2/12/11

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

BETWEEN	**AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB")**	
		PLAINTIFF
AND	**SAAD INVESTMENTS COMPANY LIMITED**	
	MAAN AL-SANEA AND OTHERS	
		DEFENDANTS

IN CHAMBERS
THE 24TH DAY OF OCTOBER 2011 AND 2ND DECEMBER 2011
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES:	**Mr. Jan Golaszewski of Maples and Calder for the Maples Defendants** **Mr. George Keightley of Mourant for Plaintiff** **Ms. Samantha Trevan for the GT Liquidators observing**

RULING

On the Application of the 3rd, 5th, 9th – 12th, 20th – 29th and 38th to 43rd Defendants ("The Maples Defendants")

1. By this application the Maples Defendants seek the directions of the Court as to the basis upon which they shall recover their costs of the action from AHAB.

2. Against a background of allegations of fraud and misappropriation on a massive scale perpetrated by their principal Mr. Maan Al Sanea, on 24th July 2009 AHAB had obtained ex parte, a worldwide freezing order ("WFO") against the Maples Defendants and the appointment of Receivers over all but two of them.

3. The Maples Defendants (apart from the 3rd and 20th Defendants) successfully challenged the WFO on appeal and the WFO was discharged as against them in the Cayman Islands Court of Appeal on the 7th April 2011.

4. AHAB was however able to avoid the effect of the WFO being discharged against the 3rd and 20th Defendants by amending its writ to plead causes of action against those companies, based on the allegation – now said to be factually erroneous in the case of the 20th Defendant – that they had received sums of money which on their face can be described in retrospect as relatively inconsequential sums. These sums were nonetheless said to be traceable as coming from AHAB's financial business division that had been under the control of Mr. Al Sanea ("the Money Exchange").

5. Further, and notwithstanding that the 3rd and 20th Defendants (together with the 9th to 12th Defendants) had applied to strike out the claim against them; on 1st March 2011 AHAB obtained a renewed freezing order ("the renewed WFO) against those Maples Defendants which are owned by the 3rd and 20th Defendants, based on its claims against those two Defendants. This was on the basis that the assets of the 3rd and 20th Defendants should be made available to satisfy any judgment obtained against their affiliates – the kind of relief that was first fully pronounced in ***T.S.B. Private Bank v Chabra** [1992] 1 WLR 231.*

6. It has now come to light in these proceedings, that AHAB had obtained the WFO and subsequent renewed WFO relief, without making proper disclosure and so in breach of its duty of full and frank disclosure.

7. AHAB has admitted this transgression and has consented to an order discharging the renewed WFO in its entirety and has admitted that its conduct deserves the award of costs against it on the full indemnity basis, albeit only insofar as those costs relate to the WFO and the renewed WFO.

The issues now before the Court

8. By an order made by consent of the parties on 24th September 2011, AHAB's claims against the Maples Defendants were, in light of its admitted transgressions, discontinued and the renewed WFO was lifted. However, the parties were unable to reach agreement on two issues, which are set out in paragraph 8 of that Consent Order as to be resolved by the Court in the following terms:

   (a) Whether the Maples Defendants' costs generally in the action now payable by AHAB following the discontinuance of its claim against them, should be taxed on the standard or on the indemnity basis; and

   (b) Whether, upon submitting its costs claim for taxation, the Maples Defendants must provide certain information to the Taxing Officer [(that is: as to the identity of the third party said by the Maples Defendants to be funding their costs)].

(a) The basis of taxation

9. It is clear that having succeeded in having the action discontinued as against them; the Maples Defendants are entitled to the costs of the action generally which follow that event. Much of their costs will have related to their having to respond to the WFO (and its renewal) but as those are agreed to be repayable on

the full indemnity basis, I am not concerned with those costs here. My concern is with the rest of their costs of the action.

10. Under Grand Court Rules Order 62(6), the amount of costs which a successful party shall be entitled to recover from any other party is (apart from fixed costs prescribed under rule 7 or costs summarily assessed by the judge under rule 8) the amount allowed after taxation either on the standard or on the indemnity basis. "Indemnity basis" in this context of Order 62(6) meaning on the basis of whatever was agreed as between the successful party and its attorney.

11. Here the Maples Defendants seek an order that those costs payable by AHAB following the discontinuance of its claim (and not related to the WFO) should also be taxed on the indemnity basis pursuant to Grand Court Rules (GCR) O. 62(6).

