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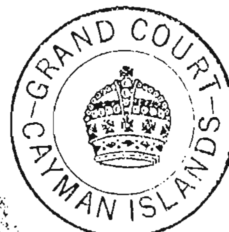
IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 OF 2009

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



AND 16 OTHER LIQUIDATIONS

BETWEEN AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

PLAINTIFF

AND SAAD INVESTMENTS COMPANY LIMITED

MAAN AL-SANEA AND OTHERS

DEFENDANTS

IN CHAMBERS
THE 14TH, 15TH and 18TH JANUARY 2010 AND 20TH APRIL 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES:

Mr. Evan McQuater QC and Mr. David Quest instructed by Mr. Peter Hayden of Mourant for the plaintiff Ahmad Hamad Algosaibi and Brothers Company ("AHAB")

Mr. Stephen Smith QC, instructed by Ms. Colette Wilkins of Walkers for the Liquidators of SICL, the SIFCo companies (except SIFCo #5)M SHL and Saad Cayman Limited ("the Grant Thornton or GT liquidators");

Mr. Ali Malek QC, instructed by Ms. Sarah Dobbyn of Harneys for the liquidators of SIFCo #5 – ("The Kinetic liquidators");

Mr. William Helfrecht of Bodden & Bodden for the liquidators of the Awal Companies, subsidiaries of Awal Bank B.S.C. ("The Johnson Smith liquidators")

[Ms. Charmaine Richter of Appleby for the second defendant Mr. Al Sanea, who disputes the jurisdiction of the Court]

RULING

1. This action arises out of allegations raised by the influential Saudi Arabian Algosaibi family against a prominent Middle Eastern businessman, Mr. Maan Abdul Wahed Al Sanea ("Mr. Al Sanea") and a large group of companies, mainly domiciled in the Cayman Islands, beneficially owned and controlled by him. These include the 17 Defendant companies which, for present purposes are referred to thus or together with the other Saad companies, as "the Saad Group of companies".

2. There are a number of serious allegations against Mr. Al Sanea and the Saad Group of companies and claims being advanced in this action by the Plaintiff ("AHAB") on behalf of the Algosaibis, include claims in conspiracy, breach of fiduciary duty, dishonest assistance and knowing receipt of the proceeds of fraud. AHAB alleges that USD 5.2 billion of its money has been directly misappropriated. This massive misappropriation is alleged to have been funded by means of fraudulent loans obtained in AHAB's name for the benefit of the Saad Group of companies, - to as much as USD 9.2 billion. This is therefore the total amounts said to have been defrauded overall.

3. Serious allegations of fraudulent misconduct have also been raised by AHAB against Mr. Al Sanea and the Saad Group of companies in other jurisdictions.

4. On 24 July 2009 at the instance of AHAB, Justice Henderson of this Court made a freezing order against all of the 17 Defendants prohibiting the disposal of assets worldwide up to the amount USD9.2 billion.

5. The Court then also appointed receivers over several of the Saad Group of companies, including the 17 Defendants and ordered them to give disclosure of relevant information.

6. The freezing order made by the Court was fortified when, on 21 September 2009 at the instance of AHAB, the English High Court made a further worldwide freezing order in support of these proceedings pursuant to section 25 of the English Civil Jurisdiction and Judgment Acts 1982 U.K. That Order was made on a without notice basis by Justice Flaux against Mr. Al Sanea and Singularis Holdings Limited (the third defendant "SHL") in the commensurate amount of USD 9.2 billion. Both Courts in England and Cayman have continued the worldwide freezing and disclosure orders ("the WFOs") after contested inter partes hearings. Henderson J. in this Court, in making the first order ("the Cayman WFO"), expressed the view that AHAB had a good arguable case on its claim, as a necessary prerequisite for the making of the Order. The English High Court proceeded on the same basis in the grant by Justice Flaux of the English WFO and when it was upheld by Justice Simon on the inter partes basis.

7. This case of AHAB's rests primarily on its proprietary claim to the very large sums of money allegedly defrauded by Mr. Al Sanea and used by him to fund the 17 Defendants and others of the Saad Group of companies. Thus, AHAB's claim against the 17 Defendants is that their assets to the extent that they represent the proceeds of Mr. Al Sanea's fraud or were acquired by use of those proceeds, are now impressed with a constructive trust in favour of AHAB and should be available to satisfy any judgment that AHAB may obtain.

8. The 17 Defendant companies are now all in liquidation before this Court although none was at the time of the Cayman WFO or at the time AHAB's writ and statement of claim were first filed on 27 July 2009.

9. The 17 Defendants may be separated out into three corporate groups and identified by reference to the liquidators appointed over them and will be looked at also from that point of view, for the purpose of a better understanding of the alleged manner of their respective involvement in the fraud and of their responses to the applications at hand.

10. However, the pivotal common issue relating to them at this juncture arises from the fact that their liquidation estates are now subject to claims, not only by AHAB by virtue of its proprietary claim, but also by third party claimants – certain banks which claim to have provided loans directly to them. These Banks were respectively the petitioners at whose instance this Court placed SICL and SIFCO #5 into liquidation. The liquidators then appointed replaced the receivers who had been appointed at the instance of AHAB when Justice Henderson made the Cayman WFO. Each of the SHL, the SIFCOs (with the exception of SIFCO #5) and the Awal Companies were liquidated voluntarily (which liquidations were brought under the supervision of the Court) and Saad Cayman Limited was liquidated compulsorily at the instance of SICL.

11. Their claims being substantiated by reference to available records, the creditor Banks have had their proofs of debt admitted in the respective liquidations but AHAB, whose claim remains as yet primarily proprietary, has had its creditor's proof of debt in support of its liquidation claim admitted only to the nominal

extent of $1 respectively in the liquidations of Saad Investments Company Limited ("SICL") and of SHL.

12. The plain reality of AHAB's position then, is that it must first prove its proprietary claim against Mr. Al Sanea and the 17 Defendant companies by way of judgment upon its writ action, before its constructive trust claim against the assets of the 17 Defendant Companies in Liquidation will be recognised.

13. In this respect, it is therefore plain that AHAB's claim does not coincide with those of the creditor Banks: to the extent that AHAB's claim is proven as a proprietary claim, the assets of the 17 Defendants will be proven to be AHAB's assets and so not coming within their liquidation estates to be available to meet the claims of creditors, including those of the creditor Banks.

14. It is against that background that AHAB now applies for the lifting of the statutory stay (imposed by section 97 of the Companies Law) upon proceedings against the 17 Defendant companies as companies in liquidation, in order that it might press ahead with the trial of its proprietary claim against them and against Mr. Al Sanea himself, in these proceedings.

15. AHAB's "good arguable case" which it asserts is already apparent from the pleadings and so found to exist by at least four different judges (two here and two in England), a circumstance that is relied upon in support.

16. The Grant Thornton liquidators, on behalf of their companies in liquidation – SICL, the SIFCo Companies (apart from SIFCo #5), SHL and Saad Cayman Limited – oppose AHAB's application arguing that AHAB's application for the lifting of the stay should at least be adjourned until after the determination of Mr.

Al Sanea's challenge to jurisdiction which is explained below. In this, they are joined by the Johnson Smith liquidators on behalf of their AwalCo defendants.

17. The Kinetic Liquidators (on behalf of SIFCo #5) adopt a neutral stance in this regard. The Kinetic Liquidators' principal concern at this juncture as explained by Mr. Malek QC, is not to take an unnecessarily adversarial position but rather as officers of the Court, to ensure that their responsibilities are clearly defined, and to ensure that there is no adverse exposure as to costs. The Kinetic Liquidators did, in the end though, express the view that AHAB's claims should be resolved in ordinary litigation proceedings, not by disputed debts in the liquidation and that such proceedings should be single, not multiple proceedings; assuming that they would be Cayman Islands proceedings. These are views which assist me in the resolution of AHAB's application to lift the stay.

In respect of their costs, all the Liquidators sought and obtained during the hearing of the present applications, orders from the Court approving of the manner in which they have managed and administered the assets under their control to date, as well as orders indemnifying them out of the assets for their fees and expenses; including for investigating the AHAB claim (but not for in engaging in hostile proceedings or in taking an adversarial stance to the AHAB claim). That relief was given pursuant to the jurisdiction of the Court recognized in ***Re Berkeley Applegate (Investment Consultants) Ltd.*** ***(In Liq) (No. 2) [1989] BCLC 28*** and the subsequent case law including ***Re Telesure Ltd.*** ***[1997] BLC Ch. D. 589*** and ***Re Eastern Capital Trustees Ltd. (In Liq.)*** ***[1989] BCLC 371.***

From that body of case law, it is clear that where a liquidator has assets in which a creditor claims an equitable interest:

> *"The Court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in the administration of the property" (per Edward Nugee QC sitting as a deputy Judge of the High Court in* ***Re Berkeley Applegate*** *(above) (at p 42-43).*

As the deputy Judge also there observed:

The allowance of fair compensation to the liquidator who has sought properly to act in the protection, preservation and administration of assets to which a claimant asserts an equitable claim is *"a proper application of the rule that he who seeks equity must do equity"*.

18. From the foregoing narrative of events, it is apparent that the different circumstances of the groups of Defendant companies within their liquidations inform the differing stances taken by the liquidators; with the GT Liquidators being the ones who are most adamantly concerned about the potentially disruptive effect that the lifting of the statutory stay and the continuation of the Cayman WFO (including its provisions for disclosure) will have on their ability effectively to perform their functions as liquidators.

I will return to consider the provisions of section 97 of the Companies Law and the competing arguments for and against the lifting of the statutory stay and for

and against the retention or discharge of the Cayman WFO; which are the issues I have before me for decision now.

The nature of AHAB's claim

19. One of AHAB's many business interests in Saudi Arabia is its Ahmad Hamad Algosaibi & Brothers Company Finance Commission and Investment Division which, as its name implies, has been involved in the provision of financial services, originally with a particular emphasis upon currency exchange. Known informally as "the Money Exchange", it is said by AHAB to have been given over to the management and control of Mr. Al Sanea in the year 1981. This it seems came about because Mr. Al Sanea is related to the Algosaibis by marriage and had become a trusted and respected member of that family.

20. By 2000, the business of the Money Exchange had been transformed under the directions of Mr. Al Sanea, and by reference to its financial statements, into one principally concerned with lending and investment; and as AHAB alleges, into a vehicle by which Mr. Al Sanea could borrow and then misappropriate money on a massive and international scale.

21. As already mentioned, Mr. Al Sanea appears to have become a successful businessman in his own right; although his emergence as a prominent business figure in the Middle East appears to have coincided with his rising fortunes within the Algosaibi family. His Saad Group of Companies has activities in Saudi Arabia, Bahrain, his native Kuwait and other Gulf States and holds significant

interests through trusts by which he controlled the Group in this jurisdiction and in Switzerland.

22. The first defendant SICL appears to be the principal holding company in the Saad Group's Cayman corporate structure.

23. In May 2009 Deloitte Corporate Finance, (the Dubai affiliate of the worldwide Deloitte accounting firm) was contacted by representatives of AHAB.

24. AHAB had recently been receiving default notices from financial institutions around the world in respect of borrowings and transactions related to the Money Exchange while under the management and control of Mr. Al Sanea and in respect of which AHAB's representatives said they knew nothing. These notices of default referred to massive liabilities.

