Claim No. CFI 016/2015

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE JUSTICE ROGER GILES

BETWEEN

(1) MOHAMMAD ABU ALHAJ

(2) ABU ALHAJ HOLDING

Claimants

and

(1) SHEIK SULTAN KHALIFA SULTAN AL NEHAYAN IN HIS CAPACITY AS DIRECTOR OF GOLD HOLDING LTD

(2) SHEIK SULTAN KHALIFA SULTAN AL NEHAYAN

Defendants

ORDER WITH REASONS OF JUSTICE ROGER GILES

UPON reviewing the Defendants' Application Notices CFI-016-2015/3, CFI-016-2015/4, and CFI-016-2015/5 on 8 October 2015 seeking immediate judgment and security for costs

AND UPON reading the submissions and evidence filed and recorded on the Court file

AND UPON hearing the First Claimant as a litigant in person by way of telephone on behalf of both Claimants and Counsel for the Defendants at a hearing on 16 February 2016

IT IS HEREBY ORDERED THAT:

1. There be judgment for the Defendants on the claim in paragraph 37 of the Particulars of Claim.

2. Paragraphs 32, 33 and 38 of the Particulars of Claim be struck out.

3. The Claimant, Abu Alhaj Holding, provide further particulars of paragraphs 7 and 8 of the Particulars of Claim in conformity with these reasons no later than the stated date.

4. The application for security for costs be dismissed.

5. The Claimants pay the Defendants' costs of the application for immediate judgment, to be assessed if not agreed.

6. There be no order as to the costs of the application for security for costs.

7. The time for filing any application for permission to appeal be extended until the stated date.

In these orders, the stated date is 14 days after the despatch of these reasons to the Claimants' email address in the Claim Form.

Issued by:

Amna Al Owais

Deputy Registrar

Date of Issue: 18 February 2016

At: 3pm

SCHEDULE OF REASONS

Introduction

1. The Claimants are Mohammad Abu Alhaj and Abu Alhaj Holding, the latter so named but correctly Abu Alhaj Holding Ltd. The Defendant is Sheikh Sultan Khalifa Sultan Al Nehayan. He is named as Defendant twice, first "in his capacity as director of Gold Holding Ltd" and secondly without that description. It is not a relevant distinction, and I will refer to him simply as the Defendant.

2. The proceedings were commenced by a Claim Form issued on 2 June 2015, with Particulars of Claim filed on 12 August 2015. The amount

claimed was USD 360 million, claimed as damages as later described. The Defendant filed a Defence on 25 August 2015, including within it, although not so identified, a Counterclaim. The Claimants filed a Reply and Defence to Counterclaim on 28 September 2015.

3.	I have today heard two applications by the Defendant, one for immediate judgment dismissing the Claimants' claims and the other for security for costs to be provided by the Claimants. The requisite application notices were not used, but no point was taken in that respect. The applications were filed on 22 October 2015. The Defendant's submissions, part of the applications, brought responsive submissions from the Claimants filed on 29 November 2015, and submissions in reply from the Defendant were filed on 21 December 2015. A number of assertions were made in and documents attached to the various submissions, but no affidavit or witness statement evidence was provided.

4.	The Claimants are not legally represented. Their documents are over the signature of Mr Abu Alhaj, who appeared on the applications by telephone. Appearing for the Defendant were Mr Daniel Roussin and Ms Helene Mathieu of the firm representing the Defendant.

Request for Adjournment

5.	By an email dated 1 February 2016 the Claimants asked that the hearing of the applications be adjourned until they were able to obtain legal representation. They said that despite their efforts from at least the end of November 2015, a number of "international law firms" had declined to represent them, and that all law firms participating in the Court's Pro Bono Programme had similarly declined, in both cases citing conflict of interest. According to the Claimants, this was because the Defendant is a member of the UAE ruling family.

6.	The Defendant opposed any adjournment. He pointed out that the Claimants agreed to the hearing date of today when it was fixed, and that it was evident from exchanges of correspondence that they had some legal assistance from lawyers in Canada and the United States of America. He said, correctly, that there was no evidence of efforts to obtain legal representation and their failure or the reasons for failure other than Mr Abu Alhaj's assertions. The Claimants' request, he said, was in order to and would delay the proceedings indefinitely, and he said that he should have the fate of such a large claim in which serious allegations were made determined without undue delay.

