

2-12-11



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 54 OF 2009**

**BETWEEN AHMAD HAMAD ALGOSAIBI  
AND BROTHERS COMPANY (“AHAB”)**

**PLAINTIFF**

**AND SAAD INVESTMENTS COMPANY LIMITED**

**MAAN AL-SANEA AND OTHERS**

**DEFENDANTS**

**IN CHAMBERS**

**THE 20<sup>TH</sup> – 24<sup>TH</sup> SEPTEMBER 2011; AND 2<sup>ND</sup> DECEMBER 2011**

**BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE**

**APPEARANCES:** Mr. Ewan McQuater QC and Mr. David Quest instructed by Mourant Ozannes for the Plaintiff, AHAB  
Mr. Michael Crystal QC instructed by Walkers for the GT Liquidators  
Mr. Marcus Smith QC instructed by Bodden & Bodden for the AWAL Defendants  
Mr. Thomas Lowe QC instructed by Harneys for SIFCO # 5  
Mr. Jan Golaszewski for the Maples Defendants  
Mr. David Butler of Appleby for Mr. Maan Al Sanea

**JUDGMENT**

- 1. Citing recent developments in this action as explained below, certain of the corporate defendants apply for the action to be struck out.
- 2. The action was commenced in July 2009 by the Plaintiff (“AHAB”) seeking restitution and/or damages against the second defendant Mr. Al Senea and the corporate defendants – which are his many affiliated Cayman Islands companies – in the amount of USD9.2 billion. The basis of the claim was and remains fraud on a massive scale,

- allegedly perpetrated by Mr. Al Sanea against a Saudi Arabian entity owned by AHAB (described as its “Money Exchange” business); a fraud by which Mr. Al Sanea is alleged to have misappropriated the billions of dollars claimed and which he allegedly used to fund his Cayman companies through AWAL Bank, a bank established by him in Bahrain.
3. On 24 July 2009, AHAB obtained a Worldwide Freezing Order (“WFO”) by order of this Court, seeking to restrain Mr. Al Sanea and his Cayman companies from disposing of assets up to the same order of magnitude of value as the claims.
  4. The fraudulent scheme employed by Mr. Al Sanea is described by AHAB as centered around the use of unauthorised loans obtained from some 118 banks via the Money Exchange over the years 2000-2009, and allegedly obtained by Mr. Al Sanea by the use of the forged signatures of AHAB’s partners.
  5. It is claimed by AHAB that at least USD5.2 billion of the proceeds of the massive fraud are traceable into Al Sanea’s Cayman Islands companies, having been paid by AWAL Bank into SICL, the first Defendant, and the entity which is at the top of the Cayman corporate chain. Payments are said to be traceable from SICL into others of the Cayman entities which are themselves (along with Mr. Al Sanea and SICL) not only defendants to the action but also many of which are in liquidation before this Court.
  6. Thus, AHAB’s claim may be described in general terms as a personal claim against Mr. Al Sanea in respect of his fraudulent and unauthorised misappropriations and a proprietary claim against his Cayman companies in respect of monies which they obtained – or assets representing those monies – as being or as representing the property of AHAB.

7. Not surprisingly, however, many of the lending banks have also brought claims against AHAB directly in respect of the loans granted in AHAB's name and at least ostensibly – from their point of view – authorised by AHAB's partners.
8. AHAB's defence to these claims has been, in general simplified terms, that as AHAB was itself an unwitting victim of Al Sanea's fraud, he did not act as its agent and it had given neither actual nor ostensible authority to him to borrow. AHAB should therefore not be liable to the banks for his fraud, the proceeds of which have been of no benefit to AHAB.
9. Such (again in general simplified terms) was AHAB's defence to a claim for some USD250 million brought in London against it by a syndicate of some of the lending banks, a defence that AHAB maintained until the 5th day of the trial on 15th June 2011, when AHAB abandoned its defence in the London proceedings and consented to judgment being entered against it in favour of the banks.
10. The banks' claims against AHAB averred not only that AHAB should be liable for Al Sanea's borrowings from them based on his actual or ostensible authority to borrow, but worse – that AHAB's partners and Al Sanea acted together in a fraudulent scheme of “borrowing from Peter to pay Paul”, being aware of AHAB's insolvency and inability to repay the loans and while also misappropriating much of the loan proceeds to their private personal purposes and benefit.
11. I am told by Mr. McQuater that by consenting to the judgment being entered against it in the London proceedings, AHAB conceded no such allegations, rather only that certain evidential material that came to light and which AHAB was obliged to disclose, reinforced the banks' case, but only of ostensible authority having existed on the part of Al Sanea to bind AHAB to the debt obligations then in dispute.

12. Accordingly, AHAB's consent to judgment being entered against it in the London proceedings was expressly without prejudice to its claim in this action in the Cayman Islands and without prejudice to its case based upon fraudulent and unauthorised misappropriations brought against Al Sanea and his defendant companies.
13. The evidential material that came to light during the London proceedings has now become, nonetheless, of central importance on this application before me, as explained below.
14. On the basis of its consent to judgment in the London proceedings, Mr. Justice Flaux of the English High Court made an order that AHAB pays the debt owed to the banks, an order which I am told remains unsatisfied in its entirety.
15. The circumstances of AHAB's sudden capitulation in the London Proceedings became of natural interest to the Grant Thornton Liquidators of SICL (the "GT Liquidators") and so they obtained an order on 16<sup>th</sup> June 2011 from Mr. Justice Flaux granting them access to certain records of the London proceedings.
16. On 18 July 2011, Walkers wrote on behalf of the GT Liquidators to Mourant Ozannes, AHAB's attorneys here, stating that it had now become apparent from the course of the London Proceedings that much of the evidence of AHAB's partners filed, both in the London and Cayman Proceedings, was untrue and/or failed to disclose material facts known to the AHAB partners. The letter, in light of its contents, invited AHAB by 29<sup>th</sup> July 2011 to apply to this Court to withdraw its claims. No response directly to that letter was received. On 1<sup>st</sup> August Walkers issued a summons on behalf of the GT Liquidators to strike out AHAB's claim for being an abuse of the process of the Court.
17. On 1<sup>st</sup> August 2011 a letter was, however, sent from Mourant Ozannes on behalf of AHAB, to the Defendants' attorneys stating, among other things, that: (i) some of the

information contained in documents disclosed in the London Proceedings should have been provided to this Court at the time AHAB obtained the WFO as part of AHAB's duty of full and frank disclosure; (ii) in the circumstances, it was appropriate that the WFO should be discharged; and (iii) copies of the relevant documents, with translations would be provided (many were in Arabic).