25. Including an experienced forensic accountant – Mr. Simon Charlton of Deloitte's Dubai office – an investigation team of 25 – 30 professionals was assembled and, with the help of other professional advisers including lawyers in various jurisdictions, began working to (i) ascertain the current position of the Money Exchange and related AHAB entities, including the nature and extent of their purported liabilities; (ii) conduct a forensic investigation and tracing of various money flows; and (iii) develop a stakeholders' plan in respect of approaching AHAB's lenders.

26. In connection with their investigation, the team managed to secure the electronic data and documents which were physically located at the Money Exchange premises. However, other important records, including books and records removed into storage at a Saad Company warehouse in Saudi Arabia and others

which had been stored in Switzerland with a custodian engaged by Mr. Al Sanea and said to be controlled by him (Saad Financial Services SA "SFS"), have not been made available by him to the investigation team.

27. Nonetheless, the team has attempted to segregate and analyze, as a matter of priority, all of the relevant available accounting and financial records of the Money Exchange and have undertaken a review of the financial records and data of the affiliate Algosaibi Trading Services ("ATS") and Algosaibi Investments Holdings ("AIH"). Based on the results of these analyses, Mr. Charlton explains in his first affidavit in these proceedings, that the team has attempted to restate the balance sheet of the Money Exchange and to establish the extent of the purported liabilities of those AHAB companies.

28. The Investigation team has also interviewed many key employees of the Money Exchange including in particular Mr. Mark Hayley the general manager of the Money Exchange, who reported directly to Mr. Al Sanea. They have also interviewed key employees of related AHAB entities including ATS and The International Banking Corporation, a licensed wholesale bank in Bahrain ("TIBC"). Mr. Charlton has also spoken to Yousef Ahmad Algosaibi, the current Chairman of the Board of Directors of AHAB and himself a deponent in these proceedings.

29. The Investigation team found that TIBC's accounts were consolidated with those of the Money Exchange and, due to various purported back to back arrangements between ATS and the Money Exchange, the liabilities of ATS appear on the financial statements of the Money Exchange. It appears to the investigation team

that Mr. Al Sanea also controlled the affairs of ATS, AIH and TIBC; although they are all Algosaibi owned entities.

30. Though somewhat hampered by not having access to all of AHAB's books and records and whilst their investigative work is continuing, Mr. Charlton, in his first affidavit, explains that the team has already formed the view that there is substantial evidence that AHAB has been the victim of an extensive fraud for which Mr. Al Sanea is responsible. It appears to them that Mr. Al Sanea used his position as a senior and trusted executive of AHAB, and his management and control of the Money Exchange in particular, to cause the Money Exchange to transfer very large amounts to Saad Group of Companies. The Money Exchange purported to account for many of these transfers as loans for the account of the Saad Group companies, but it appears that there was no intention that those "loans" would be serviced or repaid.

31. Mr. Al Sanea is also alleged to have caused AHAB, without the authority of its Board and in many cases by forging documents (including the signature of the late Sheikh Abdulaziz Algosaibi on them until his death in 2003 and thereafter the signature of Sheikh Suleiman Algosaibi until his death in February 2009) to borrow from banks and financial institutions; apparently done in large part as a means of funding the transfers from the Money Exchange to the Saad Group of companies and of concealing ongoing fraud. Many of the documents are said to be incontestably forgeries because they were purportedly signed by the Algosaibis at times when they were respectively incapacitated and/or terminally ill. Many

others are also said to be proven to be forgeries by means of forensic scientific examination.

32. As at the time of obtaining the Cayman WFO before Henderson J; the investigations were reported as indicating that Mr. Al Sanea's fraudulent scheme has left AHAB (and its related entities) with recorded potential liabilities of approximately 34.6 million Saudi Riyals, equivalent to the aforementioned approximately USD 9.2 billion dollars.

33. The alleged fraud for which Mr. Al Sanea is believed to be responsible included the following elements:

    (i) Transferring large amounts from AHAB/the Money Exchange to Saad Group of Companies;

    (ii) Directing employees of AHAB and related entities to enter into transactions with third party financial institutions to obtain financing in the name of AHAB and related entities which were not intended for nor used for the benefit of AHAB;

    (iii) Such transactions were undertaken by, or at the direction of Mr. Al Sanea, using AHAB and Algosaibi names frequently through the use of forged signatures of AHAB partners. Some of the financing was structured as split value foreign exchange transactions;

    (iv) Debiting funds from AHAB accounts for the purpose of paying expenses of Mr. Al Sanea or of companies controlled by him;

    (v) Directing employees to falsify AHAB's books and records by recording fictitious foreign exchange and other transactions for the purposes of

inflating the financial performance of Mr. Al Sanea and companies controlled by him, including SICL, the principal Cayman Islands Saad Group holding company;

(vi) Directing AHAB employees to provide false confirmation of deposit balances held on behalf of Saad Group Companies to auditors of Saad Group Companies.

Overview of transactions said to involve Cayman Saad Companies

34. From January 2008, the investigation reports that the Money Exchange telex register shows USD1,246,750,661.45 being transferred through the Money Exchange Bank of America account for the benefit of the Saad Group Companies.

35. Of the amounts, USD590,024,661.45 were transferred directly to accounts in the name of SICL. An additional USD642,100,000 and USD14,625,000 respectively were transferred from the Money Exchange to the accounts of Saad Investment Company Geneva and Saad Trading and Contracting Company ("STCC") – later known as Saad Trading, Constructing and Financial Services Company ("STCFSC").

36. Although the Saad Group has a company incorporated in Switzerland, that company is called Saad Financial Services SA, not Saad Investment Company Geneva. From Mr. Charlton's review of the supporting documents to these transactions, it is said to be apparent that these payments were to a Swiss bank account in the name of SICL. Total payments to SICL from the Money Exchange's Bank of America account during the period, January 2008 to April 2009; appear to be USD1,232,125,661.45.

37. A number of these payments appear to have been based on monetary debit entries showing receipt by the Money Exchange of matching funds from the Saad Group – arrangements which appear to have no real or proper commercial purpose. On the contrary, as Mr. Charlton also explained in his first affidavit, from 1 January 2008 through March 2008, in excess of USD 116,000,000 was transferred by Mr. Al Sanea out of the Money Exchange to "Saad Investment Company Limited, Geneva", without any recorded compensating inflows. These payments appear to have been made to or for the benefit of SICL.

38. Large sums had been traced from the Money Exchange to Saad accounts for onward transfer to SHL as well. Between January and December 2008, five payments totaling USD 634,999,928 were made in that way.

39. While there appear to be matching debit entry receipts from Saad Group Companies (again for no apparent commercial reason other than seeking to disguise the source) in respect of those payments totaling USD 634,999,928; also identified have been further transfers from TIBC - purportedly authorised by AHAB - in the amount of USD450 million to SHL in respect of which there are no purportedly compensating inflows.

40. To the extent such inflows are recorded, at paragraph 84 of his first affidavit Mr. Charlton speaks to the confirmations of deposit of money with AHAB on behalf of Saad Group entities including SHL, which were falsified by the Money Exchange accounting staff at the direction of Mr. Al Sanea.

41. These appear to have been done also for the purpose of misleading their auditors as to the true financial position of the Saad Group of companies.

42. For instance, audit confirmation sent by the Money Exchange in July 2008 directly to PWC Dubai confirmed two balances allegedly reflecting deposits with the Money Exchange by SHL. The first confirms a purported deposit balance of USD 1,020,935,978 with a purported maturity date of 28th July 2008. The second confirms a purported deposit balance of USD 3,357,136,063 with a purported maturity date of 22nd May 2008. The investigation team has been unable to locate such balances in the books and records of the Money Exchange.

43. The current overall financial position as between AHAB and the Saad Group of companies is far from conclusive.

44. As Mr. Charlton emphasizes in his affidavit, this is mainly due to the fact that the investigation team has been denied access by Mr. Al Sanea to the important records of AHAB which he has managed to remove from AHAB's control. But while the proprietary trail of ownership of AHAB's funds may be for that reason now impeded from AHAB to the 17 Defendants and other Saad Group Cayman companies; AHAB's position for which it argues on this application, is that the trail could also be traced the other way around. It is for that reason also that AHAB maintains its claim pursuant to the disclosure orders of the Cayman (and for that matter, English) WFOs, to the provision of discovery by the 17 Defendant companies.

45. In summary then, the evidence so far allegedly reveals, at the very least, unrefuted net outflows of funds from the Money Exchange of USD 116 million to SICL and USD 540 million to SHL. And as to the overall position, Mr. Charlton concludes in these terms in paragraph 159 of his first affidavit: *"Mr. Al Sanea may say that*

the Money Exchange has not suffered a loss since the payments out to Saad Group companies were matched by a debit entry against Saad Group companies in the Money Exchange's books. However, the absence of loan documentation and the failure by the Saad Group to service the indebtednesses and other circumstances surrounding these transactions strongly suggests that there was never any intention that those moneys would be repaid".

AHAB's Statement of Claim

46. Against that general background of massive outflows of money from the Money Exchange as against unsubstantiated accounting entries of receipts or receivables from Saad Group companies or other entities; AHAB's statement of claim particularises the outflows totaling US 5.2 billion under five headings as follows:

	Estimated amount/US$ m
Cheques drawn on Money Exchange accounts payable to Saad Group companies	2,155
Payments received for the benefit of the Saad Group under letters of credit (LCs) issued for the account of the Money Exchange	2,030
Withdrawal of cash from Money Exchange branches	560
Payments of Awal Bank	196
Other	300+
Total	5,200+

47. It would not be practicable here to recite in full the particulars of pleading in the Statement of Claim in support of the assertions set out in the Table above. I think it will suffice instead if I quote the summary under each heading given in the

Statement of Claim and other illustrative examples from some of those pleaded; picking up the pleadings at paragraph 66 and following.

48. The largest misappropriations, that is, those by the first three methods identified in the table above, are alleged to have been secretly recorded by Mr. Mark Hayley in a spreadsheet, which he regularly updated. The spreadsheet divided the outgoings of the Money Exchange under two headings "ALGF" [being a reference to Algosaibi Finance] and "STCC" (as identified above). Interest and facility fees on the Money Exchange's borrowing were recorded as outgoings of ALGF; cheques payments, letters of credit payments and cash withdrawals from branches were recorded as payments to or drawings by STCC. The Hayley spreadsheet is alleged never to have been provided to the AHAB partners or directors.

"The Saad Accounts"

49. Para 66. Money misappropriated by Mr. Al Sanea by the methods set out above (in the table) and other methods was generally recorded in the ledgers of the Money Exchange as debits (i.e. loans) to accounts in his name or in names apparently connected with him or the Saad Group. Those accounts were referred to as "the Saad accounts"; they included accounts in the following names: "Saad Co KH", "Dues from Mr. Maan", "Richab", "Saad Company", "Saad Company Tamweel" ("Tamweel" meaning investments). Very large debit balances were accrued on the Saad accounts.

50. Para 67. The debit balances on the Saad accounts did not, however, represent money genuinely loaned by the Money Exchange to Mr. Al Sanea or the Saad

Group. Instead the Saad accounts were merely book-keeping devices intended to disguise the misappropriations while ensuring that the Money Exchange's books balanced. There was no intention that they would be repaid.

(This is evidenced by, among other things, the fact that the accounts were held in names of entities which did not legally exist and the complete absence of any documentary evidence of the loans or of any evidence of repayments).

