



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 150 OF 2020 (NSJ)

IN THE MATTER OF SECTIONS 145 AND 146 OF THE COMPANIES LAW (2020 REVISION)

BETWEEN

**SIMON CONWAY, MICHAEL JERVIS AND MOHAMMED FARZADI
AS JOINT OFFICIAL LIQUIDATORS OF ABRAAJ HOLDINGS (IN OFFICIAL
LIQUIDATION)**

Plaintiffs

AND

THE GHF GROUP LIMITED

Defendant

AND BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

AND

- (1) ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)**
- (2) GHF GENERAL PARTNER LIMITED**
- (3) THE GHF GROUP LIMITED**
- (4) ABRAAJ GENERAL PARTNER VIII LIMITED**

Defendants

JUDGMENT ON GHF’s APPLICATION FOR PERMISSION TO AMEND ITS RE-AMENDED DEFENCE IN FSD 150 OF 2020 – FURTHER AMENDMENTS

Introduction

1. On 2-4 October 2023 the pre-trial review in these proceedings was heard at which a number of applications were made including GHF's application, made by its summons issued on 7 September 2023, for leave to amend its Re-Amended Defence and Counterclaim in the terms set out in a draft Re-Re-Amended Defence and Counterclaim filed with the Court (**RRD&CC**). On 6 October 2023, I handed down a ruling (the **Judgment**) on GHF's application and granted GHF permission to make certain of the amendments for which it sought leave. As to paragraphs 15(3) and 60 of the draft RRD&CC, I required (at paragraph 8 of the Judgment) that GHF provide revised amendments to address the deficiencies I had identified and GHF served its updated RRD&CC on the AH Parties on 11 October 2023.
2. The AH Parties oppose the revised amendments made to paragraphs 15(3), 60, 62A, 94B(5) and 94C to 95 inclusive (the **Opposed Amendments**) of the updated RRD&CC but do not oppose the other amendments (the AH Parties' position was set out in its note dated 13 October). When giving GHF permission to file further amendments to deal with the problems I had identified in the Judgment I indicated that in view of the short time before trial, any amendments would need clearly to resolve these problems in order for leave to amend to be granted. In view of the AH Parties' objections to the Opposed Amendments I must rapidly form a view as to whether to grant leave to amend in the circumstances.
3. I have reviewed the proposed further amendments and the grounds on which the AH Parties' object to leave being granted (the amendments and grounds of opposition are summarised below) and now briefly set out below my decision and my reasons.

The revised amendments to paragraph 15(3) of the RRD&CC

4. The Opposed Amendments relate to the funds paid to AH in December 2017 by two different parties, AE2L and the Plaintiff (in FSD 203 of 2020). [15(3)] of the RRD&CC sets out the facts which form the basis of GHF's claim that these funds were paid and received on the basis that they would not be at the free disposal of AH or form part of its assets but rather would be held on trust for others, being in the alternative investors, GHF and/or Hospitals or the Partnership and/or the Parallel Fund B.
5. As I understand the meaning and intended effect of the revised amendments to this subparagraph the averments made and GHF's case can be summarised as follows:
 - (a). AH intended to and did make good the deprecations from the trust by use of the funding from AE2L and the Plaintiff and that funding:

- (i). was received from AE2L and the Plaintiff on terms that it was to be used:
 - (ii). was intended by AE2L and the Plaintiff and AH and Mr Naqvi to be used: for the purpose of repaying funds received from investors and for the benefit of investors or in the alternative for the other purposes set out in [15(3)]
 - (b). the funding:
 - (i). was received from AE2L and the Plaintiff on terms that the funding was:
 - (ii). was intended by AE2L and the Plaintiff and AH and Mr Naqvi:

never to be to be at the free disposal of AH or to form part of its general assets.
 - (c). the funding was held on trust for the benefit of investors or alternatively the other parties identified in [15(3)].
6. These averments are repeated as to AE2L at [94C] ([94B], [94C], [94D], [94E], [94G] and [94H] respond to [19] of the AH Parties' Re-Re-Amended Statement of Claim (**RRASoC**) which relates to the funding from AE2L).
 7. The facts relied on to support the averments relating to AE2L are set out at [94E] and [94G]. These primarily relate to actions taken or statements made by Mr Naqvi but also cover payments made by GHF (referred to in Appendix 4) and the timing of the payments made by Indorama Group and Schweizerische International. [94G] asserts that Mr Naqvi was acting for AE2L and therefore that his state of mind and intentions should be attributed to AE2L.
 8. The facts relied on to support the averments relating to the Plaintiff are set out at [95] (which responds to [20] of the RRASoC). [95] says that GHF relies on certain matters pleaded in the Plaintiff's Re-Amended Statement of Claim in the Jafar Proceedings (FSD 203 of 2020 (NSJ)) (the **Jafar SoC**) and the circumstances and matters pleaded at [94E]. The matters referred to in [94], as I have noted, relate to actions taken or statements made by Mr Naqvi, payments made by GHF (referred to in Appendix 4), the timing of the payments made by Indorama Group and Schweizerische International and the action taken by and communications from investors. The paragraphs relied on from the Jafar SoC are as follows:

"20 In the course of a meeting between them on 20 December 2017, which took place in the late morning, at or after 11am UAE time, at Mr Jafar's offices in Sharjah, UAE and lasted about 30-45 minutes, Mr. Naqvi asked to borrow money urgently from Mr. Jafar. Mr. Naqvi stated that, or used words to the same effect:

- (1) *Certain investors in the Healthcare Fund (“the Healthcare Investors”) had demanded the return of uninvested capital (“the Uninvested Capital”);*
 - (6) *The Abraaj Group needed to borrow US\$290 million before the end of December 2017, of which US\$250 million was to pay the Uninvested Capital to the Healthcare Investors and (Mr. Naqvi implied) the balance was required to meet urgent liquidity needs of other Abraaj Group entities;*
 - (9) *The Abraaj Group was financially sound, but was simply facing short-term cash/liquidity issues over the year end to address in particular the Healthcare Fund’s problem with its investors.*
21. *Mr Naqvi requested that Mr Jafar urgently lend US\$90 million and explained that he (Mr Naqvi) was in discussions with Emirates National Bank of Dubai (“Emirates NBD”) to raise an additional US\$200 million.*
23. *Thereafter, further conversations and/or meetings took place in relation to the First Loan, Second Loan and Third Loan, during which Mr. Naqvi did not correct any of the statements pleaded in paragraph 20 above:*

The First Loan

- (1) *A telephone call took place in the afternoon of 20 December 2017, between Mr. Naqvi, Mr. Jafar and Mr. Nerguizian, Mr. Jafar’s banker and the CEO of BoS, which took place at around 2pm UAE time and lasted about 10 minutes (“the 20 December 2017 Telephone Call”).*

PARTICULARS

In the course of the 20 December 2017 Telephone Call, Mr. Naqvi:

- (a) *Stated that the unencumbered assets of the Abraaj Group would be available to meet repayments to Mr Jafar and identified alternative sources of funds which could be used to meet such repayments;*
- (b) *Stated that he was on the verge of finalising other funding, including selling down equity in AH, which would generate significant liquidity;*

- (c) *Requested that the proposed loan be US\$100 million and the date for repayment be extended to 28 February 2018 to provide an additional buffer of time; and*
- (d) *Requested that the loan be made to AIML, since, unlike AH which did not have a chequing account, AIML could, at the time that the loan was to be made, issue a cheque (in the amount of the principal, plus fees and interest) to Mr Jafar post- dated to 28 February 2018.*
- (2) *A meeting took place between Mr. Naqvi, Mr. Jafar and Mr. Nerguizian in the early evening of 20 December 2017 at the Royal Mirage Hotel, Dubai, for which Mr. Jafar was present for around 30-45 minutes. Mr. Jafar and Mr. Naqvi discussed certain practicalities relating to the First Loan; Mr. Jafar and Mr. Naqvi reiterated and confirmed their agreement to the matters that had been discussed in the telephone calls that had taken place earlier that same day: namely, the amount of the loan (US\$100 million); the conditions on which the loan was to be provided; the applicable interest rate; and the time for repayment. Mr Jafar and Mr Naqvi agreed that Mr Nerguizian and Mr Naqvi would take care of the necessary arrangements and documentation in respect of the First Loan Agreement.*

The Second Loan

- (3) *A telephone call took place on 26 December 2017, between Mr. Naqvi and Mr. Jafar, whilst Mr. Jafar was in Switzerland, during which Mr. Naqvi requested a further loan of US\$200 million, on the terms set out in the Schedule of Loan Terms annexed hereto.*

