THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

MUZOON HOLDING LLC

Claimant

and

ARIF NAQVI

Defendant

Hearing :	**28 September 2022**
Counsel :	**Mr. Amr Bajamal instructed by Amal Advocates & Legal Consultants for the Claimant** **Mr. Michael Patchett-Joyce, assisted by Mr. Sulakshana Senanayake instructed by Afridi & Angell for the Defendant**
Judgment :	**5 October 2022**

JUDGMENT OF JUSTICE SIR JEREMY COOKE

UPON the Amended Claim Form filed on 23 December 2018 (the "Claim")

AND UPON hearing counsel for the Claimant and counsel for the Defendant at the Trial listed before me on 28 September 2022

AND UPON reviewing the relevant submissions in the case file

IT IS HEREBY ORDERED THAT:

1. The Claim fails and is dismissed.

2. Costs shall be reserved.

3. The parties are to seek to agree the issue of costs within 7 days from the date of this order and in the absence of agreement, should file written submissions with the Court. The Defendant's submissions should be made within 10 working days of this order; the Claimants in answer within a further 3 working days; and the Defendant's reply submissions within 3 working days after that.

Issued by
Ayesha Bin Kalban
Acting Registrar
Date of Issue: 5 October 2022
At: 9am

REASONS

Introduction

1. The trial of this action proceeded on a limited basis. Following the setting aside of a judgement obtained in default against the Defendant, and the failure of his application to dismiss the claim for lack of jurisdiction in the summer and autumn of 2021, the Claimant filed its Particulars of Claim on 24 November 2021, the Defendant filed his Defence on 6 January 2022 and on 4 February 2022 the Claimant filed its Reply. Disclosure was ordered and took place with the production of extremely limited documentation by the Parties. The evidence for the trial was limited to 3 witness statements from Mr Prasad and numerous exhibits. Objections were taken by the Defendant to the admissibility of many of these exhibits. Neither of the main protagonists, namely the 49% owner of the Claimant, Mr Al Gergawi ("Mr Al G ") and the Defendant, (the former Vice Chairman and Group Chief Executive of Abraaj Holdings with its subsidiary, Abraaj Investment Management Limited ("AIML") and its further subsidiary Abraaj Capital (DIFC) Limited) provided a witness statement let alone appeared to give evidence.

2. In the result, the undisputed admissible evidence consisted essentially of a limited number of emails and attachments, together with the statements of truth in respect of the Parties' pleadings and Mr Prasad's three witness statements of which only one contained any relevant evidence other than the production of documents. Mr Al G had filed a witness statement in support of his application to set aside default judgement and made a declaration in relation to the disclosure given by the Claimant whilst Mr Prasad gave some background evidence about the Abraaj Group which is in liquidation and about the Defendant himself who has been the subject of DFSA proceedings. Whilst there was no issue about the admissibility of emails disclosed by the Parties, some other emails relied on by the Claimant were supplied to it by the joint official liquidators of the Abraaj Group ("the JOLs") and parts are deleted or blacked out as referring to other entities, the identity of which they were not prepared to divulge to the Claimant.

3. It is common ground between the Parties that AED 20 million was sent to AIML for investment and that apart from the return by AIML of a

sum of approximately USD 1 million for investment by the investor in The Modist FZ LLC, the Claimant and Mr Al G, one of whom is said to be the investor, have received no returns from the Abraaj Group in respect of any investment and that the Abraaj Group is now in liquidation with two partners in Deloitte, acting as the JOLs. The prospects of any dividend in the liquidation are speculative.

4. On 10 December 2018, the Claimant issued a Claim Form, naming the defendant as Rafiq Lakhani. The brief details of the claim were as follows: *"The Defendant misappropriated funds from the Claimant in a sum AED 20 million by causing the Claimant to transfer the funds for the purpose of investing in a private placement in the transport company "Careem". The Defendant then failed to return the invested sums and the profit and interest incurred to the Claimant."* The remedies sought were a *"declaration that the sums received by the defendant are held on a constructive trust for the Claimant; damages; interest; costs; the incurred profit on the invested sums; all and any further relief the court sees fit"*. On 23 December 2018 the Claim Form was amended to name the Defendant as the defendant in place of Mr Lakhani. No other amendment has been sought at any later stage in the proceedings, following pleadings, disclosure and provision of witness statements.

5. In the Particulars of Claim, following an extensive narrative it was said, in paragraph 21 that *"the Claimant's funds were never used to purchase any investment products on behalf of the Claimant. At the time when the investments were made Abraaj Holdings, the parent company of AIML, along with other investors in the fund, held units in a fund which in turn held an ownership stake in Careem. As such, if the Defendant was to deal with the Claimant's fund in an honest manner, he could have either purchased units directly in the fund for the Claimant or transferred some of Abraaj Holding units to the Claimant or Mr Al G. However.. at the time when AIML received the funds, the Defendant had no intention to direct the funds towards a real investment. The funds were used. to pay for various expenses and only months later the Defendant wrote to his employees with instructions to create fictitious accounting entries to be followed with fictitious account statements to be provided to the Claimant."*

6. The Particulars of Claim went on to say that: *"had the Defendant deployed the Claimant's funds into any investment fund, at the time of the collapse of AIML and the Abraaj Group, the Claimant would have been the proprietor of units in a stand-alone fund that owns an underlying asset. However due to the Defendant's acts, the Claimant lost its entire investment."* No plea was made as to the value of any funds in Careem at any time.

7. The alleged legal basis for liability of the Defendant, as opposed to AIML, the recipient of the funds from the Claimant or Mr Al G was said to be as follows: *"the Claimant submits that the Defendant is liable to compensate the Claimant for USD 4,449,864 (which remained with AIML from the invested amount of USD 5,449,592 further to the return of the amount of USD 999,728) on the basis of:*

(a) liability arising out of deceit pursuant to Article 31 of the DIFC Law of Obligations (DIFC Law No. 5 of 2005); and/or

(b) liability arising out of inducing or procuring a breach of a legal right - Article 32 of the DIFC Law of Obligations (DIFC Law No. 5 of 2005).