"Cheque payments"

51. Para 68. Mr. Al Sanea misappropriated about USD2,155 million by drawing a large number of cheques (details of which are set out in Schedule 3 of the Statement of Claim and about 40 of which have so far been retrieved from the Money Exchange's primary banker – Saad British Bank) payable to Saad Group Companies. The Money Exchange had no liability to the Saad Group and there was no proper reason for the payments.

"LCs" (Letters of Credit Payments)

52. Para 72. Mr. Al Sanea caused the Money Exchange to open LCs as payment for goods purportedly supplied to AHAB. The goods included very large quantities of air conditioning and heating equipment, lift machinery, marble and fabrics. AHAB had no need of these goods, did not order them and never received them – they did not exist. The proceeds of the LCs were paid initially to the purported suppliers but then retransferred to Mr. Al Sanea or the Saad Group.

53. Para 73. Details of the LCs opened for these purposes are set out in Schedule 4. In summary Mr. Al Sanea misappropriated a total of USD2,030 million under almost 1,800 LCs.

54. Para 78. The moneys paid to the beneficiaries (commercial businesses who were represented in the LCs as supplying goods and services to AHAB but who did not) would subsequently be retransferred to the Saad Group. AHAB has no direct knowledge of the details of many of these retransfers; however, investigations to date have revealed that in 2007 about USD150 million was transferred by those beneficiaries through the Money Exchange to Awal Bank for the account of STCC and in 2008 about USD175 million was similarly transferred. The end result was that the Money Exchange was left with a liability to the issuing bank in respect of money received for the benefit of the Saad Group

55. 79.4. In a memorandum to Mr. Al Sanea dated 9th January 2008, Mr. Hayley said (in reference to LC transactions):

> *"ALGF [Algosaibi Finance] also opens LCs in favour of STCC to the extent of $20 million per month on average. On the negotiation of the documents, STCC receives payments and on the maturity of the transactions, settlement is made by ALGF. In the absence of reimbursement by STCC, ALGF has outgoings in respect of these LC's of some $240 million per year."*

Cash Withdrawals from branches

56. Para 80. The Money Exchange's branches received substantial amounts of cash from customers who had made deposits or instructed foreign remittances. The branches would also periodically receive cash from the Money Exchange head office.

57. Para 81. Mr. Al Sanea would regularly send a Saud Group driver to collect the cash from the branches. Mr. Al Sanea would keep the cash, leaving the Money Exchange with the obligations to repay the deposit or complete the remittances.

58. Para 82. Mr. Al Sanea would complete and initial a debit advice directing a debit to a Saad account in the amount of the money he had taken from the branches. However, as with the other methods by misappropriation, the debit did not represent a genuine loan and Mr. Al Sanea had no intention of repaying the money.

59. Para 83. Based on Mr. Hayley's spreadsheets, AHAB believes that the total amount misappropriated in this way exceeded USD 560 million.

Payments to Awal Bank

60. From paragraphs 84-91 the Statement of Claim particularises by reference to actual written instructions given by Mr. Al Sanea to Mr. Hayley, the manner in which the Money Exchange was directed to transfer very large amounts of money to or on behalf of Awal Bank. This included transfers at or around 2 May 2009 when Mr. Hayley sent a memorandum to Mr. Al Sanea warning of the imminent default of payment by the Money Exchange to its lenders and thus of its imminent collapse, in these terms (on 2 May 2009);

61. (Picking up the narrative at para 88):

> *"Re: Payment Obligation*
>
> *Attached is a list of part due payment obligations amounting to $465 million.*
>
> *If we do not meet these obligations, it will be necessary to advise the banks, no later than Monday, 4 May that we are suspending all payments. This will amount to an event of default. Please advise me whether the shareholders are able to inject $465 million in cash in order to keep Ahmad Hamad Algosaibi & Brothers Company in operation. Alternatively, please give me your written instructions that I am to notify the Banks that we are defaulting."*

62. Para 89. Mr. Al Sanea did not inform the AHAB partners of the Money Exchange's inability to meet its obligations, nor did he ask them for an injection of further cash, nor did he advise the lenders that the Money Exchange was suspending all payments. Rather, on 3 May 2009, Mr. Al Sanea gave instructions (via another senior employee, a Mr. Glen Stewart) for a transfer of the balance in the Money Exchange's US$ account at the Bank of America, which then stood at about US193 million, to Delmon Dana EC, a company controlled by Mr. Al Sanea and owned by his wife. Mr. Hayley refused to permit this transfer. Mr. Al Sanea then instead gave written instructions to Mr. Hayley to transfer all but USD2 million of the balance to an account at Awal Bank. Pursuant to that instruction, Mr. Hayley arranged for USD191 million to be transferred.

63. Para 90. On 6 May 2009, a further €4m was transferred to Awal Bank from the € account of the Money Exchange.

64. Para 91. Although the destination accounts at Awal Bank were in the name of AHAB, Awal Bank was under the ultimate beneficial ownership of Mr. Al Sanea and, at the time, under his control. There was no proper reason for the Money Exchange to transfer money to Awal Bank – the transfers were in reality a final misappropriation by Mr. Al Sanea intended to secure for himself as much of the remaining Money Exchange cash as he could before his fraud was discovered (as it was shortly afterwards). Awal Bank, which is now in administration, returned US820m following a request from AHAB on 14 May 2009 but has retained the balances.

Other Payments

65. Para 92. Further amounts estimated to exceed USD300 million were paid or transferred by the Money Exchange on Mr. Al Sanea's instructions. About SAR 330m (USD88 million) of that was booked by the Money Exchange in its Commitment Fees account, and therefore treated as an expense of the Money Exchange. The remainder was debited to various Saad accounts; however, as pleaded above, the debits did not represent genuine loans and Mr. Al Sanea had no intention of repaying the money.

66. Details of these payments are set out in the Schedule of the Statement of Claim and following in paragraph 94, ten separate payments are particularized, amounting to approximately US216 million.

67. It is averred at paragraph 95, that there was no proper or honest reason for the Money Exchange to make these payments.

Unauthorised borrowing in the name of AHAB

68. The Statement of Claim then next proceeds in paragraphs 97-115 to particularize the unauthorised borrowings in the name of AHAB alleged to have been perpetrated by Mr. Al Sanea and which he allegedly used to fund the misappropriations of moneys pleaded in the Statement of Claim.

69. The alleged methodology of the unauthorized borrowing included the forgery of AHAB Algosaibi partners' signatures as already described above.

70. It is therefore not necessary that I refer to the detail of the particularized pleadings into which the Statement of Claim already condescends, notwithstanding the incomplete disclosure of Mr. Al Sanea and Saad Group. I will simply adopt, for present purposes, the following averments as taken from the Overview in paragraphs 97-99 of the Statement of Claim:

71. "97. In order to fund the misappropriations pleaded above, Mr. Al Sanea caused a large number of loan agreements and other valid documentations, including guarantees, to be executed in the name of AHAB with various banks and financial institutions. The borrowing was vastly in excess of what the Money Exchange or the AHAB Group as a whole required for its genuine business. Mr. Al Sanea also caused ATS, AIH and TIBC to borrow large amounts which were then transferred to the Money Exchange and/or misappropriated by him.

72. 98. In total, Mr. Al Sanea arranged borrowing from at least 118 different lenders. The balance of that borrowing, including accrued interest, was about SAR 34,600

million (USD9,200 million) as at the end of May 2009; the amount is likely to rise as further interest accrues. Details of the unauthorized borrowing by the Financial Business are given in Schedule 6.

73. 99. AHAB refers to all such borrowings as "unauthorized borrowing". Nothing in the Statement of Claim is intended by AHAB as a ratification of any purported agreement with any lender or as an admission or concession that AHAB, ATS, AIH or TIBC has any liability to any lender in respect of any of the unauthorised borrowing or otherwise in respect of the conduct of Mr. Al Sanea. AHAB fully reserves its rights and positions as against the lenders."

74. The forgoing serves not only to describe the astonishing breadth and pervasiveness of the fraud allegedly committed by Mr. Al Sanea against the Plaintiff, it also serves to lay the foundation for the Plaintiffs' proprietary and tracing claims against Mr. Al Sanea and his Defendant Saad Group of companies – an essential part of the frame work for my exercise of discretion now as to whether the Section 97 stay should be lifted.

Specific allegations in the pleadings of receipt of <u>fraudulent proceeds by Cayman Saad Companies</u>

75. Before turning finally to consider that issue – the arguments for and against the lifting of the stay - I should briefly seek to explain how it is (the foundation of the evidence having been set out above) that AHAB will seek to establish its proprietary and tracing claims specifically as against the 17 Defendants and other Saad Group Cayman companies.

76. Again the Statement of Claim can be most conveniently referenced but it must be explained that, at the hearing before me, some time was taken by Mr. McQuater on behalf of AHAB, to identify several of the accounting documents already in evidence and which, at least prima facie, appear to substantiate the pleadings which are averred currently in the Statement of Claim.

77. I have thus been able, at least prima facie, to satisfy myself that the following averments from the Statement of Claim are evidentially premised on accounts which have been disclosed.

78. Receipt of misappropriated money is said to be traceable into SICL, its subsidiaries SIFCos; into SHL; into Awal Bank and its subsidiaries AwalCos.

79. I will extract, for these purposes, paragraphs 158-166 of the Statement of Claim.

"*158 The money misappropriated by Mr. Al Sanea appears to have been paid in the first instance to various Saad Group companies, including STCC. However, as part of his fraud, Mr. Al Sanea extensively used SICL and Singularis (his Cayman Investment vehicles) and Awal Bank as the ultimate repositories – of the proceeds of his fraud, or a large part of them.*

159. SICL's financial statements report contributions by shareholders as follows:

YEAR	*Contributions/USD Million*
2004	*75*
2005	*98*
2006	*143*
2007	*858**
2008	*1,145*
Total	*2,318*
	** including USD300 million*

	subscribed to SICL for new shares.

Mr. Al Sanea is the ultimate beneficial owner of the shares in SICL and must have provided those funds.

160. *Further, USD116 million was paid to SICL as pleaded in paragraph 94 above.*

161. *The SIFCos hold substantial investments as subsidiaries of SICL. The equity capital of the SIFCos used to purchase or finance their investments must have been provided by Mr. Al Sanea through SICL, as the parent company of the SIFCos.*

162. *Singularis' financial statements report contributions by shareholders of USD7,580 million in the period 2006 to 2008. AHAB believes that about USD4,500 million of the reported contribution were fictitious in that they were represented by the false deposit confirmations pleaded in section G.4 ii above. However, it appears that at least about USD3000 million was contributed to Singularis and Mr. Al Sanea, as the ultimate beneficial owner of the shares, must have provided those funds.*

163. *Awal Bank's financial statements report contributions by shareholders of USD1,250 million in the period 2007 to 2008 in the form of share subscriptions. Mr. Al Sanea and SICL are the shareholders of Awal Bank and must have provided those funds.*

164. *The Awal companies held substantive investments as subsidies of Awal Bank. The equity capital of the AwalCos used to purchase or finance the*

Investments must have been provided by Mr. Al Sanea through Awal Bank, as the parent company of the AwalCos.

165. Total cash contributions to SICL, Singularis and Awal Bank in the period 2004 to 2008 were about USD6,568 million. AHAB is not presently aware whether SICL, Singularis, Awal Bank or other Defendants received further payments from Mr. Al Sanea; it reserves its right to amend or supplement the Statement of Claim as necessary.

