



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 203 OF 2020 (NSJ)

**IN THE MATTER OF SECTIONS OF THE COMPANIES LAW (2020
REVISION)**

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

**RULING ON THE PLAINTIFF'S APPLICATION FOR PERMISSION TO AMEND ITS
RE-AMENDED STATEMENT OF CLAIM**

Introduction

1. I set out below my ruling on the Plaintiff's application for permission to amend his Re-Amended Statement of Claim (the *RASOC*) made by his summons dated 7 September 2023.
2. A number of the Plaintiff's proposed amendments have been accepted and agreed by the Fund Parties. As regards the proposed amendments which are not agreed and in dispute, at the PTR Lord Falconer (for the Plaintiff), Mr Atherton KC (for the GHF Parties) and Mr Ayres KC (for the Fourth Defendant) made submissions by reference to a number of categories of draft amendment and I follow their approach:

Paragraph 29(A)

3. Fund IV consented to this amendment, but the GHF Parties did not.
4. The Plaintiff says that the amendment is based on the evidence filed in the Related Proceedings by Mr Conway ([325] to [332] of Conway 1 contains Mr Conway's assessment that at the time that the representations which the Plaintiff claims were made AH and AIML were hopelessly insolvent and beyond rescue. Including the amendment does not give rise to any prejudice (as it is derived from the existing evidence) and should be allowed.
5. The GHF Parties say that in order to support the assertion in the amended pleading, the Plaintiff needs to refer to and rely on more of Conway 1 – he needs to refer to [325] to [360]. Secondly, since the JOLs are no longer parties to FSD 203, their evidence cannot be relied on by the Plaintiff, even though before settlement of the Plaintiff's claim against the JOLs directions had been given for all evidence filed in all the Related Proceedings to be treated as having been served in all of those proceedings. The GHF Parties argue that if Mr Conway's evidence is to be relied on by the Plaintiff it needs to be made clear that Mr Conway will be called to give evidence in FSD 203 of 2023.

6. The Plaintiff replied by referring to [1] of the consent order made on 13 November 2020 in the Related Proceedings to the effect that all the actions should be heard together and the consequence of the two actions being heard together, which had never been contested, was that evidence heard in one proceeding was also evidence in an (the) other.
7. I agree with the Plaintiff that the 13 November 2020 order continues to apply. No application to vary it has been made. I do not see that the settlement of the claim against the JOLs automatically effects or requires such an amendment. That order provides that Mr Conway's evidence (which is expressed to be adduced in relation to both FDS 150 and 203) stands as evidence in both sets of proceedings. There is no need for a new step to be taken to direct that Mr Conway to be called as a witness. Obviously, since the GHF Parties (and the Fourth Defendant) wish to cross-examine Mr Conway, he must attend the trial and be available for cross-examination but arrangements have already been made for that to happen (he is included as a witness in the draft trial timetable).

Paragraph 29A (with consequential amendments to paragraphs 30(2), 34, 35 and 36)

8. Paragraph 29A avers that the express representation pleaded by the Plaintiff at paragraph 20(8) was false. By paragraph 20(8), the Plaintiff pleads that during his meeting with Mr Naqvi Mr Naqvi said that “*Senior representatives of the Healthcare Investors and the IFC had assured Mr Naqvi that funds returned to investors would be re-invested before the end of January 2018.*” The Plaintiff notes that his reference to this representation has long been a part of his pleaded case and that his amendments do not seek to alter that. They simply plead out a case of falsity, knowledge of falsity and inducement in respect of this representation. Significantly, the first two of these components arise directly from the GHF Parties' own witness evidence. The proposed addition of paragraph 29A (and the consequential amendments) is based on the witness statement of Andrew Farnum, which was served on 21 July. His evidence is that the Bill and Melinda Gates Foundation “was clear with the management of the GHF Fund that it had no intention of investing or reinvesting any funds until all the questions had been answered and we understood what had been going on. I recall that we were asked to reinvest, but I was resolute that [the Bill

and Melinda Gates Foundation] would not do so unless, and until, the issues were resolved.”

9. The Plaintiff noted that the GHF Parties and the Fourth Defendant objected to the proposed amendments on the basis that they are not supported by his witness statement. The Plaintiff submits that whether or not this is right is a matter for the trial and the proposed amendment was amply borne out by Mr Farnum’s evidence and arises from it.
10. The GHF Parties’ and the Fourth Defendant’s main point is that the plea in paragraph 20(8) which is said to be false is not a representation which the Plaintiff says in his evidence was actually made by Mr Naqvi at the meeting and they rely on footnote 7 in the Plaintiff’s witness statement. Footnote 7 states as follows:

“Mr Naqvi commented that it was surprising that Abraaj would in any way be making cash calls to Investors in January 2018 to fund investors and that he had been assured by senior representatives of the Investors that they would continue to meet cash calls in a timely manner in the new year including to repay the returned on Uninvested Capital once the delays to the relevant projects had been resolved.”
11. The GHF Parties say that paragraph 20(8) pleads an unconditional representation whereas the Plaintiff’s evidence is different. The representation that he says was made is not unconditional although it bears some resemblance to Mr Farnum’s evidence. The Fourth Defendant supports this submission and argues that the Court should not allow an amendment which was unsustainable on the evidence (the Fourth Defendant had previously proposed that leave should only be granted subject to a condition that the Plaintiff serve further evidence which supported his amended pleading before the PTR but since it appeared that the Plaintiff was not prepared to do so the Fourth Defendant did not press the point).
12. I agree with the Plaintiff. The GHF Parties and the Fourth Defendant seek to apply a narrow construction and attribute a limited meaning to the Plaintiff’s evidence in footnote 7 which

in my view is far from clearly correct. I do not consider that I am in a position to form a clear view at this stage of the meaning and precise nature of the Plaintiff's evidence on this point which, as the Plaintiff submitted, will need to be tested and determined at the trial. Leave to make these amendments is granted.

Paragraph 30(2) and paragraph 4A of the UAE law schedule – the reference to the Sharjah Federal Court conviction of Mr Naqvi

13. At the end of paragraph 30(2) the Plaintiff states that the Sharjah Court of First Instance convicted Mr Naqvi of fraud on 1 April 2023. The Plaintiff says that this is now pleaded because he wishes to rely on the conviction in support of its new UAE law claim that the Fund Parties were vicariously liable for Mr Naqvi's fraud. A proposed amendment to paragraph 4A of the UAE law schedule states that "[To establish] vicarious liability under UAE law there [has to] be a pre-existing finding by a Court or Tribunal of liability against the primary tortfeasor ..." The Plaintiff argues that this is only a procedural requirement of UAE law so that he does not need to satisfy it in proceedings in this Court in order for there to be attribution of what Mr Naqvi did to the Fund Parties but if he is wrong about that, then he relies on the conviction. The Plaintiff accepts that the Fund Parties are entitled to discovery of all the documents relating to the conviction and has provided some documents but will provide more if needed.
14. The Fourth Defendant says that leave should not be given until the Court can be satisfied that the Plaintiff has given full and proper discovery and that it is unacceptable that the Plaintiff only gave discovery of the conviction at the end of January. The Sharjah criminal complaint was filed by him on 30 November 2022 and judgment was given on 4 January 2023. The complaint and conviction are clearly relevant to the trial but were also highly relevant to the security for costs applications and the question of enforceability of any costs order in the UAE.

15. GHF made the same objection and also raised an objection based on the principle in *Hollington v Hewthorn* (which I reject in light of my earlier ruling on the scope and application of the principle in FSD 150 of 2023).
16. It appears that all the parties agree that the Plaintiff must give discovery of all relevant documents relating to the conviction (and the complaint) and in my view the Fund Parties are right to say that the giving of such discovery must be a condition to granting of leave.

Paragraph 45A – the Plaintiff’s new UAE law claim based on unjustified appropriation

17. Under the heading “*The Enrichment of the Healthcare Fund and APEF IV*” in the RASOC the Plaintiff seeks to add a new pleading as follows:

“Further and alternatively, Mr. Jafar paid over the sums particularised in paragraphs 3-4 above under the wrongful belief that he was obliged to do so pursuant to valid and binding contractual obligations imposed by the Jafar Loans. However, for the reasons pleaded above with respect to the claim in deceit, Mr. Jafar’s consent, which is an integral element of a contractual obligations, was or is vitiated by Mr. Naqvi’s deceit. Accordingly, pursuant to the UAE Law doctrine of Unjustified Appropriation, the Healthcare GP, AHG and APEF IV are each obliged to repay to Mr. Jafar those sums that were paid to them.”

18. The Plaintiff says that this pleading reflects the UAE law doctrine (and cause of action) of unjustified appropriation and arises out of his UAE law expert evidence which has only become clear on this point recently. The Plaintiff has sought leave to amend the UAE law schedule by adding a new paragraph 10 which states that “*If a person hands property over to another under the wrongful belief that he is under a duty to do so he will be entitled to have the property returned to him pursuant to the doctrine of unjustified appropriation (a) the matters pleaded [above] support the proposition that [the Plaintiff] paid over [the loans] under the belief that he was under a duty to do so (namely the belief that he was under a duty to make payment under a valid loan contract) and (b) the matters pleaded*

[above] support the proposition that such belief was wrongful in that by virtue of those matters his consent to the [loan contracts] was or is to be treated as vitiated.”

