IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 150 OF 2020 (NSJ)

IN THE MATTER OF SECTIONS 145 AND 146 OF THE COMPANIES LAW (2020 REVISION)

BETWEEN

SIMON CONWAY, MICHAEL JERVIS AND MOHAMMED FARZADI AS JOINT OFFICIAL LIQUIDATORS OF ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)

Plaintiffs

AND

THE GHF GROUP LIMITED

Defendant

IN CHAMBERS

Before:	**The Hon. Mr Justice Segal**
Heard:	**16 November 2021**
Appearances:	**Mr Stephen Atherton QC and Sarah Tresman instructed by Walkers on behalf of the Defendants** **Mr Tom Smith QC instructed by Peter Sherwood of Carey Olsen on behalf of the Plaintiffs**
Draft judgment circulated:	**7 February 2022**
Judgment delivered:	**14 February 2022**

HEADNOTE

Application for further and better particulars of the Plaintiffs' statement of claim

JUDGMENT ON THE DEFENDANT'S APPLICATION FOR FURTHER AND BETTER PARTICULARS OF THE PLAINTIFFS' STATEMENT OF CLAIM

Introduction

1. This is my judgment following the hearing of an application by the GHF Group Limited (the ***Defendant***) for further and better particulars. The application is made by a summons dated 11 June 2021 (the ***First Summons***) in the proceedings commenced against the Defendant by the joint official liquidators (***JOLs***) of Abraaj Holdings (***AH***) with cause number FSD 150 of 2020 (***FSD 150***) and seeks further and better particulars of the JOLs' amended statement of claim, which was amended on 28 May 2021 but had originally been dated 30 June 2020 (the ***SOC***). The application was heard on 16 November 2021. The Defendant was represented by Mr Stephen Atherton QC and the JOLs were represented by Mr Tom Smith QC.

2. There was also a second application for further and better particulars that was listed to be heard at that hearing. This second application was made by a summons dated 17 June 2021 (the ***Second Summons***) issued in proceedings commenced by Mr Jafar against AH, GHF General Partner Limited (***GPL***),), the Defendant and Abraaj General Partner VIII Limited (***GP***) with cause number FSD 203 of 2020 (***FSD 203***). In the Second Summons, the Defendant applied for an order that AH, as the first defendant, file and serve further and better particulars of AH's defence in FSD 203. However, the hearing of the Second Summons was adjourned by consent following the letters sent on 13 November 2021 by Mr Jafar's attorneys, Nelsons, in which they informed the defendants in FSD 203 of Mr Jafar's intention to apply for leave to make substantial amendments to his statement of claim

3. The background to these proceedings is set out in two judgments of mine in FSD 203. These are my judgment dated 10 August 2021 dealing with security for costs and my judgment dated 20 December 2021 dealing with Mr Jafar's application for leave to amend his statement of claim.

4. In the First Summons the Defendant applied for an order pursuant to GCR O. 18, rule 12(2) that the JOLs file and serve further and better particulars of the SOC. The application was supported by the First Affidavit of Mr Richard Lewis (***Lewis 1***), who is a director of GPL, which is itself the director of the Defendant.

5. The further and better particulars that the Defendant now seeks are a sub-set of the request for further and better particulars dated 2 November 2020 (***RFBPs***). The RFBPs listed 268 requests. The JOLs provided responses to some (60) of the requests in a document dated 4 December 2020 (the ***Responses***). The Defendant asserted that the Responses were inadequate and that it was entitled to fuller responses to many of the requests which had been answered in the Responses and responses to all of RFBPs which had not been answered by the JOLs. However, adopting what it called a pragmatic and expedient approach, the Defendant decided only to require responses or further responses to some of the allegedly incomplete Responses or unanswered RFBPs. It prepared a schedule of the requests which it required to be answered (the ***Pursued Requests***). There are 199 Pursued Requests.

6. FSD 150 and FSD 203 are related proceedings which are being tried together pursuant to GCR Order 4, rule 4(1) and jointly case managed (but not consolidated) with another set of related proceedings, namely FSD 158 of 2020 (***FSD 158***). In FSD 158 the JOLs also seek to recover other payments made by AH to another Abraaj related entity called Neoma Private Equity Fund IV L.P. (***APEF IV***), which is a limited partnership domiciled in this jurisdiction, whose general partner was GP.

The proceedings

7. Various claims have been made and proceedings commenced following the collapse of related entities, funds and partnerships that operated using the Abraaj name. In FSD 150, the JOLs seek to recover payments made (the ***Payments***) by AH to the Defendant in December 2017 and January 2018. The JOLs rely on two causes of action. First, that the Payments were dispositions of AH's property at an undervalue with intent to defraud its creditors and voidable under section 146 of the Companies Act (2021 Revision) (the ***Act***) (the SOC refers to the Companies Law (2020 Revision) but I shall just refer to the Act). Secondly, and additionally or alternatively, that (some of) the Payments (defined as the ***Repayments*** for this purpose) were voidable preferences under section 145 of the Act. In FSD 158, the JOLs seek to recover other payments made by AH to APEF IV. These other payments were made in similar circumstances to the Payments challenged in FSD 150 and the JOLs' amended statement of claim in FSD 158 is in similar terms to and relies on the same causes of action as those included in the SOC. FSD

203 involves a claim by Mr Jafar against various defendants including AH and the Defendant arising out of loans which he claims to have made to AH and AH's subsidiary, Abraaj Investment Management Limited (***AIML***) shortly before the Payments, from which loans some of the Payments are said to have been made. In FSD 203, following my granting his application for leave to amend, Mr Jafar seeks damages for deceit and orders reversing enrichment without cause as a result of the three loans which he claims to have made to AH AIML. AIML is also in official liquidation in this jurisdiction.

8. The procedural state of play in FSD 150 up to the date on which the First Summons was heard and the chronology in this action, FSD 150, can be summarised as follows. The original SOC was dated 30 June 2020; the RFBPs were dated 2 November 2020; the Responses were dated 4 December 2020; the Defendant served its Defence and Counterclaim on 12 February 2021; the JOLs' Reply and Defence to Counterclaim was dated 14 May 2021; the SOC was amended on 28 May 2021; the Pursued Requests were dated 11 June 2021, on which date the Defendant issued the First Summons, and on 23 June 2021 the Defendant issued a request for further and better particulars of the Reply and Defence to Counterclaim.

