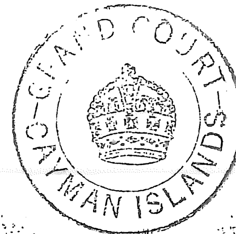


25/6/10

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

DEFENDANTS

IN CHAMBERS
THE 26TH – 30TH APRIL 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES:

Mr. Ewan McQuater QC and Mr. David Quest instructed by Mr. Peter Hayden of Mourant for the plaintiff Ahmad Hamad Algosaibi and Brothers Company ("AHAB")

Mr. T.A.G. Beazley QC and Mr. Brian Kennelly instructed by Mr. Jeremy Walton of Appleby for Mr. Al Sanea

Mr. Stephen Phillips QC instructed by Mr. Jan Golaszewski of Maples and Calder for the 3rd, 9th to 12th and 20th Defendants ("the Maples Defendants")

RULING

1. This case, which has been before this Court since July 2009, is now the subject of an application by the second defendant Mr. Al Sanea by which he challenges the Court's jurisdiction.

2. At the heart of the dispute are the current generation male Algosaibi partners of AHAB, a longstanding Saudi Arabian family partnership on the one hand, and on the other, Mr. Al Sanea, the principal of the Saad Group of Companies, which he

describes as having originated in the late 1970's in Kuwait but which came to include many affiliate entities established by Mr. Al Sanea in 2008 in this jurisdiction. These Cayman entities were, according to Mr. Al Sanea, established for asset protection and investment purposes. They are held through Awal Trust Company Limited, the shares of which were settled upon a Cayman Islands "STAR" trust by Mr. Al Sanea. Having decided to relocate from Kuwait to Al Khobar, Saudi Arabia; Mr. Al Sanea's principal operating entity there has been Saad Trading and Contracting Company, more lately called Saad Trading and Financial Services Company ("STCC").

3. The Saad Group is described as a privately-held diversified conglomerate with specialist divisions in many fields. Amidst the complex and, from Mr. Al Sanea's point of view inter-related, accounts of the affairs of AHAB and the Saad Group, allegations and counter-allegations of fraud abound. The challenge for the courts of the appropriate forum will be to determine the truth by the unraveling of the complexities of the innumerable financial transactions in question.

4. Mr. Al Sanea now disputes the earlier order of this Court which allowed service of the Writ upon him in Saudi Arabia and the central issue presented for determination is whether the courts of the Cayman Islands or the courts or other tribunals of Saudi Arabia are the appropriate forum for the trial of the dispute between himself and the plaintiff AHAB.

5. AHAB, having brought these proceedings in this jurisdiction, argues strenuously for Cayman as the appropriate forum citing a number of factors to be discussed below which point to that conclusion. This position is taken by AHAB although

its operations and the central events of its dispute with Mr. Al Sanea are based in and took place in Saudi Arabia.

6. Mr. Al Sanea argues, with equal insistence, for Saudi Arabia as the appropriate forum, relying on those very factors which connect the dispute to Saudi Arabia but which AHAB would seek to relegate in its arguments for Cayman as the appropriate forum.

7. In having succeeded in showing "a good arguable case" of fraud (as that expression is recognised in the case law (see ***Seaconsar Far East Ltd. V Bank Markozi*** (below) and ***Derby v Weldon*** ***[1990] Ch. 48 at 57***, the latter in the context of the grant of mareva injunctive relief); implicating the many Cayman Islands Saad corporate defendants, AHAB has obtained orders from no less than three different judges of this Court in support of its action here.

8. In the first place, Henderson J decided on the ex parte basis, on 24th July 2009, that a worldwide freezing and disclosure order (the "WFO") should be issued prohibiting the disposal or dealing with assets of Mr. Al Sanea and the Saad corporate defendants up to the amount allegedly defrauded of USD9.2 billion and requiring the disclosure of information about assets held by them. A receiver was then also appointed over the assets of certain of the Saad corporate defendants; an appointment which has since been superseded by the appointment of liquidators in respect of 17 of those corporate defendants which are now in liquidation before this Court.

9. On 28th July 2009, Henderson J. further ordered that the plaintiff AHAB be granted leave to serve its writ out of the jurisdiction upon Mr. Al Sanea by

personal service upon him at any place outside the jurisdiction. This order was granted pursuant to Grand Court Rules Order 11.1. (1) (c) on the basis that Mr. Al Sanea was "a necessary and proper party" to the action brought as of right by AHAB against the 17 corporate defendants in this jurisdiction, the place of their incorporation. Personal service not having been effected, a further order was made by Anderson (Actg) J. on 24th August 2009, allowing substituted service upon Mr. Al Sanea, by delivery of a sealed copy of the Writ (together with a sealed copy of that order itself) to either an adult at Mr. Al Sanea's usual place of abode in Al Khobar, Saudi Arabia or at the offices of STCC in Al Khobar, Mr. Al Sanea's principal place of business. That order also required advertisement of a notice of the Writ scheduled to the order, in the regional 'AL Watan' newspaper which is published in the Al Khobar region of Saudi Arabia.

10. Service upon Mr. Al Sanea was also deemed by Justice Anderson's order to be effective upon the expiry of three working days after delivery of the documents to the offices of STCC.

11. Despite these developments, Mr. Al Sanea has continued to challenge the jurisdiction of this Court, disputing the efficacy of the service of the Writ upon him as not being in conformity with Saudi Arabian law and asserting his arguments of *forum non conveniens* against the trial of the dispute between AHAB and himself in the Cayman Islands.

12. Despite the subsequent findings also of Justice Henderson (on 17 November 2009) and of Justice Anderson and myself in separate written rulings (respectively on 15 March and 19 April 2010) of a good arguable case of fraud to justify the

WFO obtained by AHAB in this jurisdiction, Mr. Al Sanea also asserts that those orders were improperly obtained and should be discharged.

13. Mr. Al Sanea's participation in these proceedings has thus been, on the basis of his challenge to jurisdiction, under protest. He has throughout asserted that his participation is not to be taken as submission by him to the jurisdiction of this Court.

14. That is the procedural background to these proceedings against which Mr. Al Sanea now applies to set aside (i) the order for service out against him ("the jurisdictional challenge"); (ii) the WFO and (iii) the order for service upon him by way of substituted service in Saudi Arabia.

15. The third issue is the subject of conclusions reached by Justice Anderson in his ruling of 15th March 2010, in rejecting Mr. Al Sanea's arguments to similar effect. I therefore regard that issue as decided and see no basis for revisiting it here. I should also add, in deference to the arguments raised before me in this regard, that I see no basis for concern that the method of service actually employed involved, in any way, an interference with the sovereignty of the Saudi State. Nor is there, in my view, any reason to apprehend that Mr. Al Sanea has been prejudiced by the method of substituted service employed. There was cogent evidence, on which the Court relied, that Mr. Al Sanea was seeking to avoid personal service.

16. The other two issues were argued before me in great detail over the course of a number of days by counsel for Mr. Al Sanea, for some of his defendant companies not yet in liquidation (referred to as "the Maples' Defendants") and by counsel for AHAB. The arguments on his behalf were allowed notwithstanding

the fact that Mr. Al Sanea had earlier (by the judgment of Justice Anderson on 15th March 2010) been found to be in contemptuous breach of the WFO by his dealings with certain of the assets which were restrained by it. No objection was taken to Mr. Al Sanea's standing to bring these applications and to make these arguments, his contemptuous behaviour notwithstanding. On the state of the modern authorities, Mr. McQuater QC for AHAB conceded that Mr. Al Sanea is not precluded from making the present applications. (See, in particular dictum of Saville LJ from ***Artlev AG v JSC Almazy Morrie-Sakha*** (below)).

17. I will proceed to deal with Mr. Al Sanea's application even while avoiding any attempt at an inquiry into the merits of the underlying allegations of fraud notwithstanding the volumes of evidence filed in this application on both sides.

18. No fewer than three judges here and two in England in ancillary proceedings (ie: Justices Flaux and Simon in the Commercial Court) have found that AHAB has shown a good arguable case as pleaded against Mr. Al Sanea and against the Saad corporate defendants. This finding has not been challenged by the liquidators of the 17 defendant companies in liquidation.

19. That being so, I consider it is necessary only for me to concentrate on the main issues in dispute now, beginning with the appropriateness of the Cayman Islands as the forum for the trial of the claims. That fraud on a massive scale involving Cayman Corporate defendants has arguably been perpetrated by Mr. Al Sanea does not necessarily determine that Cayman is the most appropriate forum for the trial of those allegations. Similarly, the fact – as I decided in the judgment of 19 April 2010 – that the prosecution of AHAB's claim against the 17 defendant

companies in liquidation may proceed in Cayman, does not pre-empt the present issue of what is the most appropriate forum for the trial of the complex allegations of fraud raised against Mr. Al Sanea himself. The specific issue addressed by that judgment was whether the stay imposed by the Companies Law against proceedings being taken against those 17 defendant companies in liquidation should be lifted to allow AHAB to prove its claim against them; AHAB's action having been brought against them as of right in the Cayman Islands as the place of their incorporation. The stay was lifted on that, and on the further basis of AHAB's circumstantial evidence of the 17 defendant companies' dishonest assistance in and knowing receipt of the proceeds of the alleged fraud in this jurisdiction.

20. While, in coming to those conclusions, I observed *obiter* (at para. 112) that *"considerations which go to the question of the lifting of the stay and those which go ultimately to the determination of the forum conveniens for the trial of AHAB's claim in light of Mr. Al Sanea's challenge [to jurisdiction], are also bound to converge"*, that observation may not prejudice the determination of the issue which is presented now. It was simply a reflection upon the likely overlap of some of the practical considerations going to the issue of *forum conveniens*.

21. The primary question answered in allowing the lifting of the statutory stay, was what was the most appropriate method of determining AHAB's claim against the 17 defendant companies in liquidation – was it in the separate writ action as instituted by AHAB or was it the winding up process? (see para. 111 of the judgment).

22. In answering that question in favour of AHAB's writ action against those Defendants being allowed to proceed, I was not then required to and did not undertake an examination of the somewhat different question presented now; which is to a large extent whether Cayman or Saudi Arabia is the appropriate forum for the trial of the underlying allegations of fraud as against Mr. Al Sanea himself.

23. The fact that many of his Saad companies are to be sued in the Cayman Islands, as the proper forum for the determination of the claims against them, is an important factor for consideration in deciding on the appropriate forum for the trial of the primary allegations against Mr. Al Sanea himself (see ***Credit Agricole Indosuez v Unicof Ltd. and Others*** (below). It is not, however, by itself the decisive factor in the circumstances of this case.

24. It was suggested that I should be guided by the views expressed by other judges in the earlier decisions which touched upon the question of the *forum conveniens* for the trial of AHAB's dispute with Mr. Al Sanea. Here I have in mind, in particular, the decision of Anderson J. of 15 March 2010 in relation to Mr. Al Sanea's contempt. In coming to his decision, Justice Anderson was required to decide whether the earlier order for substituted service upon Mr. Al Sanea in Saudi Arabia was a valid and effective order. His conclusion to that effect I have already recognised should be followed. He was, however, not then primarily engaged upon the wider question now before me of whether Saudi Arabia or Cayman is the appropriate forum for the trial of the dispute. Indeed, this occasion before me has involved the first full inter partes debate about that issue. For this

and reasons to be discussed below by reference to the ***Artlev*** case, I do not regard Anderson J's or any of the other earlier decisions, as dispositive in this regard.

25. I will recite only a summary of the competing allegations as required for the proper consideration of the present issues. A fuller description of AHAB's allegations is to be found of course, in the Statement of Claim and in my judgment of 19th April 2009.

AHAB's allegations

26. AHAB's claims are based on allegations of fraud committed by Mr. Al Sanea by use of his Saad Companies, on a massive and international scale. These allegations arise from investigations carried out by a large team of forensic accountants (from the renowned firm of Deloitte) and lawyers which began in May 2009 and is ongoing. The investigation was engaged by AHAB after notices of default in payment of very large loans were served upon AHAB by a number of banks; loans which were claimed to have been taken by the AHAB division known as "The Money Exchange".

