore-Bick said this ([1999] 1 All ER (Comm) 40, 50; cited at [2000] 2 All ER 679, 685*j*-686*b*):

> "It is important to emphasise that the question which has to be decided on this application is not whether Reichhold should be required to pursue a claim which it does not wish to pursue at all,

> but whether it should be required to pursue its pending claim against Jotun before it proceeds further with this action. If Reichhold had abandoned or compromised its claim against Jotun this application would not have been made, or if made, would have had no prospect of success. But the fact is that the claim against Jotun is still pending. Reichhold wishes to maintain its claim against Jotun and will pursue it if necessary. . . . In those circumstances the only prejudice which Reichhold is likely to suffer if this action is stayed is a delay of about a year. Since delay of that kind can be compensated by an award of interest if Reichhold is ultimately successful, that might be considered a small price to pay for the prospect of avoiding complex and costly litigation."

In the Court of Appeal, counsel for Goldman Sachs emphasised (at [2000] 2 All ER 679, 689*j*, 690*d*) that: "All that had happened was that the judge had delayed the action for a period estimated to be about a year".

92. The Court of Appeal upheld the judgment of Mr Justice Moore-Bick, for the reasons which he had given. Lord Bingham of Cornhill, Chief Justice, said this (*ibid*, 690*j*–691*b*):

> "It remains to consider the judge's exercise of his discretion here. I have endeavoured to summarise his judgment fully, without quoting all of it verbatim. It is in my judgment evident that he assessed and evaluated the factors which he was called upon to consider. Although it is suggested in Reichhold's skeleton argument that the judge misdirected himself in approaching the various factors which he had to consider, I for my part am persuaded that he left nothing out of account, took account of nothing of which he should not have taken account, and gave a fair and judicious summary of all the matters properly to be considered. I find no misdirection of law. This was, therefore, a decision within the discretion of the judge, not vitiated by misdirection or manifest error. I would dismiss the appeal."

Lord Bingham observed (*ibid*, 690*h-j*) that:

> "It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."

93. *In re SPhinX Group* [2009] CILR 28 was a decision of the Chief Justice himself. The applicants, who were administrators of a group of hedge funds in liquidation, had appealed to the Grand Court from the liquidator's rejection of their proof of debt. The liquidators had commenced proceedings against the applicants in New York claiming damages for failure to protect the assets of the funds. The applicants sought the determination in the Cayman Islands court of preliminary issues which had arisen in the New York proceedings. The Chief Justice refused that application. He explained (at paragraph 30 of his judgment, 2009 CILR 28, 37-38) that the question did not involve a determination of which was the most appropriate forum for the trial of the issues; but was one of proper case management. The question was to be approached by asking whether it was "in the best interests of the proper management of these proceedings, and so in the best interests of the parties, that this court should proceed to try the preliminary issues, even though it will direct the stay thereafter of these proceedings, in deference to the New York proceedings?" The answer to that question was that it was not. The Chief Justice said this (*ibid*, 39-40, paragraphs 40 to 43:

> "40. A determination of the preliminary issues as defined between DPM and the joint official liquidators in these proceedings would not be unarguably binding on them and certainly not binding on other parties in the context of the New York proceedings. The case against DPM entities is but part of a larger overall dispute about Refco losses involving a substantial number of other parties in New York (not only in the joint official liquidators' proceedings but also those brought by the Refco trustee).
>
> 41. These preliminary issues could take many months or even years to conclude (if appealed to the highest court) and could result in undue delay in the New York proceedings as well, if the final outcome here were to be awaited and so to be of any ultimate value in those proceedings. If the outcome of the trial of these preliminary issues by this court is not readily adopted as binding on all the parties before the New York court

and so leading to a separate determination of the issues by that court, there would be an obvious risk of inconsistent decisions in relation to the issues.

42. For this among others, there is reason to doubt—especially so far as the vicarious liability issue is concerned—that there would be value to the New York court in having this court's determination. Apart from anything else, New York law, which may well be different on that issue, governs the service agreements.

