IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

BETWEEN	AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY ("AHAB")	PLAINTIFF
AND	SAAD INVESTMENTS COMPANY LIMITED ("SICL")	
AND	MAAN AL-SANEA AND 41 OTHERS	DEFENDANTS

IN CHAMBERS
THE 8TH DAY OF FEBRUARY 2011
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. David Quest instructed by Mr. George Keightley of Mourant Ozannes for the plaintiff AHAB

Mr. Maan Al Sanea absent, not represented

Mr. Michael Crystal QC instructed by Ms. Colette Wilkins of Walkers for the Grant Thornton Liquidators (of SAAD Investment Company Limited "SICL" and other SAAD Investment companies in Liquidation)

Ms. Bridgete Lucas instructed by Mr. Ian Lambert of Bodden and Bodden for the Liquidators of the AWAL Group of Companies ("AWALCOs")

Mr. David Herbert of Harneys for the Liquidators Saad Investments Finance Company (No. 5) Limited ("SIFCO 5")
(The present Defendants referred to hereinafter together as the "Defendants in Liquidation")

RULING

1. This is AHAB's application for an interim award of damages against the Second Defendant Mr. Al Sanea, in respect of his liability under a default judgment obtained against him on 7th November 2011, with damages to be assessed. The

default judgment was obtained on the basis of Mr. Al Sanea's failure to file a defence to AHAB's claims in this action within the deadlines allowed by the rules and orders of this Court.

2. The default judgment arises from AHAB's claims against Mr. Al Sanea for dishonest breach of fiduciary duty and conspiracy although, as will be explained below, AHAB does not now rely upon the conspiracy claim.

3. In the action AHAB claims for damages and/or restitution of losses in the order of USD9.2 billion. Damages and losses are said to arise from a fraudulent scheme employed by Mr. Al Sanea through AHAB's Money Exchange business, of which he was in charge during the years 2000-2009. The scheme is said to have involved the borrowing of unauthorised loans (amounting to the sum of USD9.2 billion) from some 118 different banks effected by the forgery of the signatures of AHAB's partners and the misappropriation of the proceeds of the loans.

4. AHAB claims that at least USD5.2 billion of the misappropriated funds are traceable into Mr. Al Sanea's Cayman Islands companies. The trail of the funds is said to lead from the Money Exchange through Middle Eastern entities established by Mr. Al Sanea in Saudi Arabia and Bahrain, into SICL, the entity which is at the top of the Cayman corporate chain. Payments are said to be traceable in turn from SICL into others of the Cayman entities, including the other Defendants in Liquidation now present and responding to AHAB's application.

5. AHAB's claim may thus be described in general terms as a personal claim against Mr. Al Sanea in respect of his fraudulent and unauthorised misappropriations and as a proprietary claim against the Defendants in Liquidation in respect of funds

which they obtained – or assets representing those funds – as being or as representing the property of AHAB.

6. Mr. Al Sanea, although on notice of this application, has elected not to respond to it. Indeed, he has from the outset of this action on 27th July 2009, challenged the jurisdiction and orders of this Court enjoining him as a defendant to these proceedings. That challenge was recently and finally dismissed by the Privy Council on 11th April, 2012, some three weeks after the conclusion of this hearing before me on the 21st March 2012. Having earlier enjoined him as a defendant, on 13th January 2011 this Court ordered Mr. Al Sanea to file and serve a defence by the extended and final deadline of 8th February 2011. His default in complying with that deadline was the basis upon which AHAB obtained its default judgment.

7. In bringing this application by reliance only on the claim for damages for breach of fiduciary duty, AHAB recognises that a claim for damages to be assessed also upon its conspiracy claim is untenable at this stage. This is for the obvious reason that Mr. Al Sanea's alleged co-conspirators are the Defendants in Liquidation and judgment against them has not yet been obtained.

8. Mr. Al Sanea's default and steadfast refusal to submit to the jurisdiction notwithstanding, AHAB's application is opposed by the Defendants in Liquidation. They protest against the possibility of inconsistent outcomes in the event that their defences – which rely in part upon a denial of fraud and misappropriation on the part of Mr. Al Sanea – are successful.

9. Presented with their objection, I adjourned AHAB's application on 17th February 2012 for further consideration and gave directions, among other things, that:

(1) AHAB should specify the evidence on which it intended to rely to assess the damages said to be directly attributable to Mr. Al Sanea's breaches of fiduciary duty and fraud and which would entitle it to receive an interim award against Mr. Al Sanea irrespective of the outcome of the trial of the claims brought also in this action against the Defendants in Liquidation.

(2) Thereafter, the Defendants in Liquidation should serve evidence as to why determination of an interim award based on Mr. Al Sanea's deemed liability to AHAB could necessarily or reasonably be expected to result in inconsistent outcomes at trial.

(3) There be a hearing to determine the Defendants in Liquidation's objection to the Application, pursuant to Grand Court Rules ("GCR") Order 37, rule 3 and Order 29 rule 15, followed, if so determined, by the hearing of AHAB's application.

10. The upshot is that voluminous affidavit evidence has been filed on all sides of this application. Most significant, so far as AHAB is concerned, is the 7th Affidavit of Simon Charlton. Mr. Charlton is the lead forensic accountant responsible for the Deloitte & Touche team of investigators employed by AHAB to investigate the affairs of the Money Exchange and who are responsible for the revelation of the alleged fraud. They provide the evidence that supports AHAB's case against Mr. Al Sanea. I will come below to consider Mr. Charlton's evidence in some detail.

11. The evidence filed by the Defendants in Liquidation can, for present purposes, be compendiously described as seeking to address the primary bases of their factual defence to the action and which, in common, depend on the assertion that Mr. Al

Sanea, in his capacity as their principal shareholder and financier, perpetrated no fraud against AHAB. This is pleaded on the basis that payments and borrowings which AHAB now complains about as having been used by Mr. Al Sanea to fund the Defendants in Liquidation and which were effected by Mr. Al Sanea while in charge of AHAB's Money Exchange, were in fact authorised by AHAB partners at the time.