8. The deceit in question is said to arise from fraudulent statements made by the Defendant that:

8.1. the Claimant's funds were to be invested under a discretionary investment mandate;

8.2. the funds had been invested into Careem;

8.3. the investment having achieved a profit of USD 1,741,713.

8.4. the funds having attracted an interest entitlement of USD 321,896.

The Claimant is said to have relied on those statements by making the investments and suffering a loss in consequence of USD 4,449,864. In oral argument, the Claimant's counsel accepted that there were, in reality, two emails/letters which could be said to have induced the investments, which were dated 29 October 2015 and 2 September 2016, recognising tacitly that the statements contained in subparagraphs 8.3 and 8.4 above were made some time after the two tranches of AED 10 million were sent to AIML and could not therefore have induced their payment.

9. The Article 32 liability is said to arise on the basis that the Claimant made payments to AIML for it to invest the funds on his behalf with a view to generating profits. AIML was thus under a legal obligation to deal with the funds in a matter that was consistent with the purpose for which the funds were given and in accordance with the professional duties imposed upon any investment management company. It is alleged that the Defendant caused AIML to breach those obligations which resulted in the loss of the Claimant's investment.

10. The Defendant denies any personal liability of any kind to the Claimant, denying that any cause of action has been established on the evidence adduced and asserting that any claim would lie against AIML (or perhaps one of the Abraaj companies) and not the Defendant personally and that in any event, any such claim would be vested in Mr Al G, not the Claimant company.

11. The burden of proof of liability rests on the Claimant and because of the serious nature of the allegations made, the Court must examine the matter closely because of the lesser likelihood of serious allegations of fraud being true. The standard remains that of the balance of probabilities. In a case where limited evidence was adduced by the Parties, unusually the burden of proof is a significant issue.

The Admissible Evidence

12. As indicated, there were arguments as to whether documents relied on by the Claimant were admissible in evidence. These disputed documents consisted of three DFSA Decision Notices, a "Limited Scope Report" sent by the JOls of the Abraaj Companies ("the Deloitte Report"), documents emanating from the USA, including documents filed in proceedings there, various news reports in newspapers and web-based, and a book.

The DFSA Decision Notices

13. Reliance was placed on three DFSA Decision Notices relating to the running of the Abraaj Group and the Defendant's part in it. They referred to a series of misdoings on the part of those engaged in the business of the Group and failures to abide by the DFSA Rules and Regulations which applied to financial advisers and investment managers. The Decision Notice dated 8 August 2021 related to the Defendant's personal responsibility for breaches.

13.1. The conclusions in those reports are the subject of appeal and are "provisional". In my judgment, the Reports are not admissible in these proceedings, being the findings of a disciplinary Tribunal which cannot be binding on this Court. Moreover, they are not relevant in any event as they contain no references to the particular investments which are the subject of this action or the conduct of the companies or the Defendant in relation thereto.

13.2. The DFSA proceedings were disciplinary proceedings. It was argued by the Claimant that they were administrative proceedings only but that is not the case and even if it were, I cannot see how that can affect the basic operative principle, despite suggestions or dicta to the contrary. The proceedings were adversarial and disciplinary in nature, resulting in the imposition of financial penalties on two Abraaj companies and on the Defendant, as well as a prohibition on the Defendant's future business activities. The conclusions reached by others cannot bind this Court, absent the application of res judicata or specific exceptions to the rule in *Hollington v Hewthorn* which is binding on English Courts. The authorities cited by Counsel for the Claimant in relation to exceptions accepted by English Courts do not apply to the situation here, to which the decision of the English Court of Appeal in *Conlon and another v Simms* [2006] EWCA Civ 1749 is directly relevant and applicable. In that case, the question arose as to whether adverse findings made in disciplinary proceedings, which were challenged but upheld in the Divisional Court, were admissible in subsequent Court proceedings. It was held that they were not. Counsel for the Defendant also relied on *Three Rivers DC v Bank of England (No.3)* [2001] UKHL 16, [2003]2 AC 1 in relation to the report of a statutory enquiry by a Court of Appeal judge, which was similarly found to be inadmissible as evidence of the facts found by him. In my judgment, those decisions reflect the law of the DIFC and fall to be applied by me in relation to the DSFA Decision Notices.

The Deloitte Report

14. The Claimant's lawyers, in correspondence, requested information from the JOLs and received from them what has been referred to as the Deloitte Report. It is headed "Limited Scope Report" and is addressed to the "Requesting Party", who were the Claimant's lawyers. The subject of the Report is *"Assistance in relation to the use of funds transferred to AIML"*.

15. The Defendant submits that this evidence is inadmissible, including the sequence of emails that was attached to it with various passages which were deleted or blacked out. Leaving aside for a moment any issues which arise from the redactions, I am unable to see why the emails which have been adduced are in any way inadmissible as emails passing between the authors and recipients. Their authenticity as documents is not challenged. The fact that they have not been produced by one or other of the Parties to the litigation is neither here nor there. Whilst the emails are not direct evidence of any events which they purport to record, they are, self-evidently, what the authors were saying to the recipients, being the Claimant, Mr Prasad and Mr Al G at the time as well as what the Defendant, Mr Lakhani and Mr Wadood were saying to each other. Whether or not they are in any way comprehensive is obviously questionable and the large gaps between the dates of those which have been produced might be thought to make it likely that there are other documents which have not been seen by the Court.

16. Greater difficulty arises, in my judgement, from the sequence of "Answers to questions in letter from Amal" (the Claimant's lawyers). It is important to note the terms of the report which is headed "Privileged and confidential" and the terms of the Disclaimer on the first page.

