NEUTRAL CITATION NO: [2025] EWHC 131 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

KB-2023-002680

Royal Courts of Justice
Strand
WC2A 2LL

23 JANUARY 2025

Before

THE HONOURABLE MR JUSTICE MARTIN SPENCER

BETWEEN:

ADNAN OMANOVIC

Claimant

-v-

1) SHAMAAZI LTD
2) ISMAEL ABDELA MOHAMMED (also known as Ismael Dainehine)

Defendants

PHILIP COPPEL KC and GEORGE DAVIES(Instructed by **Ballinger Law**) appeared on behalf of the Claimant
DAN MCCOURT FRITZ KC and JOHN ELDRIDGE (Instructed by **Russell-Cooke LLP)** appeared on behalf of the Defendants

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APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

MR JUSTICE MARTIN SPENCER:

1. This is the third of three preliminary matters arising before the start of this trial and relates to an application by the claimant, Mr Adnan Omanovic, for permission to appeal against the order of Master Sullivan dated 5 December 2024, whereby she ordered that the single joint expert instructed by the parties to report on the valuation of the first defendant Shamaazi Limited at various times should forebear from carrying out any valuation of another company called Givetree Limited and should also forebear from carrying out any calculations in respect of the impact of treating those monies of the first defendant which were invested in cryptocurrency as spare cash.

2. The application by the defendants which led to that order being made arose in the following way. The background to this matter is that the claimant and the second defendant, Mr Dainehine, were involved together in the setting up of an enterprise called MyTenNights which was a vehicle for charitable donations to be made in the last ten nights of Ramadan each year, the first such year being 2017. The enterprise was operated through the first defendant, Shamaazi Limited, which was wholly owned by the second defendant and of whom the second defendant was the sole director.

3. It is the claimant's case that he was promised a 25% interest in the equity of the first defendant in return for his part in the setting up and development of MyTenNights and he brings this action for breach of contract with alternative claims in tortious conspiracy and inducing breach of contract and an equitable claim.

4. The parties fell out in January 2021 and proceedings were issued in June 2023 when Particulars of Claim were served. At that time there were two further claimants who also claimed to have interests in the shares of Shamaazi Limited and their claims were settled, on terms of which I am unaware, shortly before this trial was due to start, leaving Mr Omanovic as the sole remaining claimant.

5. Mr Omanovic's claim for damages for breach of contract essentially seeks a monetary sum equivalent to 25% of the first defendant as at the time of the breach of contract or such alternative times as the court should determine. It was therefore necessary and appropriate that the court should have a valuation of Shamaazi Limited at those times.

To that effect the parties agreed, and the court ordered, that a single joint expert should be instructed to give an opinion on those matters for the benefit of the court. The order of the court to that effect was made by Deputy Master Marzec in a case and costs management order made on 30 January 2024 and sealed by the court on 5 February 2024. The relevant paragraph is paragraph 4 headed "Expert evidence, the issue of valuation" and provides:

> *"4. The parties have permission to rely on the jointly instructed written evidence of an expert forensic accountant (the expert).*
>
> *(a) The expert's report will be confined to the following issues:*
>
> *(i) The market value of the first defendant as at (i) 7 December 2020, (ii) the date of the expert's instruction and (iii) such other dates as the expert may consider appropriate.*
>
> *(ii) The appropriate minority discount (if any) to ascribe in assessing the market value of the hypothetical claim shareholdings of each of the claimants in the first defendant as at the relevant valuation dates.*
>
> *(b) The parties shall use their best endeavours to agree and identify instructions to the expert by 4.00 pm on 21 June 2024. If no expert has been instructed by that date the claimants must apply to court by 4.00 pm on 28 June 2024 for further directions.*
>
> *(c) The parties shall provide to the expert any business or accounting records or other documents and information that the expert reasonably requires including by responding to any requests by the expert to meet with them and/or their representatives."*

6. The order then provided for further steps, namely the reporting by the expert by 30 August 2024, the putting of written questions to the expert by 14 September 2024, replies to any such questions by 27 September 2024.

7. For reasons which it is not necessary for me to explore, that timetable could not be adhered to. Each party blames the other for the slippage in the timetable. The result was that the instructions to the joint expert did not occur until 18 October 2024. The agreed background referred to GiveMatch as a platform which matches donations made by the public and stated "the parties disagree over the relevance of this product".