12. While such factual matters of controversy are obviously not given to resolution other than by trial, they are relied upon now to explain what the Defendants in Liquidation cite as the risk of inconsistent – and therefore unjust – outcomes, were I now to grant an interim award of damages in AHAB's favour.

13. AHAB has however expressly acknowledged and conceded that any order made on this application and any reasons for such an order, will not be binding and will have no legal effect as between AHAB and the Defendants in Liquidation. AHAB accepts that such an order could have binding effect only as between AHAB and Mr. Al Sanea, and being in the nature of an order granting interim relief, only on a provisional basis pending the conclusion of the action.

14. In light of AHAB's concession, Mr. Quest described the Defendants in Liquidation's *"root and branch opposition"* to AHAB's attempts to recover damages from Mr. Al Sanea, as "*baffling*". He expects the Defendants in Liquidation to support AHAB's efforts, since a recovery in the action would be for the ultimate benefit of all parties and would likely serve to reduce any liability proved against the Defendants in Liquidation in respect of Mr. Al Sanea's fraudulent conduct.

15. It is now clear that the Defendants in Liquidation do not see things that way, despite the fact that they have not themselves seen fit to institute any claim against Mr. Al Sanea personally in respect of any potential contribution that may be recoverable from him. Having had their concerns explained on this application, the real gravamen of their various arguments in opposition to AHAB's application is as follows.

16. As Mr. Crystal QC explained on behalf of SICL (and the other Grant Thornton Defendants), it is that "*on the proper analysis of the material now before the Court, there is no substantial undisputed balance likely due from Mr. Al Sanea to AHAB in respect of "the relevant period"* (ie: January 2002 to May 2009 as to which more below). Rather the *"lower [boundary] for recovery against [Mr. Al Sanea] on this application is zero".*

17. Mr. Herbert for SIFCo #5 submitted that it would be impossible on the present state of the pleadings and the evidence, for the court to decide where along the sliding scale of possible damages – from zero to USD9.2 billion – the interim award should fall.

18. Miss Lucas for the AwalCos submitted that by being asked, in the present state of the pleadings and evidence, to make an interim award, this Court "*is being asked to behave in a capricious and arbitrary manner".*

19. In summary then, the real practical reason for the objection – the perceived risk of inconsistent outcomes aside – is either that AHAB's evidence does not show that any substantive sum is recoverable by it from Mr. Al Sanea or that, on the present state of its pleadings and evidence, the Court is not able, with the necessary assurance, to assess what that sum might be.

20. Whether the Defendants in Liquidation should be regarded as having standing to raise these particular arguments at this stage, is a concern that AHAB raises in response.

21. But standing – in the sense of a right to oppose the interim award against Mr. Al Sanea – is not an issue I consider necessary to resolve. AHAB saw fit to serve notice of its application upon the Defendants in Liquidation and raised no objection when I issued the directions for this hearing on 14th February 2012. Moreover, I think AHAB was right to serve notice in light of GCR Order 37 rule 3 (to be discussed below).

22. For completeness sake, I should note that in their opposition, the Defendants in Liquidation, in addition to the asserted risk of inconsistent outcomes, referred also to other risks of prejudice. They are described in these terms in Ms. Lucas' written submissions and with which the other counsel associated themselves:

> *"Of course, AHAB will say that this application has nothing to do with the Defendants in Liquidation in general or the AwalCos in particular. Formally speaking that is right: the outcome of this application cannot affect the position of the AwalCos before this Court. But the appropriateness of the hearing of the application at this time can be tested in two ways:*
>
> *(1) First, how would the outside world – and the Court should be under no illusion as to the publicity that these proceedings attract world-wide – regard the Defendants in Liquidation in light of a substantive judgment against Mr. Al Sanea on (the allegations of misappropriation as they also involve the Defendants in Liquidation)? Inevitably, the point that "there is no smoke without fire" would be made against those defendants – to their undeniable (and indefensible) disadvantage.*
>
> *(2) Secondly, the Defendants in Liquidation would – quite properly – object to the same Judge reaching a conclusion in relation to the substantive claim for interim relief against Mr. Al Sanea hearing the AHAB claim against the*

Defendants in Liquidation. The reasons for this are obvious, and underline the good sense in the Cayman procedural rules (of court)".

23. The rules of court clearly admit of a discretion in the judge upon an application such as this, whether or not to make an award of interim payment and, I accept, consideration of "risks" such as these, could factor into the exercise of discretion.

24. For his part, in seeking to invoke the exercise of the discretion in favour of an interim award, Mr. Quest pointed to other risks. He explained that AHAB has been sued in several actions taken against it around the world by creditor banks in respect of the massive loans which it did not authorise. Without the benefit of an interim award of damages with which to negotiate its position with those banks, AHAB faces the risk of bankruptcy and the further risk that it may not be able to continue to prosecute its claim in this action for want of funding to do so. The hope of staving off such risks will depend, at least, upon the perception of prospects of an actual recovery of damages from Mr. Al Sanea and the interim award would be an important step in that direction.

25. I note immediately though in this regard, that AHAB is not required to prove its need for an interim payment. Unlike in the case of applications for interim payments in cases of personal injury claims, there is no general rule that a plaintiff must establish need in a case for damages for breach of fiduciary duty, before an award of an interim payment can be made (see ***Schott Kem Ltd. v Bentley [1991] 1 Q.B. 61*** at 74 C-D per Neill LJ in the English Court of Appeal).

26. I hold nonetheless – especially in light of the potentially dire consequences to it – that AHAB's difficulties may be taken into consideration in the exercise of discretion whether or not to grant an interim award.

