IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

BETWEEN **AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY**

PLAINTIFF

AND **SAAD INVESTMENTS COMPANY LIMITED**

MAAN AL-SANEA AND OTHERS
(Hereinafter called "the Maples Defendants) **DEFENDANTS**

IN CHAMBERS
THE 16TH DAY OF FEBRUARY 2011
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Mr. Hayden and Mr. Richards of Mourant for AHAB**

Mr. Halkerston and Mr. David Butler of Appleby for Mr. Al Sanea

Mr. Jan Golaszewski of Maples and Calder for the 3rd, 9th to 12th and 20th Defendants

Mr. Timothy Haynes of Walkers for the GT defendants

RULING

1. By his summons the 2nd defendant, Mr. Al Sanea, seeks the grant of a stay of the proceedings as they relate to him until his intended appeal to the Judicial Committee of the Privy Council will have been determined.

2. By their summons the Maples cause of action Defendants (the 3rd, 9th, 12th and 20th defendants) ("MCOADs") seek what would in effect be similar orders – either a stay of the proceedings or an extension of time for the filing of their defences, pending the determination of their intended appeal to the Privy Council.

3. For Mr. Al Sanea's part, his appeals to the Privy Council would be against a decision of the Court of Appeal by which the Court of Appeal upheld the decision

of this Court to the effect that Cayman is the proper forum for the trial of the action in these proceedings (and so requiring Mr. Al Sanea to submit to the jurisdiction of this Court). This was decided even while the Court of Appeal overturned the further order of this Court which had imposed a temporary case management stay upon the proceedings. This latter is an aspect of the Court of Appeal's decision against which both Mr. Al Sanea and the MCOADs seek to appeal against to the Privy Council.

4. In coming to its decisions, it is clear from the Court of Appeal's judgment that it considered fully and found lacking, the merits of Mr. Al Sanea's challenge to the jurisdiction of this Court. The Court of Appeal also considered the appropriateness of the temporary case management stay – both as a matter of the case law and as a matter of the exercise of discretion by this Court.

5. Applications by Mr. Sanea for leave to appeal to the Privy Council on the grounds described above have actually been taken before the Court of Appeal and refused. In refusing the applications for leave to appeal, the Court of Appeal also refused the ancillary application of Mr. Al Sanea for an interim stay pending appeal to the Privy Council.

6. At paragraphs 14-17 of its judgment (given on 7th February 2011 – only 9 days ago), the Court of Appeal delivered of itself in these terms:

> *"14. ...In his written submission lodged on his behalf, Mr. Al Sanea goes further: he seeks an order that (if the Court refuses leave to appeal to the Judicial Committee) the order of the 8th December 2010 (arising from the Court of Appeal's judgment on jurisdiction) should be stayed – "or*

at the least time for service by Mr. Al Sanea of a further acknowledgement of service and a Defence should be extended" – to permit a petition for special leave to the Judicial Committee and (if special leave is granted) to allow the appeal itself to take place. That application is made in circumstances where, at a directions hearing on 13th January 2011, the Chief Justice extended time for Mr. Al Sanea's defence until 8th February 2011.

15. *In support of that application, it is said that, if no stay of execution or further extension of time is granted, Mr. Al Sanea is at risk, if he fails to file a defence, that AHAB will seek to enter a default judgment against him,; and at risk, if he does file a defence, that he will be held to have submitted to the jurisdiction of the Cayman Islands courts.*

16. *In response to that application AHAB has indicated (at paragraph 30 of its written submissions) that it is prepared to undertake (a) that it will not contend that, by filing a defence in the proceedings, Mr. Al Sanea will be precluded from pursuing a petition for special leave or, if special leave is granted, from pursuing his proposed appeal to the Judicial Committee on the jurisdictional issues and (b) that, if his appeal to the Judicial Committee on the jurisdictional issues were to succeed, it would not oppose an application to withdraw his defence and would not*

contend that (by filing the defence) Mr. Al Sanea had submitted to the jurisdiction of the Cayman Islands courts.

17. In those circumstances we think it unnecessary to decide whether (absent such an undertaking) this court would have had power to stay execution of the order of 8 December 2010; or whether (if there were power to do so) a stay of execution following refusal of leave to appeal to the Judicial Committee from a decision to refuse leave to appeal to this Court would be appropriate. We are satisfied that refusal of a stay of execution will lead to no injustice if the undertaking which we have set out is given by AHAB. Whether or not there should be a further extension of time for the filing of the defence seems to us to be a matter for the Grand Court (at least in the first instance)."

7. Despite Mr. Halkerston's insistence to the contrary, it is plain from those passages that the Court of Appeal has decided that the grant of the stay of the proceedings in deference to Mr. Al Sanea's intended appeal to the Privy Council would be inappropriate. The Court of Appeal says so in terms although its decision was guided by the offer of AHAB's undertakings.