PARTICULARS

- (a) *Mr. Naqvi stated that:*
- (i) *The proposed terms from Emirates NBD, referred to at paragraph 21 above, were draconian and this deal was unlikely to close. Mr Naqvi stated that he was not happy with the way that ENBD were approaching negotiations, and indicated that certain of ENBD's stated requirements were overly draconian, unreasonable and/or intrusive; for example, requiring itemisation and valuation of art works.*
- (ii) *He was requesting Mr Jafar supply funding on the same terms as the First Loan Agreement;*

- (2) *It was intended that approximately US\$250 million of the loan monies would be used for the purpose of returning Uninvested Capital to the Healthcare Investors;”*

The AH Parties objections

9. The AH Parties have three objections, each, they say, relating to the deficiencies identified by in the three sub-paragraphs of [7] of the Judgment.
10. First, GHF has failed to specify whether it refers to contractual or binding terms (express or implied), to terms in the sense of conditions imposed by the payor, or to terms in the sense of self-imposed conditions established (or a declaration of trust declared) by AH. As such, GHF has failed to address the deficiency identified in paragraph 7(c) of the Judgment. As such, the updated amendments provide no particulars of the nature of the alleged “*terms*” or the manner in which they are said to arise.
11. Secondly, GHF has failed to plead the facts on which it relies, or any facts, to support its claim that the Plaintiff agreed, or assented to and accepted, that the loan proceeds particularised in paragraph 20.2(b) of the RRASoC were to be paid and received on “*terms*” that they were not to be at the free disposal of AH or form part of its general assets (see paragraph 7(a) of the Judgment). In particular, the AH Parties say, [15(3)] and [60] simply repeat the bald assertion in the previous version of the RRD&CC that the funding was received by AH on the alleged terms but now adds and includes bare references to the Plaintiff (and AE2L). GHF seeks to refer to matters pleaded in the Jafar SoC by way of a bare reference to numerous paragraphs therein. The AH Parties say that this is impermissible (particularly at such a late stage of proceedings). If in FSD 150 of 2020 GHF wishes to adopt and rely on contentions made in the Jafar Proceedings it should set out those contentions clearly and fully in the RRD&CC in line with the previous guidance given by the Court in these proceedings. The AH Parties rely on my judgment on the Defendant’s application for further and better particulars of the Plaintiffs’ Statement of Claim (FSD 150 of 2020 (NSJ)) (14 February 2022) in which I said at [32] that “*...it is acceptable for party A in one set of proceedings... to cross-refer and rely on pleadings in a related proceeding to which party A and party B are also parties... but party A must do so clearly and explicitly.*”
12. The AH Parties also argue that GHF’s approach is unacceptable because the GHF’s averments are inconsistent with its position in the Jafar Proceedings. The AH Parties note that GHF now relies on [20(1)], [20(6)] and [20(9)] of the Jafar SoC but in the GHF Parties’ defence in the Jafar Proceedings (*GHF Jafar Defence*) the GHF Parties expressly assert that they had no knowledge of whether Mr Naqvi made the alleged statements referred to in those paragraphs (see paras 30(2) and (5) of the GHF Jafar Defence) and do not admit those paragraphs (para 30(6) of the GHF Jafar Defence). The same inconsistency applies in relation to [21], [23(1)]-[23(4)] and [24] of the Jafar SoC since in the Jafar Proceedings the GHF Parties do not admit the correctness of the

assertions made in these paragraphs (and asserts that [24] is “*embarrassing for want of particularity*” or alternatively is immaterial and irrelevant and should be ignored). The AH Parties submit that it is incoherent and abusive for GHF to not admit statements in one set of proceedings but to purport in another set of proceedings to put those same statements forward as part of its positive case.