7.	In response, the Claimants did not deny that they had the legal assistance, but said that they could not afford "lawyers from national and international" and that they would provide evidence of the refusals of law firms upon request. No such evidence was provided. In an email of 11 February 2016 they reiterated their request for "some time to find a lawyer".

8.	The request was referred to me for a decision on the papers. I refused to adjourn the hearing, and should record my reasons.

9.	I was satisfied that the Claimants had some legal assistance, although it may have been informal and variably productive. From the asserted approaches to "international law firms" and the absence of evidence of the Claimants' financial positions, I was not satisfied that they were unable to afford legal representation. I had difficulty in accepting that, of the many law firms in the Register of Legal Practitioners, more than a few would have had a conflict of interest properly so called in acting against the Defendant, or that all practitioners, many of whom are not based in the UAE, would be deterred from acting for the Claimants because of the identity of the Defendant. It is sufficient to note that, in conformity with long and valued tradition, under the Code of Conduct registered practitioners undertake to "fearlessly advance, defend and protect the interests of their client before the Court without regard to any consequences to themselves or any other person".

10.	In short, I was not satisfied as to inability to obtain legal representation. Further, although personal appearance by Mr Abu Alhaj could be discounted, he was able to and had provided submissions in response to the applications, and could (as he did) participate in the hearing of the applications by remote means. There were serious allegations against the Defendant, who was entitled to have the proceedings duly proceed unless there was good reason to the contrary. In balancing justice between the parties I considered that the hearing should go ahead.

11.	I add that, if I had been satisfied that the Claimants had suffered a comprehensive inability to obtain legal representation as asserted, I would in any event have refused an adjournment because any further time would have been unlikely to have changed that position.

The application for immediate judgment

12. The application was said to be brought under Rule 24.1 of the Rules of the DIFC Courts ("RDC"), which relevantly provides that the Court may give immediate judgment against a Claimant on the whole or part of a claim if it considers that the Claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial. It was not suggested that there was some compelling reason within the second of these limbs, and if the first be satisfied there is no need to refer to it further. The orders the Court may make include judgment on the claim or any part of the claim or the striking out or dismissal of the claim (RDC 24.11).

13.	There is also power under RDC16 to strike out a statement of case if it appears to the Court that it discloses no reasonable grounds for bringing a claim, is an abuse of the Court's process or otherwise likely to obstruct the just disposal of the proceedings, or there has been failure to comply with a Rule. There is an overlap between the two rules. The Defendant's submissions were apt for an application under RDC 4.16 as well as, and in some respects instead of, RDC 24.1. In *International Electromechanical Services Co. LLC v Al Fattan Engineering LLC & Anor*, CFI 004/2012, 14 October 2012, Justice David Williams relied on Articles 32(f) and 44 of the DIFC Courts Law, Law No. 10 of 2004, to treat an application made under RDC 12.7 as made under RDC 12.1(2). The same Articles may be availed of here, and in my opinion, to the extent of the submissions apt to it, this application can and should be treated as made under RDC 4.16.

14.	I indicated this to the parties in the course of the hearing, and no objection was raised.

15.	Abu Alhaj Holding is the majority shareholder in Gold Holding Ltd, a company incorporated in accordance with the DIFC Companies Law, Law No. 2 of 2009 (the "Companies Law"). Mr Abu Alhaj became a Director and CEO of Gold Holding; the Defendant became a Director and its Chairman.

16. The Particulars of Claim include allegations broadly of an ousting of Mr Abu Alhaj from Gold Holding and oppressive conduct towards him and Abu Alhaj Holding, which need not be detailed because no relief is sought in relation to the control of Gold Holding or its internal affairs. The relief claimed is solely that of damages.

17. In that respect, the Claim Form states a "Claim Value" of USD 360 million plus costs, but leaves blank the box for "Remedy Sought". The Particulars of Claim conclude with three paragraphs 36, 37 and 38, respectively asserting that the Defendant is liable to pay:

(a) to Abu Alhaj Holding, USD 10 million;

(b) to Abu Alhaj Holding, USD 200 million; and

(c) to Mr Abu Alhaj, USD 150 million.