27. The first of Ms. Lucas' two points set out above is the counter-point to AHAB's argument on risk of prejudice.

28. As she explained, given their established relationships with Mr. Al Sanea as their principal, any award of damages made against him now, will no doubt carry the risk of a perception that his funding of the Defendants in Liquidation was tainted by his fraud deemed by the default judgment to have been committed against AHAB. Ms. Lucas argued that such a taint upon their reputation would be harmful to the orderly winding down of the affairs of the Defendants in Liquidation. But this is not a concern that is readily understood. The more obvious view is that such matters of perception should hardly concern defendants who are not themselves the subject of the default judgment and who therefore should be perceived as having no liability for damages recoverable pursuant to it. Furthermore, this perception of risk on the part of the Defendants in Liquidation must be overstated when it is remembered that as companies being wound up under the aegis of the Court, no steps can be taken against them without leave of the Court. And finally, as they are unlikely to continue to operate as going concerns, the perception of risk to their reputations can hardly be of consequence.

29. At all events, I do not see how such concerns can be allowed to stand in the way of recovery of damages by a plaintiff who is otherwise entitled to the Court's consideration of the matter.

30. The second of Ms. Lucas' points is another matter of perception but also carries the practical implication that the future conduct of these proceedings could be hampered by the need to assign a different judge to the case, with wasteful costs consequences.

31. While this could be a factor of note when deciding whether it would be "just" to make an interim award in AHAB's favour now, it cannot in my view be decisive, if an interim award is otherwise clearly justified. That separate question of whether a different judge should try the case would then have to be resolved as a case management issue.

32. More important to my mind now, are the arguments about the present state of the pleadings and evidence and as to whether they allow for the assessment of an interim award. The most important question I conclude I must ask myself is whether, as it stands, the state of the case is such as to allow me to arrive at a rational and safe basis for an interim award. The need for such a basis is clearly a requirement of the GCR and this question, as I have framed it, does involve a consideration of the perceived risk of inconsistent outcomes.

The Law

33. GCR O 37 rules 1 and 3 provide as follows:

> *"1(1) Where judgment is given in court for damages to be assessed and no provision is made in the judgment as to how they are to be assessed, the damages shall be assessed by a judge, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the judge, and at least seven days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is given, proceed accordingly....*
>
> ....
>
> *3. Where any judgment as is mentioned in rule 1 is given for failure to give notice of intention to defend or in default of defence, and the action proceeds against other defendants, the damages under the judgment shall be assessed at the trial unless the Court otherwise orders" (emphases supplied).*

34. It is clear from these provisions that an interim award is not to be made simply by a superficial endorsement of the quantum of damages as claimed in the pleadings. A judicial assessment is required and the nature of the assessment will be discussed below. It is also clear that where an action is to proceed against other defendants, the usual practice is that the assessment of damages against the defaulting defendant will not be dealt with separately but will be left to be dealt with by the judge at trial, unless, for good reason, the Court otherwise orders.

35. As noted in *Halsbury's Laws of England (4th Ed., 1982) Vol. 37, para 398* (in respect of the then equivalent Rules of the Supreme Court) at footnote 6; the purpose of O. 37 rule 3 is *"to prevent the possibility of two tribunals assessing the same claim for damages and arriving at different amounts"*.

36. This is the risk of inconsistent outcomes, stated differently, about which the Defendants in Liquidation primarily complain. AHAB's response to this particular concern as identified in the rules is, however, the same as before and is implicit in its decision not to seek an interim award based on its conspiracy claim which would necessarily involve findings that the Defendants in Liquidation acted in concert with Mr. Al Sanea – findings which might yet be disproved at the trial of the action in which they dispute liability.

37. By relying solely on its pleaded case of breach of fiduciary duty by Mr. Al Sanea, AHAB asserts that its claim for damages against him is not necessarily dependent in any way upon its claim against the Defendants in Liquidation. This, in my view, is plainly so and is not disputed by the Defendants in Liquidation. Indeed, the opposite is the case –AHAB's claim against them as they describe it, is

"*entirely parasitic upon*" its claim against Mr. Al Sanea, not the other way around.

38. It follows, that in principle I should be able to assess damages against Mr. Al Sanea without the risk of the Court at trial assessing damages arising from a related claim against the Defendants in Liquidation and arriving at inconsistent, even if different, amounts. And this would, in principle, remain the same, even if no liability is established against the Defendants in Liquidation and so no recovery of any amount is ordered against them.

39. I must nonetheless, for reasons already mentioned, be satisfied about the state of particularization of AHAB's pleadings as to damages as they relate to the case against Mr. Al Sanea.

40. This need for particularization is clear from the GCR which further require an applicant to "*verify the amount of damages*".

41. GCR Order 29 rule 9 to 11 provide, in relevant part that:

> ***"Interpretation of Part 11 (O. 29, r 9)***
>
> *9. In this Part of this Order "interim payments", in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff....*
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> ***Application for interim payment (O 29, r. 10)***
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> *10 (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.*
> ....
>
> *(3) An application under this rule shall be supported by an affidavit which shall*

(a) verify the amount of the damages, debt or other sum the application relates to and the grounds of the application; and

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application.

....

(5) Notwithstanding the making or refusal of an order for interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O. 29 r 11)

11(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied:

(a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damage; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,

the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the Plaintiff after taking into account any relevant contributory negligence and any set off, cross claim or counterclaim on which the respondent may be entitled to rely..." (emphasis supplied).

42. Order 29 rule 11 plainly confers the discretion on the Court whether or not to award an interim payment. Moreover, the amount of the payment is expressed to be "*of such amount as [the Court] thinks just*".

43. However, the amount that the Court may order (should it exercise its discretion) should not exceed "*a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff...*".

44. "*Likely*" in this context connotes the degree of probability suitable to proof in the context of these civil proceedings.

45. I therefore accept that when considering whether or not to exercise discretion to make an interim payment – and if so the appropriate quantum of the interim payment to order – I must reach a view as to the possible damages likely to be recovered by the plaintiff, and, as sub rule 11(1) also provides, after taking into account any relevant contributory negligence and any set off, cross-claim or counter-claim on which the defaulting defendant may be entitled to rely.