The SOC

9. The SOC contains 41 paragraphs. It is a relatively brief and concise document. It can be summarised as follows:

   (a). the introduction deals with the date on which AH was wound up and the relevant statutory provisions relating to the JOLs' claims.

   (b). AH is described as having served "*as the ultimate holding company for the Abraaj group of companies*" (defined as the Abraaj Group), which group is said to have been founded by Mr Arif Naqvi and to have "*comprised a number of private equity funds (the Abraaj Funds)"* which included GHF Fund L.P., a Cayman limited partnership (defined as the Healthcare Fund), whose general partner at all materials times was Abraaj Growth Markets Health Fund General Partner Limited (defined as Healthcare GP). AIML is said to have acted as the investment manager for the Healthcare Fund and Healthcare GP.

(c). the SOC alleges that Mr Naqvi had plenary control over AH, the Abraaj Group, and the Abraaj Funds. It is averred that Mr Naqvi was at all times relevant to the proceedings:

(i). the "*directing mind and will of [AH] and exercised plenary control over [AH] and other companies within the Abraaj Group*" (paragraph 10). Particulars of these averments are then provided. Mr Naqvi is said to have been the founder and leader of the Abraaj Group and the SOC refers to AH's board of directors and avers that "*the board was dependent on Mr Naqvi for information about [AH] and the Abraaj Group [and that] management of [AH] was carried out by the management under the control of Mr Naqvi.*" References are made to AH's articles of association. The SOC then refers to Mr Naqvi's asserted role in relation to other members of the Abraaj Group, including his position as a director of AIML, as chairman of the Global Investment Committee, and it is averred (at [10.6]) that "*all major decisions relating to the management of the Abraaj Group were made by Mr Naqvi and the senior management of [AH] and the Abraaj Group universally and/or routinely acted on Mr Naqvi's instructions and/or allowed Mr Naqvi to undertake transactions without oversight or control*" and that Mr Naqvi "*exercised close control and supervision over the financial position of the Abraaj Group*" and was "*the public face of Abraaj*."

(ii). the "*directing mind and will of the Healthcare Fund and the Defendant and exercised plenary control over Healthcare Fund and the Defendant*" ([11]). Particulars of these averments are then provided. Mr Naqvi is said to have been the investment adviser to the Healthcare Fund, described as a key person in the Healthcare Fund's limited partnership agreement and as "*Head of the Fund*" in the Healthcare Fund's private placement memorandum and to have had signatory authority on all Healthcare Fund bank accounts. It is averred that the "*Directors and officers of the Healthcare GP and the Defendant routinely followed Mr Naqvi's instructions and directions and key decisions … were submitted to Mr Naqvi for approval"* and that Mr Naqvi corresponded directly with certain Healthcare Fund investors.

(d). it is alleged that there were liquidity problems and the "*commingling*" of cash across the Abraaj Group and Abraaj Funds. It is averred that from "*as early as 2012 and at all times relevant to these proceedings, there was extensive "commingling" of cash across entities within the Abraaj Group and the Abraaj Funds (including the Healthcare Fund) to meet liquidity needs of particular entities*" ([12]). It is further averred that this included a lack of segregation of Abraaj Group and Abraaj Funds cash "*which was frequently pooled in three bank accounts in the name of AIML*", that capital contributions made by certain investors in the Abraaj Funds (including the Healthcare Fund) were used to meet the needs of other entities and that AH borrowed heavily between 2013 and 2017 to "*fund losses elsewhere in the Abraaj Group and replace cash that was "missing" from Abraaj Funds*." It is further averred that by 22 June 2017, which was immediately before the end of its financial year, the Healthcare Fund was missing approximately US$196 million and that in order to avoid this being disclosed in the Healthcare Fund's audited financial statements for 2017 a short-term loan to the Healthcare Fund was arranged, which was repaid shortly after the end of the financial year. It is also averred that in September and October 2017, certain investors in the Healthcare Fund asked for evidence that their capital contributions were still held by the Healthcare Fund and having failed to receive adequate evidence demanded the return of all unutilised investments. As a result, "*under sustained pressure, Mr Naqvi informed the investors that the unutilised and uncommitted investments would be returned to Healthcare Fund investors by 31 December 2017*." It is also averred that funds were also missing from APEF IV which would have to be returned by 30 December 2017.

(e). the SOC alleges that there was in December 2017 a cash shortfall and that external finance was raised to bridge the shortfall. It is averred (in [17]) that in early December 2017 "*Mr Naqvi and an inner circle of other trusted Abraaj Group executives reviewed the consolidated cash position and funding requirements of the Abraaj Group and Abraaj Funds for that month*" and that this showed that US$174.7 million had to be returned to APEF IV before its financial year end on 31 December 2017; that US$112.1 million needed to paid "*in respect of the Healthcare Fund's underlying investments and projects*" and that US117.9 million would have to be returned by the Healthcare Fund to

its investors by 15 January 2018. It is further averred (in [19]) that "*Despite AH's insolvency, Mr Naqvi arranged for AH to raise US$100 million*" via a company that he owned and controlled. This company (Abraaj Employees 2 SPC Limited) sold shares in AH and then paid the proceeds to AH (in discharge of loans made to it by AH to fund the purchase of the shares). It is also averred (in [20]) that between 21 and 28 December 2017 Mr Naqvi arranged for AH and AIML to borrow the equivalent of US$350 million from Mr Jafar. These payments are the subject of FSD 203 in which Mr Jafar claims that he was misled into making the payments as loans and seeks to recover the losses he claims to have suffered as a result.

(f). the SOC identifies the Payments made to the Defendant totalling US$109,061,496 between 23 December 2017 and 23 January 2018. It is averred that the Payments were made "*at the instigation and direction of Mr Naqvi*" and brief particulars refer to the "*decision to return unutilised cash to investors by 31 December 2017 [having been] made by Mr Naqvi*" and to the Payments having been authorised by individuals "*on the instructions of Mr Naqvi*." It is averred that the Payments were "*recorded in the books and records of the Abraaj Group, including the general ledger of [AH] and AIML, as increases in the intercompany debt owed by AIML to AH*" (which debt is defined as the ***AIML Receivable***).

