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In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

UNION PROPERTIES P.J.S.C
First Claimant/ Applicant

UPP CAPITAL INVESTMENT CO. L.L.C.
Second Claimant/ Applicant

and

TRINKLER & PARTNERS LTD
First Defendant/ Respondent

THOMAS PIERRE TRINKLER
Second Defendant/ Respondent

~~**PATRICK ALBERT HELD**~~
~~Third Defendant/ Respondent~~

FIRST FUND MANAGEMENT LIMITED
Fourth Defendant/ Respondent

JORG KLAR
Fifth Defendant/ Respondent

PARESH CHANDRASEN KHIARA
Sixth Defendant/ Respondent

AMNA HASAN ALI SALEH ALHAMMADI
Seventh Defendant/ Respondent

DAHI YOUSEF AHMED ABDULLA ALMANSOORI
Eighth Defendant/ Respondent

NASER BUTTI OMAIR YOUSEF ALMHEIRI
Ninth Defendant

KHALIFA HASAN ALI SALEH ALHAMMADI
Tenth Defendant/ Respondent

~~**STEFAN DUBACH**~~
~~Eleventh Defendant/ Respondent~~

AHMED YOUSEF ABDULLA HUSSAIN KHOURI
Twelfth Defendant/ Respondent

HASSAN ASHOOR AL MULLA
Thirteenth Defendant/ Respondent

BLUE ROCK INVESTMENTS L.L.C
Fourteenth Respondent

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DANA MIDDLE EAST INVESTMENT L.L.C
Fifteenth Respondent

MOHAMED HASAN ALI SALEH ALHAMMADI
Sixteenth Respondent

~~**ISLAND FALCON PROPERTY MANAGEMENT L.L.C**~~
~~Seventeenth Respondent~~

ISLAND FALCON INVESTMENTS L.L.C
Eighteenth Respondent

TEXTURE GLOBAL INVESTMENT LIMITED
Nineteenth Respondent

JUDGMENT OF JUSTICE SIR ANDREW SMITH

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Neutral Citation:	[2024] ADGMCFI 0006
Before:	Justice Sir Andrew Smith
Decision Date:	23 May 2024
Decision:	1. The Strike-Out Application is granted. 2. The Amendment Application is refused. 3. Any further application to amend the Particulars of Claim against the remaining Defendants is to be made within 21 days of the order. 4. Any applications as to the costs of or associated with the Strike Out Application and the Amendment Application, or otherwise consequential upon the rulings in the Judgment, shall be filed within 14 days of the order.
Hearing Date:	13 and 14 May 2024
Date of Order:	23 May 2024
Catchwords:	Application to strike out proceedings. Application to amend pleadings. Breach of director's duties. Dishonest assistance of breach of fiduciary duties. Compensation under the ADGM Financial Services and Markets Regulations 2015. Conspiracy by unlawful means. Joint liability, settlement with one wrongdoer.
Cases cited:	F S Cairo (Nile Plaza) LLC v Brownlie [2021] UKSC 45 Independents' Advantage Insurance Co Ltd v Cook, [2003] EWCA Civ 110 Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33 Elite Property Holdings v Barclays Bank plc [2019] EWCA Civ Three Rivers District Council v Bank of England (No 3), [2001] UKHL 16 JSC Bank of Moscow v Kekhman, [2015] EWHC 3073 (Comm) FM Capital Partners Ltd v Marino, [2018] EWHC 1768 (Comm) Gladman Commercial Properties v. Fisher Hargreaves Proctor & Ors. [2013] EWCA Civ 1466
Legislation cited	UAE Federal Law No 5/1985, the Civil Code ADGM Court Procedure Rules ADGM Financial Services and Markets Regulations 2015 ADGM Companies Regulations, 2015 UAE Federal Law No 32/2021 on Commercial Companies
Case Number:	ADGMCFI-2022-265
Parties and representation:	Mr Patrick Dillon-Malone SC and Mr William Prasifka, Clyde & Co LLP for the Claimants Dr Beat Ammann, About Law GmbH for the Second Defendant Mr Aamir Sheikh, Ms Jhanvi Jhaveri and Mr Ross Wilson, DLA Piper Middle East LLP for the Fourth, Sixth and Eighth Defendants Dr Clemens Daburon, Daburon & Partners Legal Consultants LLP for the Fifth Defendant

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	Mr Riaz Hussain KC instructed by Al Aidarous Advocates & Legal Consultants LLC for the Ninth Defendant Mr Alessandro Tricoli, Fichte & Co Legal Consultancy LLC for the Twelfth Defendant

JUDGMENT

Introduction

1. This is my judgment on two applications: the first is an application by the Ninth Defendant, Mr Naser Butti Omair Yousef Almheiri, that the claim against him be struck out (the "**Strike-Out Application**"); and the second is an application by the Claimants to amend the Particulars of Claim (the "**Amendment Application**").

2. I heard submissions on the applications on 13 and 14 May 2024. The Claimants were represented by Mr Patrick Dillon-Malone SC and Mr William Prasifka. Mr Almheiri was represented by Mr Riaz Hussain KC. Other defendants were represented at the hearing, but they made no submissions on the applications. After the hearing, I reserved my judgment.

3. The proceedings were brought on 14 November 2022 against thirteen Defendants, but they have been abandoned against the Third and Eleventh Defendants, and judgment in default has been entered against the First, Seventh, Tenth and Thirteenth Defendants. The Claimants proceed against the other seven Defendants.

