



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS FROM THE GRAND COURT OF  
THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION**

**CICA (CIVIL) APPEAL NO: 15 of 2018  
(Formerly Cause No: FSD 54 of 2009 (ASCJ))**

**BETWEEN:**

**AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY**

*Plaintiff/Appellant*

**- and -**

**(1) SAAD INVESTMENTS COMPANY LIMITED**

**(2) MAAN AL SANEA and others**

*Defendants/Respondents*

**CONSIDERED ON THE PAPERS**

**BEFORE:     The Rt. Hon Sir Bernard Rix JA  
              The Hon John Martin QC JA  
              The Hon Sir Michael Birt JA**

Appearances: John Wardell QC instructed by Nicholas Fox and Christopher Levers of Mourant Ozannes for the Appellant ('**AHAB**').

Stephen Smith QC and Marcus Haywood, instructed by Colette Wilkins and Shelley White of Walkers for the 1<sup>st</sup>, 8<sup>th</sup>, 30<sup>th</sup> to 33<sup>rd</sup>, 35<sup>th</sup> to 37<sup>th</sup> Respondents ('**GT Respondents**').

Ben Valentin QC, Harriet Fear Davies, James Hart instructed by Ian Lambert of Broadhurst LLC, Attorneys for the 13<sup>th</sup> to 18<sup>th</sup> Respondents ('**AwalCos**').

Thomas Lowe QC and Jack Watson, instructed by William Peake, James Elliott and Niall Dodd of Harney, Westwood & Riegels for the 34<sup>th</sup> Respondent ('**SIFCO 5**').

Draft circulated:           18 February 2022

Judgment Delivered:    16 March 2022

**JUDGMENT ON COSTS**

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1. The Court has for consideration the question of costs arising out of AHAB's appeal herein. That appeal led to the Court's judgment circulated on 15 November 2021 and delivered on 21 December 2021 (the **judgment**), whereby AHAB's appeal was dismissed, save that a retrial was ordered in respect of the consequences of the misappropriation by Al Sanea of US\$ 191 million in May 2009.
2. In the meantime, the GT Defendants and the AwalCos had settled with AHAB ahead of the delivery of the judgment, on confidential terms which it is assumed cover the question of costs. Accordingly, the GT Respondents had no submissions to make to the Court at this time on the question of costs, although in due course they intend to make an application for access to funds held as security for the costs of the appeal (Walkers' email to the Court dated 14 January 2021). The AwalCos have made submissions, but solely by way of explanation of events concerning the settlements of the AwalCos and the GT Respondents and the consequences thereof relating to security for costs. The AwalCos are content with an order in the following terms:

*“The Appellant to pay the costs of the 13<sup>th</sup> to 18<sup>th</sup> Respondents (“the AwalCos”), with liberty to apply to the AwalCos [and to AHAB] for directions relating to taxation and/or in relation to the release of security for costs.”*

That order is agreed by AHAB with the insertion of the words (“and to AHAB”) in square brackets in the citation above. The AwalCos have not expressed any disagreement with that insertion, and the Court is content to make that order.

3. The GT Respondents have not in terms requested an order relating to liberty to apply, but the Court proposes to make a similar order so far as concerns the question of security for costs in the following terms:

*“Liberty to apply to the GT Respondents and to AHAB for directions relating to taxation and/or in relation to the release of security for costs.”*

AHAB and the GT Respondents can inform the Court if that proposed order in any way mis-states the agreed position between them.

4. All parties have agreed that the Court may deal on the papers with the matter of costs consequent upon its judgment, and the Court is content to do so.
5. The only dispute on costs before the Court on the papers lies between AHAB and SIFCO 5.
6. SIFCO 5 requests that its costs be paid on an indemnity basis, that no allowance be made for the Court's decision to order a retrial on the question of the US\$ 191 million misappropriation, a retrial

which may never take place, and where the Court has suggested (without deciding) that AHAB's recovery on the retrial would at best and in any event, even if liability were established, be for no more than the amount which appears to have been received by SIFCO 5 in the sum of US\$ 500,000; and that an interim payment of costs be ordered in the sum of US\$ 5,679,426, being 70% of its incurred costs (broadly itemised) of US\$ 8,113,465. SIFCO 5 submits that its success on the appeal was overwhelming, that the US\$ 191 million issue is *de minimis* compared to AHAB's claim to recover some US\$ 4 billion, and that AHAB's dishonest claim to lack of knowledge, their complicity in AHAB's and Al Sanea's borrowings, and their dishonest pursuit of that claim in terms of the suppression of documents, take this case "out of the norm" (see *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67, a decision of the English Court of Appeal), justifying indemnity costs. SIFCO 5 also refers to Christopher Clarke LJ's citation in *Excalibur Ventures LLC v Texas Keystone Inc* [2017] 1 WLR 2221 of Gloster J's dictum in *JP Morgan Chase v Springwell* that "A party who chooses to litigate on such a wide and extravagant canvass takes the risk that if unsuccessful it may have to pay costs on an indemnity basis." SIFCO 5 also asks for interest on its costs.

