IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)
AND IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED

AND 16 OTHER LIQUIDATIONS

BETWEEN AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

PLAINTIFF

AND SAAD INVESTMENTS COMPANY LIMITED

MAAN AL-SANEA AND OTHERS

DEFENDANTS

IN CHAMBERS
12TH OF AUGUST 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Mr. Peter Hayden and Mr. George Keightley of Mourant Ozannes for the plaintiff Ahmad Hamad Algosaibi and Brothers Company ("AHAB")**

Mr. William Helfrecht of Bodden & Bodden for the liquidators of the Awal Companies, subsidiaries of Awal Bank B.S.C. ("the Johnson Smith liquidators")

Ms. Sarah Dobbyn of Harneys for the liquidators of SIFCo #5 – ("the Kinetic liquidators");

Ms. Colette Wilkins of Walkers for the Liquidators of SICL, the SIFCo companies (except SIFCo #5), SHL and Saad Cayman Limited ("the Grant Thornton or GT liquidators");

RULING AS TO COSTS
AND OTHER INCIDENTAL MATTERS
ARISING FROM RULING OF 20TH APRIL 2010

1. There were a number of different applications before the Court at the hearing that resulted in the Ruling of 20th April 2010:

(i) AHAB's application for leave to proceed with its action against the 17 defendant companies in liquidation. In this AHAB was successful and so Mr. Hayden now submits that AHAB should have its costs of the application on the basis of the principle that costs should follow the event – citing GCR O 62 R 4(2) and (5). Mr. Hayden says that the overriding objective of Order 62 is that the successful party should recover reasonable costs from the opposing party.

Mr. Hayden accepts, however, that the application of these Rules involve the exercise of judicial discretion to be applied having regard to the circumstances of the case.

AHAB's application for leave to proceed was fully and vigorously opposed by the Grant Thornton liquidators and the Johnson Smith liquidators. While the Kinetic liquidators then claimed to have taken a neutral stance, Mr. Hayden points to submissions made on their behalf which show that they ended up opposing the application for leave to proceed. Mr. Hayden therefore seeks an order for AHAB's costs to be paid on the joint and several basis by all the Liquidators;

(ii) AHAB's summons to continue the Worldwide Freezing Order made by Henderson J. on the 24 July 2009 ("the WFO");

(iii) AHAB's summons of 22 October 2009 to enforce compliance with the disclosure provisions of the WFO which order requires disclosure from the Grant Thornton and Kinetic liquidators;

(iv) The Grant Thornton liquidators' summons of 11 December 2009 to discharge the WFO;

(v) Various applications by the Liquidators for directions in respect of payment of remuneration and expenses and other matters which resulted in an order made largely by consent during the hearing.

2. I conclude that the costs of all these matters as between AHAB and the Liquidators shall be costs in the cause with the liquidators' costs to be met from their respective estates in the meantime.

3. This is a conclusion which was already expressed in the ruling of 20th April 2010 at paragraphs 195-196 in these terms:

> *"195. The Liquidators' respective costs may be met from the assets of the relevant company in liquidation without prejudice to the question whether part or all of the costs should ultimately be met from those assets of Companies which assets are found not to be beneficially owned by AHAB. Indeed, if AHAB proves to be unsuccessful in its writ action, all costs will be recoverable as against it.*
>
> *196. The GT Liquidators made the further submission that AHAB should pay their costs of the now to be hostile litigation up front, on the pre-emptive basis. I think I need state no more in that regard than that it would be very wrong in principle to impose such an order upon AHAB as an alleged victim of fraud, suing the 17 Defendants in Liquidation as fraudulent co-conspirators."*

(See also paragraph 6 of the summary of conclusions at pages 70-71 of the Ruling)

4. In concluding that costs should be in the cause, I do not overlook Mr. Hayden's compelling point that costs should be awarded on the merits of the outcome no less on interlocutory applications (such as the present) than on final judgments because otherwise parties will be encouraged to raise unmeritorious objections to interlocutory applications with impunity as to the incidence of costs.

5. Had I been persuaded that the Liquidators acted unreasonably in any of their respective oppositions to AHAB's applications, I would have visited such conduct with an immediate costs order in AHAB's favour, in any event. But that is not the view I take of how any of these applications was approached.

6. For instance, to take AHAB's application for leave to proceed as the most involved and strenuously opposed: neither the Grant Thornton nor the Johnson Smith liquidators argued that leave should never be given. Rather, they argued that the application for leave was premature having regard to the then as yet unresolved forum challenge raised by Mr. Al Sanea. Until that challenge was resolved, the Grant Thornton liquidators observed that it would not be clear what the final scope and concern of the action in this jurisdiction would be and so it was premature to grant leave to proceed with it.

7. While those and the other practical objections were rejected in the grant of AHAB's application for leave to proceed, they were not spurious or unreasonable objections. They required of the careful striking of a balance involving other practical considerations, in the exercise of judicial discretion.

8. The same must largely be said of the outcome of the other applications listed above.

9. While AHAB was successful in the retention of the WFO, including its disclosure provisions; the objections raised on behalf of the Grant Thornton liquidators in particular were not spurious but required of careful analysis and treatment. Indeed it is, in my view, generally correct that while AHAB has been successful at these interlocutory stages, nothing in the determinations so far would suggest that the costs incurred by the Liquidators should not ultimately be recoverable from AHAB, should AHAB fail in its claim.

10. As to the costs of the directions applications successfully brought by the Liquidators (item (v) above) – it is said on behalf of the Kinetic liquidators that they should have their costs from AHAB in any event. The main question involved here was whether, pending the determination of AHAB's proprietary and tracing claim to the assets of the 17 companies in liquidation, the Liquidators should be entitled to take their reasonable costs of the liquidation from those assets on the basis of the principle decided in ***Re Berkeley Applegate (Investment Consultants) Ltd. (In Liq.) (No. 2) [1989] BCLC 28.***

11. This question was decided during the hearing in the affirmative in favour of the Liquidators, but with conditions imposed to ensure that the assets are, as much as reasonably possible, preserved to satisfy AHAB's claim should it ultimately prove successful.

12. In arriving at that resolution I did not form the view that the position taken by any side was unreasonable such as to require an immediate condemnation in costs. The costs of this summons should also, in my view, be in the Cause.

13. Other provisions as to the form of the order arising from the ruling of 20th April 2010 must now also be settled.

14. By reference to the draft propounded by Walkers on behalf of the Grant Thornton liquidators:

    (i) The final phrase of paragraph 7 should read as is; that is: "*costs being ultimately recoverable from AHAB should AHAB not succeed in the action.*"

    (ii) Schedule A which lists the subsequent orders varying the terms of the WFO shall be included in this order for the sake of clarification of the meaning and effect of the WFO and shall have added at the end, words to the effect that for the avoidance of doubt the WFO remains in effect as to the amount restrained (US$9.2 billion) and as to the liability of third parties to comply.

15. I am also asked, for the avoidance of doubt, to confirm that the terms of the Order arising from the Ruling of 20th April 2010 are subject to the terms of the Order made in this Cause (FSD No.54 of 2009) dated 30th July 2010 and filed on 4th August 2010. I so order.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

September 6, 2010