4. The claim form describes the claim as follows:

   "In outline, the Claimants allege that a fraud was perpetrated against them resulting in the unlawful and unauthorised use of AED 320,712,867.84 to purchase 391,789,341 units of P-Notes (or Participation Notes), the great majority of the proceeds of which were misappropriated. The Claimants' case is that the Tenth Defendant, Khalifa Alhammadi, is the controlling mind of this fraud, and that he has operated with the assistance of and/or through persons and entities controlled by them or acting at their direction, in particular the other Defendants".

5. Mr Almheiri did not dispute on these applications that the Claimants have, and have pleaded, a properly arguable case that they were the victims of such a fraud. The issues are whether they have a sufficiently arguable case that Mr Almheiri was party to it, or is otherwise liable in respect of it; and whether, if the proposed amendments were permitted, they would have a properly pleaded case against him.

The Fraud

6. The Second Claimant, UPP Capital Investment LLC ("**Capital**") is a wholly-owned subsidiary of the First Claimant, Union Properties PJSC ("**UP**"), and was apparently established to undertake and hold investments on UP's behalf. Capital and UP are incorporated in Dubai. According to their pleaded case, Mr Almheiri was a director of UP between April 2017 and September 2019 and was the Chairman of Capital between June 2017 and November 2021.

7. The Claimants contend that the fraud was perpetrated or concealed through a "sham" company called First Finance Management Ltd ("**FFM**"), the Fourth Defendant, which was incorporated in the Abu Dhabi Global Market ("**ADGM**") by Mr Almheiri and Mr Khalifa Hasan Ali Saleh Alhammadi, the Tenth Defendant, on 14 March 2018. Its first directors were Mr Almheiri and Mr Alhammadi. Mr Almheiri ceased to be a director on about 22 May 2018, and was replaced by Mr Thomas Trinkler, the Second Defendant. (There are references in the evidence to Mr Almheiri ceasing to be a director in May 2019, but they are clearly slips. There is also evidence that he ceased to be a director on 18 May 2018, but the difference between 18 May 2018 and 22 May 2018 is inconsequential.)

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8. The Claimants' case is that, in July 2017, Capital opened an account with Julius Baer & Co Ltd ("**Julius Baer**"); that between January and April 2018, it transferred AED 300 million and US$10 million to Julius Baer; and that, on Capital's instructions, the monies were invested in a local Julius Baer fund, the "*UAE Focus Fund*". By a letter dated 23 June 2018, Mr Alhammadi and Mr Ahmed Khouri, the Twelfth Defendant, instructed Julius Baer to redeem the units in the UAE Focus Fund, and in July 2018 they instructed Julius Baer to invest the proceeds, together with other funds, in the 391,717,867.84 P-Notes (or Participation Notes), the underlying investments in which were almost exclusively shares in UP.

9. In June 2018 and July 2018, Capital entered into a Mandate Agreement and an Investment Management Company ("**IMA**") with the First Defendant, Trinkler & Partners Ltd ("**TAP**"), a Swiss asset management company. On 4 September 2018, TAP entered into a Service Level Agreement ("**SLA**") with FFM, under which FFM were paid a fee to "*identify and select an umbrella fund suitable for TAP and its customers*" and for other services.

10. The Claimants then plead that "*After the purchase of the P-Notes, [Mr Alhammadi] and Mr Khouri instructed Julius Baer to transfer the P-Notes to TAP. However, the P-Notes were, in fact, never delivered to TAP. Rather, in sequence of three transfers between 10 September 2018 and 5 October 2018 a total of 390,389,341 units of P-Notes, purportedly transferred to TAP for management, were instead transferred to Arqaam Bank Limited (Arqaam), an investment bank headquartered in Dubai and the issuer of the P-Notes*". Then, by way of particulars, the Claimants set out what are described as five (not three) transfers of the P-Notes. The "*first transfer*", was of 25,840,000 units, which were delivered to Arqaam and converted into 25,840,000 shares in Al Salam Bank Bahrain, and those shares were transferred to an account of Capital with SICO BSC. The transfer of the 25,840,000 units is not the subject of any claim or complaint by the Claimants. I need not be concerned with the "*third transfer*" and the "*fifth transfer*" for present purposes. The claim concerns the transfers of 364,549,341 units, comprising (i) the "*second transfer*" of 180 million units said to have been delivered to Arqaam on 20 September 2018, and (ii) the "*fourth transfer*" 184,549,341 units said to have been delivered to Arqaam on 5 October 2018. The second transfer is said to have been made after instructions were given to Julius Baer by a letter dated 12 September 2018 signed by Mr Alhammadi and Mr Khouri, purporting to act for Capital. I shall return to the fourth transfer later in my judgment.

11. The Claimants' case is that these 364,549,341 units were converted into shares in UP, and were transferred into accounts of the Thirteenth Defendant, Mr Hassan Ashoor Al Mulla. However, according to the Claimants, by letters of 20 September 2018 and 2 and 4 October 2018, FFM represented to TAP that it held units that had been transferred to Arqaam, and TAP reported to Capital by letter of 11 January 2019 that it held 364,549,341 units, and by letter of 3 April 2019 that it had sold units for AED 286,230,331.37. Capital is also said to have received regular reports from "*TAP and/or FFM*" showing false security balances.