46. Mr. Crystal submitted in this regard that the reference to *"any set off, cross-claim or counterclaim on which the respondent may be entitled to rely"* must refer to more than merely any such which a defendant has actually pleaded and extends to any set off or cross-claim which may be asserted by a defendant against a plaintiff of which the Court is aware. In the present case, this requires this Court, he submits, to take into account a claim which Mr. Al Sanea has mounted in Switzerland against certain AHAB partners based on a promissory note for USD1.42 billion which he asserts (and upon which the Swiss first instance court made pre-action attachment orders) was issued to him by AHAB. The attachment orders are subject to appeal and AHAB's response to the claim is that the promissory note is forged.

47. Mr. Crystal's construction of the rules of court would, in my view, result in obvious unfairness and absurdity. In a case like the present where the defendant

chose not to defend resulting in a default judgment against him, on the construction being argued liability could be evaded by a pleading relied upon (or even – taking this argument to its extreme – merely intimated) in another jurisdiction, but not pleaded in the jurisdiction where judgment has been entered. Such a claim could have no juridical basis. Apart from any other concern, how would the court, in the absence of pleadings before it, in assessing damages, decide what value should be attributed to the foreign claim?

48. I reject the proposition that Mr. Al Sanea's claim in Switzerland on the promissory note should be taken into account upon any assessment of damages on AHAB's default judgment. I hold that within the meaning of the rules, a defendant is not "entitled to rely" upon a defence, cross-claim or counterclaim that he has not chosen to plead in the action and that what the sub-rule contemplates is a set-off, cross-claim or counterclaim pleaded in the proceedings in which the interim award is sought.

49. I return to consider the expressed requirements of the GCR. As already noted, the procedures for the making of an interim payment of damages are not suitable if the Court will not be able to assess the just and reasonable proportion of the damages which, in the opinion of the Court, the plaintiff will likely be able to recover upon the final outcome of the case.

50. In order for the court to be satisfied that the plaintiff would obtain final recovery after judgment:

> *"...something more than a prima facie case is clearly required; but not proof beyond reasonable doubt. The burden is high. But it is the civil burden on the balance of probabilities, not a criminal burden."* See ***Shearson Lehman*** ***[1987] 1 W.L.R. 480, 489A***, per Lloyd LJ.

51. The case law also advises that *"the interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve"*. See ***Schott Kem Ltd. v Bentley*** (above), at 73 E-F per Neill LJ.

52. I might add, and I think it follows, that in the context of a complex case such as the present, while the mere *ipse dixit* of the pleadings will not suffice, the clear basis upon which an assessment of an interim award may be made must, nonetheless, be apparent from the pleadings themselves and/or the verifying evidence (see GCR O. 29 r. (3)(a) above) that is available to the Court.

53. Before turning to examine the state of AHAB's pleadings and evidence tendered in support of this application, I should further explain the basis for doing so. I conclude that it would be inappropriate to refuse AHAB's application merely because the Defendants in Liquidation dispute that Mr. Al Sanea is liable to AHAB at all and/or that substantial damages will, in the end, be recoverable.

54. Although the Defendants in Liquidation may ultimately be found to be not liable for any claim as pleaded against them and Mr. Al Sanea jointly, Mr. Al Sanea is deemed, by dint of the default judgment, to be liable for the misappropriation of AHAB's money as pleaded against him in this action. That is the effect of the default judgment, notwithstanding that it derives not from a determination of the case upon the merits but as the result of a purely administrative process.

55. In this regard, I accept Mr. Quest's submissions on behalf of AHAB: As between the parties to the judgment (and only them) a judgment in default is conclusive on the issue of the liability of the defendant as pleaded in the Statement of Claim.

The defendant is entitled to contest any subsequent assessment of damages; on that assessment any point which goes to quantification of the damage can be raised by the defendant but the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim. The default judgment is conclusive on the issue of the liability of the defaulting defendant as pleaded in the Statement of Claim. See ***Lunnun v Singh and Others*** (unreported, 1 July 1990 No. CCRT1 1999/0245/2 C.A. England and Wales (Civil Division) (available at ***1999 WL 477360***)) and ***Pugh v Cantor Fitzgerald International [2001] EWCA Civ. 307.***

56. The question what points may be sought to be raised which are inconsistent with or estopped by the liability determined by a default judgment, is however, one to be approached with great care. This principle was expressed by Viscount Radcliffe on behalf of the Privy Council in ***Kok Hoong v Leong Cheong Kweng Mines Ltd. [1964] AC 993, [1964] 1 All. E.R. 300, at p1012*** in these terms:

> *"...default judgments, though capable of giving rise to estoppels, must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC (in New Brunswick Railway Co. v British and French Trust Corporation Ltd. [1939] AC 1, 21), they can estop only for what must necessarily and with complete precision have been thereby determined."*

57. Lord Wright expressed the principle differently in these terms (at page 38):

> *"There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission.*
>
> *All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine...."*

58. In sum, there is no support in the case law for a proposition that on judgment being signed in default, a defendant must be taken to have admitted every allegation in the Statement of Claim. He must be taken to have admitted only that which the judgment necessarily directly and conclusively decides. See also in this regard, ***Gill v Walker*** in the English Court of Appeal (Civil Division, 26 January 1993 Official Transcripts (1990 – 1997) per Bedlam LJ at page 7 of 8).

59. In this case, this principle is especially on point in relation to the assessment of damages which is pleaded under various heads, and is a check on the ambit of the default judgment that I must bear in mind.

60. All questions going to quantification, including any question of loss or causation in relation to particular heads of loss claimed by the plaintiff, remain open to be challenged at the final damages hearing. I should make an award now only to the extent that I am assured that at least the amount of the interim award will be recoverable in the end. Accordingly, the plaintiff must prove the loss although the liability is deemed proven by the default judgment. (See ***Lunnun v Singh and Others***, (above) at pages 10 and 11 of 13.)

