IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE No: FSD 54 of 2009 (ASCJ)

BETWEEN:

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

Plaintiff

AND

(1) SAAD INVESTMENTS COMPANY LIMITED
(2) MAAN AL SANEA
AND OTHERS

Defendants

Representations: Mr. David Quest QC and Ms. Emily Gillett instructed by Mourant Ozannes for the Plaintiff.

Mr. Michael Crystal QC, Mr. Mark Phillips QC and Mr. Marcus Haywood instructed by Walkers for the Grant Thornton Defendants.

Mr. Marcus Smith QC and Ms. Bridget Lucas instructed by HSM Chambers for the AWALCOS.

Mr. Thomas Lowe QC and Mr. Jack Watson instructed by Harney's for SIFCOS.

RULING ON AHAB's APPLICATION TO FURTHER AMEND ITS STATEMENT OF CLAIM

1. By its summons dated 12 July 2016, a week before the commencement of this trial on 18th July, AHAB applied to re-re-amend its Statement of Claim and the application has now come on for hearing during the fifth week of the trial. By its application, AHAB seeks among other things, to add a new allegation that the 2nd defendant Mr Al Sanea, manipulated the documentation for some 16 sets of banking facilities obtained by him

in AHAB's name, so as to induce Suleiman Algosaibi (then the Chairman of AHAB[1]), into approving and signing that documentation in the belief that the facilities were not increasing but were simply being renewed in keeping with AHAB's asserted "new for old" borrowing policy. If allowed, this new allegation of manipulation would serve to buttress AHAB's existing pleaded allegations of forgery which already identify, in a "Forgery Schedule" to its existing Statement of Claim, more than 800 banking documents on which the signatures are said to have been forged by Mr Al Sanea to evade the asserted "new for old" policy. A second aspect of AHAB's application seeks to add 22 more allegedly forged documents to the Forgery Schedule and a third aspect seeks permission to amend its particulars of pleading , so as to widen the time frame said to have been covered by the "new for old" policy.

2. I will treat each of the three aspects in turn.

The manipulation allegation

3. AHAB's existing case on forgery is that Mr Al Sanea forged more than 800 documents purportedly signed by AHAB partners. In some cases, that he (or someone acting on his instructions) manually forged signatures, e.g. that of Suleiman or his predecessor chairman of AHAB, Abdulaziz Algosaibi. In many more cases, that he caused images of their signatures to be applied to documents by a mechanical or electronic process and that the latter method can be detected by "matching" signature images between documents. The obvious inference which AHAB says the court should draw from this alleged "industrial scale" program of forgery, is that Mr Al Sanea was seeking to

[1] Without intending disrespect but purely for convenience, AHAB partners will be referred to by first names and in keeping with the practice adopted in the giving of testimony at the trial.

conceal his fraudulent and unauthorized borrowings from the AHAB partners, to enable his misappropriation of billions of dollars which were obtained by means of those borrowings.

4. The allegation of manipulation of documents is, essentially, a new allegation of forgery in a different way: the texts of these 16 sets of documents are said to have been manipulated (usually by increasing or decreasing the amounts of borrowings) after signature. AHAB seeks to allege and prove these forgeries by manipulation and to invite the court to draw inferences from them.

5. AHAB's case is supported by the expert evidence of forensic documents examiner Dr Audrey Giles, who opines to the fact of forgery and manipulation.

6. Indeed, it is safe to say of these 16 sets of documents, that on the face of them, they have plainly been manipulated.

7. A primary difficulty facing AHAB in contending for this proposed amendment to its pleadings, is the vouchsafing of the inference that properly arises from the very fact that these manipulated documents exist. I say "from the very fact" because AHAB proposes to call no witness to testify as to the significance of the manipulations. Instead, they are to be relied upon by counsel in argument - in the manner already engagingly demonstrated by Mr Quest in pressing for the amendment- as giving rise to only one reasonable inference, which is that Mr Al Sanea must have been responsible for their creation and must have successfully deployed them as a decoy to his fraudulent program of unauthorized borrowings and misappropriations, in evasion of the "new for old" policy.

8. No witness who was responsible for oversight of the "new for old" policy and who would have been induced by the manipulations into approving or executing the documents is to be called to testify to those important matters. This is despite the fact that although Suleiman whose signature appears on them is now deceased, the person said by AHAB to have been responsible for enforcement of the "new for old" policy – Mr Badr Eldin Badr – is alive and well. He is however, not to be called as a witness, because as I am told by Mr Quest; Saud Algosaibi, a senior partner of AHAB[2] , does not regard him as a suitable or reliable witness. At paragraph 259 of his first witness statement filed in these proceedings, Saud asserts that Mr Badr resigned from AHAB in 2010, in the course of " our enquiries into Mr Al Sanea's fraud and whilst under suspicion that he had assisted in the fraud and remained in communication with Mr Al Sanea".

