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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 359 OF 2009

BETWEEN:

AHMAD HAMAD ALGOSAIBI AND BROTHERS COMPANY

PLAINTIFF

AND:

(1) SAAD INVESTMENTS COMPANY LIMITED
(2) MAAN AL SANEA
(3) AWAL TRUST COMPANY LIMITED
(as trustee of the SAAD STAR TRUST)
(4) BARCLAYS PRIVATE BANK AND TRUST (CAYMAN) LTD
(as trustee of the SAAD SETTLEMENT)
(5) SAADGROUP LIMITED
(6) GOLDEN BELT 2 LIMITED
(7) GOLDEN BELT 3 LIMITED
(8) SNGULARIS HOLDINGS LIMITED
(9) SINGULARIS HOLDINGS (NO 2) LIMITED
(10) SINGULARIS HOLDINGS (NO 3) LIMITED
(11) SINGULARIS HOLDINGS (NO 4) LIMITED
(12) SINGULARIS HOLDINGS (NO 5) LIMITED
(13) AWAL FEEDER 1 FUND
(14) AWAL FINANCE COMPANY LIMITED
(15) AWAL FINANCE COMPANY (NO 2) LIMITED
(16) AWAL FINANCE COMPANY (NO 3) LIMITED
(17) AWAL FINANCE COMPANY (NO 4) LIMITED
(18) AWAL FINANCE COMPANY (NO 5) LIMITED
(19) AWAL FINANCE COMPANY (NO 6) LIMITED
(20) SAAD AIR LIMITED
(21) SAAD AIR (A340-600) LIMITED
(22) SAAD AIR (A320) LIMITED
(23) SAAD AIR (A320 NO 2) LIMITED
(24) SAAD AIR (A320 NO 3) LIMITED
(25) SAAD AIR (A320 NO 4) LIMITED
(26) SAAD AIR (A320 NO 5) LIMITED
(27) SAAD AIR (A380) LIMITED
(28) SAAD INTERNATIONAL BANK LIMITED
(29) SAAD ADVISORY HOLDINGS LIMITED
(30) SAAD CAYMAN LIMITED
(31) SAAD INVESTMENTS FINANCE COMPANY LIMITED
(32) SAAD INVESTMENTS FINANCE COMPANY (NO 2) LIMITED

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(33) SAAD INVESTMENTS FINANCE COMPANY (NO 3) LIMITED
(34) SAAD INVESTMENTS FINANCE COMPANY (NO 5) LIMITED
(35) SAAD INVESTMENTS FINANCE COMPANY (NO 8) LIMITED
(36) SAAD INVESTMENTS FINANCE COMPANY (NO 9) LIMITED
(37) SAAD INVESTMENTS FINANCE COMPANY (NO 10) LIMITED
(38) SAADGROUP FINANCE COMPANY LIMITED
(39) SAADGROUP FINANCE COMPANY (NO. 2) LIMITED
(40) SAADGROUP FINANCE COMPANY (NO. 3) LIMITED
(41) SAADGROUP FINANCE COMPANY (NO. 4) LIMITED
(42) SAADGROUP FINANCE COMPANY (NO. 5) LIMITED
(43) SAADGROUP FINANCIAL SERVICES COMPANY LIMITED

DEFENDANTS

Appearances: Mr. Ewan McQuater QC, Mr. Peter Hayden & Mr. George Keightley of Mourant for the Plaintiff

Mr. Stephen Phillips QC & Mr. Jan Golaszewski of Maples and Calder for the 3rd, 5th to 7th, 9th to 30th, and 38th to 43rd Defendants

Ms. Colette Wilkins of Walkers for the 1st, 8th, 31st to 33rd and 35th to 37th Defendants

Mr. Philip Boni of Higgs Johnson Truman Bodden & Co for the 4th Defendant

Ms. Jennifer Deacon of Harneys Westwood Riegels for the 34th Defendant

Mr. Shaun Folpp of Ogier for the Receiver

Before: Hon. Justice Henderson

Heard: September 29 & 30, 2009

JUDGMENT

1. In what circumstances may a plaintiff obtain Mareva injunction relief against a party where no cause of action is asserted against that party? That is the primary question to be resolved on this application.

Procedural History

2. On July 24, 2009 the plaintiff Ahmad Hamad Algosaibi and Brothers Company ("AHAB") applied *ex parte* to me for a Mareva injunction against all forty-three defendants freezing assets up to the amount of U.S. $9.2 billion dollars in and outside the Cayman Islands. This was coupled with the usual requests for disclosure of financial information and with a request for the appointment of receivers over the first, fifth, and eighth to forty-third defendants (collectively referred to as the "Cayman Saad companies"). All of the requested relief was granted.

3. A number of subsequent orders have been made concerning disclosure and giving directions to the receivers. On July 28, 2009 I granted leave to serve the second defendant, Mr. Maan Al Sanea ("Mr. Al Sanea"), outside the jurisdiction on the ground that he is a necessary and proper party to the claims brought against the defendants which are Cayman Islands companies. On September 17, 2009 I granted leave to the plaintiff to attempt to enforce my order in Jersey and to use some of the documents disclosed in compliance with the order in proceedings to be commenced in Jersey and in England.

4. The general endorsement on the writ of summons advances claims against the first, second and eighth to twelfth defendants only. All other defendants were joined for the sole purpose of obtaining Mareva relief against them. This application is brought by the third, fifth to seventh, ninth to thirtieth, and

thirty-eighth to forty-third defendants ("the applicants"). With the exception of the ninth to twelfth defendants, no cause of action is pleaded against these applicants; I will refer to them in this ruling as the "non-cause-of-action defendants."