"The information contained within this report has been obtained from the books and records of AIM. This document is privileged and confidential to Amal and its client.

Although the information within this report is generally accepted to be accurate, we cannot guarantee its veracity. We therefore accept no responsibility for, and do not warrant the accuracy or completeness of any information within this document.

This document is for the attention of Amal and its client only. It is for the purpose of assisting you in providing further clarity on monies advanced by your client to AIML.

This document, and the information contained herein, is not to be published or passed to any other party, in whole or in part, without our prior written consent, save as required by law, regulatory requirement or professional duty. It is to be neither used nor published in whole or in part, for any purpose, without our prior written consent. Furthermore, we do not accept any liability to any third party in relation to any breach of this obligation, or any opinion expressed, or information included, within this document.

The information within this document is provided on the basis that the recipient will not rely upon it as the sole basis for any action or decision."

17. In the Introduction to the Report, reference is made to an Amal letter of 3 August 2021 which contained five appendices. That letter *"requested the assistance of the JOLs of AIML in determining the use of certain funds invested by Muzoon into the Abraaj Group."* As described in the Report, the JOLs reviewed the appendices and applied keyword searches in AIML's books and records to seek out documentation relating to the funds received by AIML. Neither the appendices, nor the keywords used in the searches have been disclosed. The Report superseded a prior report of 7 October 2021 which has not been disclosed, presumably on the grounds of privilege. The disclosed report set out the findings made from a review of the Appendices which appears to tally with the contents of the emails referred to above. It also set out a chronology of events resulting from the investigations which the Liquidators had effected in relation to the "Statement of Investment at 31 December 2017" which had been sent by Abraaj to the Claimant. The report stated that AIML had duties of confidence in relation to the investment funds where it acted as investment manager and to other entities also which meant that redactions to some of the emails were necessary. To the extent that any funds were transferred to any of these entities, the amount of the transfers and the recipients could not, it was said, be disclosed.

18. The Chronology of Events and the Answers to questions in response to the letter from Amal represent a mixture of what the AIML documents

and accounts show, and the conclusions reached by the Joint Liquidators by reference thereto. If the Claimant had adduced evidence from the Joint Liquidators by calling them to give evidence of fact or had procured the AIML accounts to be given in evidence, I cannot see that there would be any legitimate objection to such evidence. That is not what was done however. Nor was any application made for expert evidence to be adduced from forensic accountants and doubtless the JOLs would have refused to be involved in any such procedure given likely issues of conflict of interest in doing so. As submitted by the Claimants, what is presented to the court is the equivalent of an exchange of correspondence with the Liquidators which includes their conclusions on what the documents and accounts show which could be said to be a mixture of secondary evidence of fact and opinion evidence.

19. In so far as any of this evidence can be seen as hearsay evidence, namely secondary evidence of the contents of the accounts, a notice of intention to rely upon it should have been adduced under the Rules of the DIFC Courts ("RDC") RDC 29.101 - 105. The report itself, not being the oral evidence of the JOLs, is in itself hearsay and could have been adduced with a notice of intention to rely upon the factual evidence therein, with reasons advanced for not being able to call the Liquidators to give oral evidence. In my judgement, there secondary evidence of the contents of the accounts and documents in their possession would have been admissible. Insofar as there was opinion evidence of conclusions reached, that could not have been admissible without special leave for expert evidence to be given in this way which almost certainly would not have been given as it could not be tested by cross-examination

20. I fully understand the difficulties faced by the Claimant in seeking to prove its case without all the documents and accounts in question and have concluded that I should admit the Report insofar as it provides evidence of fact on the state of the accounts in the Abraaj group, despite the failure to observe the provisions of the RDC in relation to hearsay evidence. The Court wishes to avail itself of the best evidence available but must have regard to any prejudice caused to the Defendant by the manner in which this evidence has been produced. The Defendant has had no opportunity to test the evidence in any way in cross- examination and I have already referred to the terms of the Deloitte disclaimer, the redactions and the question whether the Deloitte Report can be said to be in any way comprehensive. Such matters clearly go to the weight to be attached to the evidence and to the caution with which the Court must approach it. Having said that, however, there is no reason to think that the keyword searches were inadequate or that anything said by the JOLs is misleading in any way. The emails largely speak for themselves, and it is only the accounting entries of which they give evidence that otherwise matter. Those are surely a matter of record and it is inherently unlikely that the JOLs would give inaccurate information as to what they show. As JOLs they owe a duty to the Abraaj Group but also to creditors and shareholders and can be expected to be objective in their approach. Whilst exercising the necessary caution, I consider that the Court should not be deprived of the best evidence available as to what happened to the funds in issue, as recorded in the AIML books.

21. Insofar as there is opinion evidence contained in the Deloitte Report I do not consider that the Court should take it into account as hearsay expert evidence, for the reasons given, and I therefore ignore it.

The Other documents relied on

22. Reliance was placed on documents emanating from the United States comprising SEC Complaints and US Court documents and ancillary documents. These largely consisted of allegations made but as the Claimant was not a party to any of them, no question of res judicata arises in relation to any decisions made, which are, in any event, unrelated to the alleged facts on which the claim here is based. They are relied on for the same reason as reliance was placed on the DSFA Decision Notices to show a pattern of misconduct and systematic breaches of duty on the part of the Abraaj companies, their employees and the Defendant. Allegations establish nothing and any findings of any court or body in the US is not binding on this Court, even if the findings were directly relevant to the issues here.

23. Reliance was also placed on sundry extracts from newspapers and web- sourced news reports and on a book by an investigative journalist, entitled *The Key Man.* For much the same reasons as set out above, these cannot be admitted as evidence of fact, being conclusions reached by others or second- hand reports of alleged facts when this Court must proceed on the basis of facts which are adduced in evidence to it and form its own conclusions regardless of the conclusions reached by others.

