ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

UNION PROPERTIES P.J.S.C
First Claimant/ Applicant

UPP CAPITAL INVESTMENT CO. L.L.C.
Second Claimant/ Applicant

and

TRINKLER & PARTNERS LTD
First Defendant/ Respondent

THOMAS PIERRE TRINKLER
Second Defendant/ Respondent

PATRICK ALBERT HELD
Third Defendant/ Respondent

FIRST FUND MANAGEMENT LIMITED
Fourth Defendant/ Respondent

JORG KLAR
Fifth Defendant/ Respondent

PARESH CHANDRASEN KHIARA
Sixth Defendant/ Respondent

AMNA HASAN ALI SALEH ALHAMMADI
Seventh Defendant/ Respondent

DAHI YOUSEF AHMED ABDULLA ALMANSOORI
Eighth Defendant/ Respondent

NASER BUTTI OMAIR YOUSEF ALMHEIRI
Ninth Defendant

KHALIFA HASAN ALI SALEH ALHAMMADI
Tenth Defendant/ Respondent

STEFAN DUBACH
Eleventh Defendant/ Respondent

AHMED YOUSEF ABDULLA HUSSAIN KHOURI
Twelfth Defendant/ Respondent

HASSAN ASHOOR AL MULLA
Thirteenth Defendant/ Respondent

BLUE ROCK INVESTMENTS L.L.C
Fourteenth Respondent

DANA MIDDLE EAST INVESTMENT L.L.C
Fifteenth Respondent

MOHAMED HASAN ALI SALEH ALHAMMADI
Sixteenth Respondent

~~**ISLAND FALCON PROPERTY MANAGEMENT L.L.C**~~
~~Seventeenth Respondent~~

ISLAND FALCON INVESTMENTS L.L.C
Eighteenth Respondent

TEXTURE GLOBAL INVESTMENT LIMITED
Nineteenth Respondent

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2023] ADGMCFI 0011
Before:	Justice Sir Andrew Smith
Decision Date:	9 May 2023
Decision:	1. The Continuation Application is refused. 2. Liberty to apply with regard to the costs of the Continuation Application, any such applications to be made by 5.00 pm on 29 May 2023.
Hearing Date:	9 May 2023
Date of Order:	9 May 2023
Catchwords:	Freezing order. Duty of disclosure. Risk of dissipation.
Case Number:	ADGMCFI-2022-265
Parties and representation:	Mr Patrick Dillon-Malone SC and Mr Nils de Wolff instructed by Clyde & Co LLP for the Claimants Mr Andrew Mackenzie of DLA Piper Middle East LLP for the Fourth and Sixth Defendants Mr Benjamin Joseph instructed by Fichte & Co Legal Consultancy LLC for the Twelfth Defendant

JUDGMENT

1. These proceedings were brought by the Claimants, Union Properties PJSC ("**UP**") and UPP Capital Investment Co. LLC ("**UC**"), on 14 November 2022 against thirteen defendants. The claim form describes their complaint as follows: "*In outline, the Claimants allege that a fraud was perpetrated against them resulting in the unlawful and unauthorised use of AED 320,712,867.84 to purchase 391,789,341 units of P-Notes (or Participation Notes), the great majority of the proceeds of which were misappropriated. The Claimants' case is that the Tenth Defendant, Khalifa Alhammadi, is the controlling mind of this fraud, and that he has operated with the assistance of and/or through persons and entities controlled by them or acting at their direction, in particular the other Defendants*".

2. On 15 November 2022, the Claimants applied for freezing orders and proprietary injunctions against all the defendants and six other respondents. The applications were supported by two affidavits of Mr Amer Khansaheb, the Managing Director of UP. After an *ex parte* hearing on 22 and 25 November 2022, on 25 November 2022, I made freezing and proprietary injunctions against nine of the defendants and the six other respondents, but refused relief against the other four defendants. The proprietary injunction prohibited dealings with most of the 891,789,341 P-Notes, and the "*traceable proceeds*" of them. The proceedings against one of the non-defendant respondents, Island Falcon Property Management LLC, were abandoned by the Claimants, and by an order dated 24 January 2023, the orders against it were discharged.