61. Mr. Al Sanea's absence notwithstanding, AHAB must meet this test.

62. It is appropriate here to mention briefly, another objection raised by Mr. Crystal QC to AHAB's application. This was that AHAB may not now rely upon its claim for breaches of fiduciary duty as AHAB has not proven the existence and breach of such duties as a matter of Saudi Law, Saudi Arabia being the place where the breaches are alleged to have taken place. This argument is raised despite the fact that AHAB's Statement of Claim expressly avers the dishonest

breach of fiduciary duties. The breach is a fact that must therefore be regarded as necessarily concluded by the default judgment. For that reason, I reject this argument. It is an argument that could have been relied upon by Mr. Al Sanea by way of defence but he has forfeited his right to do so. The result is that there is no evidence to contradict AHAB's averment, implicit in its pleaded case, that Saudi Law would view the allegations of dishonest breach of fiduciary duties in substantially the same light as Cayman Law (see in this regard ***AHAB v SAAD Investment Company Limited et al*** *2010 (2) CILR 289 at 319 C.A.*).

Unauthorized borrowings

63. As mentioned earlier, the liability deemed to be established, is the personal liability of Mr. Al Sanea for dishonest breach of fiduciary duty perpetrated by unauthorised borrowings and misappropriated funds. For present purposes, it is the latter category that AHAB relies upon. For the purposes of the assessment of damages for an interim award, AHAB invites me to focus in particular on three types of transactions from which Al Sanea benefitted directly and which resulted in a "net cash flow" to him of some USD4.7 billion.

64. I will come to look at these transactions below. Before so doing, a wider consideration of the pleadings is required.

65. The case as originally pleaded (and as it is still pleaded) is that all the Al Sanea borrowings were unauthorized. As the result however, of certain disclosures in proceedings taken in London against AHAB by a syndicate of creditor banks, it now appears that significant borrowings by Mr. Al Sanea were, in fact, authorised by AHAB partners. The creditor banks relied upon Mr. Al Sanea's actual or

ostensible authority to borrow from them on AHAB's behalf. The disclosures came to light in the form of documents found on files in the offices of an AHAB partner (Saud Algosaibi) after the close of discovery in the London action and which have come to be called the "N Files".

66. As the result of the N File disclosures, AHAB admitted liability in the London action and while preserving its position in these proceedings, now accepts that it was aware of and authorized:

(i) borrowings by Al Sanea on AHAB's behalf from financial institutions in the sum of approximately SAR4.4. billion (USD1.17 billion) in 2000, borrowings which thereafter remained at the level of approximately SAR4 billion (USD1.006 billion) in accordance with a "new for old" borrowing policy. (See the second affidavit of Saud Algosaibi dated 10th September 2011 filed in this action at paragraphs 44 to 48 ("Saud 2")); and

(ii) the matching borrowings by Mr. Al Sanea from the AHAB's Money Exchange in the sum of approximately SAR 4 billion (USD1.006 billion) gross in 2001/2002 (see Saud 2, paragraph 47).

67. The disclosure of the N Files resulted not only in the collapse of AHAB's defence to the London Proceedings, it also led to an application by AHAB for the discharge of the Worldwide Freezing Order which it had obtained here against Al Sanea and his related entities, including the Defendants in Liquidation; the inevitable result of AHAB's admitted breach of its disclosure obligations.

68. A further consequence of the N Files disclosure was the express acceptance by AHAB in these proceedings (per Mr. McQuater QC), that AHAB's pleaded case in this action must be amended to reflect the reality of the authorised borrowings.

69. That amendment to the pleadings has not yet been made. The consequence is not only that AHAB's pleaded case as it stands is admittedly incorrect, but also – and more to the point of the present application – the pleadings therefore do not differentiate between borrowings which were authorised and those which were not. Yet it is recognised by AHAB that it is only in respect of the latter that damages are recoverable.

70. Nonetheless, I am invited to proceed on the basis that the assessment of an interim award may involve a rudimentary arithmetic exercise which AHAB invites me to undertake on the basis not only of the pleadings as they stand but also on the basis of Mr. Simon Charlton's affidavits, in particular his 7th affidavit.

71. It is important from AHAB's point of view to emphasize that this application is said by Mr. Quest not to rely upon specific proof now of specific unauthorised borrowings. The application relates to and relies upon AHAB's claim as based upon actual payments to Mr. Al Sanea directly or for his benefit through SAAD Trading & Contracting Company ("STCC" as it was then called); the International Banking Corporation ("TIBC", a Bahraini bank controlled by him); and through AWAL Bank or other SAAD Group entities. These are payments which can only be described as misappropriations and must be deemed proven by virtue of the default judgment, and do not depend, as a separate matter, upon whether or not third party borrowings by AHAB were authorised by AHAB partners. While the original source of much of these funds may have been third party borrowings through the Money Exchange, under no circumstances, let alone in the absence of a defence from Mr. Al Sanea seeking to explain these payments, could they be justified. It is averred in Section E of the Statement of Claim, that

"there was no honest or proper reason for the Money Exchange to be making such payments to or for the benefit of Mr. Al Sanea or the SAAD Group".

72. For this reason, Mr. Quest also submits that the belated N Files disclosure, inexcusable though its lateness was, has no bearing on the grant of an interim award of damages against Mr. Al Sanea now.

73. Below are some considerations, helpfully identified by Mr. Crystal QC in his submissions (relying on the affidavit of one of the GT Liquidators Mr. Stephen Akers), which are illustrative of concerns which I acknowledge would arise from the exercise proposed by AHAB to be undertaken now.

74. These are concerns which I am satisfied however, are appropriately addressed by Mr. Charlton for the present purposes of the assessment of an interim award so as to allow me to proceed and I will consider his response to them as raised by Mr. Crystal.

75. An important basis upon which I proceed, is the consideration that Mr. Charlton is the lead forensic accountant responsible for the investigation into Mr. Al Sanea's management of the Money Exchange and the chief forensic witness on whose report AHAB's claim primarily depends. He has been responsible for oversight of the investigation of the large Deloitte team in an investigation which has been underway for more than three years and which provides information and evidence upon which AHAB's case is pleaded. The evidence and information garnered from the investigation, although generally refuted by affidavit evidence filed by Mr. Al Sanea in these proceedings; insofar as they specifically reveal and describe the payments from the Money Exchange to Al Sanea or for his benefit through STCC, TIBC and AWAL Bank, remain unchallenged.