9. For his part in them which he describes as having been very limited, Saud does give a description of the "new for old" policy at paragraphs 256-257 in these terms:

> "256...*my uncle [Suleiman] sought to restrict borrowing by the Money Exchange to the levels which had previously been authorized by my father [Abdulaziz]. To this end, my uncle told Mr Al Sanea that if he wished to renew or replace any existing borrowing of the Money Exchange, he had to show Head Office documentation that showed that the proposed new borrowing was not an increase on the expiring arrangement. The idea was that only if satisfied that this was the case would Uncle Suleiman approve and sign the new agreement.*

[2] And its Managing Director from 2003 until 2013 when an executive team of directors largely comprising of professionals from the accountancy firm Deloitte, was appointed.

257. Mr Al Sanea was to send a copy of the existing agreement and the new facility agreement to Badr, who was supposed to check the old agreement against the new one. If the new agreement was not essentially the same as the old one (particularly the amount), he was told to reject it and return it to Mr Al Sanea. If he considered that the new agreement was effectively a like-for-like replacement of existing borrowing, he was to take it to Uncle Suleiman, explain its contents to him[3], and obtain his approval and signature".

10. It follows that, in the absence of Mr Badr or any other witness who could explain the context and significance of the manipulated documents, I must be satisfied that the inference contended for by AHAB is the only one that could reasonably arise, to the civil standard of proof on the balance of probabilities, before I could allow the proposed amendments. Otherwise, the proposed amendment, seeking to rely on the manipulated documents as proof of Mr Al Sanea's evasion of the "new for old" policy, would assert an unsustainable pleading and so should not be allowed[4].

11. Another equally important principle of the case law, is that a pleading of fraud must be of such particularization as to enable the defendants to understand the allegations they must meet. Such allegations must be specifically and distinctly pleaded with the utmost particularity. No averment which is essential to the plea succeeding can be omitted.[5]

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[3] Explained elsewhere as being necessary because these banking documents were invariably in English, which Suleiman did not speak.

[4] It is settled law and common ground among the parties, that an application to amend to introduce an unsustainable pleading - one that is bound to fail because it will not be supported by credible evidence- must not be allowed. See, for instance Grupo Torras v Bank of Butterfield 2001 CILR 9 and Embassy Investments v Houston Casualty Co 2013 (2) CILR 212 at [45]

[5] See, for instance, AHAB v SICL 2013 (1) CILR 202, at paras 93 and 94 and Three Rivers v Bank of England [2003] 2 AC 1.

12. Here the proposed amendment as drafted would simply aver that the documents were manipulated as alleged and that an inference can be drawn that the manipulation was for the purpose of deceiving AHAB. There is no proposed pleading as to who was deceived, in what way or as to whether any of the manipulated documents were actually relied upon to effectuate the borrowings which they represent. AHAB would be assuming no burden to prove those things, yet they would be left to be inferred and so would require the defendants, if they intend to respond, to assume the burden of proving otherwise.

13. In support of the application, Mr Quest invites me to regard the proposed amendment as but one more aspect of the already pleaded case and of the wider "net of circumstances" relied upon by AHAB as proof of the alleged industrial scale forgery perpetuated by Mr Al Sanea against AHAB. As the trial judge I am, however, obliged to take an objective and critical view of the application, testing it against the principles identified above and others discussed below.

14. It is already quite clear from the allegations that this case will involve the examination of two separate allegations of fraud. Already there is that which shows that AHAB itself was knowingly involved (at least while Abdulaziz was chairman) in presenting fraudulent financial statements to lending banks, in order to obtain loans.

15. In this regard, the evidence already given by Mr Mark Hayley, an important AHAB witness, is moreover to the effect that just about every loan obtained by AHAB through its Money Exchange Division during his ten year tenure working there, as he says at the behest of Mr Al Sanea, was obtained fraudulently by the dissemination of false

financial information to the lending banks. Thus, a fraud against the lending banks is to be regarded as an established fact on AHAB's case, at least as it has been presented up until now.

16. Of central concern to AHAB's proposed amendment, is a different fraud: that alleged to have been committed by Mr Al Sanea against the AHAB partners themselves by the evasion of the "new for old" policy, using forgery and manipulation of documents as his instruments of deception. It was by these means that Mr Al Sanea is said to have obtained and misappropriated billions of dollars of unauthorized loans taken in AHAB's name.

17. But apart from what, by any measure, must be regarded as the terse second-hand description of the "new for old" policy given by Saud Algosaibi, for proof of its existence and its evasion by Mr Al Sanea, AHAB presently relies only upon inferences. And these are to be drawn from a very finite list of documents AHAB identifies as speaking only indirectly to the policy[6] and from the allegedly forged signatures of Suleiman and Abdulaziz (and far less extent Saud and Yousef[7]) Algosaibi. The addition of the manipulated documents to AHAB's "circumstantial net of evidence" would therefore be a very significant enhancement of its ability to argue, not only for the evasion but also for the very existence of the policy itself.