13. In addition, the paragraphs from the Jafar SoC relied on by GHF do not support the allegation that the Plaintiff agreed, or assented to and accepted, that the loan proceeds were to be paid and received on “*terms*” that they were not to be at the free disposal of AH or form part of its general assets. Rather the paragraphs of the Jafar SoC are concerned with the separate question of what representations Mr Naqvi made to the Plaintiff about the state of the Abraaj Group.
14. Thirdly, the AH Parties argue that GHF has failed to plead the facts on which it relies, or any facts, to support its claim that Mr Naqvi’s knowledge and intentions are to be attributed to AE2L for the purpose of AH’s receipt of the funding raised in December 2017 on the “*terms*” alleged and its case remains entirely opaque and unclear on this point. Paragraph 94C of the updated RRD&CC sets out GHF’s averment that AH received the funding raised by the share sales from AE2L on the alleged “*terms*” however the particulars provided only repeat the bald assertions that the terms were that the funding was *inter alia* not to be at the free disposal of AH or form part of its general assets. No particulars are provided as to the nature of the alleged terms, or the manner in which they are alleged to have arisen. Paragraph 94E of the updated RRD&CC purportedly provides particulars of the basis on which the alleged terms and intentions pleaded in paragraphs 15(3), 60 and 94C arise but, the AH Parties argue, they fail to provide a basis for the alleged terms on which AH received the funding from AE2L and the Plaintiff. GHF also now alleges that the funding raised by way of the share sales was paid by the relevant investors to AH “*on behalf of and/or at the direction of AE2L*” (RRD&CC/94B). However, GHF fails to provide any particulars of the basis on which the funding is alleged to have been paid to AH on behalf of or at the direction of AE2L. Paragraph 94B(5) refers to paragraphs 58(1) and 58(2), which simply plead AH’s receipt of the funding from the investors to whom the shares were sold, and do not mention AE2L at all. The AH Parties claim that on GHF’s own pleaded case the monies were received by AH and not by AE2L. Furthermore, the AH Parties say that GHF also now apparently contends that Mr Naqvi was the directing mind and will of AE2L for “*the specific purposes of AE2L selling its shares in AH*” but does not admit that Mr Naqvi was the directing mind and will of AE2L generally (see RRD&CC/94G). The AH Parties submit that this appears to be the intent of this sub-paragraph but the meaning is not entirely clear. However, no basis is pleaded on which Mr Naqvi’s knowledge and intention are to be attributed to AE2L for the specific purpose of AH’s receipt of the funding “*on behalf of and at the direction of AE2L*” but not for other purposes. The AH Parties also say that they do not understand how GHF can say, on the one hand, that Mr Naqvi controlled AE2L (RRD&CC/94B(1)) but, on the other, not admit that Mr Naqvi acted for and on behalf of AE2L (RRD&CC/94G).

15. The AH Parties argue that the proposed amendments are clearly deficient as a matter of pleading and that they would be prejudiced if leave to amend were granted. They say that they are entitled to know the case which they have to meet at the imminent trial and this is particularly so given the imminent need to serve trial skeletons. At present, they argue, it is unclear what GHF's case is. Moreover, the lack of clarity and particulars in the amendments means that it is impossible for the AH Parties to determine whether they would wish to serve any evidence in response to the amendments (if, for example, GHF had pleaded a properly particularised case that the monies had been advanced on terms imposed by the Plaintiff then it is entirely possible that the AH Parties would have wished to adduce evidence in response to that suggestion or at the very least would have wished to have the opportunity to investigate this, and the lack of clarity in GHF's case means that the AH Parties are unable to determine what further evidence might be required).

Discussion and decision

The AH Parties' first objection – the impact of the failure to specify whether “terms” refers to contractual terms, to conditions imposed by the payor, or self-imposed conditions established (or a declaration of trust declared) by AH

16. As regards AH's first objection, it seems to me that GHF has adequately (albeit rather inelegantly) pleaded the *facts* on which it relies to support its case that the funds received from AE2L and the Plaintiff were received on the basis that they would not be freely available to AH but rather held on trust for others. The continued use of “*terms*” without further elaboration does create some ambiguity as to the precise *legal* basis for the claim but in my view the amended pleading sets out the factual basis for the plea in a comprehensible and sufficiently precise manner and the legal basis for the claim based on those facts can be discerned from the language used. But, as I explain below, since the service of skeletons is imminent and the trial only a short time away, I think that fairness requires that GHF briefly confirm its position to the AH Parties so that they can be sure as to the case they have to meet.
17. [15(3)] of the RRD&CC (and the Opposed Amendments generally) asserts that the funding was “*received from AE2L and Mr Jafar on terms that it was to be used and was intended (by AE2L and Mr Jafar (as appropriate) and Mr Naqvi and AH) to be used for the purpose of repaying funds received refer to*” a particular purpose. It would have been much clearer had GHF added after the reference to “*the terms*” the words “*imposed by AE2L and Mr Jafar and accepted by Mr Naqvi and AH*” (or to have referred to conditions as to use imposed by AE2L and Mr Jafar and accepted by Mr Naqvi and AH). However, I take the meaning connoted by these additional words to be what is intended by GHF. Significantly, GHF has not pleaded *an agreement* between AE2L and AH or the Plaintiff and AH, which would be the factual matter required to be pleaded. I accept that the drafting, which refers to the mutual intention of AE2L, the Plaintiff, Mr Naqvi and AH to adopt and impose the “*terms*” (as I have said “*conditions*” seems to me to be a better