166. Mr. Al Sanea's only (or at least principal) source of large amounts of cash during this period was the money misappropriated from the Money Exchange, which exceeded USD4,735 million by end of 2008. AHAB infers that the money contributed by SICL, the SIFCos, Singularis, Awal Bank and the Awal Cos was part of the proceeds of fraud on AHAB."

80. The Statement of Claim culminates in the heads of Claims in section K and at K.7 - the proprietary and tracing claims. Those most immediately relevant to the argued justification for lifting the statutory stay are, in the following terms, taken from K.7 paragraphs 187-188:

"187. AHAB was and remains the equitable owner of the money misappropriated from the Money Exchange as pleaded in section E above. It is entitled to trace those moneys into and through the hands of the recipients and claims an account from Mr. Al Sanea, SICL, The SIFCos, Singularis, Awal Bank, the AwalCos, Saad Air and Awal Trust Company of the receipt and use of the moneys.

188. In particular, AHAB was, at the time of payment and receipt, the equitable owner of:

188.1 USD2,318 million paid to SICL as shareholder contributions.

188.2 About USD3,000 million paid to Singularis as shareholder contributions.

188.3 USD1,250 million paid to Awal Bank as shareholder contributions; and/or

188.4 The sums paid from the Bank of America account as pleaded in paragraph 94 above and in Schedule 5."

These moneys were received subject to a constructive trust in favour of AHAB."

81. So, in summary, it is alleged that from AHAB's investigations to date, a large part of the moneys misappropriated was transferred to the 17 Defendant companies by way of shareholders' contributions by Mr. Al Sanea. The financial statements of SICL and SHL report contributions by Mr. Al Sanea of billions of dollars at the same time that similar sums were being diverted by him from the Money Exchange. AHAB maintains that it is likely this money also filtered down into others of the 17 Defendant Companies in Liquidation which are all part of the Cayman Saad Group of Companies owned and controlled by Mr. Al Sanea.

82. Finally in this context, I should note here the concern of AHAB that Mr. Al Sanea continues to have access to very significant assets which are not yet within the control of the GT Liquidators notwithstanding the imposition of the English and Cayman WFOs. In this regard, Mr. McQuater referred in particular to very

valuable shares in Hong Kong Shanghai Banking Corporation ("HSBC") and in certain French banks. These are assets which AHAB says it should be allowed separately to be able to pursue to ensure their availability to meet its, or all creditors including the creditor Banks' claims; as the case might be. The WFOs, including their requirements for the provision of information by the liquidators of the 17 Defendant companies to AHAB, ought to be maintained to assist AHAB in its quest.

83. AHAB also points to the payment of USD60 million by SICL to Saad Specialist Hospital Company ("SSHC"); a payment which was authorized and directed by Mr. Al Sanea in blatant breach of the Cayman WFO – and so found by Justice Anderson after full enquiry, on a judgment delivered on the 15th March 2010 after the conclusion of this hearing before me. It appears that Mr. Al Sanea also voted SHL into voluntary liquidation in breach of the WFOs. These are all further factors which AHAB contends supports its application for the lifting of the stay to allow it to press its claim and, at the very least, to bolster the efforts of all the Liquidators to vouch-safe the assets. Finally, in this context, AHAB points to Mr. Al Sanea's refusal to allow both AHAB and the GT Liquidators access to the financial records of SICL which are held in the SFS database and which have been removed from Switzerland to Saudi Arabia now, it seems, within Mr. Al Sanea's exclusive control.

84. As these are records which, among other things, relate to assets which SICL has with certain Swiss banks and those banks have refused to recognise the GT Liquidators, AHAB contends that it should be allowed to press ahead with its

claim as bolstered by the WFOs, in the concerted attempt to assist in the recovery of assets.

<u>Mr. Al Sanea's response</u>

85. Although named as the second defendant in these proceedings, Mr. Al Sanea does not submit to the jurisdiction of this Court and his response to the various steps taken by AHAB in the proceedings have so far been conditioned by the reservation of his position in that regard. To the extent that he has responded to AHAB's claim, his response can be summarised as follows. He asserts that the proper forum for the determination of the dispute between AHAB and himself and his Saad Group of companies is Saudi Arabia where he says there is already an ongoing process (albeit extra-judicial) which pre-dates the Cayman proceedings. He has brought a summons seeking a declaration that Saudi Arabia is the proper forum and not Cayman. This jurisdictional challenge and his contingent challenge to the Cayman WFO, are set to be heard on the 26th April 2010.

86. He has nonetheless, in his various affirmations filed in the proceedings, made it quite clear that he does not accept any of the allegations raised against him by AHAB. Indeed, he has been quite adamant in his counter-allegations and, in the face of the damning allegations of fraud made against him; he is equally accusatory of the current AHAB directorship – the present generation male Algosaibi management of AHAB – whom he accuses of having conspired to frame him and whom he alleges are themselves fraudulently responsible for the misappropriation of AHAB's and so the Money Exchange's assets.

The GT Liquidators' objections to the lifting of the stay

87. The GT Liquidators have raised several practical objections both to the lifting of the stay and to the continuance and enforcement of the WFO, including its orders for disclosure of information to AHAB.

88. At this juncture, I will focus on the objections to the lifting of the stay, then return to deal, more briefly, with those relating to the continuance of the WFO.

89. First, the GT Liquidators point to the unresolved challenge which Mr. Al Sanea has raised to the jurisdiction of the Court in respect of the claims made against him.

90. Until that issue is determined, the GT Liquidators observe it will not be clear what the final scope and course of the action in this jurisdiction will be. In particular, if Mr. Al Sanea's application is successful, there will have to be careful consideration of the extent to which it is viable for the claims against the Cayman Saad Companies to continue to be litigated in the Cayman Islands in the absence of Mr. Al Sanea. For example, if the allegations against him were not proven in Saudi Arabia, Mr. Al Sanea's fraud as the basis for the proprietary claims against his Saad Companies in this jurisdiction may be critically undermined. Such a possible outcome is presented as basis now for the GT Liquidators' argument, that the decision to lift the stay to allow AHAB's action to proceed against their Companies in Liquidation would be pre-mature and should await the outcome of Mr. Al Sanea's challenge to jurisdiction. To further bolster this argument, the GT Liquidators cite what they describe as AHAB's failure to adduce evidence of Saudi Arabian law going to the crucial issue of whether the proprietary and

tracing claims may be sustainable as a matter of the law of that jurisdiction as the place where the fraud is alleged to have taken place.

91. Lifting of the stay now (and the concurrent enforcement of the WFO disclosure obligations) would require of the GT Liquidators (and perhaps of the other Liquidators) that they respond to AHAB's claim by having to undertake their own tracing exercise, something that they are hampered in doing because of the non-disclosure of records and of the SFS records in particular.

92. Not only would the tracing exercise be unduly onerous in such circumstances, it would also disrupt the work of the Liquidators and distract them from the important work they have already begun to recover the Defendant Companies' books and records and to recover their assets. As all the Liquidators have obligations not just to AHAB but to all the respective creditors, it would be unjust to impose such onerous obligations on the Liquidators and such onerous expenses upon their liquidation estates at this time.

93. The GT Liquidators (and in this they are joined by the Kinetic and Johnson/Smith Liquidators) were extremely concerned to avoid the situation arising where they have to cease all work in the liquidations, as the result of AHAB's proprietary claims to all the assets of the relevant companies.

94. This concern was, however, resolved by special provisions in the interim order which I made during this hearing (on 19th January 2010) and which are intended to allow the work of the Liquidators in the ordinary course of their liquidations to continue, including for their costs of taking reasonable steps to gather information for the purpose of investigating AHAB's claims, to consider those claims and to

obtain legal opinions as to whether the claims should be defended. This was particularly recognised to be appropriate where (a) AHAB's claims are presently still not fully particularised or substantiated and remains subject to challenge; (b) it seems probable (in light of the documented loans from the creditor Banks including US$2.815 billion under a Facility Agreement) that at least some of the 17 Defendant Companies' present assets may not be subject to any proprietary claims; and (c) all creditors have a legitimate expectation that the affairs of the 17 Defendant Companies will be wound up properly in accordance with the statutory scheme under the Companies Law.

95. Notwithstanding those provisions being put in place for those reasons, the GT Liquidators are adamant in their view that there is obvious good sense in letting them get on with their job without the distraction of active hostile litigation by AHAB or having to give disclosure to AHAB. They insist that there can be no question but that the assets (including choses in action against third parties) which may yet turn out to be subject to AHAB's proprietary claim, are safe in their hands or will be recovered by them and that there is no need for AHAB's intervention to secure their recovery.

96. In the meantime, they say that AHAB should concentrate on resolving its interlocutory battles with Mr. Al Sanea, especially the crucial challenge to the jurisdiction of this Court to try the claims against him.

97. Mr. Smith QC, on behalf of the GT Liquidators went further in his closing submissions, to argue that the most sensible course is for AHAB to proceed with its claim against Mr. Al Sanea (wherever may be the most appropriate forum for

those claims) and for the claims against the GT Defendants (SICL, the SIFCos apart from SIFCo #5, SHL and Saad Cayman Limited) to remain on hold until those claims are determined. In the interests also of good case management and the prevention of wasted costs, the prosecution of AHAB's claims should wait until the principal claims have been determined as it will never become necessary for those claims to be litigated if AHAB's claims against Mr. Al Sanea fail.

98. Finally, for these purposes of arguing whether the statutory stay should be lifted, Mr. Smith QC argued that to do so for AHAB could well result in a floodgate of similar applications by creditors (the declared and undeclared Banks in particular) seeking to pursue their own proprietary or other claims against the 17 Defendants in Liquidation. In this respect, the GT Liquidators filed as evidence in support a letter from the local law firm of Solomon Harris dated 4 December 2009 on behalf of Abu Dhabi Commercial Bank stating that it may have creditor claims "amongst other claims"; the suggested implication being that such other claims could include proprietary claims. The Johnson Smith liquidators relied upon a similar letter.

99. Primarily, for all those reasons, I am invited to dismiss (or at best adjourn *sine die*) AHAB's application for the lifting of the stay and its application for the continuance of the Cayman WFO including by the provision of disclosure of information from the GT Liquidators (the Kinetic and Johnson Smith Liquidators not objecting to reasonable disclosure at this time).

AHAB's practical arguments for the lifting of the stay

100. The foregoing arguments dictate that AHAB must have legal basis as well as compelling practical reasons for the exercise of my discretion now in its favour for the lifting of the stay and continuance of the Cayman WFO.

101. These were fully articulated in the arguments of Mr. McQuater. As to the practical reasons, a convenient summary of them are provided in the affidavit of Mr. Keightley sworn on AHAB's behalf:

(a) AHAB's substantial proprietary claims set out in the Statement of Claim finds support in the financial statements of SICL and SHL which record shareholder contributions from Mr. Al Sanea contemporaneous with the commission of the illegal fraud against AHAB.

As these claims are disputed they will have to be resolved by litigation which may yet prove that the assets of the 17 Defendant companies fall outside the relevant estates in liquidation and are subject to a trust in AHAB's favour.

A just disposal of the claims to be litigated will require all the processes of litigation afforded by the Rules of the Court, including exchange of pleadings, discovery, witness statements and expert witness reports together with extensive cross-examination of witnesses at trial.