18. This is to my mind, the consideration that most sharply brings into focus the real shortcomings of AHAB's arguments and the potential unfairness of allowing this

[6] Such as a letter from Saud to Mr Al Sanea dated 29 May 2004 at N/1118; in which Al Sanea's proposal to buy more shares in Saudi American Bank at a price of SAR 1 billion, to be funded by bank borrowing was rejected in the following terms: "I have mentioned to you on several occasions and through previous memorandums that our Group is not interested, in principle, in increasing the banking facilities of the Exchange."
[7] The current Chairman appointed following the death of Suleiman in 2009.

aspect of its application. For, by allowing the amendment as proposed on the state of the evidence as it stands, I would be allowing AHAB to assert that the fact itself of the existence of the manipulated documents is also proof of the existence of the "new for old" policy (otherwise why would there be manipulated documents?, says Mr Quest), rather than simply that they are proof of evasion of the policy, otherwise shown by independent and reliable evidence to have been in existence. Thus, the premise of the argument would itself be used to prove the conclusion, which in turn would be used to prove the premise.

19. This circularity of inferential reasoning is, in my view, unsustainable and impermissible on the evidence as it presently stands. A finding of the actual existence of the "new for old" policy is crucial to AHAB's case. It would be the basis for the acceptance of AHAB's asserted lack of knowledge and authorisation of Mr Al Sanea's borrowings through the Money Exchange after Abdulaziz's death. That in turn, would be the basis for AHAB's claim to recover the proceeds of those borrowings, as having been fraudulently misappropriated by Mr Al Sanea. In this case where so much is at stake for all the parties, one is entitled to expect that a matter as important as the asserted "new for old" policy, would be established beyond mere speculation by cogent and credible evidence.

20. On the present state of the evidence, when one asks rhetorically, "what is the true reason for the manipulation of documents?"; the only fair answer is: "no one really knows".

21. This is clearly illustrated by the several possible (even if unlikely) alternative inferences which counsel for the Defendants identified, in their unanimous opposition to AHAB's amendment application. In general terms and without the Defendants accepting a burden to identify innocent explanations for the manipulations, these are explained as different ways in which the text of the documents might have been altered to be attached to pre-existing signature pages as a matter of convenience, with the knowledge and authority of Suleiman.

22. Another possibility, not to be too readily discounted in the particular circumstances of this case of pervasive fraud, is that the documents might have been manipulated to conceal the true extent of the borrowings from the external auditors of AHAB (whether the Money Exchange or the Partnership itself) or those of its putative other Financial Businesses in Bahrain (of which ATS, AIS and AIH figure prominently as borrowers on the face of the manipulated documents).

23. The unreliability of the inferences which AHAB invites is poignantly illustrated by excerpts from the transcript of Day 27 (recording the following exchanges between Mr Quest and the Court during the course of his arguments in reply to the Defendants' objections). They came in the context of it having been established that some of the manipulated documents had been discovered at the AHAB Head Office, others at the Money Exchange and still others at the offices of the Financial Businesses in Bahrain. This included instances where some found at the Head Office showed, on the face of them, borrowings for higher amounts than the related documents found, for example, at ATS. I pick up the transcript at Day 27 page 74, line 1 in Mr Quest's arguments in reply:

"74:1 .We see the same point can be made in relation to all of these documents. We have to ask ourselves: if the documents were manipulated in this way and no plausible other reason can be suggested as to why that could have happened, the obvious inference, we say, is that it was (a) dishonest, it was part of the fraud that Al Sanea was carrying out, and that it was done for the purpose of creating a different impression in the head office by using different documents from the impression we see in the Money Exchange.

My Lord, that is why we say -- at this stage we have to show a sustainable inference -- there is a sufficient case in relation to the manipulations. There is an important inference that your Lordship can draw if you accept that documents were changed in the way we suggest and which we say is supported by the forensic evidence. It goes obviously to the question of partner knowledge of particular facilities but more important, it goes to Mr Al Sanea's conduct. Because if he was the one responsible for it, as I say, you have to ask: why was it being done? The only reason it can have been done was for the purpose of concealment.

23. CHIEF JUSTICE: Is therefore the inference that you would invite me to draw - taking this view of not just the particular documents you compare but other relevant documents forming part of the context - which is that Suleiman and Badr, and anybody else at head office who may have been responsible, were not in the habit of checking the history of transactions? They never bothered to go back any further than the exact documents being placed before them at any given point in time.

MR QUEST: Well, it seems not. The process that has been described by Saud as being the new for old process is a process of producing an expiring document and a new document.

This was a business, the evidence is, that was essentially run by Mr Al Sanea. He was the managing director. The oversight, it is said, on the evidence that Suleiman had in the business, was extremely limited, and it was limited to the new for old process. So Mr Al Sanea was essentially left, at least during the 2000s, to manage the facilities himself, subject only to producing from time to time an expiring and a new facility, which obviously was thought -- and that was the purpose of the process -- to be the limit on what he was doing. But we say, as these documents demonstrate, it was in fact being used by him as a tool of the fraud. He, no doubt, appreciating that the only control on him was the new for old process, needed to show that the process was being operated and used these documents to do that.

Once one accepts that, if one accepts that, then one asks, "Well, why, if as the defendants say" -- and this is the defendants' case -- "the partners, the Algosaibis, Suleiman, were completely happy for Mr Al Sanea to borrow as much money as he liked and to take it for himself?" That's the case that is put against us, that we consented or acquiesced to everything that he was doing. Well, if that is right, why would it ever have been necessary to create these kinds of documents?

