



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 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

AND BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

AND

- (1) ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)**
- (2) GHF GENERAL PARTNER LIMITED**
- (3) THE GHF GROUP LIMITED**
- (4) ABRAAJ GENERAL PARTNER VIII LIMITED**

Defendants

JUDGMENT ON THE GHF's APPLICATION FOR PERMISSION TO AMEND ITS RE-AMENDED DEFENCE

Introduction

1. I set out below my ruling on GHF's application for permission to amend its Re-Amended Defence in FSD 150 of 2020, made by its summons dated 7 September 2023.
2. A number of GHF's proposed amendments have been accepted and agreed by the AH Parties. As regards the proposed amendments which are not agreed and in dispute, at the PTR Mr Atherton KC (for GHF) and Mr Smith KC (for the AH Parties) made submissions by reference to a number of categories of draft amendment and I follow their approach:

The proposed amendments to paragraphs 5, 8(1A), 52(A), 58A and 103(5).

3. The AH Parties submit that if these amendments are to be allowed they ought to be permitted to file further evidence in order to address the new allegations which they say have been made by way of these amendments. They wish to be able to file and serve short evidence substantially in the form of a draft memorandum dated 28 September 2023 written by the JOLs (PwC) which was annexed to their skeleton argument. I agree and grant GHF leave to make these amendments but on terms that the AH Parties may file on or before 13 October 2023 brief evidence in response (substantially in the form of the PwC memorandum). I do not see that GHF, as the Defendant in these proceedings needs to or should have permission to file further evidence following the service of the AH Parties' evidence in response.

The proposed amendments to paragraphs 32A, 32B and 122(2A)

4. Once again, the AH Parties submit that if these amendments are to be allowed they ought to be permitted to file further evidence in order to address the new allegations raised. I agree. They have not identified precisely what the new evidence will be but say that it will be no more than 2-3 pages in length. I am prepared to permit them to file evidence in response on that basis. Therefore, I shall grant GHF leave to make these amendments on terms that the AH Parties may file on or before 13 October 2023 brief evidence in response (by way of a

witness statement of no more than three pages in length). Once again, I do not see that GHF, as the Defendant in these proceedings needs to or should have permission to file further evidence following the service of the AH Parties' evidence.

The proposed amendments to paragraphs 15(3) and 60

5. The AH Parties submit that leave to amend these paragraphs should be refused on two grounds. First, they say that the amendments are hopelessly unparticularised as GHF has failed to provide any (or any adequate) particulars of the agreement under which the funding raised in December 2017 was received by AH. Second, they say that the new case that GHF seeks to advance is inconsistent with other aspects of its amended case and bound to fail. They say that GHF wishes to claim that the Payments made by AH as set out and defined in [21] of the Re-re-re amended statement of claim (the *ASOC*) were (a) dispositions of monies held on trust by AH; (b) repayments by AH of a loan made by AIML made by way and reason of the Outward Transfers and/or (c) repayments of monies owed by AH to GHF.
6. GHF submits that the amendments are adequately particularised in other parts of its pleaded case. In particular, in paragraph [94] which GHF says provides particulars of Mr Naqvi's intention that the funds received by AH were not to be at AH's free disposal and GHF's case that Mr Naqvi's intention was to be attributed to AH. GHF also submits that the objection based on inconsistency is unfounded since it has pleaded the various and different arguments identified by the AH Parties in the alternative.
7. In my view, leave to make these amendments should be granted but on terms. GHF must amend paragraph 15(3) (and to the extent necessary paragraph 60) to meet the deficiencies set out below. I have considered whether, in view of the very limited time before the start of the trial, I should refuse leave but have concluded that, on balance, it would be unjust and inappropriate to do so but that GHF should be given a short time to prepare amendments which clearly deal with and resolve the deficiencies with the current draft amendments.

8. I accept GHF's submission that the objection based on inconsistency fails. GHF is putting forward alternative constructions of the facts asserted and relied on all of which (on their case) establish a defence to the AH Parties' proceedings. The alternative constructions and arguments are incompatible but GHF does put them forward in the alternative on the basis that only one construction is correct. I agree with Mr Smith that a party cannot plead and rely on inconsistent facts but here GHF is putting forward competing and alternative interpretations of the primary facts in a manner that seems to me to be permissible. There is therefore no inconsistency although I must say that the pleading of multiple differing constructions does result in complexity and prolixity and that GHF will need at trial to explain its order of preference.

9. I also accept GHF's submission that paragraph [94] does set out the facts (with particulars) on which it relies to support its averment in the amended paragraph 15(3) that AH intended to and did make good the depredations from the trusts by obtaining and using the funding received in December 2017 so that these funds were not to be at its free disposal. But:
 - (a). paragraph 15(3) refers both to paragraphs 19 and 20.2(b) of the ASOC (the latter subparagraph deals with the loans made by Mr Jafar), as does paragraph 94, but paragraph 94 does not set out facts which support a claim or which could establish that *Mr Jafar* imposed or agreed to the "terms" on which it is claimed the loans) were made and to be held. If wishes GHF to retain the cross-reference in paragraph 15(3) to paragraph 20.2(b) of the ASOC and to assert that the Mr Jafar agreed that the loan proceeds were paid (or assented to and accepted that the loan proceeds were to be paid) and received on the "terms" referred to in paragraph 15(3), so that they were not to be at the free disposal of AH, then GHF must set out the facts (properly particularised) on which it relies to support such a claim.