5. The applicants say that the court has and had no jurisdiction to grant Mareva relief in relation to the non-cause-of-action defendants as a matter of law. They say also that the plaintiff failed on the *ex parte* application to make full and frank disclosure of the proper legal analysis concerning the position of the non-cause-of-action defendants. There is an alternative request for fortification of AHAB's undertaking as to damages. Although the appointment of the receivers is not directly in issue, their appointment would, in the case of the non-cause-of-action defendants, fall to be set aside if the applicants are successful.

6. Since this is the first opportunity for the applicants to address this court about the Mareva injunction, I have conducted a full hearing *de novo* in accordance with the usual procedure referred to in *Wea Records Ltd. v. Visions Channel 4 Ltd* [1983] 1 WLR 721. The "review" of an *ex parte* order is not in any sense an appeal.

Background

7. AHAB advances a claim in damages for conspiracy, deceit, and breach of fiduciary duty by Mr. Al Sanea coupled with allegations of misappropriation

and requests for declarations of its entitlement to trace assets, an accounting, and restitution. The same relief is claimed against the first Defendant, Saad Investments Company Limited ("SICL"), for its alleged participation in these acts. As against the eighth to twelfth defendants ("the Singularis companies"), there are claims in damages for conspiracy and deceit and for a declaration of entitlement to trace assets misappropriated by Mr. Al Sanea and paid to those defendants by SICL in breach of its own fiduciary duty. It is said that all such sums received by the Singularis companies are impressed with a constructive trust in favour of AHAB; restitution and an accounting are requested.

8. Mr. Yousef Ahmad Algosaibi ("Mr. Algosaibi") has been the chairman of AHAB since February 2009. In his affidavit evidence, Mr. Algosaibi explains that AHAB is a general partnership and a family enterprise which has carried on business in Saudi Arabia since 1969. It has extensive interests in manufacturing, travel, real estate, shipping and insurance.

9. One division of AHAB is an unincorporated business known until 2006 as the AHAB Money Exchange Commission and Investment (to which I shall refer as the "Money Exchange," despite its recent change of name). Mr. Al Sanea, who married into the Algosaibi family, has had the day to day responsibility of running the Money Exchange since 1981. He has never been a member of AHAB's board or its executive committee. The Money Exchange was run as an entirely separate business. The principal business of the Money Exchange has been the provision of remittance services inside and outside Saudi Arabia

and currency exchange. It has seven branches in Saudi Arabia but it is not licensed or regulated by the Monetary Authority there.

10. All instructions of significance provided to employees of the Money Exchange came from Mr. Al Sanea himself. Mr. Algosaibi says that his family members "did not interfere" in Mr. Al Sanea's management of the Money Exchange and he cannot recall ever having had substantive discussions with employees of the Money Exchange or its related financial businesses. Mr. Al Sanea, who was granted a 25% interest in the profits of the Money Exchange division, was entrusted with the sole authority to govern and guide its affairs.

11. He was also granted permission to borrow funds from the Money Exchange. A member of the Algosaibi family agreed to guarantee these debts and took some security for them from Mr. Al Sanea. According to Mr. Algosaibi, it was agreed that the indebtedness would not exceed about U.S. $610 million dollars and that adequate security would be posted. Mr. Algosaibi and AHAB were unaware of any indebtedness by Mr. Al Sanea to the Money Exchange which exceeded this limit. Mr. Algosaibi explains that the financial statements of the Money Exhange were consolidated with those of other entities and he did not receive any audit materials relating specifically to the Money Exchange.

12. In April, 2009 the directors of AHAB began to receive default notices from financial institutions in Saudi Arabia, the Middle East, Europe and the United States for very significant amounts regarding loans of which they were

unaware. In May, they hired Deloitte Corporate Finance Limited to investigate the circumstances of these unauthorized loans.

13. The Deloitte investigation has occupied approximately twenty-five to thirty professional investigators working in Bahrain, Saudi Arabia, England and the Cayman Islands. The investigation is ongoing. Its findings to date are summarized in an affidavit by Mr. Simon Charlton ("Mr. Charlton") sworn July 24th, 2009. Mr. Charlton's team has secured documents and electronic data at the Money Exchange premises and begun a review and analysis of the material. Many employees of the Money Exchange have been interviewed.

14. The Deloitte investigators have not had access to all of the relevant books and records. Mr. Al Sanea has removed some from the Money Exchange offices and stored them at a Saad company warehouse in Saudi Arabia. Mr. Charlton says that records prior to 2006, including original loan documents, are missing and that all original records from 2006 onwards are in the possession of Mr. Al Sanea or of companies controlled by him.

15. In general terms, Mr. Charlton alleges that Mr. Al Sanea has caused the unauthorized transfer of large amounts of money from AHAB or the Money Exchange to his own group of companies; has directed employees of the AHAB group to obtain loans from third parties in the name of AHAB which were neither needed by nor used for the benefit of AHAB; has transferred funds from AHAB accounts to accounts controlled directly or indirectly by Mr. Al Sanea; has used funds from AHAB for the purpose of paying expenses

of his own and of his companies; and has directed employees to falsify books and records and to provide false audit confirmations. He estimates that the loss caused to AHAB by these activities is approximately U.S. $9.2 billion dollars.

Allegations of Fraud

16. No later than 2004, Mr. Al Sanea began transferring large sums of money out of the Money Exchange into accounts in his own name or in the names of companies which he controlled. Mr. Charlton says that to fund these appropriations Mr. Al Sanea arranged for loans from third party financial institutions using AHAB's name. He also caused the Money Exchange to enter into split foreign exchange transactions which were, in substance, loans. The funds obtained in this way were deposited into accounts of the Money Exchange controlled, directly or indirectly, by Mr. Al Sanea himself.

