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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009



29-9-2010

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)
AND IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED

AND 16 OTHER LIQUIDATIONS

BETWEEN AHMAD HAMAD ALGOSAIBI
AND BROTHERS COMPANY
AND SAAD INVESTMENTS COMPANY LIMITED
MAAN AL-SANEA
AND 42 OTHER CORPORATE DEFENDANTS

PLAINTIFF
1ST DEFENDANT
2ND DEFENDANT

IN CHAMBERS
THE 13TH DAY OF SEPTEMBER 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Peter Hayden and Mr. George Keightley of Mourant Ozannes for the plaintiff Ahmad Hamad Algozaibi and Brothers Company ("AHAB")

Mr. Jeremy Walton of Appleby for Mr. Al Sanea (with Mr. Baller)

Mr. Jan Golaszewski of Maples for the 34^d, 9th – 12th and 20th Defendants

RULING

1. Mr. Walton, on behalf of the 2nd defendant, Mr. Al Sanea, applies for leave to appeal against my ruling of 25 June 2010 ("the Ruling") and the directions order arising from the Ruling.

2. He identifies and relies upon what he describes as six errors of law and fact which render the Ruling susceptible to appeal. He says that those errors are jointly or severally of such significance as to amount to a good arguable case for appeal.
3. The Ruling being interlocutory in nature and so in respect of which leave to appeal is required either from this Court or the Court of Appeal – (section 6(f) of the Court of Appeal Law) – the applicant must show, on the points of law raised, that there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case. As to supposed errors of fact, the test is that leave can only appropriately be given if it can be shown that the Ruling draws untenable inferences from primary facts or should have drawn materially different inferences. Even so, leave will nonetheless rarely be given for an appeal based on the first instance court's evaluation of evidence and where what is required is an examination of the detail of the factual investigation done by that court. Leave will also rarely be given on the basis of the court's alleged wrongful exercise of its discretion, unless the case raises a point of general principle requiring the opinion of the appellate court. Those being the guiding principles, a further principle has logically developed which is that if this Court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter. See generally *T.I.W. Inc and T.I.W. Do Brasil v CVC/Opportunity Equity Partners and others* 2001 CILR Note 21, citing and applying on *Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)*, [1999] 1 WLR 2.

4. The Ruling decided, among other things, that the Cayman Islands is the appropriate forum for the trial of AHAB's claims (in fraud, conspiracy and in equity for recovery of its property) brought here as of right against the corporate defendants which are Cayman entities and in respect of which claims Mr. Al Sanea should be joined as a necessary and proper party by virtue of leave granted for service out of the claims against him in Saudi Arabia where he resides.
5. Mr. Walton describes his six grounds of appeal as all having in common, that the Ruling correctly starts off with findings of fact and holdings of law but fails to take them to the logical conclusions in the outcome concluded in the order, including that his client is condemned in the costs of AHAB in the proceedings leading to the Ruling.
6. Mr. Golaszewski also seeks leave to appeal on behalf of the Maples Defendants who are some of the corporate defendants. In summary, he says that the Ruling wrongly concludes that Cayman law governs the claims which are brought against his clients by the plaintiff AHAB and that that conclusion has been wholly determinative of the question of their challenge to the Cayman Court as the appropriate forum for the trial of the claims against them.
7. He also shares some of Mr. Walton's arguments that the Ruling relies on other misdirections in law; including as to the relevance of what it describes as "juridical advantages" in deciding on the appropriate forum.
8. On behalf of AHAB, Mr. Hayden submitted to the contrary of both of Mr. Walton's and Mr. Golaszewski's arguments.

9. I will now deal with the arguments in favour of leave to appeal in turn:

(i) That in the Ruling, the Court correctly found that upon the earlier ex parte hearing for leave to serve the action out of the jurisdiction upon Mr. Al Sanea in Saudi Arabia, Henderson J had misdirected himself. That the learned judge had so done in accepting AHAB's Counsel's proposition that "the argument about whether Cayman was the appropriate forum [for trial of the action] was "not an argument for today" (that is: not a matter to be considered on the then ex parte application for leave to serve out upon Mr. Al Sanea [before him]".

However, says Mr. Walton, the Ruling is wrong because I did not, despite that finding, go on to discharge Justice Henderson's earlier ex parte order but instead proceeded to hear and decide the matter afresh.