 - (b). if, as I understand is GHF's case, it is asserted that Mr Naqvi's knowledge and intentions are also to be attributed to AE2L (which it is asserted he controlled) for this purpose (to make good the assertion that AE2L agreed to or accepted these "terms"),

then that claim should be clearly set out by reference to the facts which GHF asserts support it. As far as I can tell, this has not been done.

- (c). the reference to “terms” is unclear and needs to be clarified. Does GHF refer to contractual or binding terms (express or implied), to terms in the sense of conditions imposed by the payor or to terms in the sense of self-imposed conditions established (or a declaration of trust declared by) AH. GHF’s pleading needs to be clarified to confirm the facts on which it relies (and the case which it is making).
10. GHF must file and serve amended versions of paragraph 15(3) (and to the extent required, paragraph 60) on or before 4pm Cayman time 11 October and the AH Parties, if they still object to the further amended pleading, may do so by 4pm Cayman time on 13 October and I shall issue a ruling on Monday 16 October as to whether leave is granted in respect of all or parts of the further amendments. In view of the very limited time available before trial, GHF’s amendments will need clearly to deal with these issues since if any doubts remain as to the adequacy and clarity of the further amendments then I shall be required to refuse permission to amend.

The proposed amendments to paragraphs 52(7A) and 140(3A)

11. The AH Parties, in their skeleton argument, object to these amendments on two grounds (they relied on a third ground based on the expiry of the limitation period in their skeleton argument but Mr Smith confirmed at the hearing that his clients no longer relied on this third ground). First, they say that GHF had failed to give any or any adequate explanation for the unacceptable delay in raising an entirely new claim in knowing receipt against AH at this very late stage in the proceedings. Secondly, they say that the amendments are hopelessly unparticularised and bound to fail.
12. GHF submits that the factual basis for the knowing receipt claim is based premised on already pleaded facts. GHF’s case has always been that money was paid from GHF to AH (see paragraph 51 of the Defence and Counterclaim) and that the monies transferred were

subject to trust and fiduciary obligations (paragraph 52(3)). The knowing receipt pleading alleges one new liability on the part of AH arising from facts that are already pleaded and already in issue i.e., it raises the question whether the sums that are already pleaded as having been received by AH gave rise, in law, to a personal liability for knowing receipt liability on the part of AH. Accordingly, allowing the amendment GHF says that discovery has been given on this issue (under Issue 2 of the Discovery Protocol) and it is, therefore, hard to see what new and necessary evidence they would envisage serving (nor have they explained what that evidence would be).

13. I accept GHF's submissions on this issue. The new claim does not rely on any new facts but only draws a new legal conclusion from (by identifying and asserting an additional cause of action arising out of) those facts. I do not accept the AH Parties' submission that there are no proper grounds in the pleading that AH knew that the funds being received were traceable to a breach of fiduciary duty owed by AIML to GHF. The amendment is undeniably late but it is clear from the correspondence between the attorneys that the ASOC has been the subject of relatively recent further amendments (the JOLs provided GHF with their fourth round of amendments to the ASOC on 31 July 2023) and that GHF provided their proposed further amendments reasonably promptly after that (on 23 August 2023). On balance, I consider that GHF should be permitted to rely on the knowing receipt claim and I shall grant leave to make these amendments.
14. It appears that in the correspondence before the hearing the AH Parties had suggested that if these amendments were permitted they would need to have the opportunity to serve further evidence (a position which was not accepted by GHF). However, this was not a point made in the AH Parties' skeleton argument or in oral submissions and I therefore assume that it is not relied on by them.

The proposed amendments to paragraph 106(4)

15. The AH Parties object to leave being granted in respect of this amendment on two grounds. First, that GHF seeks to raise an entirely new factual allegation (that "*AIML had a value to*

AH of (at least) US\$125 million”) on which no discovery has been given or evidence produced, which should not be permitted at this very late stage of the proceedings. Secondly, that GHF has failed to identify any evidence which supports even a *prima facie* case that AIML had a value to AH of “at least” US\$125 million.

16. GHF submits that its new factual assertion does not require further and new evidence to be filed by the AH Parties. GHF says that it is for the AH Parties to prove, by evidence, their pleaded claim that the Payments were made at an undervalue (and therefore that the value of the increase in the AIML Receivable/the value of the covenant to repay in respect of the AIML Loan was worth “*significantly less than the value of the property which is the subject of the disposition*” for the purpose of section 146(1)(e)(ii) of the Companies Act) and that it is entitled to offer and rely upon evidence to rebut that plea, including evidence as to AIML’s value. It will be open to the AH Parties wish to argue that the evidence now adduced by GHF does not effectively rebut their allegation but that is a matter for submission. They do not need, “*substantial discovery and evidence*” in order to do so.
17. I accept the AH Parties submissions. Permission to make this amendment is refused. In my view, it is too late for the GHF Parties to put in new evidence as to the equity value of AIML which will require the AH Parties to be given a real opportunity to adduce evidence in response, for which there is now insufficient time. Furthermore, the non-binding and heavily qualified offer from Cerberus is, as the AH Parties submit, is of such limited weight that it is insufficient to support the new factual allegation made by GHF.

The proposed amendments to paragraph 132(6)

18. GHF withdrew its application to make this amendment at the hearing.

Preparation of order

20. I shall invite the parties to discuss and seek to agree the appropriate order as to costs but if they are unable to reach agreement, they may make brief written submissions and I shall deal with the issue on the papers.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
6 October 2023