8. The instructions required the expert to review all the documents that were enclosed, request and review such further business or accounting records or other documents or information that the expert required, or that the expert considered might assist in properly

answering the questions asked, and consider any submissions made by the parties as to their competing positions. That led to the claimant's advisers making submissions to the joint expert on 21 October 2024 which included the following:

> *"Investments in cryptocurrency.*
>
> *14. We note that (per the accounts) Mr Dainehine claims to have 'invested' £2,207,379 in cryptocurrency, suffered a revaluation loss on the 2022 accounts of £544,093, and a further revaluation loss of £1,030,370, in the 2023 accounts.*
>
> *15. The first point to make about this is that if Mr Dainehine wishes to invest his own money in highly speculative investments such as cryptocurrency that is a matter for him. However, as a company director, with duties to both the company and the minority shareholders, it is plainly not permissible for him to gamble away their money (whether on cryptocurrency or on the horses).*
>
> *16. If the claimant investment losses are genuine the appropriate way to treat the £2,207,379 investments would be as surplus cash which should have been distributed to shareholders by way of dividend. If Mr Dainehine wishes to gamble away his dividend that would be a matter for him. The claimants would not have done so with their dividends.*
>
> *17. In this scenario the revaluation losses should also be added back to the maintainable earnings.*
>
> *18. The claimants sought proper disclosure of the investments in cryptocurrency said to have given rise to significant loss. The Koinly statements were eventually provided in response. The Koinly statements present a very different picture to the company accounts. Whereas the company accounts show massive losses as a result of cryptocurrency investments, the Koinly statements show massive profits. This is obviously deeply concerning.*
>
> *19. The expert is asked to get to the bottom of the discrepancy. To the extent that the cryptocurrency losses are real they should be added back. To the extent that the cryptocurrency losses are not real and they are in fact profits from these investments then the company accounts will clearly need to be adjusted to reflect such profits."*

And then later in the same submissions, there was the following:

> *"Diversion of business properties.*
>
> *26. Shamaazi was set up as the corporate vehicle for a number of brands including MyTenNights, MyTenDays and GiveMatch. MyTenNights and MyTenDays appear to operate through the company. However Mr Dainehine appears to have diverted GiveMatch into his separate vehicle called Givetree (a company wholly owned by himself) presumably for the purpose of minimising the valuation of the company in this litigation ...*

30. It appears to be beyond dispute that GiveMatch was originally part of the company (see paragraphs 20 to 28 of the second witness statement of Michael Ballinger).

31. It is equally beyond dispute that Mr Dainehine has transferred this brand from the company to Givetree Limited.

32. The company therefore has an obvious cause of action against Mr Dainehine for breach of his duties as a director arising out of his diversion of the company's business opportunities to benefit himself.

33. The company also has an obvious cause of action against both Mr Dainehine and Givetree Limited in respect of their unlawful means conspiracy to divert company's business opportunities."

9. The basis for these assertions appears to have been known since at least 11 June 2024 because on that date the claimant's solicitor, Mr Michael Ballinger, made a witness statement in support of the claimant's application for an unless order in relation to the service of a supplemental list of documents in which he referred, at paragraph 22(v), to the second defendant having diverted part of Shamaazi's business to other entities which he owns so as artificially to decrease the value of Shamaazi for the purposes of this litigation and referring to the second defendant as a "dishonest individual".

10. So far as the application for disclosure by the claimant is concerned, the defendants answered the application through a witness statement of their solicitor, Mr Michael Timothy Stacey, dated 21 October 2024. At paragraph 7 of that statement Mr Stacey referred to the fact, as he would have it, that Mr Ballinger's witness statement highlights fundamental problems which underlie the whole of the claimant's approach to disclosure to date and stating:

"For present purposes it is enough to note the first and most significant of those problems which is that the claimant's wish to approach disclosure by reference to a series of roving, nebulously framed allegations of dishonesty, fraud and malfeasance as against the second defendant, none of which are pleaded in the Particulars of Claim, it is by reference to those unpleaded allegations of serious wrongdoing that the claimants seek to justify the sweeping orders for disclosure which they seek."

11. The disclosure application came before Master Sullivan on 24 October 2024 and she gave a short judgment on that date, dismissing the disclosure application and making an order against the claimant for indemnity costs. At paragraph 7 of hr judgment, the Master said this:

"In respect of the allegations of dishonesty that are made against the second defendant and lack of credibility and trust in the process of disclosure against this defendant's solicitors, it seems to me if there is going to be allegations of that sort of dishonesty they have to be put on a formal basis."

