

**AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY v. SAAD
INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION)
and THIRTEEN OTHERS**

GRAND COURT, FINANCIAL SERVICES DIVISION (Smellie, C.J.):

In Open Court on 18th to 22nd, 25th to 26th, 28th to 29th July 2016, 1st to 5th, 8th to 12th, 15th to 19th, 22nd to 24th August 2016, 6th to 9th, 12th to 15th, 19th to 22nd, 26th to 29th September 2016, 3rd to 6th, 10th to 13th, 17th to 20th, 24th to 27th and 31st October 2016, 1st to 3rd, 15th to 17th, 21st to 23rd and 30th November 2016, 1st to 2nd, 5th to 7th December 2016, 16th to 19th, 24th to 25th, 30th and 31st January 2017, 1st to 2nd, 6th, 9th, 13th to 16th, 20th and 21st February 2017, 8th to 10th, 13th to 16th, 20th to 24th and 27th March 2017, 26th to 30th June 2017, 4th to 7th, 10th to 14th, 17th to 21st, 24th to 27th July 2017 and also in Camera on 31 January 2017, 2 February 2017 and 9 March 2017

Fraud – Forgery – Breach of Fiduciary Duty – Proprietary Claims – Knowing Receipt – Unjust Enrichment – Dishonest Assistance – Restitution

Tracing – Maelstrom – Inference – Reversal of the Burden of Proof – Duty to Account

Defence of Illegality

Attribution of Knowledge of Officers to Companies

Conflict of Laws – Double Actionability

The plaintiff ("AHAB") is a partnership incorporated in Saudi Arabia, owned and run by members of the Algosaiibi family. AHAB claimed to have suffered loss of over US\$6 billion. as a result of fraud committed by Maan Al Sanea ("Al Sanea"), a member of the Algosaiibi family by marriage who was the director of one of AHAB's businesses (the "Money Exchange"). AHAB alleged that billions of dollars had been fraudulently used by Al Sanea to fund the defendant companies, each of which is now in official liquidation under the supervision of this Court.

The Money Exchange was established as an unincorporated division of AHAB in 1981. Al Sanea, who had married into the Algosaiibi family in 1980, was appointed its Managing Director and partner (together with AHAB and Yousef Algosaiibi). The primary purposes of the Money Exchange were threefold; to hold AHAB's investments in shares in financial and other institutions, including substantial holdings in a number of Saudi Arabian banks; to provide benefits (including loans) to partners of the Money Exchange or entities related to them; and to raise bank financing for these purposes.

Between 1981 and 2009, the Money Exchange was used to perpetrate one of the largest Ponzi schemes in history, with later borrowing used to repay earlier borrowing, while also providing funds for the ever-increasing indebtedness of the Money Exchange. In May 2009, when the global financial crisis occurred, the Money Exchange was overwhelmed by its indebtedness and collapsed. As a result, AHAB defaulted on billions of dollars' worth of debt. In September 2009, AHAB commenced proceedings against Al Sanea and companies established by him (including entities forming a part of Al Sanea's "Saad Group"), claiming that all of Al Sanea's borrowing through the Money Exchange was unauthorised and seeking US\$9.2 billion, being the amount of unrepaid borrowing at the time of AHAB's default and which represented the proceeds of the fraud that AHAB alleged Al Sanea had perpetrated against it.

In 2011, late disclosure by AHAB in proceedings brought against it by certain lending banks in London revealed that until at least mid-2002 AHAB was aware of and had authorised borrowing by the Money Exchange. AHAB amended its claim in these proceedings to rely on a policy termed "*New for Old*", which AHAB said was intended to restrict Al Sanea to borrowing such amounts as had been borrowed before the time of its implementation; thus to ensure that the borrowings did not increase beyond SAR 7.8 billion (US\$2.3 billion). AHAB's case was that borrowing in excess of that amount was unauthorised and fraudulent.