Civil litigation and not the liquidation process is the only feasible and effective way for dealing with claims of this kind. The alternative of invoking the procedure of determining disputed proofs of debt in a liquidation is an ill-suited way of seeking to resolve a claim of this kind.

It would be manifestly unfair to AHAB if it were to be deprived of the procedural benefits (such as full discovery) that litigation offers to a defrauded plaintiff pursuing a claim of fraud.

(b) There is a compelling convenience in having all the fraud claims against Mr. Al Sanea and his companies decided in the current action, which will not occur if the claims against some of the companies fall to be determined in their respective liquidation procedures. Allowing these matters to be addressed in these Proceedings avoids the risk of inconsistent or different findings in the separate liquidation procedures of the companies involved. It will also reduce duplication of argument, evidence and costs and will avoid the fragmented decision making which would ensue if each claim against each company were to be decided within its own separate liquidation procedure, of which there are now 17. In particular, AHAB has pleaded a claim in conspiracy between Mr. Al Sanea, SICL, SHL and other Companies in Liquidation and it is obviously sensible for all of the alleged conspirators to appear in the same action.

(c) If these claims are addressed in multiple different liquidations, the decision of each set of liquidators in rejecting the claims or refusing to admit them to proof will inevitably be challenged by AHAB, resulting in multiple court applications and appeals, inconveniencing both the parties and the court, increasing costs for AHAB and for the relevant estates and leading to a real risk of inconsistent findings being made.

(d) The Grant Thornton JOLs' report to creditors of SICL on 2 November 2009 indicates that SICL may contend that it is itself owed money by AHAB, i.e. that it may wish to make a counterclaim against AHAB. The report also indicates that monies may be owed to SICL by co-defendants and that the Grant Thornton JOLs are investigating what other claims SICL may have. Counterclaims, claims against co-defendants and third party claims will all require to be litigated by action and cannot be resolved in the liquidation process. Moreover, as set out above from the Statement of Claim, Mr. Al Sanea created false records of debts from AHAB to SICL and SHL and other Defendant companies as part of the conspiracy between them and in order to help those companies present a false view of their finances. AHAB's substantive defence to such counterclaims is therefore closely bound up with the underlying fraud.

(e) The Grant Thornton JOLs have already given two very strong indications of the treatment AHAB's claim is likely to receive in their liquidation processes:

(i) Proofs of debt were required by the Grant Thornton JOLs in the SICL liquidation by 2 November 2009. AHAB submitted a proof of debt for US$9.2 billion, expressly without prejudice to its right to pursue its claim by Court action in the Proceedings. Before and at the first meeting of creditors (which took place on 5 November 2009) AHAB sought to persuade the Grant Thornton JOLs that a just estimate of its claim (which by statute includes contingent

claims) should be made for voting purposes and provided a summary of how that ought to be calculated. In short AHAB said that the claim should at least be valued at the amount of sums representing the proceeds of the fraud contributed by Mr. Al Sanea to SICL between 2004 and 2008 amounting to some US$2.3 billion. Notwithstanding this information and the fact that three judges had by that time already considered AHAB's evidence as justifying extensive relief, the Grant Thornton JOLs valued AHAB's claim at a nominal $1 for voting purposes. This had the immediate result that AHAB had no influence on the appointment of the creditors committee and was excluded from that committee and its interests are not represented by other members.

(ii) Substantially the same happened in relation to the first creditors meeting of SHL on 17 November 2009. AHAB there contended that a just estimate of its claim should be at least the US$3 billion of funds contributed by Mr. Al Sanea to SHL during 2004-2008. The Grant Thornton JOLs however valued the claim for voting purposes at the same nominal value of US$1.

AHAB has registered its objection to these valuations and the voting procedure in correspondence but the GT Liquidators have not changed their stance. If the claims have to be pursued in the liquidation process, it will in time be the GT Liquidators who decide the value in which they are

admitted to proof in respect of many of the important Companies in Liquidation.

(f) The Cayman WFO was obtained and the Proceedings were commenced before any of these companies was placed into liquidation. Moreover AHAB has quite rightly sought and obtained substantial, necessary and extensive interlocutory relief in two jurisdictions (Cayman and England) on the basis of the Proceedings brought in Cayman. The English WFO was specifically sought and obtained in support of the Cayman Proceedings. These measures remain in place and rightly so and they are among the procedural remedies available to AHAB having brought the Proceedings. The existence or extent or continuation of those remedies in both jurisdictions may in time be jeopardised if the Proceedings were to remain indefinitely stayed against the Companies in Liquidation, which would be wholly unfair to AHAB.

(g) Continuing the Proceedings will afford AHAB no advantage over other creditors of the Companies in Liquidation. Nor will it interfere with equal distribution of assets among creditors. If AHAB's proprietary claims are made good then those assets should fall outside the estate anyway and should not be available to the general body of creditors. But AHAB's personal claims if made good will rank alongside other creditors.

(h) Given the size and nature of AHAB's claims, it is very unlikely that any of the liquidators of the Companies in Liquidation will be able to make any

distributions to creditors or investors until the claims have been resolved by the Court. Delaying the proceedings may well delay any distributions.

(i) Continuing the Proceedings against the Defendant Companies in Liquidation will also serve to conserve the resources of the parties and the relevant courts by permitting the fraud to be litigated against all its participants (or substantially all of them) in a single proceeding. The Companies in Liquidation are rightly and legitimately sued in the Cayman Islands. Moreover, as set forth by AHAB in its earlier filings, Mr. Al Sanea is sued here as a necessary or proper party and is also properly joined in a single proceeding here. The procedural advantages of having the claims against Mr. Al Sanea and his companies determined in the same proceedings and in the same jurisdiction are obvious. If however the Proceedings as against the Companies in Liquidation were to be stayed, this may tend to weaken the jurisdictional basis for joining Mr. Al Sanea, who is already mounting a challenge to this Court's jurisdiction over him and which is due to be heard on 26th April 2010. The upshot could be that Mr. Al Sanea escapes this Court's jurisdiction in respect of a massive fraud carried out using a whole series of Cayman Islands companies, in respect of which a good arguable case has already been shown and which the Cayman courts ought to decide.

Analysis of the competing arguments

105. Section 97 of the Companies Law (2009 Revision) provides:

> *"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."*

106. It is clear from the express wording of section 97 that the Court has the jurisdiction to grant the lifting of the stay of proceedings against a company in liquidation and to do so subject to conditions.

107. This dispensing power is not in terms dependent on a plaintiff first establishing that he is a secured creditor of the Company in liquidation, but on the exercise of the Court's discretion. Section 97 gives the Court *"a free hand to do what is right and fair according to the circumstances of each case"* per the English Court of Appeal in ***In re Aro Co. Ltd.* [1980] Ch. 196 at 209 (H)**, per Brightman LJ; echoing the words of Vaisey J from ***In Re Grosvenor Metal Co. Ltd.* [1950] Ch. 63, 65** and describing the similar discretion vested by section 231 of the Companies Act 1948 (U.K.).

108. It must follow that I may not take a singular view of what may be *"right and fair"* from the point of view only of AHAB in the case.

109. I accept, as Justice Pumfrey observed in ***Enron Metals and Commodity Ltd. v HIH Casualty and General Insurance Limited* [2005] EWHC 485 (Ch)** that:

> ***"...fairness in this context is fairness in the context of the provisional liquidation or liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration of the interests of the creditors as a whole and of the capacity of***

the provisional liquidators or liquidators to deal with the burden of the proposed litigation."

110. Consideration must be given to what conditions may be imposed upon the lifting of the stay to mitigate that burden in determining whether the stay should be lifted. The conditions which may appropriately be placed upon the lifting of the stay will also be determined according to the circumstances: See ***In the Matter of Euro Bank Corp (in Liquidation); Attorney General v Euro Bank Corp. and Crystal Limited*** ***2001 CILR 517*** in which this Court exercised its discretion leading to the imposition of strict conditions to preserve the priority of claims of lawful depositors with the Bank, over any fine imposed in favour of the Crown in its prosecution against the Bank which was allowed to proceed despite the Bank being in liquidation.

111. However, in a case like the present where there are competing proprietary claims to the assets, in my view, the "*essential question*" in deciding whether to grant leave to proceed under section 97, becomes what is the most *"appropriate method for determining the proposed claims – is it separate proceedings or is it the winding up process?"* See ***Re Bank of Credit and Commerce Int'l S.A. (No. 4)*** ***1994 1 BCLC 419, 426*** (per Jonathan Parker J as he then was).

112. In this case, considerations which go to the question of the lifting of the stay and those which will go ultimately to the determination of the *forum conveniens* for the trial of AHAB's claim in light of Mr. Al Sanea's challenge, are also bound to converge.

113. But that view of the case does not necessarily mean that joinder of Mr. Al Sanea in the action in this jurisdiction, is a prerequisite to Cayman being regarded as the proper forum.

114. This is because the 17 Defendants are themselves separately sued here as of right by AHAB and, as their allegedly fraudulent enrichment or receipt by the misappropriation of AHAB's money took place in this jurisdiction, there can be no argument that this is the proper forum for the trial of the action as against them. The claims against the 17 Defendants are particularly important to AHAB because they actually hold significant assets and it is important that AHAB is able to proceed to establish its proprietary claim against them.

115. Thus, while AHAB's ability to join Mr. Al Sanea to its action here may be important as a matter of better case management for the disposition of AHAB's case against him and the 17 Defendants here; Mr. Al Sanea's absence would not preclude AHAB's case proceeding on its merits against the 17 Defendants. And so it is primarily on the basis that its claim against the 17 Defendants has merit that AHAB's present application rests. I therefore record my acceptance that I may not lift the stay simply on the basis that that would assist AHAB in the *forum non conveniens* application against Mr. Al Sanea.

116. AHAB's concern at this point in time in this regard is rather the obverse: If the stay of proceedings against the 17 Defendants is not lifted, Mr. Al Sanea may well be able to argue that AHAB should be required to proceed against him in Saudi Arabia as the proper forum as the pending actions against the 17 Defendants here would be stayed and so not a factor weighing in the balance in favour of Cayman

as the *forum conveniens*. In other words, AHAB invokes Mr. Al Sanea's challenge to jurisdiction as a reason not to adjourn this section 97 application, not as a reason why leave should be granted on the merits of the application. Hence, AHAB's concern about Mr. Al Sanea being allowed to "escape the jurisdiction" of this Court.

117. When viewed in that light, I agree with Mr. McQuater that the position of the GT Liquidators in saying that the section 97 application should be adjourned, pending the outcome of the forum issue, is based on a misconception about what may happen if Mr. Al Sanea's challenge to jurisdiction succeeds. The GT Liquidators argued under the impression that in that event the claims in this jurisdiction against the 17 Defendant Companies in Liquidation would have to await the outcome of the proceedings in Saudi Arabia and would therefore be stayed.

118. But the 17 Defendants are not (and I am told by Mr. McQuater are not proposed to be) parties to any Saudi Arabian proceedings. They have not given any indication of any intention to submit to the Saudi Arabian jurisdiction, nor would they be bound by the outcome of proceedings there as between AHAB and Mr. Al Sanea.

