IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: FSDOO54 OF 2009(ASCJ)

BETWEEN:

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB") **Plaintiff**

AND:

SAAD INVESTMENTS FINANCE COMPANY (No 5) LIMITED (In liquidation) ("SIFCO5"), SAAD INVESTMENT COMPANY LIMITED (In liquidation) ("SICL")
And Others

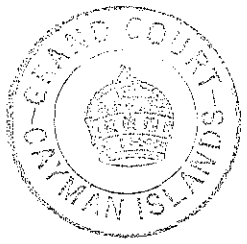
Defendants

Appearances: **Mr. Peter Hayden and Mr. George Keithley of Mourant Ozannes for AHAB**

Mr. Tom Lowe QC instructed by Ms. Jessica Williams of Harney Westwood & Riegels for SIFCO5

Before: **The Honourable Anthony Smellie, Chief Justice**

Heard: **12TH November 2013; 4TH December 2013**



RULING

1. This is AHAB's application for leave to appeal against my judgment of 22nd February 2013 by which among other matters, I granted SIFCO5's application for the striking out of AHAB's claim against it.

2. The claim was brought against SIFCO5 as one of the SAAD Group of companies established in this jurisdiction by Mr Maan Al Sanea and which AHAB alleges were used by him to perpetrate a massive fraud – in the order of USD 9.2 billion- against AHAB's Money Exchange, its financial operations in Saudi Arabia over which Mr. Al Sanea had been put in charge.

   By the Judgment of 22nd February 2013, AHAB's claim was allowed to continue to trial as against other members of the SAAD Group which are also in official liquidation under the aegis of this Court. The claim against SIFCO5 was struck out on the basis that AHAB had failed to plead a reasonable cause of action.

3. AHAB's application for leave to appeal is refused for the following reasons.

4. AHAB had no basis for assuming - as appears from the nature of its response to the strike out application it had assumed - that the general concerns earlier expressed by the Court about lack of discovery from other defendants[1], were intended to allow AHAB to await further discovery from SIFCO5 before being required to particularize its claim against SIFCO5.

Mr. Hayden's submissions in support of this application for leave to appeal betray this assumption where he said:

> *". . . SIFCO5 is in the same position as the other defendants – it is obliged to give discovery before it could have been appropriate for AHAB's claim to be struck out".*

5. This was a mistaken assumption. From the time of the December 2011 Judgment, the different light in which SIFCO5 was presented and stood to be regarded was already sharply focused upon the need for AHAB to particularize its claim.[2]

6. SIFCO5 was from then presented by its JOLs as an entity established for the bona fide commercial purposes of an investment arrangement between its parent company SICL and Barclays. They explained that the shareholding arrangements show that SICL, on behalf of Mr. Al Sanea its principal, holds the USD100 Class A Management Shares in SIFCO5 while Barclays holds the USD124 million equity shares.

7. The SIFCO5 JOLs had also affirmed that they had provided to AHAB what they regarded as full discovery of all relevant material in their possession. They relied and still rely in their pleaded defence on the inference, based on the information available to them, that SIFCO5 had been funded by SICL using funds provided by Barclays. As the result, that SIFCO5's capital did not come from AHAB's money allegedly defrauded by Mr. Al Sanea.

[1] Concerns as expressed fully in the 22nd February 2013. Judgment and in an earlier judgment of 2nd December 2011 reported at 2011(2)CILR 434 ("the December 2011 Judgment").
[2] At paragraphs 53-54 of the reported December 2011 Judgment.

8. AHAB's claim was based nonetheless on the theory that SIFCO5's funding must have been provided by SICL its parent company (as capital or shareholder contributions), by using AHAB's moneys provided to SICL by Mr. Al Sanea, that being the source from which other funding for SICL is shown to have come. And this was asserted notwithstanding AHAB's admitted ongoing inability to present any evidence by which it would be able specifically to plead, let alone prove in that way, its tracing claim against the assets held by SIFCO5.

9. Thus, in reality, AHAB's claim remained premised on the bare assertion of an inference which it says is the only reasonable inference to draw despite the known countervailing circumstances, including Barclays' undisputed shareholding in SIFCO 5.

10. AHAB had been on notice, from well before the hearing that led to the December 2011 Judgment, that the SIFCO5 JOL's case is that SICL has no more than a negligible economic interest in SIFCO5 and that SIFCO5 is clearly beneficially owned by Barclays.

11. The evidence to this effect was presented by Mr. Varga, one of the SIFCO 5 JOLs, in his affidavit of 7th January 2010 and has never been challenged by AHAB, despite the documentary discovery with which it has been provided. At paragraph 14 Mr. Varga explained that the SIFCO shares issued to Barclays reflect (a) the provision by Barclays of $100 million in re-financing capital to SICL, and (b) a "premium" element represented by the remaining $24,508,062 worth of shares. At paragraph 46 he explained that the significant assets in SIFCO5 consist of the Funds Portfolio (then valued at US145 million) which had been refinanced with the Barclays funding. He explained that the value of the assets has since plummeted to less than one-half, in his view, as a consequence of the compulsory liquidation proceedings.