Over the years following the alleged implementation of "*New for Old*" until the collapse of the Money Exchange at the end of May 2009, some US\$126 billion was raised by the Money Exchange (including through AHAB's financial business in Bahrain (the "Bahraini Financial Businesses") by way of fraudulent borrowing, from at least 118 different banks around the world. The total amount of the unrepaid borrowings at the time of the collapse, was SAR 34.6 billion (US\$9.2 billion). This was the sum that AHAB originally sought in its pleaded case, from Al Sanea and the defendants.

By its claim, AHAB said that Al Sanea engaged in forgery on an industrial scale and, by way of a late amendment, alleged that documents were also manipulated by Al Sanea in order to deceive the Algosais into thinking that the existing and new facility agreements were for the same amount, and thus compliant with the alleged "*New for Old*" policy. AHAB alleged that this unauthorised bank borrowing was misappropriated by Al Sanea to his companies, which were said to have become the repositories for these stolen funds. AHAB pursued claims against Al Sanea as the allegedly dishonest fiduciary, and proprietary claims against the defendant companies in liquidation, into whose hands it is said its misappropriated property had come. AHAB argued that it was unnecessary in order to prove its proprietary claim to show an unbroken chain of transactions and that the Court could infer that transactions were linked. In so arguing, AHAB relied on "patterns" relating to the movement of sums of money from the Money Exchange and the funding of particular defendants, from which AHAB said such an inference (that the transactions were linked) could be drawn. The defendants were also said by AHAB to have participated with Al Sanea in the creation of a "maelstrom" and to have been involved with him in the "cross-firing" of transactions in order to obfuscate the operation of the alleged fraud. Thus branded as constructive trustees, the defendants would have been impressed with a duty to account. AHAB further claimed the defendants were liable to account on the basis that the defendants received the traceable proceeds of AHAB's money with the requisite knowledge of Al Sanea's breach of fiduciary duty or on the basis of their dishonest involvement with Al Sanea and their knowing receipt of the proceeds of his fraud against AHAB.

The defendants defended AHAB's claims on the basis that the AHAB partners knew of and expressly or implicitly authorized the enormous borrowings from banks. The defendants said there was no reasonable foundation for a finding that the documents and signatures impugned by AHAB were deployed by Al Sanea without the knowledge and authority of AHAB partners; and that the transfers out of the Money Exchange were all recorded in the books and records of the Money Exchange, of which AHAB's claim of ignorance and non-authorisation was argued to be false. Moreover, AHAB could not satisfy the evidential rules of tracing, nor was it entitled to a reversal of the burden of proof. The defendants also relied on the defence of illegality; pleading that AHAB was barred from pursuing its claims in equity because of its own involvement in the fraud upon the banks.

Two of the defendants brought counterclaims against AHAB for a total of US\$5.9 billion based primarily upon liabilities recorded in the accounts of SICL and Singularis as due from AHAB, secured by promissory notes.

Held, dismissing the claims and counterclaims:

- (1) From the outset the Money Exchange was a criminal enterprise. Together with the Bahraini Financial Businesses, it was used by Al Sanea, with AHAB's full knowledge, to perpetrate one of the biggest Ponzi schemes in history. The means by which the Money Exchange perpetrated the fraud against the banks was by the dissemination to the banks of falsified financial statements. From near the time of the re-establishment of the Money Exchange in July 1981 until its collapse in May 2009, the financial statements deliberately and grossly understated the extent of the borrowings and so the true extent of the AHAB indebtedness to the banks and its status as a borrower. By presenting them to the banks, the false financial statements became the central instrumentality of the fraud. The methodology used for the falsification of the financial statements was elaborate and sophisticated and, over the course of several years, became institutionalized within the Money Exchange. The AHAB partners knew of and expressly authorized the issuance of fraudulent financial statements and knew of the fraud on the lending banks. As such, the fraud was perpetrated by AHAB and Al Sanea acting in concert against the banks, to obtain borrowing which would not have been provided had the banks known the true financial position of the Money Exchange. These conclusions are overwhelmingly borne out by the evidentiary evidence in the case and which, being contemporaneous with events as they unfolded was to be preferred over the purported recollections of individual witnesses, several of whom were self-interested. (*Armagas Ltd v Mundogas S.A. (The "Ocean Frost")* [1985] 1 LL R 1, 57; *Grace Shipping v Sharp & Co* [1987] 1 LL.R, 207; *Villeneuve v Gaillard* [2011] UKPC 1, 67.
- (2) AHAB needed to borrow through the Money Exchange in order to acquire and hold investments. Al Sanea was allowed by AHAB to deploy a similar strategy for his own purposes as the *quid pro quo* for his willingness also to use the Money Exchange to procure fraudulent borrowing on behalf of the AHAB partners themselves. The alleged "*New for Old*" policy never existed. Without "*New for Old*", there could be no basis for a finding that there was at any time a limit placed upon Al Sanea's authority to borrow so as to have rendered his actions unauthorized and thus no basis for AHAB's claim that Al Sanea had defrauded AHAB.
- (3) Al Sanea's withdrawals from the Money Exchange were not misappropriations, but were loans which Al Sanea was expected to repay. Meticulous record keeping of Al Sanea's indebtedness revealed the intention as between Al Sanea and AHAB, that this indebtedness was to be repaid. Thought to be one of the wealthiest men in the world, the Algosaibis assumed Al Sanea would be able to pay back his debt. However, when the global financial crisis erupted in 2008, Al Sanea was unable to do so, leading to AHAB's default.
- (4) The Court rejected the allegation that the impugned documents and signatures were deployed by Al Sanea without the knowledge and authority of AHAB partners. Moreover, the bank facility documents on which AHAB's manipulation case rested did not bear the weight of inference that AHAB wished to place upon them.
- (5) AHAB's proprietary tracing claims failed. For every proprietary tracing claim, two premises must be established: the antecedent breach of trust or fiduciary duty; and the identification of the traced asset or its traceable proceeds in the possession of the defendant. There having been no fraud on AHAB, and AHAB having at all times been privy to and authorized Al Sanea's activities, AHAB failed to prove an antecedent breach of trust or fiduciary duty by Al Sanea. Even if AHAB had been able to establish the antecedent breach of trust or fiduciary duty, the rules of tracing demand that a plaintiff establish that his property, which has been unlawfully taken from him (a proprietary base) has been used to acquire some other new identifiable property, which may then have been used to acquire another identifiable asset (a series of transactional links) and requires that the chain of substitutes be unbroken. It would be incumbent

upon a plaintiff to plead each element of the chain linking the original misappropriation with the property held by the defendant. That requirement was not satisfied by AHAB. Whilst inference might be allowable as a substitute for direct evidence of a transactional link, or links, in the chain (*Relfo Limited (in liquidation) v Varsani* [2015] 1 BCLC 14 and *Federal Republic of Brazil & Another v Durant International Corp* [2015] 3 WLR 599 considered) it would be impermissible to rely on mere assertion of receipt without linking that receipt to a specific misappropriation, or set of misappropriations. AHAB's claim for equitable accounting for reversal of the burden of proof failed for the same reasons.