18. The basis for these liabilities in the Particulars of Claim, as allegations, are that the Defendant is liable:

(a) to Abu Alhaj Holding for the price of shares in Gold Holding transferred by Abu Alhaj Holding to the Defendant ("the shares claim");

(b) to Abu Alhaj Holding for the loss caused to Gold Holding under his management ("the mismanagement claim"); and

(c) to Mr Abu Alhaj as compensation for defaming him ("the defamation claim").

19. The Defendant's submissions identified these as the three claims in the proceedings. The Claimants did not take issue with that understanding of their claims.

(a) The shares claim

20. In the Particulars of Claim it is relevantly alleged:

"7. An agreement was reached between the Defendants and Claimant (2) Abu Alhaj Holding, represented by Mohammad Abu Alhaj, in that ten million (10,000,000) shares be transferred from Abu Alhaj Holding to the Defendants for the consideration of ten million dollars US ($10,000,000USD);

8. The said shares were effectively transferred but the Defendants have neglected to pay the sum of ten million dollars USD ($10,000,000USD) to the Claimant (2) Abu Alhaj Holding;

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36. The Defendants have appropriated themselves with shares from the Claimant (2) Abu Al Haj Holding without compensation therefore making them liable to pay ten million dollars US ($10,000,000USD) to the Claimant (2) Abu Alhaj Holding."

21. In his Defence the Defendant denied these paragraphs, and asserted that the shares in Gold Holding held by him "have been issued by [Gold Holding] and are fully paid and completely released". In submissions the Defendant's position was clarified, namely, that while 9 million shares (not 10 million) had been transferred by Abu Alhaj Holding to the Defendant, the transfer had not been for a money consideration but in return for the Defendant becoming Chairman of Gold Holding and lending his name and contacts to its fortunes. Mr Abu Alhaj, on the other hand, affirmed that the Claimants' case was that a money consideration was payable.

22. The Defendant submitted that he should have immediate judgment because Abu Alhaj Holding had not provided any documentation to support its claim. The submission is misconceived.

23. The Defendant has the overall burden of satisfying the court that Abu Alhaj Holding has no real prospect of success, see *ED&F Man Liquid Products Ltd v Patel & Anor [2003] EWCA Civ 472* (Peter Gibson and Potter LJJ) at [9] in relation to the equivalent rule of the CPR. The Defendant must provide some credible evidence in support of his application whereupon Abu Alhaj Holding may have an evidential burden of demonstrating a real prospect of success. However, the Particulars of Claim contain allegations, "a concise statement of the facts on which the Claimant relies" (RDC 17.17(1)), and Abu Alhaj Holding is not required to support the allegations by evidence upon the application brought by the Defendant in the absence of evidence from the Defendant controverting or casting doubt upon the facts as alleged.

24. The Defendant brought no such evidence. Regard may be had to verification by a statement of truth (RDC 23.7) but the Defence was not so verified and could not be relied on (rather, the Particulars of Claim were so verified). It was said in the application notice and repeated in submissions that the shares were fully registered and it that the Company's books did not indicate any unpaid money, which was not to the point when the case was one of transfer for consideration from Abu Alhaj Holding to the Defendant; but in any event there was no verification by statement of truth in the application notice. No ground was provided for absence of a real prospect of success, and it is not necessary to decide whether a form of shareholder resolution on which Abu Alhaj Holding relies lends support to the shares claim.

25. The pleading of the shares claim is not satisfactory. In response to my enquiry, Mr Abu Alhaj said that the agreement alleged was partly oral and partly in writing, and the Particulars of Claim should have set out the contractual words used and stated by whom, to whom, and when and where they were spoken (RDC 17.41) and identified the writing. Further, the words "effectively transferred" in paragraph 8 of the Particulars of Claim are unclear, and the occasion and means of transfer should have been set out. Nonetheless, the essential allegations are made and these deficiencies can and should be rectified by further particulars. I will not strike out the relevant paragraphs, but will order further particulars.

(b) The mismanagement claim

26. In the Particulars of Claim there appears, rather out of the blue and without preceding allegations to give content to it -

"37. The Defendants, under their management and rule, have caused Gold Holding Ltd to lose contracts worth over two hundred million dollars US ($200,000,000USD) therefore making them liable to pay same to the Claimant (2) Abu Al Haj Holding."

27. The pleading is hopelessly defective. The Defendant took issue with it rather mildly by the submission that no fault had been alleged against

him. No doubt the paragraph should be understood as intended to raise breach of duty in the management of Gold Holding, but its deficiency in that respect is only the beginning.

