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A Cauldron of Fraud: AHAB v SICL & Ors – from the Middle East to the Cayman Islands and beyond

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In a landmark ruling for the Cayman Islands jurisdiction, the Honourable Chief Justice Smellie of the Grand Court, on 31 May 2018, emphatically dismissed a multi-billion dollar claim in the case of *Ahmad Hamad Algosaibi & Brothers Company* ("AHAB") *v SICL & Ors*, involving allegations of fraud arising from one of the largest corporate collapses of the financial crisis. This case rivalled, if not surpassed in respects, the notorious Madoff Ponzi scheme which was also uncovered during the financial crisis, and has been described, both in terms of length and value, as the most substantial trial ever to be heard in the Cayman Islands. This article looks at the global scope of the dispute which led to the Cayman judgment.

Background

The proceedings began as a family dispute between the AHAB partners and Maan Al-Sanea who was the head of AHAB's investment division over a thirty–year period (the "Money Exchange") and married to the daughter of one of the AHAB founding partners. It was alleged that Mr Al Sanea abused his authority to enter into billions of dollars' worth of revolving credit facilities by means of the production of dishonest financial statements and using the AHAB name as collateral (or "name lending"), unbeknownst to the AHAB partners.

When the lending banks began calling in their loans in 2009, amidst the global liquidity crisis at that time, the AHAB partners insisted that they had no knowledge of the level of borrowings incurred on their behalf, and that they were in fact the victims of a US$9.2 billion fraud. In what was later described by the Court as "one of the largest Ponzi schemes in history", their claims included allegations of forgery and the siphoning of proceeds of fraud to special purpose vehicles incorporated by Al Sanea in the Cayman Islands, Switzerland and Bahrain.

Cayman proceedings

AHAB's Writ of Summons was filed in the Grand Court of the Cayman Islands on 27 July 2009, following which several of the defendants, including Mr Al Sanea, brought applications seeking, variously, case management stays of the proceedings in favour of proceedings underway in Saudi Arabia or stays or strike outs on *forum non conveniens* grounds. These challenges were unsuccessful, with the Court of Appeal's judgment remaining the leading case in Cayman on case management stays. The Court of Appeal (overturning the Grand Court in part) confirmed a case management stay would only be appropriate in the most compelling circumstances, if at all, to impose a temporary stay on proceedings commenced as of right in the Cayman Islands in order to force a plaintiff to commence parallel proceedings in a foreign jurisdiction.[1] This robust approach was critical given the jurisdictionally labyrinthine dispute.

Some six years later, the substantive trial eventually commenced. The primary themes upon which the 129 day-long trial hinged were those of knowledge and authority. Dismissing AHAB's claims, the Cayman Islands Court found "overwhelmingly and conclusively" that the AHAB partners knew of and authorised fraudulent borrowing through the Money Exchange, as well as AHAB's other financial businesses over a period of about 30 years. Other key findings centered on issues such as forgery, manipulation of documents, tracing and illegality.[2]

Saudi Arabia

Proceedings were brought relating to debts owed by AHAB to Saudi banks before a body known as the "Royal Committee" formed by Royal Order in Saudi Arabia in 2009

1 The Court of Appeal found there was no evidence before it to give rise to an expectation that the Royal Committee established in Saudi Arabia would reach a determinative decision, how long it would take, or whether it would be binding on the Cayman companies in liquidation which would be unlikely to submit to the Saudi jurisdiction. Conversely, a case management stay gave rise to the possibility that the underlying issues might be tried in both Saudi Arabia and Cayman Islands with the potential for inconsistent findings.

2 Counterclaims brought by two of the defendants were also dismissed.

at AHAB's instigation to inquire into its allegation of Al Sanea's fraud against the banks, as well as against AHAB itself.

A further entity was established by Order of the Supreme Judicial Council in Saudi Arabia on 21 March 2016 called the Joint Directorate of enforcement at the General Court of Al–Khobar ("JDEK") responsible for issuing enforcement orders against AHAB and overseeing the process of distributing AHAB's assets to satisfy those orders, either through a settlement or liquidation process. It is understood this process is on-going.