12. Despite all that background, it is Mr Hayden's argument now that my grant of the strike out application was premature and unfair for two reasons. Firstly, that there are disputed questions of fact as to the ownership of the SIFCO5 assets and disputed questions of fact are not subject to being resolved and were not resolved on the strike out application. Although no evidence was filed by AHAB to refute

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the evidence of the SIFCO5 JOLs, that was because no evidence was allowed. The strike out application was therefore granted on the one-sided and unfair basis of the JOLs' evidence alone.

13. Secondly, the SIFCO5 JOLs had been advised by the Court in the December 2011 Judgment, that a strike out application was not the appropriate recourse but that they needed to bring an application for summary judgment in their favour against AHAB's claim. Such an application was made and was pending a date to be set for hearing when the SIFCO5 JOLs' strike out application was heard. AHAB's lawyers had therefore approached the strike out application on the basis that the disputed matters of fact were reserved to the summary judgment application and did not address them on the strike out application. Hence, the abbreviated nature of Mr. McQuater QC's response on the factual issues on behalf of AHAB at the hearing of the strike out application.

14. Having reviewed the transcript of that hearing, I note however, that it is recorded that Mr. Lowe QC on behalf of SIFCO5, made extensive submissions about the inadequacy of AHAB's pleaded case against SIFCO5. He made extensive reference to the evidence available to the SIFCO5 JOLs (and by disclosure from them to AHAB) and which showed Barclays to be the true beneficial owner of SIFCO5.

15. I do not accept, as Mr. Hayden also now argues on behalf of AHAB, that that reference to the evidence by Mr. Lowe QC went beyond the bounds of what was permissible on a strike out application. Such applications are often argued, as was this one, on the basis that the claim is "frivolous and vexatious", an expression that comes from Grand Court Rules Order 18 rule 19 and which has acquired a defined meaning in the case law. The principles are identified and discussed in the local case of **Kalley v. Manus** 1999 CILR 566. There, at page 574 Murphy J, in striking out certain defences to the claim, expressed himself in these terms which are apposite to the issues before me now:

> *"I approach these defences... under the "frivolous and vexatious "and "abuse of process" heads of O.18 r (19) (1)(b) and (d). Accordingly, I can have regard to the evidence put before me. The test in relation to whether a case is vexatious was described by Lindley, L.J. in Att.-Gen. of Duchy of Lancaster v. London &*

N.W. Ry. Co. (2) ([1892]) 3 Ch. At 277). He referred to "cases which are obviously frivolous or obviously unsustainable..." The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court" (see Young v. Holloway (23) ([1895] P. at 90-91, per Juene P.), cited in 1 Supreme Court Practice 1999, para 18/19/16, at 350). As regards abuse of process of the court, para. (1) (d) of r.19 confers upon the court in express terms powers which were previously exercised under its inherent jurisdiction. The connotation is that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery and will in a proper case summarily prevent its machinery from being used a means of vexation and oppression in the process of litigation. The categories of vexation and abuse are not closed and depend on the relevant circumstances".

Thus, it is apparent from the case law that a strike out application on the grounds of the pleadings being "frivolous and vexatious" or an "abuse of the process" will be assessed on the available evidence and may succeed on the basis of incontrovertible fact as so presented.

16. Here the incontrovertible fact remains as explained above, that SIFCO5 is beneficially owned by Barclays who substantively provided its equity funding and so negating any basis for an inference that SIFCO5 is a depository for the proceeds of Mr. Al Sanea's fraud against AHAB. That was the only reasonable view to take of the evidence at the time of SIFCO 5's strike out application.

As the case law reveals, if AHAB had evidence to the contrary, it would have been a miscalculation not to have adduced it upon the strike out application on the assumption that evidence was not allowed, or that any factual inquiry had to await SIFCO5's summary judgment application.

17. But that, as I understand Mr. Hayden's argument now, was not really what transpired. Rather, AHAB adduced no evidence because it had none, and because it assumed it was entitled to await further discovery from the other defendants (SICL especially) and any further discovery to come from SIFCO5 itself; before coming under an obligation to particularise its claim against SIFCO5. Indeed, it is also to be

inferred that AHAB further assumed that it was entitled to await further discovery and to further amend its claim, before being required to respond to SIFCO5's summary judgment application. Otherwise, given the state of the available evidence it is difficult to see how AHAB intended to resist the summary judgment application which was soon to be heard, had the strike out application not been granted.

18. Those, for the reasons already noted, were all false assumptions. SIFCO5 had the right to have its strike out application heard and determined on its merits as it related to the present state of AHAB's pleaded case, especially in light of the SIFCO5 JOLs' assertion that they had already disclosed all relevant material in their possession.

19. When its claim against SIFCO5 is examined in light of all the known circumstances, I do not see that AHAB has an arguable appeal for which it has a real prospect of success. As that was the test to be satisfied before I might grant leave to appeal [3], the application could not succeed.

20. SIFCO5 will have its costs of the application to be taxed if not agreed.

Dated the 5th December 2013

The Honourable Anthony Smellie, Chief Justice
Judge of the Grand Court

[3] A principle of settled law already applied in the context of this action: see, most recently, the 22nd February 2013 Judgment, at para. 208: applying **In Re Universal & Surety Co. Ltd.**, 1992-93 CILR 157 and **Practice Directions 1999 1 WLR** 2 (per Lord Woolf).