3. By orders dated 6 December 2022, 21 December 2022, 7 February 2023 and 9 February 2023, the proprietary and freezing injunctions against the nine defendants and other respondents were extended to 9 May 2023. By an application dated 4 May 2023 (the "**Continuation Application**"), the Claimants applied for a further extension of the orders, and I heard it on 9 May 2023. At the hearing, I told the parties that I refused the application and the freezing and proprietary orders against all the defendants and respondents lapsed accordingly. I said that I would give my reasons in a later judgment.

4. On 6 February 2023, the twelfth defendant, Mr Ahmed Khouri, had made an application (the "**Jurisdiction Application**") by which he challenged the jurisdiction of the Court to entertain the claims against him. By an application dated 3 March 2023 (the "**Discharge Application**"), Mr Khouri had applied for an order that the proprietary and freezing orders against him be discharged. The Jurisdiction Application and the Discharge Application were heard on 29 and 30 March 2023. One of the arguments advanced in support of the Jurisdiction Application was that this Court is not the *forum conveniens* to determine the claims in these proceedings. The freezing order was challenged on the grounds, inter alia, (i) that there was no real risk of "*dissipation*", that is to say, no real risk that Mr Khouri would, unless restrained, dispose of his assets so as to prevent a judgment being enforced against him; and (ii) that it was not just and convenient to continue the freezing order. I reserved judgment, and permitted the parties to make further written submissions on one discrete point.

5. On 24 April 2023, I gave judgment, and (inter alia) I refused the Jurisdiction Application, I refused the Discharge Application in respect of the freezing order (subject to a qualification that is irrelevant for present purposes), and I granted the Discharge Application in respect of the proprietary injunction against Mr Khouri. In my judgment of 24 April 2023 ([2023] ADGMCFI 0009), I described the claims made in the proceedings more fully than I need do here: reference can be made to it for further details.

6. I concluded that it was just and convenient to continue the freezing order, but (at paragraph 100 of my judgment) I recorded the complaint made on Mr Khouri's behalf that, having been granted the freezing orders, the Claimants had not pursued the proceedings efficiently and expeditiously, and that, if continued, they would remain in force for an excessive time. As I explained, I was troubled about the lack of progress in the proceedings, but was not persuaded, on the material then available, that it was the Claimants' fault.

7. Before I gave my judgment of 24 April 2023, the Claimants had entered into an agreement in principle (the "**Settlement Agreement**") to settle some of the claims that are the subject of these proceedings. The Claimants' representatives did not tell me this before I delivered my judgment: they first mentioned it in a witness statement filed on 5 May 2023 and made by Ms Caitlin Coady of Clyde & Co LLP ("**Clydes**"), the Claimants' solicitors, in support of the Continuation Application. I should set out her evidence about the Settlement Agreement:

> *"I am instructed that, as at [5 May 2023], the Settlement Agreement remains unsigned and that several conditions precedent, including for example the appointment of an escrow agent and third party custodian which persons are intended to facilitate the settlement, remain unsatisfied, although terms have been agreed in principle (subject to contract), as outlined in a Gulf News article dated 17 April 2023.*
>
> *I am also instructed that the specific terms of the Settlement Agreement are confidential and that the parties have been instructed by the Public Prosecutor not to share a copy of the agreement with any third party; not least on the basis that the matters in issue involve ongoing criminal proceedings.*
>
> *I am in a position nevertheless to confirm, from sight by this firm of the terms agreed in principle, that the settlement relates to the alleged actions taken by the Tenth Defendant (i.e. the former Chairman of Union Properties [Mr Khalifa Alhammadi]) and others, including members of Mr Alhammadi's family,...that go way beyond the claims advanced by our clients in these ADGM proceedings.*
>
> *In outline, the terms of the settlement provide that AED 620 million will be paid to [UP] in cash over a one-year period in two components: the first component, consisting of AED 300 million, is payable within one year of signing the Settlement Agreement (which, as at the date of this witness statement, remains unsigned).*