Mr. Charlton's evidence as to total payments during the "Relevant Period"

76. The "Relevant Period" for the exercise at hand is January 2002 to May 2009. According to Mr. Charlton, cash transfers between the Money Exchange and Mr. Al Sanea and his SAAD Group were recorded in ledger accounts discovered by the Investigation Team in the accounting records of the Money Exchange. These ledger accounts ("the SAAD Accounts") comprise a large number of separate accounts which were used to record both transfers made to Mr. Al Sanea and the SAAD Group from the Money Exchange and transfers from Mr. Al Sanea or the SAAD Group to the Money Exchange.

77. In summary, as at 31st May 2009, the SAAD Accounts recorded a total balance due to the Money Exchange from Mr. Al Sanea and the entities to which the SAAD Accounts related of USD8.9 billion. However, for reasons he explained in his first affidavit, it does not appear to Mr. Charlton that this balance represents genuine arm's length commercial lending by the Money Exchange.

78. I note, in passing, that there is disagreement between AHAB and at least some of the Defendants in Liquidation over the question of access for the latter to the ledger of the SAAD Accounts, now said by Mr. Charlton to be under AHAB's control. I simply note that I do not consider that disagreement to be relevant to the present application in the absence of an application for and an order for disclosure.

79. As at 31st May 2009, the SAAD Accounts recorded a total balance owed by the Money Exchange to Al Sanea, and to entities owned or controlled by him, of USD4.5 billion. While the reasons for these recorded borrowings by the Money Exchange are unclear, even when credit is given for these payments, the balance

of the SAAD Accounts in favour of the Money Exchange as at 31st May 1999, says Mr. Charlton, was USD4.4 billion.

80. Besides the SAAD Accounts, from other information obtained by the Investigation Team (such as bank statements for accounts in the name of the Money Exchange), the Team was also able to identify actual transfers of funds from the Money Exchange to Mr. Al Sanea and the SAAD Group, in an amount exceeding USD5.5 billion. There were three principal methods by which these payments were made, namely:

(i) Approximately USD2.185 billion in cheques drawn by Mr. Al Sanea on Money Exchange bank accounts on which he was a signatory and made payable to entities in the SAAD Group;

(ii) Approximately USD2.030 billion in the proceeds of letters of credits opened by AHAB as payment for goods purportedly supplied to AHAB, but which it did not need and which it never received. The proceeds of the letters of credit were paid initially to the purported suppliers, but then appear to have been transferred to Al Sanea personally or to entities in the SAAD Group;

(iii) Approximately USD1.785 billion in electronic transfers paid or transferred by the Money Exchange for Mr. Al Sanea's benefit.

81. In relation to the Relevant Period specifically, the total payments made by each of the three principal methods identified above were as follows:

(i) Approximately USD1.714 billion in cheques. This figure is supported by an analysis of the SAAD Companies "Tamweel account" within the Money Exchange.

(ii) Approximately USD1.813 billion in the proceeds of letters of credit. This figure is supported by an analysis of memoranda prepared by Benjamin Jesudas, an employee of the Money Exchange, and the Money Exchange Letters of Credit registers.

(iii) Approximately USD1.202 billion in electronic transfers. This figure is supported by an analysis of telex registers and bank statements.

82. On this analysis, the total transfers from the Money Exchange to Mr. Al Sanea or to entities owned or controlled by him during the Relevant Period were approximately USD4.7 billion as shown in the following table:

Summary of Payments to Entities Owned or Controlled by Mr. Al Sanea				
As at End	Cheques US$bn	Letters of Credit US$bn	Electronic Transfers US$bn	**Total US$bn**
2002	0.159	0.244	0.021	0.424
2003	0.078	0.293	0.190	0.561
2004	0.148	0.291	0.316	0.755
2005	0.204	0.287	0.063	0.554
2006	0.316	0.249	0.087	0.652
2007	0.631	0.229	0.139	0.999
2008	0.146	0.180	0.197	0.523
May 2009	0.031	0.040	0.190	0.261
Total	**1.714**	**1.813**	**1.202**	**4.729**

83. This is the amount upon which AHAB now relies as a starting point for the making of an interim award.

84. Mr. Quest did, however, concede that it would be appropriate now to deduct certain sums which may be regarded as controversial, despite the absence of a defence from Mr. Al Sanea, but in light of further concerns raised by the Defendants in Liquidation to be explained below.

85. The actual assessment must, of course, begin with the Statement of Claim. The relevant pleadings in which Mr. Al Sanea's actual misappropriation of money are in broad terms narrated, are in Section E of the Statement of Claim.

86. Section E begins with paragraph 62 which sets out a table in these terms:

> "62. *Mr. Al Sanea misappropriated money from the Money Exchange in summary as follows (further details are given* below).

	Estimated amount US$m
Cheques drawn on Money Exchange accounts payable to Saad Group companies	2,155
Payments received for the benefit of the Saad Group under letters of Credit (LCs) issued for the account of the Money Exchange	2,030
Withdrawal of cash from Money Exchange branches	560
Payment to Awal Bank	196
Other	300+
Total	**5,200+**

87. Mr. Crystal mounted strong criticisms of the claims as set out in this table and his criticisms were endorsed by Ms. Lucas and Mr. Herbert on behalf of their clients. In summary, the criticisms were to the effect that in very significant ways, both the rest of the pleadings and the evidence filed by AHAB, fall short of showing that the amounts claimed in the paragraph 62 schedule were misappropriated.

88. For instance, and perhaps most graphically, Mr. Crystal pointed out that although Mr. Charlton's 7th Affidavit (as summarised above) describes payments from the Money Exchange to the SAAD Group of approximately USD1.285 billion by way of electronic transfers, no such amount is claimed in paragraph 62 of the Statement of Claim. In paragraph 62 there is a heading for "Other" payments but

for the much smaller amount of USD300+ million, a difference which is not explained.