27. The partners of AHAB claim to know nothing of how those liabilities were incurred through the Money Exchange.

28. This issue of the partners' knowledge will be of pivotal importance to Mr. Al Sanea's case, which is that the partners currently in charge of AHAB – Yousef, Saud and Dawood Algosaibi – were fully aware of the indebtedness which was in large part incurred to fund ventures of AHAB undertaken at their direction; as well their own lavish and expensive life styles.

29. For its part, AHAB relies heavily on the fact that its investigation team, on arriving at its conclusions, has already reviewed thousands of documents and interviewed many witnesses. Its case is that Mr. Al Sanea was, until May 2009, the person exercising complete and exclusive managerial control of the Money Exchange which had been given over to his management from as long ago as 1981. Over the years, under his management, it is said that the Money Exchange grew from being a single location cash remittances service, to having offices throughout Saudi Arabia from which it came to operate effectively as an investment bank and through which Mr. Al Sanea was able to borrow and then misappropriate amounts in the order of magnitude of USD 9.2 billion; some USD 5.2 billion of which is alleged to have been defrauded by him to fund his Saad Group of Companies.

30. It is alleged that this latter amount of USD5.2 billion was paid to Mr. Al Sanea or his companies principally between 2000 and 2009, by various dishonest means and that much, if not all, of this money ended up with the Saad corporate defendants in the Cayman Islands.

31. It is said that Mr. Al Sanea was able to obtain the fraudulent loans without the knowledge or authority of the AHAB partners by forging signatures on hundreds of banking documents. That the scale of the unauthorised borrowing became enormous because it was necessary for the Money Exchange not only to fund the payment of over USD5.2 billion to Mr. Al Sanea and his companies, but also to service its ever increasing borrowing. In effect therefore, the Money Exchange became a gigantic Ponzi Scheme taking more and more loans to repay existing

loans until the scheme collapsed under the sheer burden of having to service the debt of USD9.2 billion, including interest discovered at the end to have been incurred.

32. While AHAB disputes owing the liability for these loans, it asserts that as a result of Mr. Al Sanea's fraud, it now faces claims in respect of the unauthorised borrowings from 118 banks around the world. Five major actions at the instance of banks are already pending in the Commercial Court in London, as well as claims in New York, Bahrain, Switzerland, France, the UAE, Saudi Arabia, Jordan and Qatar. The bank claims in the Commercial Court in London are to be tried together at a trial fixed for 8 weeks beginning 7th June 2011.

33. It is further alleged that in carrying out his fraud, Mr. Al Sanea was assisted by senior executives of the Money Exchange and related businesses, including the general manager of the Money Exchange, Mr. Mark Hayley who, it appears, received very large undisclosed "bonuses" by way of cash and traveler's cheque payments directly from Mr. Al Sanea.

34. Mr. Hayley has sworn affidavits in these proceedings in support of AHAB's case and explaining his and Mr. Al Sanea's alleged roles at the Money Exchange. Mr. Hayley is also reported to have been an important source of information for the Deloitte investigation team which is headed by Mr. Simon Charlton, himself a frequent deponent in these proceedings.

35. Based on the evidence seen and analysed so far by the investigation team, Mr. Charlton says that there is a very strong inference that the money taken from the

Money Exchange was sent to and received by the Saad Cayman Islands Companies which were set up by Mr. Al Sanea to hold his personal assets.

36. The tentacles of the fraud are said, by the Deloitte investigation team, to have spread out to other places in the Middle East – Bahrain in particular – and to Europe, in particular Switzerland, France and England.

37. In Bahrain, the Awal Bank (now in administration by the Bahraini authorities) was established by Mr. Al Sanea as the bank for his Awal Group, which is a part of his Saad corporate group. It is alleged by AHAB that Awal Bank was used as an instrument of his fraud by its massive borrowings from the Money Exchange, some of which was booked with the Money Exchange but never serviced and was never intended to be serviced.

38. Through Awal Bank, misappropriated money is alleged to have been sent to Saad Investments Company Limited ("SICL") – through SICL's offices in Switzerland. SICL is the Cayman Islands holding company of the Saad Group through which Awal Bank and Awal Group, as well as Saad Investments Finance Co. Ltd. ("SIFCO") and the SIFCO Group, are held.

39. SICL, although the major link in the chain of command between Mr. Al Sanea and his Cayman corporate structure, is shown to have been based in Switzerland.

40. Another entity of pivotal importance to the dispute and itself also now under the control of the Bahraini authorities, is The International Banking Corporation ("TIBC"), a bank incorporated and licensed in Bahrain.

41. It is a further peculiarity of this already puzzling and complex case that this bank, ostensibly established, owned and operated by AHAB; is said by the plaintiff

AHAB Partners to have been promoted, licensed and operated in Bahrain by Mr. Al Sanea for his own purposes. Specifically, it is alleged that he used TIBC to book loans through the Money Exchange with third party banks, ostensibly on behalf of AHAB, but the proceeds of which were salted away for the use of his Saad Group of Companies.

42. So too, it is said, Mr. Al Sanea was able to abuse other ostensibly Algosaibi entities – Algosaibi Trading Services Bermuda Ltd. ("ATS"), a Bermudian company trading in Bahrain and Algosaibi Investment Holdings EC, a Bahraini company ("AIH") – all as part of an elaborate corporate structure through which he was able to orchestrate the fraud and channel funds away from the Money Exchange for his own purposes.

43. Based on the foregoing allegations, in Section K of the Statement of Claim are set out distinct claims against Mr. Al Sanea for breaches of fiduciary duty owed as arising from his position of trust and confidence as managing director of the Money Exchange (paragraphs 176 and 178).

44. Further, in paragraph 180-184, are claims based on the knowing receipt of the proceeds of fraud by several of the Saad Cayman Companies (and Awal Bank) and of their conspiracy with and dishonest assistance of Mr. Al Sanea in his breach of fiduciary duty by acting as repositories of the misappropriated money and/or investing it for him. And finally in this respect at paragraph 187, are pleaded AHAB's proprietary and tracing claims in which AHAB asserts its unbroken equitable ownership of the money misappropriated from the Money Exchange, and its right to trace that money.

Mr. Al Sanea's counter-allegations

45. Mr. Al Sanea's counter-allegations are now set out in his seven affidavits filed in these proceedings as supported by hundreds of pages of exhibits.

46. As narrated by his counsel Mr. Beazley QC, I will now set them out to the extent necessary for identifying factors raised in them which are to be considered in deciding on the present issue of the appropriate forum.

47. They come against the background, important from Mr. Al Sanea's point of view, that both AHAB itself (including The Money Exchange) as well as his own principal operating company STCC, are based in and operate from Al Khobar in the Eastern province of Saudi Arabia. STCC and several others of the Saad Group of Companies are Saudi entities. The Saad Group is run and controlled from Al Khobar, although several companies in the Group are incorporated and have acted abroad.

48. There have been two generations of inter-marriage between the Algosaibis and the Al Saneas; Mr. Al Sanea himself being married to one of the Algosaibi Partners, Madam Sana Algosaibi.

49. All the Partners of AHAB have always been and are members of the Algosaibi family in Saudi Arabia.

50. Moreover, for all purposes material to the present matter, all the Partners have always lived in and worked in Al Khobar. The present Chairman is Yousef. His predecessor as Chairman was his father, Suleiman Hamad Algosaibi. Suleiman's predecessor as Chairman was Abdul Aziz Hamad Algosaibi; the father of Saud Algosaibi, for a long time the Managing Director of AHAB.

51. While Mr. Al Sanea was never made a member of AHAB's board, it appears that he was highly regarded and favoured by Abdul Aziz and Suleiman when they were respectively the heads of AHAB's board.

52. He originally had a senior role at the Money Exchange as appointed by Abdul Aziz and came to be a highly valued advisor to both Abdul Aziz and Suleiman.

53. While performing that role at the Money Exchange, Mr. Al Sanea claims to have worked closely with those Algosaibi patriarchs and to have gained intimate knowledge of AHAB's business. He was granted by them a 25% stake in the capital of the Money Exchange and 15% share in its profits.

54. It is from this background of longstanding and intimate knowledge of the affairs of AHAB and of its interrelationship with the Money Exchange as an integral AHAB division that Mr. Al Sanea asserts the proposition – crucial to his defence to the AHAB's claims – that the Money Exchange was used for all practical purposes as the "central treasury" and clearing house for all major AHAB borrowings and external financing and for the personal borrowings of AHAB Partners. More especially, so he says, that has been the position with the current generation Algosaibi Partners – Yousef, Saud and Dawood – who are his accusers.

55. On this basis, he asserts that the Partners are and have always been fully aware of the true extent of the massive borrowings of the Money Exchange, much of which was for AHAB's or the Partners' direct use and benefit.

56. While Mr. Al Sanea accepts that he and his companies in Saudi Arabia had over many years a banking relationship with the Money Exchange, this, he asserts, was

by way of both borrowing and lending. Monies were paid into the Money Exchange by him and his Saad companies, and monies were withdrawn or borrowed by them from the Money Exchange. All Saad Group Accounts with the Money Exchange were documented. From time to time there were large deposits with the Money Exchange by him and his companies and the balance of account between them and the Money Exchange varied from time to time. Overall, he asserts that on full accounting the balances will be found to be in favour of himself and his companies; but in any event, if there is an overall balance in favour of AHAB, that is an ordinary debt owed to AHAB by him and the Saad Group as customers of AHAB's Money Exchange, and the balance in favour of AHAB is far less than USD9.2 billion – the amount claimed overall by AHAB in these proceedings and the amount targeted by the WFO. Mr. Al Sanea further insists that his and the Saad Group's banking relationship with AHAB through the Money Exchange, including its deposit making and borrowing, was known to and approved by AHAB; including Abdul Aziz, Suleiman and, most to the point of their current allegations of fraud against him– by Yousef, Saud and other male partners of AHAB, including Dawood.

57. Moreover, he asserts, his companies' borrowings from AHAB were well known to and reported upon by El Ayouty, AHAB's external auditors and were fully recorded in the books of AHAB. El Ayouty is the Saudi branch of the well-known international accountancy practice Moore Stephens.

58. Mr. Al Sanea, for these and other reasons cited in the arguments, invites this Court to regard as incredible, the AHAB Partners' accusations of his use of the

Money Exchange as his exclusive bailiwick from which he was able to manipulate the affairs of AHAB and through which he was able to borrow and misappropriate the enormous sums of money alleged in this case – all without the Partners' knowledge.

59. It is said to be of further moment that much of AHAB's borrowing took place in the financial market from Saudi banks and financial institutions. The sums involved are in the billions of dollars. Suleiman and Saud were important figures in the Saudi Arabian financial world as (for example) senior officers of Saudi American (now SAMBA) Bank, one of AHAB's major lenders. Large amounts of the allegedly unauthorised borrowings are from SAMBA.

60. It is argued therefore, that it is fanciful to suggest that in such circumstances unauthorised and unknown loans could have been obtained from SAMBA and from other major banks or, if taken, would have remained unknown to AHAB Partners. Further, there are a number of documents signed by the current AHAB Partners showing their own knowledge and approval of certain of the allegedly unauthorised loans. Their response that they do not know about these documents and that some of them may be forged, or that they were duped into signing them, is also incredible.

61. Mr. Al Sanea describes the allegations leveled against him by the present generation male AHAB Partners as attributable in no small measure to the fact that Abdul Aziz and Suleiman are now dead and so cannot give evidence. This is of particular relevance to the allegations against him of having forged their signatures on many loan transactional documents. His counter-accusation is that

the younger Algosaibi males are seeking to avoid AHAB's legal responsibilities to the many lending banks and institutions by pretending that AHAB knew nothing of, and did not authorise or approve, the borrowings from the banks, and know nothing of Mr. Al Sanea's banking relationship with the Money Exchange; they seek without justification, to pretend that the borrowing, and that banking relationship, were hidden from AHAB by him over all the years.

62. He sees their retention of western advisers and investigators in the personnel of Deloitte in particular, as deliberately chosen for their susceptibility to being misled by whatever information or lack of information the AHAB Partners chose to provide to them. That Deloitte have been given only limited access to documents, not for want of disclosure on his part as alleged, but by a deliberate scheme on the part of the Partners to obfuscate the truth; in particular, giving Deloitte the false account of their own lack of knowledge. Deloitte are simply therefore not in a position to give this Court an accurate full and frank picture of what really happened. This point is of particular significance from Mr. Al Sanea's point of view because of the major role taken to date by Deloitte in the presentation of the forensic evidence in support of AHAB's case before this Court.