The reason, as I say, that these documents have a significance different from the other forgeries is that in relation to the signature transposition documents there is

an argument which has been raised against us, which I don't accept -- I don't accept for a moment, either forensically or as a matter of inference and evidence - but it is said maybe the explanation for there being hundreds and hundreds of matched signature documents is that someone was using a stamp -- it would have to be several hundred stamps, but that someone was using a lot of different stamps -- or it is said that maybe Mr Al Sanea was allowed to use this electronic process to put signatures on. We don't accept that case and obviously we will have to deal with it in due course.

The reason these documents have a significance above and beyond the matched signature documents is that that kind of explanation just doesn't work in relation to these documents. Here you have two different documents with the same signatures on but these signature couldn't both have been applied by -- or the explanation can't be that someone stamped those documents because all the signatures are not only the same but they are in the same position.

It is hard to understand why, if the case against us is, well, the partners were happy for Mr Al Sanea to do whatever he liked; they said to him, "You go off and borrow as much money as you like, take as much money as you like, don't bother us with any of the facilities, if you want to use a computer to sign, you can use a computer to sign, we are just not interested." We don't accept that. But that argument wouldn't explain why he apparently felt it necessary to change the text of documents after they were signed and to have different versions in the Money Exchange and the head office. That again, we say, is only consistent with him having a different agenda to the *partners, which is a key aspect in the case. Not*

only a different agenda but an agenda that he didn't want the partners to know about.

Your Lordship raised the point about, couldn't someone have kept a record in AHAB of the progress of the facilities.

CHIEF JUSTICE: Well, you would expect that, wouldn't you?

MR QUEST: With hindsight, that might have been a more efficient thing to do. Of course, we don't see that. In fact, the process of new for old actually is a different kind of process because if you kept a record -- if you decided that the way in which you were going to keep tracks on Mr Al Sanea was to keep a careful record all along, you wouldn't need new for old, because you wouldn't need to be presented with the old agreement and the new agreement because you would know what the old position was. The very fact that the system was set up, obviously in hindsight it was not a very effective system, obviously with hindsight it would have been better to –

CHIEF JUSTICE: That's an understatement.

MR QUEST: Absolutely. Obviously, with hindsight, knowing of the massive fraud that was committed, of course a great deal more could and perhaps even should have been done to keep Mr Al Sanea in control. But the system that for whatever reason was imposed on him was, one can see with hindsight, a rather ineffectual one because it relied only on being able to show two documents the same and, as we see, it turned out that was a system that was very easy to circumvent.

CHIEF JUSTICE: I suppose another way of putting the concern is that there is very little evidence about the system. It is all a matter of inference, based on the documents which you have identified. But a further aspect of it which I'm going to have to infer is what we are now discussing, which is that they never bothered to check the historical documents. And I must assume that they existed.

MR QUEST: Assume that what?

CHIEF JUSTICE: The historical documents, in the previous years, in relation to some of these facilities. They increase over time, so it is reasonable to infer that earlier iterations would have been kept at the head office.

MR QUEST: My Lord, not necessarily. We have the files -- the head office files we have seen contain some facility agreements, but what we see in the Money Exchange is a far, far greater number of agreements. We see agreements in the Money Exchange, we see many, many agreements in the Money Exchange.

CHIEF JUSTICE: What do we know about what was at head office?

MR QUEST: We have the documents we have given discovery of.

CHIEF JUSTICE: That is part of the problem that the other side have identified, that one doesn't really know where this leads to in terms of what other documents there may be or where they may exist or whether they do in fact exist or existed in the head office.

MR QUEST: In terms of discovery, there has obviously been essentially a more or less complete scanning process for the documents in the Money Exchange, which

contain the primary files, because they were the ones arranging the financing; those documents are all in the Money Exchange. We have also given what was called hard copy discovery in relation to hard copy documents that were found in the head office files and, where appropriate, the defendants have asked for production of those and they have been produced. If there are other documents that they want to produce, they can ask for them to be produced. There is within the Money Exchange -- the Money Exchange is the best record because they were the ones who were actually doing the work and obviously they have not only -- within the Money Exchange there is not only the copy facility agreements –

CHIEF JUSTICE: This point concerns what may have been at head office.

MR QUEST: Yes.

MR SMITH: My Lord, you would need to be very clear about how those head office documents were produced. I'm very concerned that your Lordship recalls that at an interlocutory hearing the AwalCos asked for a list of the files that were held at head office to be produced by my learned friend and that list was produced. The descriptions of the files are generic descriptions. From that set of descriptions we identified in a very broadbrush way a number of files that we invited AHAB to produce, and your Lordship ordered that they be produced. But, to be clear, there's been no discovery exercise carried out by my learned friend over the head office documents. So it has been a very broadbrush, almost impressionistic, process. So, my Lord, we don't know, and I don't think my learned friend knows, what actually is in the head office archive.