(g). the SOC sets out the "*First Cause of Action: Disposition at an undervalue pursuant to section 146 of the Act*":

(i) the SOC avers that the Payments "*constituted a disposition of [AH's] property by AH"* which were "*made at an undervalue because at the time each of them was made, AIML was hopelessly insolvent on both a cash-flow and balance sheet basis and consequently no consideration was received by [AH]"* ([26]). The SOC then sets out particulars of AIML's alleged insolvency. It is also averred that "*the incremental increase in the AIML Receivable was worth significantly less than the value of the Payments because of AIML's insolvency.*"

(ii). the SOC then avers that AH was also insolvent at the time of the Payments and provides particulars of AH's alleged insolvency ([28]).

(iii). it is averred that the Payments were made with intent to defraud AH's creditors in that they were intended wilfully to defeat AH's obligations to its creditors ([29]). Particulars are then provided which include the averment that the purpose or one of the purposes of the Payments was to cover up the Healthcare Fund shortfall in order to make distributions to Healthcare Fund investors of all unused funds; that Mr Naqvi and therefore AH was aware that AIML was insolvent and unable to repay the AIML Receivable (so that the Payments were made for no or no substantial consideration); that the effect of the Payments was to defeat, hinder or delay the payment of AH's creditors when AH was insolvent, as Mr Naqvi and therefore AH knew, and that Mr Naqvi and therefore AH knew that the Payments would have that effect (or that Mr Naqvi was recklessly careless that the Payments would have that effect and he and AH acted dishonestly in making the Payments).

(iv). it is also averred (in [30]) that the Defendant acted in bad faith in accepting the Payments "*knowing that they were made in all the circumstances pleaded above*."

(v). the JOLs' claim (in [31]) that the Payments are "*voidable at the instance of the Plaintiffs under section 146 .... and by these proceedings the Plaintiffs declare such Payments void and seek repayment and/or restitution from the Defendant.*"

(h). the SOC then sets out an "*Additional or alternative cause of action: Voidable preference under section 146 of the Act*":

(i). the SOC notes that the Defendant had asserted that at the time of the first of the Payments it was a creditor of AH in a sum not less than US$16.5 million (which debt AH does not admit) ([33]).

(ii). it is averred that even if the Defendant was a creditor, and it is determined that any part of the Payments (Repayments) had the effect of discharging any debt owed by

AH, the Payments (Repayments) nevertheless were made at an undervalue because the consideration received by AH (being the discharge of such debt and the increase in the AIML Receivable) was worth significantly less than the value of the Payments (Repayments) because of AIML's insolvency ([34]).

(iii). in the alternative, the JOLs' claim (in [35] – [40]) that the Repayments were made within six months of the commencement of AH's liquidation, at a time when AH was unable to pay its debts within the meaning of section 93 of the Act and was insolvent; that since the Defendant was a related party within the meaning of section 145(3) of the Act (because AH and the Defendant "*were controlled by Mr Naqvi ... and therefore at the time of the Repayments, the Defendant had the ability to control and/or exercise significant influence over [AH]*") AH is deemed to have made the Repayments with a view to giving the Defendant a preference over AH's other creditors so that the Repayments were invalid pursuant to section 145 and subject to repayment up to the amount for which the Defendant was indebted to AH at the time of the Repayments.

The Defence and Counterclaim

10. The Defence and Counterclaim run to 54 pages. In summary, in the Defence:

(a). the Defendant denies that the Payments are voidable whether pursuant to section 145 or section 146 of the Act.

(b). it is averred that when AH made the Repayments to the Defendant, it was returning funds received from the Defendant (and a subsidiary of the Defendant) which AH held on constructive or resulting trust for the benefit of investors or alternatively for the Defendant (and its subsidiary) so that there was no disposition of property or assets of AH. The funds held by AH out of which the Repayments were made represented capital contributions (or the traceable proceeds of such contributions) received from investors which were subject to a proprietary interest in favour of those investors (or alternatively in favour of the Defendant and its subsidiary).

(c). it is averred in the alternative that if (which is denied) the Payments constituted a loan to AIML, they did not constitute a disposition of property of AH.

(d). it is averred in the further alternative that if the Payments constituted the repayment of an amount payable by AH to the Defendant, they did not constitute voidable preferences.

(e). in addition to denying that a critical condition for relief under section 145 and section 146 of the Act is established (namely that there was a disposition of property of AH by way of the Payments or Repayment), the Defence also denies or does not admit the core factual allegations on which the section 145 and section 146 causes of action are based.

(f). the Defendant also denies that, even if the Payments were made using AH's property (or its traceable proceeds), the JOLs had made out a claim, or that the conditions were satisfied to establish a claim, under section 145 and section 146 of the Act, in particular the Defendant:

(i). denies that Mr Naqvi was AH's directing mind and will or exercised plenary control over AH or the Defendant.

(ii). does not admit that AH was insolvent at the time that the Payments (and the alleged loan to AIML) were made.

(iii). asserts that the SOC has failed properly to plead that the Payments and the alleged loan to AIML were made by AH with intent to defraud as defined by section 146(1)(b) of the Act.

(iv). asserts that the Payments were received by the Defendant in good faith (and denied that the SOC identified a relevant individual whose alleged bad faith was to be treated as the bad faith of the Defendant).

(v). as regards the claim under section 145 of the Act, asserts that this claim could only constitute an alternative claim to the section 146 claim; denies that AH was a

debtor of the Defendant, does not admit that the Repayments were made at a time when AH was unable to pay its debts and denies that the Defendant was a related party of AH.