The Exchanges between the Parties and internal emails at Abraaj, including those produced by the Liquidators.

24. On 29 October 2015, Mr Lakhani, as Managing Director of the Abraaj Group sent an email to Muzoon (Krishna Prasad) attaching a letter requesting a transfer of funds. The attached letter was from the Defendant in his capacity as Vice Chairman and Group Chief Executive of Abraaj Holdings and was addressed to *"H.E. Mohammed Al Gergawi, Muzoon Holdings LLC, United Arab Emirates"*. Under the title *"Investment with Abraaj",* the letter referred to a discussion the previous day and requested the recipient of the letter to remit an amount of AED 10 million to an account, the number of which was given. The beneficiary of the account was named as *"Abraaj Investments Management Limited"*. The letter closed by saying: *"As agreed, this amount will be invested by Abraaj on your behalf under a discretionary investment mandate."*. (No evidence was given of the contents of the discussion the previous day, whether by Mr Prasad, Mr Al G or the Defendant.)

25. On 9 November 2015, Mr Prasad at Muzoon emailed Mr Lakhani asking for confirmation of the safe receipt of AED 10 million *"that was transferred on behalf of H.E."*. The same day Mr Lakhani responded acknowledging receipt. There is then a gap in the documentation provided to the Court until 27 June 2016 when a sequence of Abraaj internal emails appear in the bundle produced to the court, all of which are in entitled *"Subject: Re: Mohammed Abdullah Ali Algergawi"*. On that day, Mr Lakhani emailed the Defendant attaching the letter of 29 October 2015 and referred to the receipt of AED 10 M received on 9 November 2015, which was some seven months earlier. It is apparent from the Defendant's reply on 16 July 2016 that nothing had been done with these funds at all. He said, in an email which was copied to Mr Wadood as well as being sent to Mr Lakhani: *"This is a ticking time bomb. We need to allocate it into investments. Careem was one. Can we please deal with this?"*.

26. The response from Mr Wadood, that day, was: *"We can use the vehicle that was put aside for Careem. For other investments we can look at AH positions and either transfer against cash or synthetically hold the underlying (e.g. [word(s) deleted] along with new investments such as* [word deleted]. *Will try and compose a portfolio. What is the deployment period we should look? 100% within two years of commitment?"* On 2 August 2016 Mr Lakhani responded to Mr Wadood saying: *"AMN [the Defendant] has asked me that the portfolio should comprise of investment in Careem* [words deleted] *and balance should be shown as cash"*. Mr Wadood's response on the same day is in part deleted but continues *"would almost be better to synthetically mirror that through documentation that says our share of*

our LP position [word deleted] *has transferred the Careem portion of its interest to the Gergawi vehicle. So we effectively "sell" our economic benefit from Careem* [words deleted] *to the tune of the size of the Gergawi vehicle.* [Words deleted]. *Please advise and then we can act as per below or as per recommendation above".*

27. On 30 August 2016 Mr Lakhani emailed Mr Wadood, copying in the Defendant who had been copied into all the previous emails saying: *"as you are aware, we have to provide valuation of their portfolio by the end of this week. We had decided on giving them Careem $1M and [word deleted] $1 million and balance as cash for future allocation (education etc). Now that we don't have* [word deleted] *to be allocated, I suggest we allocate Careem $1.5 M and balance as cash to be invested in future investment opportunities. Please advise."*

28. On 31 August 2016 Mr Prasad of Muzoon requested a portfolio update from Mr Lakhani, saying that it had almost been a month since an initial request had been sent. That earlier request is not in evidence.

29. On 2 September 2016, under the title "Re: *Portfolio Update"*, Mr Lakhani emailed Mr Prasad at Muzoon, not copying the email to the Defendant, saying: *"we have allocated $1.5 M of your investment to Careem. At 30 June 2016, this investment is valued at $2.85 M. We are currently in the process of finalising a couple of new investment opportunities and the remainder of your investment will be allocated to these investments when they are consummated."* On the documents provided to the Court, this appears to be the only communication following the investment of the first AED 10 million in November 2015 stating what had been done with that money. The balance which had not ostensibly yet been invested would therefore have remained in cash.

30. On 17 May 2017, Mr Prasad, for Muzoon, sent a letter to Mr Lakhani as Managing Director of the Abraaj Group under the same heading as had been used in the internal emails exchanged between members of that group, as set out above: *"Upon instructions from H.E. Mohammed Abdullah Ali Algergawi, please find enclosed a cheque of AED 10 million towards additional investment under the discretionary investment mandate he has with Abraaj. We request you to kindly acknowledge the receipt of the check and sign and return us a copy of this letter."*

31. Requests for updates of the portfolio are to be found in the documents from January 2018 onwards which appear to go unanswered until March 2018. However, in January 2018, Mr Prasad sent Mr Lakhani Mr G's bank details, following which USD 999,728 was transferred out of an AIML bank account to Mr AL G's bank account, which sum was used for an investment in The Modist FZ-LLC, apparently on Abraaj's recommendation. There must have been communications leading to this, whether orally or in writing. In March 2018 there are internal Abraaj emails discussing a request for a portfolio update from Mr Al G's office which appear to show Abraaj producing arbitrary figures for interest on cash and valuation uplifts on the Modist investment.

32. On 16 April 2018 a Portfolio Update was sent describing the position at 28 February 2018. The statement was headed: *"H. E. Mohammed Abdullah Al Gergawi, Statement of Investment at 31 December 2017",* which purported to show the position at 28 February 2018. This referred to the cash received on 9 November 2015 and 20 May 2017, to investment in Careem of USD 1,823,047 in November 2015 and December 2016, to "Proceeds from Careem Investment" of USD 3,564,760 and to the investment in Modist of USD 1 million. The closing balance was shown as USD 6,513,218 in cash including a profit on the Careem investment and interest on cash of USD 321,896.