63. AHAB's ultimate objective, says Mr. Al Sanea, is to use this claim brought in this jurisdiction and the "oppressive interlocutory relief it has obtained", as part of a world-wide strategy (including seeking relief against him in other non-Saudi jurisdictions) to apply pressure to him outside Saudi Arabia, rather than letting the Saudi authorities, to whom AHAB first turned (and who have been and are

dealing with the matter in great detail), or the Saudi Courts of their home state, decide the merits of their claims against him.

64. While his role at the Money Exchange was not as alleged by AHAB, Mr. Al Sanea argues that whatever duties he owed to AHAB would be governed by the laws of Saudi Arabia, and whether or not he breached such duties would be a matter for Saudi law and jurisdiction. For instance, Mr. Al Sanea claims to have been granted releases by AHAB which would absolve him from liability in any event. Such releases are governed by and so must be construed according to Saudi law.

65. While some of the Saad Cayman Companies did receive some funds from Mr. Al Sanea and other Saad Group Companies, he asserts that they had no involvement in the alleged unauthorised borrowings or alleged misappropriations. If any of them were to have any liability at all in AHAB's case (and against some no cause of action is even alleged), it would only be because they eventually and indirectly received "misappropriated funds", and Mr. Al Sanea's knowledge is attributed to them. The allegations by AHAB of conspiracy with the Cayman Saad Companies and knowing assistance by the Cayman Saad Companies, he says, are therefore no more than devices to seek to give some justification for bringing these proceedings against him in the Cayman Islands, when it is plain that the appropriate forum for the trial of AHAB's claims against him is Saudi Arabia.

66. Thus is articulated in summary, the factual grounds for Mr. Al Sanea's challenge to the jurisdiction of this Court as the appropriate forum for the trial of the dispute

between himself and AHAB. They must be considered as against AHAB's grounds for contending for Cayman as the appropriate forum.

67. Mr. Al Sanea is, and has at all material times been resident and domiciled in Saudi Arabia and so, in order to bring its claim against him, AHAB had to obtain the leave of this Court to serve proceedings out of the jurisdiction on him in Saudi Arabia. He contends that leave to serve out on him should not have been given, and that the order to serve out should now be set aside and/or that other appropriate relief should be granted to him. The broad basis for these contentions are:

    (i) The Court (per Henderson J.) applied the wrong legal test in granting leave. In so doing the Court failed properly to consider and determine the crucial question whether the case was a proper one for service out of the jurisdiction under Grand Court Rules Order 11 Rule 4(2).

    (ii) The application of the correct legal test would have meant that leave would not have been granted. This was not a proper case for leave to be granted for service out of the jurisdiction. In particular, the Cayman Courts were not, and are not, let alone clearly, the appropriate forum for the trial of the claims against him: the Courts of Saudi Arabia are, and for that matter are clearly the most appropriate Courts for the trial of such claims and it is therefore not unjust for AHAB to be deprived of trial in the Cayman Islands.

    (iii) AHAB did not on the ex parte applications for the Service Out Order and the WFO give a truthful and full and frank account of all material matters,

and made grave misrepresentations. For that reason as well, the orders should be discharged.

(iv) As leave to serve out should not have been granted, and should not now be granted, the Service Out Order should be set aside.

The jurisdiction application

68. This case, as described above, presents a difficult dichotomy. It derives from the circumstance that while AHAB brings its action against the Saad Cayman defendant companies as of right in this, the jurisdiction of their incorporation and domicile, AHAB nonetheless required the leave of this Court before it was entitled to serve the action upon Mr. Al Sanea as a citizen of the foreign sovereign jurisdiction of Saudi Arabia.

69. While that circumstance is by no means in and of itself exceptional, it does give rise to the different and opposing legal principles that apply on the one hand to service as of right within the jurisdiction and on the other, to service outwith on the basis that a foreign party is a necessary or proper party to the action commenced as of right within the jurisdiction.

70. Even though in the former case the action may be regarded as properly instituted against local defendants, in the latter case it nonetheless behoves the Court to be satisfied, that the dispute comprised in the action as between the plaintiff and the foreign defendant, is a dispute which is appropriately to be tried in its jurisdiction rather than in another jurisdiction. This responsibility on the Court is to be discerned from the Rules of Court and the decided cases.

71. It is a complaint of Mr. Al Sanea that this Court (per Henderson J.) failed in respect of this latter responsibility when leave to serve out upon him was granted, by failing specifically to consider whether the Cayman Islands is clearly the appropriate forum for the trial of the action as between AHAB and himself.

72. Reference is made to the transcript of that hearing in which is recorded by way of exchanges between the learned Judge and Counsel for AHAB Mr. McQuater QC, the view being expressed (and it seems implicitly accepted by the Judge) that the argument about whether Cayman was the *forum conveniens* was "not an argument for today" (that is, not a matter to be considered on the then ex parte application); and that the court only had to decide that there was a "good arguable case" that Cayman was the most convenient forum.

73. On the basis of the statutory requirements of GCR Order 11 Rule 4 (2) I am obliged to recognise and accept that the Court may not avoid consideration even at the ex parte stage, of whether Cayman is clearly the appropriate forum.

74. But what happened on the ex parte application must now, in my view however, be seen as overtaken by events.

75. Before me now AHAB accepts that it then bore and still now bears the burden of establishing that Cayman is clearly the appropriate forum, as the correct test to be applied.

76. It must also be accepted that "the good arguable case" test does not apply to the question of *forum conveniens*; that is : in this case whether Cayman is shown to be clearly the appropriate forum. Rather, that test applies to whether or not the claim falls within one of the subheads of Order 11 Rule 1(1) as showing a good

arguable or serious case to be tried and so for leave to serve out. The distinction between the "good arguable case" and the forum tests is clearly recognised in the judgment of Lord Goff on behalf of the House of Lords in ***Seaconsar Far East Ltd. v Bank Markozi*** [1994] 1 A.C. 439 at 456 H – 457 A where he stated:

> *" ..a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable case laid down in Korner's case [1951] A.C. 869], under one of the paragraphs of (Order 11) rule 1 (1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion with particular reference to the issue of forum conveniens."(emphasis supplied).*

77. That being so and it being accepted that on this inter partes application Mr. Al Sanea who was not heard on the ex parte application, now has a right to be heard, I am at liberty to approach the matter afresh.

78. The correct procedure is further explained by Saville LJ in ***Artlev AG v JSC Almazy Rossii-Sakha*** (unreported decision of the English Court of Appeal 8 March 1995 Official Transcripts 1990-1997) - at p4:

> *"In the course of listening to Mr. Downs' application this morning I have gained the distinct impression that the plaintiffs have been proceeding on something of a misconception of the relationship between leave to serve out of the jurisdiction granted ex parte and*

an inter partes application to set the ex parte order aside. The judge at the first stage proceeds upon the basis of the material put before the Court by the plaintiff in the absence of the defendant. The fact that on that basis the judge concludes that the plaintiff has – using the words of the rule "…made [it] sufficiently to appear to the Court that the case is a proper one for service out…" under the rule, does not begin to entail that the defendant is thereby bound by any such determination. To contend otherwise would be contrary to the first rule of natural justice, namely that the tribunal should give all the parties an opportunity to be heard.

In our courts that opportunity is given under Order 12 R8. If the defendant challenges the ex parte order under that rule then the Court will, in effect, reconsider the ex parte order to the extent that the defendant wishes to challenge it. The fact that the plaintiff has satisfied the court on its ex parte application in no way entails that some how the burden shifts to the defendant to demonstrate that leave should not [have] been granted. It remains for the plaintiff to establish, inter partes, that the requirements of O.11 have been met, save in those respects not challenged by the defendants in their application under O. 12 R. 8"

79. Accordingly, it still remains for AHAB to satisfy me on this inter partes application that its case was a proper one for service out under Order 11.

80. Under Cayman law, as under English law, the foundation of the Court's jurisdiction *in personam* is service of its process on a defendant. The Rules as to service of process on a person who is out of the jurisdiction define, for present purposes, the limits of the Court's jurisdiction over that person. A plaintiff has no right to invoke the process of the Court as against a person who is not within its jurisdiction. The summoning to the Court of a defendant who is absent from its jurisdiction, involves an exercise of sovereign power and so is a power that can only be exercised with the permission of the Court.

81. As is stated in **Dicey, Morris and Collins, 14th Ed.** Vol. 1. Ch.11 Rule 22 (1):

> *"Subject to clause (2), [dealing with civil or commercial matters covered by EC Regulations or Convention], the court has jurisdiction to entertain a claim in personam if, and only if, the defendant is served with process in England or abroad in the circumstances authorised by, and in the manner prescribed by, statute or statutory order."*

82. In this case, the "statutory orders" relied upon are those Rules contained in the Rules of Court – GCR Order 11, Rules 1-4.

83. In summary then, the following conditions must be satisfied before the Court may grant leave for service out of the jurisdiction thereby summoning a foreign defendant to submit. AHAB must show:

    (i) a substantive cause of action within the jurisdiction of the Court. See: ***The Siskina [1979] AC 210*** a good arguable case that its claim comes within at least one of the sub- paragraphs of GCR Order 11 Rule 1(1). See ***Seaconsar*** (above);

(ii) that there is a serious issue to be tried in respect of each cause of action in relation to which leave is sought for service out of the jurisdiction. See again ***Seaconsar*** (above); and

(iii) that the Cayman Islands are clearly the appropriate forum for the trial of its claims. See ***Spiliada Maritime Corp v Consulex Ltd.*** ***("the Spiliada") [1987] AC 460.***

84. With that preliminary recitation of first principles, I must now proceed to address the issue whether, in keeping with GCR Order 11 Rule 4(2), there is a proper case for service out of the jurisdiction.

85. In seeking the answer to this question, it is of basic importance to remember that the plaintiff AHAB has sought and obtained leave for service out of the jurisdiction of a case which seeks to prove not only the dishonest assistance and conspiracy of the Cayman Saad Companies in the alleged misappropriation by Mr. Al Sanea and their knowing receipt here of the proceeds of fraud, but also the underlying allegations of fraud and breaches of fiduciary duty against Mr. Al Sanea himself as committed by him in Saudi Arabia. This is so although the ultimate relief sought against Mr. Al Sanea and his Saad companies is the disgorgement of assets by way of AHAB's proprietary and tracing claims.

86. On that basis AHAB invoked GCR Order 11 r.1(1) (c). where it provides:

> *" service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ –*
>
> ...
>
> *(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out*

of the jurisdiction is a necessary or proper party thereto."

87. Thus, the "good arguable case" about which AHAB has managed to persuade a number of judges is in respect of its proprietary and tracing claim as derived from Mr. Al Sanea's allegedly fraudulent conduct in Saudi Arabia and that which grounds its action which has been *"duly served within"* this jurisdiction against the Saad Corporate Defendants. To the same extent, its merits have been addressed as a proper case for leave to join by service out on Mr. Al Sanea as *"a necessary or proper party thereto"*.

88. However, GCR Order 11 Rule 4(2) must still be addressed (in keeping with the case law discussed above) where it provides that:

> *"No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order".*

89. This sub-rule, as we have seen, operates in the sense that the Court must be satisfied that its forum is *"the appropriate forum for the trial of the action, i.e in which the case may be tried more suitably for the interest of all the parties and the ends of justice"* before leave to service out may be granted. This principle also entails that the Court seeks to identify the "natural forum"; that is: *"as being that to which the action had the most real and substantial connection"*.

90. These statements of principle are from the oft-cited speech of Lord Goff in the ***Spiliada*** (above), taking the meaning of "natural forum" as also cited above, as Lord Keith defined it in the ***Abidin Daver [1984] A.C 398, 415.***

91. And as Lord Goff went on to explain in the ***Spiliada*** at 478A:

> *"So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction... and the places where the parties respectively reside or carry on business."*

92. These are now recognised as settled principles of Cayman Islands law on the subject of *forum conveniens*, having been applied many times in the past by this Court and affirmed by the Court of Appeal most recently in ***Brasil Telecom v. Opportunity Fund*** 2008 CILR 211.

93. They nonetheless manage to generate in case after case, as they have in this case, seemingly endless debate and argument. This is the tendency described by Lord Templeman in the ***Spiliada*** case itself (at page 465G) as "*parties to a dispute (choosing) to litigate in order to determine where they shall litigate*".