- (6) The proper law governing AHAB's equitable claims was the law of Saudi Arabia. The law of Saudi Arabia did not admit proprietary claims against bank accounts, as intangibles and as such, AHAB could not satisfy the conflicts of laws rule of double actionability in respect of its receipt-based or proprietary claims. In any event, as matters of Saudi Arabian law, there was no rule of joint and several liability for harm and damages at large for conspiracy. In the circumstances of this case, a Saudi Arabian Judge would apportion liability between joint tortfeasors on an actual "receipts" basis. As a consequence of the double actionability rule, the liability of the defendants as a matter of Cayman Islands law would be restricted to actual receipts (if any).
- (7) AHAB's attempts to rely on a "maelstrom" argument and on the reversal of the burden of proof also failed. In every case of a "maelstrom" there is a minimum requirement of a deliberate attempt to create a co-ordinated scheme calculated to hinder any attempt to trace the relevant funds. These circumstances had not been proven by AHAB in this case. While there were myriad and complex transactions going back and forth between the Money Exchange and Saad entities, there were apparent commercial reasons for the transactions. There is no factual basis for concluding that Al Sanea used these transactions merely as an overarching and coordinated campaign to divert AHAB's assets or as cross-firing to create a maelstrom to obfuscate fraudulent activity. The transactions appear to have been invariably and accurately recorded for accounting purposes within the ledgers and Deal Management System ("DMS") of the Money Exchange and, to the extent the records of the Saad entities are available, within their records as well. The defendants could not be branded as constructive trustees, and were not subject to the reversal of the burden of proof and were not impressed with a duty to account.
- (8) AHAB's dishonest assistance, conspiracy, and unjust enrichment claims depended on the defendants having received money or assets that represented the proceeds of funds misappropriated from the Money Exchange. As AHAB's proprietary tracing claim failed, so did these claims. AHAB's submission that recovery would be possible against an *indirectly* enriched recipient provided that there was a sufficient causal connection between the payment in question and the enrichment were misconceived and could not survive the decision of the United Kingdom Supreme Court in the 2017 case of *Commissioners for HM Revenue and Customs v Investment Trust Companies (In Liquidation)* [2017] UKSC 29. The general rule (subject to limited exceptions) is that there must be direct dealings between plaintiff and defendant. Where the benefit has not been received "directly" from the claimant it will be difficult to demonstrate that one has been enriched by the other. Further, and in any event, for the purposes of the tort of dishonest assistance, mere receipt of funds, absent more, was insufficient to constitute assistance. None of the relevant defendants' acts provided any assistance, *a fortiori* dishonest assistance, to Al Sanea in his alleged breaches of fiduciary duty. Further, the tort of conspiracy, required an agreement between co-conspirators. AHAB had failed to identify any such agreement.

- (9) In deciding AHAB's assistance-based and the conspiracy claims against the defendants, and SIFCO5 in particular, an important question was whether Al Sanea's knowledge and conduct could be attributed or imputed to each of the defendant companies. The knowledge which a person acquired as an officer of one company will not be attributed or imputed to another company of which he is also an officer, unless he owes a duty to the first company to communicate his knowledge, and also a duty to the second company to receive the notice: *Re Hampshire Land Co* [1896] 2 Ch. 743; *Re Fenwick, Stobart & Co Ltd.* [1902] 1 Ch 507; *Re David Payne & Co Ltd* [1994] 2 Ch 608.
- (10) The defendants' defence of illegality was entitled to succeed. On AHAB's own case, "*New for Old*" involved the continued dissemination to the banks of falsified accounts in order to induce the banks to continue to lend at least as much as was required to prevent the collapse of the Money Exchange and Bahraini Financial Businesses. The Court would not enforce an illegal arrangement and AHAB, as a party to a fraudulent partnership or enterprise was not entitled to invoke the powers of the Court to recover the proceeds of their fraudulent partnership from their fellow criminals so as to profit from it (*Patel v Mirza* [2016] UKSC 42, applied). Alternatively, AHAB lacked clean hands and would not be entitled to invoke equitable remedies.
- (11) Even if "*New for Old*" was real, there was no possibility of AHAB establishing a *locus poenitentiae* in the face of its conduct. On its own case, AHAB had failed to make any attempt at penitence long after the fraud took place. Even had the AHAB partners sought to withdraw from their illegality, they would not have been able to do so; the effects of the fraud were entirely irreversible, the loans obtained by the Money Exchange having been paid off many times with the proceeds of other dishonestly borrowed funds. The proceedings before a specifically convened tribunal in Saudi Arabia did nothing to unravel the years of robbing one creditor to pay off another.
- (12) The counterclaims would be dismissed. The counterclaims were unsupported by any witness evidence regarding the correctness of the accounts or provenance of the purported liabilities. The Ponzi scheme of borrowing was so complex and massive, that no court could be expected to rely merely upon accounting records from within them as proof of these multi-billion dollar counterclaims. These concerns were underscored by the absence of accounting entries in the ledgers of the Money Exchange corresponding with entries in the accounts of SICL and Singularis purporting to record the alleged liabilities and notwithstanding that these entities were all under the control of Al Sanea at the relevant times. The promissory notes which purported to secure indebtedness owed by AHAB to SICL and Singularis were also of dubious authenticity in the absence of the corresponding accounting entries relating to the liabilities.