12. There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation.

13. In ***Bonotto v Boccaletti*** ***2001 CILR 292*** the Court of Appeal held that this Court has a discretionary jurisdiction (said to be founded in equity) to grant costs on the indemnity basis but the discretion is to be exercised only in the most exceptional cases (otherwise than where the costs are to be paid under contract or out of a fund).

14. In more categoric terms, the GCR in Order 62 r. 4(11) states:

> *"The court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*

15. It is nonetheless recognised that the jurisdiction is wide and flexible, allowing the Court to exercise its discretion as the circumstances of the case may require.

16. In ***Simms and Others v The Law Society [2005] EWCA Civ. 849*** Carnwath LJ, in delivering the lead judgment on behalf of the English Court of Appeal, summarized the principle (by reference to the English equivalent of GCR4 O. 62) in the following terms which I think are suitably to be adopted by this Court:

> *"The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085ff) show that costs will normally be awarded on the standard basis –*
>
> > *"...unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalize a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis ..." (p. 1087–8)*
>
> *Similarly, in Kiam v MGN (No. 2) [2002] 2 All ER 242 , 246 Simon Brown LJ, while agreeing that –*
>
> > *"...conduct, albeit falling short of mis-conduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs ..."*
>
> *added –*
>
> > *"To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight ..."*
>
> *Thus, when considering an application for the award of costs on the indemnity basis, the court is concerned principally with the losing party's conduct of the case, rather than the substantive merits of his position."*

17. In ***Excelsior Commercial and Industrial Holdings Ltd. v Salisbury Hameer Aspden & Johnson*** ***[2002] EWCA Civ. 879*** Waller L.J. had earlier expressed the view that the issue whether indemnity costs should be ordered depends on whether there is:

> *"....something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs."*

18. Mr. Golaszewski cites, as an example of the kind of conduct of litigation that deserves being visited with an order for indemnity costs, the circumstances identified in and illustrated by the case of ***Three Rivers v Bank of England*** ***[2002] 5 Costs LR 714.*** In that case Justice Tomlinson (in his attempted categorization of principles, cited as his fifth "principle") the following:

> *"Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails."*

19. Mr. Golaszewski submits that AHAB's conduct of the case against the Maples Defendants falls within that description.

20. While I do not regard Justice Tomlinson's "principles" as being principles in the true sense, this, his fifth does provide an illustration of one type of factual situation which a Court may well conclude takes a case out of the norm such as to justify the imposition of indemnity costs. In ***Mireskandari v The Law Society*** ***[2009] EWHC 224 (Ch). At para 18,*** Henderson J treated with Justice Tomlinson's "principles" in a similar way.

21. The institution and maintenance of a patently speculative or weak case merely with the opportunistic intention of embarrassing or compelling an opposite party

to comply with a claim will be conduct coming within the imbrue of GCR Order 62 R. 4(11) as being "improper" and "unreasonable".

22. But to my mind, the exceptionalism of the indemnity costs principle is explained by the purpose for which an award of costs is made. What the case law clearly explains is that awards of indemnity costs will be the exception rather than the norm.

23. In the ordinary case, an award is not made to punish the unsuccessful litigant. The purpose is to reimburse an amount to the successful litigant to cover what may objectively be regarded as the reasonable costs of litigating in the case. This has been termed the "indemnity principle", not to be confused with the concept of an award of costs on the full, attorney and client indemnity basis, which is what is sought by the Maples Defendants here. This primary purpose behind cost orders is further explained in the case law: See ***Liebaers and Limbourg v Smith et al*** ***2008 CILR 176 at para. 10***; citing ***Garbutt v Edwards*** ***[2006] 1 W.L.R. 2907 at 2910*** and ***Smith v Butler*** ***(1875) LR 19 Eq. 413.***

24. As was confirmed in ***Garbutt v Edwards***: *"there are limitations on what a receiving party may recover from the paying party. The touchstone for the recoverability of costs between the parties is today expressed in terms of the costs having to be reasonably incurred and proportionate in amount, rather than in terms of necessity....Unsuccessful litigants should not have to pay excessive amounts of costs but nonetheless the successful party should be reimbursed for the costs that he has properly incurred."*

25. The difference between indemnity costs, as thus defined in the case law, and full indemnity costs is one of both principle and scale – in the former, the ordinary case, the objective is to reimburse the costs which have been reasonably incurred and proportionate in amount to the cause of action and (in our jurisdiction) by reference to a prescribed scale of hourly rates; in the latter, the exceptional case, the conduct of the unsuccessful party is such as to justify requiring it to repay all the costs actually incurred by the successful party on the attorney and own client basis, without regard to such concerns as the scale of fees or proportionality, provided only that the rate or scale of fees is not plainly unreasonable in the sense of being exorbitant.