43. Finally, if the joint official liquidators are successful in the New York proceedings as against DPM on the liability issues, DPM can have no claim to advance on appeal here. There would then be no need for this court's determination of the issues and so trying them now might yet prove to be an expensive exercise in futility."

The Chief Justice refused the application.

94. I am very conscious that the decision to impose a temporary case management stay was a decision taken by the Chief Justice in the exercise of his discretion; and that an appellate court should not interfere unless satisfied that that exercise of discretion was flawed for one or other of the reasons mentioned by Lord Bingham in *Reichhold* (*ibid*, 691*a-b*). But, in my view, it is impossible to avoid the conclusion that, in exercising his discretion in this case, the Chief Justice erred in failing to address the question – posed by Mr Justice Moore-Bick and endorsed by the Court of Appeal in *Reichhold* - whether the benefits which were likely to result from imposing a temporary stay so clearly outweighed any disadvantage to the plaintiff that this was one of those cases in which "rare and compelling circumstances" provided the "very strong reasons" that justified doing so.

95. I am satisfied that, had the Chief Justice addressed that question – as he should have done – he would have been driven to conclude that the benefits which were likely to result from imposing a temporary stay did not clearly

outweigh the disadvantages to the plaintiff which would follow. As I have said, on the basis of the evidence which he had set out, there was no reason to expect that the Saudi Committee would reach a conclusion which would or might be determinative of AHAB's claims against Mr Al Sanea for breach of duty as managing director of the Money Exchange. This, unlike *Reichhold*, was not a case in which some existing process (the deliberations of the Saudi Committee) – short of *lis alibi pendens* – could be expected to resolve issues between the parties that would otherwise have to be decided in the proceedings which were properly brought and pending before the court.

96. Nor was it possible to be confident that proceedings commenced in the Saudi Courts would lead to a decision determinative of AHAB's claims against Mr Al Sanea within any measurable period, if at all. This, unlike *Reichhold* was not a case in which it could be said that the stay would delay the proceedings properly commenced in this jurisdiction for no more than a relatively short time. Nor, as I have said, would proceedings in the Saudi court necessarily lead to a resolution of issues which would otherwise have to be tried in this jurisdiction.

97. Further, it was impossible to conclude that the outcome of whatever proceedings AHAB could commence in Saudi Arabia would be accepted as binding as between AHAB and the Cayman companies in liquidation: in particular, it was impossible to conclude that an outcome favourable to AHAB would be acceptable to the liquidators of SICL and Singularis (companies which, it appears from the statement of claim, were the recipients of very substantial funds from Mr Al Sanea during the period of the alleged misappropriations). As the Chief Justice had said (at paragraph 158 of his judgment) proceeding in Saudi Arabia would not be an acceptable way forward for the Cayman companies in liquidation. His recollection of the section 97 proceedings which had been before him in January 2010 was that those companies had indicated that they had no intention of submitting to the jurisdiction of the Saudi Arabian courts. As he put it: "From their point of

view, that is perfectly understandable given the allegations of those Companies' involvement *ex post facto* the events of fraud in Saudi Arabia and the clear connection between their alleged involvement and the Cayman Islands". The case management stay gives rise to the real possibility that the underlying issues might be tried in both jurisdictions; with the potential consequence of inconsistent findings.

Conclusion

98. For the reasons which I have set out – at (I regret) much greater length than would usually have been appropriate on applications of this nature – I am satisfied, first, that that there is no basis on which this Court should interfere with the conclusions reached by the Chief Justice on the jurisdiction summonses issued by Mr Al Sanea and the Maples defendants; and, second, that the Chief Justice erred in imposing a temporary case management stay.

99. In those circumstances – and subject to any further submissions from counsel as to the form of the order which should be made – I would dismiss the applications for permission to appeal made by Mr Al Sanea and the Maples defendants (on the basis that appeals from paragraphs 2 and 3 of the order of 30 July 2010 would have no real prospect of success). I would grant AHAB permission to appeal from paragraph 1 of the order of 30 July 2010; allow that appeal; and set aside the temporary case management stay which the Chief Justice imposed.

Justice Chadwick P

Justice Forte JA
I agree.

Justice Mottley JA
I also agree.