33. On 18 June 2018 joint provisional liquidators were appointed in respect of AIML and Abraaj Holdings which had filed for voluntary bankruptcy and on 15 August 2018 they were appointed by the DIFC courts in respect of Abraaj Capital (DIFC) Ltd.

The Contents of the Deloitte Report above and beyond the emails

34. Put shortly, what the Deloitte Report shows, over and above the exchanges of emails to which I have referred is as follows:

34.1. When the AIM bank account received USD 2,724,796 from Mr Al G on 9 November 2015, it was commingled with other funds in a bank account from which AIML paid expenses.

34.2. On 9 August 2016 following the internal email discussions at Abraaj referred to earlier in this judgement as to how to allocate the funds received, *"AIML recorded a debit of USD 1 million to Investment allocation - Gergawi, with a corresponding credit recorded as a payable to XXX. the journal description is "Investment in carrying Gergawi share" with a transaction date of 30 June 2016".* The JOLs concluded that the transaction did not represent the movement of cash into Careem but the transfer of a USD 1 million ownership interest in Careem from another entity to Mr Al G. They concluded that no investment of the funds provided was made until 9 August 2016. Though these are expressed as conclusions, in reality, they say no more than what the accounting entries and emails show unless there are any entries which the JOLs have missed.

34.3. On 9 September 2016, following the email to Mr Prasad of 2 September 2016, stating that USD 1.5 M had been allocated to Careem, *"AIML recorded a debit of USD 500,000 to Investment allocation -Gergawi, with the corresponding credit recorded as a payable to Abraaj Holdings.* The journal description was *"Investment in Careem -additional transferred to Gergawi"*. The transaction date was recorded as 30 June 2016 and the JOLs concluded that the transaction did not appear to represent the movement of cash into Careem but rather the transfer of a USD 500,000 ownership interest in Careem from Abraaj Holdings to Mr Al G. That too is no more than the accounting entries show.

34.4. On 21 December 2016, USD 5 million is transferred out of AIML's bank account to Careem with the transaction description of "Careem networks FZ LLC". AIML recorded a credit of USD 5 million to Cash with corresponding debits of USD 300,000 to *"Investment allocation -Gergawi"* and USD 4,700,000 receivables due from other entities. The journal description was *"funds transferred to Careem Network o/a of Investment"*. The journal recorded a transaction date of 31 December 2016.

34.5. When AIML received USD 2,724,796 on 20 May 2017, it was commingled with other funds and other expenses were immediately paid from this bank account. A debit of the same figure was recorded to Cash and a corresponding credit to Employee Payables. The journal description was *"Funds received from - Mohammed Abdullah Ali Algergawi-1025"*.

34.6. On 15 August 2017, AIML recorded a debit of USD 23,048 to *"Investment allocation -Gergawi",* with a corresponding credit to payables due to Abraaj Holdings. The journal description was *"Careem - Transfer to AH (actual amount 5076825.17, we have booked $5M) Gergawi share."* The JOLs concluded that after AIML transferred USD 5 million to Careem on 21 December 2016, AIML transferred another USD 76,825 to Careem, *"of which USD 23,048 represented an investment on Gergawi's behalf".* The journal recorded a transaction date of 30 June 2017. Once again, the conclusion is no more than what is shown by the accounts to which they refer.

The Identity of the Investor entitled to sue

35. Apart from producing and setting out the contents of various documents, at paragraph 2 of his first witness statement, without giving any basis for so saying, Mr Prasad stated that it was *"on behalf of the Claimant"* that on 5 November 2015 Mr Al G, sent AED 10 million to AIML's bank account, as requested by the Defendant, and at paragraph 26 that, on 17 May 2017, the Claimant sent a letter to Mr Lakhani, the Managing Director of Abraaj Holdings, enclosing a cheque of another AED 10 million to be put towards *"the discretionary investment mandate [the Claimant] has with Abraaj".* The latter phrase is not that which appears in the letter of 17 May 2017, as appears above, and it is the Defendant's case that the investments were made by Mr Al G personally and not by the Claimant.

36. The invitation of 29 October 2015 was addressed to Mr Al G at Muzoon and its terms are not determinative of the identity of the investor. No evidence was given of the discussion which took place the previous day. The funds were sent by Mr Al G to AIML. The correspondence, such as it is, was sent to Mr Prasad at the Claimant, including the email which attached the October 29 invitation letter. No evidence is given of the exact relationship between Mr Al G and the Claimant, save that his 49% interest is known. The assumption is that it is a family investment vehicle although the Defendant's Counsel characterised it as a "family office" which acted as agent for Mr Al G. The issue is who was the agent and who was the principal. There is no direct evidence in relation to this from the Claimant but in an ex post facto letter of 24 July 2018, from Mr Al G to the Claimant, he stated that the money was sent on behalf of the Claimant and that *"as such, all the right in the said amounts including the rights to pursue its recovery along with any investment profits generated through the investment shall be entitled to Muzoon.."* the fiscal implications of the location of the right to make recovery are unknown and it was contended on behalf of the Claimant that the only issue which mattered was the prevention of double recovery. In that connection, the Claimant's Counsel gave an undertaking on behalf of Mr Al G not to seek recovery and said that Mr Al G would be estopped from doing so, by virtue of this letter. The latter would appear to be the case, but unless the letter of 24 July 2018 can be read as an assignment of which notice was given, and this was not suggested, the Court has to decide whether the claim is vested in the Claimant or not.