19. In paragraph 49 of the RASOC the Plaintiff confirms that he does not maintain a positive case as regards the exercise of any right to rescind the loans he claims to have made and acknowledges that the Fund Parties are entitled to ask the Court to assume that the loans are subsisting and that he affirmed them. The Plaintiff does not seek to amend this paragraph and at the PTR Lord Falconer confirmed that the Plaintiff accepts that it is not open to him at trial to claim that he has a right to rescind the loans or that the loans are not subsisting. Lord Falconer said that this meant that if the UAE cause of action of unjustified appropriation required the Plaintiff to show that he had rescinded or was entitled to rescind the loan agreements then this new claim would fail. However, he said, the Plaintiff’s UAE expert advice and evidence was that there was no such requirement in UAE law.

20. The Fund Parties argue that the new paragraph 45A on its face contradicts what is said in paragraph 49 and stands in contradiction to the clear and unwithdrawn assurances provided to the Court by Mr Jafar’s then leading counsel (Michael Bloch KC) at the November 2021 CMC. They say that it is not open to the Plaintiff to allege, as he now seeks to do in paragraph 45A, that the loans are not subsisting because they were never binding. That allegation is contrary to the concession made to the Court and the assurances given to other parties as part of his prior amendments (i.e., the basis on which the Fund Parties consented to the amendments). The proposition that the loans were voidable (not void) has been the position adopted in every one of the Plaintiff’s iterations of his statement of claim so that to change this position now would be a wholesale change of case which would upset the basis upon which discovery and witness statements have been produced in a manner which would put the fairness of the trial in serious doubt. Furthermore and in any event, the Plaintiff’s expert evidence does not support the proposition that there was never any valid and binding contract in relation to the loans. Dr Ahnish does not say that the loans were *void ab initio* but rather his evidence is that the loans were *voidable*. In those circumstances, the proposed amendment (even if otherwise permissible) would have no real prospect of success.

21. I agree with the Fund Parties that leave should not be granted to make this amendment. It seems to me that the unjustified appropriation cause of action involves at least in substance and probably as a matter of UAE law a claim based on or which assumes a right to rescind (or at least a claim that the Plaintiff's consent to contract was so undermined as to generate a right to rescind) and that in the circumstances it would be wrong to permit the Plaintiff to amend his pleading and rely on this new cause of action at this very late stage.
22. I note that Dr Ahnish in his expert report for trial dealing with the unjustified appropriation cause of action states (at [8.16]) that (underlining added): *“In my view, it would be a valid alternative ground before a UAE Court to claim a refund of the Jafar Loans, on basis of Articles 320 and 321 of the Civil Code and also on the basis of Article 324 which, as explained in the Explanatory Memorandum, has its roots in the rules of justice under the Islamic Shari’a. This alternative cause of action will be successful only if the court upholds the contention that the agreements pursuant to which the Jafar Loans were advanced are liable to be validly rescinded on the basis of deceit, which vitiated Mr Jafar’s consent to advance the Jafar Loans.”*
23. I am obviously not at this stage in a position to decide the point of UAE law that arises. However, this statement of the applicable UAE law strongly suggests that a right to rescind is a key element of the cause of action. Even if it is not, as Lord Falconer claimed at the hearing, in order to maintain the cause of action the Plaintiff will have to assert that his consent to contract was fundamentally undermined such that he will be forced to contradict or in substance go against his position (already somewhat coyly) set out in paragraph 49 and the assurances clearly given by Mr Bloch and subsequently Lord Falconer. The Plaintiff would need, and if the amendment were allowed be permitted, to rely on unacceptably fine distinctions between what he has assured the Court he will not be arguing and the new case he is making. Had the amendment been proposed some time ago (and there appears to be no adequate justification for it not having been so proposed) it might well have been possible to clarify and confirm the basis in UAE law for the claim and the pleadings to establish whether the unjustified appropriation claim could properly be made

without there being and independently of an assertion that the Plaintiff's consent to contracting had been so undermined as to give rise to an entitlement to rescind, and to give the Fund Parties sufficient time with their experts to examine the claim (and to consider the evidence needed to support it and to amend their expert reports and seek further discovery or evidence if they considered that to be necessary and justifiable). But it is too late for that to be done now and it seems to me that the Fund Parties are right to submit that the proposed amendment at this stage would give rise to real prejudice and should not be allowed.

24. Accordingly, leave to make the proposed amendment in paragraph 45A and in paragraph 10 of the UAE law schedule will be refused.

