

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION (ASCF)

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF SAAD CAYMAN LIMITED
(IN OFFICIAL LIQUIDATION)
FSD NO. 0015/2010

AND IN THE MATTER OF SINGULARIS HOLDINGS LIMITED
(IN OFFICIAL LIQUIDATION)
FSD NO. 0016/2010

AND IN THE MATTER OF SAAD INVESTMENTS FINANCE
COMPANY LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0041/2010

AND IN THE MATTER OF SAAD INVESTMENT COMPANY
(NO. 2) LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0040/2010

AND IN THE MATTER OF SAAD INVESTMENT COMPANY
(NO. 3) LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0036/2010

AND IN THE MATTER OF SAAD INVESTMENT COMPANY
(NO. 8) LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0037/2010

AND IN THE MATTER OF SAAD INVESTMENT COMPANY
(NO. 9) LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0038/2010

AND IN THE MATTER OF SAAD INVESTMENT COMPANY
(NO. 10) LIMITED (IN OFFICIAL LIQUIDATION)
FSD NO. 0039/2010

AND IN THE MATTER OF SAAD CAYMAN LIMITED
(IN OFFICIAL LIQUIDATION)
FSD NO. 035/2010

(COLLECTIVELY "the COMPANIES")

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 29TH DAY OF MARCH 2011

APPEARANCES: Ms. Collette Wilkins and Ms Shelley White for the JOLs.



Re-Issued Reasons for RULING

1. The JOLs of the Companies by this *ex parte* application, seek various forms of relief (i) to dispense with personal service upon Mr. Maan Al Sanea and so to order substituted service upon him instead; and (ii) to further order with an extension of time, the earlier orders made under Section 101/103 of the Companies Law and to attach penal notices to those orders.

Application to dispense with personal service

2. In its ruling of 26th November 2010 (with which this ruling should be read), this Court, being satisfied on the evidence before it that Mr. Maan Al-Sanea was deliberately seeking to avoid personal service, made an Order for substituted service upon Mr. Al-Sanea by service upon Messrs. Jeremy Walton and Graham Stoute of the local law firm of Appleby, the local legal advisers to Mr. Al-Sanea.

3. The Order for substituted service allowed for service by those means of orders requiring Mr. Al-Sanea to produce documentation belonging to the Companies. By the Order of 26th November 2011 the Court also required, under section 101 and 103 of the Companies Law (2010 Revision), (“the 1st section 101/103 Order”) that Mr. Al-Sanea must;

(i) Prepare and submit to the JOLs a statement of affairs for each of the Companies in Liquidation, verified by an affidavit of affirmation;

(ii) Provide those statements of affairs to the JOLs before the end of 21 days beginning the date after the notices issued pursuant to section 101 were served on Mr. Al-Sanea; and;

(iii) Delivery up to the JOLs of all property belonging to each of the

Companies which may be in his possession, custody or control (including

but not limited to certain specific property considered below).

4. On 8th December 2010, the Court further ordered Mr. Al-Sanea to attend the office of Dr. Al-Sawaf in al Khobar, Saudi Arabia at 9am on 4th, 5th and 10th January 2011 (or at such other place and time as agreed with the JOLs) to be examined in the manner set out in that order about the matters described in schedule 1 to that order ("the 8th December 2010 Order").

5. Written reasons for those orders were prepared and later delivered on 4th April 2011.

6. The 1st Section 101/103 Order and the JOLs' request for statements of affairs were served on 26th November 2010 and 29th November 2010. The letters of service conveying that Order and the JOLs' request on the 26th November 2010 was marked for the attention of Jeremy Walton of Appleby as opposed to Jeremy Walton and Graham Stoute, as per the Substituted Service Order. I find that nothing turns on this omission and specifically that it is not sufficient to invalidate service. Moreover, the letter accompanying the Order and the JOLs request on the 29th November 2010 was marked, as required, for the attention of both Jeremy Walton and Graham Stoute. I note also that in accordance with the Order for Substituted Service, the 8th December 2010 Order was served on 9th December 2010 upon Mr. Walton.

7. The matter is now before the Court on the basis of the Eighth Affidavit of Mr. Hugh Dickson. It states that notwithstanding the deemed service of the 1st Section

101/103 Order and the 8th December 2010 Order, Mr. Al-Sanea has failed to comply with any part of either of those Orders.

8. In correspondence with the JOLs, Mr. Al-Sanea's legal advisers claimed to reserve Mr. Al-Sanea's right to have the 1st Section 101/103 Order and the 8th December 2010 Order set aside but to date, no such an application has been made. Additionally, in correspondence, dated 13th December 2010, Mr. Al-Sanea's

legal advisers requested copies of any proceeding brought by the JOLs in Saudi Arabia against Mr. Al-Sanea and purported to reserve their client's position as regards the jurisdiction of this Court to make any orders in relation to him. In further correspondence dated 22nd December 2010, Mr. Al-Sanea's legal advisers raised the following points:

(1) Some of the documents which Mr. Al-Sanea was ordered to deliver up to the JOLs were already the subject of pending legal proceedings in Saudi Arabia. Further, this was not drawn to the attention of this Court at the *ex parte* hearing and, given that that question goes to the exercise of the Court's discretion, is a material non-disclosure.

(ii) The orders aimed at acquiring oral evidence and other information from a Saudi citizen in support of foreign legal proceedings were unlawful, as a matter of Saudi law, unless 'appropriate procedures in Saudi Arabia for obtaining recognition of their status as JOLs' were obtained.

(iii) That a Letter of Request should be issued to the Saudi Ministry of Justice through the Saudi Ministry of Foreign Affairs and if approved, the matter will be referred to 'the appropriate local court which will supervise the

taking of the evidence/information. Further, the failure to bring this Saudi Arabian legal requirement to this Court's attention at an ex parte hearing was another material non-disclosure.

(iv) Mr. Al-Sanea will not attend for examination until the requirements of the Saudi law are dealt with. Additionally, Saudi Arabian procedure requires the following;

(a) Oral examination in local court in Arabic;

(b) Foreign nationals appearing in the Court must have valid visas, entry permits, be licensed to practice in Saudi and be authorized by the Saudi Ministry of Justice to participate;

(c) The assigned judge to record and produce an official transcript;

(d) The proposed participant expressly confirming their willingness to comply with these procedures.

(v) That a confirmation of appropriate procedural requirements may be obtained by requesting an opinion from the Saudi Arabian court.

(vi) That the extensive volume and absence of structure of the materials on which Mr. Al-Sanea is sought to be examined is oppressive and prejudicial. Specifically, Mr. Al-Sanea's legal advisers allege that the materials were a 'mass of un-indexed documents' and 'not cross referenced to the wide ranging topics of examination or questions that are being proposed'. Further, the fact that these documents were not shown to the Court is another material non-disclosure.

(vii) That the Statements of Affairs be delayed or dispensed with until after the

oral examination of Mr. Al-Sanea.

Alleged failings of the JOLs upon the earlier application

I see the need to deal specifically only with certain of these complaints.

(i) Pending Applications before the Shari'a Court

10. The Affirmation of Dr. Mujahid Al-Sawwat (a Saudi Arabian legal adviser

engaged by the JOLs) evidences that two applications have been made in the Shiri'a Court in Al-Khobar. To date, the Shari'a court has made no substantive order in respect of either of those proceedings.

11. The first of those applications, filed on 30th March 2010 by the JOLs seeks the

delivery up of documents belonging to Saad Investment Company Limited ("SICL") which were removed from Saad Financial Services' office in Switzerland ("SFS"). The application is for SICL to be allowed to 'review and

take copies and extracts of...' those documents. On its face, the parties to that

application before the Shari'a Court are different to the parties in this application.

And, on the evidence before this Court, and while there may be some overlap

between the documents demanded for copying and review purposes in that

application and the documents belonging to the Companies ordered by this Court

to be delivered to the JOLs ; the basis on which the documents are sought here is

different.

12. The application brought in the Shari'a Court to the extent it relates to him, is

brought against Mr. Al-Sanea personally, whereas the application before this

Court for delivery of documents and the giving of a deposition is made under the

statutory rights and powers of the JOLs under the Cayman Islands Companies Law and directed at Mr. Al-Sanea in his capacity as a former officer of the Companies in respect of each of the Companies.

13. Notwithstanding those differences, in the Eighth Affidavit of Mr. Hugh Dickson the JOLs undertake that they will not seek to enforce the same relief against Mr. Al-Sanea in the Cayman Islands and Saudi Arabia, and by so doing seek to satisfy this Court that there will be no prejudice to Mr. Al-Sanea.

14. The second application to the Shari'a Court – that filed on 21st November 2010 by the JOLs – is an application made against Saad Specialist Hospital Company for “actual and real accounts for all transactions” which the plaintiff SICL has the right to review, copy and extract. Again therefore, there appears to be no overlap such that Mr. Al-Sanea can claim to be prejudiced by having to respond in that action as well as in this.

15. In particular, I consider the evidence of Dr. Mujahid Al-Sawat to be persuasive and find no evidence of prejudicial overlap between the documents that are the subject of pending legal proceedings in Saudi Arabia and the documents that are the subject of legal proceedings in this Court. Moreover, I accept Dr. Al-Sawat's evidence contradicting the other various assertions of Mr. Al-Sanea, as to the requirements of Saudi law and procedure as outlined in his complaints listed above.

(ii) Saudi Arabian law - procedural matters

16. The Affirmation of Dr. Mujahid Al-Sawaf indicates that having reviewed the procedural rules and regulations of each of the Board of Grievances and the General Courts of Saudi Arabia in their entirety;

(i) [T]here is procedure ... that establish requirements for depositing Saudi Arabians in non-Saudi Arabian court cases. ...

(ii) No foreign lawyers are licensed to practice law in Saudi Arabia – without exception. ...

(iii) [F]oreign nationals appearing before any court in Saudi Arabia must have a valid entry visa into Saudi Arabia, but not a residency visa. ...

(iv) There are no Saudi Arabia rules or regulations that contemplate an assigned judge for any such deposition in respect of a Saudi Arabian citizen in a foreign court proceeding, and there is no such thing as an 'official transcript of the proceeding' under Saudi Arabian law or regulations. ...

(v) There is no rule or regulation which requires that a participant 'expressly confirm [his] willingness to comply with certain procedural requirements of Saudi Arabian law', ...

(vi) [J]udgments of foreign courts and tribunals have not been recognized and enforced by the courts of the Kingdom of Saudi Arabia.

17. [T]here is no procedure available in Saudi Arabia by which the Joint Official Liquidators of the Cayman Islands companies can request an opinion from a court in Saudi Arabia confirming the alleged procedural requirements. Mr. Al-

Sanea's legal advisers claimed that this Court's orders to acquire oral evidence and other information from a Saudi Citizen in support of foreign legal proceeding were, as a matter of Saudi law, unlawful unless 'appropriate procedures in Saudi Arabia for obtaining recognition of their status as JOLs' were obtained. The affirmation of Dr. Mujahid Al-Sawwat confirms that there are no procedural requirements imposed by the Saudi Arabian Court with regard to a Cayman Islands Court order for the examination of Mr. Al-Sanea.

18. I find the opinion of Dr. Mujahid Al-Sawwat to be persuasive on those matters also and accordingly, I find that there is no basis for a conclusion that compliance with the 1st Section 101/103 Orders and the 8th December 2010 Order would give rise to Mr. Al-Sanea being in breach of the rules and regulations to be applied by the Shari'a Court, as alleged.

(iii) Letter of request

19. As to the complaint that the JOLs should have sought the issuance of a letter of request: the Companies Law (2010 Revision) section 103(7)(b) does confirm this Court's jurisdiction to issue letters of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person outside the jurisdiction.

20. Further, in relation to the power of this Court under GCR O.39 r.1 to order that depositions may be taken from persons; rule 2 provides where a person to be examined is out of the jurisdiction as follows:

2. (1) *Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made –*

(a) for an order under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; ...”

21. It is clear however, that those rules contain no mandatory requirement that an application must be made to this Court to issue a letter of request where depositions are to be taken overseas. There being- as I have accepted from Dr. Al-Sawwar's evidence- no mandatory requirement of Saudi law in that regard either, I find that there was no failure on the part of the JOLs in not having raised the question of the issuance of letters of request with this Court.

(vi) Disclosure of document to the court and the oppressive nature of the request

22. The Company Winding Up Rules 2008 (as amended) (CWR) do not require the Court to be shown the documents on which the examinee is to be examined under the section 101/103 Orders.

23. CWR Order 7 rule 2(4)(a) provides that:

- “(4) In the case of an order for oral examination, the order shall –
- (a) contain a statement which discloses to the examinee the matters about which he will be examined;
 - (b) specify the time and place of the examination; and
 - (c) specify the maximum duration of the examination.

24. In addition, CWR Order 7 rule 3(6) provides;

- (6) The examinee shall be given an opportunity to review all the documents intended to be put to him in advance of the examination, for which purpose the official liquidator may –
 - (a) provide the examinee with copies; and/or
 - (b) require the examinee to review the originals at his office.

25. It is clear from the affidavit evidence, in particular that of Mr. Hugh Dickson and

Dr. Al-Sawaaf, that the JOLs complied with the disclosure requirements of CWR Order 7. Further, given that these documents have been in Mr. Al-Sanea's possession for more than three months which is ample time to become familiar with the documents, there is no evidence that would support a conclusion of prejudice to or oppression of Mr. Al-Sanea.

Ex parte nature of this application

26. The Court also notes that notwithstanding the *ex parte* nature of the current application, the legal representatives for Mr. Al-Sanea were informed of it and provided with copies of the summons and other documents relevant to this application. I also record that the foregoing objections raised by them were brought to my attention by Ms. Wilkins, on behalf of the JOLs.

Jurisdictional challenge

27. The legal advisors for Mr. Al-Sanea made the point that they reserve their clients' position with regard to the jurisdiction of the Cayman Court over Mr. Al Sanea. By this they deny the Court's jurisdiction in relation to him and assert that Saudi Arabia is the proper forum for the resolution of the dispute. This is however a belated objection on Mr. Al Sanea's part, insofar as the JOLs' applications for Section 101/103 and related relief is concerned. In this context, my view accords with the decision in Mansour v Mansour [1989] FLR 418 where Lord Donaldson MR held:

"For my part, I think much the most important consideration was

that the application was made so late. If people want to raise the

- 31. In that respect GCR Order 45 rule 6 provides:
for these purposes.
the general applicability of the Grand Court Rules ("GCR") as they would apply
Sanea personally such that the CWR, in my view, do not operate so as to affect
- 30. These are applications which would thus result in penal orders directed at Mr. Al
orders.
to be done within a further time limit and to attach a penal notice to these new
Orders and the 8th December 2010 Order, but which provide for the required acts
make further orders that are in substance the same as the 1st Section 101/103
- 29. In light of the foregoing, the Court is requested, by the JOLs' present summons, to

Order under Grand Court Rules Order 45 with penal notice

- 28. Having failed to appear at all in opposition either to the 1st Section 101/103
application or to these applications, I think it is far too late now for Mr. Al Sanea
to be seeking to rely on this jurisdictional challenge.

is made."
issue that the action would be more conveniently tried in a foreign
court they should do so at the very outset before costs are incurred
in the proceedings. ... I think it is of paramount importance that
any application of this nature, which in effect is in much the same
position as an application based upon the proposition that the
court has no jurisdiction, should be made at the outset and that no
steps or very minimal steps, should be taken in the action before it

“(1) Notwithstanding that a judgment or order requiring a person to do an act to be done within another time, being such time after service of that order, or such other time, as may be specified therein.

(2) An application for an order under this rule must be made by summons and the summons must, notwithstanding anything in Order 65, rule 9, be served on the person required to do the act in question.” (emphasis added)

32. GCR Order 45 rule 7(2) requires that an order shall not be enforced under rule 5 (which provides for sequestration of assets or committal) unless;

“(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.” (emphasis added)

33. Further and notwithstanding all of the foregoing rules, Order 45 rule 7(7) provides:

“Without prejudice to its power under Order 65 rule 4, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.” (emphasis added)

Order to dispense with personal service

34. Notwithstanding that GCR Order 45 rules 6 and 7(2) require personal service, in this instance, being satisfied on the evidence before me that in this and in previous proceedings Mr. Al-Sanea has sought and still seeks to evade personal service, I find that it is just to dispense with personal service by the invocation of rule 7(7).

35. In addition to Order 45 rule 7(7), GCR Order 65 rules 1 and 4 preserve the power of the court to dispense with personal service where they provide:

“When personal service required (O.65, r.1):

"There is nothing on the face of that rule [(that is: RSC Order 11 as it then was)] which limits the discretion of the court under O. 52 r. 4(3). No doubt it is a factor to be taken into consideration that the respondent to the notice of motion is resident abroad but, for my part, I cannot see that other rules fetter this rule. ... I cannot see why, if it is appropriate, if it is just, to dispense with service,

MR held that:

GCR Order 45 rule 7(7) as it then appeared in RSC O. 52 r. 4(3). Lord Donaldson jurisdiction in Egypt. The question involved the construction of the equivalent of motion for committal notwithstanding that the defendant resided outside the to consider the appropriateness of dispensing with personal service of a notice of The case of Mansour v Mansour (above, *ibid*) was a case in which the Court had

37.

so".

substituted service in circumstances such as these, if the Court "thinks it just to do together with GCR O.65 4.4(4) preserve the power to make an order for of an order which is to be backed by a penal notice. However, sub-rule 7 (7) Order 45 rules 6 and 7(2) would be to require personal service upon Mr. Al Sanea

36.

The effect of GCR Order 45 rule 6 sub-rules (1) and (2) when read with GCR

"(4) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document." (emphasis added)

And O.65, r.4 provides that:

(2) Paragraph (1) shall not affect the power of the Court under any provision of these Rules to dispense with the requirement for personal service."

(1) Any document which by virtue of these Rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these Rules or by order of the Court is required to be so served.

40. Accordingly, in this instance where the person required to do the ordered act seeks to evade personal service and the evidence supports the conclusion that he is aware of the summons and the present proceedings, I conclude that it is just that the Court exercises its discretion to dispense with personal service. I so order.

of the JOLs' intention to make this application.

39. In the present case, the correspondence between the JOLs' legal advisers and Mr. Al-Sanea's legal advisers and, by extension, Mr. Al-Sanea himself, were made aware of the JOLs' intention to make this application. Further, by correspondence from the JOLs legal advisers dated 14th February 2011, Mr. Al-Sanea's legal advisers provided evidence that the summons for this application – issued on 21st March 2011 - did come to the notice of Mr. Al-Sanea. In the present case, the correspondence between the JOLs' legal advisers and Mr. Al-Sanea's legal advisers and, by extension, Mr. Al-Sanea himself, were made aware of the JOLs' intention to make this application.

2002 CLR 591).

Opportunity and others v Telesystem International Wireless Inc. and others

Bank NV London Branch (CICA 13, 14 15 and 16 of 2009) and CVC

Sanea CICA 8 of 2010; HSH Cayman I GP Ltd and others v ABN AMRO

Brothers Company v (1) SAAD Investments Company Limited (2) Maan Al

orders – itself a clear requirement of the case law: Ahmad Hamad Algosabi and

which are intended to afford protection to those charged with a breach of its

this Court is mindful of the need to give strict effect to the procedural safeguards

38. Notwithstanding that dicta and the clear power to dispense with personal service,

*one should be concerned with leave [to serve upon the defendant
outwith the jurisdiction as required by Order 11].*

Notice of penal consequences

41. As noted above, the Court is requested to attach penal notices to the orders requested in this application. Effectively, a penal notice serves to put Mr. Al-Sanea and his legal representatives on notice that failure to comply with the relevant Orders without lawful excuse would be a contempt of court and as such could attract penal consequences which could include imprisonment.

42. The Court's power to compel a person to obey its orders is provided by GCR Order 45 rule 7(4) which states;

“(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served –

(a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it;*(emphasis added)*

43. In addition, GCR Order 52 rule 9 provides the Court with the power to amend a penal notice to include the potential liability to a fine as well as (or instead of) sequestration or imprisonment.

44. Specifically, GCR Order 52 rule 9 provides;

“9. Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order requiring a person guilty of contempt of the court, or a person punishable by virtue of any enactment in like manner as if he had been guilty of contempt of the Court, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal.”

45. It is common ground that Mr. Al-Sanea has, to this date, not complied with the 1st Section 101/103 Order or with the 8th December 2010 Order. On the evidence

before the Court, Mr. Al-Sanea's legal advisers and, by extension, Mr. Al-Sanea himself, were first warned of the JOLs' intention to make this application by the JOLs' legal advisor's letter of 14th February 2011. That letter, to which no response was received, notes Mr. Al-Sanea's breach of the 1st Section 101/103 Order and the 8th December 2010 Order and invites proposals for cooperation. The JOLs have indicated that they remain hopeful that Mr. Al-Sanea will cooperate voluntarily with their request. Notwithstanding, in the interest of extending every further opportunity to Mr. Al-Sanea to comply with its orders, I grant the further orders requested which will now provide that compliance should be within twenty one days from the date of deemed service of the Orders now made.

46. On its face, there is nothing which limits the discretion of the court to issue a penal notice where it is just to do so. Indeed, the fact that Mr. Al-Sanea is out of the jurisdiction is 'merely a factor to be taken into consideration'; (*Mansour v Mansour (above, ibid.)*)

47. The need to avoid the waste of the costs incurred and to be incurred by the JOLs in the preparation of any examination of Mr. Al-Sanea, militate in favour of making a penal order. Additionally, the penal consequences of such an order militate in favour of attaching the penal notice so that there can be no uncertainty about the consequences.

48. Accordingly, I find that it is just to attach a properly indorsed penal notice to the further orders granted upon this application. I observe that the penal notice ordered is in a similar form to that which was accepted by this Court in

Telesystem International Wireless Incorporated and others v CVC/Opportunity

Equity Partners LP and others [2002 CILR 96] and subsequently affirmed by the

Court of Appeal [2002 CILR 591].

49. The Court specifies a deadline of seven days from the date of deemed substituted service in which Mr. Al-Sanea may make an application to set aside the Orders

made on this application.

Hon. Anthony Spellicci
Chief Justice

Oral Reasons given on 29th March 2011
Written Reasons issued on 1st June 2011
and re-issued as corrected on 14th June 2011