18. On 10<sup>th</sup> August 2011, Mourant Ozannes provided four bundles of documents to Walkers. The first page of the first bundle of those documents states as follows: "N Bundles as Disclosed in the Consolidated Proceedings in the English Commercial Court"; (that is: the London Proceedings).
19. These "N Bundles" are so called because of the alphabetical reference to the files in which they were produced in the context of the London Proceedings.
20. The Liquidators of the AWALCos ( the 13<sup>th</sup>-19<sup>th</sup> defendants) and of SIFCO #5 (the 34<sup>th</sup> defendant) issued their own summonses for strike out of AHAB's claims respectively as against their companies, on 22<sup>nd</sup> August 2011 and 2<sup>nd</sup> September 2011; along with the GT Liquidators' summons, bringing to three the number of summonses for strike out of AHAB's claim.
21. While there are now eight summonses before the Court in total, I am invited to deal first with the three strike out summonses, each of which is mainly predicated upon AHAB's breach of duty to the Court and to the Defendants in having failed – the strike out applicants say "deliberately failed" – to disclose the N Bundle materials earlier.
22. The Defendants also say that the information now revealed in the N Bundles show that AHAB has pleaded a case that it knows to be incorrect.
23. That information reveals that substantial borrowings undertaken by Mr. Al Sanea through the Money Exchange (some USD1.17 billion or 4.4 billion Saudi Riyals) may well have

been undertaken with either the express or implied knowledge and authority of the AHAB partners. This is in marked contrast to AHAB's pleaded case in its statement of claim to the effect that substantially all the borrowings by Al Sanea were unauthorized.

24. In light of this, the Defendants quite understandably assert that it must now be an open question whether any of the borrowings through the Money Exchange was unauthorized and, in the state of such uncertainty, that AHAB's claim is shown to be misleading and even deliberately false.
25. The deliberate pleading of a false claim is sanctionable by strike out, say the Defendants. They say that until AHAB produces a credible (and innocent) explanation for the failure to disclose the N Documents, the proper inference is that AHAB has been suppressing them, and that is, of course, a serious factor to take into account when considering whether or not to strike out its claim.
26. In a fulsome expression of *mea culpa*, AHAB has itself applied for the final discharge of the WFO, and has accepted that the Defendants will be entitled to their related legal costs on the indemnity basis and to the assessment and award of any damages caused by its imposition.
27. But in so conceding, AHAB resists the allegations made by the strike out applicants to the effect that the earlier failure to disclose the N Bundles was deliberate. AHAB invites the Court to accept that the failure was inadvertent and relies on explanations given, in particular in affidavits filed for these purposes, by two of AHAB's partners, Saud and Yousef Algoaibi. In this the AHAB partners are supported by the affidavits also of Andrew John Ford and Eric Leslie Lewis – respectively members of AHAB's forensic accounting and legal teams.

28. Most central to AHAB's explanation is Saud Algozaibi. He says, in effect, that although he was aware of the N Documents and had secured the compilation of them, he had assumed that they had come to the attention of AHAB's large forensic team who were responsible for ensuring that AHAB's discovery obligations were met.
29. The question whether the failure to disclose the N Bundles was inadvertent or deliberate, is said by the Defendants to be of pivotal importance to the future conduct of AHAB's claim for a number of reasons.
30. First, as in every action, the credibility of the central witnesses will be important. As partners of AHAB, Saud's and Yousef's credibility will be central to the question of whether or not they had knowledge of the extent of the massive borrowings actually undertaken by the Money Exchange (in the order of the USD9.2 billion or \$38 billion Saudi Riyals claimed).
31. Second, the extent of the partners' knowledge will be highly relevant to the further question of whether or not they had authorised Mr. Al Sanea to borrow and this question of authorisation will itself be pivotal to the defences. This is in the following ways.
32. AHAB's proprietary claim against the Defendant companies is based on fraud. It is that Mr. Al Sanea's actions were fraudulent and unauthorised such that AHAB is entitled to a proprietary claim in respect of all monies misappropriated by him from the Money Exchange without their knowledge and authority. To the extent that the AHAB partners knew of and authorised the impugned transactions, to that extent therefore the proprietary claim is bound to fail because AHAB would not be able to lay a proprietary claim to assets which may have been lawfully transferred (in the sense of being known or authorised by AHAB) into the Defendant Companies. AHAB would thus be left with only its personal claim against Mr. Al Sanea which it could later only enforce as against

any surplus in the liquidation of the Defendant companies that may be due to Mr. Al Sanea as shareholder of the Defendant Companies. AHAB would thus have no standing as a creditor in the liquidations of the Defendant Companies.

33. This is, of course, also apart from the further question whether AHAB could ever be able to trace – for the purposes of establishing a proprietary claim in equity – into assets acquired by the Defendant Companies from other sources lawfully, such as from other third party lending banks.
34. In this regard, the applicant Defendant Companies seek to strike out AHAB’s claim on the further ground therefore, that AHAB has so far failed, and will necessarily continue to fail, to plead particulars of its proprietary claim and the basis upon which it asserts it can trace monies taken by Al Sanea fraudulently from the Money Exchange, into assets held by them.
35. In the absence of specific identification of property, a plaintiff can have no proprietary claim. A plaintiff has to identify his original proprietary right in respect of particular assets and then show that there is a nexus or causal link between the stolen property and the assets being claimed. Without that link no proprietary tracing claim can be established: See, for instance, *Serious Fraud Office v Lexi Holdings Plc [2009] QB 376 at para 49-50* per Lord Justice Keene.
36. It is not open to AHAB to overcome an inability to trace its specific property by instead asserting a general proprietary right to or lien over the assets of the Defendants in liquidation, merely on the basis that their assets have been or must have been “swollen” by the contributions made to them by Mr. Al Sanea with what is alleged to be AHAB’s money misappropriated by him. The so-called “swollen assets theory” – as derived from the obiter dictum of Lord Templeman in the Privy Council decision in *Space Investments*



*v Canadian Imperial Bank of Commerce (Bahamas) Ltd.* [1986] 1 WLR 1072 – has been distinguished by the Privy Council itself (in *Re Goldcorp* [1995] 1 AC 74) and the theory rejected in later cases, including in *Serious Fraud Office v Lexi Holdings* (above).