CHIEF JUSTICE: The point is in the present context, as we are having this discussion, there is no way of knowing what other related documents there may be or have been in the head office files.

MR QUEST: We have obviously given the discovery we were ordered to give and-

CHIEF JUSTICE: That's not the point. Putting it another way, it seems to me a necessary inference you are going to have to ask me to draw is that, for the purposes of our present discussion, the documents which are now before the court are the only documents that relate to these transactions.

MR QUEST: My Lord, in a sense we can only -- for all purposes in the case, including the authority case and the new for old case, one has to draw some kind of inference or reach some kind of view as to what the relevant documents are in the case. If it is said, for example, well, there might be other documents in the head office archives -- because this issue goes to the question of the partners' knowledge of the facilities, which is obviously a critical issue in the whole case. A great deal of the -- the entirety of the discovery process so far has been aimed at, on the defendants' side, as you might expect, getting discovery –

CHIEF JUSTICE: I understand that. The partner here being Suleiman. This is why I think -- if you would have understood the force of some of the arguments on the other side about the lack of pleadings and what it is said Suleiman was induced to do by this exercise, and my point is as to what his state of mind had been, one would need to know the context in which the documents were put before him and whether or not there were other documents, historical documents, which

would have been available for him to see or not see the progression of the borrowing. Because if I am to at the end of the day conclude that this was a device to induce him to sign documents which he would otherwise not have signed, the inference would have been that he wasn't aware of the history. But as we speak it seems to me that it is reasonable to draw the inference the other way, which is that there would have been a record kept of these borrowings.

MR QUEST: Documents evidencing Suleiman's knowledge, or indeed any of the other partners' knowledge, of the activities of the Money Exchange are clearly documents which are relevant to this case, not just to this amendment but relevant to the entirety of the case, of course; in particular, documents that are relevant to the partners' knowledge, Suleiman's knowledge, of the facilities. In a sense they are relevant to the amendment but they are just as relevant to the authority case more generally. A large part of the discovery process in this case has been aimed at fashioning orders and fashioning the discovery process to make sure there is before the court, and the defendants have the opportunity to see documents that are relevant to that issue.

At the end of the day we can only work on the documents we have, and many of these things go back many years. But that exercise of pressing us for discovery and extracting discovery in relation to partners' knowledge has already been done. The documents have been scanned, they have been produced, an exercise of listing –

CHIEF JUSTICE: I understand that. It may be in that sense a predicament that you face. But this is an application to amend your pleadings and one of the principal objections is prejudice, and one way in which that argument is developed is that: look, there may be other documents and, had we had time, we may have been able to trawl through all the relevant documents, including some which have not been uploaded, although they may be available, to see whether there are other documents that tell another story about these transactions. And there have been attempts -- you will want to address this -- on the other side to show how when one looks at the entire context you may get a different impression of these documents.

MR QUEST: Yes, they are entitled to make that argument, of course. Looking at it as a matter of prejudice, returning to that topic, prejudice in relation to discovery, I think, if I may say so, is rather overstated in relation to the amendment application for this reason: that the question of – it is really the point I made a moment ago… partners' knowledge and the question of authority and the question of new for old has always been at the heart of this case. And it has always been… for the Defendants, if they wanted to, to investigate what records there are in relation to that subject. If it is said that documents are missing, well then one can make submissions about what might be inferred from that. But in a sense the discovery is what it is in relation to knowledge of facilities. We have already been around that particular track and we have given hard copy lists, we have given the scanned documents, so the material is there. I accept that no doubt the defendants will wish to renew it or review some of it in relation to this manipulation

allegation to see the context of these particular loans, but the issue of whether the lending increased over the years and, if it did, what was known in head office about it is already part of the case and is already a central part of the case which is going to have to be decided anyway. .. we don't accept that this amendment, .. is extending or creating some problem in relation to discovery... because the documents available on this topic are the same documents that you would expect to be considered in relation to the authority case.

CHIEF JUSTICE: That's not quite how I understand it is put. The prejudice is in terms that they are being required to go through the documents, as it seems they do exist, to see whether or not the full picture to be presented has been presented, whether or not some other inference can be drawn from other related documents and that could take a very long time, it would result in Mr Handy [the Defendants' documents examiner] having to do a lot more work. We understand what the issues of prejudice are... But I raise this issue also in the context of the inference you are asking me to draw about these documents being put before Suleiman and I make the point that you are requiring me to draw yet another inference, which is that there would have been no check on the historical progression of the loans, as part of the new for old policy. It seems to follow that on any given occasion, all that would happen was that they would look at the two documents presented, from the Money Exchange, and if on the face of them they match they were therefore approved.

MR QUEST: That is what the evidence is.

CHIEF JUSTICE: As simplistic as that.

MR QUEST: It is simplistic and one can see, because it is simplistic, it turned out not to be very effectual. But that is the procedure which was adopted ..."