This argument does not, in my view, meet the test for leave to appeal. It has no prospect of success because the case law (which is fully discussed in the Ruling) clearly allowed me to hear and decide on the inter partes basis, whether or not leave to serve out upon Mr. Al Sanea should be given. It was on that basis that I decided that the grant of leave should stand. See pp 21-26 of the Ruling and in particular, dictum of Seville LJ. In *Artlev AG v JSC Almazly Rossii-Sakha* cited in the Ruling at pp 23-24. This makes

it clear that I was not obliged simply to set aside the leave for service out granted by Henderson J., as Mr. Walton contends.

- (ii) That although the Ruling correctly identifies that there are distinct claims against Mr. Al Sanea alone not involving the corporate defendants, the Court nonetheless proceeded to grant leave to serve out against Mr. Al Sanea on the basis that he is a necessary and proper party to such claims against the corporate defendants.

This argument proposes that where there are a multiplicity of claims, each and every claim brought against a defendant against whom leave to serve out is required must by itself satisfy the test for service out, rather than at least one of those claims satisfying the test.

Thus, notwithstanding the Court having found, in the words of GCR O. 11 r. 1(1)(c) that:

“...the claim is brought against a person (or persons) – here brought against the 17 corporate defendants] duly served within...(this) jurisdiction and a person [here Mr. Al Sanea] out of the jurisdiction is a necessary or proper party thereto.”

this argument asserts that the Court was obliged to find that each head of claim came within another specific limb of GCR O 11 R 1(1); before leave to serve outwith upon Mr. Al Sanea could have been properly granted in respect of any such head of claim.

The case law relied upon by Mr. Walton for that proposition does not support it. The first case relied upon is the *Eras Eil Actions*

[1992] Vol. 1 Lloyds Law Report, 570. In it, one of the many issues which the Court of Appeal had to address in that complicated case, was whether a claim which was added after the writ and statement of claim was amended and so was not included at the time when leave to serve the writ out of the jurisdiction was granted, could be regarded as the subject of that leave so as to make the further claim justiciable in the action in England as against the foreign defendant.

Citing the principle established by Parker v Schuller (1901) 17 T.L.R. 299 and affirmed ever since by later decisions, the Court (per Mustill LJ, at p.613) observed:

“...where leave to serve out is obtained in respect of a claim based on one cause of action it cannot be treated as leave in respect of a claim based on some other cause of action.”

But that is the observe to what Mr. Walton contends for here; which is that a particular cause of action against Mr. Al Sanea (that for tortious breach of fiduciary duty allegedly committed by him in Saudi Arabia) and which was included in the writ and statement of claim when leave was given, should not have been included and so by its inclusion rendered the grant of leave wholly improper.

This was not an argument taken at the hearing that led to the Ruling: Had it been, no doubt The Eras Eil Actions case itself and

the other highly authoritative cases cited in it would have been considered and found, as I now find them, to be entirely conclusive against this argument. One of those cases, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391, clearly illustrates the basis for my conclusion here.

That case laid down, among others, the rule that although the acts alleged in tort against a defendant had in the main taken place abroad, if the consequences included substantial damage sustained by the plaintiff in England, then the plaintiff's claim could be regarded as based upon a tort that is both actionable in the foreign jurisdiction and in English law (citing *Boys v Chaplin* [1971] A.C. 356 H. L. (E.) the so-called "double actionability rule"). Accordingly, leave to serve out in respect of such a claim could be appropriate. See paragraph 126 (v) (page 48) of the Ruling where *Boys v Chaplin* and that principle was, itself, noted.

When the circumstances of the case are viewed in the light of that case authority, it becomes clear that leave could have properly been given for the service out of the claim for tortious breach of fiduciary duty, in any event, on the specific basis of GCR O 11 r 1(1)(f). It is a tortious breach – even if committed as alleged in Saudi Arabia – which is also alleged to have redounded in damages to AHAB in this jurisdiction and so actionable here as well as in Saudi Arabia.

But such a specific finding, based on sub-paragraph (1)(f), was not necessary, once I was satisfied that AHAB has a good arguable case on at least one of the sub-paragraphs of Order 11 r. 1(1). The following discussion illustrates.

In this case the plaintiff AHAB relied upon the limb of Order 11 r 1(1)(c) - the necessary or proper party limb –and it was entitled to do so. See *The Siskina* [1979] A.C. 210 and page 25 (para. 83) of the Ruling.