37. When the email exchanges are examined it can be seen that, whilst the invitation to invest from the Defendant of 29 October 2015 could be taken to refer to either the Claimant or Mr Al G as the investor, the very issue which arises is the result of the failure on the part of AIML/ the Abraaj Group to require completion of the usual documents in the form of application forms, KYC information and the like, which would clearly have identified the investor. Nonetheless, it lay in the hands of the Claimant to adduce evidence showing the inter-relationship between it and Mr Al- G, which it failed to do. As pointed out by the Defendant's Counsel, if money had been sent by Mr Al G on behalf of the Claimant, there ought at least to be accounting entries in the company's books of account reflecting the situation and some documentation passing between them. No evidence of any kind was adduced in these respects.

38. The later emails from Mr Prasad almost uniformly refer to the monies being transferred on behalf of Mr Al G and the title to most of the emails refer to him personally, where they are not headed "Portfolio Update". The letter of 17 May 2017 from Mr Prasad enclosing a cheque for the tranche of investment refers to the discretionary investment mandate which "he", Mr Al G, has with Abraaj. There is, however, reference in the internal Abraaj email of 2nd August 2012 from Mr Wadood to Mr Lakhai and the Defendant, to *"the Gergawi vehicle"* which the Claimant says is a reference to the Claimant itself and, in my judgment, cannot be understood to refer to anything else. Unsurprisingly perhaps, given the absence of proper documentation, Abraaaj and Mr Prasad seem to have used loose language when referring to the investor as Mr Al G as if he was interchangeable with the Claimant, but the references in the 2 August email to *"the Gergawi vehicle"* as the recipient of an interest in Careem is inexplicable if it was acting as agent for Mr Al G, rather than vice versa. In the context of discussion of documentation which was to record the transferee of interest in Careem, whether directly or indirectly, the reference to the vehicle is significant. It *"would almost be better to synthetically mirror that through documentation that says that our share of our LP [Limited Partnership] position has transferred the Careem portion of its interest to the Gergawi vehicle".* That seems to me to be more significant than the names used in the debit entries and the journal entries which refer to Mr Al G's name in one form or another, which I would consider as critical evidence.

39. Whilst therefore the preponderance of documents refer to Mr Al G, I conclude that the investor was known to be "the Gergawi Vehicle", which means the Claimant, which was seen as the personification of Mr Al G and that it was at all time understood that Mr Al G was in fact acting as agent for the Claimant, even though the funds came from his own resources, rather than the company's bank account. With the reinforcement of the letter of 24 July 2018, with some hesitation I hold that the Claimant was the investor entitled to make any claim against the Abraaj companies in relation to its investment and to make claims against the Defendant if there is a valid cause of action in deceit and unlawful interference with AIML's/ Abraaj's obligations to him in relation to that investment.

The Claim in Deceit

40. Regardless of any conclusions reached by the JOls, it is impossible for me to find that, on the balance of probabilities, at the time when the Defendant sent the letter of 29 October 2015, attached to Mr Lakhani's email of the same date, he had no intention of investing sums under a discretionary investment mandate.

41. It is said by the Claimant that the Defendant's actions and those of AIML show that he had no such intention because there was no investment in the name of the Claimant at any time, let alone on receipt of the funds. It was submitted that, because the Abraaj Group specialised in private equity it was a necessary concomitant of the statement in the 29 October 2015 letter that there would be investment *"on your behalf under a discretionary investment mandate"* that the investment should be in the name of the investor either as a direct shareholder in the particular company in which the investment was made or as a unit holder in one of the Abraaj administered funds which held such shares. The result of that would have been that the Claimant would have had a proprietary interest, either directly or indirectly in a company such as Careem, which would survive any liquidation of the insolvent Abraaj group. Furthermore, it was said that it was a necessary concomitant of the DFSA Rules under which

the Abraaj companies were supposedly operating that any cash would be held in a separate account and not commingled with cash available to the Abraaj companies for their own expenditure.

42. In my judgement this is reading much too much into the last sentence of the Defendant's letter of 29 October 2015. A statement that the remittance of AED 10 million would *"be invested by Abraaj on your behalf under a discretionary investment mandate"* does not carry with it any imputation as to the form which such an investment would take. Whether or not the Claimant or Mr Al G was familiar with the DFSA rules is unknown, but it seems highly unlikely given the absence of the application forms and other required documentation for financial advisers/investors to complete in order to comply with the DFSA requirements. A *"discretionary investment mandate"* would give the Abraaj company in question a discretion to decide what investments to make on behalf of the Claimant and in what form. Whether this would be units in a fund administered by an Abraaj company or Limited Partnership in which it was the General Partner which invested in shares of potentially profitable companies, shares held directly in another company of that kind in which private equity funds invest or any other form of investment cannot be spelled-out from the letter. *"Discretionary"* means discretionary and, absent any evidence of the content of the discussion the preceding day, no limits can be placed on it. If, for example, an Abraaj Company held shares in an entity such as Careem and allocated them to the Claimant in its books, so that a portion of its shareholding was held in trust for the Claimant, that would qualify as an investment on behalf of the Claimant. So too would any investment which was not formally held on trust but held by an Abraaj company and allocated internally in its books to the Claimant. That is what appears to have been done, at least in part and belatedly, if the internal Abraaj emails and the accounting/ journal entries mean what they say.

43. Because the investment was to be discretionary, the Abraaj company was entitled to look for opportunities and to hold cash balances either until an opportunity came up or to maintain cash as a form of investment, failing better options in its view. It cannot be said therefore that the 29 October letter contained a representation that any investment in any entity would immediately follow the provision of funds or that the Defendant had a fraudulent intention not to invest on the Claimant's behalf whether immediately or otherwise. The allocation of some interest in Careem in the summer of 2016 when the Defendant refers to the funds as a ticking time bomb, shows his consciousness of the need to invest in something which appeared profitable, but does not throw light on any earlier intention not to do so.