Then at paragraph 10, she said this:

"10. It seems to me that even when the valuation of a company is in issue the likelihood of all their accounting and financial documents will fall within either standard disclosure or specific disclosure is pretty limited because it is not an identifiable class of documents which is likely to assist the court in resolving a dispute. Until in fact the expert has reported it is unlikely to know what, if any, of those documents are going to be of further assistance over and above what has been disclosed already. It seems to me it is unnecessary for me to make an order at this stage, there being an expert who is going to look at these matters.

11. If there are concerns or gaps or inconsistencies, for example, in respect of the crypto trading that I have been taken to I am told there is an apparent discrepancy although I am not sure the right year are being compared, but if there is a discrepancy there that is exactly the sort of thing that I would expect that the financial expert, complying with their duty to court, will be raising and saying: well, I need to see that and take it into account.

12. If there are matters thereafter that arise of specific disclosure, or the defendants fail to provide something that the expert asked for, that is an entirely different matter and I would expect at that point for there to be specific disclosure applications. But it seems to me for those reasons even if this were a specific disclosure application I would have to reject it on that basis also. And in those circumstances I am sorry I'm not doing full credit to the argument I have heard given the time constraints but those are my core reasons. I dismiss the application."

There was no appeal from that ruling.

12. The parties were unable to agree in relation to the parameters of the expert's inquiry so far as the GiveMatch and cryptocurrency matters are concerned. I am going to refer to those two matters as "the additional allegations". The defendants' position was made clear in letters in early November 2024. Thus on 5 November 2024 Russell-Cooke, for the defendants, wrote to the claimants' solicitors *inter alia* in the following terms:

"In your clients' submissions to the joint expert dated 21 October 2024 your clients sought to advance the very same unpleaded 'nebulously framed allegations of dishonesty, fraud and malfeasance' upon which your clients sought to rely in support of their application dated 11 June 2024 (the disclosure application)."

Russell-Cooke then referred to the decision of Master Sullivan of 24 October and in the light of that decision stated:

> *"We trust that you will now (finally) cease making the improper allegations of fraud that you've been intimating since the costs and case management conference."*

13. Russell-Cooke followed that up with a further letter the following day, 6 November, where they stated:

> *"In your clients' submissions to the joint expert dated 21 October 2024 your clients advance the (unpleaded) allegation that 'Mr Shamaazi appears to have treated Shamaazi as his own personal piggy bank, using Shamaazi's funds to pay for his lavish lifestyle'. For the avoidance of doubt the defendants' position is that your clients are not entitled to advance this wholly unpleaded allegation."*

14. Needless to say, the parties were unable to agree this matter and therefore the defendants issued this application on 14 November 2024 seeking an order directing the single joint expert to forebear in the terms to which I have already referred. That came before Master Sullivan on 29 November when she gave a short *ex tempore* judgment. She referred to her order on the disclosure application and said (referring to the Claimants in the plural, this being a time when the second and third Claimant were still parties to the action):

> *"2 ... Part of my judgment was that there was no pleading in respect of the Givetree issue. Givetree is mentioned in the pleadings but there was no pleading of any breach of duty in respect of amounts of money going to or from Givetree and no allegations of any breach of duty or indeed conspiracy I should say for either of them in respect of cryptocurrency and it seems to me that that remains the position.*
>
> *3. That being the position the question is whether the scope of the task of the valuation single joint expert is to conduct some general investigation or indeed specific investigation into matters of the value of the company and how it was managed where there is no pleading of any particular issue in respect of how it was managed, or whether it is a valuation strictly in the terms of the order of Deputy Master Marzec to value the company at particular dates ... and following on from that the appropriate minority discount to ascribe in assessing the market value of the hypothetical claimed shareholdings of now the first claimant.*
>
> *4. It seems to me that in this particular case if there was to be any investigation in respect of the valuation of any matters that the first claimant wanted to be taken into account that amount to wrongdoing on the part of*

either defendant then those are matters that have to be pleaded in order for them to be in issue between the parties and thus for the experts to take them into account. I accept that what is said by the expert and quoted in Mr Coppel's skeleton is based on the premise that there is an issue in dispute between the parties and properly so that this was something that she should be taking into account.