37. That failure of pleading of its proprietary claim, which the Defendants argue renders AHAB's claim a "frivolous and vexatious" claim, forms a separate basis for the strike out applications.
38. AHAB's response to it is that AHAB may not be expected to particularise its proprietary tracing claim fully until after the discovery process is complete and that stage has not yet come in the action. AHAB has been making "best efforts" to obtain and in turn give complete disclosure but, like the GT Liquidators themselves when seeking to recover the corporate records, has been met with obstruction at every turn by Mr. Al Sanea. Mr. Al Sanea is believed, with good reason, to have many important records of the Money Exchange and the Defendant companies in his possession or under his control in Saudi Arabia and has refused to produce them.
39. In light of the decision I have reached in relation to the strike out applications as based specifically on the alleged deliberate failure to disclose the N Documents, I consider that this further assertion that AHAB's claim is frivolous and vexatious as a basis for striking out (raised especially by the Liquidators of the AWALCos and the Liquidators of SIFCO #5) may better be raised at a later stage in the form of applications for summary judgments in favour of those Defendants in liquidation.
40. I come to the third factor for consideration in relation to the N Documents. It is that a deliberate and evasive failure on the part of the AHAB's partners to disclose the N Documents is said necessarily to give rise to the question whether they have suppressed

other relevant evidence in the case. Such a concern must lead the Court to doubt whether a fair trial of the action is still possible and if there is basis for doubt, the only proper recourse must be to strike out AHAB's claim now.

41. In summary, therefore, the Defendants seek to strike out AHAB's claim now based on three allegations of abuse:

- (i) The information revealed by the N Documents means that the evidence given by AHAB in support not just of the WFO but also of its case as a whole so far in the action, must be false and the explanations given are not acceptable. This also points to the likelihood of further suppression and so there is a risk that a fair trial is no longer possible;
- (ii) AHAB's case must necessarily now move from one based on complete lack of authority to certain undeniable authority in Mr. Al Sanea to borrow, but that is not AHAB's pleaded case and no application to amend the pleadings has been made by AHAB. AHAB is therefore maintaining a case which it knows to be false. That is an abuse of the process of the Court and should not be allowed;
- (iii) AHAB's claims are now rendered hopeless on the merits for in light of the substantial evidence now revealed in the N Documents of actual authority given to Al Sanea, AHAB can no longer maintain (if it ever could) a proprietary tracing claim based upon allegations of fraudulent misappropriation. The claim, so shown to be frivolous and vexatious, should be struck.

### **The Law on Strike Out**

42. The following exposition of the applicable law is uncontroversial. It is conveniently adopted from the skeleton arguments with my acknowledgement of the industry of counsel.

GCR Order 18, rule 19(1) provides as follows:

*"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:*

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court,*

*and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

43. The Court also has an inherent power to prevent misuse of its process in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right thinking people: **Hunter v Chief Constable of the West Midland Police** [1982] AC 529 at 536C per Lord Diplock. Also in this jurisdiction, it was stated in **RCB & Ors v Thai Asia Fund Ltd** [1996 CILR 9] at 28:

*"Within its inherent jurisdiction and for the purpose of protecting its own process from abuse, the court has the power to stay (see **Reichel v. Magrath** (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159.), or to dismiss before the hearing, actions which it holds to be frivolous, vexatious or otherwise an abuse of process: see **Metropolitan Bank Ltd. v. Pooley** (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449. and generally *The Supreme Court Practice 1995, para. 18/19/36, at 346. The inherent powers given at common law are in no way diminished but instead are expanded by the rules of court made under the Grand Court Law.*"*

44. The circumstances in which an abuse of the process of the Court may arise are varied and the categories of circumstances in which the Court has a duty to exercise its power to prevent misuse of its procedure are not limited: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536C-D per Lord Diplock. In *Kalley v Manus & Ors* [1999] CILR 566 at 574 Murphy J said as follows:

*"As regards abuse of the process of the court, para. (1)(d) of r.19 confers upon the court in express terms powers which were previously exercised under its inherent jurisdiction. The connotation is that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of vexation and abuse are not closed and depend on the relevant circumstances."*

45. However, the jurisdiction to strike out "*will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed*": *Hubbock v Wilkinson* [1899] 1 QB 86 at 91 (per Lindley MR, on this point). See also *The Supreme Court Practice 1999 para 18/19/6 and 18/19/27*.

46. In *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 166, the respondents to a petition for relief under section 459 of the English Companies Act 1985 applied to strike it out before the trial on the basis that the petitioners had disclosed forged documents so that a fair trial would not be possible. That application was refused but renewed at trial on the basis that it was then clear that the petitioner had lied about the circumstances of the previously admitted forgeries and there was a danger that other documents had been

forged. The Judge again refused to strike out the petition, holding instead that a fair trial was still possible. On appeal, the English Court of Appeal held that the Judge should have struck out the petition at the time of the second application for two reasons. First, once the Judge had accepted that documents had been forged and it would no longer be possible to have a fair trial of certain issues, the Judge should have struck out the petition because there was no other evidence which was capable of supporting the relief claimed. However, Chadwick LJ (with whom the other members of the Court of Appeal agreed) gave a second reason for his conclusion. At paragraphs 54 to 55 he said:

*"[54] But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Millett J. in Logicrose Ltd v Southend United Football Club Ltd (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to*

*determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.*

*[55] Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed."*

47. Having reviewed the evidence in that case Chadwick LJ concluded (at paragraph 56):

*"A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to*

*conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."*

48. Chadwick LJ also made it plain in the Arrow Nominees case that if the Court considered it appropriate it may order cross examination on an application to strike out for abuse of process in such circumstances. (See also in this regard GCR Order 38, rule 2.) At paragraph 61 he said as follows:

*"But I should not leave the matter without this comment. The judge's observation, in the final paragraph of his first judgment, that: "if in the course of the trial further evidence emerges that . . . other documents have been suppressed or fraudulently altered, the application to strike out can then be renewed and is highly likely to be successful" must be taken to have led, in some measure, to the trial thereafter taking the course that it did. It seems to me that it may well be more satisfactory, in a case where there has been admitted forgery or destruction of relevant documents, to decide on the application to strike out, whether the full extent of the fraudulent conduct has been revealed, even if that requires oral evidence at that stage. The judge recognised that cross-examination could have been sought on the application in October 1999. It is, of course, a matter of case management for the judge in each case whether to invite cross-examination on an interlocutory application, or to leave the point until trial. But I venture to suggest that a judge faced with an application to strike out in circumstances such as those in the present case ought to address the question whether the better course would not be to resolve the issue, before the trial begins (or, perhaps, as a preliminary issue at the*