In the circumstances, assuming even that a settlement agreement is signed on the basis of the terms agreed, the Settlement Agreement does not compromise the ADGM Court proceedings, or any claim or part of a claim made by the Claimants in these proceedings, nor does it give rise to a defence of accord and satisfaction. The applicants undertake to promptly notify the court if and to the extent that any recovery is made relating to the misappropriated sums and related damages arising from the alleged fraud involving the use of investment monies to purchase 391,789,341 units of P-Notes that are the subject of the present proceedings".

8. This evidence is, to my mind, unsatisfactory in a number of respects. First, nothing is said about how likely it is that the agreement will be concluded. I can only infer from the material before me that it most probably will be. The matters to which Ms Coady refers as still needing to be dealt with, the appointment of an escrow agent and a third party custodian, seem unlikely to present formidable difficulties. Further, Mr Alessandro Tricoli of Fichte & Co Legal Consultancy, Mr Khouri's legal representatives, refers to a document headed "*Results of the Annual General Assembly Meeting of Union Properties PJSC ...* " that was published by the UP and dated 18 April 2023, and gives evidence that at UP's Annual General Meeting on 17 April 2023 the majority of shareholders approved (in the words of the document) "*the proposed settlement's draft between the Company and Mr Khalifa Alhammadi and others and approved to authorize the new Board of Directors to execute the agreement on behalf of the Company*".

9. Next, the evidence about what has been agreed is vague. I shall come below to the explanation that Ms Coady gives, but I observe here that it appears from the document of 18 April 2023 that a draft of the proposed Settlement Agreement was available to the shareholders. It has not been satisfactorily explained by the Claimants why this draft could apparently be made available to shareholders but not to the Court and the parties to these proceedings.

10. Thirdly, the evidence is vague not only about the terms of the proposed settlement agreement, but also about the parties to it. Ms Coady's statement did not identify them at all. However, the Gulf Times report exhibited to it reported a statement by a representative of UP that agreement had been reached by Mr Khalifa Alhammadi and "*his family members and other former board members*". The defendants and other respondents to these proceedings include other members of Mr Khalifa Alhammadi's family. His sister, Ms Amna Alhammadi is the seventh defendant. Their brother, Mr Mohamed Alhammadi is a non-defendant respondent against whom proprietary and freezing orders were made. So too are companies said to be associated with one or more of the siblings: Blue Rock Investments LLC, Dana Middle East Investment LLC and Island Falcon Investments LLC. The defendants also include these former board members of UP, as well as Mr Khalifa Alhammadi: Mr Jorg Klar, the fifth defendant; Mr Dahi Almansoori, the eighth defendant; and Mr Naser Almheiri, the ninth defendant. It is unclear from the material put before me whether all or any of these defendants and other respondents are party to the Settlement Agreement.

11. Further, I do not find convincing the Claimants' explanation for providing so little information about the proposed settlement. Mr Benjamin Joseph, who represented Mr Khouri at the hearing on 9 May 2023, submitted that obligations of confidentiality are not in themselves a reason to withhold information, but I need not engage with that question. Ms Coady says that she is instructed that the "*specific terms*" of the proposed agreement are confidential, and that the parties have been instructed by the Public Prosecutor not to share a copy of the agreement "*with any third party*". She does not identify who gave her the instructions. More importantly, more information could have been given about the proposed settlement without stating its "*specific terms*" or sharing a copy of the proposed agreement: indeed, as I have said, there is reason to think that more information was provided to shareholders at the Annual General Meeting. It is not said whether the instructions of the Public Prosecutor were given orally or in writing, nor are their precise terms set out. Moreover, at the hearing on 9 May 2023, UP undertook to request the permission of the Public Prosecutor to provide a copy of the proposed terms to the Court and the parties to these proceedings: the clear implication was that previously no such request had been made, and that UP had not raised with the Public Prosecutor its obligations in these proceedings.