17. The Money Exchange kept three accounting ledgers, referred to as ledger 90, ledger 91 and ledger 3. Many of the unauthorized loans and payments were recorded in ledger 3. Financial statements were prepared for the Money Exchange as a separate division, but there were also consolidated financial statements for the Money Exchange and other entities. The local auditors in Saudi Arabia reviewed all three ledgers and made adjustments between them but any consideration of ledger 3 appears to have been omitted from the consolidated statements published in English. Without the ledger 3 transactions, the Money Exchange appears to have net assets of about 5.8

billion Saudi riyals as at December 31st 2008; taking ledger 3 into consideration, a net deficit of approximately 8 billion Saudi riyals as at June 13th, 2009 is apparent.

18. The Deloitte investigators have retained a forensic document examiner who has examined some 144 documents purportedly bearing the signature of AHAB's Chairman. She says that these signatures are not genuine. These documents relate to transactions recorded in ledger 3 and involve loans and foreign exchange split value transactions. For example, reconstruction of the books and records by Deloitte identifies an apparent liability of AHAB to the Saudi Investment Bank in the amount of U.S. $426.3 million dollars. The indebtedness appears to have been obtained on the strength of forged documents provided by or at the direction of Mr. Al Sanea, including promissory notes, facility agreements, guarantees, and an undertaking. There are loan facilities from other Middle Eastern financial institutions obtained with instruments forged in a similar manner.

19. Mr. Charlton's affidavit provides an example of an allegedly fraudulent foreign exchange transaction. The Money Exchange purportedly purchased GBP 300 million on November 3rd 2008 from Saad Trading Contracting Company ("STCC"), an entity controlled by Mr. Al Sanea. In exchange, it sold U.S. $488,082,000 dollars at an exchange rate of 1.62694. On the same date, the Money Exchange purportedly sold the same number of GBP to STCC for U.S. $447,669,000 dollars at an exchange rate of 1.49223. Thus, as Mr. Charlton explains, the net effect of these two purported transactions was

that STCC would make a profit of U.S. $40,413,000 dollars at the expense of the Money Exchange. The email instruction to carry out these transactions was actually sent on November 27th; the November 3rd date was selected (allegedly) because the exchange rates on that particular day were favourable for the purpose.

20. Mr. Charlton says that Mr. Al Sanea caused the Money Exchange to open loan accounts and deposit accounts simultaneously and in the same amount for certain Saad entities under his control. No cash was received by the Money Exchange in support of the "deposits". An employee of the Money Exchange says that Mr. Al Sanea dictated the interest rates for each account; the interest on the Saad entity's deposit account was always higher than the interest that entity was charged on its loan account. For a single month (June 2008), Mr. Charlton has estimated the net interest gain to Mr. Al Sanea at approximately 12 million Saudi riyals.

21. There are a number of instances in which Mr. Al Sanea has caused allegedly false confirmation of deposits on account held at the Money Exchange to be issued to third parties. For example, at Mr. Al Sanea's direction, an audit confirmation was issued to PriceWaterhouseCoopers confirming that the Money Exchange owed the sum of U.S. $101,112,965.79 dollars as of December 31st, 2008 to Saad Group Bank Europe Limited. Mr. Charlton's team has been unable to locate such a balance in the books and records of the Money Exchange.

22. Foreign currency exchange transactions usually involve an exchange of currencies simultaneously or, at least, within a very short interval of each other. A "split value" foreign exchange transaction is one where the currencies are paid on different days, posing a credit risk to the party which pays first. Split value transactions involving the U.S. dollar and Middle Eastern currencies are not uncommon for a day or two because of the different weekend in those two regions. However, the split value transactions authorized by Mr. Al Sanea involved a gap of as many as seven days between the Money Exchange's receipt of U.S. dollars and its obligation to pay Saudi riyals. In effect, this sort of split value transaction amounted to short term borrowing by the Money Exchange because it had the use of U.S. dollars for up to a week before incurring its own obligation to pay. One hundred and sixty-four such transactions occurred between February, 2005 and May, 2009 with the Mashreq Bank. These transactions were carried out at an exchange rate above the fixed U.S.D./SAR exchange rate, providing a profit to the Mashreq Bank. In effect, the Money Exchange was borrowing from the bank on a short-term basis at very high rates of interest. Neither party was at any risk from exchange rate fluctuation so the premium paid by the Money Exchange was, in effect, the cost of borrowing. The sole purpose of these transactions appears to have been to disguise the fact of the short-term, high cost loans arranged by the Money Exchange.

23. Mr. Al Sanea frequently wrote and signed cheques payable to companies owned by him and under his control and drawn on the Money Exchange. He would then direct his staff to account for the payment by recording a debit to a

purported loan account in the Money Exchange's ledger 3. The most frequently used account was called "Saad Company Tamweel", which may be translated as Saad Company "investment" or "financing". Mr. Charlton says that this occurred several times per week and cheques for more than U.S. $1 million in a single day were not unusual. Because they were debited to ledger 3, these purported loans were not reflected in the published financial statements. Mr. Charlton says that there is no documentation concerning these loan accounts (other than the ledger 3 entries) in existence. No loan agreements, promissory notes, security agreements or other relevant documents have been found. Often, the funds were dispersed to a Saad Group company owned and controlled by Mr. Al Sanea which was not the purported borrower whose name appeared on the loan account. There is no evidence that any repayments have been either made or requested. For the period from 2007 through 2009, amounts debited to the Tamweel account total about 4.4 billion Saudi riyals, of which approximately 2.8 billion Saudi riyals can be shown (at this time) to have gone to Saad Group entities. As of May 31, 2009, the balance owing recorded in the Tamweel account was approximately 7.8 billion Saudi riyals.

24. Mr. Charlton says that Mr. Al Sanea has caused the Money Exchange to pay "very substantial" expenses on behalf of Saad Group entities without any apparent justification. These expenditures have been debited to a Money Exchange profit and loss account instead of a loan account in the name of the entity receiving the funds. Since 2007, approximately 330 million Saudi riyals

have been diverted from the Money Exchange in this way and posted to "commitment fees" in the profit and loss account.