24. The first concern emphasized by these exchanges goes to what inference can safely be drawn about the AHAB Partner's knowledge (Suleiman's especially) from the manipulated documents, in the absence of the other contextual documentation that may well exist within Head Office. Despite Mr Quest's assertion as to the workings of "new for old" having been explained by Saud, absent a witness to explain first-hand how it was intended to work and was actually implemented, we see that AHAB would invite the inference that no other documents were available at Head Office and none required against which the new borrowings would have been compared to the old borrowings. Instead, simply that the process relied only upon what comparable documents Mr Al Sanea chose to put forward, presumably to Mr Badr. Thus, the very existence of such respectively comparable manipulated documents now presented by AHAB, is itself evidence of the policy and how it must have been implemented. This would be despite the fact that some of them are shown to have come from the Head Office records, suggesting that historical documents were indeed kept there and so may well have been available to Suleiman (at his behest with Mr Badr's help) for monitoring new borrowings.

25. To counter this latter inference which arises from the versions found at Head Office, Mr Quest found it necessary to argue for yet a further inference in respect of a subset of those which showed higher levels of borrowings on those found at Head Office, than on

those found respectively at the Money Exchange. I describe but two instances from among the manipulated documents.

26. In one instance relating to AIH, we see identical documents on Mashreqbank letterhead dated 30/08/06 with identically matching Suleiman and bank official signatures with the only difference being the amount of the loan facilities apparently provided to AIH – with that bearing the larger amount - USD429,000,000 - having been discovered at Head Office and that bearing the lesser amount - USD272,000,000 - having been discovered at the Money Exchange.

27. A second instance relates to ATS where we see identical documents on Gulf Bank letterhead dated 25th July 2006, with identically matching bank official signatures along with the Suleiman signature appearing on the version found at Head Office recording a credit facility of USD258,000,000, while the version found at the Money Exchange in the lesser amount of USD205,000,000, bears the bank officials' signatures but no Suleiman signature. However, there is a later iteration of this Gulf Bank agreement apparently relating to the renewal of this facility in the amount of USD258,000,000, dated a year later on 3rd September 2007. This appears to have been signed by Suleiman along with the same Gulf Bank officials who signed the 25th July 2006 agreement, with this version also having been found only at Head Office.

28. The obvious difficulty facing AHAB's argument presented by these documents is that with "new for old", one would expect the documents bearing on their face the higher and increasing levels of borrowings to have been secreted away (at the Money Exchange or at AIH or ATS offices in Bahrain) from sight of the AHAB partners

(especially at the time Suleiman) rather than being available to them at Head Office. But as this was plainly not the case in instances like these present, Mr Quest was compelled to argue for another explanation and in this regard raised his further hypothesis. This, as I understand it, is to the effect that from year to year, as the borrowings were being increased by Mr Al Sanea and despite his ability to forge signatures on the documents, it was necessary for him to appear to be complying with "new for old". It therefore remained necessary for him to present documentation to Suleiman notwithstanding that he otherwise was able simply to forge his signature on them, as shown by the hundreds of forged documents in the Forgery Schedule. He was therefore required to ensure that there existed within the records of the Money Exchange, or were presented to Suleiman from time to time with the comparable documents for the renewals, documents which bore the higher amounts of borrowings on their face so that when the time came (say typically the next year) for renewal, there would appear already to be documents with the higher, seemingly matching amounts. Hence, for instance, the presence within the Head Office of the credit facility for ATS from Gulf Bank with the higher levels of borrowings being apparent on the face of them. Thus, when the time for renewal came on 3rd September 2007, there was already in existence, in anticipation as it were, the fully executed document bearing date 25th July 2006 in the amount of USD258,000,000 while the level had in fact not been increased from that of USD205,000,000 shown on the other document dated 25th July 2006. As Mr Quest finally explained this hypothesis (at page 105 lines 20-23):

"...we say at the point when (the document) was put on the (Head Office) file, it can only have been for the purpose of concealing at that time, what was the true level of the facility."

29. This hypothesis is but a further illustration of the circular nature of the argument because it would be entirely implausible unless one assumes the existence of a "new for old" policy which did not include reference to historical documents kept at Head Office other than that manipulated with the higher amount for renewal. But even on the basis of that assumption, it is hardly a conclusive argument. This is illustrated by an exchange between Mr Quest and the Court (at pages 107- 108):

"CHIEF JUSTICE: In the case, it seems to me where it suits your argument, you are prepared to ask me to draw the inference that Suleiman would have had knowledge or would not have had knowledge, depending on where the documents were found. In this particular case [here referring to another Gulf Bank of Kuwait facility] you are saying that the fact it was (found) in the Head Office file doesn't mean that he would have known. In other cases, precisely because it wasn't found (at Head Office) you are saying he wouldn't have known.

MR QUEST: I am saying that just because a document was on a file, it doesn't follow that Suleiman would necessarily have known about it. What is significant in terms of his knowledge and what he did as a result is where you can see documents that have been produced as part of the new for old process: because if they had been produced as part of the new for old process, they have been produced for the purpose of showing to Badr and showing to him. Subsequently,

obviously, the facilities are issued, and the next time it comes for renewal, there is a process of showing the then existing facility and the new one."