word and what is intended), uses contractual language and could be understood as establishing the factual basis for a contract, but in my view in the absence of a plea that there was an agreement the amended pleading is to be understood as not making a contractual claim. The facts asserted are said to establish, without a binding contractual agreement, a legal basis for the averment that the funds received by AH are held on trust (whether as a matter of law by reason of the conditions imposed by the payers, accepted by AH or AH's decision to impose such conditions with the assent of the payers). It seems to me that this is a sufficient pleading and that the AH Parties have sufficient to understand and defend the case made against them.

18. I am prepared to grant leave (subject to the decisions I set out below on the AH Parties other objections) despite the failure further to particularise the reference to terms on the basis that the pleading is to be understood in the manner I have described. If the GHF Parties had intended, contrary to my understanding, to assert an agreement and a contractual basis for the trust (so that the “terms” are said to take effect as contractual terms in a binding agreement) in my view they have failed adequately to plead such a case and it is now too late to make further amendments.

The AH Parties’ second objection – has GHF failed to plead any or sufficient facts to support its claim that the Plaintiff agreed, or assented to and accepted, that the funding was not to be at the free disposal of AH?

19. I agree with the AH Parties that GHF has failed adequately to identify and plead facts from which it could be concluded that the Plaintiff agreed to (impose), assented to or accepted that the funds he advanced were to be held in the manner asserted by the GHF Parties.
20. The GHF Parties fail to refer to, and I assume are unable to rely on, any statements made by or communications from the Plaintiff or to identify specific steps and conduct and relate that to the Plaintiff so as to establish a basis for what GHF says the Plaintiff required or assented to as regards the use of the funds he advanced. I agree with the AH Parties that, even if GHF could properly rely on them, the paragraphs of the Jafar SoC do not assist GHF and are concerned with the separate question of what representations Mr Naqvi made to the Plaintiff about the state of the Abraaj Group.
21. I also accept that GHF cannot credibly rely on averments and factual allegations made in the Jafar SoC when they have denied or failed to accept the truth of such allegations in the Jafar Proceedings. At least, GHF would need to spell out in its own pleading which averments and facts pleaded in the Jafar SoC it asserted to be true and relied on (otherwise it would be wholly unclear, in circumstances where in the Jafar Proceedings, GHF did not admit the truth of the averments and matters pleaded in the relevant parts of the Jafar SoC, what GHF’s case was).

22. Accordingly, leave is refused to make the Opposed Amendments so as to claim that the funds advanced by the Plaintiff were held subject to the conditions (the “terms”) asserted by GHF.

The AH Parties’ third objection – has GHF failed to plead any or sufficient facts to support its claim that Mr Naqvi’s knowledge and intentions are to be attributed to AE2L for the purpose of AH’s receipt of the funding raised in December 2017 on the “terms” alleged and is GHF’s position on this issue inconsistent or coherent?

23. I shall give leave to make the Opposed Amendments in relation to the funding derived from the AE2L share sales. It seems to me that, while the pleading has in places unfortunately become byzantine in its complexity, GHF has done enough to support, and pleaded sufficient facts in support of, its case that AE2L (via Mr Naqvi) imposed or accepted that the funds paid and derived from the share sales would not be at the free disposal of AH.
24. I accept that the drafting of [94G] is unhelpfully complex and confusing. But I take it that GHF is asserting that (a) Mr Naqvi acted (as agent) for (and as the directing mind and will of) AE2L (and AH) at least in relation to the AE2L share sales, such that his state of mind and intention regarding the use to which the funds paid to AH were to be and could be put was to be attributed to AE2L (and AH); and (b) in the alternative, if GHF is wrong in saying that Mr Naqvi was not the directing mind and will of AE2L (and AH) for all purposes, and the Court finds that he was, then GHF relies on that fact and such a finding for the purpose of establishing that the funds derived from the AE2L share sales and paid to AH were not to be at AH’s free disposal. This seems to me to a proper and sufficient plea which can be dealt with at trial.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
24 October 2023