25. Letters of credit worth approximately 1.3 billion Saudi riyals have been issued by the Money Exchange in favour of third party suppliers. These purported suppliers have provided invoices and the Money Exchange has "confirmed" the receipt of the relevant goods and services. Mr. Charlton says that in fact no goods or services were provided for the benefit or use of the Money Exchange; his suspicion is that they were actually provided to Saad Group entities or, perhaps more likely, that this was simply a "cash routing exercise." On the settlement dates, the Money Exchange would settle the letter of credit liability but there is no evidence that it has been reimbursed by the Saad Group entities.

The Corporate Structure

26. The third defendant, Awal Trust Company Limited ("ATCL"), is the trustee of the Saad Star Trust, a trust settled by Mr. Al Sanea. According to regulatory filings, the trust provides that Mr. Al Sanea is a "parent undertaking" of companies in which ATCL is a shareholder. Under the applicable regulations, this means that he exercises "dominant influence and control" over the trust. An email dated September 11, 2008 from the legal counsel for the Saad Group to the Assistant Financial Controller of Saad Financial Services S.A. explains that Mr. Al Sanea has the power to revoke the Saad Star Trust and cause its

assets to revert to him. Mr. Al Sanea is a director of ACTL and appears to have sole signing authority for it.

27. There is evidence (contained in a recital to a re-purchase agreement) that as at December 30th, 2008 ATCL was the sole shareholder of Saad Group Limited, the fifth defendant. Mr. Al Sanea is a director of Saad Group Limited and is apparently its sole signing authority. Saad Group Limited appears to be a top level holding company.

28. Saad Group Limited is the owner of many of the other defendant entities, including Saad Advisory Holdings (the twenty-ninth defendant), Saad Group Financial Services Company Limited (the forty-third defendant), Saad International Bank Limited (the twenty-eighth defendant), and the Singularis companies (defendants eight to twelve inclusive).

29. In December, 2008 Singularis Holdings Ltd (the eighth defendant) owned 2.97% of the share capital of HSBC Holdings PLC, an investment with a market value of about £2.3 billion pounds sterling. In January, 2009 Mr. Al Sanea caused Saad Group Limited to transfer its shares in the eighth defendant directly to him. He then, in August 2009, purported to vote his shares in Singularis Holdings Limited so as to place it in voluntary liquidation before it had complied with its asset disclosure obligations imposed by my *ex parte* order.

30. Saad Group Limited is also the owner of the first defendant, SICL. An annual report of SICL in 2008 asserts that Mr. Al Sanea is the Chairman of its board of directors and that the company acts as a "private investment company incorporated in the Cayman Islands which holds some of the offshore assets of Maan Al Sanea ... and his family". SICL owns Saad Investments Finance Company Limited, the thirty-first defendant, which owns the thirty-second defendant directly and the thirty-fourth to thirty-seventh defendants indirectly. It also owns the Awal Bank of Bahrain (currently under administration by the regulatory authorities there) and, indirectly, the thirteen to nineteenth defendants inclusive. Mr. Al Sanea has direct ownership of the thirtieth, thirty-eighth, and fortieth to forty-second defendants. He also owns 80% of Saad Air Limited, the twentieth defendant, which in turn owns the twenty-first to twenty-seventh defendants inclusive.

31. Mr. Charlton concludes his analysis of the corporate structure, based on information which has come to light so far, by asserting that "to the best of my knowledge, Mr. Al Sanea is also directly or indirectly the sole ultimate beneficial shareholder of the other applicants."

Events since the *Ex Parte* Order

32. Attempts to serve Mr. Al Sanea personally with my *ex parte* order have not been successful. Representatives of AHAB have tried to serve Mr. Al Sanea in Saudi Arabia but have been prevented from doing so by members of his personal security detail. On August 24th, 2009 Anderson, J. made an order

granting leave for substituted service. In any event, Mr Al Sanea is a director of a number of the corporate defendants who were served at their registered office on 27 July 2009. Maples and Calder's letter of 7 August 2009 to Walkers acknowledges that representatives of SICL and other defendants were provided with a copy of the order at 10.40 pm Cayman time on 27 July 2009.

33. Since the *ex parte* order, a number of the defendants have been placed into liquidation. On the petition of certain bank creditors, SICL was been placed in provisional liquidation on August 5th, 2009. Joint voluntary liquidators have been appointed for the thirty-first to thirty-seventh defendants. As mentioned above, Singularis Holdings Limited (the eighth defendant) was placed into voluntary liquidation by Mr. Al Sanea himself. This liquidation has been continued under court supervision.

34. My *ex parte* Mareva injunction contained the usual terms requiring disclosure by the respondents of information about the value, location and details of their assets. Singularis Holdings Limited has failed to provide any such disclosure and it is therefore unclear whether it still holds its 2.97% interest in HSBC. Singularis did make some disclosure prior to being placed into voluntary liquidation but, as Mr. Charlton explains, it disclosed "no information at all about its assets." The voluntary liquidators have made some attempts to comply with my order but their lack of prior familiarity with the affairs of the company has been a serious hindrance. Mr. Richard Fogerty, a voluntary liquidator, said that as recently as September 15, 2009 he had not been given any books and records of Singularis Holdings Limited and had no access to

any of the employees of the Saad Group who might possess pertinent knowledge. Disclosure by the other entities has been equally sporadic and incomplete.

35. On July 28, 2009, after it had already been served with my order, SICL transferred U.S. $60 million dollars to a Saudi Arabian company called Saad Specialist Hospital Company. This transfer occurred prior to the appointment of the joint provisional liquidators and at a time when Mr. Al Sanea was in control of SICL. The recipient company is wholly owned by Mr. Al Sanea in his personal capacity. Other transfers (for relatively small amounts) have also been made in breach of my order. Newspaper reports of September 17, 2009 suggest that Mr. Al Sanea has purported to enter into a settlement with his Saudi creditors which may, upon investigation, amount to a further breach of the order. Mr. Al Sanea has not attorned to the jurisdiction of this court. The inference that Mr. Al Sanea has no intention of complying with my order is irresistible.