This issue is of fundamental importance and was extensively dealt with in the Ruling. Further clarification can also be found in the *The Eras Eil Actions* case (at page 587) so heavily relied upon now by Mr. Walton, (citing in turn the judgment of Lord Justice Slade in *Metall und Rohstoff* (above) at p. 434):

“Order 11 r 4(2) provides that leave to serve a defendant out of the jurisdiction shall not be granted “unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction” under the Order. This imposes a three-fold burden on a plaintiff seeking leave. First, he must show that the claim he wishes to pursue is a good arguable claim on the merits. While the court cannot at this stage determine whether the plaintiff, if given

leave, will succeed, it must be satisfied that the plaintiff has a good chance of doing so. Secondly, the plaintiff must show a strong probability that the claim falls within the letter and the spirit of the sub-head or sub-heads of Order 22 4 1(1) relied upon. This requirement is treated strictly, since if leave is given (and, if challenged and upheld) it will never thereafter be investigated. Vitkorice Horni A Hutni Terirstvo v Korner [1951] A.C. 869, 889, per Lord Tucker. It is furthermore, an established principle that a foreigner resident abroad will not lightly be subjected to what is, to him, a foreign jurisdiction. Thirdly, the plaintiff must persuade the court that England is the forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice. This calls for the making of a judgment, the nature of which has recently been comprehensively reviewed in Spiliada Maritime Corp. v Consulex Ltd. (1987) A.C. 460, to which we revert below.

To that statement, Lord Mustill immediately added these words which are of direct application now (also at p.587):

“It will be observed that of the three tests prescribed by this formulation, only the second relates directly to jurisdiction in the strict sense. The lettered paragraphs of Order 11 r. 1 states conditions, one at least of which must be shown to exist before the Court can contemplate the exercise of the discretion to permit service abroad. However obviously justified the claim, however obviously suitable it may be to have it tried in England, the Court must not grant leave unless the case falls within the lettered paragraphs. It is therefore to be expected that a stricter test will be applied when deciding whether the claim does so fall, than in regard to the first and third stages, which are not concerned with formal jurisdiction. This is indeed what we find.”

(Emphasis supplied)

As to the “*necessary and proper party*” test – the Ruling at paragraph 101 proceeded on the basis that Mr. Al Sanea could be so described because:

“It is obvious that the liability of Mr. Al Sanea and the Saad Corporate defendants depend on the same investigation and that he is a proper party to the claims against them. Bringing Mr. Al Sanea into these proceedings also confers a real additional advantage on AHAB since he has assets separate

from the Saad Corporate defendants', against which a judgment could be enforced. Service out upon Mr. Al Sanea may thus be regarded as essential for the proper determination of the issues joined in the action so defined".

This view of what a “necessary and proper party” may be found to be is reinforced by the case of *Phillips and Others v Salton Europe and Others [2004] EWHC 2092 (Ch) (at para. 33)* cited now by Mr. Hayden in his reply.

The Ruling (at paragraph 83 and following) recognises and applies “*the three-fold burden*” (per Lord Justice Slade in *Metall und Rohstoff* (above) which was on AHAB when seeking leave to serve out of the jurisdiction. In so doing, the Ruling accepted that AHAB had shown that Mr. Al Sanea was “a necessary and proper party” to the action brought here as a prerequisite to the existence of the jurisdiction for service out. Jurisdiction having been thus established, there is no tenable argument for appeal that all aspects of AHAB’s claim must separately be shown to come within the other sub-paragraphs of Order 11 Rule 1.

- (iii) The third ground of appeal, in questioning the manner in which the Ruling deals with the competing connecting factors of the action to this or the Saudi jurisdiction as the appropriate forum, really seeks to challenge the exercise of discretion in that regard and so, in my view, is unsustainable.

(iv) It is further sought to be argued on appeal that it was impermissible of me to have taken certain factors into account in favour of Cayman as the appropriate forum, having already found that AHAB had failed to show that it could not get substantial justice in Saudi Arabia. This further proposed ground of appeal relies upon what, in my view, is a misconceived reading of the Ruling where, at paragraph 130, the Ruling cites three “distinct juridical advantages” as being among the factors which point to Cayman as the appropriate forum.