28.	The Defendant again submitted that Abu Alhaj Holding had not supported the claim by evidence, a submission which suffers like misconception to that in relation to the shares claim. But the Defendant was on sound ground, and it is sufficient to go straight to it, in the submission that Abu Alhaj Holding cannot claim for any loss which may have been suffered by Gold Holding as a result of any breach of duty by the Defendant in its management.

29.	This stems from the so-called rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 that in an action to recover damages for a wrong to a company (here, any breach of duty by the Defendant in the management of Gold Holding) the proper plaintiff is the company. The value of a shareholder's shares may be diminished by the wrong, but the shareholder cannot bring an action and it is for the company to sue whereby the value of the shareholding is restored; see generally *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 and in the different context of breach of duty by solicitors towards the company *Johnson v Gore Wood & Co* [2002] 2 AC 1.

30.	There are exceptions to the rule, that commonly invoked being where there is a fraud on the minority and the wrongdoers control the company and so will not bring an action against themselves. The minority shareholder will be permitted to bring a derivative action against the wrongdoers on behalf of itself and all other shareholders to assert the company's claim.

31.	In many jurisdictions bringing a derivative action is now regulated by statute, see for example Sections 260 - 269 of the Companies Act 2006 (UK). The Companies Law contains no provision for a derivative action. RDC 20.63-69, however, states the requirements for a derivative action. They include that the Court must give permission to continue with a claim once filed. The claim in paragraph 37 is not of this nature. Abu Alhaj Holding is not a minority shareholder, and in any event it does not purport to bring a derivative action.

32.	I do not think that the DIFC Law of Damages and Remedies, DIFC Law No. 7 of 2005, alters this position. The mismanagement claim has no real prospect of success, and the Defendant is entitled to judgment on that claim.

**(c)	The defamation claim**

33.	In the Particulars of Claim it is relevantly alleged:

> "32. The Defendants have told Gold Holding Ltd's clients and anybody else who will listen that the Claimant (1) Mohammad Abu Al Haj has stolen money from Gold Holding Ltd and has fled the country in hiding;
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> 33.	The Defendants have seriously defamed the Claimant (1) Mohammad Abu Al Haj causing him serious prejudice;
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> .
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> 38.	The Defendants have slandered the Claimant (1) Mohammad Abu Al Haj's good name in the investment banking industry, thus causing him irreparable damage therefore making them liable to pay one hundred and fifty million dollars US ($150,000,000USD) to the Claimant (1) Mohammad Abu Al Haj."

34.	The Defendant submitted that there were no facts or evidence supporting this part of the claim, again a misconceived stance when he brought no evidence to provide grounds for immediate judgment. To a point that is understandable when, even assuming that paragraphs 33 and 38 do not go beyond paragraph 32, the alleged publication is almost completely general ("Gold Holding Ltd's clients and anybody else who would listen"). It is not surprising that the Defence contained no more than a denial of these paragraphs. Thus the Defendant submitted also in the written submissions that the paragraphs lacked "specific reference to facts and events", a submission that was amplified to like effect orally, and also that the amount claimed was "frivolous, ill-founded and in any event grossly exaggerated".

35.	These submissions are more correctly an invocation of the power to strike out in RDC 4.16. They should be accepted.

36.	The pleading of the defamation claim is fundamentally flawed. The Court's jurisdiction relevantly depends on an incident occurring in the DIFC (DIFC Law of the Judicial Authority at Dubai International Financial Centre, Law No. 12 of 2004, Article 5(A)(1)(b)). Mr Abu Al Haj being overseas, as appears from the Particulars of Claim, it depends upon publication in the DIFC. That adds to the necessity at the least that the words written or spoken, and when and to whom, should be identified and set out in the Particulars of Claim. This is a fulfilment of the requirement that there be a concise statement of the facts on which the Claimant relies as a matter of common sense there being no specific Rules of this Court for defamation claims, but regard may also be had to PD 53 supplementing Part 53 of the CPR as a sound guide. The Defendant cannot be expected to meet the defamation claim as it is pleaded. The Particulars of Claim in this respect are in my opinion likely to obstruct the just disposal of these proceedings, within RDC 4.16.