Law

36. It is now well accepted that the Court has jurisdiction to grant a *Mareva* injunction against a defendant against which no cause of action is asserted where there is a good arguable case that assets apparently vested in that defendant are in fact owned beneficially by another defendant against whom a cause of action is asserted. If this can be shown, it demonstrates that the assets may be available to satisfy the plaintiff's claims if established at trial. This is

the so-called *Chabra* jurisdiction, first recognised in *T.S.B Private Bank International SA v. Chabra and another* [1992] 1 WLR 231 (Ch.D.). The non-cause of action defendants do not dispute this. They argue that there is no good arguable case that any present defendant against which a cause of action is asserted can be shown to own a beneficial interest in the assets of the non-cause of action defendants.

37. The *Chabra* jurisdiction derives from this brief passage in the judgment:

> "In brief, in the light of the plaintiff's evidence and the absence of any detailed evidence on the part of the defendants, I am of the view that there is a good arguable case that there are assets, apparently vested in the company, which may be beneficially the property of Mr. Chabra and therefore available to satisfy the plaintiff's claims against him if established at trial. I am also of the view that it is arguable that the company was, in fact, at relevant times the alter ego of Mr. Chabra and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established. There is support for the claims in the plaintiff's evidence, though they are not yet articulated in the statement of claim. Those claims have not been satisfactorily dealt with in the scant evidence adduced by the defendants."

38. The evidence in *Chabra* showed that a home, previously owned by Mr. and Mrs. Chabra, was registered in the name of a company against which no cause of action was asserted. The company was owned and controlled by Mr. and Mrs. Chabra. When the company listed its assets in response to the injunction, it failed to mention the home at all and asserted that it was "not aware of any other assets within the jurisdiction held by [it], whether in its own name, or by nominees, or otherwise" (at page 237). Mr. Chabra had not complied with the court's order for disclosure. Mummery, J. found a good arguable case for the proposition that the company was "nothing more than a convenient repository for Mr. Chabra's assets" (at page 240). Essentially, the inference was drawn

from the inconsistency in the available evidence of ownership and from the conflicting and incomplete disclosure concerning assets. The ultimate conclusion of the court was that the injunction against the company was "ancillary and incidental to" the claim against Mr. Chabra and therefore within the power of the court to grant.

39. An example of the exercise of the classic *Chabra*-type jurisdiction is found in *Mercantile Group (Europe) A.G. v. Aiyela and Others [1994] QB 366 (CA).* The wife of one of the defendants was made the subject of a *Mareva* injunction although no cause of action was asserted against her. She accepted, for the purpose of the hearing, that there was an arguable case that she held certain monies on trust for her husband, against whom there was a cause of action. The court had little difficulty upholding the injunction. Steyn, LJ noted that the decision did not amount to an expansion of the law as the wife, by holding assets of her husband in her name, had become mixed up in her husband's attempts to make himself judgment-proof (at page 376).

40. *Walker International Holdings Limited and Others v. Olerius Ltd and Others* [2003] CILR 457 (Smellie, CJ) is an example of the *Chabra*-type jurisdiction having been recognised and applied in the Cayman Islands.

41. The applicants have placed reliance upon *SCF Finance Co. Ltd v. Masri and Another* [1985] 1 WLR 876 (CA), a case in which the Court of Appeal addressed the way a court should proceed when faced with a claim by a third party to ownership of assets allegedly owned by a defendant. That is

essentially the converse of the case at bar. Their lordships said that a court is not obliged to accept such an assertion without an enquiry as to the facts, but neither is it obliged to hold an enquiry in every case. The judgment (at page 884) closes with a statement that

> "Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party ,,, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant."

42. The Court of Appeal was not asked in *Masri* to set out the boundaries of the jurisdiction to grant freezing orders over the assets of defendants against which no cause of action is asserted, and its judgment must be read in that light, and in the light of the later cases I will now mention.

43. Since *Chabra*, there has been a rapid and significant development in the law. The decision of the High Court of Australia in *Cardile v. LED Builders Pty Ltd* [1999] HCA 18 has been the catalyst. LED Builders commenced proceedings against a company ("Eagle Homes") owned and controlled by Mr. and Mrs. Cardile. The Cardiles incorporated a second company which appeared to be carrying on the business formerly done by Eagle Homes; the latter continued to do some business but was building houses with "plans which are likely to become commercially obsolete" (at para. 3). Eagle Homes had paid substantial dividends to the Cardiles in circumstances from which the Motions Judge drew the inference that assets of Eagle Homes which would otherwise be available to satisfy the judgment were being stripped from it in favour of the new company. The plaintiff did not say that it had any

expectation of establishing beneficial ownership in the Cardiles or in the new company of the assets of Eagle Homes; the argument was confined to the proposition that the assets of the Cardiles and the new company might ultimately be applied in discharge of any judgment against Eagle Homes.

44. The Court began by expressing its view that the proposition that *Mareva* relief against a third party must be limited to cases where that property can be shown to be beneficially owned by the defendant is "too narrowly expressed" (at para. 54). It considered, however, that the granting of *Mareva* relief where the possibility of beneficial ownership cannot be shown will be a "rare case." The court then said:

> "What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word "may", be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances which:
>
> i. the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including "claims and expectancies," of the judgment debtor or potential judgment debtor; or
>
> ii. some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor."