(g). the Defendant notes that there had been a large number of RFBPs to which there had been no response or only deficient responses. Accordingly, it reserves its rights to seek further responses and stated that as pleaded the SOC discloses no reasonable cause of action, is embarrassing for want of particularity and/or vexatious and/or may prejudice or embarrass the fair trial of the action and renders the SOC liable to be struck out (at least in part), in particular with respect to the large number of paragraphs in the SOC identified at [12] of the Defence and Counterclaim (and the claim that the pleading in the SOC was embarrassing and insufficiently particularised was asserted and repeated when responding to the relevant paragraphs in the SOC). Furthermore, the Defendant states that it pleads to the relevant factual background in so far as it was able to do so, "*pending the provision of proper particulars and /or disclosure.*" In relation to the facts which it claims had not been properly particularised and in relation to which it requires further and better particulars, the Defendant incorporates a denial or non-admission.

11. In the Counterclaim, the Defendant claims that:

(a). if, contrary to the Defence, the Payments are to be set aside under section 146 of the Act, the Defendant has a first and paramount charge over the monies constituting the Payments in an amount equal to the costs properly incurred by the Defendant in the defence of the JOLs' action under section 146 of the Act and that provision has to be made for the payment of the Defendant's proper fees, costs, pre-existing rights, claims and interests.

(b). if the Repayments were avoided under section 145 of the Act, it is entitled to a declaration that upon repayment of the Repayments, the JOLs be required to admit the Defendant as a creditor for the amounts that remain payable to it in the same or approximately the same amount as the Repayments.

The Plaintiffs' Reply

12. The JOLs' Reply primarily addresses the Defendant's case that investors retained a beneficial or other proprietary interest in their capital contributions after they were paid over to AH or other Abraaj Group entities. The JOLs deny that this was so or that any trusts were created or arose upon payment of the contributions or that the Defendant was a fiduciary agent for investors or held their capital contributions or their traceable proceeds subject to constructive or resulting trusts for the benefit of investors or that, to the extent that the Defendant was subject to a fiduciary duty to investors it acted, when paying funds to AH, in "*innocent*" breach of such duty. In their Reply, the JOLs aver that the Defendant's Counterclaim arises out of and by reason of its own breach of trust and fiduciary duty and deny that AH is liable to account to the Defendant for monies alleged to have been paid to AH as trustee for the Defendant and further claim that, assuming that AH did receive monies from the Defendant as trustee as alleged, the Defendant's pre-existing claims are barred and not actionable by reason of illegality.

The Pursued Requests

13. It is obviously inappropriate to set out each of the large number of Pursued Requests. A useful summary is contained in the letter from the Defendant's attorneys (Walkers) dated 11 June 2021 to the JOLs' attorneys Carey Olsen. Walkers said as follows:

> *"7. The Pursued Requests fall broadly into the following categories:*
>
> *a. A reiteration of the Requests where the Responses are inadequate;*
>
> *b. Requests for further and better particulars of the "Abraaj Group" corporate structure;*
>
> *c. Requests for further and better particulars of the facts and matters on which your clients rely in averring that Mr Naqvi was the directing mind and will of [AH];*
>
> *d. Requests for further and better particulars of the facts and matters on which your clients rely in averring that Mr Naqvi was the directing mind and will of our client;*
>
> *e. Requests for further and better particulars of the alleged commingling;*

f. *Requests for further and better particulars of the amounts allegedly "missing" from the AGHF and APEF IV;*

g. *Requests for further and better particulars of the alleged cash shortfall and the raising of external finance to bridge the alleged shortfall;*

h. *Requests for further and better particulars of Mr Naqvi's alleged instigation and direction of the Payments;*

i. *Requests for further and better particulars of the nature of the Payments;*

j. *Requests for further and better particulars of the facts and matters on which your clients rely in pleading the insolvency of AIML and AH;*

k. *Requests for further and better particulars of your clients' claims under s.146 of the Companies Act, including the allegation that our client acted in bad faith in accepting the Payments (as defined in the Amended Statement of Claim); and*

l. *Requests for further and better particulars of the facts and matters on which your clients rely in pleading that our client was a related party of AH."*

14. The parties provided me with a very helpful document (of 115 pages), initially prepared by the JOLs to summarise their position, that set out in three columns the Pursued Requests, a summary of the JOLs' reasons (basis) for refusing to provide a response to these and the Defendant's reasons and justification for claiming that a response was needed. I shall refer to this document as the ***Overview Document***.

The Defendant's submissions

15. The Defendant relied on and referred to GCR Order 18, rule 12(1)-(3) which provide as follows:

"(1) Every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words – (a) particulars of any…fraud…on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether…fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

> *(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter, or thing, then, without prejudice to the generality of paragraph (2), the Court may, on such terms as it thinks just, order that party to serve on any other party – (a) where he alleges knowledge, particulars of the facts on which he relies and (b) where he alleges notice, particulars of the notice"*

16. The applicable law and the approach to be adopted by the Court on an application for further and better particulars was not in dispute. Both parties accepted that whether and if so what further particulars should be ordered by the Court is a question of discretion and they relied on the commentary in the 1999 White Book at 18/12/2 which states that "*The requirement to give particulars reflects the overriding principle that the litigation between the parties ..... should be conducted fairly, openly, without surprises and as far as possible, so as to minimise costs.*" This commentary identifies six functions of particulars as follows: (i) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved; (ii) to prevent the other side from being taken by surprise at the trial; (iii) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (iv) to limit the generality of the pleadings, or of the claim or the evidence; (v) to limit and define the issues to be tried, and as to which discovery is required; and (vi) to tie the hands of the party so that he cannot without leave go into any matters not included (although if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings).

17. The Defendant argued that the SOC was pleaded very broadly and, in material respects, inadequately and that the Pursued Requests addressed facts and matters that were not set out in sufficient detail and with sufficient clarity to enable the Defendant to be *fairly* informed of the case to be met. The Pursued Requests did not involve an illegitimate or premature request for evidence (by requiring references to matters covered in documents to be produced on discovery or to be contained in witness evidence to be adduced at trial). None of the Pursued Requests required the JOLs to plead the evidence by which the facts averred in the SOC are to be proved or asked for an indication of matters which will be contained within witness evidence.