Paragraph 32(4)

25. Under paragraph 32(4), the Plaintiff has sought to add to his pleading an allegation of ostensible authority (in addition to his existing pleas of express and implied authority). He says that the amendment is based on existing factually pleaded material and seeks to articulate an additional legal effect of facts and matters that have long been in issue. The Plaintiff argued that the particulars at paragraph 32(4)(a), (b), (c) were all holding out particulars and (e)(iv), (h)(iii) and (h)(iv) were examples of holding out taking place. As such there can be no prejudice to the Fund Parties.
26. The Fourth Defendant has consented to the amendment.
27. However, the GHF Parties argue that an allegation of ostensible authority is very different from the previously asserted allegations of express or implied authority. Express and implied authority are based on the allegation that authority was in fact given, whereas ostensible authority depends on whether an external appearance of authority has been created (as is sought to be explained in the Plaintiff's proposed additions to the UAE law schedule). The GHF Parties say that therefore this is a very significant addition to the plaintiff's case, raising new factual issues after discovery and after witness evidence has

been served. Further, it raises questions concerning the nature of ostensible authority under UAE law, which was not in issue on the pleadings prior to the point in time when expert evidence was served (and which was not, therefore, addressed by the GHF Parties' expert witness). They say it is too late for this allegation now to be fairly determined at trial.

28. I have concluded that leave to make this amendment should be granted. I have some sympathy with the GHF Parties' position and concern but am satisfied that the claim based on ostensible authority is being made on the basis of the existing pleaded facts and can be adequately dealt with by the GHF Parties by giving them an opportunity to amend their expert evidence and pleadings (and of course by an order for costs in their favour).

Paragraph 32(4A)

29. Under paragraph 32(4A) the Plaintiff seeks to add a new pleading to the effect that by reason of various matters set out in the RASOC (almost all of which were previously pleaded) the deceit committed by Mr Naqvi is to be attributed to the Former Healthcare GP, AHG (GHF) and/or the Fourth Defendant. Once again the Plaintiff (referring in particular to paragraph 44A of the RASOC) says that the amendment is based on existing factually pleaded material and matters that have long been in issue and that there can be no prejudice to the Fund Parties.
30. Once again, the Fourth Defendant has consented to this proposed amendment.
31. The GHF Parties object on the ground that (in so far as I understood the objection) the facts asserted in the new paragraph 32(4A) are materially different from those asserted in paragraph 44A and elsewhere in the RASOC and the claim asserted in the new paragraph is not supported by those pleaded facts.
32. I am satisfied that leave to amend this paragraph should be granted. I do not consider that the GHF Parties objection justifies a refusal to grant leave.

Paragraph 33(3)

33. By this paragraph the Plaintiff seeks to add a claim that the directors of the Fund Parties should be treated as having ratified Mr Naqvi's acts such that he had the Fund Parties' authority to procure the loans that the Plaintiff claims he was induced to advance. The Plaintiff submits that once again this amendment only seeks to plead an additional legal effect of facts and matters that have long been in issue so that there can be no prejudice to the Fund Parties.
34. The Fourth Defendant has consented to this amendment.
35. The GHF Parties object to the amendment. They argue that the new pleading lacks any (or any proper) particularity since it is not explained how it is that Messrs Lakhani, Dave and Siddique had adequate knowledge of Mr Naqvi's alleged acts or what they in fact did and the capacity in which they were said to be acting nor how whatever conduct is intended to be relied upon amounted to ratification whether as a matter of fact or as a matter of law or was sufficient to confer retrospective authority on him. Furthermore, this is an entirely new factual allegation that in order to be disposed of fairly would require further discovery exercise to ensure that all documents potentially relevant to this allegation of retrospective authority/ ratification are found and produced and might require inquiries to be made to obtain further relevant evidence. It is now too late for that process to be undertaken and therefore too late for this plea to be advanced.
36. I am also satisfied that leave to amend this paragraph should be granted. While I have some sympathy for the GHF Parties' concerns I consider them to be exaggerated. I do not consider that they justify refusing to grant leave to amend this paragraph.

Further amendments to pleadings and expert reports and draft order

37. As I understand it the parties have discussed and are in agreement as to the need to allow the Fund Parties to have the opportunity to arrange for amended expert reports and pleadings to be prepared and filed. I would ask the parties to seek to agree a form of order to give effect to this ruling and incorporating the directions for the filing of such further reports and pleadings on or before Friday 13 October. If the parties are unable to reach agreement they should file brief written submission setting out the paragraphs in the draft order that are agreed, those which they seek but are not agreed and their reasons for seeking such orders. I shall then settle the order on the papers.

Costs reserved

38. I note that Fourth Defendant seeks an order for indemnity costs in the sense of costs of and occasioned by the amendments to the UAE law schedule. The Fourth Defendant argues that there was no excuse for bringing forward the new UAE points of law so late and that it was totally unreasonable and unacceptable and should have been done years ago.

39. I have a good deal of sympathy with this view but do not propose to deal with the point now. The parties should also seek to agree the appropriate order as to costs to be included in the order and if they are unable to agree include the orders they seek and their brief submissions in the draft order to be filed in accordance with paragraph 35 above.



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