*start of the trial), whether full disclosure of the fraudulent conduct has been made. If, in the absence of cross-examination, the judge cannot resolve that issue at the interlocutory stage, then he is left in the position that he cannot be confident that there is no substantial risk that the trial (if it proceeds) will be a fair trial. Indeed, he can be reasonably confident that it will be unfair, in the sense that it will give rise to a detailed examination of issues which ought not, properly, to be occupying the time of the court at the trial. If, on the other hand, he is able to resolve that issue before trial (after cross-examination if necessary) then it will not require further investigation at the trial. If the judge is satisfied, in the light of what he accepts is full disclosure, that there is no substantial risk that the admitted forgery or destruction of documents will lead to a result which is unsafe then he will allow the trial to proceed. But, if he is not satisfied that there has been full and frank disclosure of the fraudulent conduct, then, for the reasons which I have already given, it seems to me that the correct response is to refuse to allow the party in default from taking any further part in the proceedings, with whatever consequences follow from that" (emphasis added).*

49. The decision of the English Court of Appeal in *Arrow Nominees* has been applied in the Cayman Islands: See *TMSF v Wisteria Bay* [2008] CILR 231. After citing and adopting the passages from *Arrow Nominees* referred to in paragraphs 36 and 37 above, the Court said at 254 to 256 as follows:

*"57. Here, I have indicated that I am driven to the conclusion that a fair trial is no longer possible. One single example of the reason for this*



*conclusion is the concern that, had the other documents now said to be other originals been produced, they might well have yielded results from the ink analysis and dating, and ESDA tests, different from those which the documents themselves, so reluctantly produced, were capable of yielding. The probabilities will always be unknown and there can be no burden upon the plaintiffs to demonstrate what they could have been, or to demonstrate their probative potentiality in the case. The defendants' case is plagued by the internal and irreconcilable inconsistency as between the accounts of Mr. Al-Ghuwairi on the one hand, and of Messrs. Al-Ayed's and Al Bustami's on the other.*

58 *In these circumstances, I must conclude that there is no probability of the defendants complying in good faith with their discovery obligations. This further finding, by itself, would be a sufficient basis for strike out, by reference to the willingness of the courts in the analogous situation of the absence of a bona fide defence, to grant summary judgment to the plaintiff: see **National Westminster Bank PLC v. Daniel [1993] 1 W.L.R. 1453; [1994] 1 All E.R. 156.** This is not a conclusion, I might add, which depends upon the court undertaking the sort of "trial on affidavit evidence," which was discountenanced in that and other cases: see **Long v. Farrer & Co EWHC 1774 Ch); and Re Keypak Homecare Ltd. [1987] BCLC 409.***

59 *Here, the unsatisfactory state of the defendants' explanation and the unsafe state of the case, is patently clear from the admitted failures and the irreconcilable inconsistencies in the explanations, which have been*

*proffered. I am also driven to the conclusion that, if indeed there were (as Mr. Al Bustami and Mr. Al-Ayed deposed) a second set of originals in Mr. Hakan Uzan's possession, they are to be fairly regarded as being, or as having been, deliberately withheld.*

...

62 *In such circumstances, plaintiffs are not to be invariably required to show that there is a real risk of prejudice to their case, before the sanction of striking out can be imposed upon the defendants. That sanction is justified by the deliberate and inexcusable nature of the breach itself. See **Hytec Information Systems Ltd. v. Coventry C.C.** [1997] 1 W.L.R. 1666 and **Ebanks v. Brooks** 2004 -05 CILR N [28] (in the case of breach of “unless” orders), and the Grand Court Rules 1995, O.24, r.20, considered in **Brown v. Horvat Properties (Cayman Islands) Ltd.** 1992-93 CILR N-5 (in the case of breach of general discovery obligations).*

63 *For all the foregoing reasons, I conclude—and even with concerns as to the need for proportionality of the just sanction in mind (see **In re Jokai Tea Holdings Ltd.**, [1992] 1 W.L.R. 1196; as explained in **Beeforth v. Beeforth**, *English C.A.*, *The Times*, September 17<sup>th</sup>, 1998, unreported; and **Woodrow v. Chalk Catering Ltd.** [1999] C.L.Y. 569—that there is a real risk that the conduct of the defendants has rendered further conduct of the proceedings unsatisfactory (a conclusion of principle reached by Millett, J., as he then was, based on similarly serious concerns in **Logicrose Ltd. v. Southend Ltd. F.C. Ltd**) (1988), 132 Sol. Jo. 1591. The defendants have therefore, in my view, entirely forfeited their right to*

*continue to defend, or to sue, in these proceedings. I order that their defence and counterclaim be struck out."*

50. In *Masood v Zahoor* [2010] 1 WLR 746 (at page 750, paragraph 71) the English Court of Appeal recently said of the decision in *Arrow Nominees*:

*"In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In the *Arrow Nominees* case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. There is a valuable discussion of the principles by Professor Adrian Zuckermann in his editor's note entitled 'Access to Justice for Litigants who Advance their case by Forgery and Perjury' (2008) 27 CJQ 419".*

51. At paragraph 73 (also at page 750) the English Court of Appeal also said:

*"One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. Once the proceedings have run their course, it is too late to further that important objective."*

52. This factor was stressed by the strike out applicants recognising that if the sanction for failure to disclose the N Documents is not imposed now, it cannot later be imposed when the matter is allowed to go to trial.
53. Nonetheless, it must be recognised that a strike out application is not an occasion for a summary trial on the documents and in this case, what in effect is being invited by the strike out applicants, is a summary trial, including by way of cross-examination, of the veracity of Saud and Yousef Algosabi. As the principles are further explained by Danckwerts LJ in Wenlock v Moloney [1965] 1 WLR 1238 at 1243:

*“The practice under RSC Ord. 25, r. 4, and under the inherent jurisdiction of the court was well settled. Under the rule it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the process of the court, an affidavit could be filed to show why the action was objectionable. The commonest case was where a plaintiff was seeking to bring an action on a point which had already been decided or was obviously wholly imaginary. An example of that is Willis v. Earl Howe [1893] 2 Ch. 545]. But, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial, unless the matter was clear.*

*The position is very clearly expressed by Lord Herschell in Lawrence v. Lord Norreys [12 App. Cas. 210]. He said: 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of*

*the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.' In that case the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the pleadings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case.*

*The position under two former rules has been incorporated in the present RSC Ord. 18, r. 19. There is no doubt that the inherent power of the court remains. But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power" (emphasis added).*

54. Consistent with those two principles, the Court should not entertain prolonged argument on a strike out. In ***Williams & Humbert v W & H Trade Marks [1986] 1 WLR 368 (HL) at 441***, Lord Mackay (with whom the rest of the House agreed) referred to the “serious risk” that if a prolonged and serious argument will be necessary to decide a strike out application, the court time, effort and expense devoted to it will likely be lost since the pleading in question may well not be struck out and the whole matter will then require to

be considered again at trial. Accordingly, he recognised a general rule that if it appears to the court hearing an application to strike out that prolonged and serious argument will be necessary, *“the judge should decline to proceed with the argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worthwhile”*.