94. I believe this has come about here primarily because of the manner in which AHAB seeks to prosecute its actions in this jurisdiction.

95. As I have sought to explain above by reference to the nature of the proprietary and tracing claims brought by AHAB in this jurisdiction against the Saad Companies and as against Mr. Al Sanea as a proper and necessary party; although inextricably related to the underlying fraud claim, they are not strictly the same thing.

96. This is what gives rise to the "difficult dichotomy" identified above and, to the extent AHAB has properly sued the Saad Cayman Companies in this jurisdiction seeking to join Mr. Al Sanea as a necessary or proper defendant to that action, Mr. Al Sanea's objections may seem to acquire the flavour of a defendant seeking to

stay an action properly brought within the jurisdiction rather than a challenge to service out upon him by way of the Court's "exorbitant" use of its powers.

97. This distinction, which was, I must observe, recognised in the submissions of Mr. Beazley QC, was aptly captured by Lord Templeman in the following passage from his speech in the ***Spiliada case*** p 464 H – 465A:

> *Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere."*

98. However, the equally authoritative dicta that follows as taken from the Speech of Lord Goff must also be observed (at page 480F):

> *"It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in* ***Sim v Robinow,*** *19 R 655, 668, viz. to identify the forum in which the*

case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction:" see R.S.C., Ord. 11 r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the ***Amin Rasheed*** *case [1984] A.C. 50, 65 that the jurisdiction exercised under Order 11 may be "exorbitant". This has long been the law. In Societe Generale de Paris v Dreyfus Brothers (1885) 29 Ch. D. 239, 242-243, Pearson J. said:*

> *"It becomes a very serious question...whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.*

....The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."

[Lord Goff then explained that the word "exorbitant" in the modern context means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the **Amin Rasheed** case (above)].

99. In this case AHAB as plaintiff commenced its action as of right in this jurisdiction against the Cayman Saad Companies; 17 of which are now in liquidation before this Court.

100. No one disputes that this Court has jurisdiction to entertain that action, nor as I understand the matter, that it would be wrong to seek to confine AHAB to remedies elsewhere as against those corporate defendants.

101. Out of an abundance of caution I will nonetheless make my views clear on this in agreement with Mr. McQuater's submissions in this regard: not only has AHAB brought its action as of right against the Cayman Saad Corporate defendants here, AHAB had to commence substantive proceedings here in order to secure its

claims against those Defendants, 17 of which are now in liquidation in this jurisdiction. As explained in my ruling of 19 April 2010, the proceedings are necessary for any meaningful remedy to be obtained in those liquidations, AHAB's claims having been admitted only to the nominal value of $1 to the extent they have been admitted at all in the liquidations. The question of whether the Cayman Saad Corporate defendants were co-conspirators with Mr. Al Sanea in the alleged fraud, dishonestly assisting him in breach of fiduciary duties owed to AHAB and whether they are in knowing receipt of the proceeds and unjustly enriched thereby, are matters to be determined according to Cayman Islands law and so are all matters which are properly to be tried in the Cayman Islands as the natural forum. It is obvious that the liability of Mr. Al Sanea and the Saad Corporate defendants depend on the same investigation and that he is a proper party to the claims against them. Bringing Mr. Al Sanea into these proceedings also confers a real additional advantage on AHAB since he has assets separate from the Saad corporate defendants' against which a judgment could be enforced. Service out upon Mr. Al Sanea may thus be regarded as essential for the proper determination of the issues joined in the action as so defined. See ***Contadora Enterprise S.A. v Chile Holdings (Cayman) Limited*** 1999 CILR 194 – a decision of the Cayman Islands Court of Appeal which turned on comparable circumstances. And, while the ***Contadora case*** was subsequently disapproved in the ***Brasil Telecom*** case (above) to the extent that it had identified Cayman public policy as a factor going to determine *forum conveniens*; it still stands as authority for the settled propositions – recognised in the *Spiliada case* itself – that where

the laws of a jurisdiction govern the transaction in dispute, that will be a factor going to identify the *forum conveniens*. But this brings the debate full circle to the real difficulty presented by this case as already identified. It is that while the laws of Saudi Arabia may be said to govern the allegations of fraud and breach of fiduciary duties alleged by AHAB to have been owed and breached by Mr. Al Sanea there; the laws of the Cayman Islands are said to govern the allegations of conspiracy, dishonest assistance, knowing receipt and the proprietary and tracing claims which have been leveled against Mr. Al Sanea and his companies in this jurisdiction. And so, although the fact that Mr. Al Sanea is a necessary or proper party in Cayman proceedings is not in and of itself a sufficient reason for exercising the "exorbitant" jurisdiction over him, it weighs very heavily in any consideration of the appropriate forum.

102. This point is made very clearly in ***Credit Agricole Indosuez v Unicof Ltd. and others*** ***[2003] EWHC 2676 (Comm)***, a case in which an action had been properly brought against eight defendants in England and the question, like it is here, was whether service out upon a ninth defendant ("SDV") in Kenya should have been allowed on the basis that it was a necessary and proper party to the English action.

103. Mr. Justice Cooke addressed the matter in these terms at page 201:

> *"Mr. Justice Langley held, in granting permission to serve out, having been informed of political arguments in favour of Kenyan jurisdiction, that he was satisfied that England was the proper place to bring the claims against SDV, in accordance with CPR 6-21 (2A).*

The forum conveniens issue was effectively resolved by the necessary or proper party issue and the question of discretion under CPR 6.21. Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and lis alibi pendens cases make this clear. Although there are connecting factors with Kenya to which I refer later in this judgment, if proceedings are going on in this jurisdiction on the self-same or linked isues, this is clearly the most appropriate forum for those common and connected issues to be tried between all the relevant parties".

104. While the circumstances of each case will be different and must be considered in their own light for the identification of the most appropriate forum and while the circumstances of this case may be far more complex than those before Justice Cooke in that case, the fact that there will, in any event, be related Cayman proceedings to which Mr. Al Sanea is a necessary or proper party goes a long way to "virtually (concluding)" the issue here as well.

105. What Mr. Al Sanea says nonetheless, and what it seems to me I must now consider most closely, is whether it is wrong to allow AHAB to seek to litigate in

the Cayman Islands the dispute as between himself and AHAB, based on the allegations of fraud committed by him in Saudi Arabia. He asserts that Saudi Arabia is the natural and indeed the only appropriate forum for the trial of that dispute. But I stress, even if that is correct – and I must examine the competing factors – that may not by itself detract from the conclusion that Mr. Al Sanea is a necessary or proper party to AHAB's action against his Saad Companies brought as of right in this jurisdiction.

106. And I should add, by way of further consideration of the principles, that even if one of the factors involved in the grant of leave to serve out was the "litigational convenience" of AHAB that, by itself, is not sufficient basis for criticism of the grant of leave. As was stated in the ***Baltic Flame*** [2001] Vol 2 Lloyds Law Report 203 by the English Court of Appeal (per Potter LJ) at para 22:

> *"It is of course the position that, because of the very nature and wording of the rule, the argument of litigational convenience is able to be advanced by the claimant in every case where leave is sought [for service out of the jurisdiction]. While that will not necessarily be sufficient in itself to persuade the Court into a favourable exercise of its discretion, it is , in my view, a factor which may properly encourage a Judge to lean in favour of allowing service out of the jurisdiction in the absence of positive counter-indications. As it seems to me, the very existence of the rule and its underlying rationale bring into play the factor of litigational convenience as a matter to be weighed against any*

reluctance (as opposed to "caution" in the sense referred to above), on the part of the Court when considering whether to exercise its discretion under O. 11 r.4 (2)."

107. AHAB is entitled to pursue such legitimate personal or juridical advantage as it perceives may be obtained by bringing its action in Cayman, provided Cayman is clearly the appropriate forum for the trial of its action.

108. Thus, when the issues are considered from the point of view of AHAB's claim against the Saad Cayman Companies, I do not perceive the problem to be primarily a competition as between Saudi Arabia and the Cayman Islands as the most appropriate forum for the trial of what is at base, AHAB's proprietary and tracing claim. The real problem, to my mind, is whether it should properly be concluded that this jurisdiction is the appropriate forum for the trial of the related but distinct underlying and complex issues of fraud alleged against Mr. Al Sanea.

109. In this regard, while not going so far as to argue that substantial justice is not attainable in Saudi Arabia (as an arguable reason for bringing its entire action here), Mr. McQuater on behalf of AHAB did seek to lay emphasis on the further concern (as explained in the legal expert evidence) that the legal system of Saudi Arabia, based as it is on Sharia law, is not one readily given to the resolution of disputes which involve banking transactions (including the charging of interest). Moreover, it is said and more fully explained below, that the Saudi legal system does not allow for cross-examination of witness and does not embody the sort of full disclosure rules of the English (Cayman) legal system and that this case is especially dependant upon full and frank disclosure from Mr. Al Sanea.

110. Such issues termed "juridical advantages" were also addressed extensively by Lord Goff in the ***Spiliada*** case in terms which I regard as particularly helpful in the context of this case and requiring of full citation; (pp482-483):

> *"Treatment of "a legitimate personal or juridical advantage"*
>
> *"Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the Société du Gaz case, 1926 S.C.(H.L.) 13, 22:*
>
> > *"I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."*
>
> *Indeed, as Oliver L.J. [1985] 2 Lloyd's Rep. 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in Sim v. Robinow, 19 R. 665, 668.*
>
> *The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice". Let me consider the application of that principle in relation to advantages which the plaintiff may derive*

from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery available in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas.

....

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases.

For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum. Such a conclusion is, I understand, consistent with the manner in which the process of saisie conservatoire is applied in civil law countries; and cf. section 26 of the Civil Jurisdiction and Judgments Act 1982, now happily in force."

111. Mr. McQuater did not go so far as to argue that *"substantial justice will not be done"* in Saudi Arabia.

112. If Saudi Arabia is clearly shown to be the appropriate forum for the trial of the underlying allegations of fraud, as being that with which that action has "the most real and substantial connection", AHAB would have to establish, by cogent evidence, that it could not obtain justice there before this Court could order that the action, as primarily based upon those allegations, should nonetheless be tried here (see ***Brasil Telecom v Opportunity Fund*** (above) at p223). In determining whether AHAB has discharged this burden, any alleged differences in the *quality* of the procedure or *quality* of justice obtainable in Saudi Arabia when compared with the Cayman Islands is not a relevant consideration for this court to take into account. For a Court to *"...investigate such a matter and pronounce a judgment on it is not consistent with the mutual respect which the Courts of friendly states, each of which has a well developed system for the administration of justice, owe or should owe, to each other"* - per Lord Diplock in ***The Abidin Daver*** (above) at

p44. (cf. ***Deripaska v Cherney*** *[2009] EWCA Civ. 849* – where the defendants' close connection with the Russian Government was good reason to find that the plaintiff would not have access to a fair trial in Russia). No such allegation arises here.

113. AHAB would be required to show some real reason – such as the unavailability of appropriate remedies (***The Abidin Daver***) p 411 per Lord Diplock) – why it would not be able to obtain substantial justice in Saudi Arabia.

114. There was however, extensive debate before me about whether certain proceedings currently under way in Saudi Arabia before a committee of inquiry appointed by the King ("the Saudi Committee") is an alternative forum for the resolution of the dispute and whether there is a *lis alibi pendens* therein and whether the appropriate remedies that AHAB seeks may be available from the Saudi Committee's deliberations.

115. While on the basis of the evidence presented to me, the true status of the Saudi Committee, the nature of the proceedings pending before it and the results to be expected from its deliberations may not be fully resolved, I concluded that I could not overlook the remit of the Saudi Committee in arriving at my decision in this matter.