5. There is no foundation that I have been taken to for a pleading of either breach of fiduciary duty or conspiracy in respect of either Givetree or the cryptocurrency and in those circumstances it seems to me it is not within the scope of the valuer's remit to investigate those. I do not accept that it is a remit which requires the sort of wide investigatory matters or matters being pointed out to the expert in the way that the claimants suggest. If the claimants want to run specific points about the valuation and suggest that these were matters that should be taken into account the onus on the claimant was to plead those matters. In those circumstances I will grant the defendants' application."

15. It is from that ruling that the claimant seeks permission to appeal. In the usual way permission to appeal would first be dealt with on the papers and then, if refused, it would be open to the claimant to renew his application on an oral hearing. However, there has not been an opportunity for consideration of the application on the papers and I therefore treat the application for permission to appeal as if on a renewal oral hearing. I do not, however, assume that the application would have been refused on the papers. For that reason I have heard full submissions from both sides in relation to this matter. Had there been a refusal on the papers then the defendants, although they could have appeared on the oral renewal, would not necessarily have done so or been allowed their costs of doing so.

16. For the claimant, as I shall refer to him rather than the appellant, Mr Coppel KC's fundamental submission is that for the expert to be forbidden from considering and taking into account the losses to the company from the diversion of interest, and in particular GiveMatch, and from cryptocurrency transactions, would potentially result in significant unfairness to the claimant. The reason for that is that if on the hearing of the trial I were to find that there had been breach of fiduciary duty or other conduct by the second defendant which had the effect of diminishing the value of the first defendant at the relevant time, and that were not taken into account, then the claimant's damages, assessed on the basis of a 25 per cent value of the first defendant, would be wrongfully diminished.

17. He gives as an example a director who in consideration of something paltry like the surrender of a lever-arch file is paid £1 million for the lever-arch file by the company. He submits that it would be wholly artificial and wrong for the court then in assessing the value of the company not to feed that £1 million back into the value of the company. Equally he portrays the cryptocurrency transactions on a similar basis, suggesting that there has been misconduct on the part of the second defendant in relation thereto which would give the company a right of action against him and that notional right of action should therefore be taken into account by the forensic accountant in valuing the company.

18. He makes it clear that, in so doing, no assumption should be made by the expert as to whether the transactions in question were or were not wrongful or in breach of some duty. He submits that that is a matter for the court at trial, that is for myself, and all he wants at this stage is evidence as to the numbers involved so that the court has the material which it requires to assess damages, should it conclude that the value of Shamaazi was artificially and wrongfully diminished by the second defendant to the detriment of the claimant.

19. For the defendants Mr McCourt Fritz KC seeks to uphold the Master's judgment and the basis for it. He submits that it is trite law that allegations of fraud or dishonesty need to be pleaded and need to be pleaded with such specific particularity that the party who is alleged to have acted in that way knows precisely the case which he has to meet, in this case that being the second defendant Mr Dainehine. Indeed, he goes further and submits that the principle of the importance of pleadings and the need for pleadings to enable a party to know the case that it has to meet is not confined to allegations of dishonesty or fraud.

20. In this regard he reminds the court of the decision in *Three Rivers DC v Bank of England (No 3)* [2003], 2 AC, page 1, and the well-known dictum of Lord Millett at page 291. There Lord Millett said:

> *"183. Having read and re-read the pleadings I remain of the opinion that they are demurrable and should be struck out on this ground. The rules which govern both pleading and proving a case of fraud are very strict. In Jonesco v Beard [1930] AC 298 Lord Buckmaster said at page 300:*

'It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires'.

184. It is well established that fraud or dishonesty, and the same must go for the present tort, must be distinctly alleged and as distinctly proved, that it must be sufficiently particularised and that it is not sufficiently particularised if the facts pleaded are consistent with innocence ... This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent and that the facts, matters and circumstances which are consistent with the negligence do not do so.

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. If the pleading means 'dishonestly' or 'fraudulently' it may not be enough to say wilfully or recklessly, such language is equivocal. Similar requirement applies in my opinion in a case like the present. But the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intention of tort.

186. The second principle which is quite distinct is that an allegation of fraud or dishonesty must be sufficiently particularised and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly but also the primary facts which will be relied upon at trial to justify the inference. At trial, the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty and this fact must be both pleaded and proved."