55. The foregoing dicta notwithstanding, it must be recognised that cases have arisen in which, exceptionally and after fairly extensive enquiry, the pleadings have been struck.

56. Summarizing all the foregoing principles as they might pertinently apply to the present application for strike out based on the concerns raised by the late disclosure of the N Documents, they are as follows:

(i) The power to strike out will not be exercised except with great circumspection and unless it is perfectly clear that the claim cannot succeed. The objective of the strike out sanction is not merely to punish the disobedient party but to secure the fair trial of the action in accordance with the due process of the court.

Accordingly, a party is not to be deprived of his right to a proper trial merely as a penalty for disobedience of the rules, even if such disobedience amounts to contempt or defiance of the court. Striking out would not be appropriate if the object of a fair trial is or can ultimately be secured by (for example) the late production of documents which had been withheld.

57. It must therefore be noted here that, but for the concerns which have been raised about the credibility of the AHAB partners (which will be considered more closely below), as those concerns may relate to whether they have or will in due course make full and frank

discovery in the action, the Court could be invited to conclude now that a fair trial of the action is still possible and so the sanction of striking out should not be imposed.

(ii) Conversely, a litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial should be treated as having forfeited his right to take part in a trial. His object is “*inimical to the process which he purports to invoke*” (per Chadwick LJ in *Arrow Nominees* (above)) and so his claim should be struck out.

58. If the AHAB’s partners conduct can be characterised in this way despite their explanations proffered for the late production of the N Documents, then they would indeed be liable to having their claim struck out.

(iii) Further, to the extent that there remains substantial doubt about the possibility of a fair trial because of the litigant’s conduct, the Court must bear in mind that a fair trial is a trial that is conducted without undue expenditure of time and money. A claim is therefore liable to be struck out if the doubt about the litigant’s conduct remains to be resolved only after an extensive enquiry can be undertaken into the effect which that conduct has had on the fairness of the trial itself.

(iv) While a strike out application is not an occasion for a summary trial on the documents, if it is possible to resolve questions of that kind about the conduct of a litigant before the trial so as not unduly to increase the expense and time for trial, it becomes a matter of case management for the judge whether he would seek to do so (including by allowing cross-examination of relevant persons) rather than striking out the claim or leaving the vexed issues of credibility to be resolved at trial.

59. For the reason of the apparent implausibility of Saud Algosaibi's explanation for the failure to disclose the N Documents (so also expressly regarded by Justice Flaux in the London proceedings) this option of allowing his cross-examination (and that of Yousef) is the least that the Defendant Companies would seek now.

60. As to Saud's explanation, I think I need only, for present purposes, reference what is set out in AHAB's Counsel's Mr. McQuater's written submissions:

*"53. The circumstances in which the N Documents came to be discovered have been explained (to the extent that they are known) in some detail in the Second Affirmation of Saud Algosaibi, dated 10 September 2011 (see, in particular, paras 17-40) and the First Affidavit of Andrew Ford, dated 13 September 2011.*

*54. Both Saud Algosaibi and Mr Ford explain that AHAB has devoted considerable resources to identifying and managing the huge quantity of documents which its investigation of Mr Al Sanea's fraud and its involvement in numerous sets of legal proceedings has required since May 2009. AHAB has retained a large team of professionals to take charge of that process on its behalf, including not only its legal advisers and specialists from Deloitte, but also specialist companies who have provided electronic scanning and document management services.*

*55. To enable its advisers to undertake their document management work, AHAB has allowed them full and unfettered access to its offices, computers, document stores and employees, as well as to the AHAB partners and the AHAB partners' homes. Mr Ford, who*



*has been involved in the document management process since 2009, explains (Ford 1, paras 9-12 [C1/5]) that at no time have AHAB or any of the AHAB partners sought to place any restriction on the advisers' access to documents, or any potential source of documents or information. He says:*

*“At every stage of the investigation the Investigation Team has been free to undertake whatever searches it has considered necessary. Moreover, it has not had to give any notice of searches – AHAB has essentially opened its doors to the Investigation Team, and the Investigation Team has been diligent in searching for relevant and disclosable documents in the places where they could reasonably expected to be found.”*

- 56. He describes the searches undertaken by AHAB's advisers in greater detail in paragraphs 13-23 of Ford 1.*
- 57. It is therefore a matter of some consternation and considerable embarrassment to AHAB that the N Documents were not located, and the information in them not disclosed, until earlier this year.*
- 58. AHAB has not been able to establish with any certainty how this happened. The documents were found in a cupboard in Saud Alghosaibi's office in May 2011, when a final sweep was undertaken to ensure that all disclosable documents had been located for the English proceedings. As Mr Ford explains, a very full search of AHAB's Head Office, including Saud Alghosaibi's office, had already been conducted by the Investigation Team in 2009, and the N Documents were not found as part of those searches. Nor were they at Saud Alghosaibi's house when that was*

*searched by the Investigation Team for relevant documents in September/October 2010.*

59. *Saud Algosaiibi acknowledges that he is personally at fault for the failure to discover the N Documents earlier, albeit the failure was wholly inadvertent. His explanation of what he believes to have happened (insofar as he is able to give one) is set out in paras 22-40 of his Second Affirmation [bundle C1/2]. As he says, the relevant events occurred at a time of extraordinary turmoil for him and his family and, unfortunately, he has very little recollection of them now, but he believes that the likely sequence of events was as follows (in the relevant paragraphs of his Affirmation he identifies those events he recalls and those he has reconstructed):-*

(1) *In early to mid May 2009, before he had any grasp on the true nature and scope of the Money Exchange's problems, Saud made an effort to understand and (if he could) solve the problems without extensive outside assistance. To that end he asked some of the younger members of his family to collect documents that might be relevant to the default notices which AHAB had started to receive from banks at the time, and bring them to his home.*

(2) *In response to that request, documents were collected from the Money Exchange offices and from AHAB Head Office, including Saud's personal office, and delivered to his home. Since none of those involved in gathering the*

*documents knew much about the Money Exchange or its liabilities, and none of them had any experience of complex financial fraud investigations, this was a somewhat chaotic and uninformed exercise, the result of which was that Saud received an odd assortment of files and loose documents, some of which appeared to him to be relevant to the demands being issued by banks at the time, but many of which did not. He says that he read those which appeared to him to be directly relevant to the banks' demands, but did not look in any detail at those which appeared to him to be of lesser or no relevance.*