89. This criticism is accepted by Mr. Quest who explained that the amount of USD300+ million is unrelated to the referenced electronic transfers and is a claim for other payments which are explained in paragraph 92 and schedule 5 to the Statement of Claim.

90. Recognising that in this regard, as with regard to the N Files disclosure, *"the pleaded case has not yet caught up with the state of the evidence"* (repeating Mr. McQuater's refrain deployed when the N File disclosure was first raised with this Court); Mr. Quest concedes that in my assessment of the interim award, the difference between USD1.285 billion and USD300+ million (that is: USD985 million), should be deducted from the amount of the proposed USD4.7 billion interim award.

91. Mr. Quest also concedes that a further amount of USD1.25 billion should be deducted now for the purposes of an interim award. This is an amount which from the Investigations, Mr. Charlton accepts is shown in the SAAD Accounts as moneys paid from Mr. Al Sanea to the Money Exchange.

92. That amount would reduce the amount of an interim award from USD4.7 billion to USD3.45 billion. With the further deductions accepted by Mr. Quest during the arguments the schedule of damages for an interim award would be as follows:

	Estimated Amounts USD billions
Summary of payments per Mr. Charlton's 7th Affidavit	4.729
Add "Other" payments per paragraphs 62 and 92 of the Statement of Claim	0.300+
Deduct amounts for electronic transfers raised in Mr. Charlton's 7th Affidavit but not pleaded in paragraph 62 of the Statement of Claim	-1.285
Deduct amount of USD1.25 billion cash flows from Al Sanea to Money Exchange acknowledged by Mr. Charlton in his report	-1.25
Net sum of misappropriated payments due on the pleadings	2.494

93. It is on this basis that Mr. Quest rests his argument that the approximate amount of USD2.5 billion is an appropriate and safe sum for an interim award. It is less than one-half the amount claimed in paragraph 62 of the Statement of Claim as related specifically only to net actual transfers of money from the Money Exchange to or for the benefit of Mr. Al Sanea. Moreover, the primary position is that in relation to the figures set out in the Statement of Claim, there is nothing that Mr. Al Sanea could himself reasonably say on an assessment of damages, to suggest that an interim award in the amount of USD2.5 billion could be described as "unjust".

94. For his part, Mr. Crystal invited the Court to undertake a different arithmetic exercise by reference to what he described as the already obvious deductions to be

made even from AHAB's lesser claim for the purposes of an interim award.

95. Mr. Crystal's schedule of deductions, with explanatory comments would look like this:

	Estimated Amounts USD billions
1. Deductions for the value of the promissory note "counter-claimed" in the Swiss proceedings	1.42
2. Deductions for the difference between "Other" payments claimed in paragraph 62 of AHAB's Statement of Claim ($300+ million) and the unparticularized claim in Charlton 7 for electronic transfers ($1.285 billion)	.985
3. Claims for transfers to Saad Group by way of letters of credit (Charlton 7 – $1.81 billion – paragraph 62 of the Statement of Claim - $2 billion) but reduced by $0.5 billion for lack of particularization in the Statement of Claim	.500
4. Letters of credit for which it is shown that AHAB and not Saad Group was the applicant	.023
5. Loans, in respect of which per the N Files disclosures, AHAB now accepts knowledge and authorisation	1.006
Sub-total	**3.95**
6. Deduct further the amount of USD1.25 billion in cash flows from Mr. Al Sanea to the Money Exchange for which Mr. Charlton accepts evidence was found	1.25
TOTAL	**5.41 billion**

96. Mr. Crystal's argument is that this sum – showing a net recovery due to AHAB of zero as against its claim of USD5.2 billion in paragraph 62 of the Statement of Claim – readily illustrates the dangers of embarking now upon an assessment which could lead to a substantial interim award of USD2.5 billion. This would be so, he argued, whether in the context of a claim for USD5.2 billion for misappropriated amounts or in the context of the greater global claim of USD9.2 billion (as including all unauthorised borrowings).

Analysis and Conclusion

97. I am satisfied that it would nonetheless be safe to grant an award for interim damages now against Mr. Al Sanea in the amount of USD2.5 billion for the following reasons.

98. First, as already explained, the amount of USD1.42 billion cited by Mr. Crystal but referable to the promissory note of the Swiss claim is not relevant. It therefore does not figure in the present assessment.

99. Nor is the amount of USD1.006 billion, referable to the N Files disclosure, relevant to the question of what amounts were actually transferred to the SAAD Group on behalf of Mr. Al Sanea or to him personally during the Relevant Period. This amount is relevant in the context of what loans taken in the names of the AHAB partners were authorised or not authorised by them. That is a question that goes to the source of the borrowed funds, not to its misappropriation during the Relevant Period. This is an amount which I therefore accept for present purposes is to be disregarded in the exercise of identifying what amounts were dishonestly transferred from the Money Exchange to or for the benefit of Mr.

Al Sanea. It is this latter exercise that forms the basis for AHAB's application for an interim award.

100. The amount of USD1.006 billion is therefore not to be deducted for present purposes from the amount of USD5.2 billion claimed in paragraph 62 of the Statement of Claim (or the more up to date sum of USD4.7 billion identified in Charlton 7).

101. The amount of USD.985 billion is, in effect, conceded by AHAB to be deducted from the amount pleaded in paragraph 62 of the Statement of Claim as explained above, referable to the inadequacy of its pleadings as they stand in relation to electronic payments.

102. The other amounts (USD.500 billion and .023 billion) are arguably also properly to be disregarded at this stage by reference to the lack of pleading. As explained in the last schedule above, these payments are either unparticularized in the Statement of Claim or the SAAD Group are shown not to have been the applicant through the Money Exchange for the letters of credit in question.