The Applications

12. The Strike-Out Application was made by Mr Almheiri by an Application Notice dated 29 August 2023, supported by witness statements of Mr Almheiri and Ms Gayle Hanlon of Hend Al Ktebi Advocates and Legal Consultants, his representatives at that time. The Claimants filed and served in response a witness statement of Mr Nils de Wolff of Clyde & Co, their representatives, to which Mr Almheiri replied by his witness statement of 11 October 2023 and another witness statement from Ms Hanlon dated 13 October 2023.

13. The application came on for hearing on 7 November 2023. Having heard argument from Mr Hussain for Mr Almheiri and Mr Prasifka for the Claimants, I delivered an oral ruling, in which I concluded that the Claimants' pleading did not allege primary facts from which an inference of dishonesty could properly be drawn against Mr Almheiri. As I explained, this was partly because two matters on which they sought to rely in argument were not pleaded in the Particulars of Claim.

> *"Firstly, there is no distinct case pleaded that FFM was incorporated and established for the purposes of the conspiracy and not for any proper purpose. It may be that the Claimants would*

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allege that there is no reasonable case to be advanced that it had a proper purpose. If that is their allegation, it should be pleaded. It is not yet pleaded.

Secondly, reference was made to a document apparently signed by [Mr Almheiri] on the face of it, whereby P-Notes were to be sold and that, as a result of that instruction, as it is alleged, … P-Notes found themselves in the hands of the issuer, a stage in the scheme which is said to be fraudulent. If it were to be alleged that [Mr Almheiri] had an improper purpose in signing that document, that should be pleaded fair and square".

I shall refer to these two points respectively the "*Fraudulent Incorporati*on" point and the "*September Letter*" point.

14. Accordingly, I concluded that "*as matters stand, the [Claimants'] pleading is one which should properly be struck out. However, it is well established on applications of this kind that, if deficiencies in the pleading might be cured by amendment, it is proper to give an opportunity for such amendment to be made*". Therefore, I adjourned the Strike-Out Application to allow the Claimants, if so advised, to make an application to amend their pleading, and I gave Mr Almheiri liberty to restore the Strike-Out Application after 28 days.

15. On 8 December 2023, the Claimants issued the Amendment Application, supported by a witness statement of Mr de Wolff dated 8 December 2024, which exhibited a proposed draft pleading (the "**First Draft**"). It included allegations against Mr Almheiri both as to the Fraudulent Incorporation point and as to the September Letter point:

    a. It pleaded that FFM was incorporated by Mr Almheiri and Mr Alhammadi, and alleged, under the heading "*Deceit and/or Negligent Misrepresentation*", that the "*FFM Directors*", a term defined to include Mr Almheiri, represented (inter alia) that "*FFM would set up a specialised fund and invest any assets received from the Claimants into such fund*"; that the representation was false in that "*FFM was established as a sham company to conceal a fraud and this was known to the FFM Directors*"; and that the FFM Directors made the representation "*knowing [it] to be false, without any belief in [its] truth or recklessly in the sense of not caring whether [it was] true or false*".

    b. The First Draft also pleaded that the representations, including the "Fraudulent Incorporation" representation, were "*made negligently in circumstances where [Mr Alhammadi] and [Mr Khouri] owed a duty of care to the Claimants*". No duty of care was pleaded against Mr Almheiri: the implication was that the case against him about this representation was advanced in fraud, and not in negligence.

    c. The September Letter point was introduced into the First Draft by way of an allegation relating to the first transfer of 25,840,000 units, and not in relation to either the second or fourth transfers, the transfers of the units that are the subject of the claim.

16. In a witness statement in response to the Amendment Application dated 12 January 2024, Ms Hanlon said that Mr Almheiri opposed the application on the grounds that: (i) the amendments in the First Draft were not coherent, comprehensible or adequately particularised; (ii) they were not supported by any cogent evidence of the matters alleged, in particular the alleged dishonesty or negligence; and (iii) the First Draft introduced new causes of action against Mr Almheiri, namely breach of fiduciary duty and negligence as a director of UP, that had no reasonable prospect of success. She said that "*although a new purported claim for alleged breach of fiduciary duty and alleged negligence as a director of [UP] is now raised ….,the causes of action in dishonesty remain and are without the necessary particulars for such a claim … For these reasons, even if the amendments were permitted [Mr Almheiri] will renew its* [sic] *application to strike out the clams (both old and new)* …".

17. The Claimants filed and served a witness statement of Mr de Wolff dated 19 January 2024 in reply. Further witness statements of Mr Almheiri and Ms Hanlon dated 7 and 8 May 2024 respectively were filed and served shortly before the hearing.

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18. The First Draft included this plea: "*In June 2023, the Claimants entered into an agreement (**the June Agreement**) with several parties (including the Seventh Tenth and Thirteenth Defendants) which provided for the return of certain monies to the Claimants. The June Agreement does not compromise these proceedings in any way*". In her witness statement, Ms Hanlon said that some of the parties, including Mr Almheiri, had not seen the terms of the June Agreement, and that he should be provided with it. The Claimants contended that the terms of the June Agreement were confidential under the laws of the United Arab Emirates ("**UAE**"). Eventually, after Mr Almheiri had issued an application for production of the June Agreement and pursuant to an order of the Court dated 7 May 2024, a redacted copy of the June Agreement was provided to Mr Almheri and his advisers under the terms of a Non-Disclosure Agreement.