- (3) *Since the bulk of the N Documents consists of files which were readily identifiable as relating to the Money Exchange, Saud believes that they are likely to have been among the documents that were brought to his house in May 2009 (although he does not recall if they were or not). He says that he does not believe he would have reviewed the files at that time – at any rate, he has no recollection of doing so and he had no recollection of their existence or relevant contents a few months later, in July 2009, when AHAB obtained the WFO, or in April 2010 when he made his First Affirmation in these proceedings. His assumption is that when they were delivered to him in May 2009 he regarded them as historical documents (they all date from*

*2005 or earlier – many of them date from the 1980s) which were unlikely to be of any help to him in addressing the immediate problems that AHAB faced from bank demands, and therefore he put them to one side.*

- (4) As a result, when the Investigation Team conducted their detailed inspection of AHAB's offices in 2009 for documents relevant to the investigation, the N Documents were not found there.*
- (5) At about the same time, the Investigation Team also approached the partners to establish whether they had any relevant documents in their homes: Ford 1, paras 17-19. Saud told them that he had documents which had been brought to his home in May 2009 in the circumstances described above. Unfortunately, Saud also told them that (as he believed) the Investigation Team already had copies of the documents he had at his home. Saud now recognises that he was wrong about this, but he believed what he said to be accurate at the time. He explains in paragraph 27 of Saud 2 how he now believes he came to make this error.*
- (6) As a result, although the Investigation Team had open access to any of the documents Saud had at his home in 2009 had they wished to look at them, the documents were not inspected at that time because all concerned (the*

*Investigation Team and Saud) believed that the Investigation Team already had copies of them.*

- (7) *In October 2010, the question of documents at Saud's home was revisited for the purposes of disclosure in the London proceedings, and, to double-check rather than because it was anticipated that anything previously unseen would turn up, the documents were inspected. Unexpectedly, those inspecting the documents found that in fact they included some which the Investigation Team had not seen before.*
- (8) *Unfortunately, even at this point, the N Documents were not found. It appears that by this time the documents had been returned to AHAB head office (and, presumably, placed in the cupboard in which they were found in May 2011). Saud has not used his office since May 2009 out of a concern that Mr Al Sanea has paid collaborators in AHAB head office who are prepared to keep him informed about the steps being taken or contemplated in response to his fraud: Saud 2, para 36. As a result, he does not know when the documents found in his office in May 2011 were placed there. Again, Saud has no specific recollection of having returned the documents prior to the inspection of his home in September/October 2010, but he thinks it likely that he did so because he had no place to store unused documents at his home and it was inconvenient and untidy having them*

*lying around. Very regrettably, however, when it was discovered in September/October 2010 that there were documents at his home which had not previously been seen by the Investigation Team, he did not recall that some documents which had been at his home since May 2009 had subsequently been returned to his office. Since he had forgotten about the documents, he did not alert the Investigation Team to their existence and, as a result, they were not discovered until the search in May 2011.*

60 *AHAB and Saud Algosaihi personally acknowledge that the succession of errors relating to the N Documents described above should not have happened and is deeply regrettable. Saud Algosaihi has apologised, both on his own behalf and on behalf of AHAB, in his Second Affirmation. He also emphasises (see Saud 2, paras 5 and 39) that the non-disclosure of the N Documents was wholly inadvertent. He explains that (as outlined above and set out in substantially greater detail in his Second Affirmation) the errors were the result of oversight on his part and not the product of any ulterior motive, and he asks the Court to take into account the extraordinary and chaotic circumstances in which he and his family have found themselves in since May 2009, which have had terrible consequences for AHAB and a deep effect on Saud personally (see Saud 2, paras 8-16)."*

61. That detailed and extensive explanation must however, be considered against the background of the admitted and obvious relevance of the N Documents in the London Proceedings and as that relevance may arise in these proceedings. Counsel for the Defendant Companies identify a number of factors arising from the discovery of the N Documents:

- (i) Whereas before the disclosure of the N Documents Saud's evidence in this Court was that he never had any involvement in the operations of the Money Exchange (Saud's 1<sup>st</sup> Affidavit, paras 18 and 34), the N Documents now reveal at least certain relevant and potentially very significant involvement.
- (ii) At Saud's 1<sup>st</sup> Affidavit para 26, he swore that the Money Exchange's known borrowings (and implicitly therefore authorized borrowings) was in the region of SAR 1 billion (approximately USD250 million), but the N Documents have come to reveal authorized borrowings of approximately SAR 8 billion (or USD2.1 billion).
- (iii) This significant discrepancy is sought in part to be explained away on the basis that the further borrowing was believed by the AHAB partners to be undertaken by Mr. Al Sanea to replace old borrowings on behalf of his own business (in what came in the arguments to be called the "new for old policy" described at Saud 4 para 52). But this was not pleaded before as part of AHAB's case and is not supported by any independent evidence to support Saud's explanation.
- (iv) On the basis of what is revealed in the N Documents, suggesting that AHAB partners were aware that Mr. Al Sanea had undertaken borrowings through the Money Exchange to fund his own businesses, Saud's earlier evidence (Saud 1<sup>st</sup> Affidavit para 25) that he knew of no such borrowings, is now shown to be false.

- (v) Similarly, Saud's earlier evidence to the Court that he had no knowledge of the operations of TIBC, AIS and AIH (entities established in Bahrain and Bermuda and ostensibly operated by Mr. Al Sanea in the name of AHAB) is shown to be false by the references to those entities which are contained in the N Documents and in particular in an important auditor's report found in the N Documents and initialed by Saud as having been seen by him. TIBC, AIS and AIH are Bahrain and Bermudian licensed entities through which Mr. Al Sanea conducted banking and other investment activities respectively in those jurisdictions and ostensibly on behalf of AHAB, using monies borrowed through the Money Exchange.
- (vi) In effect, what Saud seems to be saying is that the documents brought to his house by the "junior members of the family" at his behest, were sifted for relevance and the N Documents regarded by him as irrelevant and so not directly and immediately provided by him to his forensic team. This is to be regarded as an implausible assertion if only by reference to the labels (presumably placed by Saud or on his instructions) on the spine of the N-Bundles. Saud's assertion becomes even more implausible when reference is made to the contents of many of the N Documents themselves.

62. What the labels and the respective contents of the N-Bundles reveal is a mind being applied to the documents contained in them and a filing system which is clearly relevant to the Money Exchange.