44. Moreover, there is no evidence from either Mr Prasad or Mr Al G of any reliance on any statement in that letter, with the concomitant implicit statement referred to in paragraph 41 above, as an inducement to invest. In reality, no doubt, the money was sent for the purpose of investment but it cannot be said, on a plain reading of the letter that anyone could rely on that alone as a statement that a discretionary investment would take the form of a direct holding in which the investor would have a proprietary interest in a fund as opposed to an interest allocated to it by an Abraaj company in its books. Without any evidence of the content of the oral discussion which preceded the letter which could give a different meaning to the wording of that letter, there is no room for any reliance of that kind, let alone reasonable reliance.

45. Counsel for the Claimant, in discussion with the Court, appeared to recognise the problems inherent in any case based on this email but said that the second investment tranche made in May 2017 could only have been based on what was said in the email of 2 September 2016. That email stated, under the rubric *"Portfolio Update"* that *"we have allocated $1.5m of your investment to Careem"* and set out a current value for it, whilst stating that a couple of investment opportunities were being finalised. It was submitted that it was in reliance on the making of such an investment in Careem that the further sum of AED 10 million was sent to AIML. There are three problems in relation to that submission.

45.1. The first is that there is nothing to show that the Defendant was personally responsible for the email which was sent on 2 September 2016 by Mr Lakhani. The Defendant was not copied into that email and there is nothing to show that he authorised it being sent before the actual allocation of USD 1.5million was actually made. The decision to make such an allocation appears to have been made in August 2026 as the email chain, which was copied to the Defendant shows, but there is no evidence that he was party to an email which anticipated that allocation occurring and stated that it had already occurred.

45.2. Secondly, by the time that the second tranche was paid, some 9 months later, AIML had allocated that amount to the Claimant in its books, even though it did so seven days after the email was sent and backdated the allocation to 30 June 2016 in its books. It appears from the internal Abraaj emails that the decision had been taken to make that allocation on 30 August 2016. On 21 December 2016, some 4 months or more before the payment, a further USD 300,000 had been allocated with a cash payment, so that by the time the second payment was made, the investment, direct and indirect, in Careem was of the sum of USD 1.8millon. The representation of such an investment of USD 1.5milllion, if it be enough for it to appear in the books of the company, was therefore true at the time that payment was made (and more had been invested by that time), even if, at the time that the statement itself was made, the decision had been taken to do so but the allocation only happened a few days later. (It was followed by the further investment of USD 300,000.) It was thus true at the time when any reliance could be placed upon it in making the payment, which is the only reliance suggested by the Claimant.

45.3. Thirdly, there is again no direct evidence of any reliance on such a statement in making the investment. Common sense would suggest that a further sum might only be sent if the sender was confident in the investing ability of AIML to whom the money was sent, and belief that what had been said was true as to the investment of USD 1.5million and its value at USD 2.85 million, but no evidence was adduced to show reliance on this letter which had been sent long before the remittance of the second tranche. From the documents available to the Court, there were no communications of any kind between the Parties in the intervening period, which seems unlikely. What had taken place in the interim? A more recent trigger for the May payment seems more likely and the absence of evidence of reliance, or indeed any evidence on the subject from the Claimant has to be seen in this context.

46. As the facts appear from the factual evidence of the JOLs, it seems that USD 1,823,048 had been invested in Careem and attributed to the Claimant in the books of AIML, as a 15 August 2017. There is no evidence as to the true value of those investments at any time which would falsify the valuation in Mr Lakahni's email of 2 September 2016 and nothing which could link the Defendant to that valuation in any event.

47. I cannot find therefore, on the evidence available, that the Defendant fraudulently misrepresented an intention to invest (which is pleaded) in either of the emails/letters relied on, nor misrepresented that investment to a particular level had taken place at the time that the second payment was made (which is not pleaded). The claim in deceit must fail.

The Article 32 Claim

48. The Claimant says that it was the Defendant who orchestrated the misuse of the funds which were sent by it to AIML. The Defendant is said to have been privy to a fraud in not putting the Claimant's money into any fund or shares which gave him units in that fund or title to shares. The alleged misuse consists of not investing in Careem to the tune of USD 1.5 million so as to create proprietary interests in Careem for the Claimant as opposed to an interest in it through the holdings of AIML or the Abraaj group. Reliance was placed on the word "synthetically" in the internal email exchanges on 2 August to suggest that there was no investment in Careem at all and that the statements of investment were no more than a charade- a pretence that investment had been made. The word "synthetic" will not bear that weight and is used in a variety of contexts, with different meaning or nuances. Definitions of a synthetic investment vary but include investments which replicate or attempt to replicate the cash flows incident to ownership of an asset, commonly a security, a basket of securities or financial instruments such as derivatives in the form of total return swaps or equity swaps. Synthetic investments can simulate the return of an actual investment where the return is created by using a combination of financial instruments, such as option contracts or an equity interest and debt securities. The explanation of what was meant by *"synthetically mirror"* in the email of 2 August 2016 appears in the terms of the email itself, which is quoted above. It envisages a real interest in Careem being transferred to the Claimant.

49. As appears above, I do not consider that it can be said that there was no investment on behalf of the Claimant in Careem. I do not consider that the Defendant's involvement in the decision to allocate interests in Careem to the Claimant in the books of AIML was outwith the scope of his discretionary authority in the absence of evidence which limited that authority to something less than appears in the 29 October 2015 letter. There was discretion as to how to invest in Careem, and there were investments in interests in Careem in the name of the Claimant/ Mr Al G in the Defendant's books.

50. Allegations pursued at the hearing in relation to Articles 6.4.2, 6.13.1 and 6.13.2 of the DFSA Rulebook, Conduct of Business Module ("COB") which were not foreshadowed in any pleading did not seem to me to take the case any further when such wide authority had been given and where there is no evidence that the Defendant, as opposed to other employees of AIML was responsible for any particular breach of COB in relation to these particular investments. No doubt the Claimant wanted to rely on the findings of the DFSA as to systemic patterns of breach but that would not be enough without a focus on the individual facts of this case.