21. The principle of a party knowing the case which he has to meet through the pleadings applies more generally than in cases of fraud. Mr McCourt Fritz set out ten reasons which it is not necessary for me to repeat, but which I accept, as to why allegations of the facts relied upon and the particulars required need to be pleaded in a formal pleading as opposed to being set out in correspondence or in witness statements or otherwise. One particular aspect of that submission is that if such allegations are set out in the pleading, the party against whom the allegations are made has the opportunity to strike them out or to seek reverse summary judgment in relation to them.

In this context Mr McCourt Fritz submits that the additional allegations, if they are to be investigated by the expert, need to be set out in a pleading and in particular in the Particulars of Claim, because otherwise there is no basis for the court to make any findings in relation to them such as to justify the alternative damages which may have been identified by the expert relying upon those matters. He submits, in effect, that it is therefore futile for the expert to report on those matters because even if the expert does so and finds some significant discrepancy in relation to the valuation of Shamaazi Limited there is no pleaded basis upon which the court can then give effect to those findings. He submits that if there had been a pleading, for example in relation to the cryptocurrency dealings, there would almost certainly have been such an application to strike out or for reverse summary judgment on the basis that it is and has at all times remained wholly unclear on what basis it is said that Mr Dainehine acted in breach of duty in conducting those transactions. Equally, he says that any allegation made in pleadings about the diversion of GiveMatch to Givetree Limited would have been challenged, not least on the basis that there was in fact no such diversion from the first defendant because, he submits, the first defendant never had an interest in GiveMatch.

22. I can see that that final issue would have been a contentious one, and as Mr Coppel has pointed out, documents provided to the claimant's solicitors by the defendants' solicitors in September 2024 seeking to show that GiveMatch was not an asset of Shamaazi, were at least such that their authenticity should and has been challenged through an application under CPR Part 32.19.

23. Mr Coppel's response is that the difficulty which he says his client faces is that the breach of duty suggested on the part of the second defendant is not a breach of duty vis-a-vis the claimant, in the sense that no fiduciary duty is alleged, breach of which gives rise to direct damages, but is rather part of the quantification of Shamaazi and is therefore not suitable for pleading. He submits that the way in which the parties agreed to resolve the matter of the valuation of Shamaazi through the instruction of a single joint expert with the directions made by the Deputy Master on 30 January 2024 were an appropriate solution which avoided any unfairness to the defendant, in particular. At the trial the defendant has and will have every opportunity to contest the basis for the alternative valuation of the company.

24. In my judgment Mr Coppel is not right about this. It is perfectly possible, including in relation to matters of quantum, for allegations such as those made in this case to be fully pleaded as the basis for the quantification exercise. In personal injury actions that is done through a schedule of loss which forms part of the pleadings and in a counter-schedule a defendant can contest the basis upon which it is said that the quantification should take place and indeed, in an appropriate case, seek to strike out or obtain reverse summary judgment in relation to that matter.

25. In my judgment it is no different here. The fundamental point is that Mr Dainehine has the right to know precisely the basis upon which it is said that he has acted in breach of duty; and in the absence of that being pleaded, it remains obscure. Even now, it is submitted by Mr McCourt Fritz on his behalf that how it is said he acted in breach of duty in conducting transactions in cryptocurrency is wholly unclear - and I agree. Clarity is not given by him using phrases such as "gambling" or "equivalent to betting on the horses" which were the phrases used by the claimant's solicitors in their submissions to the expert. Mr Dainehine in advance of the trial is entitled to know how the matter is put against him, in a way in which he can seek further information under a part 18 request, if necessary, or submit to the court that there is no case to answer in relation to such allegations.

26. Although Mr Coppel has submitted that he has not gone as far as to suggest that the allegations betray dishonesty or fraud on the part of Mr Dainehine, I cannot accept that submission. Allegations of dishonesty have been made in terms in the correspondence, as I have already indicated. I have no doubt that the suggestion that Mr Dainehine has acted in breach of his fiduciary duties to Shamaazi Limited, knowingly, and intentionally, and in particular he has engaged in tortious conspiracy, can only properly be interpreted as allegations of fraud and dishonesty, in particular when it is alleged, as it has been, that this was a deliberate attempt on his part to diminish the value of Shamaazi in response to this litigation. These are serious allegations to make against anybody and in my judgment should the claimant have wanted to pursue them they should have been pleaded.

27. In that regard I wholly endorse and agree with the judgment of the learned Master, which she was admirably able to express in rather shorter and more condensed terms

than I have been able do. But nevertheless I consider that she and I are of the same mind and for the same reasons. For that reason the application for permission to appeal is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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