19. In the course of exchanges on the first day of the hearing on 13 May 2024, Mr Dillon-Malone was constrained to accept that the First Draft was defective in several significant respects (and also contained other more minor errors). After the first day's hearing on 13 May 2024, the Claimants' representatives drafted a significantly altered draft pleading (the "**Second Draft**"), and by an Application Notice of 14 May 2024, supported by a further witness statement of Mr de Wolff, the Claimants applied for permission to amend their pleading in the terms of the Second Draft.

The claims against Mr Almheiri

20. The Second Draft pleads (or purports to plead) four causes of action against Mr Almheiri:

    a. A claim for breach of duties as a director of Capital on the basis that he "*authorised the transfer of the P-Notes to Arqaam*" and failed to investigate and to exercise independent judgment or oversight. It is also said that as a result of Mr Almheiri and other directors of Capital failing in their duties, Capital entered into the IMA with TAP.

    b. A claim in dishonest assistance, in that Mr Almheiri procured other Defendants to act in breach of their fiduciary duties as directors of UP and Capital.

    c. A claim for compensation under section 242 of the ADGM Financial Services and Markets Regulations 2015 (the "**FSMR**").

    d. A claim for damages for conspiracy by unlawful means.

21. The First Draft had included claims against Mr Almheiri in deceit and, as the Claimants maintained although Mr Almheiri disputed, in negligent misstatement. Those claims were abandoned in the Second Draft. So too was a claim for breach of duties as a director of UP, the allegations that had been pleaded in respect of that claim now, for the first time, being relied on to support the claim of breach of duties owed to Capital. Finally, the Second Draft abandoned a claim in unjust enrichment or for money had and received, which Mr Dillon-Malone said the Claimants had not intended to make against Mr Almheiri.

22. The claims for breach of director's duties, in dishonest assistance and in conspiracy by unlawful means were pleaded as causes of action governed by ADGM law. I did not receive submissions about which law governs these claims, but they appear to me more closely connected with, and more likely to be governed by, the law of the UAE. However, the Second Draft pleads that the "*nature of the tort claims that arise under ADGM law and UAE law are similar*", and it refers to article 282 of Federal Law 5 of 1985, the Civil Code. This plea would clearly cover the tortious conspiracy claim, and I understood from Mr Dillon-Malone's submissions that it is also intended to refer to the dishonest assistance claim. The Claimants also submitted, citing the judgments of the Supreme Court in *F S Cairo (Nile Plaza) LLC v Brownlie [2021] UKSC 45*, that they are entitled to plead ADGM causes of action, relying on a presumption that the governing law, if not ADGM law, is materially similarly to it, at least in respect of the non-statutory claims.

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The jurisdiction and applicable principles

23. The Court Procedure Rules 2016 ("**CPR**") provide at CPR r.9 (2) that:

"(2) The Court may strike out a statement of case if it appears to the Court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a material failure to comply with a rule, practice direction or Court order".

24. Mr Hussain also relied on CPR r. 68 (1), which is about applications for summary judgment, and provides that:

"(1) The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that –

(a) the claimant has no real prospect of succeeding on the claim or issue; or

(b) the defendant has no real prospect of successfully defending the claim or issue; and

(c) there is no other compelling reason why the case or issue should be disposed of at trial."

25. Mr Almheiri's application notice does not include an application for summary judgment, and in any case an application for summary judgment would not, in reality, add anything to the Strike-Out Application: see, for example, *Independents' Advantage Insurance Co Ltd v Cook, [2003] EWCA Civ 1103*: "*If the particulars of claim disclose no reasonable grounds for bringing the claim, the court has ample power to strike out the pleading and to enter judgment for the defendant*", per Chadwick LJ (at para 8). It shall therefore consider Mr Almheiri's application by reference to CPR r.9 (2).

26. The Court's power to permit a party to amend a statement of case is set out in general terms in CPR r. 52. Both parties cited extensive authority from English cases about the proper principles governing applications for permission to amend pleading, and about pleading allegations of dishonesty or other moral impropriety. The principles are well-established, and they were not, as far as I understand, controversial between the parties.

27. I shall cite just two authorities about amendment applications. In *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33*, Popplewell LJ gave this guidance:

"(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: …

(2) The pleading must be coherent and properly particularised: …

(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct …" (at para 18).

28. Similarly, in *Elite Property Holdings v Barclays Bank plc [2019] EWCA Civ*, Asplin LJ said: "*For the amendments to be allowed the* [Applicants] *need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction:….A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary*

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inferences:…The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon" (at paras 41 and 42).

29. With regard to pleading allegations of dishonesty, bad faith and comparable misconduct, I again refer to the two authorities mentioned in my ruling on 7 November 2023:

    a. In *Three Rivers District Council v Bank of England (No 3), [2001] UKHL 16*, Lord Hope said, "*Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence*" (at para 55).

    b. In *JSC Bank of Moscow v Kekhman, [2015] EWHC 3073 (Comm),* Popplewell J, having examined the speeches of Lord Hope and others in the *Three Rivers DC* case, said: "*The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'. At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge*. …" (at para 20).

The Second Draft

30. The Second Draft made extensive revisions to the First Draft, and Mr Hussain was at a disadvantage in replying to it without more notice. However, he did not apply for an adjournment, and submitted that the claim against Mr Almheiri should be struck out in any event. I shall therefore consider whether the Second Draft sets out a claim that is sufficiently coherent, particularised and plausible for the amendments to be permitted.

31. Before considering separately the proposed pleading of the four causes of action that the Claimants now seek to advance against Mr Almheiri, I make two more general observations about the Second Draft. Firstly, the Second Draft omits the First Draft's allegations of dishonesty by way of the Fraudulent Incorporation point and the September Letter point. Although on 7 November 2023 I had declined to strike out the claim against Mr Almheiri in order to give the Claimants an opportunity to plead these points, on the first day of the hearing, Mr Dillon-Malone had said that the Claimants do not allege that Mr Almheiri was dishonest in establishing FFM and in giving the instructions in the 10 September 2018 letter.

32. Secondly, the Second Draft (like previous drafts) used the term "*FFM Directors*" to refer to, inter alia, Mr Almheiri. However, in the Second Draft, the definition is qualified by the words, "*which shall include where the context requires only those directors appointed at the relevant time*". Thus, the term "*FFM Directors*" is not intended to refer to Mr Almheiri wherever it is used on the Second Draft, but the pleading leaves it to the reader to work out when the "*context requires*" that the allegation is made against only some of the FFM directors, and if so, against which.

33. The embarrassment of this can be sufficiently illustrated by a single example relating to the dishonest assistance claim, although a number of instances might be used. It is pleaded at paragraph 50K of the Second Draft that "*the FFM Directors assisted in and/or procured breaches of fiduciary duty … in that they … entered into the SLA so as to enable the eventual misappropriation of the [P-Notes and the monies used to acquire them]*"; and in that they made various representations. It is pleaded at paragraph 50L that the dishonesty of "*the FFM Directors … is apparent and/or to be inferred*" from

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various matters including that P-Notes were received by FFM and that "*FFM were a newly incorporated entity with no experience of managing assets*". I cannot tell whether this pleading is intended to allege dishonesty against Mr Almheiri, and if so, on what basis. Mr Dillon-Malone appeared unable to clarify the position in his submissions.

The September Letter point

34. The September Letter point had been pleaded in the First Draft as a matter relevant to the first transfer. In their skeleton argument, the Claimants suggested that it was connected with a letter of 16 September 2018, by which Julius Baer were "*instructed to 'sell' around 165 million P-Notes 'on a free-of-payment basis with no exchange of cash*'", and that, accordingly, "*a few days later*, [Mr Al-Mulla] *appeared to be in possession of some 200 million units of P-Notes*", referring to a letter to Arqaam of 16 September 2018. The Second Draft abandons that argument, replacing it with a new allegation that the 10 September 2018 letter is, in some way, relevant to the fourth transfer of 184,549,341 units.

35. Mr Almheiri gives evidence that he has no recollection of the 10 September 2018 letter, and that his passport indicates that he was not in the UAE on 10 September 2018. He explains that he was "*routinely requested to execute a considerable volume of documents… as a matter of some urgency on a regular basis and relating to the day-to-day operational business of the Claimants*". For the purpose of these applications, I must take it that he did sign the 10 September 2018 letter.

36. This leads to the question how the Claimants now contend that the 10 September 2018 letter was instrumental in transferring P-Notes to Arqaam for the purposes of the fraud that they allege. While, as the Claimants plead, the 10 September 2018 letter contains instructions for 164,549,341 units to be sold "*on a free-of-payment basis with no exchange of cash*", it does not refer to Arqaam. Moreover, there is in evidence a letter dated 24 September 2018, apparently signed by Mr Alhammadi and Mr Khouri (and not Mr Almheiri), which instructs Julius Baer to transfer to TAP 184,549,341 units "*on a free-of-payment basis with no exchange of cash*", and which says that TAP would provide further instructions to Julius Baer about settlement. A "*Securities Delivery*" note from Julius Baer dated 5 October 2018 records delivery of the units to Arqaam "*according to your instruction dated 3 October 2018*".

37. It would appear from this evidence that the fourth transfer was made on the basis of the instructions in the letter of 24 September 2018 and the subsequent settlement instructions to which it refers. The Claimants presented no coherent theory as to how the 10 September 2018 letter might have led to the transfer of these, or any, units. The 10 September 2018 letter, assuming it to be genuine, remains something of a mystery. Mr Dillon-Malone rightly recognised that the Claimants could not allege that Mr Almheiri was dishonest with regard to it, but he submitted that the Claimants should be permitted to pursue their claims against him so as to explore at trial whether there is an explanation for it that supports their claim against him. In their skeleton argument, the Claimants say that, "[i]*t is expected that further information/ documentation will be uncovered during the course of the proceedings which will shed more light on the precise sequence of events*". It was not explained why this is expected, but more importantly, that is not a proper reason to allow the Claimants to pursue an allegation that they cannot properly explain and that, however presented, is incoherent.

The Claim of Breach of Fiduciary Duty

38. I come to the four causes of action that the Claimants seek to plead against Mr Almheiri: firstly, that he acted in breach of his duties as a director of Capital. Mr Hussain criticised both the pleading in the Second Draft as to the duties that are alleged and the adequacy of the allegations of breach.