51. It is also said on behalf of the Claimant that, in breach of the DFSA Rules, the money sent by the Claimant was not kept separate in one or more Client accounts in accordance with Article A 5.3.1 of COB. This was not a pleaded allegation as such. It was alleged that AIML was under a legal obligation to deal with the Claimant's funds in a manner that was consistent with the purpose for which the funds were given and in conformity with the professional duties on an investment management company, without any particulars relating to the use of cash. The evidence of the JOLs in the Deloitte Report was that the funds received from the Claimant in November 2015 and May 2017 were commingled with other funds and that it was impossible to say how the specific funds received from the Claimant had been used.

52. In order to prove damages resulting from any breach of duty by AIML in relation to such monies, the Claimant needs to show misuse of that money. The fact of payment into an account with commingling is not enough both because a client account may include monies received from many clients for investment and commingling does not give rise to a claim for damages in itself. Nor is it enough to show that money has been taken from such an account for expenses of the investment manager or payment of staff salaries in breach of duty. Reliance was placed by the Claimant on statements in the Deloitte Report of commingling of funds but there was nothing in the Report to identify the account or accounts in which that commingling took place. They must inevitably, it would seem, have been client accounts into which AIML then wrongfully delved for its own purposes. Whilst such use of client funds would undoubtedly constitute a breach of the DFSA Rules and a breach of duty on the part of AIML, commingling with other client monies would not be such a breach and there was no evidence to establish the extent of any loss suffered by the Claimant as a result of that breach.

53. Equally, or perhaps more, importantly, however, the Claimant produced no evidence to show that the unlawful delving into such client accounts, whether to the detriment of the Claimant or not, was done at the instigation of the Defendant or on his authority. I cannot simply make that inference without evidence to support it. If he did instigate it, authorise it or was privy to it, he could be liable for inducing a breach of the obligations of AIML to its investor, but the evidence does not show it and it cannot be assumed.

Pleadings points

54. The Claimant made a number of points about the deficiencies in the Defendant's pleading because there were bare denials, general denials and non- admissions without any attempt to grapple with the facts alleged and put forward his own version of the facts. The Particulars of Claim were lengthy and recited much of the evidence recorded in the Deloitte Report, as well as referring to the emails. It was submitted that the Court should disregard the Defence in its entirety or treat the Defendant's failures to address the Claimant's individual allegations in accordance with RDC 17.26 and RDC 17.27 as amounting to admissions of the facts stated. These were ambitious submissions, and this was in part a case of the pot calling the kettle black because the Particulars of Claim were lengthy but exiguous in setting out the basis of the Defendant's alleged personal liability. The Claimant also invited the Court to draw negative inferences from the Defendant's failure to address the Claimant's allegations or to adduce evidence from the Defendant himself.

55. The reality is however that the Defendant denied personal liability and contended in his Defence that the Abraaj Group had a structured decision- making process and that the Defendant could not make individual decision relating to the actions of companies in the Group. It was averred that he was not liable for any wrongdoing by companies in the Group and that the Claimant had failed to plead any basis for such liability or any nexus between any wrongdoing on his part and loss and damage suffered by the Claimant. At paragraph 15 of the Defence, the Defendant averred that the Claimant had failed to plead any basis for liability under Articles 31 and 32 of the Law of Obligations; had not specified which statements were alleged to have been fraudulent; had not stated how they were relied on; had failed to specify any causal link between the alleged deceit of the Defendant and the loss suffered by the Claimant: had failed to say what obligations were owed by a third party where breach had been induced by the Defendant; and had failed to specify the causal link between any such conduct and loss suffered. The general nature of the Defendant's case was thus plain in saying that the Claim Form and Particulars of Claim were inadequate in themselves to make a case against the Defendant. The Defendant was entitled to rely on RDC 17.28, having set out the general nature of his case as to the absence of personal liability on his part and to require the allegations made to be proved.

56. As I have held, the limited evidence adduced by the Claimant has not established its case nor any basis on the facts alleged for personal liability for fraud or misappropriation or inducing a fraudulent breach by AIML. It has made serious allegations of wrongdoing causing it damage. Whereas I would have been prepared to draw inferences against the Defendant from his failure to give any relevant evidence had there been evidence sufficient to make out a case against him, that is not the position here and *Wisznieski v Central Health Authority* [1998] PIQR 324 requires there to be a prima facie case to answer before any such negative inference can be drawn. Looking at all the evidence in the round, and even allowing for the Defendant's failures to provide any version of events to the Court in relation to the claims made against him, the Claimant has not discharged the burden of proof which rests upon it.

Conclusion

57. The Claimant has failed to make good its case and judgment must be given in favour of the Defendant.

58. In the ordinary way, costs would follow the event and neither Party, when asked, advanced any reason at the trial why this should not be the case here. In the absence of detailed submissions on the quantum of costs, and with the costs of each party broadly comparable, I would consider that a figure of AED 616,200 as claimed by the Defendant is not unreasonable.

59. However, having given that indication, I make no order at this stage, in case there are matters of which I am unaware which could affect the order to be made. If the parties can agree on costs so much the better, but if they cannot I will make any necessary ruling. If there is no dispute about the principle that the Claimant should pay the Defendant's costs but only an issue as to quantum, I would be thinking of an immediate interim payment of AED 450,000, being confident that this would be recoverable on any detailed assessment by the Registrar, with the balance to be the subject of assessment.

60. The parties should seek to agree the issue of costs within 7 days of the date of this judgment and in the absence of agreement, should file written submissions with the Court. The Defendant' submissions should be made within 10 working days of the date of this judgment; the Claimants in answer within a further 3 working days; and the Defendant's reply submissions within 3 working days after that.