116. For reasons to be expanded upon below, the decision at which I have arrived is to affirm that Cayman is the appropriate forum for the trial of AHAB's claims against Mr. Al Sanea and the Saad Corporate Defendants taken as a whole as it is presently framed, but to impose a temporary stay of the proceedings here pending the deliberations of the Saudi Committee or the outcome of any other proceedings

which AHAB may seek or may be directed to take (arguably potentially even by the King himself) in Saudi Arabia in respect of the underlying allegations of fraud against Mr. Al Sanea. This decision is in effect a "case management stay" to be explained below; the alternative recourse for which Mr. Beazley QC (at paras 108 and 126 of his submission) argued. It is a recourse which was implicitly recognised in the last quoted passage from Lord Goff in the *Spiliada* case above; and it resolves the difficult dichotomy presented by this case, in that it allows AHAB to retain the juridical advantages of bringing its action as of right in this jurisdiction against the Saad Cayman Companies and against Mr. Al Sanea as a necessary or proper defendant thereto, even while allowing the "action" such as it may be, in respect of the underlying allegations of fraud against Mr. Al Sanea, to proceed in Saudi Arabia; if indeed it may be tried there.

117. The case management stay is now established as a legitimate exercise of the Court's discretion for the resolution of a forum dispute.

118. In ***Reichhold Norway v Goldman Sachs*** ***[2000] 2 All E.R. 679*** the English Court of Appeal (per Lord Bingham CJ as he then was) in approving of the decision of Moore-Bick J. at first instance accepted that since the Court's jurisdiction to stay proceedings was discretionary and the circumstances in which an application for a stay might be made are almost infinitely variable, there may well be circumstances (as found to exist in that case) where it is proper for the Court to grant a stay of an action pending the outcome of proceedings elsewhere.

119. Citing ***Reichhold*** (ibid), this Court took a similar approach in ***In Re SPhinX Group*** 2009 CILR 28. In the ***SPhinX*** case, as in this, there was local litigation

involving a group of companies in liquidation before this Court, even while the group was involved in proceedings abroad in which fraud was alleged. This Court continued the non-permanent stay of the local proceedings pending the outcome of the foreign proceedings which were pending before the New York Southern District Courts.

120. An important factor then considered as it must be considered now, is the need to avoid the risk of inconsistent decisions in the two fora in respect of the same issues.

121. To the extent therefore, that the Saudi Committee or the Saudi Courts may itself or themselves determine – (or, in the case of the Saudi Committee, through the King, refer to the Saudi Courts for determination) – the allegations and counter-allegations of fraud, I must be concerned to avoid the possibility of conflicting decisions there and here in respect of those allegations.

122. However, I am satisfied that that unwanted outcome will be avoided in this case because the Cayman proceedings are entirely dependent upon a successful outcome in AHAB's allegations of fraud against Mr. Al Sanea.

123. That I can exercise the case management discretion in this way is now, it seems to me, also beyond argument; either as a matter of the Rules of Court or as a matter of the inherent jurisdiction of the Court: See the recent decision of the Privy Council in ***Texan Management Ltd v Pacific Electric Wire and Cable Company Ltd*** [2009] UK PC Case Ref 46. There the decision of the British Virgin Islands ("BVI") Court at first instance to stay its proceedings pending the outcome of related proceedings in Hong Kong was approved by the Privy Council.

124. The action involved a disputed claim to shares in a BVI Company carrying on business in Hong Kong which was clearly the appropriate forum for the trial of the underlying dispute notwithstanding that the ultimate relief – that of rectification of the share register – had to be obtained in the BVI. In recognizing that the BVI action would thus remain extant pending the outcome in Hong Kong and may need to be reactivated to ensure that the plaintiff is availed of the appropriate relief, the following final bit of advice appears at para 95 of the Privy Council judgment (per Lord Collins):

> *"It only remains to be mentioned that the stay is not a permanent one and it remains open to [the Plaintiff] to apply for it to be lifted if circumstances change or new evidence which could not previously have been obtained comes to light."*

<u>The competing "connecting factors"</u>

125. A consideration of these will help to explain my decision. There are several connecting factors to Saudi Arabia (including for these purposes, access to neighbouring Bahrain) even while there are several to the Cayman Islands, but it must be accepted on an objective assessment of the situation, that those which naturally connect the underlying allegations of fraud against Mr. Al Sanea (and his counter-allegations against the AHAB Partners) to Saudi Arabia, would collectively outnumber and outweigh those connecting those allegations to Cayman. That simple approach of seeking to compare the competing factors would not however by itself, resolve the forum dispute in this complex case. As the following exercise will show, there are also several other considerations of

practice, procedure and principle to be considered but in the end those supervening factors connecting the underlying allegations of fraud to Saudi Arabia informed the decision at which I arrive.

126. The competing connecting factors were helpfully categorised in the written submissions of counsel and are also identifiable from the circumstances of the case as discussed above.

First, From Mr. Al Sanea's point of view:

(i) Witnesses as to fact

The most central and many of the other relevant witnesses are in or near Saudi Arabia.

While some, such as Mr. Mark Hayley (former G.M. of the Money Exchange) and certain employees or former employees of the Saad Group of Companies have relocated to several places around the world, the central figures including the AHAB Partners and Mr. Al Sanea himself all remain in Saudi Arabia. A list of many witnesses identified by Mr. Al Sanea as required for his case was presented. They are said to reside in Saudi Arabia or nearby in the Middle East . Many will testify in Arabic.

There is moreover, a travel ban imposed by Royal Decree which prevents several of the central figures – the key AHAB Partners, Directors and Mr. Al Sanea himself – from leaving Saudi Arabia without permission. Yet it is the evidence of those central figures that could be most crucial to the resolution of the fraud dispute; and there is no way of knowing now exactly when the ban will be lifted.

This is not a case which can be resolved simply by reference to the contemporaneous documents (even assuming all the relevant documents become available).

The personal accounts of the central figures will be essential. It is of course to be expected that much of the relevant communications between the central figures would have been in the Arabic language, although it is apparent from the evidence already disclosed, that they are all, to varying degrees, competent in the English language and apparently conducted commercial transactions in English.

There would therefore inevitably be the need for translation from Arabic to English of documentation were Cayman to be the forum for trial of the main allegations of fraud which underlay the dispute. While that is possible, the need for translation and the possible loss of nuance of important documents and oral testimony detracts from Cayman as the appropriate forum.

As would the need to resort to the taking of evidence by way of video link from the important witnesses for the defence such as Mr. Al Sanea himself, and even perhaps on behalf of the Plaintiff, from some of the AHAB Partners who may not be allowed to travel.

There was some dispute over whether a reliable video link may be available from Saudi Arabia, but with the global reach of the technology, I would find that quite surprising of such a relatively wealthy and developed country. But availability aside, the notion of taking this sort of

extensive and document intensive evidence from so many crucially important witnesses over what could be weeks if not months of testimony by video link, is hardly a viable proposal.

Not only would the logistical differences in time zones and the cost of the technology have to be considered, but also the time involved in having to transmit documents electronically and having to marshal the testimony of witnesses about them electronically. There were also concerns expressed about the mores which would preclude Saudi women, such as Madam Sana, from testifying by video link.

As we have seen, the *Spiliada* principles recognise that when determining which is the "natural forum" for trial of a claim factors "affecting convenience or expense (such as the availability of witnesses)" should be considered. (per Lord Goff at p 478 A-B). Subsequent case law in this jurisdiction also illustrates that problems of convenience and expense, in relation to witnesses, are relevant factors when determining jurisdiction. This , in the end, I find to be one of the most weighty factors.

(ii) Mr. Al Sanea's fundamental right to be present

This, cited as a core right under Article 6 (1) of the European Convention on Human Rights, derived from the right to a public hearing in ones presence (***Góc v Turkey*** (judgment of the General Chamber of the European Court of Human Rights (11 July 2002) at para 47); was presented as another factor in favour of Saudi Arabia given the ban on Mr. Al Sanea's travel.

(iii) Physical evidence

Much of the documentary evidence that is likely to be relevant will be located in Saudi Arabia or neighbouring Bahrain. Although, as Mr. McQuater observes, much of it is likely to be in English, the language of the commercial transactions (as has been shown from documents already in evidence), some of the documentation will inevitably be in Arabic.

By contrast, not much of the documentation relating to the underlying allegations of fraud is likely to be in Cayman. The documentation in Cayman would be far more likely to relate to the proprietary and tracing claim and to have arisen *ex post facto* the allegations of fraudulent misappropriation in Saudi Arabia. The costs of reproducing documents and of transporting voluminous documents to Cayman is a factor pointing to Saudi Arabia as the appropriate forum for the trial of the allegations of fraud.

(iv) Other witnesses

AHAB's and Mr. Al Sanea's and his Saad Group's lawyers, accountants and other professional advisors who will be involved in the case are said to be in Saudi Arabia or Bahrain (or elsewhere in the adjacent Middle East). I am told that there is in existence a standing arrangement between the Saudi and Bahraini authorities for mutual legal assistance, including the procurement of witness testimony.

(v) Applicability of Saudi Law

The law applicable to the issues which lie at the heart of the fraud dispute is the law of Saudi Arabia. That has not been disputed by AHAB. The alleged breaches of trust and duty on the part of Mr. Al Sanea took place in Saudi Arabia and the extent to which they may amount to actionable wrong-doing would therefore be a matter of Saudi law.

In an action in this jurisdiction in which the primary allegations of fraud would have to be proved, there would be a requirement that AHAB establishes that the claim is actionable under Saudi law; as well as under Cayman law. (The so-called "double actionability rule", see for example ***Chaplin v Boys*** ***[1971] AC 356***, which remains applicable in the Cayman Islands. There Lord Wilberforce described the principle in these terms:

> *"I would restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done." (at p389 f-g).*

This rule would imply the need to prove that the civil liability of Mr. Al Sanea owed to AHAB exists as a matter of Saudi Law before AHAB's claim would be actionable as a matter of Cayman Law.

There is, however, no positive submission on behalf of Mr. Al Sanea to contradict AHAB's argument that Saudi law would view the allegations of

breach of fiduciary duties, fraud and theft substantially the same as English/Cayman law.

Assertions on behalf of Mr. Al Sanea to the effect that somehow Saudi norms and customs would place such allegations in a different light not readily discernable by a Cayman Court were unsubstantiated by expert evidence and were raised only by Mr. Al Sanea himself in his affidavit evidence.

However, defences which Mr. Al Sanea may have against such claims may exist peculiarly as a matter of Saudi law, as was the opinion of his expert in Saudi law, Mr. Ian Edge; although these were not specified.

(vi) Need for opinion on Saudi Law

The applicability of Saudi law in the Courts of this jurisdiction, although essential, would be a matter of expert evidence when no such difficulty would arise in the Saudi Courts.

(vii) Banking regulators and banking evidence

The evidence of the banking regulators in Saudi Arabia and Bahrain as to the results of their investigations could be relevant to the allegations of Mr. Al Sanea's control and manipulation of the affairs of the Money Exchange, TIBC, Awal Bank, ATS, and AIH.

It seems, at the very least, that the Saudi Committee has undertaken an enquiry into the borrowings from Saudi Banks, including as to how those borrowings might impact Saudi national interests.

Evidence from those banks will be relevant to the trial of the allegations of fraud and may not be readily available to this Court.

The Bahraini authorities have undertaken independent investigations into the affairs of TIBC and Awal Bank there. It is however, as yet moot whether those authorities will be responsive to the process of this Court for the giving of evidence arising from their investigations. They certainly cannot be compelled. The Bahraini authorities are said to be more likely to be amenable to testifying in Saudi Arabia. However, the results of their investigations are likely to become public information and so otherwise than by the testimony of the regulators themselves, available as evidence in these proceedings. Already, an initial report of Ernst & Young, undertaken into the affairs of TIBC in Bahrain at the request of the Bahraini authorities, was available as evidence in these proceedings.

(viii) Other potential defendants

The claims against the Cayman Companies are only "the tip of the iceberg" as regards claims against other recipients of the allegedly tainted funds. A true and complete resolution of AHAB's claims against all recipients would involve trial of claims against many Saudi Companies and entities (e.g. STCC) as well as other companies and entities incorporated or based in places other than the Cayman Islands.

A trial of this action in the Cayman Islands as presently framed against the present defendants will not, in the circumstances, resolve all the relevant claims that AHAB on its case, asserts that it has against recipients of the

proceeds of the alleged fraud. AHAB has not told this Court that the Cayman action is the only action it will bring in respect of the alleged wrong-doing or that it will not make such claims against other companies or entities, not incorporated or based in the Cayman Islands. Any such suit would or would in many instances, have to be in Saudi Arabia.