103. Further criticisms were raised by Mr. Crystal of the lack of particularization of the very large claim (USD2.105 billion in paragraph 62 of the Statement of Claim) in respect of cheques drawn on the Money Exchange account payable to SAAD Group companies. Note especially, he complained, the fact that, of 8,306 cheques purportedly "detailed" in Schedule 3 of AHAB's Statement of Claim and 14,000 cheques apparently relied upon (but not "detailed") in Appendix 7A of Charlton's 1st; Mr. Charlton by his own admission has examined only 40 originals of the allegedly relevant cheques having a value of only USD12 million (see paragraph

70 of the Statement of Claim and paragraph 7.A.4 of the Appendix to Charlton's 1st).

104. My view of this criticism takes account, first of all, that Schedule 3 to the Statement of Claim does indeed set out details – dates, amounts and cheque numbers – of the 8,306 cheques.

105. Moreover, it is apparent from Appendix 7A to Charlton's 1st, that AHAB also relies upon accounting entries from the "SAAD Accounts" and upon certain bank statements in support of its pleadings in this regard. Further, the Statement of Claim recites the evidence of Mr. Mark Hayley – the manager of the Money Exchange during the Relevant Period who reported directly to Mr. Al Sanea. Many of Mr. Hayley's reports and memoranda to Mr. Al Sanea have been recovered and a number are relied upon in the Statement of Claim.

106. As pleaded at paragraph 64 of the Statement of Claim apropos the issue of misappropriated payments:

> *"By way of example, Mr. Hayley's spreadsheet ([report)] as at the end of 2008 shows total payments to the SAAD Group during 2008 of USD544 million: USD194 million by cheques, USD217 million by [Letters of Credit], USD133 million from branches [of the Money Exchange]".*

107. And further at paragraph 65.4:

> "On 12th March 2008, Mr. Hayley wrote to Mr. Al Sanea stating:
>
> *"I am allowing for drawings by SAAD of USD135 million per month. We also have to meet $20 [(million)] of SAAD LCs and interest in a further $50 [(million)] per month. I am concerned that this is not sustainable."*

108. Mr. Hayley's reports and memoranda provide compelling evidence of a pattern of massive payments to SAAD Group (at times running at an average of well over 1

million dollars per day) which were inexplicable having regard to the nature of AHAB's business and the lack of any legal or equitable interest of AHAB in the SAAD Group. Such payments could, at least prima facie, have been of no benefit to AHAB.

109. For the purposes of the assessment of an interim award based on AHAB's pleaded case now deemed proven against Mr. Al Sanea in respect of his misappropriations, I am satisfied that a significant proportion of the pleaded damages will ultimately be recoverable as against him personally. I am satisfied that this is so despite the various objections and the counter-arguments raised by the Defendants in Liquidation by reference to the pleaded case and the state of AHAB's evidence.

110. While the Defendants in Liquidation remain entitled to raise their objections and counter-arguments at the trial of the case as against them, they are not entitled, in my view, to raise those objections and courter-arguments now in effect, as surrogates for Mr. Al Sanea.

111. At trial, the Defendants in Liquidation will, presumably, have the full benefit of mutual and complete discovery in the case and of cross-examination of Mr. Charlton and Mr. Mark Hayley. So, for that matter, should AHAB have the benefit of full disclosure, the better to particularise its tracing claim and the details of the unauthorised borrowings.

112. While, as Mr. Akers says in paragraph 76 of his 7th Affidavit, "*the GT Defendants do not accept that any of the alleged cheques relied upon by AHAB represent a "misappropriation" by Mr. Al Sanea*", Mr. Al Sanea cannot now contest the evidence in that regard, and it is his liability which underlies AHAB's present

application. There is a patent and now deemed proven dishonesty involved, for instance, in Mr. Al Sanea writing himself and his SAAD Group some USD2 billion in cheques, to the tune of USD1 million or more every day.

113. Similar conclusions may now, at least at this interim provisional stage, be reached about the letters of credit payments. Whilst the precise total is not amenable to determination now (and need not be determined at this stage) it is clear that vast amounts were paid out to the SAAD Group by that route. These payments are also set out in considerable detail – as to dates, amounts, beneficiaries and merchandise purportedly obtained – in Schedule 4 to AHAB's Statement of Claim.

114. As with the payments by cheque, the Court must proceed by virtue of the default judgment and in the absence of evidence to the contrary, on the basis that the letters of credit payments pleaded were made in dishonest breach of fiduciary duty.

115. In conclusion, I dismiss the objections of the Defendants in Liquidation, but reserve their right to raise all matters relevant to liability and quantum in the trial of the proceedings against them.

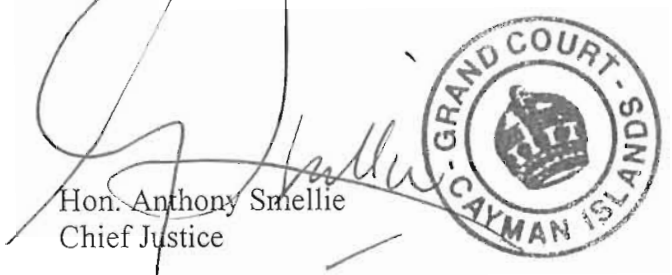
116. I award an interim payment against Mr. Al Sanea in the amount of USD2.50 billion on the basis that:

(a) such an order represents a reasonable proportion of the damages which in the opinion of the Court, are likely to be ultimately recoverable by AHAB from Mr. Al Sanea;

(b) this order and the reasons herein given for it shall not be binding on the Defendants in Liquidation, and shall be without prejudice to their right to pursue any argument pleaded in their Defences;

(c) The formal order for this interim award of damages may not be filed and issued until AHAB fulfills its undertaking given to this Court in December 2011, to amend its pleadings to reflect the impact of the N Files disclosure upon its pleaded claim in relation to unauthorised borrowings.

117. This last condition upon AHAB's interim award is placed in enforcement of the principle that a party should not expect to rely upon a pleaded case which it acknowledges even if only in part, to be factually incorrect. It is not a condition intended to detract from AHAB's now proven claim for dishonest breach of fiduciary duty.



Hon. Anthony Smellie
Chief Justice

June 12, 2012