45. The Court assessed the payment of the dividends as a likely "non-commercial exercise" borne of a desire to frustrate the potential judgment creditor. The

injunction was granted against the third parties. Kirby, J., who wrote separately, provided a somewhat different formulation of the rule:

> "The suggestion that there is a universal rule that asset preservation orders of the *Mareva* type may not, or will not, be made against non-parties in the absence of proof that the party seeking such relief has a subsisting cause of action against that party (or that the judgment debtor has a proprietary or beneficial interest in the property held by the non-party), must be rejected. Judicial dicta which propose such strict rules are too broadly stated. At least this is so where such rules are intended to suggest a categorical requirement.
>
> To secure an asset preservation order in a case such as the present, it will be necessary for the party seeking it to show, in addition to the conditions ordinary to the grant of relief injunctive in nature that (1) there is a danger that the non-party will dispose of relevant assets or property in its possession or under its control; and (2) that the affairs of the actual or potential judgment debtor and the non-party are closely intermingled, and that the actual or potential judgment creditor has a vested or accrued cause of action against the non-party or may otherwise become entitled to have recourse to the non-party, its property and assets to meet the claim."

46. *Cardile* was first followed in England by Aikens, J in *C Inc PLC v. L Another* [2001] 2 Lloyd's Rep at 459 (QBD). Mrs. L. had failed to satisfy a demand for repayment of a loan and a judgment, which remained unsatisfied, was obtained against her. When the plaintiff obtained a *Mareva* injunction in aid of execution of its judgment against Mrs. L., she asserted that she had no assets – all of the family assets were in her husband's name. She said she held some shares in the plaintiff company as trustee or agent for her husband. The court found that Mrs. L. had, at least arguably, a right to an indemnity from her husband that could be enforced by the appointment of a receiver to satisfy the judgment out of his assets. There was no suggestion that Mr. L. held assets owned beneficially by his wife. On the question of whether a *Mareva* injunction was available against Mr. L., the Court said:

"The crucial question is whether the Court can go one stage further. Does it have the power to grant a freezing order against the assets of C when: (i) A has a substantive right against B (e.g. in the form of a judgment); (ii) the assets of C are not, even arguably, beneficially owned by B. The answer, to my mind, depends on how one interprets the phrases "ancillary" and "incidental to and dependent upon" used by Lords Browne-Wilkinson and Mustill in the *Channel Tunnel* case. In the *Cardile* case the High Court of Australia has, effectively, given those phrases a broad interpretation. But, critically, the High Court of Australia held that the right of A to a freezing order against C is dependent upon A having a right against B and that right itself giving rise to a right that B can exercise against C and its assets. Therefore the freezing order sought by A against C is "incidental to" A's substantive right against B and it is also "dependent upon" that right.

...I have concluded that, upon analysis, the English Court can and should adopt the same approach as the Australian High Court. Therefore the Court does have the legal power to grant a freezing order against Mr. L. Such an order is "incidental to" the substantive right that the claimant has against Mrs. L. The order is also "dependent upon" the substantive right that the claimant has against Mrs. L." (underlining added)

The underlined words appear to require that the plaintiff has, against a non-cause-of-action defendant, an existing right which arises directly from its cause of action against the wrongdoer. This somewhat restrictive reading of Cardile has not been repeated in subsequent decisions.

47. *Yukong Line Ltd v. Rendsburg Investments Corporation and Others* [2001] 2 Lloyd's Rep. 113 (CA) was a case in which the Court of Appeal was obliged to determine, for the purpose of an enquiry as to damages, whether a certain order had been made in exercise of the Court's *Chabra*-type jurisdiction. In the course of its judgment, the Court of Appeal provided this description of the nature and extent of the jurisdiction:

"Although it is plain that the Court's *Chabra*-type of jurisdiction will only be exercised where there are grounds to believe that a co-defendant is in possession or control of assets to which the principal defendant is beneficially entitled, it does not seem to me that the jurisdiction is limited to cases where such assets can be specifically identified in the hands of the co-defendant. Once the Court is satisfied that there are such assets in the possession or control of the co-defendant, the jurisdiction exists to make a

freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant. Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant's assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it. However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their proceeds are not readily identifiable in his hands it is open to the Court, where it is just and convenient to do so, to make an order which catches the co-defendant's general assets up to the amount of the principal defendant's assets of which he appears to have possession and control. That was in fact the position in *TSB v. Chabra* itself."

48. The decision in *Dadourian Group International Inc. and Others v. Azuri Limited* [2005] EWHC 1768 (Ch.) contains a review of prior decisions within the context of assets settled upon a trust for the purpose (it was alleged) of making the defendant judgment-proof. The court said:

"For my part, I do not believe it is necessary to establish beneficial ownership in a strict trust law sense. Clearly, if assets are held on a bare trust then the *Chabra* jurisdiction can be exercised. But, in my judgment, even if the relevant defendant to the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the *Chabra* jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to, the assets. The important issue, to my mind, is substantive control. The view expressed in *Gee on Commercial Injunctions 5th Edition 2004* at 13.007 is that if a network of trusts and companies has been set up by a defendant to hold assets over which that defendant has control and that this has, apparently, been done to make himself judgment-proof, then such would be an appropriate case for the granting of freezing relief against a relevant non-party. I agree. What needs to be considered is the substantive reality of control, not a strict trust law analysis as to whether the third party is a bare trustee. Thus, in my judgment, placing assets in a discretionary trust would not prevent the *Chabra* jurisdiction being exercised against that discretionary trust if the substantive reality were that the relevant defendant controlled the exercise of the discretionary trust. Any other analysis would entirely defeat the ability of the English courts to take drastic action and would allow the court's orders to be evaded by manipulations, entirely contrary to the court's powers and duties as identified by Robert Walker J in *International Credit and Investment Co*

(Overseas) Limited v. Adham (above). Whether this be described as identifying the discretionary trust as a "sham", as piercing the corporate veil, or as seeking to identify a controlled discretionary trust as a bare trust does not, to my mind, particularly matter. Certainly, at the interim stage, all that matters is to ascertain whether there is good reason to suppose that the relevant defendant controlled the assets in the discretionary trust."