119. Such proceedings between Mr. Al Sanea and AHAB would therefore raise no issues estoppel in relation to them.

120. There would thus be no apparent advantage to the Court maintaining the stay of these Cayman Islands proceedings against Cayman Island defendants, pending the resolution of other proceedings elsewhere in which they are not parties and by which they would not be bound.

121. This, I accept, is the principal reason why the decision of the Privy Council in the case of ***Texan Management Limited and others v Pacific Electric Wire and Cable Company Limited*** *[2009] UK PC REF 46 (P.C. Appeal No. 18 of 2009)* relied upon by the GT Liquidators, is distinguishable.

122. In that case, the question was whether the British Virgin Islands ("the BVI") or Hong Kong was the *forum conveniens* for the trial of issues which were common to the two sets of proceedings simultaneously underway in those two jurisdictions, involving corporate entities which were defendants in both.

123. The case did not involve the question of the lifting of a section 97 insolvency stay but rather the assessment of the classically competing issues which usually go to the determination of the *forum conveniens*.

124. Among those issues was the consideration that if the Hong Kong proceedings went first (as was determined to be correct) there would be issues estoppel binding on the companies in the BVI proceedings as well. For all the reasons explained above, that is not to be the case here.

125. I find the following passage (on the discussion of the *forum conveniens* principles) from **Dicey, Morris and Collins**, **The Conflict of Laws 14th Edition,** Rule 31 para. 12-033 to be apposite.

> "***The case for a stay may also be overcome if to grant it would adversely affect the efficient conduct of litigation: in a case with multiple defendants, if the result of one defendant obtaining a stay would be to force the claimant to bring his claim in two separate sets of proceedings, with the possible further***

consequence of inconsistent conclusions being reached by two courts, it will not generally serve the interests of justice to order a stay" – citing among many other case authorities the well known ***The Abidin Daver** [1984] A.C. 398 at 423.*

126. In my view, the merits of AHAB's claims are sufficiently established for the present purposes of its application for the lifting of the stay. All parties to the application now accept that, for the purposes of these applications, AHAB has a good arguable case. That includes, in particular from the pleadings examined in detail above, a good arguable case that each of the 17 Defendants in Liquidation was a fraudulent co-conspirator with Mr. Al Sanea, as well as a good arguable proprietary claim against each of the 17 Defendants in Liquidation.

127. I regard the "floodgates" argument raised by the GT Liquidators as misplaced in this context. AHAB is the only claimant asserting a proprietary claim and the mere intimation by certain Banks that they may seek to assert proprietary claims of their own is not relevant for present purposes. Prima facie, the Banks are lenders and have so sought to base their claims as creditors in the liquidation; those having already claimed doing so on the undisputed basis that they are parties to the $2.8 billion Facility Agreement.

128. AHAB is in the unique position of having a good arguable case but having first to obtain a judgment on which it might rely to base its constructive trust claim in the liquidations. For those reasons, I regard the case of ***In the Matter of Lehman Bros. Int'l (Europe)(In Administration); Four Funds v Lomas** [2008] EWHC 2869 (Ch.)* relied upon by the GT Liquidators as being wholly distinguishable. In

that case an application was made for the provision of disclosure by the Administrators to the applicant of information relating to certain securities held for the applicant. It was refused on the ground that it would prompt immediately a plethora of other applications against the company in liquidation for similar disclosure.

129. Here by analogy, it cannot be said that the lifting of the statutory stay would likely result in a spate of other such applications for leave to sue the Defendant Companies.

130. The GT Liquidators nonetheless raise the specific criticisms which they have going to issues of (i) AHAB's title to sue; (ii) AHAB's lack of pleading of Saudi Arabian Law; (iii) AHAB's lack of pleading of specifics of how money was transferred to the 17 Defendant companies; (iv) the lack of certainty about the extent of AHAB's claim and (v) the fact that neither AHAB nor any of the liquidators has access to all the information that would be needed to respectively prove or disprove AHAB's claim.

131. None of these concerns sufficed, in my view, to justify denying AHAB the right to pursue its claim. I will deal with each briefly in turn.

(i) <u>Title to sue</u>

The notion that the proper title to pursue monies paid to the 17 Defendant Companies in Liquidation may lie with the Banks which lent to the Money Exchange but not with AHAB has already been implicitly addressed. None of the bank lenders has asserted such an argument or formally indicated that it is going to sue SICL (the principal Saad Cayman entity)

or any other of the 17 Defendants. That is notwithstanding that proofs of debt have been filed by creditor banks and AHAB has been in litigation with several of the lending banks in other jurisdictions. Moreover, the claims made in the liquidation to date are debt claims, not proprietary claims by the Banks to trace their own property through AHAB and this is notwithstanding that the financial difficulties of the Saad Group of Companies and its dispute with AHAB has received ongoing international publicity especially since late July 2009 when the WFOs were obtained. There can therefore be no doubt that all interested banks are watching these proceedings very closely as they receive the ongoing attention of the international financial press.

In the continuing absence of such proprietary claims there is therefore no reason to suppose that AHAB's title to sue will be challenged by the Banks.

As already noted, the evidence relied upon by the GT Liquidators to suggest otherwise and intimating that two banks may be contemplating creditor claims *"amongst other claims"*, is too inconclusive to be given the significance posited by the GT Liquidators.

In any event, any bank seeking to bring a proprietary claim against any of the 17 Defendants in Liquidation would need to raise their own application under section 97 to allow them to do so. Such an application would have to be considered on its own merits.

(ii) Lack of pleadings of Saudi law

The GT Liquidators pursued this argument as a basis for objecting to the lifting of the stay but were not supported by the Kinetic Liquidators in it. I consider that it is unreasonable to require greater specification of pleadings of Saudi Arabian law on the state of discovery and the pleadings as they stand.

The content of the relevant fiduciary duties owed to AHAB and said to have been owed and breached by Mr. Al Sanea (and implicitly the 17 Defendant Companies) as a matter of Saudi Arabian law are pleaded in the Statement of Claim as being similar to Cayman/English law duties. See paragraph 176. In any event, it is settled that there is a presumption that foreign law is the same as Cayman law, unless pleaded otherwise. See ***Unilever v ABC Intl. 2008 CILR 87 at 101***. Moreover, given AHAB's good arguable case that the 17 Defendants are mixed up in Mr. Al Sanea's alleged fraud, I can properly at this stage regard the issue of proof of Saudi Arabian law on the nature of the duties which he owed, to be a matter of evidence to be fully provided after the relevant investigations are complete and after it will be clear what laws are applicable to the tracing claims as they are to be finally pleaded.

(iii) Lack of specific pleadings

While Counsel for the Kinetic and Johnson Smith Liquidators disavowed this particular criticism, the GT Liquidators persisted in the criticism that

AHAB's claim is unparticularized and as "*not much more than speculative*."

Having set out in some detail above the nature of AHAB's claim as pleaded, I think that all I need further state now for the purposes of the present application to lift the stay, is that the GT Liquidator's criticism is unpersuasive.

(iv) Lack of certainty

The same must be said for the same reasons about the criticism that there is uncertainty about the extent of AHAB's claim.

(v) Incomplete disclosure

While it is true for the reasons explained above, that neither AHAB nor the GT Liquidators (nor, for that matter, the Kinetic or Johnson Smith Liquidators) have as yet managed fully to obtain necessary information, that is a factor that adds to rather than detracts from the urgency of AHAB's application.

Indeed, in a case where there is already shown to be a good arguable claim based on allegations involving the entire Saad Group of Companies having become "mixed up" in their principal's fraudulent conduct, there is a compelling basis for concluding that the Liquidators should assist by providing whatever information they have which could assist AHAB to better particularise its claim.

This is on the basis of the well known "***Norwich Pharmacal***" principles (***[1974] A.C. 133***) which have been extended to apply to cases involving

international fraud; including by this Court: see ***Grupo Torras v Butterfield Bank* 2000 CILR 441.**

I will return to expand on this principle below when I come to deal with AHAB's application for the enforcement of the disclosure provisions of the Cayman WFO.

132. In deciding to grant the lifting of the stay, I have, as discussed, weighed in the balance AHAB's need to be able to prosecute its claim to judgment upon which it might rely in the liquidations.

133. In so doing, I have however not overlooked the "commercial inconvenience" and "distraction" cited by the GT Liquidators in particular, in having to prepare for a defence to AHAB's claim. But I am persuaded that all such concerns can be properly accommodated by the grant of an appropriate extension of time (at least until after the resolution of Mr. Al Sanea's jurisdiction challenge) for the filing of any defence.

134. This was indeed a specific concession that AHAB offered through Mr. McQuater. Further accommodation can be given as the need may arise, as a matter of proper case management. Already, accommodations have been given in terms of the directions for the costs of all Liquidators to be reasonably incurred in the proper investigation of AHAB's claim and for the taking of advice on the appropriate responses including the filing of defences if any, short of approving of engaging in hostile litigation in opposition to it. Even such further directions – for pre-emptive orders that the future costs of hostile litigation should be given in advance as a priority from the assets of the companies - may be within the power

of the Court to grant in exceptional circumstances which may justify them and notwithstanding AHAB's claim in trust over the assets of the 17 Defendant companies. But the general rule is very clear. A very important consideration before any such direction could be given would, of course, be the need for the showing of a very strong defence to AHAB's claim such that the judge can be satisfied that at trial the Defendants are likely to succeed and so recover their costs in any event. See ***Re Westdock Realisations Ltd. and another** [1988] BCLC 354; **Re Ciro Cittero Menswear Plc (in Adm.)** [2002] BPIR 903 and **Re Local London Residential Ltd.** [2004] 2 BCLC 72*. It goes without saying that, as matters stand, including with discovery being substantially incomplete and so pleadings far from finally settled, the grant of such directions (which were rather optimistically sought only by the GT Liquidators to be given now) would be premature. ***Bridge Trust et al v Wahr-Hansen et al** 2001 CILR 132* is entirely distinguishable for being a case in which the pre-emptive costs order which allowed the trustees to defend the interests of charity in the trust, was essential to ensure that justice could be done.

The need for the continuation of the restraint provisions of the WFO

135. The GT Liquidators characterised this issue as being whether they, as experienced liquidators and officers of the Court, "*are likely now to dissipate their assets in a way that would prejudice AHAB's claim before it is resolved?*" The Johnson Smith Liquidators, through Mr. Helfretch, posited the same question.

136. The Kinetic Liquidators, for their part, put the issue, per Mr. Malek QC, more neutrally; as being one objectively of fact, as to whether there remained the need

and the risk of dissipation, notwithstanding the existence of the WFOs and the efforts of all the Liquidators to date to identify and take control of assets.

137. Whether the risk continues to exist depends on the nature of the assets and who is presently in control of them. This was properly recognised at the hearing to be the primary question to be asked in determining this issue.

138. The GT Liquidators conceded expressly during the hearing and it is plain from the evidence, that the Liquidators generally have not identified and secured all the assets of the 17 Defendant companies and that some very valuable assets are either at the risk of falling into Mr. Al Sanea's control or are already within his control.

139. A striking illustration of this possibility appears from the financial statements of SHL. This revealed that from a reported position of $20 billion worth of assets and $14 billion of liabilities in April 2008, the Report of the GT Liquidators a year later in 2009 showed a net equity position not of $6 billion in assets as might be expected; but a negative $2 billion – a net decline of $8 billion.

140. Whatever may have been the impact of the global financial crisis upon the net asset values in the meantime, such a drastic decline in values was bound to give cause for concern and call out for investigation.