39. The duties are pleaded under the heading "*Breach of Fiduciary Duties*". In the First Draft, it was alleged that the directors of UP and Capital, including Mr Almheiri, owed duties under sections 160 to 167 of the *ADGM Companies Regulations, 2015* (the "**ADGM Regulations**"), and the pleading sets out five specific duties that apparently are based on sections 161, 162, 163, 165 and 167. On the first day of the hearing, I observed that UP and Capital are incorporated in Dubai and the ADGM Regulations do not apply to them. In the Second Draft, the reference to the ADGM Regulations was omitted, but it

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alleges that the same duties were owed to UP and Capital because they were directors and "*pursuant to UAE Federal Law No 32/2021 on Commercial Companies*" (the "**CCL**"). There are also pleaded three additional duties that apparently, at least in part, reflect section 162 and other provisions of the CCL, although the relevant sections are not identified.

40. Mr Hussain objected to this pleading: he said that it is obscure which duties are alleged to arise under the CCL, and what is the alleged basis under UAE law for those duties that were previously said to arise under the ADGM Companies Regulations. I agree. The Claimants might be relying on the presumption that UAE law and ADGM law are similar (see para 22 above), but the Second Draft simply does not make the position clear. The Defendants, including Mr Almheiri, are entitled to understand the case that they face.

41. The Second Draft goes on to plead (at paragraph 50E), "*In addition to the above, by virtue of their position as directors and pursuant to the CCL, [the directors of UP and Capital] also owed a duty not to make any 'gross error' or 'error in management' and to manage the company and preserve its right to the level expected of a 'diligent person', being a person having sufficient experience and commitment required to perform his work*". As far as I can discern, this paragraph is based on section 84 of the CCL. Section 84 is concerned with the liability of managers, not directors, of companies, and the Claimants do not plead, and there is no evidence, Mr Almheiri, or any other Defendant, is or was a manager of either UP or Capital. Here too, the Second Draft is defective.

42. I come to the complaint that the Second Draft does not plead a properly particularised or sufficiently arguable case of breach of any duty to Capital. The first allegation is that Mr Almheiri "*authorised the transfer of the P-Notes to Arqaam*". The Second Draft does not explain this allegation further, but I can only suppose that it refers to September Letter point. Certainly, it is not otherwise pleaded that Mr Almheiri was party to the P-Notes being transferred to Arqaam. I have explained why I do not find the September Letter point convincing.

43. I can take together the other two allegations of breach of fiduciary duty: that Mr Almheiri "*failed to investigate or exercise any independent judgment or oversight (or did so insufficiently) in relation to the fraudulent dealings with company assts and/or funds as set out above*" (in para 50G(b)); and that the Capital Directors, including Mr Almheiri, "*in breach of their duties as directors of [Capital] … procured [Capital] to enter into the IMA with TAP in circumstances where they knew that no bona fide asset management service was to be provided under that agreement*" (in para 50J).

44. Ms Hanlon criticised these allegations (as pleaded in the First Draft, and therefore as allegations of breach of duties owed to UP, rather than to Capital) as follows in her witness statement of 8 May 2024:

> *"Paragraph 50g(b) is incomprehensible and not properly particularised at all. … This wording is entirely vague and obtuse and in my view deliberately so because there is no proper basis for this bare allegation. There is no statement whatsoever of what [Mr Almheiri] in fact omitted to do or any reference to any particular action that he did not take independently. Let alone how the same comprises a breach of fiduciary duty.*
>
> *Paragraph 50J makes no particularised allegation against [*Mr Almheiri*] at all. There is no factual basis asserted for how [*Mr Almheiri*] (rather than other directors) somehow procured [*Capital*] to enter into the IMA with TAP.* [Mr Almheiri*] was not a member of [*Capital's*] Investment Committee that recommended the IMA. Nor is there any particularised factual basis to aver that [*Mr Almheiri*] acted dishonestly if he did act in this manner".*

The evidence that Mr Almheiri was not on the relevant Investment Committee is not challenged.

45. I do not comment upon the view that the pleading is deliberately vague and obtuse, but I entirely agree that the pleading is defective because it lacks any particularisation of any kind: it does not tell Mr Almheiri the case that he is required to meet. In my judgment of 8 November 2023, I referred to the allegation in the original Particulars of Claim that directors of Capital and of TAP "*worked jointly to procure [Capital] enter into the Mandate Agreement and IMA with TAP*", and I observed that it is not

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"*said in what way [Mr Almheiri] worked jointly to procure*" that. The First and Second Drafts do nothing to focus this and comparable allegations more specifically. I observe that in these proceedings (unlike some others where a company claims to be the victim of dishonesty on the part of its directors or management) the Claimants have not said that their board, committee or management papers are missing or incomplete. Although the Claimants referred in their skeleton argument to a "*deficit of contemporaneous documentation*", this suggestion was entirely vague and is not supported by satisfactory evidence.

46. The Claimants' submissions did not answer these complaints. Mr Dillon-Mallone was unable to explain how the allegation of breach of duty might be developed so as to carry any conviction. In their skeleton argument, the Claimants argued that, because Mr Almheiri said that he "*was routinely requested to execute a considerable volume of documents*", and that FFM was established on the recommendation of Mr Alhammadi, he "*potentially*" admits that he did not exercise independent judgment. To my mind, that argument is far-fetched: it is not a credible basis for an allegation of breach of fiduciary, or any, duty.