8. That being so, the reference at the end of the quoted passage to this Court being still seized of a power to decide whether to grant an extension of time for the filing of the defence, must be taken in its appropriate context.

9. It cannot mean that this court still has jurisdiction to impose a general stay on the proceedings so as to allow for Mr. Al Sanea's (or for that matter, the MCOADs') appeal to the Privy Council.

10. That is an order that the Court of Appeal has said would be inappropriate from its point of view. And, in this regard, the absence of the word "stay" from the description of the residual power that the Court of Appeal identifies as remaining with this Court is not merely co-incidental.

11. In my view, the Court of Appeal must be regarded as speaking to a residual power in this Court to grant extensions only of a specific time, not extensions which could operate either in terms or in effect as a stay of the proceedings generally pending appeal to the Privy Council. The contrary meaning of the Court of Appeal's decision contended for by Mr. Halkerston would result in an absurdity: having only nine (9) days ago refused a stay or extension of time pending appeal to the Privy Council, a grant of a general stay or extension by me now would certainly result in an appeal to the Court of Appeal with only one possible outcome having regard to their earlier decision – a reversal.

12. This Court may not be invited to exercise its jurisdiction in such a futile way.

13. I conclude that I have no jurisdiction to make an order for a stay or general extension of time in these proceedings pending the proposed appeals to the Privy Council.

14. That then leaves the question whether, as a matter of discretion, I should grant an extension of time for the filing of the defences on some basis other than to allow for the proposed appeals to the Privy Council.

15. No arguments have been put forward for such an order, in Mr. Al Sanea's case. The entire thrust of his application as described by Mr. Halkerston (and as framed in his summons) is that without a stay of the proceedings, he would be irremediably prejudiced by having to file a defence before the Privy Council's decision on his appeal and so before the final judicial determination on the question whether or not he is obliged to submit to the jurisdiction of this Court.

16. Mr. Halkerston says that once Mr. Al Sanea files his defence as he has been directed to do by this Court, he will be held to have irrevocably submitted to the jurisdiction even if he succeeds before the Privy Council. Thus, the irremediable prejudice he would have suffered would be the loss of his right to elect whether or not to submit to the jurisdiction of this court.

17. By reliance on the case of ***Sithole and Others v Thor Chemical and others (unreported, Court of Appeal LTA/7187/7642/1 3 February 1999)***, Mr. Halkerston says the choice facing Mr. Al Sanea is stark, that there is no middle ground; either he submits completely to the jurisdiction once and for all or he does not submit at all. For that reason, the choice offered to him by the Plaintiff AHAB and endorsed by the Court of Appeal (in the passage quoted above) – that of an undertaking by AHAB to allow him to withdraw his defence if he succeeds before the Privy Council – is not an effective choice at all.

18. The stark choices to which Mr. Halkerston refers he divines from the following passage from the ***Sithole*** case per Tuckey LJ at page 8 of the transcript:

> *"A defendants' original notice of intention to defend ceases to have effect so if he does nothing he is at risk of judgment in default. In neither case is his position saved if he appeals since an*

appeal does not act as a stay. To protect himself he must either apply for a stay or to extend time for filing an acknowledgement of service pending the appeal. In my judgment neither of these steps could possibly be construed as a submission to the jurisdiction."

19. While that is a practical and true explanation of the effect of the rules relating to the acknowledgement of service and the filing of a defence, Tuckey LJ was not contemplating a case in which an undertaking of the kind offered here, was involved. Nor was he envisaging a case in which a foreign defendant has finally and conclusively been found by the highest Court to be amenable to the jurisdiction – the ultimate scenario that Mr. Al Sanea seeks to be protected against.

20. As to AHAB's undertaking; the Court of Appeal has regarded it as an effective means of Mr. Al Sanea avoiding submission to the jurisdiction of the Court if he succeeds on his appeal.

21. When pressed as to the real practical reasons why that may not be so, Mr. Halkerston offered a scenario where, notwithstanding that Mr. Al Sanea may have eventually succeeded before the Privy Council, third party proceedings may have already been joined against him in this Cause for, say, an allegation that he contributed to the liability of the third party by way of fraudulent mis-representations as to the ownership of the assets in dispute (the very large sums of money allegedly obtained by him by fraudulent borrowings through AHAB's Money Exchange business of which he had been in charge).

22. That scenario is, in my view, so unlikely as not to present a viable reason for not accepting the undertaking. This action is now more than 18 months old. AHAB's

claims against some 42 companies related to Mr. Al Sanea and already in liquidation against Mr. Al Sanea himself, has long since been pleaded. It is widely published around the world. A plethora of actions have sprung up around the world, including claims for billion of dollars by some 118 Banks against AHAB in relation to their lending to its Money Exchange while Mr. Al Sanea was in charge. Yet no third party claims of the kind apprehended by Mr. Halkerston have yet been raised in this jurisdiction.

