IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE No: FSD 54 of 2009 (ASCJ)

BETWEEN:

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

Plaintiff

AND

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

Defendants

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

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

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

Mr. Thomas Lowe QC and Mr. Jack Watson instructed by Harneys for SIFCOS.

RULING

1. In seeking leave to appeal, AHAB needs to show a real prospect of success[1], viz: that it can convince the Court of Appeal that I was wrong to have concluded as I did on two fundamental issues.

[1] See Telesystem Int'l Wireless v CVC/Opportunity Equity Partners 2001 CILR N – 21, applying Swain v Hillman [2001] 1 All E.R. 91; [1999] T.L.R. 745, dicta of Lord Woolf M.R., leave to appeal will also be grated if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, eg: when a public policy issue arises or a binding authority requires reconsideration – circumstances which do not arise on this application.

2. The first is as to the unsustainability of the inferences AHAB seeks to draw from the manipulated documents. The second, as AHAB puts it – that, as a matter of the exercise of my discretion, I was wrong to have concluded that the potential prejudice to the Defendants to arise from allowing the amendment would outweigh the prejudice to AHAB from not allowing the amendment.

3. These are two distinct fundamental issues, either of which, properly analysed, could be a proper basis for having refused AHAB's application to amend.

4. Mr Quest has identified in his written arguments 10 separate grounds of appeal but I will not respond to each ground separately. They deal with one or other of the two issues identified above and for the sake of convenience in preparing this note of ruling, I will deal with them as they fall respectively under the same two compendious headings – "sustainable inferences" and "potential prejudice".

Sustainable inferences

5. As already noted, this is a fundamental issue to be addressed upon AHAB's application now. In doing so, I note Mr Quest's argument that I am obliged to accept as a proven issue the fact that there is already a pleaded case of "new for old" and that this provides an established basis for testing the sustainability of the inferences he seeks to advance by way of the manipulated documents.

6. That is the very circularity of reasoning identified in the judgment as a reason for refusing the application to amend and when properly examined, reveals the real danger of allowing the amendment on the contended basis.

7. "New for old" is not a proven fact, it is, as yet, nothing more than a pleaded assertion. As matters stand, AHAB proposes to adduce no direct evidence from any witness capable of proving that "new for old" was anything more than an idea that was discussed, that it was actually implemented as a policy and how it was implemented.

8. What there is is what I have described in the subject judgment as Saud Algosaibi's "second hand" account of the existence of the policy. Given the hearsay nature of Saud's evidence, even taken with it, none of the very finite set of documents identified as evidencing the policy can be regarded as clear proof of its existence. Those documents are themselves to be relied upon only inferentially as evidence of its existence.

9. Yet, as Mr Quests acknowledges, the inferences for which he contends and which I must now be satisfied are sustainable before the amendment can be allowed, can arise only if "new for old" is regarded as a fact capable of proof on the evidence as it now stands. Without that, the manipulated documents would exist in a vacuum and the reason for their existence becomes a matter for speculation. It is that invitation to speculation which must be eschewed for its circularity: the argument would be that the manipulated documents must have been created by Mr Al Sanea only to evade "new for old" and so "new for old" must have existed.

10. This sort of reasoning would be permissible only in the light of cogent evidence upon which a finding of the existence of "new for old" could separately be made. To be clear, by describing Saud's evidence on this issue as "second hand", I do not prejudge the issue. But I am required nonetheless to form a view of the case. An assessment now

of the sustainability of the inference contended for is unavoidable. That is what is required by the case law when it speaks of scrutinizing the application to amend to see whether it would plead a sustainable case.

11. One then sees that the purpose of the amendment would be to establish a number of important averments, all as a matter of inference. First, that Mr Al Sanea must have been responsible for the manipulation of the documents. Second, that this must have been for the purpose of evading "new for old" and deceiving Suleiman Algosaibi. And third, that this would have been achieved (a)simply by the presentation of the documents along with their counter parts for the true amounts of borrowings to Badr Eldrin Badr who (b) must then have relied upon them to the exclusion of all others, to advise Suleiman to agree to the increased borrowings which the documents represent.

12. Absent any of those averments, the manipulated documents would be irrelevant to AHAB's case.

13. Yet, in the absence of separate cogent proof of "new for old" , those are all quantum leaps of reasoning which it would be unsafe and therefore impermissible to take in the circumstances of this case where other possible explanations, innocent or fraudulent, may well exist.

14. This is illustrated by but one example of a different inference identified in the judgment – that arising from some of the transactional documents found at Head Office and which suggest that they would have been available to Suleiman and Badr as records for checking the history of the transactions. It is reasonable to think that still further documents related to the manipulated documents, not yet identified for want of a

complete inspection of the discovery, may well have been available to Suleiman and Badr (or anyone else involved) at Head Office. The availability of these other documents at Head Office against which Mr Badr could have been able to check the history of the transactions seems to negate the inference that no such check could or would have been made.

Potential prejudice to the Defendants

15. This leads naturally into a discussion of the second issue because the probable existence of other related documents would require the Defendants to search for, identify and analyze them, to see whether or not the inferences for which AHAB contends are ultimately sustainable. It is in this sense that the prejudice would primarily arise: as I am required to allow the amendment only if satisfied that it pleads a sustainable case, the very fact of the amendment would present the Defendants with inferences deemed prima facie sustainable, which they must refute. Deeming the inferences for which AHAB contends sustainable would make it incumbent upon the Defendants to trawl through the discovery for the possible or even probable existence of other documents which could disprove the inferences. AHAB has not carried out this exercise itself so as to be able to vouchsafe the elimination of those contingencies.

16. Placing the Defendants in that position is the impermissible reversal of the burden of proof of which the case law and the judgment speak and I can see no prospect of AHAB persuading the Court of Appeal to take a different view in the circumstances of this case. This is quite apart from the further question of how onerous the task would

be, both for the Defendants' expert Mr Handy and the rest of the Defendants' litigation teams.

17. For these reasons the application for leave to appeal is refused.

Hon. Anthony Smellie

Chief Justice of the Cayman Islands

Released in draft on 12 September 2016.