Dishonest assistance

47. The ingredients of the tort of assisting a breach of fiduciary duty are well-established: there must be a breach of fiduciary duty, but the breach by the fiduciary itself need not be dishonest. The tortfeasor must have assisted in, induced or procured the breach, playing "*more than a minimal role*" (see *FM Capital Partners Ltd v Marino, [2018] EWHC 1768 (Comm)* per Cockerill J at para 82), and must have acted dishonestly in doing so. The tortfeasor has the requisite dishonest state of mind if he deliberately closes his eyes and ears, or deliberately refrains from asking questions to avoid learning something that he would rather not know, and then proceeds regardless.

48. What do the Claimants allege to support their contention that of Mr Almheiri was dishonest? In their skeleton argument, it is said that *"[Mr Almheiri's] involvement in the fraud can be inferred from the fact that he held positions of authority with the Claimants and FFM: a. Director of [*UP*] from April 2017 to September 2019; b. Chairman of [Capital] from June 2017 to November 2021; c. Director of [*FFM*] from March 2018 to 22 May 2018 (i.e. at inception, together with [Mr Alhammadi])".* As I have said, they do not allege that he acted dishonestly in establishing FFM, nor in signing the 10 September 2018 letter.

49. In his witness statement of 19 January 2024, Mr de Wolff said that the dishonesty is pleaded in paragraph 50L of the First Draft, which is unchanged in the Second Draft. That paragraph reads as follows:

> *"The dishonesty of TAP, FFM and/or the FFM Directors in assisting and/or procuring the aforementioned breaches of fiduciary duty is apparent and/or to be inferred (at the very least) given:*
>
> *a. they would have known, given the terms of the SLA, that FFM were obliged to act pursuant to those terms;*
>
> *b. no Trust Assets were ever received, managed or their proceeds invested by FFM, nor was any specialised fund ever set up by FFM such that they cannot have understood that by producing or passing on the reports set out at paragraph 36 above that their involvement in the fraudulent scheme described above was at all honest;*
>
> *c. FFM were controlled by the FFM Directors, the majority of whom were either directors of Union Properties, UPP Capital or relatives of such directors, none of whom had experience of managing assets; and*
>
> *d. FFM were a newly incorporated entity with no experience of managing assets".*

Paragraph 36 of the pleading refers to the reports by TAP and FFM described at para 11 of this judgment.

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50. The allegations are made against the "*FFM Directors*". Because the definition of FFM includes Mr Almheiri only "*where the context requires*" and in so far as he was a director "*at the relevant time*", I cannot tell whether all the allegations in paragraph 50L are directed against him. If they are, the pleading does not explain why he is said have been dishonest because FFM acted dishonestly after he ceased to be a director. This is not a proper pleading of dishonesty against Mr Almheiri.

The claim for compensation under section 242 of the FSMR

51. The claim for compensation under the FSMR is made against FFM, Mr Khouri and "*the FFM Directors*". As with the claim for dishonest assistance, the qualified definition of the "*FFM Directors*" means that the pleading leaves it uncertain which allegations are made against Mr Almheiri: no relevant allegation is directed specifically against him.

52. The allegations made in the Second Draft against the FFM Directors in support of this claim are these:

    a. That they "*have committed fraud or other dishonest conduct in connection with investing and/or managing the Trust Assets (in particular pursuant to the Mandate Agreement, IMA and SLA)*" (paragraph 69).

    b. That they "*intentionally or recklessly (or negligently) made a false or misleading statement in order to induce the Claimants to enter into the IMA and/or to make payment of management fees pursuant to the IMA and/or to refrain from exercising rights of termination as conferred by the IMA*" (paragraph 70).

    c. That they "*have intentionally or recklessly (or negligently) made false or misleading statements in order to induce the Claimants to refrain from disposing or otherwise exercising their rights in relation to the P-Notes or their underlying shares*" (paragraph 70A).

53. Mr Almheiri had ceased to be a director of FFM when the "*Trust Assets*", the P-Notes, were acquired, invested and managed, and when the Mandate Agreement, the IMA and the SLA were concluded. The pleading does allege a statement that Mr Almheiri made in order to induce the Claimants to enter into the IMA or to make payments under it or to refrain from terminating it; nor does it allege a statement to induce the Claimants to refrain from disposing of, or from exercising rights in relation to, the P-Notes or underlying shares. The Claimants do not plead a comprehensible claim under the FSMR against Mr Almheiri.

Conspiracy to injure by unlawful means

54. It is pleaded in both the First Draft and the Second Draft at para 82B that "*The Defendants combined or acted in concert with a common intention of misappropriating the Transferred Funds and/or the Trust Assets*", the "*Trust Assets*" being the P-Notes and the "*Transferred Funds*" being the AED 320,717,867.84 used to acquire them. At paragraph 82C, the pleading sets out matters from which it is said such combination is to be inferred: the First Draft set out eleven matters, and the Second Draft added two further matters.

55. The matters that concern, or might conceivably be directed against, Mr Almheiri are these:

    a. The fact that he and Mr Alhammadi incorporated FFM in March 2018: para 82C(c).

    b. The "*relationship*" between the Defendants, which, as far as Mr Almheiri is concerned, appears to be that he was a director of UP, the Chairman of Capital and, until 22 May 2018, a director of FFM: para 82C(d).

    c. The fact that the directors of Capital "*procured [Capital] to enter into the Mandate Agreement and IMA with TAP, and TAP entered into the SLA with FFM*", despite FFM being newly incorporated and closely associated with unexperienced persons who were generally directors of UP or Capital, or relatives of those directors: para 82C(e).