As explained above, a Saudi judgment would be recognised and enforceable not only in Saudi Arabia, but also elsewhere. Saudi proceedings by AHAB could, if successful, give rise to what would amount to a world-wide enforceable issue estoppel against Mr. Al Sanea and other defendants and potential defendants.

(ix) Non-enforceability of Cayman judgment

By contrast, there would be difficulties of enforcement outside the Cayman Islands of a judgment obtained against Mr. Al Sanea (and non-Cayman based corporate defendants) in the Cayman Islands, while he (or any such entity) has not submitted to the jurisdiction of this Court. As things stand, no judgment of this Court against him in this action would be regarded by him as enforceable or is likely to be enforceable against him in other countries. For example, none of the rules of private international law relied upon by common law courts in deciding whether to recognise a foreign judgment would be satisfied; see **Dicey** (op. cit.) Rule 36, 14R-049 – 14-083.

The fact that an eventual Cayman judgment would not be enforceable against him (absent his later submission to the jurisdiction) underscores

how inappropriate the Cayman Court is for these claims against him. By contrast, a Saudi judgment against him would be enforceable against assets such as he may have in the Cayman Islands. His assets are principally in Saudi Arabia so proceedings against him would be necessary there in any event. A Saudi judgment against him, being a judgment of his place of presence, residence and domicile, would be enforceable against him where his principal assets are, and would be likely to be recognised and enforceable everywhere.

AHAB's countervailing arguments on forum

(i) Cayman only forum where all claims can be tried at once

Mr. McQuater laid great emphasis on "*the critical and decisive factor establishing the Cayman Islands as the natural forum in that it is the only place where the claims against Mr. Al Sanea and all the corporate defendants (including the Maples Defendants) can be brought in a single court before a single judge. All other factors raised by the parties should be treated as subsidiary to that.*"

I have already expressed the conclusion that that is a fair view of the action when viewed as AHAB's entire claim, including its proprietary and tracing claim. However, as I have also explained, a different view may be taken of the underlying allegations of fraud against Mr. Al Sanea seen as a distinct and justiciable cause of action in Saudi Arabia in and of itself.

It must be emphasised, however, that AHAB regards its action brought here in Cayman as encompassing all the allegations and claims it has against Mr. Al Sanea and against (at least) his Cayman companies.

(ii) Mr. Al Sanea's connections to Cayman

Mr. Al Sanea's personal connection with the Cayman Islands must be recognised despite his protestations to the contrary. He deliberately chose to establish the corporate defendants here as a base for his offshore operations and has involved his Cayman corporate empire in arrangements now alleged to amount to massive international fraud. According to its financial statements SICL was established specifically for the purpose of holding and managing his personal assets. To allow him to disavow these connections would be to allow him to use the Cayman Islands as a flag of convenience.

(iii) Mere geography not to be ascribed undue importance

The fact that Mr. Al Sanea's and the AHAB's partners' homes and offices are located in Al Khobar in Saudi Arabia and that the events giving rise to the alleged fraud took place there should not be ascribed undue importance. This is not a family dispute and as Anderson J. found, it would be facile to look at mere geography in selecting forum.

The international nature of the allegations must be borne in mind – the manipulation and forgery of financial records and the subornation of senior banking executives, all funded by money borrowed from more than

a hundred banks around the world. No single forum appears more suitable than the Cayman Islands.

(iv) Travel ban

As to the travel ban imposed (apparently at the request of the Saudi Committee), Mr. Al Sanea's evidence is that the Saudi Committee is resolving the dispute between him and AHAB "*as a matter of urgency* (his 4th Affidavit para. 56)". If that is right, then there is every reason to think that the travel ban against him will be lifted in the near future.

Moreover, as it is within the power of the Saudi authorities to give dispensation to allow Mr. Al Sanea to travel to participate in a trial of such crucial importance to him here, there is no reason to suppose that that would not happen. Mr. Al Sanea has apparently sought no such dispensation as yet. Certainly, it is the intention of the AHAB Partners to attend to testify here in Cayman, and if necessary, they would seek dispensation from the ban for those purposes.

As a last resort, Mr. Al Sanea could be required to give evidence, as could any other witness (including Madam Sana, despite her protestation) by video link. Limiting the number of witnesses who must testify by video-link is a viable proposition.

(v) Travel and accommodation costs

While the travel and accommodation costs of witnesses from around the world would be very significant if the trial were taken in Cayman, they

would be just as significant if taken in Saudi Arabia. Many of the witnesses are in places other than in Saudi Arabia. Moreover, such costs would pale into insignificance in comparison to the legal costs if the dispute had to be resolved in separate proceedings in Saudi Arabia and Cayman.

(vi) Documents availability and translation

Nor should the availability of documents be an issue. Mr. Al Sanea has acknowledged that a scanned database is being created and should in any event be created of all documents wherever they are located. That being so, making them available for trial in Cayman can just as readily be done as in Saudi Arabia. Any difficulty likely to arise would only be due to Mr. Al Sanea's recalcitrance in giving full disclosure of documents which he removed from the Money Exchange.

Issues of language are not likely to be an obstacle either. The case will be document intensive and, as has been seen from the evidence of Mr. Hayley the former general manager of the Money Exchange, although the Money Exchange, ATS and TIBC were based in Saudi Arabia and Bahrain, they did business almost entirely in English and were staffed almost entirely by English speaking expatriates. They were English language businesses and the documentary records of the Money Exchange and ATS were almost entirely in English. Translating the many thousands of pages of English documents into Arabic, as would likely be required for the Saudi Courts, would be an expensive and colossal task.

(vii) Expert witnesses

As to expert witnesses, both sides have already instructed English speaking experts on forensic handwriting examination – Dr. Audrey Giles, based in the UK (by AHAB) and Mr. Gus Lesnevich based in the US (by Mr. Al Sanea).

They, like the English speaking accountancy expert witnesses, could more readily testify in the Courts in Cayman than through translators in the Saudi Courts.

(viii) Saudi law

While AHAB does not dispute that Mr. Al Sanea's duties to AHAB as managing director of the Money Exchange arise under Saudi law, Mr. Charlton's evidence (his first Affidavit para 142) is that he has been advised that Saudi law imposed fiduciary-type duties on a director/employee which are similar to those under Cayman/English law.

If so, as stated in **Dicey** para 12-029:

> *"If the legal issues are straight forward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance."*

Mr. Al Sanea's expert on Saudi law, Mr. Edge, says (at his 1st Affidavit para 37) that Saudi Arabian law covers the same areas as those raised by the claims brought by AHAB here and that the Cayman Court would not

have a sufficient level of understanding to appreciate the subtleties of Saudi law which, in his view, can only be found in Saudi Arabian Courts. Mr. Edge does not however, go on to identify just what relevant differences there may be as between Saudi and Cayman law on the issues such as give rise to "*subtleties*" of potential misunderstanding.

(ix) More appropriate procedure

While not inviting this Court to undertake the odious comparison of Cayman Islands and Saudi Arabian procedure to suggest that one system is superior to the other, Mr. McQuater did press for the conclusion that in exercising its broad discretion, the Court can and should take into account which forum offers the more appropriate procedures for the particular case. Such considerations will lead to different conclusions in different cases and in each case the question is what *"is in the best interests of the parties and the ends of justice"* (per Lord Goff in ***Spiliada*** (op. cit)). There are three essential areas in which the Cayman procedure would be far more convenient for all the parties and the ends of justice:

(a) **Witness evidence and cross-examination**

The parties are agreed that, in a case where there are allegations and counter-allegations of fraud and dishonesty, cross-examination of witnesses will be essential.

However, on an unusual point of agreement, the Saudi law experts Mr. Edge (for Mr. Al Sanea) and Mr. Vogel (for AHAB) both

acknowledge that there is no provision in the applicable Saudi procedural rules for cross-examination as of right.

Even more fundamentally, according to Mr. Vogel (1st Affidavit at para 55), Islamic law disqualifies from testifying any witness who has a potential or deemed interest in the outcome of the dispute. The disqualification extends to the parties themselves and to their agents and employees, including former employees. That would prevent from testifying almost all of the witnesses identified by AHAB and by Mr. Al Sanea, including witnesses identified by Mr. Al Sanea as "critical".

All parties should therefore wish to take advantage of Cayman procedure for good and understandable reasons. Saudi procedure suits no one.

(b) **Discovery**

Discovery is recognised by all parties as being of critical importance in this case involving such wide spread allegations of fraud.

Mr. Al Sanea has already made liberal use of the Cayman discovery process by requiring copies of each and every document referred to in AHAB's pleadings, and in having made an application to the Cayman Court for discovery orders. This is even while he has refused to make full discovery of documents taken from the Money Exchange. There will likely be the need for

compulsory pre-trial discovery. Such orders are however not available in Saudi Arabia. Mr. Vogel says (at 1st Affidavit para 52) that the only form of compulsory document production which exists is via the Court's discretion during the trial (and not beforehand) to require a party to produce relevant documents. Such a process would be wholly impractical in the present case.

Mr. Edge while asserting (IE2 para 34) that there is "no reason why a Sharia court or quasi judicial tribunal could not accede to a request" by a party, makes no clear assertion that there is any established procedure for such orders to be made.

(c) **Compulsion of foreign witnesses**

Similar concerns arise in relation to the power and procedure of a Saudi Court to compel disclosure or live testimony from non-parties, whether within or outside of its jurisdiction. This Court can expect to be able to do so even in the case of non-resident third parties by means of letters of request under the Hague Convention; although that is said not to be available from Saudi Arabia.

According to Mr. Vogel (FEV1 paras 52, 54); Saudi law does not permit compulsion of either testimony or documents from non-parties.

(x) The "Cambridgeshire factor"

This invokes the name of a ship which was the subject of a separate action, related to and preceding the ***Spiliada*** action and which involved

similar factual and scientific circumstances. One of the key factors in the ***Spiliada*** case which later persuaded the Courts (including the House of Lords) to select England as the appropriate forum was what has become known as "the Cambridgeshire factor", which refers to the "efficiency, expedition and economy" of having the case tried by lawyers and before judges who are already familiar with the circumstances of the case (as they were in ***Spiliada*** familiar with the earlier ***Cambridgeshire*** case ***[1985] 2 Lloyds Rep. 116, 124***). Lord Goff explained the point at p 485 in these terms:

> *"I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the ship owners, but also constituted*

an advantage which was not balanced by a countervailing equal disadvantage to Cansulex, and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the Cambridgeshire action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy – and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case.

This is not simply a matter, as Oliver LJ suggested, of financial advantage to the ship owners; it is a matter which can, and should, properly be taken into account in a case of this kind, in the objective interests of justice."

127. I acknowledge, in agreement with Mr. McQuater, that Lord Goff's comments are directly applicable to this case. Already a great deal of time and money has been spent in familiarising several teams of lawyers for the presentation of this case before this Court. Three members of this Court, as well as the Court of Appeal have already acquired considerable knowledge about this case through the hearing of substantial applications arising from it. There can be no denying that the dispute between AHAB and Mr. Al Sanea now very much feels like (and it appears is reported around the world as being) a Cayman Islands case.

128. The foregoing listing and discussion of the competing connecting factors demonstrate how difficult this forum application is to resolve by seeking to identify the "natural" forum. There are many compelling factors in favour of Saudi Arabia as there are indeed in favour of the Cayman Islands.

129. Some logistical concerns about the presentation of evidence – both testamentary and documentary – fall no more heavily on one side of the scales than the other. For instance, just as there may be the need for translation from Arabic to English before the Cayman Courts, there will be the need for translation from English to Arabic before the Saudi Courts.

130. There are, however, the other equally important factors which together, in my view, bring the scales down heavily in favour of AHAB's choice of Cayman as the appropriate forum: the obvious amenability of the Saad Corporate Defendants established here by Mr. Al Sanea himself and the good arguable case of their involvement in the fraud allegedly committed by him (see ***Credit Agricole*** (above); the fact that they may well have assets against which a judgment might be enforced; the three (at least) distinct juridical advantages identified (that is: the ability (doubtful in Saudi Arabia) to compel and cross-examine witnesses; a full discovery process and compellability of overseas witnesses by Letters Rogatory); the "***Cambrigeshire*** factor" and – given that the action here is the first (subject to the discussion below about the Saudi Committee) and only one in which the dispute is fully enjoined – the capacity to avoid the risk of multiple actions and inconsistent outcomes in different jurisdictions.