141. As Mr. Al Sanea was in control of SHL until at least 20th August 2009 when SHL was voted into voluntary liquidation by him; a reasonable concern is that he may have been involved in the dissipation of SHL's assets.

142. The situation with the HSBC shares mentioned above, is another example of AHAB's reasonable concerns.

143. Having obtained the English WFO over those shares, disclosure given to AHAB from the English custodians revealed that only some of those shares had been seized by Saad Group creditors as Mr. Al Sanea had suggested. Others had been transferred to further nominees (presumably of his) and some had been sold by SHL under his directions. These shares are assets that belong to SHL's liquidation estate and may ultimately be found to belong to AHAB.

144. A shroud of mystery still surrounds the equities in French banks. The GT Liquidators with noticeable hesitation said that they believe that these are probably Banque Nationale du Paris shares. This would be a very large holding in the order of magnitude of USD3.8 billion and I must share AHAB's view that it is extremely disquieting that even now, many months after the commencement of the official liquidation, there is such uncertainty about so important a matter.

145. On the present state of affairs and assuming that the SHL reports are accurate, AHAB apprehends that some USD8 billion of assets which could yet prove to belong to it, are completely unidentified and untraced as remaining outside the control of the GT Liquidators.

146. AHAB argues that in those circumstances, it should have the opportunity to assist in the exercise of recovering those assets; it has a team of highly experienced forensic accountants and experienced fraud lawyers of its own. Moreover, AHAB asserts that so far, it is the only party to have done anything about freezing assets in the form of the WFOs and, by way of enforcement of them; by the bringing successfully of contempt proceedings against Mr. Al Sanea for his dissipation of $60 million worth of assets in breach of the WFOs and his voting of SHL into

voluntary liquidation, among other breaches of the WFOs (see, in this regard the judgment of Justice Anderson handed down on March 15 2010).

147. In summary, the GT Liquidators object to the continuation of the WFO on the basis that it is wrong in principle (if not illegitimate) to restrain them from dealing with the assets of their liquidation estates as they think they are duty bound to do; that there is no longer any need for the WFOs since their appointment deems all assets of their companies to be within their control and that in any event, any risk of dissipation (such as Mr. Al Sanea by his conduct continues to present) can only justify the continuation of the WFOs as against him.

148. AHAB, in response, points to the continuing threat of Mr. Al Sanea, in his capacity as director of many Saad Companies, being able to issue instructions for the dissipation of assets. If the Defendant Companies in Liquidation were to be removed as respondents to the Cayman WFO, Mr. Al Sanea, at least in those relevant jurisdictions in which the liquidations have not yet been recognised (of which there are several); would be able to say to relevant third parties that the Cayman Court has lifted the WFO in relation to a particular company or companies and that they should recognise and act on his mandate and instructions as director.

149. This could conceivably include in England where assets are known or believed to exist (e.g. the HSBC outstanding shares) because the lifting of the Cayman WFO would inevitably lead to the discharge of the English WFO, which was granted only as being an ancillary measure.

150. Similar but more confined concerns arose in relation to the continuance of the WFOs as against the Kinetic Liquidators/SIFCo #5 and the Johnson Smith Liquidators/AwalCos.

151. In respect of SIFCo #5, Mr. Malek QC emphasised the fact that this is an SPV entity in which Barclays Bank is an equity holder and whose assets are refinanced, managed and ultimately controlled by Barclays and for those reasons, not to be considered a part of the Saad Group.

152. It is clear, however, that Mr. Al Sanea and his wife were directors of SIFCo #5 and that while Barclays had acquired preference shares, Mr. Al Sanea also has an economic interest such as could arguably be regarded as giving him control of SIFCo #5.

153. SICL, through its delegate SFS appears to have been the investment manager of SIFCO #5 and as SFS appears still to be under the control of Mr. Al Sanea, he probably is the only person with a complete knowledge and understanding of the assets of SIFCo #5.

154. It is worthy of note that Mr. Mbanefo, a Managing Director of Barclays Capital, states in his affidavit filed in these proceedings, that Barclays did not have a complete understanding of what assets SICL/SFS as the investment managers of SIFCo #5, had invested in.

155. Given this state of affairs, Mr. McQuater argued that the Court cannot be sure that there are no other investments of SIFCo #5 which still remain accessible to Mr. Al Sanea and to which he could have access with impunity were the WFOs to be lifted.

156. Similar concerns are noted in respect of the AwalCos bolstered, from AHAB's point of view, by the reports of the Johnson Smith liquidators which disclose a number of suspicious transactions between the AwalCos and SICL which they wish to investigate. In summary, those Liquidators' concerns are: a conflict of interest on the part of SICL as both investment manager and purchaser of SIFCO #5 assets; the motives for such transactions (as they would have been motivated by Mr. Al Sanea at the time); whether they were at full market value; and whether the transactions were simply a means of transferring assets and costs from the AwalCos to SICL.

157. These are concerns which, say AHAB, can only increase with the passage of time in the climate of uncertainty created by Mr. Al Sanea's refusal to give account of his dealings or access to the SFS database. It is a climate of uncertainty that only increases, not diminishes, the need for the retention of the WFOs and, for reasons like those which point to the continuing risk of dissipation by Mr. Al Sanea attendant upon the assets of the other Defendant Companies in Liquidation; the WFO should be maintained.

158. A resolution of these competing concerns for and against the continuation of the WFOs requires first an answer to the objection in principle raised by the GT Liquidators that the law does not allow for the continuation of freezing orders over the assets of companies once liquidators have been appointed.

159. In any approach to this question, the first step must be to recognise that there must be some very good, even exceptional reason, for the continuation of a freezing

order at the instance of a third party over the assets of companies which are in liquidation under the aegis of the Courts.

160. In the usual case, upon a liquidation order being made, the assets of the company are impressed with a statutory trust in the sense that they constitute a fund to be administered by the liquidator as officer of the Court and agent of all persons interested in the winding up; see for instance: ***Re Oriental Inland Steam Co.*** ***(1874) L.R. 9. Ch. App. 557, 559, 560.***

161. It would usually follow therefore, that as liquidators are to be regarded as reputable, licensed insolvency practitioners and capable of the proper custody and management of the assets, there should be no further risk of dissipation of assets so entrusted to them and that a freezing order already made should be discharged.

162. Indeed, that would accord with the view taken by the English High Court in ***Capital Cameras Ltd. v Harold Lines Ltd. [1991] 1 W.L.R. 54, 56,*** a case in which Harman J. held that property rights of a debenture holder which crystalised upon the appointment of receivers in exercise of the debenture rights and which constituted a prior fixed charge over the property encompassed by the debenture; entitled the secured chargee to have the assets which had been the subject of a Mareva injunction (imposed at the instance of another unsecured claimant) released from the restrictions which the Mareva order had imposed upon dealings with them.

163. In the particular circumstances of that case, where the other unsecured claimant could assert no competing claim to that of the debenture holder, Harman J said:

"...in my judgment quite plainly...the prima facie view which I formed is in truth the correct view in law that the debenture holder, or mortgagee in the case of a personal debtor, would be entitled to have the Mareva varied to enable the persons properly appointed by the chargee to deal with the charged assets."

164. That conclusion, reached in the circumstances of that case may not, however, be treated as proposed by the GT Liquidators, as authority for some wider proposition to the effect that the continuation of freezing orders when office-holders have been appointed must invariably be wrong in principle.

165. Indeed, on a careful reading, it becomes clear that Justice Harman's dictum was not addressed to a situation where there is a pre-existing good arguable claim to the liquidation assets being impressed with a constructive trust and in the event of being so found by the Court, ultimately would not fall within the liquidation estate at all.

166. Yet that hypothesis more aptly describes the present status of the competing claims to the assets of the 17 Defendant Companies in liquidation and sets the background against which I must now decide whether the WFO should be discharged or varied.

167. The Australian case of ***Deputy Commissioner of Taxation v Advanced Communications Technologies (Australia) PT Ltd*** *[2003] VSC 67* was also relied upon by the GT Liquidators. In it the question was whether a Mareva injunction – which had been granted at the instance of the Commissioner because it had been established that, without it, threatened dealings with the defendant

company's assets, if allowed to go ahead, could – in the likely event of its winding up – result in there being no assets left for distribution to creditors.

168. The judge answered that question in the negative giving the following expressed findings:

> ***"That original threat is no longer present. The circumstances are changed. There is an administrator and receivers and managers in place. I am satisfied that the experienced professional people occupying those positions are discharging their functions in a responsible and appropriate way; attentive to the various interests in the complexity of the disputation. Indeed, the contrary is not disputed."***

169. It must be noted immediately that the only thing in common as between those findings and the circumstances here attendant upon the debate over the retention of the WFO; is that, here too, nobody disputes that the GT Liquidators (indeed that all the Liquidators) are "experienced professional people occupying those positions." All the other premises are different including, importantly for present purposes, the genuine concern of AHAB as discussed above; that notwithstanding the appointment, the bona fides and efforts of the Liquidators to date; there are significant assets in question which remain within the control of Mr. Al Sanea personally or of others associated with him and outside the control of the liquidations.

170. The second point to note as it seems to me from the forgoing discussion of the cases is that while, as Harman J. concluded, "the *prima facie* view" is that the freezing order should go once office-holders are appointed; it is also implicit in that dictum that it remains a matter of discretion to be exercised in the circumstances of each case, whether or not that should be so.

171. Indeed, that there is no hard and fast rule to the contrary, is supported by the text book writers.

172. **Gee on Commercial Injunctions, 5th Edition** at para 3.00778 and 20.078 posit that the exercise of discretion whether to maintain a Mareva order, may well depend on the extent to which (in the case of a liquidation) the liquidators have in fact obtained control over the company's assets. **Hoyle, Freezing and Search Orders**, 4th Edition para 6.24 is to similar effect. In support of the foregoing proposition **Gee** relies primarily upon the dictum of Lord Denning in the Court of Appeal, from ***Re Claybridge Shipping SA*** ***[1997], BCLC 572*** (judgment earlier delivered on 9th March 1981).

173. In that case, a Mareva injunction had been obtained against a Panamanian company in support of an action by an English bank on a substantial debt. After the order was obtained the bank petitioned for the company's winding up. The debt was disputed, but the Court of Appeal allowed the petition to stand because, otherwise, there was a risk that the company's assets would be dissipated if it did not.

174. After so holding, Lord Denning further stated:

"The Mareva injunction should continue in the form that no assets are to be removed or disposed of except in accordance with the directions of the Companies Court. I foresee that in the case of foreign companies with assets here, it may be very convenient to have a Mareva injunction remedy alongside a petition to wind up. That will ensure all the creditors are fairly done by".

175. The narrow construction of that dictum– although not taken by **Gee** above – proposed nonetheless on behalf of the GT Liquidators; is that it should be construed as applying only when a liquidation petition is pending and not when liquidators have been appointed. But to the extent Lord Denning's dictum appears to have been subsequently considered judicially, there appears no support for that proposition in the case law either. The following passage from the judgment of Young CJ sitting in the Equity Division of the Supreme Court of New South Wales is instructive. It comes form ***Lawindi v Elkateb*** **[2001] NSW Lexis 742 at 745-746** in which an undischarged bankrupt (Mr. Elkateb), moved the Court to discharge a Mareva injunction which had been made against him restraining his dealings with his assets before he was ordered into bankruptcy. His argument was that, because he was now bankrupt, the Mareva order was of no utility (as his assets had become vested in his trustee-in-bankruptcy) and should not be maintained. Young CJ stated:

"Although there is no authority directly on point, all the indications in what authority there is, go in the direction of saying that this point should be found against Mr. Elkateb.