37.	It does not necessarily follow that the defamation claim should be struck out. Further particulars may be a sufficient and appropriate remedy, as in the case of the shares claim. However, I do not think this is so in the case of the defamation claim. The generality is gross, the damages claimed are well beyond any reasonable contemplation, and I am not satisfied that there is likely to be acceptable clarification through further particulars. That is supported in my view by regard on the one hand to the sketchy evidence of publication proffered by the Claimants in their submissions, falling far short of the generous allegation in paragraph 32 of the Particulars of Claim and of dubious support for the defamation claim, and on the other hand to Mr Abu Alhaj's assertion in the course of submissions of publication to thousands. For like reasons, I do not think liberty to re-plead should be granted. If Mr Abu Alhaj wishes to persist in a defamation claim, it should be via fresh proceedings properly mounted.

38.	In the result, therefore, I will order that there be judgment for the Defendant on the mismanagement claim; that paragraphs 32, 33 and 38 embodying the defamation claim be struck out; and that further particulars of paragraphs 7 and 8 of the Particulars of Claim be provided.

The application for security for costs

39. By RDC 25.101 security for costs may be ordered if the Court is satisfied, having regard to all the circumstances of the case, that it is just to make the order and one or more of the conditions in RDC 25.102 applies. The conditions include that the Claimant is resident out of the UAE, the Claimant is a company and there is reason to believe it will be unable to pay the Defendant's costs if ordered to do so, the Claimant failed to give his address in the claim form, and the Claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

40. The Defendant initially submitted that each of these conditions was satisfied and that it was just to make an order. He proposed that, in the light of the claim to USD 360 million, an amount of AED 3 million was appropriate.

41. However, the goalposts shifted. I foreshadowed my decision on the application for immediate judgment, and invited submissions on the basis that the proceedings were confined to the shares claim. Thus the application was to be approached on the basis that the only claim was the shares claim and the only Claimant was Abu Alhaj Holding.

42. The result may be shortly stated. After some debate in which the satisfaction of the conditions was explored, the Defendant said that he could not satisfy any of them in relation to Abu Alhaj Holding as Claimant. He accepted that, on the reduction of the proceedings to the shares claim alone, the application for security for costs could not succeed. The frankness is appreciated and in accordance with proper professional conduct. The application will therefore be dismissed.

Costs

43. The Defendant submitted that he should receive the costs of the application for immediate judgment, and that there should be no order as to the costs of the application for security for costs. The Claimants left the disposition of costs to the Court. The Defendant was not in a position to assist in arriving at costs amounts.

44. The Defendant succeeded in large monetary measure by the application for immediate judgment and also in reduction of the proceedings bringing what should be but a brief trial. As to the shares claim, he will also obtain necessary further particulars. The application for security for costs was reasonably brought, and although its fate had the goalposts not shifted has not been decided that shift is because of the Defendant's substantial success on the application for immediate judgment. In my view, the orders proposed by the Defendant are appropriate orders as to costs.

The CMC

45. The proceedings were also listed today for a Case Management Conference. I proposed, for reasons then briefly explained, that the conference should be held at a later date. Amongst other things, the parties must now adjust to the truncated proceedings; particulars will be provided; and the Defendant is to reassess continuation with the counterclaim. A fresh date should be fixed in due course, and not on the basis that I am part heard as to the CMC.

Orders

46. Mr Abu Alhaj could not reasonably be present by telephone as I give these reasons. He will receive notice of the orders and a transcript of the reasons. He has already indicated an intention to appeal. I will extend the time for applying for permission to appeal from the orders so that it runs from the despatch of the reasons to him by email.

47. I make the following orders:

(1) That there be judgment for the Defendant on the claim in paragraph 37 of the Particulars of Claim.

(2) That paragraphs 32, 33 and 38 of the Particulars of Claim be struck out.

(3) That the Claimant Abu Alhaj Holding provide further particulars of paragraphs 7 and 8 of the Particulars of Claim in conformity with these reasons no later than the stated date.

(4) That the application for security for costs be dismissed.

(5) That the Claimants pay the Defendant's costs of the application for immediate judgment to be assessed if not agreed.

(6) That there be no order as to the costs of the application for security for costs.

(7) That the time for filing any application for permission to appeal be extended until the stated date.

In these orders, the stated date is 14 days after the despatch of these reasons to the Claimants' email address in the Claim Form.