12. There is another point: leaving aside the terms of the proposed settlement, the Court has been told nothing about any information that the Claimants have learned about the alleged misappropriations since these proceedings were brought. It beggars belief that they entered into a settlement of this kind without learning something about what became of the assets that they say were misappropriated and the proceeds therefrom. Such information would clearly be material to whether the proprietary injunctions should be continued and if so against whom; it would also be relevant to the question whether the freezing orders should be continued. It might be that all such information would be privileged, but the Claimants do not say so.

13. Mr Benjamin also challenged Ms Coady's evidence that the agreement that has been reached has not compromised the claims in these proceedings, or some of them. He cited Charlesworth & Percy on Negligence (15th Ed) at para 3-112: "*Where settlement is achieved with a number of concurrent defendants it will depend on the terms of the agreement whether any action can survive against others. On the face of it, settlement 'in full and final satisfaction of all causes of action' in a statement of claim against one concurrent tortfeasor discharged also the liability of other tortfeasors even when they had not themselves been included in the claimant's suit .... The critical questions were whether the claimant's claim was for the full amount of his loss and whether the sum was accepted in full satisfaction of that claim. If it was, then satisfaction of the claim extinguished the claim against the other concurrent tortfeasors*".

14. It seems to me far-fetched to suppose that any claims have yet been settled: there is no reason to doubt the evidence that no agreement is yet finalised. As for the position if and when the Settlement Agreement is concluded, Mr Dillon-Malone of Clydes acknowledged that "*whether and the extent to which proceedings are compromised may be a matter of debate*". Without knowing the terms of the Settlement Agreement or even which law governs its interpretation and effect, I can say no more about what claims might be compromised by it; nor is it necessary to say more in order to decide the Continuation Application.

15. To my mind, the important questions for me to consider were these:

    a. Should the Claimants have brought the Settlement Agreement to my attention before I delivered my judgment of 24 April 2023?

    b. Should the Claimants have provided more information, or more satisfactory evidence, about the Settlement Agreement in support of the Continuation Application.

    c. On the information before the Court, should the proprietary and freezing orders be continued?

16. In my judgment, the Claimants should have told the Court of the prospective settlement before I delivered my judgment of 24 April 2023. It is axiomatic that applicants for freezing orders owe a particularly important duty of candour to the Court when obtaining an *ex parte* order. To my mind, although the proceedings had been served on Mr Khouri, at least in the circumstances of this case, the Claimants also were under a duty to draw to the Court's attention material information of which they were aware and about which Mr Khouri did not know or did not have full information. It is not in point that Mr Khouri, or indeed, the Court, might have learned from other sources that settlement was in prospect.

17. The prospective settlement was material to questions that were before the Court on the Jurisdiction Application and, more particularly, the Discharge Application. With regards to the Jurisdiction Application, it appeared on the material before the Court that the proceedings would continue in this jurisdiction against at least some of the defendants: indeed, I so observed at paragraph 72 of my judgment when considering the *forum conveniens* argument. The Court should have been made aware that they might well be settled against at least some of the defendants who are in the United Arab Emirates.