7. AHAB on the other hand request that their success on the US\$ 191 million issue should be marked by discounting SIFCO 5's otherwise success by one third of its costs recovery, both in this Court and below; that although the sum involved in the US\$ 191 million issue is comparatively small compared to the total claimed, it is not *de minimis*, and that in any event AHAB had to succeed on a significant number of issues (such as attribution, maelstrom, illegality and such like) in order to win the right to a retrial. As to indemnity costs, AHAB submit that all their arguments presented to the Court were serious and reasonable, as to fact and law, even if they ultimately failed, and that the appeal had been made in circumstances where Al Sanea was found to be a fraudster and forger, and where the Respondents had called no witnesses of fact at trial. AHAB also opposed any interim payment pending a possible appeal to the Privy Council and/or the US\$ 191 million issue retrial, or at any rate, any interim payment which exceeded the security for costs available to SIFCO 5 on appeal, which was US\$ 2.7 million.
8. The Court considers that AHAB's success on the US\$ 191 million issue (and on the many issues which needed to be decided in their favour in order to validate that success) should be marked by discounting SIFCO 5's costs recovery. SIFCO 5 was of course the ultimate winner of the appeal, but the Court is entitled to mark AHAB's albeit limited success on issues which took up a significant amount of preparation and the Court's time by reducing SIFCO 5's total recovery. This is not therefore the kind of case (on which SIFCO 5 has relied) where a claimant wins a purely

nominal amount on the only issue(s) in a case – cases such as *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All E R 873 (Devlin J) and *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394 (English CA).

9. The Court disagrees however with AHAB’s suggestion of a one-third discount, and considers that a discount of 15% is adequate and reasonable to reflect both AHAB’s limited success and SIFCO 5’s limited failure. The Court is satisfied that it is entitled in its discretion to make such a discount: see GCR Order 62, rule 4(5) – “*except when it appears that in the circumstances of the case some other order should be made as to the whole or any part of the costs*” – and the decisions in these islands such as *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Limited* (CICA, unreported 15 November 2019).
  10. The Court considers that a similar discount should be made in SIFCO 5’s costs recovery at trial, and to that extent this Court varies the Chief Justice’s costs award. This is not a case where AHAB’s appeal was entirely dismissed with respect to SIFCO 5, and there is therefore jurisdiction for this Court to alter the disposition of costs below (cf *Primeo Fund*).
  11. As to the question of indemnity costs, this Court notes that the Chief Justice awarded indemnity costs to the defendants at trial. Nevertheless, the Court considers that the issues raised on appeal were arguable and reasonably advanced, even if there was a background of dishonesty (it has to be said on both sides of the argument). The jurisprudence is replete with decisions, both at first instance and on appeal, as to whether or not indemnity costs should be or should have been imposed at trial: but there is no helpful guidance cited to us as to the imposition of indemnity costs on appeal from a judgment where indemnity costs were awarded at trial, even if we note that on occasions that has occurred. We therefore consider that SIFCO 5’s appeal costs should be on the standard basis.
  12. As to interest on costs, this may be awarded (Order 62, rule 4(7)(g) – “*interest on costs (at the prescribed rate for Cayman Islands dollars) from or until a certain date, including a date before judgment*”). Given the size of the costs incurred, and the lengthy period over which they have been expended, the Court considers that interest should be awarded, and that the most efficient order to make is that interest on SIFCO 5’s costs should be at the prescribed rate of 2.375% *from* a date midway between the commencement of the appeal and this judgment and thereafter until payment.
  13. As to an interim payment, the Court thinks that it would be right to order one: but, having regard to the decisions taken above, we think that the right amount to order is US\$ 3 million. That is some
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65% of two-thirds of 85% of SIFCO 5's broad claim for the costs of the appeal, where two-thirds is a rough estimate of what might be obtained on taxation on the standard basis. For these purposes, any access to AHAB's deposited security for the Respondents' costs must await the decision of Chief Justice Smellie on a dispute between the parties relating to access to that security.

14. In sum: SIFCO 5 is entitled as against AHAB to 85% of its costs on appeal, on a standard basis, such costs to be taxed if not agreed; SIFCO 5 is also entitled to an interim payment in the sum of US\$ 3 million, to be made within 28 days from the date of the Chief Justice's order on the access to security for costs issue; but AHAB are entitled to a revision of the costs order at trial such that instead of SIFCO 5 being awarded all its costs (on an indemnity basis), it is limited to 85% of such costs only.