30. As I remarked to Mr Quest during our exchanges, this argument raises more questions than it answers. In the first place, how does one determine whether the documents were "produced as part of the new for old process"? Taking the aforesaid Gulf Bank of Kuwait facility as an example, are we to assume that the facility dated 25th July 2006 found on the Money Exchange files in the lesser amount of USD205,000,000, was the earlier one which was actually (if not itself also genuinely) transacted? If so, why does it not bear Suleiman's signature? And again if so, would not a copy have been kept at Head Office when signed by him? If not, and we are to assume that on each occasion Mr Al Sanea would have simply presented the previous year's document and the matching one for the current year to be "renewed" and then both taken away by Al Sanea to leave behind at Head Office a "clean slate" so to speak until the next time, why then do we see some of these documents being left at the Head Office? And why then is it to be assumed that no copy of this particular 25th July 2006 facility in the amount of USD205,000,000 was available to Suleiman by way of comparison, when it is suggested he was duped into signing (or at least believing) that USD258,000,000 was the correct level of borrowings for renewal on 3rd September 2007?

31. In all instances, one would have to assume that despite there being no answers to such questions arising, whatever the manipulated documents showed on the face of them must have been intended to evade the "new for old" policy which, itself, must be assumed to have existed and implemented in a manner so as to have allowed for the deceptions inferred.

32. That to my mind, is not an acceptable basis for drawing one-sided inferences of fraudulent behaviour, let alone in a case so already heavily burdened with allegations of fraud on all sides.

33. There are still further concerns arising from the first of the above two examples – Mashreqbank - about the nature of the inferences that can safely be drawn. For while it can certainly be inferred that the facility documents described above as extended to AIH have been manipulated, there is yet a further but clearly different set of documents setting out facilities apparently offered to AHAB itself, in the identical amount of USD429,000,000. These appear to have been duly executed by Suleiman and the bank officials, with one set (fully sealed and attested) found at the Money Exchange and the other not yet sealed and attested) found at Head Office.

34. Of potential significance in this trial where an issue is whether the Money Exchange was used as a "central treasury" for AHAB, is the note on this latter set of documents to the effect that the facilities could be "utilized by the Borrower for purpose of financing working capital requirements."

35. And so the further questions arise: was this a separate facility from that shown to have been offered to AIH? If not, how does one explain the different designation of the borrower? Absent a definitive answer to the former question, is it safe to draw the inference proposed by Mr Quest here - which is that the AIH document bearing USD429,000,000 and dated 30/08/06, would have been presented to Suleiman along with the AHAB document in like amount, to mislead him into signing the latter on 12/06/07 when, it seems, he did sign it?

36. Similar such and yet further questions arise in respect of a number if not all the others of the 16 sets of manipulated facilities documentation – many referenced in a schedule on the manipulated documents presented by Mr Lowe QC in his response on behalf of SIFCO5 to AHAB's application. In this schedule, the telling point is made that it is "impossible to infer misrepresentation to have procured Suleiman's signature for the Gulf Bank Kuwait facility in the amount of USD258,000,000 (discussed above) when there was found among the Head Office discovery a joint and several guarantee of AHAB partners provided to that bank for the even greater sum of USD279,000,000".

37. Other stark examples are those 7 of the 16 sets of facilities documentation which, as well as having been manipulated, bear Suleiman signatures found by Dr Giles to have been forged. If so, the obvious question becomes: what would have been the point of forging the signatures if the purpose of manipulation was to dupe Suleiman into signing, or vice- versa? Included among these are the Mashreqbank and Gulf Bank Kuwait facilities discussed above. Here Mr Quest was unable to offer any plausible explanation, resorting again (at pages 56 -57 of the Transcript) to the hypothesis for the existence of the manipulated documents, which is that Mr Al Sanea needed to give the appearance that "new for old" was being complied with.

Prejudice to the Defendants

38. The second concern emphasized by the transcript exchanges, including Mr Smith QC's timely intervention at page 81, is the potential prejudice that would likely arise to the Defendants on the present state of the evidence, were the amendment allowed so as to plead the manipulation case.

39. As the exchanges above from the Transcript confirm, and as the discussion of the proposed amendments also confirm, the Defendants would be required, at this relatively late stage, to identify from among the discovery those documents which could be relevant to the analysis of the manipulated documents when seen as evidence of "new for old".

40. In order to respond, the Defendants would then need to inspect newly identified documents in detail, to see whether there might be other related documents, relevant to show the full context in which the manipulated documents were generated or deployed. Although an onerous and time consuming task, this would be required as it is already apparent that in several if not all instances, the manipulated documents do not tell the full story of the respective loan transactions. Nor is Mr Quest's response as recorded above in the Transcript on this issue, a satisfactory basis for minimizing the Defendants' concerns: while the Head Office discovery has been available by way of listing, the need for the Defendants to inspect with this issue of manipulation in mind, could not have been earlier anticipated. Rather, it is fair to say that AHAB itself should have inspected and discovered these and all related documents much earlier, especially as they claim to have suspected Mr Al Sanea's forgery (of which AHAB says this is but another method), as long ago as 2009.