18. As for the Discharge Application, there was an issue between the Claimants and Mr Khouri about whether there was a sufficient risk of "*dissipation*" to justify the freezing order: that is to say, whether there was a sufficient risk that, without the order, any judgment obtained by the Claimants would go unsatisfied as a result of Mr Khouri dealing with assets under his control so as to prevent enforcement against them. In this context, the Court should have been made aware of the possibility that the Claimants might recover their losses, or some of them, as a result of a settlement. Further, there was a question before the Court on the Discharge Application about the significance of settlement discussions with Mr Khalifa Alhammadi in November 2022, before these proceedings were brought. If, as on the face of it seems probable, those very discussions developed into an agreement in principle, the Claimants left the Court with a misleadingly incomplete impression. I do not say that, had I been informed of the Settlement Agreement, I would have reached a different decision either on the Jurisdiction Application or the Discharge Application, but this information should have been put before the Court by the Claimants. Indeed, Mr Dillon-Malone accepted at the hearing on 9 May 2023 that the failure to disclose the Settlement Agreement was "*unfortunate and unsatisfactory*". (I should make clear that these observations do not imply criticism of Clydes, who represented the Claimants on the Discharge and Jurisdiction Applications. I do not, of course, know what instructions they received from the Claimants.)

19. Should the Claimants have provided more information or more satisfactory evidence about the Settlement Agreement in support of the Continuation Application? In my judgment, they should have done. I have explained why I consider the evidence incomplete and unsatisfactory, and why I am not convinced by the explanation advanced for this. Because the Court is being asked to exercise a jurisdiction which can cause serious prejudice to respondents, it requires applicants for freezing orders to put all relevant information before the Court. I am not persuaded that the Claimants have done so.

20. I also concluded that, on the basis of the information now before the Court, the freezing order should not be renewed. The Claimants have not proved a sufficient risk of dissipation to justify the continuation of the freezing orders, and it is not just and convenient to continue them. As I explained with regards to the position of Mr Khouri in my judgment of 24 April 2023, there was no direct evidence against him that he had sought to dispose of assets so as to frustrate the claims against him, and the same is true of the other defendants and respondents. The Claimants' contention was that the sophisticated nature, scale and duration of the fraud justified an inference that there was a risk. As I explained in my judgment of 24 April 2023, Mr Khouri argued that that was not sufficient to establish the risk, and that there were two important countervailing considerations: (i) that the Claimants had delayed before applying for a freezing order, and (ii) that they did so only after they had approached some of the defendants with "*settlement proposals*": I described the proposals at paragraph 95 of my judgment. Like considerations applied to the question before the Court on the Continuation Application as to whether the Claimants had shown a sufficient risk of dissipation to justify the freezing orders against the other defendants and non-defendant respondents.

21. On the Discharge Application, despite these considerations, I concluded that, on balance, the Claimants had sufficiently shown a risk of dissipation to uphold the freezing order against Mr Khouri. Now, however, there is the further consideration of the Settlement Agreement, which reduces the risk that the Claimants will not be able to recover their losses, and so the risk that they will be frustrated in enforcing any judgment that they obtain. In my judgment, this tilts the balance against renewing the freezing orders, either against Mr Khouri or against the other defendants and non-defendant respondents: of course, the case for and against each of them is, in principle, to be considered separately, but, on the facts here, similar consideration apply to each.

22. What of the proprietary injunctions? In my judgment of 24 April 2023, I concluded that the proprietary injunction against Mr Khouri should be discharged because the Claimants had not shown a real issue that he had beneficial ownership of, or possession or control over, any of the P-Notes or their traceable proceeds; and so had not shown that it was just and convenient that Mr Khouri should continue to be subject to the proprietary injunction. On the Continuation Application, I reached a similar conclusion about the order against other defendants and other respondents. Particularly given the settlement discussions that have taken place since the proprietary orders were made in November 2022, I cannot

accept that the Claimants could not have put more information before that Court relevant to these questions. In these circumstances, I do not accept that it is just to continue these orders.

23. Therefore, on 9 May 2023 I declined to continue the proprietary and freezing orders. I add only that the evidence put before the Court since 24 April 2023 about the service of the claim form only aggravates the concerns that I expressed in my earlier judgment about the slow progress of the proceedings, and that the defendants and others would be constrained, in particular by the freezing orders, for an excessive time if they continued to trial. However, these concerns were not a reason for my decision not to continue the orders.

Re-Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
23 May 2023