49. *Dadourian* has been quoted with approval by the High Court of the Hong Kong Special Administrator Region in *Akai Holdings Limited (in Compulsory Liquidation) and others v. Ho Wing On Christopher and Others* (unreported) September 1st, 2009, a case involving assets settled upon a trust by the defendant against whom a cause of action was asserted.

50. The decision of the High Court of Australia in *Cardile* was again applied in England in *H.M. Revenue & Customs v. Egleton,* [2006] EWHC 2313 (Ch). Again, it was argued on behalf of the respondents that there was no jurisdiction to grant *Mareva* injunction relief against a party against whom no cause of action is asserted. The submission, essentially, was that *Chabra* describes the outer limits of the jurisdiction. This argument was rejected. In accepting and applying the *Cardile* decision, the Court said:

"The conclusions to which I have come on the question of jurisdiction are as follows. First, that the time has come for the English Courts to recognise, consistently with the carefully considered conclusion of the High Court of Australia, that the jurisdiction to grant freezing orders against third parties is not rigidly restricted by the *Chabra* requirement to show that, at the time when the order is sought, the third party is already holding or in control of assets beneficially owned by the defendant. However attractive that test is as a bright and focused boundary-line, it does not seem to me to accord with the dictates of justice and common sense. To take a simple example, it would operate so as to distinguish between a case in which the third party misappropriated an asset of the defendant and held on to it and a case in which in otherwise identical circumstances the third party misappropriated the asset and dissipated it. It makes no sense that the first of those third parties should be amenable to the freezing order jurisdiction whereas the second, however separately

wealthy, should not. In both cases the defendant or its officeholder would have an equally viable restitutionary personal claim, the frustration of which by yet further asset dissipation by the third party would in turn detract from the efficacy of any order for the winding up or bankruptcy of the defendant and from any prior judgment for which winding up or bankruptcy was a means of enforcement.

Secondly, it seems to me that once the relatively clear *Chabra* boundary line is breached, there is no wider boundary which has any sufficient clarity to serve as a workable condition to the existence of jurisdiction than the broad confines of the second limb of the principle in para.57 of the main judgment in *Cardile*. In particular, it seems to me that a rigid causation test is too narrow and potentially unjust, in particular because it would protect third party fraudsters who had in reality caused the claimant's loss from exposure to a freezing order while exposing honest third parties such as Mr L in the *C Inc* case because the claimant's claim was the cause of their exposure. By contrast, the supposed "sufficient connection" test which Mr Shaw sought to extract from the minority judgment in *Cardile*, while having much to say for it in terms of justice and common sense, and being similar to the test which identifies the circumstances in which a third party may, because he has become mixed up in the defendants' wrong doing, be obliged to assist the claimant with the provision of information, is by its nature so subjective and unfocused as to make it quite unsuitable as the boundary for the existence of jurisdiction. It may however be a valuable tool in the analysis of the question of discretion.

It follows that with all the misgivings attendant upon the opening of a potential Pandora's box, I reject the submission that the court had no jurisdiction to grant the freezing orders against the respondents in this case, or to continue them pending the appointment of a liquidator of C&E."

Analysis

51. From these decisions, I draw the following conclusions:

i. The *Chabra* jurisdiction is a part of the law of the Cayman Islands;

ii. The jurisdiction is most often exercised where there is a good arguable case that a cause-of-action defendant is the beneficial owner of assets in the possession of a non-cause-of-action defendant, but it is not confined to that situation;

iii. The jurisdiction is available against a non-cause-of-action defendant where a freezing order is ancillary and incidental to the effective enforcement of a prospective judgment because that defendant's assets may become available to satisfy the judgment;

iv. This may be so where the non-cause-of-action defendant has become mixed up in an attempt by a cause-of-action defendant to make himself judgment-proof and the assets or their proceeds are not readily identifiable in his hands (*Yukong, supra*);

v. The important question is whether there is good reason to suppose that the cause-of-action defendant exercises substantive control over the assets in the possession of the non-cause-of-action defendant (*Dadourian Group, supra*);

vi. The law in this area is evolving significantly and it is undesirable to deprive it of the necessary flexibility to address complex corporate relationships whose purpose (in whole or in part) may be to put assets beyond the reach of legitimate creditors (see the remarks of Robert Walker, J in *International Credit and Investment Co (Overseas) Ltd and Another v. Adham and Others* [1998] BCC 134 (Ch. D.);

vii. The limitation proposed in *C Inc, supra*, (that there must be a causal link between the cause of action and the subsequent right to claim against the non-cause-of-action defendant) has not found support in later decisions and does not represent the current state of the law;

viii. On an application of this sort, one question of importance is the degree to which those who are challenging the injunction have complied with their disclosure obligations under it;

ix. Uncertainty about the true ownership of assets or whether they might be available to satisfy a future judgment may count against an applicant where it could have, but did not, shed light upon the question of ownership by making appropriate and credible disclosure.

52. The ninth to twelfth, twenty-eighth, twenty-ninth and forty-third defendants are owned by Saadgroup Limited (Cayman), the fifth defendant. The sole owner of Saadgroup Limited is the third defendant, ATCL, the trustee of the Saad Star Trust. This trust was settled by Mr. Al Sanea and he has the power

to revoke it and cause its assets to revert to him. Mr. Al Sanea is a director of ACTL and Saadroup Limited and appears to be the sole signing authority for both entities. Clearly, he is in control of the assets of these non-cause-of-action defendants.

53. The thirteenth to nineteenth defendants are owned by the Awal Bank of Bahrain, which is in turn owned by SICL and Mr. Al Sanea. Saadgroup Limited is also the owner of SICL and thus Mr. Al Sanea also has control over the assets of this group of non-cause-of-action defendants.