63. Thus, the suggestion in Saud's 4th Affidavit that the N Documents must have been regarded by him as simply irrelevant and for that reason not provided to the Forensic Team, does not bear scrutiny. The documents would have been removed from the Money Exchange to Saud's home in the first place only because they appeared to be relevant.



His explanation that he did not review them in detail must, for that reason also, be regarded as implausible.

64. For those reasons, it must be recognised that this narrative of Saud's begs a number of further questions:

- (i) Why did he not tell his very large Forensic Team (with as many as 35-50 persons engaged at various stages in the process) that he had the N-Bundles which on the face of the many documents in them and their very labels, were relevant? He would have had those professionals explaining to him how important the discovery obligations are to the various proceedings in which AHAB had become engaged, not least these here in Cayman which AHAB initiated as plaintiff.
- (ii) Why were only the N-Bundles removed from his home at the time (October 2010) when other – it seems irrelevant – documents were found there by the Forensic Team?
- (iii) Given the manner in which the documents in the N-Files were selected and labeled, this could not have been otherwise than deliberately done by someone. Was Saud that person, if not, who was?

65. Mr. Ford's and Mr. Lewis' affidavits support Saud's narrative but only insofar as they confirm the circumstances under which the N-Bundles were found in the cupboard in Saud's offices at the Money Exchange. This was in response to last minute directions from Justice Flaux to "*double check to make sure*" no documents were overlooked.

66. I am bound to conclude that these questions and circumstances point to the patent implausibility of the explanations which have been provided for the belated disclosure of the N Documents.

67. Is that, however a proper basis for striking out?

68. Counsel for the Defendant Companies say it is. Again, their argument is that AHAB has advanced a tale that it knows to be false and now shown to be false by the N Documents. And AHAB's case on the pleadings remains nonetheless as it has stood for two years, although now contradicted by the N Documents.
69. The patent implausibility of Saud's narrative shows that this Court is still being misled and given such misconduct that is still continuing, AHAB remains determined "to subvert the adjudicative process by fraudulent means". This is precisely the kind of conduct that requires the sanction of striking out (citing Professor Adrian Zuckermann: "Access to Justice for Litigants who Advice their case by Forgery or Perjury", Civil Justice Quarterly, Vol. 27, Issue 4 Sweet and Maxwell 2008 and above).
70. Mr. Crystal Q.C. proposed a further consideration. It is that the power of the Cayman Court to strike out is critical in this jurisdiction because most litigants in the Financial Services Division of the Court will be foreigners and so not necessarily physically present in person and amenable to sanctions in person. So other solutions, such as prosecutions for perjury, may not be realistic or achievable in this jurisdiction. The strike out power is therefore to be emphasized.
71. I mention this point only *en passant*, to say that to the extent it would invite a departure from the well established common law principles identified above and which have come to define the use of the Courts' strike out power in circumstances such as those presented here, I do not think that what Mr. Crystal proposes is either necessary or appropriate. It is precisely because these Courts are known to be guided by the settled common law principles that persons from afar seek to do business, and are willing to litigate their business disputes as they may arise, in this jurisdiction.

## Discussion and analysis

72. Having regard to these principles as they apply and as discussed above, the primary and most important question for me here is whether, in light of all that has happened in relation to the late disclosure of the N Documents, a fair trial of the action is still possible.
73. On the basis of the affidavit evidence as it stands, I am unable to conclude otherwise. The fact of the matter is that the N Documents are now disclosed. Saud Alghosaibi's accounts, implausible as they may arguably be regarded, have not been disproved conclusively.
74. Even if they had, unless it could be said or inferred that the AHAB partners' mendacity over the N Documents points to it no longer being possible to have a fair trial, the weight of the case law authority is clearly to the effect that striking out would not necessarily be the appropriate response from the Court.
75. Rather, Saud's and Yousef's creditworthiness would ordinarily be a matter left to be determined at trial where the consequences to follow would be a matter for the trial judge. See *Wenlock v Maloney*, per Danckwerts LJ at p1244 above.
76. While on the authority of *Arrow Nominees* case (per Chadwick LJ at para 54) "*a litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial*"; that proposition is not yet shown conclusively enough to be AHAB's position, to justify strike out of its case. There simply is no evidence to suggest that there is still an ongoing deliberate failure on AHAB's part to fulfill its discovery obligations. And it is in that respect that the affidavits of Mr. Ford and Mr. Lewis are most helpful to AHAB now: they confirm their independent best efforts to meet AHAB's discovery obligations based on their

unrestricted access to all of AHAB's offices, the homes of its partners and any other known sources of relevant information. The fulfillment of AHAB's discovery obligations has become the responsibility not just of the partisan AHAB partners themselves, but also of the independent professionals of the Forensic Team.

77. There is, moreover, the objective consideration that, if AHAB sought and continues to seek to suppress relevant information, there would have been any number of other ways of ensuring that the N Documents never emerged.
78. While this consideration does not bolster the credibility of the explanations given by Saud in particular (after all, the final searches of his office cupboard could well perhaps not have been anticipated by him) the fact of the matter is that only the N Documents were found and they have been disclosed.
79. So where there is no apparent basis for concluding now that a fair trial is in jeopardy, should I nonetheless accede to the secondary applications by the Defendant Companies and direct cross-examination of Saud and Yousef before finally deciding on the strike out applications and for the purposes of doing so?
80. I have grappled with this question.
81. In as difficult and complex a case as this has been and would likely continue to be, any deliberate failure to disclose relevant material must be regarded as serious and sanctionable.
82. Here, the N Documents propose to bring about a fundamental change to the case to which the Defendant Companies must respond – from one, from their perspective, based on complete lack of authorization in Al Sanea – to one of qualified authorization. It involves the seismic shift from a case of no authorised borrowings, to a case of borrowings which were authorised but limited to replacing “new for old” and so, at least, that some of

whatever of AHAB's monies passed by him into the Defendant Companies may have been authorized and so not tainted by fraud.