18. Mr Atherton QC referred me to the commentary in the 1999 White Book dealing with pleadings imputing fraud or misconduct to a party, in which "*the facts must be stated with especial particularity and care*" (at 18/12/2); that an allegation that a party had been guilty of bad faith was the equivalent to an allegation of dishonesty (at 18/12/14); that where an

allegation is made that a person had a particular intention, particulars will be ordered of any acts and any other facts relied on to support the allegation (at 18/12/20); that where knowledge was pleaded as a fact, particulars of the facts relied on in support of such an allegation should be given on request or ordered to be given by the Court (18/12/23). He relied on the dictum of the Chief Justice in *Tasarruf Mevduati v Wisteria Bay Limited* [2007] CILR 310, which was a case involving claims that the defendant was a party to a transnational fraud and breaches of Turkish law. The Chief Justice held that questions of foreign law that became issues of fact for the Court to resolve had to be fully particularised in the pleadings. In such a case, he said (at page 316) "*mere assertion in a pleading will not do. Before a party has to respond to a [burdensome] allegation [in a case where such allegations frequently led to the need for extensive evidence including expert reports] it is incumbent on the party making the allegation to set out clearly and succinctly the major facts upon which they will rely*."

19. Mr Atherton QC said that it was important to take into account the fact that in this case the JOLs through AH were the parties in possession of all the key documents as AH was the corporate entity which was involved in the conduct giving rise to the JOLs' claims. The Defendant did not have these documents and so was not in a position in many instances to plead a positive case or make an admission. In such circumstances, it was incumbent on the JOLs, when requested, to provide more detail and further particulars so that the Defendant could be fairly informed of the case it had to meet. Mr Atherton QC argued that the Defendant was entitled to insist that the claims against it be pleaded with clarity and adequate precision and thereby to impose appropriate discipline on the JOLs' conduct of the proceedings. There was no question of the Defendant seeking an improper or tactical advantage (or playing games) in the litigation as the JOLs had alleged. Mr Atherton QC claimed that the justification for adopting this approach was to be seen in developments in FSD 203, where the result of the Defendant's approach to requiring proper particulars to be given by Mr Jafar had recently resulted in a substantial amendment to Mr Jafar's statement of claim and the withdrawal of a number of claims and a substantial narrowing of the issues in the case. Mr Atherton QC also denied the JOLs' allegation that the Defendant had been guilty of an inexcusable delay in filing the First Summons. He noted that *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611, relied on by the JOLs, was distinguishable. The relevant request in that case had been made over a year after pleadings had closed and just a week before trial. He also rejected the

JOLs' argument that the Defendant's assertion that it needed answers to the Pursued Requests in order to understand and properly plead to the claims made against them was not credible because the Defendant had already been able to file a 54-page Defence and Counterclaim. The JOLs argued that the Defence incorporated matters already covered by the Responses and set out at length and in some detail the Defendant's defence to the JOLs' claims. But, Mr Atherton QC said, the length of the Defendant's document was hardly a point of any weight when 21 pages contained the Defendant's introduction and executive summary. Furthermore, the Defence had repeatedly made it clear that the Defendant continued to maintain that the JOLs' pleading was inadequately pleaded (and that the SOC disclosed no reasonable cause of action, was embarrassing for want of particularity and at least in part liable to be struck out).

The JOLs' submissions

20. The JOLs drew attention to the comments of Saville LJ (as he then was) in *Trust Securities Holdings v Sir Robert McAlpine & Sons Ltd* (1994), *The Times*, December 21, CA when he noted that there was a tendency to forget the basic purpose of pleadings and seek particularisation when it was not necessary, causing delay and expensive interlocutory battles when in truth each party knew the other's case. The purpose of pleadings was not to play a game at the expense of litigants. They also relied on the dictum of Bankes LJ in *The Aga Khan v Times Publishing Company* [1924] 1 KB 675 at 679:

> *"…it is an accepted rule that a party is entitled to an order for particulars only for the purpose of ascertaining the nature of his opponent's case that he has to meet, and not for the purpose of ascertaining the evidence by which his opponent proposes to prove it."*

21. The JOLs noted that the English Court of Appeal in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611 had made it clear that the Court may refuse to order particulars be given, even where the party would have otherwise been entitled to them, where there had been inexcusable delay in making the application for particulars.

22. The JOLs argued that the Defendant's assertion that it required responses to the Pursued Requests, in Mr Lewis's words (at [16] of Lewis 1) "*to understand and properly plead to the*

claims made against them" was not credible. The Defendant had filed and served a 54-page Defence and Counterclaim to the SOC which incorporated matters covered by the Responses and set out at length, and in some detail, the Defendant's defence to the SOC. The issues in the case were clear from the pleadings as they stand and the SOC was therefore fit for purpose without the need for further particulars.

23. In the Overview Document, the JOLs summarised their position as follows:

> *"The requests made in the Pursued GHF AH JOLs RFBPs are not proper or legitimate requests for further and better particulars because they fall into one or more of the following categories:*
>
> *(A) the request is a pedantic and/or unnecessary request for clarification of the ordinary and natural meaning of words or phrases used;*
>
> *(B) the request is an illegitimate and premature request for evidence either by way of discovery, or an indication of matters which will be contained within witness evidence to be adduced a trial;*
>
> *(C) the request is not restricted to matters which are reasonably necessary for GHF to understand the case they have to meet;*
>
> *(D) the request is a request for legal argument which is a matter for legal submissions; and/or*
>
> *(E) the request is covered by a response already provided by the AH JOLs and/or in a related pleading."*

24. In addition to, or perhaps more accurately by way of a gloss on, these reasons, the JOLs said in many of their responses in the Overview Document that it was not necessary or proportionate to require them at this stage to provide the extensive and detailed particulars that the Defendant was insisting on in the Pursued Requests. Furthermore, and to my mind importantly, the JOLs also argued that while in some cases the account of the factual background was stated in general terms, there was sufficient and greater particularity in the description and articulation of the facts directly relevant to the JOLs' claims. The JOLs argued, in relation to many of the requests for particulars of admittedly general averments contained in the sections of the SOC dealing with the factual background or summaries of the factual matrix, that the parts of the pleading which set out the facts relied on and which needed to be proved in order to establish

the relevant cause of action, did contain the necessary precision and particulars such that the Defendant had (as could be seen from the substantial Defence that it had filed) sufficient details so as to be able to determine the case it had to meet.

Discussion and decision

25. I have carefully read and considered all the Pursued Requests and the written and oral submissions of the parties and have concluded that save in a few cases the JOLs are right, and the Defendant's application should be dismissed. I do not accept that the Defendant had been responsible for inexcusable delay but do consider that the Defendant has repeatedly sought to extract every detail and require to be spelled out the minutiae and subordinate facts (and on occasions to request evidence) in circumstances where that is unnecessary to enable it to understand and answer the case against it or to define the issues and where to do so would involve, certainly before discovery, disproportionate and wasted costs. I do not find the Defendant guilty of committing Saville LJ's sin, as I can see why the Defendant wants to have more precision and meat on the bones of a concise and somewhat skeletal SOC, but I regard its approach as overly zealous and misguided at this stage and in the current circumstances.

26. I shall briefly consider each of the sections and paragraphs in the SOC and the Pursued Requests relating to them and briefly explain my reasoning and decision.

27. Paragraphs 4-9 of the SOC are under the heading "*Parties*" and set out the background to the JOLs' claims. Requests (in the Pursued Requests) 3, 5, 7, 9, 10, 11, 16 and 17 relate to these paragraphs. The Responses had provided a partial response to request 3 which asked the JOLs "*to identify each of the companies which is said to have comprised the Abraaj Group as the term is used in the [SOC]*". The response stated that "*The companies within the Abraaj Group include, but are not limited to [AIML, Abraaj Mauritius Limited (AML), Riyada Enterprise Development Limited (RED) as well as the general partners of the Abraaj Funds and special purpose vehicles which only held assets, including limited partnership interests in the Abraaj Funds."* I do not consider that the Defendant needs more detail at this stage. As the JOLs submitted, they plead and identify the relevant entities within the Abraaj Group where relevant when formulating or giving particulars in support of the causes of action and it is both

unnecessary and would be disproportionate to require the Plaintiffs to list of all the entities in the Abraaj Group in the SOC. I also accept the JOLs' submissions with respect to requests 5, 7, 9, 10, 11, 16 and 17.

28. Paragraphs 10 and 11 of the SOC deal with the JOLs' assertion that Mr Naqvi had plenary control over AH, the Abraaj Group, and the Abraaj Funds. Paragraph 10 deals with AH and paragraph 11 deals with the Healthcare Fund and the Defendant.

29. Requests (in the Pursued Requests) 18-20, 24, 27, 29-30, 32, 34-37, 39, 40, 42, 43, 44-47, 49, 51, 52, 54-69 relate to the various sub-paragraphs of paragraph 10. As can be seen from the missing numbers in the sequence, the JOLs did respond to some of the RFBPs dealing with paragraph 10 but refused to respond to most of them. Importantly, in response 23 in the Responses, the JOLs did, in response to the request to identify the "*other companies*" referred to in paragraph 10 of the SOC ("*At all times relevant to these proceedings, Mr Naqvi was the directing mind and will of the Company and exercised plenary control over [AH] and other companies within the Abraaj Group*") state that the SOC referred "*in particular (and without limitation),* [[to] *AIML*" which I consider to be an important and sufficient clarification. Furthermore, the JOLs also, importantly, provided a response to request 41. This request asked the JOLs to "*identify all individuals who are said to have constituted the "senior management" of the Company…*" and the JOLs did so by reference to the response to request 31 which provided the names and details of four individuals other than Mr Naqvi. I accept, taking into account these responses, the JOLs' submissions with respect to these requests. I do not consider that the Defendant is entitled to an explanation of the reference to "*directing mind and will*" and accept the JOLs' submissions on this point. It seems to me that in these Pursued Requests the Defendant is generally seeking unnecessary detail, unnecessary clarification of the language in the pleading or evidence that is properly to be addressed in due course in the witness evidence.

30. Requests (in the Pursued Requests) 71-79 and 82-92 relate to paragraph 11 of the SOC. Once again, I accept the Plaintiffs' submissions with respect to these requests. Once again, it seems to me that the Defendant is generally seeking unnecessary detail, unnecessary clarification of the language in the pleading or evidence that is properly to be addressed in due course in the witness evidence.

31. Paragraphs 12-16 of the SOC deal with liquidity problems in and the commingling of cash across the Abraaj Group and the Abraaj Funds. Requests (in the Pursued Requests) 101-103, 105-117 and 128-131 deal with these paragraphs. Paragraph 12 avers that there was "*extensive commingling*" and includes examples of the alleged commingling, but the Defendant seeks particulars of any other commingling relied on (request 101) and of "*each instance of commingling*" (request 111). It seems to me that the basis of the JOLs' claim is clear and sufficient facts are pleaded at this stage so that it would be disproportionate to require the JOLs to provide particulars of other examples of or indeed of all commingling, and unnecessary to do so in order to allow the Defendant to have sufficient details of the case it has to meet. Furthermore, I agree with the JOLs that requests seeking for example the "*precise nature and terms of the pooling arrangements*" (request 102) and particulars of each borrowing (request 108) are requests for evidence and unnecessary. The Defendant also asks for an explanation of "*what is meant by "missing*"" (request 114). As the JOLs says, there is and can be no serious uncertainty about what is meant, and it seems to me that insisting on a response to this type of question is unjustified (and an example of the overly zealous approach I have already referred to).

32. The JOLs do say, in the summary of their position in response to request 114 in the Overview Document that they have "*further admitted and averred the circumstances in which funds were "missing" from the Healthcare Fund in their [amended] defence in [FSD 203], in particular paragraphs 80-130 thereof*" (see also, for example, the JOLs' comments on request 128 in the Overview Statement, to request 131 which cross-refers to the JOLs' statement of claim in FSD 158 and to requests 165-167 and 174-186 which refer to AH's defence in FSD 203). The relative timing of the filing of that amended defence (28 May 2021) and the Responses (4 December 2020) meant that it was not possible for the JOLs to cross-refer to the amended defence in the Responses. However, to the extent that the JOLs wish to *rely in their responses to requests for further and better particulars* in FSD 150 on AH's pleaded case (or indeed responses to further and better particulars filed) in FSD 203, they should (as the Defendant submitted) do so explicitly and clearly in their responses, and update and serve supplemental responses if required. To the extent that they wish to make admissions or formally plead facts which are made or included in AH's pleading in FSD 203, they should do so in their pleading in FSD 150, so that it is clear what is being admitted and what facts are asserted for the purpose

of FSD 150 (as has been done in [28.4] of the SOC by way of amendment). It seems to me that where, as in the present case, the Court has ordered that the related proceedings be tried together pursuant to GCR Order 4, rule 4(1) and jointly case managed (but not consolidated) it is acceptable for party A in one set of proceedings (involving both party A and party B), for the purpose of giving responses to requests for further and better particulars, to cross-refer and rely on pleadings in a related proceeding to which party A and party B are also parties and on responses given by party A to party B in such related proceedings, but party A must do so clearly and explicitly. This is not an issue that arises here as I have accepted that the JOLs do not need further to particularise this part of their pleading in the SOC, but this is a point that the JOLs will need to take into account going forward.

33. Paragraphs 17-20 of the SOC deal with the alleged December 2017 cash shortfall in various Abraaj entities and the raising of external finance to bridge it. Requests (in the Pursued Requests) 137-138, 141-142, 144-148, 150-163, 165-167, 174-184 deal with these paragraphs. Once again, it seems to me that the Defendant is generally seeking unnecessary detail, unnecessary clarification of the language in the pleading or evidence that is properly to be addressed in due course in the witness evidence. The Defendant has sought further and full particulars of each of the payments that it is said in the SOC were needed to be made in relation to each of the Healthcare Fund's investments and projects, the forecast referred to, the parties to and terms of each payment deferral, the meaning of the term "*financier*", the manner in which Abraaj Employees 2 SPC Limited operated and was financed and of all the transactions to which it was a party (see request 157), the identity of each of the investors referred to, and of the discussions between Mr Naqvi and Mr Jafar. This seems to me to involve the provision of a disproportionate amount of detail at this stage, which the Defendant does not need in order to understand the case against it and plead its response and which will emerge after discovery and the provision of witness evidence (and can more effectively be dealt with if required in amendments to the pleadings at that stage). For example, in request 142, which relates to [17.4] of the SOC, which states that the "*total cash shortfall for the Abraaj Group and Abraaj Funds in December 2017 was forecast to be US$533.8 million*", the Defendant asks the JOLs to "*particularise when, by whom and how (orally or in writing and if orally the words uses and if in writing please provide copies of all relevant documents) the forecast was calculated*." The details of (and the provisions of copies of documents relating to) who prepared the forecast and

when and how it was prepared are matters to be dealt with by way of discovery and in the evidence and do not need to set out and particularised in the pleading at this stage.

34. There are three exceptions:

(a). in request 151 the Defendant asked (underlining added) the JOLs to "*particularise the allegation [in [19]] that [AH] was insolvent, including particulars of [AH's] assets and liabilities (including what sum, to whom those liabilities were owed and on what terms) and whether the alleged insolvency is said to have been on a cash flow or balance sheet basis*." The JOLs in their response to request 151 say that "*particulars of AH's financial position relevant to the assessment of its insolvency on a cash-flow and/or balance sheet basis are matters to be properly addressed in evidence*" but it seems to me that they should be specific and clear about what state of affairs they allege to have existed at the relevant time and that it is not disproportionate to require them to do so. They should be clearer and more specific about what they mean by "*insolvent*" (at the time in December 2017 that Mr Naqvi is alleged to have raised the further US$100 million through the sale of AH's shares). When referring (at [26]) to AIML being "*hopelessly insolvent*" the SOC goes on to state "*on both a cash-flow and balance sheet basis*" and I see no reason why the averment in [19] of the SOC should not also state what the JOLs allege. I recognise that the reference to cash-flow and balance sheet insolvency are shorthand terms, as indeed is the reference to "*insolvent*" and that it is a matter for the JOLs as to which terminology they use. But they should be clear as to what they mean by and are referring to when they use the term "*insolvent*" in [19]. I note that the SOC also avers (at [28]) that AH was "*insolvent*" at the time of the Payments (which were made at approximately the same time as the US$100 million was raised) and sets out particulars in [28.1]-[]-[28.7].]. The Defendant has not asked the JOLs to specify whether the reference to insolvency here is to cash flow or balance sheet insolvency no doubt because what the JOLs refer to is spelled out in the particulars.

(b). in request 153 the Defendant asks the JOLs to "*state the years during which the [scheme said in [19.1] of the SOC to have been operated by Mr Naqvi for "several years"] was operative*" and it seems to me that it would be of assistance to the Defendant to know,

and not an onerous requirement on the JOLs for them to identify, at least a period during which the JOLs assert the scheme was operative even if the JOLs are unable to state the full period at this stage.

(c). in request 158, the Defendant asks the JOLs to identify the investors referred to in [19.2] of the SOC ("*In December 2017, Mr Naqvi found two prospective investors that were each willing to purchase a tranche of AH shares*") and once again it seems to me that it will be of assistance for the Defendant to have (for example for discovery purposes) and not onerous for the JOLs to provide details of the two investors to whom they specifically refer.

35. Paragraph 20 deals with the loans allegedly made by Mr Jafar, which are the subject of FSD 203, and I have already noted that extensive references are made in the JOLs' statement of their position in the Overview Document, and that one reference is made in the SOC, to their defence in FSD 203. The JOLs will need to consider, once they have filed AH's amended defence to Mr Jafar's Concise Statement of Claim in FSD 203, how to amend the SOC to ensure that their reliance on AH's FSD 203 defence is properly particularised and clearly set out.

36. Paragraphs 21 and 23 of the SOC deal with the Payments. Requests (in the Pursued Requests) 186-192 deal with [22] of the SOC and requests 195-197 deal with [23] of the SOC. In my view, the JOLs do not need to provide responses, and I accept the JOLs'JOLs' submissions in relation to these requests.