41. Mr Phillips QC was adamant about the additional 8 weeks of work that the Defendant's expert Mr Handy would need to do to respond to Dr Giles' report on the manipulated documents. I accept that that could well increase in ways yet unknown, were the Defendants required to undertake the further discovery exercise just mentioned above.

42. That to my mind, would be significantly prejudicial in the manner strongly discountenanced by the case law[8]. It would also be tantamount to a reversal of the burden of proof on this aspect of the case, as the inference contended for by AHAB having been deemed prima facie provable on the face of the manipulated documents, the Defendants would be set the task of disproving it. AHAB has no compunction about this, as is apparent from paragraph 42 of the written submissions in support of the amendment application where it is stated by reference to the case of *Tigris* (infra):

> *"Applying those observations[9] to this case, as it is the Defendants who are relying upon the authenticity of the various documents which, in its pleadings, AHAB disputes and in relation to which AHAB has put the Defendants to proof, it is the Defendants who bear the burden of establishing the authenticity of those documents on the balance of probabilities."*

43. But what AHAB proposes here is the converse of what was approved in *Tigris*. Here it is AHAB who asserts that documents which it produces from its own records and which on the face of them have been manipulated, must have been manipulated by Mr Al Sanea or on his instructions, to mislead and deceive AHAB. Requiring the Defendants to disprove AHAB's hypothesis would be to impose upon them not merely an evidential burden, but an obvious and impermissible reversal of the burden of proof on a pivotal issue in this case. It may not be forgotten that "new for old" was not always AHAB's case. Rather, it started out as one of complete lack of knowledge and authorisation of Mr Al Sanea's borrowings through the Money Exchange, on the part of

[8] See Cole v Smith 2010 (1) CILR 136 at [10]

[9] From Tigris Industries Inc v Ghassemian [2016] EWCA Civ 269 in which the English Court of Appeal per Lewison LJ approved of the dictum of Norris J in the court below, to the effect that an evidential burden rests upon a party producing and relying upon a document of disputed authenticity, to prove its authenticity.

AHAB's partners. AHAB must accept the burden of proving this different case which crucially depends upon a matter so peculiarly within its gift to prove – the state of its partners' knowledge.

44. For all the foregoing reasons, AHAB's application to amend its pleadings, to allow the case on manipulation of documents, is refused.

45. If the state of the evidence were to change, for instance by the adduction of direct evidence from a witness who had relevant knowledge of the putative "new for old" policy and its workings and so could speak to the significance of the manipulated documents, I consider that the matter would be capable of being reconsidered. It must also be recognized that the case law is in favour of allowing an amendment of pleadings even after a trial has begun, if that would ensure a fair trial of all the issues between the parties and where no prejudice, arising from further delay, would result to the Defendants from allowing the amendment at an even later stage[10].

Addition to the Forgery Schedule

46. The second aspect of AHAB's application seeks permission to add the further 22 documents bearing allegedly forged signatures to its Forgery Schedule. This, I am satisfied, would in no sense be pleading a new or different case. And while I am told that it would require a further 3 weeks' work by Mr Handy in order for him to respond to Dr Giles' further report on them, it is clear that this additional work would not be related only to Dr Giles' findings on these 22 documents but also to many others from the existing Forgery Schedule which have not yet been examined by him. All in all, that

[10] See again Cole v Smith and Grupo Torras (both above) and Cayman Hotel & Golf Inc v Resort Gems 1992-93 CILR 385-386.

scope of additional work would be neither untenable before Mr Handy comes to testify in November 2016, nor prejudicial to the Defendants.

Amendment to widen the period of "new for old"

47. The third aspect simply involves striking the word "late" from AHAB's pleading in paragraph 99K of its re-amended Statement of Claim, related to the "new for old" policy, so as to widen the period presently described as having commenced "in or around late 2002 ". This is justified by the recent discovery by AHAB's team, of certain documents regarded as bearing reference to the policy but dated before late 2002. A further amendment to paragraph 101 would change the averment as to what documents were sent to AHAB partners as part of the "new for old" policy, consistent with what AHAB asserts is now being shown by the contemporaneous loan documentation, to have been sent.

48. I allow the amendment to widen the alleged "new for old" period but it is unclear whether, in light of the refusal of the manipulation amendment, AHAB would still seek to amend paragraph 101. If so, I would wish to have an explanation in writing before finally deciding, copied to the Defendants to allow for their response.

49. Finally, while there were concerns raised by Mr Phillips QC in particular whether AHAB acted in good faith in bringing its amendment application at this late stage (referencing the changes over time to AHAB's pleaded case), I find no basis for that concern here. I accept that, although AHAB ought to have discovered the manipulated documents much earlier, they were recognized as such only when the legal team were in the process of comparing documents found on the Head Office files with those found

on the Money Exchange files, in preparation for trial. I also accept that they then acted promptly (and without impropriety) to obtain Dr Giles' opinion on the documents and presented her report on them in timely fashion.

50. All things considered, I am satisfied that the costs of the application, in all its aspects, should be in the cause.

Hon. Anthony Smellie

Chief Justice of the Cayman Islands

Released in draft on 31 August 2016.