Under s.30 of the Bankruptcy Act 1966, a court with jurisdiction in bankruptcy can make an injunction in aid of the proper administration of the bankrupt's property. In a proper case, the court can make a mareva order to preserve the assets for the trustee. A good example is Re Clunies-Ross; Ex parte To Herdill (1987) 72 ALR 241. If such an injunction can be made, there is firm ground for saying that a mareva injunction is not necessarily rendered otiose because of bankruptcy."

[He then cites the passage from **Gee** (op. cit., ibid and continued]:

"The authorities for that proposition are given as Re Claybridge Shipping SA [(ibid, above)] as applied by Hobhouse J in the Mercantile Group (Europe) AG v Aiyela (1993) 20 FSR 745, 758 (affirmed without this point being discussed [1994] QB 336).
It would seem that if a mareva order interferes with the due administration in bankruptcy that the trustee may apply to have it discharged in analogy with what was said in cases such as Capital Cameras Ltd v Harold Lines Ltd [1991] 1 WLR 54

[Young CJ then cites the passage from ***Hoyle*** (op.cit., abid) then concluded]:

"In the present case … there is no evidence that the existence of the mareva order impedes the bankruptcy. Accordingly, there is no reason to discharge the order."

176. I consider that Young CJ's judgment contains an accurate summary and analysis of the present state of the law on this question of the continuation of a mareva

injunction over the liquidation assets once an office-holder has been appointed (there being no difference for these purposes between personal bankruptcy and corporate liquidation).

177. In summary, it appears that the principle that emerges is that the appropriate course will be determined by whether or not there remains a real risk of dissipation of assets notwithstanding the appointment. That, in turn will depend, in the context of a case like the present, on the extent to which liquidators have in fact obtained control over the company's assets.

178. In the prevailing circumstances of this case as discussed above, I find that the risk of dissipation of assets by Mr. Al Sanea remains extreme. The appointment of the GT Liquidators notwithstanding, that risk has not diminished since Justice Henderson was sufficiently persuaded of its existence not only to grant the Cayman WFO, but also to extend it (under the ***TSB v Chabra*** jurisdiction) to all of Mr. Al Sanea's Cayman Islands companies; nor since Justice Anderson's judgment of the 15th March 2010 by which Mr. Al Sanea was found to be in contempt by the deliberate breach of Justice Henderson's order.

179. For all the foregoing reasons, I am satisfied and so order that the Cayman WFO shall continue as amended only by the interim order made on the 19th January 2010 (paragraphs 7 and 8 in particular giving the Liquidators certain freedom to deal with assets); but with liberty on notice to AHAB, to apply, should there be material change of circumstances.

Enforcement of the Disclosure provisions of the WFO

180. From all the foregoing it would seem to follow that the disclosure provisions of the WFO should be enforced. The Cayman WFO was obtained in circumstances where the Court (per Henderson J) was satisfied that the Cayman Saad Companies had become "mixed up" in the massive fraud of international proportions alleged against their principal Mr. Al Sanea and that AHAB as the victim, was entitled to their assistance by way of disclosure in seeking to recover its money.

181. Up until now, that duty of disclosure on the part of Cayman Saad Companies including the 17 Defendants in Liquidation has not diminished. From the relevant evidence – of which there is now significantly more available to AHAB (as appears from the affidavit evidence filed on this application) – the duty of disclosure is only reaffirmed, not diminished. AHAB needs to first prove its proprietary tracing claim before it can prove in the Liquidations but as yet little of the information disclosed by the Liquidators (including in their reports) is regarded by AHAB as "assets specifics". In that regard, AHAB is certainly entitled to know what the assets are and to ascertain that they are properly secured, or whether further steps are needed to secure them.

182. On the basis of the case of ***Motorola Credit Corp. v Uzan [2002] 2 All. E.R. (Comm) 945*** it must be accepted first that where rarely and exceptionally a WFO is granted, a disclosure order will usually follow. But also, secondly, that a disclosure order should only be made for a purpose for which the power exists as part of the Mareva jurisdiction; viz: to "police" the Mareva injunction.

183. It is not a power to be confused with the Courts' general and wider power to compel disclosure as part of the duty of parties to civil litigation. Nonetheless, discontinuing their disclosure objections under the WFO now would only, to my mind, serve to delay the process for the fulfilment of the Defendant Companies' undoubted and inevitable obligation to assist. Indeed, Mr. Smith for the GT Liquidators did not specifically seek to advance his objection on the basis that the transition to adversarial proceedings required the discontinuance of the WFO disclosure obligations. Rather, the thrust of the argument is that the GT Liquidators and not AHAB, were the right people to do the asset tracing and securing exercise and that the disclosure provisions of the WFO therefore served no purpose.

184. And, further, that if assets were traced and recovered, they would be secure within the remit of the Liquidators and that there was no need for AHAB to be informed so long as the assets were available to satisfy any judgment AHAB managed on its own to obtain.

185. Part of the GT Liquidators' concern in this regard was also, of course, that the same disclosure obligations may be demanded by other claimants, reiterating in this context the "flood gates" argument already addressed above and by reliance on the ***Four Funds v Lomas*** case (above).

186. These are not concerns which can reasonably prevail at this stage of the matter, even though I acknowledge that Liquidators might reasonably think that nothing should be allowed to hamper their conduct of their liquidations.

187. In the absence of any clearly articulated reasons for apprehending that the task of providing full and frank disclosure would be unduly onerous or prejudicial to the Liquidation estates, I regard the GT Liquidators duty to assist AHAB in the investigation of its good arguable case, to be of persuasive importance.

188. The Kinetic Liquidators acknowledge the appropriateness on their part of remaining neutral in this regard. They accepted through Mr. Malek, that as AHAB has demonstrated its good arguable case of fraud as found by a series of judges, they have a duty to assist AHAB to resolve its problems in relation to getting the information to which it would be entitled. As officers of the Court, having their costs provided for from the estate and having been asked to do nothing that is impossible, they would be willing to provide any relevant information within the AwalCos' control.

189. The Kinetic Liquidators indicated that they believe they had in fact already provided all information about assets which they had. Subject to the caveat that disclosure ought to be on a rolling basis as and when information is uncovered, Mr. McQuater for AHAB would accept that assurance.

190. A similar response has been given to the similar assurance given on behalf of the Johnson Smith liquidators by Mr. Helfretcht who also, like Mr. Malek, said that his clients believe they have already given disclosure but would be willing to give ongoing discovery provided the reasonable costs of doing so would be recoverable from the AwalCo's estate in the first instance.

Costs of disclosure under the WFO

191. By reliance on the case of ***Totalise Plc v The Motley Fool Ltd.*** *[2002] 1 W.L.R. 1233* Mr. Smith argued that the Liquidators should be awarded their costs (of making disclosure) by AHAB; in any event.

192. That case provides that because ***Norwich Pharmacal*** disclosure is akin to pre-action disclosure and involve an innocent party mixed up in the tortious acts of others coming under a duty to give disclosure in the context of non-adversarial proceedings (unlike adversarial proceedings where the general and contrary rule is that the unsuccessful party should pay the costs of the successful party) the costs of the innocent party of making disclosure should be borne by the applicant. The applicant should then in turn be able to recover those costs from the wrongdoer.

193. This case is, however, different from the typical ***Norwich Pharmacal*** situation in that although the Liquidators are themselves to be regarded as being innocently "mixed up", the same may not yet be said of their Defendant Companies in Liquidation. Yet it was on the basis of their own *"innocence"* in that sense that Mr. Smith for the GT Liquidators sought to rely on the ***Totalise*** case.

194. I agree with Mr. McQuater that the good arguable case in fraud having been shown as against the Companies themselves, the estates of Defendant companies in Liquidation should bear their respective costs of the disclosure exercise.

195. The Liquidators' respective costs may be met from the assets of the relevant company in liquidation without prejudice to the question whether part or all of the costs should ultimately be met from those assets of Companies which assets are

found not to be beneficially owned by AHAB. Indeed, if AHAB proves to be unsuccessful in its writ action, all costs will be recoverable as against it.

196. The GT Liquidators made the further submission that AHAB should pay their costs of the now to be hostile litigation up front, on the pre-emptive basis. I think I need state no more in that regard than that it would be very wrong in principle to impose such an order upon AHAB as an alleged victim of fraud, suing the 17 Defendants in Liquidation as fraudulent co-conspirators.

SUMMARY OF THE CONCLUSIONS

1. Pursuant to Section 97(1) of the Companies Law, AHAB shall have leave to proceed with its claim against each of the 17 Defendant Companies in liquidation;

2. Time for service of a Defence of each of the Companies in liquidation shall be extended until the date two months after the determination at first instance of the application by Mr. Al Sanea, the 2nd Defendant in action, to dispute the jurisdiction of the Court.

   If there is to be an appeal notified by Mr. Al Sanea then there will be liberty to apply for further directions.

3. The Cayman WFO (as varied on the 19th January 2010) shall continue against the 17 Defendant Companies in liquidation until trial or further order.

4. The Liquidators shall, insofar as they have not already done so, comply with paragraphs 14 and 16 of the WFO, subject to the following:

4.1. paragraph 14 shall apply only to assets exceeding USD100,000 in value;

4.2. time for compliance shall be extended until 28 days from the date hereof;

4.3. the Liquidators shall promptly inform AHAB's attorneys of any additional assets of the companies in liquidation as and when they become aware of them (and irrespective of whether it is thought that such assets may not be amenable to AHAB's proprietary claim).

5. The Liquidators shall, insofar as they have not already done so, comply with paragraphs 17 and 19 of the WFO, subject to the following:

5.1. paragraph 17 shall apply only to transfers since 1 January 2009 and shall otherwise be stayed with liberty to apply;

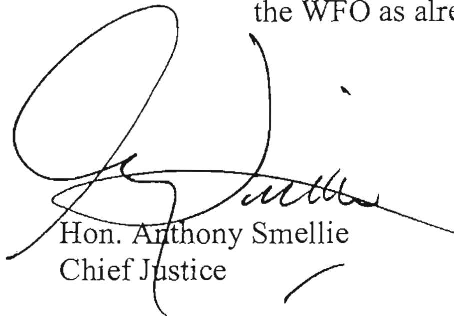
5.2. Time for compliance shall be extended until 30th May, with liberty to apply for further time;

5.3 the Liquidators shall inform AHAB's attorneys of any additional transfers (subsequent to 1 January 2009) as and when they become aware of them.

6. The costs of compliance with paragraphs 14 and 17 of the WFO shall be paid from the assets of the relevant company in liquidation without prejudice to the question of whether part or all the costs should ultimately be met from those assets which are not beneficially owned by AHAB and

without prejudice to the costs being ultimately recoverable from AHAB should AHAB fail in its claim.

7. Liberty to apply, including, for the avoidance of doubt, liberty to apply to vary or discharge any provision of this order and liberty to apply for directions for the giving of title in respect of any assets which the Liquidators may be advised to transfer or otherwise deal in keeping with the WFO as already varied on 19th January 2010.



Hon. Anthony Smellie
Chief Justice

April 19, 2010