37. Paragraphs 24-31 of the SOC deal with the first cause of action based on section 146 of the Act. Requests (in the Pursued Requests) 198-214, 217-240, 242-244, 246-259 and 260-263 deal with [26], [28], [29] and [30] of the SOC. Once again, with two exceptions, I consider that the Defendant is seeking unnecessary detail, unnecessary clarification of the language in the pleading or evidence that is properly to be addressed in due course in the witness evidence. The averment that AIML was insolvent and the meaning of insolvent in this context is clearly stated. Nevertheless, the Defendant has asked for full particulars of AIMLs' assets and liabilities, of the entities to which it provided investment management services and of AIML's

operating expenses, but these are matters of evidence. The Defendant asks for particulars of "*each instance when AIML relied on cash withdrawn as part of the commingling referred to at paragraphs 12 to 16 of the [SOC], the ways in which AIML was reliant upon that cash and the amount of cash provided in each instance and from which Abraaj Fund*." This is typical of the level of detail that the Defendant asks the JOLs to particularise, and it seems to me to be a request for evidence and in any event disproportionate. The two exceptions relate to the pleading of how Mr Naqvi was aware that AIML was insolvent and of the Defendant's bad faith:

(a). at [29.3] of the SOC, the JOLs aver that "*Mr Naqvi and therefore [AH], was aware that AIML was insolvent and could not repay the AIML Receivable. The Payments were therefore made for no consideration, alternatively no substantial consideration*." In request 247, the Defendant requests that the JOLs particularise "*the basis on which it is alleged that Mr Naqvi had the alleged knowledge and how he is said to have acquired the said knowledge*." In the summary of their position in the Overview Document, the JOLs say that that a response to this request is not reasonably necessary to enable the Defendant to understand the JOLs' case and plead its response and that the JOLs "*have clearly set out in the pleading the basis on which it is alleged that Mr Naqvi had this knowledge*." But where in the pleading and what particular facts are particularly relevant and relied on to support the averment regarding Mr Naqvi's knowledge of AIML's insolvency? I accept that it is to be inferred that the JOLs' claim that Mr Naqvi's knowledge is to be derived from Mr Naqvi's alleged control of AIML, and the information provided to him and to which he had access by reason of the facts and particulars set out in [10], and perhaps [11], and [17]-[20] of the SOC. But in view of the obvious significance and importance for the JOLs' section 146 claim of the averment in [29.3], the Defendant is entitled to insist on greater precision and particularity in the SOC. The JOLs should identify at least in broad terms the facts which are relied on to support the allegation of Mr Naqvi's knowledge, either by cross-referring to the relevant parts of and paragraphs in the SOC or pleading additional facts relied on. This can be done in [29.3] of the SOC by stating that Mr Naqvi was aware of AIML's insolvency "*by reason inter alia, of…….*"

(b). at [30] of the SOC, the JOLs aver that (my underlining) "*The Defendant acted in bad faith in accepting the Payments, knowing that they were made in all the circumstances pleaded above*." In request 262 the Defendant requested that the JOLs "*particularise the allegation of bad faith, including which individual is alleged to have acquired said knowledge, how and from whom*." In their letter dated 11 June 2021, Walkers said that "*[The JOLs] allege that [the Defendant] acted in bad faith in accepting the Payments. That is a serious allegation, which must be, but has not been, particularised: 1999 White Book [18/12/14]. [The Defendant] therefore requires [the JOLs] to provide the particulars sought of paragraph 30, which paragraph is not properly particularised (or indeed particularised at all).*" In the Overview Document, the JOLs say that they "*have adequately pleaded the basis of this allegation in the [SOC]… [and] have consistently made their case on attribution clear ..[and] summarised the relevant paragraphs where that case is made in [AH's response to the request for further and better particulars of its defence in FSD 203 (dated 11 June 2021)], in particular response 1 thereof."*

(c). response 1 relates to the request to provide particulars of the facts and matters relied on in support of the averment that "*Mr Naqvi was the directing mind and will of the Abraaj Group*." It was in the following terms:

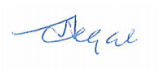
> *"[AH] has particularised the facts and matters relied on in support of this averment in [[10]-[11] of the SOC] [AH] also provided further particulars of the facts and matters pleaded in [[10]-[11] of the SOC] in [the Responses] in particular in responses 21-98 thereof."*

(d). as Mr Atherton QC pointed out, the commentary in the 1999 White Book at 18/12/2 emphasises the importance of facts being stated with "*especial particularity and care*" in pleadings which allege fraud or misconduct (and also see paragraph 18/12/14, referred to above). In my view, [30] is pleaded too broadly and vaguely, and response 1 does not help.

(e). the SOC avers that Mr Naqvi was the directing mind and will of the Defendant (see [11]) and that because he knew the purpose (or purposes) for which the Payments were made and the other circumstances pleaded in [29], so did AH (see for example [29.5]). But there is no averment that Mr Naqvi's knowledge (or if not Mr Naqvi's, someone else's

knowledge) was also that of *the Defendant* for this purpose (in contrast to the averment *with respect to AH* in for example [29.5]). For this reason the request in request 262 to particularise "*which individual is alleged to have acquired said knowledge, how and from whom*" is not unreasonable. Nor is there an indication as to the facts knowledge of which *in particular* establish dishonesty and bad faith.

(f). even if the JOLs' case is that Mr Naqvi knew all the facts and circumstances relating to the Payments set out in the SOC (or, if the reference to "*pleaded above*" in [30] is to the circumstances pleaded in [29] rather than the rest of the SOC) and that since he was the directing mind and will of the Defendant his knowledge, purposes and intentions are to be attributed to the Defendant, the JOLs still need to aver that Mr Naqvi's knowledge (purposes and intentions) are to be attributed to the Defendant, (even if this is only clarification of what is implicit in the directing mind and will averment) and indicate which facts and circumstances (so known to the Defendant) go to and are relied on as showing dishonesty and bad faith. This may ultimately only involve unpacking and elaborating on the reference in [30] to "*all the circumstances pleaded above*" but even so it will produce further and necessary clarification.



Mr Justice Segal
Judge of the Grand Court, Cayman Islands
14 February 2022