London proceedings

The Cayman Islands was not the only trial venue in the saga; in 2011, five of the defrauded banks went to trial in London's Commercial Court over AHAB's unpaid borrowings. Despite AHAB's sticking to its familiar "deny all knowledge" refrain, the dramatic discovery of a set of damning documents just days into opening submissions, suggesting at least some knowledge and awareness on AHAB's part of the borrowing, led to the spectacular collapse of AHAB's defence. Those documents, known as the "N Files", mysteriously placed in Saud Algosaibi's office (not having been found during several previous discovery-related sweeps) and later described as "eerily neatly stacked" by AHAB's CEO, ultimately proved central to the defence of the Cayman proceedings.

New York

In New York, two of the defendant groups, which formed part of Mr Al Sanea's business empire, the AwalCos and SICL, instituted proceedings under Chapter 15 of the US Bankruptcy Code, whilst another Saad Group defendant, SIFCO5, sought recognition in the Delaware Courts. These applications resulted in the defendants' foreign bankruptcy proceedings in the Cayman Islands being recognized by the US bankruptcy court. Such recognition under Chapter 15, which implements the UNCITRAL Model Law on Cross-Border Insolvency, brings with it a host of tools and powers which assist the office-holder (or "foreign representative" in the parlance of the US statute) in identifying and gathering estate assets for the benefit of creditors. Chapter 15 recognition also provides the benefit of US bankruptcy law's "automatic stay," which shields the entity with bankruptcy proceedings pending abroad from being sued in the US, protects that entity's assets in the US from attachment or execution and stays any pending proceedings it is a party to, in the event the entity is already a party to any lawsuit or other proceedings. Moreover, one of Chapter 15's primary purposes is to facilitate international cooperation between and among the US courts and those handling foreign insolvency proceedings and to streamline the identification of cross-border assets. To that end, the defendants were able to utilise these Chapter 15 tools (with the US Bankruptcy Court's approval) to great effect, in particular the ability to obtain discovery from entities with key information in support of worldwide efforts to identify and gather estate assets.

To aid its own discovery efforts, AHAB sought and obtained the assistance of the United States District Court for the Southern District of New York in obtaining discovery from certain financial institutions in New York pursuant to 28 U.S.C. § 1782, a federal US statute under which a US district court may order the production of documents for use in a foreign proceeding. To obtain such assistance under Section 1782, certain discretionary factors must be met, as well as the following statutory requirements: (1) the discovery target must reside or be found in the district of the district court to which the application is made; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the application must be made by a foreign or international tribunal or any interested person. The Section 1782 application led to the imposition of confidentiality restrictions on AHAB and the defendants alike, each of which was required to sign confidentiality undertakings governing the use of the 1782 material, as well as agree a pre-trial Order stipulating that the trial would be heard *in camera* on occasions such material was referred to in open Court.

Other cross-border workstreams have included:

- Proceedings in the High Court of England and Wales for recognition under s236 of the Insolvency Act, 1986;
- Proceedings in Switzerland for recognition under Article 166ff of the Swiss Private International Law Act;
- Various proceedings between AHAB and one of its financial business subsidiaries, TIBC, in Bahrain and Saudi Arabia;
- Letters of request for judicial assistance to the authorities of Saudi Arabia and Switzerland;
- SIFCO5 also engaged the Chapter 15 process in Delaware which was the first successful one before those Courts following the high-profile denial of Chapter 15 relief in the US to two Cayman-incorporated Bear Stearns' managed hedge funds on grounds that they did not have a true business interest establishment in its place of incorporation.[3] SIFCO5 successfully argued before the Delaware Courts that COMI should follow where the liquidators were located, regardless of where management of the entity may have been pre-liquidation, a principle that was further developed by the Second Circuit in the Fairfield case.

Conclusion

The enormous scale and truly international scope of these proceedings has showcased the ability of practitioners to work collaboratively across several jurisdictions to successful ends. Not only did the proceedings grow from a family dispute to the most substantial trial in Cayman Islands history, it also contributed to the development of US bankruptcy and Cayman Islands law. The Cayman litigation also demonstrated the jurisdiction's ability to manage high profile litigation, the quality of its judiciary and the Court's ability to use cutting-edge technology, as well as the resources and flexibility to manage a year-long, multi-jurisdictional trial.

With numerous Chapter 15 proceedings pending in the US bankruptcy court and AHAB's Appeal[4] slated to be heard in May 2019, it is clear that this global saga already spanning nine years is not set to end anytime soon.

3 The Bear Stearns decision was later superseded by the United States Court of Appeals for the Second Circuit in the Fairfield Sentry Ltd. case, which enunciated principles making Chapter 15 available to offshore funds.

4 Notice of Appeal was lodged on 14 June 2018.