While those factors – which are procedural in nature – do not themselves show, by their ready availability in Cayman, that substantial justice by contrast would not be available in Saudi Arabia; that does not mean that they must be ignored in the exercise of discretion in determining the appropriate forum. Rather, the principle of the exercise remains as Lord Goff explained in *Spiliada* (and as cited at paragraph 126 (ix) of the Ruling – to determine where the case can be more “*suitably tried in the best interests of the parties and the ends of justice.*” I was persuaded in this regard specifically by Mr. McQuater’s submission (cited at page 57 paragraph (ix) of the Ruling) that the Court can and should take into account which forum offers the more appropriate procedure for the particular case and may do so without undertaking the odious comparison of whether Cayman

Islands or Saudi Arabian procedure is superior one to the other. This is the context, as further explained at paragraphs 125 and 128 to 134 of the Ruling, in which reliance is placed upon the juridical advantages being more readily available in Cayman. The case law does not, in my view, go so far as to require that by the unavailability of such factors in Saudi Arabia, it must be shown that substantial justice cannot be obtained there, before they might be considered in the exercise of discretion in arriving at the appropriate forum. Yet, this is tantamount to what Mr. Walton and Mr. Golaszewski now would seek to argue.

- (v) The fifth proposed ground of appeal proceeds on the basis that the Ruling conclusively accepted that the Board of Grievances in Saudi Arabia provides an available forum for the trial there of AHAB's claim when no such conclusive finding was made. The argument would be to the effect that as Saudi Arabia provides available forum, I should have concluded that it is the appropriate forum. But on the contrary, the Ruling explains why – notwithstanding a degree of agreement on the part of the experts that the Board of Grievances could take jurisdiction in this matter – there remains considerable doubt whether it would do so. A case management stay was imposed by the Ruling in part to allow for an opportunity to resolve that doubt.

(vi) Mr. Walton's sixth ground of appeal would argue first that the Ruling, in imposing a case management stay, should not have ordered the dismissal of his client's forum challenge and further that in light of the case management stay his client should not have been condemned in the "*costs of the application*".

Again I do not see a good arguable case for appeal. The challenge to the jurisdiction of this Court raised by Mr. Al Sanea was dismissed. In that regard, he was wholly unsuccessful and AHAB was successful. Had Mr. Al Sanea submitted to the jurisdiction and argued instead for a stay on the case management grounds only, that approach might well have (as the outcome indicates) resulted in the grant of such an order with the attendant savings of costs and time.

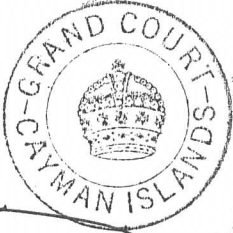
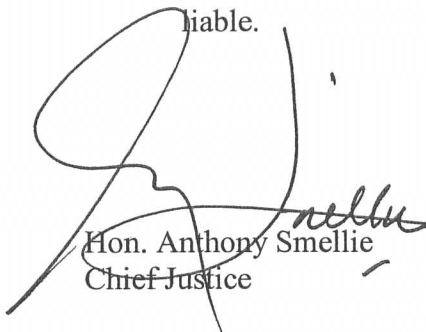
In the result he can hardly seek to evade the incidence of costs generated by his far more adversarial approach. This ground also, in my view, shows lack of merit.

10. Mr. Golaszewski for the Maples Defendants would seek to contend for the same kind of singular application of the Order 11 r 1(1) limbs as does Mr. Walton. For the reasons already given, his arguments show no greater prospect of success in this regard.
11. A primary premise of Mr. Golaszewski's argument is that the governing law of these claims against Mr. Al Sanea and his clients, is the law of Saudi Arabia as the place having the closest connection with the alleged actions. To the extent the

Ruling concludes that Saudi Arabia is not the appropriate forum at paragraph 101, I therefore fell into error and so the Ruling is susceptible to being set aside on appeal, at least insofar as his clients, the Maples Defendants are concerned.

12. In light of the discussion above about the case of *Boys v Chaplin* and citing its application by the Court of Appeal in the *Metall und Rohstoff* case, this argument is, in my view, also bound to fail.
13. For all the foregoing reasons, I refuse leave to appeal.
14. It follows that AHAB must have its costs of this application in any event and for which Mr. Al Sanea and the Maples Defendants shall be jointly and severally

liable.



Hon. Anthony Smellie
Chief Justice

September 29, 2010