131. In the end though, I do not think it can be denied as things presently stand, that Saudi Arabia, <u>if it offers an available forum</u>, may be the more appropriate forum for the trial of the underlying allegations of fraud against Mr. Al Sanea. The alleged misconduct took place in Saudi Arabia and the preponderance of the witness testimony and documentary evidence undeniably will have to be obtained there.

132. AHAB does not go so far as to argue that it cannot obtain substantial justice in Saudi Arabia even while seeking to invoke the legitimate juridical advantages which this jurisdiction offers. But that cannot altogether resolve the difficulties: As Lord Goff observed in the **<u>Spiliada</u>** (above) at para 112) the Court should not be deterred from granting a stay of proceedings or from exercising its discretion against granting leave under RSC Order 11 simply because a plaintiff will be deprived of certain juridical advantages.

133. The "*key to the solution*" as he also emphasised and as I repeat here, is "*to consider where the case may be tried [most] suitably for the interests of all the parties and the ends of justice*".

134. By requiring AHAB to resort to the Courts or other tribunals of Saudi Arabia for the trial of the allegations of fraud against Mr. Al Sanea, even while its action here (modified as may become necessary) is temporarily stayed, AHAB would not lose the juridical advantages identified insofar as there would remain issues to be tried in Cayman.

135. On the other hand, if successful in Saudi Arabia on its fraud claim, AHAB can expect to have the important advantage of a judgment in its favour which would

be more widely and generally enforceable there (and perhaps elsewhere) than a judgment based on allegations of fraud as proven only in the Cayman Islands. I did not understand Mr. McQuater to demur from this proposition. The issues remaining to be tried in Cayman would also be greatly reduced.

136. When viewed in that way, the problem condenses into one of how AHAB should be required to prosecute its case. Should it be prosecuted as presently pleaded entirely before this Court? Or should it be prosecuted first based on the allegations of fraud in Saudi Arabia against Mr. Al Sanea for subsequent enforcement of a judgment, including by tracing of assets in this Court (or elsewhere)?

137. In all the circumstances of this case, I think the answer should, as a matter of proper case management, be in the affirmative to the second of these two propositions; even while concluding that Cayman is the appropriate forum for AHAB's claim viewed as a whole

138. In coming to this conclusion, I also emphasise that there should be no concern over the possibility of conflicting outcomes here and in Saudi Arabia. All are agreed that should the underlying allegations of fraud fail, so would the proprietary and tracing claims.

139. There remain the questions whether Saudi Arabia is an available forum and whether there is already a *lis alibi pendens* there in one venue or another.

140. Given the time and effort taken over those issues in the arguments before me, I think I am obliged to address them; including as my treatment of them has served

to inform the decision at which I have arrived for the imposition of the case management stay.

Is Saudi Arabia an available forum: is there a Lis Alibi Pendens?

141. Apart from the Saudi Committee to which I must return below, it is proposed on behalf of Mr. Al Sanea that the judicial or quasi-judical system of Saudi Arabia provides an available and appropriate forum for the trial of all the issues in dispute.

142. First, there are the general Saudi Courts (which apply Islamic or Sharia law (the main formal source of which is the Holy Qu'ran and the Sunna – a collection of allegories, recitations and proverbs or "Haddiths") supplemented in Saudi Arabia, by laws and regulations ("anzima") promulgated by the King (See first affidavit of Mr. Jamal Al-Muzein of "JAM" 1, paras 7-21).

143. Second, there is the Board of Grievances – a separate judicial tribunal established by the King. While having a more limited jurisdiction than the general Courts, the Board of Grievances was established to try special cases, including commercial cases. The Board of Grievances also applies Sharia law.

144. Plans announced in 2007 to delegate its jurisdiction to deal with commercial disputes to a specialized Commercial Court within the re-structured Sharia Courts have not yet been implemented (JAM 1 para 33). Within the existing justice system of Saudi Arabia, it appears that disputes of this kind would likely be referable to the Board of Grievances which would then refer specific specialized aspects of it to various Committees which are offshoots of the Board, depending on the issues involved. So, for example, issues relating to banking disputes could

be referred to the Committee for the Settlement of Banking Disputes (JAM1 para 43).

145. It is said, on behalf of Mr. Al Sanea, that the Board of Grievances is clearly capable of dealing with this dispute and has already in fact had its jurisdiction invoked by AHAB in a related matter.

146. This is not accepted by AHAB on whose behalf Mr. McQuater explained (based on the evidence of Mr. Al Fahad (AHAB's lawyer having first hand knowledge of the matter), that the matter in question before the Board of Grievances is a claim by AHAB against Mr. Al Sanea unrelated to the present dispute, for the surrender of certain shares in SAMBA Bank belonging to AHAB and which Mr. Al Sanea had improperly taken. While the claim to the SAMBA shares was first taken by AHAB before the Saudi Committee seeking an immediate resolution by the King, the Committee declined to so advise the King but advised instead that the claim be taken before a Sharia Court, which the Board of Grievances is.

147. More fundamentally, however, Mr. McQuater emphasizes the reasons to doubt that the Board of Grievances would be an appropriate or available forum.

148. Mr. Vogel, AHAB's expert in Saudi law and procedure explains (FEVI) that there is jurisdictional uncertainty affecting cases involving banking transactions because of the essentially un-Islamic nature of lending at interest; transactions which would be essential to AHAB's claim.

149. He states that both the Sharia Courts and the Board of Grievances have long been known to refuse jurisdiction over cases involving un-Islamic transactions; and that it is uncertain as to whether they would be prepared to overlook the Islamic

unlawfulness of the transactions – somewhat, it seems to me, like asking a common law court to overlook public policy restrictions.

150. Mr. Vogel's view is that the Board of Grievances would ultimately accept jurisdiction, but perhaps only after appeal, and that resolving the jurisdictional uncertainty could easily take several years.

151. Mr. Edge (Mr. Al Sanea's expert on Saudi law) also discusses (at IEI) the several likely permutations that could arise in respect of AHAB's claim as a matter of Saudi jurisdiction. From his evidence it seems much would depend on the nature ascribed to the claims – whether civil, criminal or more specifically, as relating only to banking transactions.

152. If given that latter classification, it is his opinion that the claims would be heard by the Committee for the Settlement of Banking Disputes. If the claim were made as a debt claim relating to unsettled loans involving the Money Exchange, the misappropriation of funds and/or claims for compensation for losses, his opinion is that the matter would be heard by the Board of Grievances.

153. Given that AHAB's claim against Mr. Al Sanea involves all the elements laying across that jurisdictional spectrum, one is left with the firm impression, as advised by Mr. Vogel, that there would be at least initial uncertainty and delay about the forum in which AHAB's claim could appropriately be taken, if indeed there is such a specific forum available in Saudi Arabia.

154. It follows that I must accept, at the very least, that there could be some considerable time and expense taken before AHAB might finally be able to present its case for fraudulent breach of duty and misappropriation, pleaded as

specifically as it has been in this jurisdiction, before an appropriate forum in Saudi Arabia. But to be clear, this is not a finding in any sense that AHAB would be placed at risk of "*substantial injustice*" in the meaning discussed in ***Konamaneni v Rolls Royce*** ***[2002] 1 WLR 1269*** by Lawrence Collins J (as he then was). Indeed, as was pointed out in that case, delay is a reality that attends the process of adjudication in all jurisdictions and should not by itself - even measured in years – be taken as defining one jurisdiction to be a less appropriate forum than another.

155. What is of common concern here however, given the complex nature of AHAB's claim, is the indefinite nature of the process contemplated by which a suitable forum (or fora) might be identified and finally engaged in Saudi Arabia. There is no basis, as yet, for supposing that there would be further delay beyond that kind of delay.

156. I must recognise though, that that is looking at the matter from the points of view of AHAB as plaintiff and Mr. Al Sanea as defendant. Further difficulties could well arise from the point of view of the Cayman corporate defendants as defendants to the AHAB claims in Saudi Arabia.

157. In this regard, Mr. Edge speaks (at para 43 IEI) only to the "possibility" of a Saudi court or committee asserting jurisdiction over the Cayman Islands Companies, given the nature of the transactions complained of (being between Saudi Arabian entities and individuals, and these Cayman Companies), and the close connection between these Companies and the alleged conduct in Saudi Arabia by Saudi subjects.

158. But that would not be an acceptable way forward for many of the Cayman Companies themselves. Those in liquidation have, through counsel, submitted that Cayman is the appropriate forum, indicating no intention to submit to the Saudi Arabian jurisdiction. From their point of view, that is perfectly understandable given the allegations of those Companies' involvement *ex post facto* the events of fraud in Saudi Arabia and the clear connection between their alleged involvement and the Cayman Islands.

159. The exception to this is the Maples Defendants on whose behalf Mr. Phillips argued firmly in support of Mr. Al Sanea's position, for Saudi Arabia as the appropriate forum.

160. It is clear however, that the Maples Defendants and Mr. Al Sanea, under whose control they remain, argue in the same interests.

161. While this fact may not serve to diminish any objective merits their arguments might carry through learned counsel, I must nonetheless be astute to bear in mind the common interests. This consideration goes especially to the reliance that I might place upon undertakings authorised by board resolutions procured by Mr. Al Sanea and given on behalf of the Maples Defendants by Counsel – that they will submit to the jurisdiction of the courts, tribunals and quasi-judicial committees of Saudi Arabia, should I decide that Saudi Arabia is the appropriate forum.

162. Mr. McQuater submits that I should have no regard to these undertakings given at the behest of Mr. Al Sanea who has otherwise shown by his conduct in these proceedings amounting to proven contempt, not willing to abide by the directions

of this Court. That is indeed a cause for concern but, more to the point here, and as Mr. Phillips recognises in his written submissions: "the allegations against (these) six companies are pathetically small and/or irrelevant in the context of the claim of US9.2 billion made against (Mr. Al Sanea)."

163. That being so, even if (which is in doubt) I might safely ascribe to the Maples Defendants an independence of thought and approach, their views should not be ascribed any significant additional weight in the debate between the truly competing and opposed interests of AHAB and Mr. Al Sanea, and certainly no more than I might ascribe to the unquestionably independent views of the liquidators of the 17 corporate defendants in liquidation. As Lord Templeman advised in ***Spiliada*** above at p.465: *"Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose".*

164. On this issue also, it seems to me that the requirement by way of case management that AHAB should, if there is an available forum there, first prove its case in fraud against Mr. Al Sanea in Saudi Arabia before proceeding here against the Cayman corporate defendants, would provide the solution.

The Saudi Committee

165. While it seems clear enough that the Saudi Committee was formed by the King in May 2009 by Royal Order, it is a further peculiarity of this application that the parties are deeply discordant as to what its real remit and objectives are.

166. On this discordant issue, an abundance of conflicting affidavit evidence was put before the Court: on one side that of Mr. Al Sanea himself; of Madam Sana; of Mr. Al-Muzein; and of Mr. Edge and; on the other, of Saud Algosaibi; of Mr. Al Fahad, Mr. Al Habardi and of Mr. Vogel.

167. Of all that evidence the most cogent seems to be that of Mr. Al Fahad, acting as he does (along with Mr. Al Habardi) as the only independent persons having first hand knowledge of what the Saudi Committee is about.

168. But even Mr. Al Fahad's evidence does not yet provide a clear answer to the question what sort of relief AHAB (or Mr. Al Sanea for that matter) might expect to obtain from the Saudi Committee.

169. The discord here is, essentially, over whether the Saudi Committee is an adjudicative or investigative body. Does it have before it and if so, will it pronounce upon the dispute between AHAB and Mr. Al Sanea in a determinative way or will it more narrowly, investigate and advise the King on what steps should be taken either for its determination or for its reference to a Sharia or other Court or tribunal.

170. It is part of Mr. Al Sanea's arguments for Saudi Arabia as the appropriate forum that the Saudi Committee should be regarded as adjudicative and (at least in an advisory capacity to the King) as potentially determinative of the dispute, including AHAB's allegations against him and his Saad Group.

171. Mr. Beazley in his written submissions on behalf of Mr. Al Sanea put the arguments in this way:

"133.2 The plain fact in the present case is that a high powered multi-member Committee in Saudi Arabia, appointed by the King of Saudi Arabia, has been considering the substantive merits of AHAB's contentions for months, and were doing so before the Cayman Court was seized at all.