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d. The fact that "*the FFM Directors*" falsely represented to UP and Capital that they had received and maintained custody of the P-Notes: para 82C(f).

e. The fact that "*the FFM Directors*" provided false trading reports that the P-Notes were being used for active trading in stocks: para 82C(g).

f. The "*circumstances supporting the conclusion that FFM was established as a company and the fact that it had no legitimate purpose*": para 82(j).

g. The "*record of contradictory and/or false instructions in relation to P-Notes and the absence of inquiry or monitoring in relation to how those instructions were acted upon*": para 82(k).

56. I have already commented on these various matters, and I can deal with the conspiracy claim summarily. Given that the Claimants do not allege that the incorporation of FFM involved any dishonesty on the part of Mr Almheiri, I cannot accept that matters (i) or (vi) above provide any cogent support for the contention that he was party to a combination of the kind alleged. Nor does the fact that Mr Almeiri was a director of UP and Chairman of Capital and, for a brief time, a director of FFM. I am not impressed by the allegation that Mr Almheiri "*procured*" the Mandate Agreement, the IMA and the TAP be made: see para 44 above. The alleged false representations and false reports were made, if at all, when Mr Almheiri was not a director of FFM, and these allegations do not support a case against him. The only instructions said to have been given by Mr Almheiri in relation to the P-Notes is the 10 September 2018 letter, and given that it is not said to have been dishonest, it does not support the case that he was party to their misappropriation. A failure to inquire or monitor is too vague to assist the Claimants and is not relevant to the allegation that he was party to a combination.

The June Agreement

57. Apart from the complaints about the inadequacy of the pleadings, Mr Almheiri relied on the fact that, as the Claimants plead, they entered into the June Agreement with Mr Alhammadi and some others of the Defendants. In her witness statement of 8 May 2024, Ms Hanlon said that this is material to the Strike-Out Application in two principal ways: firstly that any claim against Mr Almheiri as a joint tortfeasor would be compromised by a settlement against another joint tortfeasor, such as Mr Alhammadi; and secondly that, in a context of allegations of fraud, conspiracy and dishonesty, settlement with one alleged wrongdoer casts doubt upon the basis of the claim generally.

58. I am not impressed by the second point: there is too little evidence about the circumstances in which the June Agreement was concluded to draw any inference about whether the Claimants have arguable cases against Defendants who are not party to it.

59. As for the argument that the June Agreement operated to compromise the claim against Mr Almheiri and others alleged to have incurred joint liability with Defendants who were party to it, I accept Mr Hussain's starting point, which he formulated as follows: "*A release of one joint tortfeasor by way of accord or satisfaction will operate to release all the other joint tortfeasors. This is because joint liability gives rise to a single obligation and the release of one joint tortfeasor discharges the other persons jointly liable*". This proposition is clearly supported by Briggs LJ in *Gladman Commercial Properties v. Fisher Hargreaves Proctor & Ors.[2013] EWCA Civ 1466*, who said, "*At common law … (leaving aside statutory intervention) if A claimed to be the victim of a tort committed by joint tortfeasors, and if A obtained either a judgment against one or more of them, or the benefit of a settlement by which he released one or more of them, then subject to certain exceptions, A thereby released the others*: …". However, this general rule does not apply if the settlement agreement reserves a claimant's rights against other wrongdoers.

60. The June Agreement does not expressly reserve rights against persons who are not party to it, but I consider it arguable that it impliedly does so. It provides at clause 3.6 that recoveries from these proceedings from Defendants who are not party to the June Agreement should be deducted from what is payable to the Claimants: clause 3.6. Further, clause 13.5(a) requires the Claimants, upon other

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parties complying with certain obligations, "*expeditiously [to] do such things as may be necessary to withdrawn and discontinue the ADFM Proceedings as against the Settling Parties*" and certain other entities, but not as against Mr Almheiri and other Defendants. Similarly, clause 13.5(b) provides that the Claimants in those circumstances "*irrevocably waive all actual and potential claims and causes of action*" against the so-called Settling Parties and some other entities, but not against other Defendants, such as Mr Almheiri.

61. I emphasise that I express no concluded view about the effect of the June Agreement, not least because it is governed by UAE law and I heard no submissions about contractual interpretation and implied terms under UAE law.

Conclusions

62. I am not persuaded that Mr Almheiri's submissions about the June Agreement assist him on these applications. However, I accept his main argument that none of the versions of the Particulars of Claim discloses reasonable grounds for bringing any of the claims against Mr Almheiri.

63. The Claimants have had every opportunity for putting their pleading in order. It still does not set out a case against Mr Almheiri that is properly particularised or coherent or plausible. There is no reason to think that, given another chance, the Claimants could or would remedy those deficiencies.

64. Accordingly, I grant the Strike-Out Application, and I refuse the Amendment Application.

65. If the Claimants wish to make another application to amend their Particulars of Claim against the remaining Defendants, they are to do so within 21 days of my order pursuant to this judgment. If they do so, I shall give further directions and invite further submissions about how those claims should proceed.

66. Any applications about the costs of or associated with the Strike-Out Application and Amendment Application, or otherwise consequential upon my rulings on them, are to be made within 14 days of my order.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
23 May 2024