23. Not content to rest his arguments on such an apprehensive scenario, Mr. Halkerston also argued that even if Mr. Al Sanea loses before the Privy Council he should be regarded as having the right nonetheless then to elect whether or not to submit to the jurisdiction of this Court, a right he would have lost irretrievably even if he files his defence by reliance on AHAB's undertaking. Further, that such potential prejudice is a matter that I should take into account when considering his application for a stay of the proceedings.

24. Having already concluded that I no longer have the jurisdiction to make such an order for a stay of the proceedings or for the general extension of time for the taking of steps within it pending the proposed appeal to the Privy Council, such questions of potential prejudice to Mr. Al Sanea are rendered moot.

25. Nonetheless, to the extent that his arguments were, in the alternative, presented as a plea to my residual discretionary power to grant specific extension of time within the proceedings for the filing of Mr. Al Sanea's defence, I think I should make my views clear, as follow.

26. I reject the notion that this Court is obliged to recognize a genuine risk of prejudice to Mr. Al Sanea arising from an ultimate determination that he is

obliged to submit to its jurisdiction. Such a determination involves nothing more nor less than an obligation to submit to the jurisdiction of this Court for the purposes of the just resolution of a claim which this Court (upheld by the Court of Appeal) has found to be properly brought against him in this jurisdiction. The reason why the claims must be tried in this jurisdiction are now fully explained in the judgment of this Court as approved by the Court of Appeal, and, on Mr. Al Sanea's ultimate hypothesis; would have been approved also by the Privy Council.

27. The exercise of any residual discretion I might have cannot therefore be exercised properly in deference to such a notion of potential prejudice to Mr. Al Sanea.

28. As Mr. Halkerston has articulated no other basis for a discretionary extension of time for the filing of defence other than to await the outcome of the proposed appeal to the Privy Council, Mr. Al Sanea's summons is dismissed.

29. As to the summons of the MCOADs, their position may be differently regarded for the primary reason that they are not in a position to and so do not challenge the jurisdiction of the Court over them. They seek to contend before the Privy Council for the restoration of the temporary case management stay that this court had imposed but which the Court of Appeal has overturned.

30. That being so, Mr. Golaszewski, on their behalf, did not perceive the same stark "all or nothing" choice perceived by Mr. Halkerston on Mr. Al Sanea's behalf.

31. The MCOADs therefore seek either a stay or general extension of time for the filing of their defences or, as a fall back measure, a specific extension, at least until the 21 March 2011 or at the very least, until 1 March, 2011. This last would

at minimum be a three week extension of time from the deadline of 8th February 2011 already imposed by order of this Court and already exceeded.

32. All parties are in attendance today with their eyes turned toward the Case Management Conference ("CMC") set for three (3) days next week when leading counsel are expected to be present.

33. From AHAB's point of view, Mr. Hayden has already laid down the marker (and AHAB's summons against the MCOADs has already been filed) that applications will then be made for default judgment for failure to file defences within the deadline already imposed; that is, 8th February 2011.

34. While all defendants must be regarded as having had more than ample time after 15 months of the pendency of these proceedings to file their defences, I am minded to accede to the MCOADs' request for an extension of time but to no later than the 1st March 2011 – the absolute fall back position sought by Mr. Golaszewski. This is because I accept that, unlike the other defendants, the date for the CMC though set with the availability of all leading counsel in mind, did not include the confirmed availability of their leading counsel. The MCOADs had anticipated that their application for extension of time would be heard at the CMC but it, as well as Mr. Al Sanea's, was expedited on my directions and brought forward to today. The grant to the MCOADs of the further short extension to 1 March 2011 is intended to alleviate any prejudice or inconvenience that the happening of events might have occasioned.

35. Finally, on the question generally of whether extensions of time ought to have been granted for the filing of defences, I note my acceptance of Mr. Hayden's arguments as to the potential prejudice that continued delay in the progress of

these proceedings could occasion to AHAB. In this regard, he cited and relied upon the 6th affidavit of Mr. Simon Charlton filed in these proceedings. I accept the concerns raised in that affidavit in this regard; in particular the concerns as to the likely reaction of the many banks who have sued or have threatened to sue AHAB in respect of loans to the Money Exchange and the potential risk of harm to AHAB should they press ahead with those claims out of a perceived concern that AHAB is failing to make progress with the prosecution of its claims against Mr. Al Sanea and his related entities (including the MCOADs) in this jurisdiction.

36. For all those reasons, the summonses are dismissed, save for the limited extension of time – to 1 March 2011 – granted to the MCOADs, for the filing of their defences.

37. Costs in the cause.

Hon. Anthony Smellie
Chief Justice

February 16, 2011

GRAND COURT CAYMAN ISLANDS