83. This is not, however to my mind, a change which in and of itself may be regarded as prejudicial to the Defendant Companies. If anything, it should strengthen their ability to resist AHAB's claim which, AHAB accepts, must now be particularized specifically in terms of what transactions were authorized and what were not authorized. This will be the minimum required of its pleadings if AHAB is to have any hope of proving its equitable proprietary tracing claim.
84. AHAB quite understandably says that it may not be expected to do so until after discovery is complete – by which it means of course, including discovery by the Defendant Companies themselves. (Discovery by Mr. Al Sanea is required as well but, just as he is not a party to this strike out application, the Defendant Companies cannot be held responsible for his failure to give the disclosure of the documents said to have been taken away from the Money Exchange by him and secreted away in Saudi Arabia).
85. There is therefore, to my mind, very little to be gained by directing cross-examination now in respect of the N Documents. Even if Saud's mendacity in respect of the N Documents disclosure were confirmed, that confirmation would not by itself suggest that a fair trial is no longer possible. The disclosure of the N Documents, although suspiciously late, rather suggests that a fair trial of AHAB's proprietary claim is now, if anything, more likely than before.
86. Nor has AHAB's claim been shown conclusively to be frivolous and vexatious, by virtue of the N Documents disclosure, so as to render it suitable for striking out.
87. AHAB's pleadings are now admittedly amenable to being corrected and clarified as it can no longer be maintained that all of Al Sanea's borrowings from and through the Money

Exchange were unauthorized. But to the extent that there remains objective evidence of fraud committed by Al Sanea it cannot now be said that AHAB no longer has a good arguable case against, at least, some of the Defendant Companies. Such objective evidence would include, I am told, a criminal prosecution now brought in Bahrain in respect of his dealings there with and through TIBC and, further in particular, the massive and unexplained funding that he would have required to obtain the 3.3 per cent of HSBC bought through SHL (said to be worth USD6.6 billion).

88. Nonetheless, I recognise that others of the Defendant Companies may well, already, be positioned so as to have their defences regarded differently.

89. Several of them, although having assets, are already clearly massively insolvent vis-à-vis third party creditors. This is in respect of claims brought mainly by banks which provided funding directly to them and having nothing to do with AHAB's Money Exchange.

90. Theirs are the claims with which AHAB's proprietary tracing claim would compete.

91. The longer these Defendant Companies remain enmeshed in AHAB's claims, the longer therefore before their liquidators can honour the banks' admitted claims and so the more prejudicial to those claims AHAB's action may prove to be. This is apart from the deleterious impact which the costs of litigation will likely have upon the available assets, especially as it now seems possible that AHAB will not be good for the massive costs orders in favour of the Defendants that would result from its claim being unsuccessful. Witness, in this regard say the Defendant Companies, AHAB's apparent inability or unwillingness to pay the judgment debt and related costs awarded against it by Justice Flaux, in the London proceedings.

92. Further documentation, showing that AHAB's own professional advisers are now taking liens over AHAB's properties for their fees, provides another troubling indicator in this regard.
93. The Defendant Companies are themselves hamstrung by Mr. Al Sanea's recalcitrance and without the benefit of disclosure from him, are as yet unable to speak to what went on in Saudi Arabia at the Money Exchange and as to what monies may have come to them having been obtained through the Money Exchange.
94. They are therefore as yet obliged in their respective Defences to plead only a series of non-admissions, leaving it to AHAB to prove the positive assertions made in its claim.
95. AHAB's claim, they say, should therefore be struck out now on the basis that in light of the N Documents, it is plainly false as pleaded and given that AHAB makes no application to amend.
96. The position of SIFCO #5 (the 34th Defendant) is even more acute.
97. As Mr. Lowe QC explained, SIFCO #5 is hardly, on any view, to be regarded as a cypher for Mr. Al Sanea. It is a special purpose vehicle (SPV) set up as a part of a special series of transactions that involved Barclays Bank and SICL (the first Defendant). As a result of those transactions, it seems Barclays paid USD124 million for all the equity interests in SIFCO #5, with SICL holding the management shares of the SPV.
98. Perhaps proportionately worse than upon the other Defendant Companies, the WFO is said to have had a devastating impact upon the value of the SIFCO #5 equity shares – resulting in a likely loss to Barclays of USD50-60 million.
99. AHAB, it is said, can have no basis for proceeding with its proprietary claim against SIFCO #5 as distinct from its claim against Al Sanea personally. The appropriate inference to draw is that SIFCO #5's assets did not come from AHAB or Al Sanea

personally. Thus, here in particular, the “swollen assets theory” cannot prevail (see *Director of SFO v Lexi Holdings* above). The kind of latitude to be given to a claimant having a viable proprietary tracing claims (such as was given in the *Gruppo Torras* case (2000 CILR 441) by way of orders for discovery) is inappropriate and AHAB’s case against SIFCO #5 should be struck now for being patently and irredeemably frivolous and vexatious.

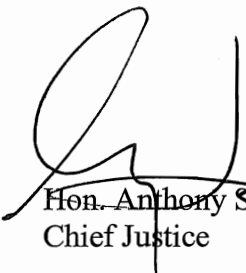
100. While I am very sympathetic to SIFCO # 5’s concerns (as I am to those of the other Defendant Companies which claim to hold assets which could not have come from AHAB), it and their appropriate recourse is not by way of the present strike out summonses. In my view it is by way, in due course, of applications for summary judgments on the basis that AHAB’s claim, after close of pleadings, will have been shown to be unsustainable.


### **Cross-examinations**

101. In the end, what the Defendant Companies are inviting me to find now instead, is that AHAB has deliberately withheld material from the Court and has deliberately given false evidence (per Saud and Yousef Alghosaibi) on affidavit.
102. As I have explained above, suspicious and implausible as their accounts may be, there is as yet no basis, at these interlocutory stages, for making such a finding.
103. Had it been shown to be important to the Defendants’ cases that the question whether the Court should accept their accounts should be answered now, an order for cross-examination would have been appropriate. But that has not been shown. Whether the Court ultimately accepts the explanations and whether Saud and Yousef are to be regarded as truthful witnesses, are matters that remain suitably to be determined at trial.



104. Ordering cross-examination now would incur the risk of launching a mini-trial about the N Documents involving significant time and expense, but without resolving any significant aspect of the case. Already it is apparent that not only Saud and Yousef would have to be cross-examined, but also the members of the Forensic Team who became involved in the discovery process.
105. Mr. Mark Hayley, who was manager of the Money Exchange while it was latterly under Mr. Al Sanea's control, would also be required to testify in relation to the AHAB partners' assertion that they were not involved in the running of the Money Exchange; an issue that arises for cross-examination on the face of the N Documents to the extent they may show otherwise. Yet, these are all issues that could properly be canvassed at the trial.
106. While the circumstances of the discovery and disclosure of the N Documents and the nature of their contents will remain in issue at trial, in my view, they do not provide a basis now upon which AHAB's claim could properly be struck, either to prevent a further abuse of the process of the Court or because there is a risk of a fair trial being no longer possible.
107. The applications for strike out are refused; as are the applications for cross-examination.
108. I will hear submissions as to the costs of these applications.

  
Hon. Anthony Smellie  
Chief Justice



December 2 2011