26. Practice Direction No. 1/2001 (as amended by Practice Direction No. 1 of 2011) sets the Guidelines relating to the Taxation of Costs and recognises the difference between the indemnity principle (which it treats as the ordinary basis for taxation by reference to scheduled hourly rates) and full indemnity costs. The Scheme is explained in paragraphs 7.3 and 7.4 in the following way:

> *"7.3 The hourly rates to be applied will continue to be determined on the basis of the post-qualification experience of the person engaged as follows:*
>
> *Civil Division and Family Division*

More than 20 years	*Up to CI$443 or US$540*
Between 15 and 20 years	*Up to CI$426 or US$520*
Between 10 and 15 years	*Up to CI$361 or US$440*
Between 5 and 10 years	*Up to CI$308 or US$375*
Fewer than 5 years	*Up to CI$230 or US$280*
Articled Clerk and Paralegals	*Up to CI$156 or US$190*

Financial Services Division and Admiralty Division

More than 20 years	*Up to CI$738 or US$900*
Between 15 and 20 years	*Up to CI$705 or US$860*
Between 10 and 15 years	*Up to CI$599 or US$730*
Between 5 and 10 years	*Up to CI$513 or US$625*
Fewer than 5 years	*Up to CI$377 or US$460*
Articled Clerk and Paralegals	*Up to CI$262 or US$320*

In each case these are maximum rates.

If in any proceedings, or part of proceedings, in the Civil Division or in the Family Division the judge is satisfied that the proceedings, or any part of the proceedings, were unusually important or unusually complex, he may certify that with respect to any one or more of the persons engaged the maximum allowable rates shall be those applicable in the Financial Services Division.

In any proceedings in any Division the taxing officer may, in the exercise of his discretion, determine that rates lower than the maximum rates are appropriate in any particular case.

The number of years post-qualification experience for attorneys shall be reckoned from the date upon which the attorney was first admitted to practice as an attorney in the Cayman Islands or as a professional legal adviser elsewhere, whichever is the earlier. Queen's Counsel shall be treated as attorneys having more than 20 years post-qualification experience.

7.4 In the case of taxation on the indemnity basis, the hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable."

27. So then I must examine the conduct of AHAB as plaintiff in the prosecution of its case against the Maples Defendants to see whether, in the words of GCR Order 62 r. 4(11), AHAB has conducted the proceedings "improperly, unreasonably or

negligently" so as to justify being ordered to pay costs on the "full indemnity" or attorney and own client basis.

28. Mr. Golaszewski submits that AHAB has acted improperly and unreasonably in seeking to have the WFO applied to the Maples Defendants even after it became clear that several of them had little or no assets and even after it was known that they were not entities related to any entity into which AHAB could assert a proprietary claim by way of tracing of monies allegedly defrauded and misappropriated by Mr. Al Sanea from AHAB's Money Exchange.

29. This case of "mistaken identity" is described in this way in Mr. Golaszewski's written submissions:

> *"14. The only Maples Defendants against whom the Plaintiff pleaded a cause of action when it commenced its claim in July 2009 were the 9th to 12th defendants. As can be seen further below, these claims were brought by the Plaintiff on the mistaken belief that the 9th to 12th Defendants were direct or indirect subsidiaries of the 8th Defendant [Singularis Holdings Ltd.]. The Plaintiff has known since the Second Affidavit of Simon Charlton dated 28th September 2009 ("Charlton 2") and through independent evidence (its receipt of the affidavit of Peter Anderson, one of the Receivers appointed under the terms of the WFO) dated 10 December 2009 (Anderson Affidavit), that this was incorrect and that the 9th to 12th Defendants are in fact all owned 100% by the 5th Defendant. The Plaintiff pleads no cause of action against the 5th Defendant."*

30. Given the allegations of massive fraud against their principal Mr. Al Sanea in this case, and his persistent disregard of his discovery obligations (including those owed to the liquidators of many of his Cayman entities), that view of the Plaintiff's obligations in its approach to the litigation of this action – one

requiring a clinical precision of pleadings – is, in my view, unreasonably and unrealistically narrow.

31. The nature of AHAB's claim is set out in its statement of claim and examined in various judgments of this Court and of the Court of Appeal. While its pleaded case can still be described as being in many respects unparticularized, it nonetheless contains extensive detailed description of payments totaling some $5.2 billion paid directly or indirectly (eg. through AWAL Bank in Bahrain) from the Money Exchange to the Saad Group of Companies in the Cayman Islands.

32. During the time-frame of the alleged fraud, borrowings in the name of AHAB arranged by Mr. Al Sanea totaled $9.2 billion. While it is very much in dispute whether those borrowings (or the great majority of them) were authorised or unauthorised by AHAB, the work done by AHAB's team of forensic accountants (led by Mr. Charlton) shows that during a more particular time-frame (2004-2008), total cash contributions to the first Defendant (SICL), the 8th Defendant (Singularis Holdings Ltd.) and AWAL Bank amounted to about US6.5 billion (See ***Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and Forty Two Others*** ***2010 (1) CILR 553, at 571-574.***

33. When one looks at the diagram of the corporate structure of Mr. Al Sanea's Cayman entities – some 55 entities – those three Defendants are at the top of the respective branches, two of which include the Maples Defendants.

34. Discovery in the action remains incomplete.

35. AHAB, while conceding that the WFO and renewed WFO were improperly obtained for breach of its disclosure obligations and so had to be discharged; has

not conceded that the Maples Defendants were innocent of involvement in the alleged fraud. Nor has it conceded that some at least of the Maples Defendants held no valuable assets and did not or does not have relevant information to disclose. That concern must have been quite pronounced in respect of the Maples Defendants because they, unlike the defendants which have been in liquidation and so under the control of their respective liquidators, remained throughout under the control of Mr. Al Sanea.

36. Moreover, to the extent that it has been known for some time by AHAB that some of the Maples Defendants held no assets, that information did not answer the concern about the possible extent of their involvement in the alleged fraud. For this reason in particular, I do not see the need now to look at this issue from the point of view of each of the Maples Defendants (or each sub-group of them) separately. The commonality of their control by Mr. Al Sanea, against the background of his alleged massive and pervasive fraud and the unrequited quest for discovery from all of his entities, provided a rational basis for AHAB's maintenance of the action.

37. Having regard to the background and the overall history of the conduct of this litigation, I do not conclude that AHAB has conducted itself vis-à-vis the Maples Defendants "improperly, unreasonably or negligently "within the meaning of the Rules or to have brought a merely "speculative, opportunistic or thin claim" so as to justify imposing upon it an order for the payment of full indemnity costs.

38. The costs of the Maples Defendants (other than those associated with responding to the WFO) are to be therefore taxed on the standard basis in keeping with the GCR and Practice Direction.

(b) Must the Maples Defendants disclose the identity of the third party paying its costs?

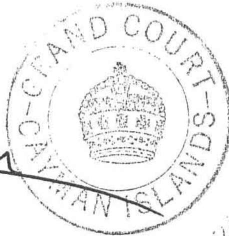
39. On 19th April 2011, the Court of Appeal (per Chadwick P.) granted an order for costs to the Maples Defendants (upon their successful application for the discharge of the original WFO). That order for costs was expressed as to be taxed forthwith "subject to the Defendants lodging with the Taxing Officer their bill of costs indicating which costs have already been paid and by whom and if paid by a third party, the basis on which the third party paid such costs. They are also to indicate whether any costs are specific to these Defendants rather than a proportion of the (common) costs incurred on behalf of these and other Defendants."

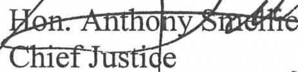
40. It must be that this conditionality placed upon the taxation (and subsequent payment) of the costs of those Maples Defendants benefitting from that order was aimed at ensuring the observance of the ordinary indemnity principle. That is of course, that the beneficiaries should not recover costs which they were not themselves liable to pay. If, for instance, their costs were being secretly paid by Mr. Al Sanea seeking to defeat AHAB's claim, that would certainly be a factor going to the issue of their entitlement to indemnity. See also in this regard ***Liebaers and Limbourg v Smith*** (above).

41. Mr. Al Sanea and the Maples Defendants have variously maintained throughout the proceedings that their costs are being met by a third party (or third parties) whose identities they have not revealed.

42. A natural concern of AHAB's has been to ensure that Mr. Al Sanea is not himself (directly or indirectly) the beneficiary of the costs orders by way of recovery of funds having funded the Maples Defendants' costs.

43. That concern must now however, be regarded as eliminated by the discharge of the WFO in its entirety, and in the case of the Maples Defendants, by the total discontinuance of the action as against them. AHAB can no longer claim an interest in the source of their funding to be protected and preserved for the enforcement of its claim. There therefore would be no point to an order requiring the disclosure of the identity of the person paying the Maples Defendants' costs and I decline to make any such order.





Hon. Anthony Smellie
Chief Justice

December 2 2011