133.3 The Committee's proceedings lead to adjudication according to Mr. Al Sanea's evidence, including expert evidence of Mr. Edge. That the proceedings result in an "advisory" conclusion does not mean that the proceedings are not adjudicative in effect.

133.4 By contrast, the Cayman Courts are still at the jurisdictional challenge stage, and that could, with possible appeals, continue for some time yet. There is no suggestion that the Saudi Committee should or would stop its work, so the Cayman proceedings, if they continue, will involve wasteful and unnecessary duplication and additional cost. AHAB started the Saudi process, and it should be held to that decision. It is abusive and vexatious for AHAB to pursue substantive proceedings – however the Saudi process is characterised – in two jurisdictions...."

172. Mr. Al Fahad, though not at the inception, has since become AHAB's representative before the Saudi Committee. He explains (at para 8 et seq of his 2nd Affirmation), that those assertions by and on behalf of Mr. Al Sanea are unfounded. That they are based on a misrepresentation of the circumstances in which the Saudi Committee came to be formed and the matters it appears to have

been investigating, and on a mischaracterization of the Committee as an adjudicative body.

173. Mr. Al Fahad explains that the issue of the Royal Order followed an approach to the King made by AHAB in May 2009 to seek the assistance of the King to create, if possible, an arrangement by decree to enable AHAB both to deal with the crisis it was facing (and still faces) as a result of the alleged huge bank debts and to obtain information regarding the debts Mr. Al Sanea had allegedly fraudulently incurred in its name.

174. The approach was made after AHAB had sought, but had been unable to obtain, an explanation of the situation from Mr. Al Sanea.

175. The focus of the Committee's investigations has remained on the issue of AHAB's and presumably the Saad Group's bank debts to Saudi banks rather than on AHAB's dispute with Mr. Al Sanea.

176. Contrary to assertions made in evidence on his behalf in these proceedings to the effect that the Committee (and by extension the King) has made determinative findings exculpatory of wrong-doing by Mr. Al Sanea, Mr. Al Fahad states as follows (para 28 AAF 2):

"28.1 In response to direct questions from me, the Committee has, on a number of occasions, unequivocally told me that it has not made any findings that Mr. Al Sanea has committed any wrong-doing or that AHAB's complaint lacks merit (or indeed any other finding). The last such occasion was at a meeting which I attended on AHAB's behalf on Monday 22 March 2010;

28.2 As far as I am aware, the Committee is not investigating the allegations of forgery made by AHAB against Mr. Al Sanea in these proceedings. I am certainly unaware of any finding by it that there is "no truth" in AHAB's allegations, or of any reason why or how it could reach any such conclusion. And nor would the Committee be likely to inform Mr. Al Sanea of any such finding, either at all or without also informing me.

28.3 ....

28.4 Notwithstanding the fact that the Committee was formulated to make recommendations to the King – as opposed to issuing "orders" – I do not believe that the Committee would communicate its readiness to reveal findings to "several local bankers" [as Mr. Al Sanea proposes that it would in resolution of the disputed indebtedness of AHAB and/or Mr. Al Sanea to Saudi banks] before communicating the same to the parties."

177. While I may not at this juncture answer the question just what kind of disposition might be expected of the King on the advice of the Saudi Committee, I have a sufficient understanding of the nature of the Committee's work to allow me to conclude that it does not constitute a *lis alibi pendens* in the strict sense (see **Dicey** op. cit. para 12-035 – 12-036) such as might itself help to persuade me that Saudi Arabia is already the appropriate forum for the trial of the dispute as fully engaged in AHAB's Statement of Claim in this action.

178. In any event, the weight to be given to the foreign proceedings depends on the circumstances, as ***Spiliada*** (at p485 B-E) and ***The Abidin Daver*** (above at 411-

412) show. At common law there is no "first seized" priority rule. See also ***Deutche Bank v Sebastian Limited*** ***[2009] EWHC 2132.***

179. I also have a sufficiently clear understanding of the juridical processes of Saudi Arabia – complex and nuanced as they appear to be – to be able to accept that AHAB's decision to bring this action in this jurisdiction instead of in Saudi Arabia, is one which AHAB could reasonably have taken on proper legal advice.

180. But this, I repeat, is not in any sense to suggest that *"substantial justice would not be available"* in Saudi Arabia.

181. Even while recognizing that some linguistical, logistical and juridical difficulties might attend the presentation of the underlying fraud case against Mr. Al Sanea in Saudi Arabia, similar difficulties would likely attend its presentation before this Court.

182. Certainly, among such difficulties would be the logistics (and perhaps power) for ensuring the attendance before this Court of all the relevant witnesses and parties. While Mr. Al Sanea, Madam Sana, their employees and professional witnesses may be best advised to submit to the jurisdiction of this Court, the real risk that they might not could possibly render the proceedings here, as presently framed, of doubtful efficacy because they would be by nature in large part, *in personam* as against Mr. Al Sanea.

183. And while I agree with Anderson J. that "mere geography" is not a decisive factor, it is clear that as a matter also of the greater convenience of all concerned, Saudi Arabia, if it is an available forum, may well prove to be a more appropriate forum for the trial of that fundamental aspect of the case.

184. If, on the other hand, it transpires that the Saudi Committee expressly declares itself not to be seized in any substantive way of the disputes between AHAB and Mr. Al Sanea, that would affect the debate in due course. Equally, if its deliberations are not to result in a reference of the dispute to the Sharia Courts.

185. In that or the further event it becomes clear that the Sharia Courts will not (on public policy or other grounds) accept jurisdiction over the dispute, AHAB would then have a very clear basis for then reverting to this jurisdiction for want of access to "substantial justice" in Saudi Arabia.

186. Indeed, I have discerned that a reason why AHAB has not positively asserted that it might not obtain substantial justice in Saudi Arabia may be due to its not having as yet, fully explored the nature of the substantive and procedural relief that might be obtained there.

187. In such an event, Cayman would likely be rendered the <u>only</u> appropriate forum for the trial of the underlying fraud dispute as well; including, I might venture to say, as possibly widened to include the Saudi and Bahraini entities (eg: STCC) not yet joined in any action here or in Saudi Arabia.

<u>SUMMARY OF CONCLUSIONS</u>

1. While Mr. Al Sanea is properly joined to the action brought by AHAB in this jurisdiction as against him and his Cayman corporate defendants, Saudi Arabia may be an available forum and if so, would be the more appropriate forum for the trial of the underlying allegations of fraud raised personally against him.

2. Viewed as an enforcement action, the claim in this jurisdiction is likely to be of greater juridical advantage to AHAB if it follows on a successful prosecution of AHAB's fraud claim against Mr. Al Sanea in Saudi Arabia.

3. If such a claim is not to be justiciable there at all as an available forum (as distinct from being justiciable without the benefit of the English/Cayman law juridical advantages identified above), then Cayman would likely be rendered the only appropriate forum for the trial of the allegations of fraudulent breach of duty as well as the claims based on conspiracy, knowing receipt and dishonest assistance and the proprietary and tracing claims.

4. The solution to the present problem of *forum conveniens* is therefore to impose a temporary "case management" stay of the action as pleaded here against Mr. Al Sanea, thereby allowing time until the Saudi Committee declares its results and/or to allow AHAB to petition the Sharia Courts (perhaps the Board of Grievances) for the resolution of its fraudulent breach of duty claim against Mr. Al Sanea.

5. Service upon Mr. Al Sanea by substituted service in Al Khobar, Saudi Arabia was valid and effective service of this action, constituted as it is with Mr. Al Sanea as a necessary and proper party to the action against the Saad Cayman Companies.

6. For the reasons to follow, the WFO (as already varied or modified) shall remain in place until further order of the Court.

188. The temporary stay for these further purposes will, in effect, operate so as to extend time for the filing of defences but for reasons which also follow, will not

operate to suspend the process of disclosure already ordered by Henderson J and further reinforced by my order of 10 February 2010.

Discharge of the Cayman WFO for want of full and frank disclosure

189. Despite the demonstrated good arguable case for its imposition and the risk of dissipation of assets as now proven by the judgment of Anderson J., Mr. Al Sanea argues for the discharge of the Cayman WFO on the grounds that AHAB failed in its duty of full and frank disclosure of the material facts when it obtained the WFO on the ex parte basis before Henderson J.

190. Much of the material non-disclosure alleged by Mr. Al Sanea was raised with Anderson J. on the contempt hearing but in his judgment (at para 91) he rejected the allegation of non-disclosure in holding Mr. Al Sanea to be in contemptuous breach of the WFO.

191. Having had a further full five days of hearing into this difficult and complex matter, I must accept that much of the details of material may not have been as fully canvassed before the Court then as now. The proceedings are still however, only at the interlocutory stages and as the case unfolds, it may well turn out that different views are to emerge of the voluminous material evidence than have been afforded the Court until now.

192. I have identified some 18 different areas – helpfully itemized under 27 issues by Mr. McQuater – in which Mr. Al Sanea alleges that AHAB failed fully and frankly to disclose.

193. They begin with Mr. Al Sanea's assertion that AHAB failed to disclose the very substantial balance of debt between the Algosaibi and Saad Groups alleged to be in favour of the Saad Group. They then range through the contested expert handwriting; the contested evidence as to forgery of Suleiman's and Abdul Aziz Algosaibi's signatures; the counter-allegations of AHAB's indebtedness to 118 banks said by Mr. Al Sanea to have been incurred through the Money Exchange for AHAB's benefit; to the allegations that the AHAB Partners had knowledge of the use of the Money Exchange as the central treasury for AHAB's and their own borrowings.

194. Mr. Al Sanea also alleges that the AHAB Partners misled the Court by not disclosing their own involvement in and knowledge of TIBC's affairs and by not disclosing that he had resigned from and had earlier obtained releases in respect of his role at the Money Exchange. And finally, for the present purposes of summarizing the alleged areas of non-disclosure; that Mr. Al Sanea had failed to disclose to this Court that his dispute with AHAB was seized by the Government of Saudi Arabia by virtue of the institution of the Saudi Committee by the King.

195. Having described in some detail above, the present state of the dispute between AHAB and Mr. Al Sanea as it now stands on the available material, I think that all I need say on the contention that AHAB has failed in its duty is that AHAB in its response seeks to refute those contentions. It does so by way of affidavit evidence which, at the very least, shows that no conclusion of breach of the duty can be reached without further enquiry.

196. On the present state of the evidence, I am not persuaded that AHAB has breached its duty of full and frank disclosure.

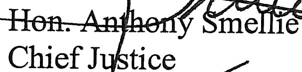
197. On the basis of the case authority of ***Brink's Mat Ltd. v Elcombe*** *[1998] 1 W.L.R. 1350*; ***Arena Corp. v Schroeder*** *[2003] EWHC 1089* (and the case of ***C. Corporation v P*** *1994-95 CILR 189* in this Court to similar effect) Mr. McQuater argued that even if I were to find (which he says I should not) that there is any substance to Mr. Al Sanea's allegations of breach, I should conclude nonetheless that there is no justification for the discharge of the WFO which is proven to be necessary and important in this case. In other words, that the breach should be forgiven as being explicable by the circumstances

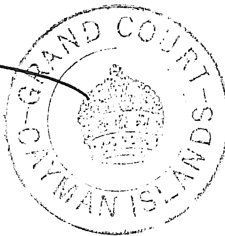
198. In this latter regard, he prays in aid the immensely complicated and heavily documented nature of the case as having imposed a monumental burden on AHAB and its advisers to prepare and present to the Court on the urgent basis dictated by the circumstances of dissipation and further risk of dissipation of assets. Any material oversight which may have resulted in failure to disclose, he says, may be forgiven in the midst of overwhelming evidence of fraud which has been presented.

199. In this regard, I do not however, consider that the Court should be expected to give a committed view at this stage. All I can and will say is that it has not clearly emerged in the evidence so far that AHAB has breached its duty of full and frank disclosure. If it ever so clearly emerges, the Court should be at liberty to consider the position anew.

200. Even while the case management stay is imposed, the risk o f dissipation is shown to remain. The orders for disclosure must also remain (as modified) to assist AHAB with the presentation of its case, whether here or in Saudi Arabia (or elsewhere in response to bank claims).

201. For now, I am satisfied that the WFO should be continued and I so order.





Hon. Anthony Smellie
Chief Justice

June 25 2010