54. The thirtieth, thirty-eighth, and fortieth to forty-second defendants are owned directly by Mr. Al Sanea. He also owns a controlling interest in Saad Air Limited, the twentieth defendant, which in turn owns the twentieth-first to twenty-seventh defendants inclusive. In summary, Mr. Al Sanea is shown on the available evidence to be in control of the corporate empire of which these applicants are a part. The risk of dissipation of assets by Mr. Al Sanea and by entities under his control is obvious.

55. SICL and the Awal Bank of Bahrain have been involved in the purported foreign exchange transactions (see Charlton 1, paragraphs 72 to 75), Singularis Holdings Limited (the eighth defendant) has been the beneficiary of false audit confirmations (Charlton 1, paragraph 84.9), and SICL has received transfers (directly and indirectly) from the Money Exchange in the amount of U.S. $1,232,125,661.45 dollars between January 1st, 2008 and April, 2009. These payments were matched by transfers from entities in the Saad Group to the

Money Exchange without any apparent commercial reason. Singularis Holdings Limited has received five payments from the Money Exchange (via other Saad accounts) in 2008 in the total amount of U.S. $634,999,928 dollars (see Charlton 1, paragraph 133 to 136). Mr. Charlton says he has discovered no legitimate commercial reason for these latter payments.

56. There is evidence that some of the non-cause-of-action defendants have been involved in allegedly fraudulent transactions. Mr. Charlton (in paragraph 131 of his first affidavit) says that Awal Trust (the third defendant) received payments from the Money Exchange in the amount of U.S. $200,000 dollars in November and December 2008. Employees of Saad Air Limited received salary payments in excess of SAR 80,000 from an AHAB account in January, 2008 without apparent reason.

57. In general terms, the unchallenged evidence before me demonstrates that the cause-of-action defendants have been the recipients of large sums of money from the Money Exchange and have benefited in other ways from the allegedly fraudulent conduct of Mr. Al Sanea. The non-cause-of-action defendants are part of a complex corporate structure owned and controlled by Mr. Al Sanea, either directly or through his indirect ownership of the cause-of-action defendants. It is not unreasonable to infer, as I do, that one purpose for which the non-cause-of-action defendants came into existence is to protect Mr. Al Sanea's assets from potential creditors. They assist in making him judgment proof and were likely intended for that purpose.

58. This conclusion must be weighed together with the breaches of my *ex parte* order mentioned above. SICL transferred U.S. $60,000,000 dollars to another entity in Saudi Arabia owned by Mr. Al Sanea after service of the order. The required disclosure, which might have shed further light on the beneficial ownership of money misappropriated from the Money Exchange, has been incomplete. The liquidators of the AWAL companies, the 13th to 19th defendants, have written to say that they wish the *Mareva* injunction to remain in place.

59. It seems probable that when the dust has settled and the true picture has emerged, the assets of many of the non-cause-of-action defendants may become available to satisfy a judgment against Mr. Al Sanea personally. As a result of all of these factors, I am satisfied that the injunction is indeed ancillary and incidental to the effective enforcement of any judgment the plaintiff may obtain and it should be maintained in effect for that purpose. For these reasons, the application to set aside my *ex parte* order is dismissed.

Fortification of Undertaking

60. When it obtained the *ex parte* order, AHAB provided the usual undertaking as to damages. The applicants now ask for fortification of that undertaking.

61. AHAB does not appear to have assets in this jurisdiction. It reported net assets as at December 31st, 2007 of U.S. $11.2 billion dollars. However, this takes no account of any liabilities AHAB may have incurred to lenders as a

result of the allegedly fraudulent activity of Mr. Al Sanea. Of course, any reduction of AHAB's net worth arising from these transactions would likely prove to be the direct result of the fraudulent activity which is the subject of AHAB'S claim.

62. In determining how and to what extent an undertaking must be fortified, I am required to make an "intelligent estimate" of the likely amount of any loss which may result from the granting of the injunction. (*In Re DPR Futures Ltd.* [1989] 1 WLR 778, at 786.)

63. I have no affirmative evidence from the applicants which suggests how or in what way they might suffer such a loss. Thirteen of the applicants claim to have no assets exceeding U.S. $10,000 dollars in value. Seven have failed to make any disclosure at all. Three claim to have no assets other than shares in other Saad Group companies.

64. The twenty-eighth and forty-third defendants are banks and have the requisite (for regulatory purposes) U.S. $1,000,000 dollars on deposit in Cayman bank accounts. The applicants have said that the forty-third defendant owns a bank in Malta with a value exceeding U.S. $100,000,000 dollars. They have relied upon a letter (not attached to an affidavit) indicating that the Malta Financial Services Authority has suspended the bank's licence. Three reasons are given for the suspension. It is said that all of the staff have resigned, which may have been precipitated by the *ex parte* order although there is no evidence of that. The second reason for the suspension is that the Malta authorities have

apparently concluded that the bank was simply a "shell" bank, a circumstance which seems unconnected with my prior order. The third reason is that the authorities suspect a "general lack of funds [in the bank] to pay off creditors beyond a certain timeline." My *ex parte* order contains the usual clause permitting any defendant to deal with or dispose of its assets in the ordinary and proper course of business. Assuming these repayments to creditors would take place in the ordinary course of the bank's business, the injunction will not prevent that.

65. Overall, the applicants have not been able to justify fortification of the undertaking in any amount which would bear a reasonable relationship to the amount frozen. There is no reliable evidence that any of the applicants might suffer any significant loss by virtue of this injunction. I am prepared to infer that some loss will necessarily be caused by the existence of the *Mareva* injunction but the applicants have not been able to justify a fortification order in anything more than what must seem, given the scale of the claims and the scope of the freezing order, to be a nominal amount.

66. I direct the plaintiff to fortify its undertaking by posting a guarantee from a Class A bank or the equivalent in the amount of U.S. $2,000,000.

Dated this 17th day of November, 2009

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS