ADGM Courts
محاكم أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

UNION PROPERTIES P.J.S.C
First Claimant/ Applicant

UPP CAPITAL INVESTMENT CO. L.L.C.
Second Claimant/ Applicant

and

TRINKLER & PARTNERS LTD
First Defendant/ Respondent

THOMAS PIERRE TRINKLER
Second Defendant/ Respondent

~~**PATRICK ALBERT HELD**~~
~~Third Defendant/ Respondent~~

FIRST FUND MANAGEMENT LIMITED
Fourth Defendant/ Respondent

JORG KLAR
Fifth Defendant/ Respondent

PARESH CHANDRASEN KHIARA
Sixth Defendant/ Respondent

AMNA HASAN ALI SALEH ALHAMMADI
Seventh Defendant/ Respondent

DAHI YOUSEF AHMED ABDULLA ALMANSOORI
Eighth Defendant/ Respondent

NASER BUTTI OMAIR YOUSEF ALMHEIRI
Ninth Defendant

KHALIFA HASAN ALI SALEH ALHAMMADI
Tenth Defendant/ Respondent

~~**STEFAN DUBACH**~~
~~Eleventh Defendant/ Respondent~~

AHMED YOUSEF ABDULLA HUSSAIN KHOURI
Twelfth Defendant/ Respondent

HASSAN ASHOOR AL MULLA
Thirteenth Defendant/ Respondent

BLUE ROCK INVESTMENTS L.L.C
Fourteenth Respondent

DANA MIDDLE EAST INVESTMENT L.L.C
Fifteenth Respondent

MOHAMED HASAN ALI SALEH ALHAMMADI
Sixteenth Respondent

~~**ISLAND FALCON PROPERTY MANAGEMENT L.L.C**~~
~~Seventeenth Respondent~~

ISLAND FALCON INVESTMENTS L.L.C
Eighteenth Respondent

TEXTURE GLOBAL INVESTMENT LIMITED
Nineteenth Respondent

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2024] ADGMCFI 0014
Before:	Justice Sir Andrew Smith
Decision Date:	15 November 2024
Decision:	1. The Twelfth Defendant's application to strike out or stay proceedings, or for summary judgment is refused. 2. The Claimants' application to amend particulars of claim is granted to the extent stated in this Judgment.
Hearing Date:	10 and 12 September 2024
Date of Order:	15 November 2024
Catchwords:	Application to strike out proceedings. Application for summary judgment. Application to amend pleadings. Representation by conduct. Delay and abuse of process.
Cases cited:	Union Properties P.J.S.C & Anor. v. Trinkler & Partners Ltd & Others [2024] ADGMCFI 0006 Union Properties P.J.S.C & Anor. v. Trinkler & Partners Ltd & Others [2023] ADGMCFI 0009 Union Properties P.J.S.C & Anor. v. Trinkler & Partners Ltd & Others [2023] ADGMCFI 0011 Union Properties P.J.S.C & Anor. v. Trinkler & Partners Ltd & Others [2024] ADGMCFI 0004 Union Properties P.J.S.C & Anor. v. Trinkler & Partners Ltd & Others [2024] ADGMCFI 0003 Independents' Advantage Insurance Co Ltd v Cook [2003] EWCA Civ 1103 ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066 King v Stiefel [2021] EWHC 1045 (Comm) Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16 JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) Peek v Gurney (1873) LR 6 HL 377 Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205 Wearn v HNH International Holdings Limited [2014] EWHC 3542 (Ch) The Owners and/or Bailees of the Cargo of the Ship Panamax Star v The Owners of the Ship Awk [2013] EWHC 4076 (Admlty) Broxton v McClelland [1995] EMLR 485 Mueen-Uddin v Secretary of State for the Home Department [2024] UKSC 21

	Jameel (Yousef) v Dow Jones Company Inc [2005] EWCA (Civ) 75
Legislation cited	ADGM Financial Services and Markets Regulations 2015 ADGM Court Procedure Rules 2016 UAE Federal Decree Law 2/2015 on Commercial Companies UAE Federal Decree Law 32/2021 on Commercial Companies
Case Number:	ADGMCFI-2022-265
Parties and representation:	Mr Patrick Dillon-Malone SC and Mr William Prasifka instructed by Clyde & Co LLP for the Claimants Dr Beat Ammann, About Law GmbH, for the Second Defendant Dr Clemens Daburon, Daburon & Partners Legal Consultants LLP, for the Fifth Defendant Mr Paul Bonner Hughes instructed by DLA Piper Middle East LLP for the Seventh and Tenth Defendants Mr Riaz Hussain KC instructed by Al Aidarous Advocates and Legal Consultants for the Ninth Defendant Mr Jeremy Richmond KC and Mr Benjamin Joseph instructed by SOL International Ltd for the Twelfth Defendant

JUDGMENT

The applications

1. This is my judgment on two applications:

   a. an application of the Claimants, Union Properties PJSC ("**UP**") and its wholly owned subsidiary, UPP Capital Investment Co LLC ("**Capital**"), to amend their Particulars of Claim (the "**Amendment Application**"). I shall refer to the draft pleading for which permission was originally sought as the "**First Draft**". The Amendment Application was filed on 14 June 2024 and is supported by the twenty-eighth witness statement of Mr Nils de Wolff of Clyde & Co LLP ("**Clyde & Co**"), the Claimants' solicitors; and

   b. an application by the Twelfth Defendant, Mr Ahmed Yousef Abdulla Hussain Khouri, for an order that the claims against him be struck out, or in the alternative that he have summary judgment on them, or in the further alternative that they be stayed. It was filed on 2 August 2024 and is supported by a witness statement of Ms Sarah Malik of SOL International Ltd, his legal counsel.

2. There were originally thirteen Defendants to the proceedings. Of those, the claims have been discontinued against Mr Patrick Albert Held, the Third Defendant; and Mr Stefan Dubach, the Eleventh Defendant. The claims against the Ninth Defendant, Mr Naser Butti Omair Yousef Almheiri, have been struck out by order of 23 May 2024 in accordance with my judgment, [2024] ADGMCFI 0006 (the "**23 May Judgment**"). Judgment in default of appearance has been entered against four Defendants: the First Defendant, Trinkler & Partners Limited (**"TAP"**); the Seventh Defendant, Ms Amna Hasan Ali Saleh Alhammadi; the Tenth Defendant, Mr Khalifa Hasan Ali Saleh Alhammadi (Ms Alhammadi's brother); and the Thirteenth Defendant, Mr Hassan Ashoor Al Mulla. Three of the six remaining Defendants took no part in the hearing of these applications: the

Fourth Defendant, First Fund Management Limited (**"FFM"**); the Sixth Defendant, Mr Paresh Chandrasan Khiara; and the Eighth Defendant, Mr Dahi Yousef Ahmed Abdulla Almansoori. The Amendment Application was opposed by the other three Defendants: the Second Defendant, Mr Thomas Trinkler; the Fifth Defendant, Mr Jorg Klar; and Mr Khouri.

3. I heard the applications on 10 and 12 September 2024. The Claimants were represented by Mr Patrick Dillon-Malone SC and Mr William Prasifka. Mr Trinkler was represented by Dr Beat Ammann of About Law GmbH on 10 September 2024, when I heard Mr Dillon-Malone's opening submissions on the Amendment Application, Dr Ammann's submissions and those of Mr Dillon-Malone in reply to him. I also received a further short written submission from Dr Ammann after the hearing on 12 September 2024. Mr Khouri was represented by Mr Jeremy Richmond KC and Mr Benjamin Joseph. Mr Klar filed evidence in opposition to the Amendment Application, and he was represented at the hearing by Dr Clemens Daburon of Daburon & Partners Legal Consultants LLP, but Dr Daburon only observed the hearing and made no submissions.

4. At the hearing, I also heard applications by Ms Alhammadi and Mr Alhammadi to set aside the default judgments entered against them, and I gave an oral judgment in the course of the hearing refusing their applications. Their representatives had filed and served evidence and a skeleton argument in opposition to the Amendment Application, but having refused their applications, I did not hear submissions on their behalf.

The alleged fraud

5. In the First Draft, the Claimants introduced the case as follows: that the claim "*relates to and arises from a fraudulent scheme for the misappropriation of* [UP's] *assets (via* [Capital]*) orchestrated by* [Mr Alhammadi]*, the former CEO and Chairman of* [UP]*"*. They continued:

> "*In outline, the scheme involved the unlawful and unauthorised use of AED 320,717,867.84 belonging to* [UP] *to purchase (via* [Capital]*) 391,789,341 units of participatory notes (P-Notes), whose underlying investments were made up almost exclusively of shares in* [UP]*. The shares were then sold, and for some two and a half years (between February 2019 and June 2021) the proceeds were falsely described as having been invested in various stocks whose supposed performance was falsely reported to the Claimants. In fact, the proceeds of sale were diverted. It is believed that a substantial portion of the diverted funds was used in turn to purchase substantial real property assets owned by* [UP] *at an undervalue"*.

The last sentence of this citation was omitted from later drafts of the proposed amended pleading, which, as I shall explain, the Claimants produced during and after the hearing.

6. As I understand it, none of the Defendants who have responded to the claims have disputed that the Claimants were (or one of them was) victim to a fraud of this kind. The thrust of the response of each of them has been about who was party to it.

7. I described the Claimants' case about the fraud in more detail in the 23 May 2024 Judgment at paras 6 to 11. They are companies incorporated in Dubai, and Capital is said to have been established by UP to undertake and hold investments on its behalf. The Claimants contend that the fraud was perpetrated or concealed through FFM, which was incorporated on 14 March 2018 in the Abu Dhabi Global Market ("**ADGM**") by Mr Almheiri and Mr Alhammadi, who were its directors until about 22 May 2018. Mr Trinkler became a director on 22 May 2018, and in February 2020 Mr Khiara, Ms Alhammadi and Mr Almansoori became directors. Mr Klar also became a director, but the Claimants do not plead when he did so.

8. Mr Almheiri was a director and the Chairman of UP from April 2017 to September 2019, and he was a director and the Chairman of Capital from June 2017 to November 2021. Mr Khouri was UP's Chief Executive Officer ("**CEO**") from July 2017 to July 2018 and its Managing Director from July 2018 to December 2019. Mr Alhammadi was a director of UP from August 2018 to December 2019, its CEO from December 2019 to March

2020, its Vice-Chairman from May to June 2020 and its Chairman from June 2020 to November 2021. Between June 2020 and November 2021, Mr Khiara was the Chief Financial Officer of UP and Mr Almansoori was a director of UP. Mr Klar was a director of UP between June 2020 and November 2021.

9. Both Mr Alhammadi and Mr Khouri were directors of Capital and were on its Investment Committee from June 2017 to November 2021, together (at least at the material times) with a Mr Jonathan Nicoll.

10. According to the Claimants, in July 2017, Capital had opened an account with Julius Baer & Co Ltd ("**Julius Baer**"), and between January and April 2018, it transferred AED 300 million and USD 10 million to Julius Baer. On Capital's instructions, most of these sums were invested in a local Julius Baer fund, the "**UAE Focus Fund**". By a letter dated 23 June 2018, Mr Alhammadi and Mr Khouri instructed Julius Baer to redeem the units in the UAE Focus Fund; and in July 2018 they gave instructions for the proceeds, together with other funds, to be invested in the 391,717,867.84 P-Notes, the underlying investments in which were largely shares in UP.

11. In June 2018 and July 2018, according to the Claimants, Capital entered into a Mandate Agreement ("**MA**") and an Investment Management Agreement ("**IMA**") with TAP, a Swiss asset management company which had been founded by Mr Trinkler and of which he was the CEO. I note that Mr Trinkler disputes that his signature on the MA is genuine and that the MA is valid and effective. On 4 September 2018, TAP entered into a Service Level Agreement ("**SLA**") with FFM, under which FFM was to be paid a fee to *"identify and select an umbrella fund suitable for TAP and its customers*" and for other services.

12. In the unamended Particulars of Claim and the First Draft, the Claimants pleaded that: "*After the purchase of the P-Notes,* [Mr Alhammadi] *and* [Mr Khouri] *instructed Julius Baer to transfer the P-Notes to TAP. However, the P-Notes were, in fact, never delivered to TAP. Rather, in a sequence of three transfers between 10 September 2018 and 5 October 2018 a total of 390,389,341 units of P-Notes, purportedly transferred to TAP for management, were instead delivered to Arqaam Capital Limited (**Arqaam**), an investment bank* [or, according to the First Draft, *"a financial services company"*] *headquartered in Dubai and the issuer of the P-Notes*". The claim is directly concerned with the P-Notes said to have been transferred to Arqaam Capital Limited ("**Arqaam**") by way of a transfer of 180 million units delivered on 20 September 2018, and a transfer of 184,549,341 units delivered on 5 October 2018. The Claimants' case is that these were the 364,549,341 units that were converted into shares in UP, and that the shares were transferred into accounts of Mr Al Mulla, a lawyer and the principal of Hassan Al Mulla Advocates & Legal Consultants. They plead that they believe that the shares were held "*under the instructions*" of Mr Alhammadi and Mr Khouri or Mr Almheiri. It appears to be the Claimants' case that the proceeds were then used to acquire assets in the names of Mr Al Mulla, Mr Alhammadi and Ms Alhammadi. No claim is made in respect of the smaller transfer to Arqaam on 10 September 2018 of 25,840,000 P-Notes that the Claimants plead comprised shares in Al Salam Bank Bahrain. They accept that they have recovered these notes or the assets that they represented because they were transferred to an account that Capital held with SICO BSC, which the Claimants describe as a "*regional asset management firm*".

13. Nevertheless, according to the Claimants, by letters of 20 September 2018 and 2 and 4 October 2018, FFM represented to TAP that it held the units that had in fact been transferred to Arqaam; and TAP reported to Capital by letter of 11 January 2019 that it held 364,549,341 units, and by letter of 3 April 2019 that it had sold the units for AED 286,230,331.37. Capital is also said to have received regular reports from "*TAP and/or FFM*" showing false security balances and *"cash flow statements, which purported to show a picture of active trading in UAE, Saudi and Egyptian stocks"*. The Claimants plead that *"the reports were either compiled by TAP based on reports … from two websites … and sent to FFM … , or generated by FFM …"*; the stock portfolios were fake; and the websites were *"created by employees of* [UP] *on instructions of* [Mr Alhammadi] *and/or* [Mr Khouri]".

14. Further, Mr Khouri received in copy an email from Mr Alhammadi dated 31 October 2018 to UP's Finance Director, Mr Abrar Atif (the "**Atif email**"). For auditing purposes, Mr Atif had asked for information about the divestment of the UAE Focus Fund and for some details of the investment as at 30 September 2018 in P-

Notes. In reply, Mr Alhammadi said that Capital's Investment Committee had decided "*to redeem the entire investment from* [the] *UAE Focus Fund and to utilize the redemption proceeds towards investment* [in] *Diversified Notes*", and to discontinue the relationship with Julius Baer, and that it had appointed another investment manager. He said that the "*Diversified Notes worth USD 47M were transferred from Julius Baer to the Investment Manager*". He said nothing about the underlying investment in UP shares. As I said in my judgment of 24 April 2023 ([2023] ADGMCFI 0009) (the "**April 2023 Judgment**") (at para 33), on the face of it, this response is incomplete and evasive, and the term "*Diversified Notes*" is misleading, given the preponderance in the underlying investment of the UP shares. There is no evidence or suggestion that Mr Khouri corrected the incomplete and misleading response to Mr Atif, and the Claimants submit that this suggests that he was colluding with Mr Alhammadi and party to a scheme to mislead the Claimants about their funds.

15. The Claimants plead that in late October 2021 UP learned that the United Arab Emirates ("**UAE**") Federal Prosecuting Authorities were investigating Mr Alhammadi's activities, that in November 2021 he, Mr Klar, Mr Khiara and others were dismissed by the Claimants, and that in December 2021 UP appointed a new board of directors.

The proceedings

16. I should say something about the history of the proceedings. They were brought by UP and Capital on 14 November 2022 against thirteen Defendants. On 15 November 2022, on the Claimants' application, I made freezing orders and proprietary injunctions against nine of the Defendants and six other Respondents. By orders of 6 December 2022, 21 December 2022, 7 February 2023 and 9 February 2023, I extended the orders and injunctions to 9 May 2023.

17. In their Particulars of Claim filed on 14 November 2022, the Claimants made claims against all or some of the Defendants on the basis of: (i) deceit or negligent misrepresentation; (ii) conspiracy by unlawful means; (iii) breach of fiduciary duties; (iv) dishonest assistance of breach of fiduciary duties; (v) liabilities under the ADGM Financial Services and Markets Regulations 2015 (the "**FSMR**"); (vi) unjust enrichment; and (vii) (against TAP) breach of contract.

18. On 25 January 2023 and 17 February 2023, DLA Piper Middle East LLP ("**DLA Piper**") filed and served defences on behalf of Mr Khiara and FFM to the claims against them. On 24 January 2024, Mr Trinkler, who was the founder and CEO of TAP, and Mr Klar filed and served defences to the claims against them.

19. On 6 February 2023, Mr Khouri made an application (the "**Jurisdiction Application**") in which he challenged the jurisdiction of the Court to entertain the claims against him, and on 3 March 2023, he made an application (the "**Discharge Application**") for the freezing order and proprietary injunction against him to be discharged. After a hearing on 29 and 30 March 2023 and by the April 2023 Judgment, I rejected his challenge to the jurisdiction, and (subject to a qualification that is irrelevant for present purposes) I refused to discharge the freezing order, but I discharged the proprietary injunction against him. However, on 9 May 2023, I declined to continue the orders and injunctions against any of the Defendants, for reasons that I explained in my judgment [2023] ADGMCFI 0011. The essential reason for my decision was that, on the evidence that had then become available, I was not satisfied that the Claimants had shown sufficient risk of dissipation to justify the freezing orders. I also concluded that it was not just to continue the proprietary injunctions against the remaining Defendants. I criticised the Claimants for not making proper disclosure at the hearing on 29 and 30 March 2023 in respect of a settlement in principle (albeit it was not yet legally binding) of claims against some of the Defendants (including Mr Alhammadi) who were eventually parties to an agreement that was later concluded in June 2023 (the "**June Agreement**").

20. On 29 August 2023, Mr Almheiri applied to have the claims against him struck out. By an oral ruling at a hearing of the application on 7 November 2023, I said that the Claimants had not pleaded facts from which an inference of dishonesty could properly be drawn against Mr Almheiri. Nevertheless, I did not then grant the strike out application, but I adjourned it in order to give the Claimants a chance to apply to amend their

Particulars of Claim. On 8 December 2023, the Claimants applied to amend their pleading. On the same date, they discontinued the claim against Mr Held and Mr Dubach.

21. By an order of 11 March 2024, I ordered that the Claimants provide security for Mr Khouri's costs to the completion of disclosure in the sum of AED one million by 8 April 2024, and that the claims against Mr Khouri be struck out if they failed to do so. The Claimants did fail to do so, but by my judgment of 9 May 2024, [2024] ADGMCFI 0004 (the "**9 May 2024 Judgment**"), I granted the Claimants relief from the sanction of having claims struck out and extended the time for the Claimants to provide the security, which they then did.

22. By orders of 15 April 2024, I granted the Claimants' applications for judgments in default of acknowledgment of service against Ms Alhammadi and Mr Alhammadi, and also against TAP and Mr Al Mulla. TAP and Mr Al Mulla have not challenged the orders against them. The judgments were in similar terms and were for:

    a. AED 289,070,952.04 in respect of the claim for restitution;

    b. damages and/or compensation to be determined by the Court;

    c. an account of profits, and payment of any sum found to be due; and

    d. costs and interest thereon.

23. After a hearing on 13 and 14 May 2024, I delivered the 23 May 2023 Judgment on the application which Mr Almheiri had originally made on 29 August 2023, and which I had adjourned on 7 November 2023. I concluded that the amended pleading advanced by the Claimants was defective, I refused the amendment application of 8 December 2023, and I struck out the claims against Mr Almheiri. None of the other Defendants resisted Mr Almheiri's application, nor said anything to suggest that he was party to any wrongdoing. I directed that, if the Claimants wished to make another application to amend their Particulars of Claim against the other Defendants, they should do so within 21 days of my order giving effect to the 23 May 2024 Judgment.

24. The Claimants did not seek permission to appeal against my decision to strike out the claims against Mr Almheiri within the prescribed time limit. However, by an application of 30 August 2024 (the "**Appeal Application**"), they have sought an extension of time to do so. In a witness statement in support of the Appeal Application, Mr Khaled Chaaban, the Chief Legal Officer of UP, explains that the Claimants reviewed their decision not to appeal in light of evidence filed on the applications that are before me; and that "*evidence of the Defendants relating to the involvement of* [Mr Almheiri] *in the wrongdoing alleged in these proceedings that was not before the Court and that was unknown to the Claimants and not capable of being ascertained by them at any time before 13 June 2024*", when the time for seeking permission to appeal expired. For reasons that are not relevant for present purpose, the Appeal Application is still pending.

25. The Amendment Application is, therefore, made pursuant to my direction of 23 May 2024. In the course of Mr Dillon-Malone's opening submissions on the first day of the hearing,10 September 2024, I made various criticisms of the First Draft. On 11 September 2024, the Claimants presented a revised draft pleading (the "**Second Draft**"), which was considered on the second day of the hearing, 12 September 2024.

26. I gave directions about the Appeal Application at the hearing on 10 September 2024, and on 17 September 2024 the Claimants filed more material in support of it. It included, in an exhibit to a witness statement of Mr Chaaban, a further version of the Particulars of Claim, described as "*Intended Draft Proposed Re-Amended Particulars of Claim*" (the **"Third Draft**"). It was prepared on the assumption that the Claimants would be permitted to amend in accordance with the Second Draft, and on its face was designed to introduce changes to reintroduce the claims against Mr Almheiri. On 19 September 2024, Clyde & Co sent an email to the Court. They pointed out some minor errors in the Third Draft, but also observed that there were other changes from the Second Draft "*of potential relevance to the Amendment Application*".

27. The email of 19 September 2024 was not a proper way for the Claimants to present what was really yet a further version of their proposed amendments for consideration on the Amendment Application. It appeared from the email that I was being asked to consider it without the Defendants having an opportunity to comment upon it. The Defendants were entitled to this opportunity, and I invited their comments. In response, I received further observations from Mr Richmond and Mr Benjamin on behalf of Mr Khouri, and Dr Ammann for Mr Trinkler also responded with criticisms of the Third Draft. I then received a further note on behalf of the Claimants from Mr Dillon-Malone and Mr Prasifka.

Mr Khouri's application: the legal principles

28. I come to Mr Khouri's application, which is for an order that the claims against him be struck out or in the alternative that he have summary judgment on them, or in the further alternative that they be stayed. Mr Richmond made these arguments that:

    a. there is no sufficient basis for the Claimants' case that Mr Khouri was dishonest or participated in a conspiracy; and that the claims against him depend, entirely or substantially on a finding of dishonesty or conspiracy, for which there is no proper basis;

    b. the claims should be struck out because they are an abuse of process; and

    c. the claims should be struck out because the Claimants have contravened Court orders.

    I shall consider the first argument here, and I will return to the other two arguments towards the end of my judgment.

29. Rule 9(2) of the ADGM Court Procedure Rules 2016 ("**CPR**") is about striking out a statement of case, and it provides that:

> "*The Court may strike out a statement of case if it appears to the Court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
> *(b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*
> *(c) that there has been a material failure to comply with a rule, practice direction or Court order*".

30. Part 9 of the CPR is about summary judgment, and CPR rule 68(1) provides:

> "*The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that –*
>
> *(a) the claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(c) there is no other compelling reason why the case or issue should be disposed of at trial".*

31. In this case, the core question that arises under CPR rule 9(2)(a) and CPR rule 68(1) is the same: whether the Claimants have a realistic chance of succeeding in their pleaded claims against Mr Khouri. As Chadwick LJ said in *Independents' Advantage Insurance Co Ltd v Cook [2003] EWCA Civ 1103*: "*If the particulars of claim disclose no reasonable grounds for bringing the claim, the court has ample power to strike out the pleading and to enter judgment for the defendant*" (at para 8). The approach adopted by the Court on applications of this kind is well-established and was not controversial. I summarise them as they apply here as follows:

    a. The essential question for the Court is whether the claims against Mr Khouri have a realistic, as opposed to a fanciful, prospect of success, which means that the claims must carry some degree of

conviction, and not be merely arguable: *ED&F Man Liquid Products v Patel [2003] EWCA Civ 472* at para 8.

b. While the Court will not conduct what has been termed a "*mini-trial*" on applications of this kind, it does not have to take at face value and without analysis everything in the parties' statements. As Potter LJ said in the *ED&F Man case sup. cit.* at para 10: "*In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable*".

c. In some cases, the Court will properly take account not only of evidence before it on the application, but also evidence that might reasonably be expected to be available at trial. This does not mean that the Court will entertain groundless speculation that something might turn up. In *Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066,* Moore-Bick LJ said: *"It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court"* (at para 14).

d. In cases where fraud or other comparable dishonesty is alleged, the approach of the Court was summarised by Cockerill J in *King v Stiefel [2021] EWHC 1045 (Comm)* at para 25:

> "*i) The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.*
>
> *ii) Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.*
>
> *iii) However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings*".

As for the last of these points, I also refer to two authorities that I cited at para 29 of the 23 May 2024 Judgment about pleaded allegations of dishonesty, bad faith and comparable misconduct:

a. In *Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16,* Lord Hope said this: "*Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence"* (at para 55).

b. In *JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm),* Mr Justice Flaux, having examined the speeches of Lord Hope and others in the *Three Rivers DC case sup. cit.*, said: "*The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and*

assessment of whether the evidence justifies the inference is a matter for the trial judge" (at para 20).

The Claimants' allegations of deceit and negligent misrepresentation against Mr Khouri

32. It is convenient next first to refer to the proposed claim against Mr Khouri in deceit or alternatively negligent misrepresentation that the Claimants seek permission to introduce by amendment. They allege that Mr Khouri "*purportedly acting on behalf of* [Capital]" made these representations to Capital and to UP that:

    a. "*the P-Notes were "Diversified Notes"*";

    b. "*they* [Mr Khouri and Mr Alhammadi] *would transfer the quantities of P-Notes set out therein from Julius Baer to TAP for its management*"; and/or

    c. "*they had transferred the quantities of P-Notes set out therein to TAP*".

33. The proposed pleading is curious in that it alleges that Mr Khouri made representations to Capital "*purportedly*" acting on its behalf. More importantly, it does not identify when or how the representations were made, except that they were made "[a]*s set out at paragraphs 30 to 54"* of the proposed pleading. It is left to the reader to work out what allegations there pleaded are said to give rise to the alleged representations by searching those 25 paragraphs, in which the Claimants set out their account of matters from 10 July 2017, when Capital is said to have opened an account with Julius Baer, to 15 October 2018, when it is said that Mr Al Mulla reported to the Dubai Financial Market that he held 429,183,516 shares in UP. As Mr Richmond said, this is unsatisfactory. That said, the Claimants' skeleton argument goes some way to explaining the basis for the allegation that Mr Khouri made these representations.

34. First, I consider the proposed pleading that Mr Khouri represented that "*they would transfer the quantities of P-Notes set out therein from Julius Baer to TAP for its management*"; and that "*they had transferred the quantities of P-Notes set out therein to TAP*". Deficiencies in the pleading are immediately apparent. First, there is nothing in the proposed amended pleading to explain the words "*set out therein*". I would infer that it is probably intended to refer to the letters of 20 September 2018 and 2 and 4 October 2018, but it is unsatisfactory that this is not expressly pleaded. Further, the law requires that a representation be a statement of present or past fact, and a statement about the future cannot constitute a representation. Of course, what is literally a statement about the future can include an implied representation about the representor's belief, expectation or intention, but again, if that is the Claimants' allegation, it should be so stated in the pleading.

35. But as well as these criticisms of the Claimants' draft pleading, there is a more fundamental difficulty in their attempt to put forward a claim on the basis of these statements. In their submissions, their case was that these statements were made in the letters of 20 September and 2 and 4 October 2018. Those letters were addressed to Julius Baer, and in the First Draft and the Second Draft it is pleaded that by the letters Mr Alhammadi and Mr Khouri *"instructed Julius Baer to transfer the P-Notes to TAP*". In the Third Draft, the Claimants proposed instead to plead that Mr Alhammadi and Mr Khouri "*signed letters of instruction to Julius Baer purporting to transfer the P-Notes to TAP*", but by way of particulars they retained the allegations that, by the various letters, Mr Alhammadi and Mr Khouri did so instruct Julius Baer.

36. It seems to me, therefore, that the Claimants have not sought to plead any positive case that any of the letters addressed to Julius Baer were intended to make any representation, or did make any representation, to either of them. I can therefore see no pleaded case that by the letters (or in any other way) Mr Khouri represent to the Claimants (or either of the Claimants) that anyone intended to transfer, or had transferred, P-Notes to TAP.

37. What of the Claimants' contention that Mr Khouri was party to a representation that the investments underlying the P-Notes were diversified? Mr Richmond understood, in my judgment correctly, that this allegation can only be based upon the Atif email. In the Second Draft, it is pleaded that the Atif email was

sent on 5 November 2018, but Mr Khouri took no point on that. As I said in the April 2023 Judgment, Mr Khouri did nothing to correct what was said in the Atif email, although it was copied to him. It was argued for the Claimants that, by reason of his conduct, therefore, he associated himself with what Mr Alhammadi said in the email. Mr Richmond argued that there is no sufficient argument that Mr Khouri is liable for what was said in the email. He submitted, and I accept, that silence in itself is not sufficient to find a claim in deceit: that was established by *Peek v Gurney (1873) LR 6 HL 377*. The same applies in a case where a defendant is said to be liable for a negligent misrepresentation. In order to establish liability for a representation made by another person in such circumstances, a claimant must prove that the defendant adopted or approved the other person's statement, and the approval must have been made manifest and communicated to the alleged representee: see *Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205, 211*, per Visc Maugham.

38. Thus far, I accept Mr Richmond's argument, but the question whether the circumstances are such that a defendant is to be taken to have indicated to a claimant approval of what has been said in his presence or (as in this case) copied to him in a written communication is fact-sensitive. In this case, Mr Alhammadi's email was a response to an inquiry by UP's financial director, Mr Atif, about investments made by Capital's Investment Committee, and, while the inquiry was addressed to Mr Alhammadi, it was copied to Mr Khouri, who was also a member of the Investment Committee. Had the inquiry been made at a meeting between Mr Atif, Mr Alhammadi and Mr Khouri, and Mr Khouri heard Mr Alhammadi give what he knew to be a misleading answer to Mr Atif, I would regard it as sufficiently arguable for the purpose of a strike out or summary judgment application that Mr Khouri indicated that he agreed with what Mr Alhammadi said, or at least that he knew nothing to the contrary. In the circumstances of this case, I take a similar view about the exchange of emails. For these reasons, in my judgment, the Claimants might have been able to present a realistic argument that Mr Khouri represented to Mr Atif that "*the P-notes were "Diversified Notes"*". However, this case is not set out in proper detail and with proper clarity in the proposed pleading. It is not for Mr Khouri's representatives nor for the Court to construct what case might have been pleaded.

39. The next question is whether the Claimants have sought to plead a sufficiently arguable case that, if a representation of this kind was made, it was made to either or both of the Claimants. The pleading which the Claimants seek permission to introduce is that the representation was made "*to* [Capital] *(which for all the reasons above was … also a representation made to* [UP])". Again, the proposed pleading is unsatisfactorily vague. I can only suppose that the Claimants are intending to put forward a case that, because Capital was, as it is put, "*the investment arm"* of UP, a representation to Capital was tantamount to making it to UP. However that might be, the Claimants' pleaded case is a different one: that the Atif email was sent to Mr Atif, as the Finance Director of UP. None of the draft pleadings states how the email to him constituted a representation to Capital.

40. There is another deficiency in the proposed pleading of a claim in misrepresentation through the Atif email. It does not plead how either of the Claimants is said to have relied on the alleged representation by Mr Khouri, nor about how his alleged misrepresentation caused damage to either of the Claimants. The allegedly illicit transfers that the Claimants allege had been made some time before the Atif email was sent.

41. I accept Mr Richmond's argument that the proposed pleading is defective in failing to set out a coherent case about when and how Mr Khouri is said to have made representations on which a claim might be based. He managed to pick out from the Second Draft the only possible basis for the allegations that Mr Khouri made relevant representations, but that does not mean that the Claimants have put forward in it a proper case that the Court should permit them to pursue. As Mr Dillon-Malone rightly recognised, while the Court will generally allow amendments that allow parties to put forward their "*real case*", an amended case must not only be properly arguable but carry "*some degree of conviction"*. In my judgment, these proposed claims in deceit and negligent misrepresentation do not do so. I shall refuse the Amendment Application in so far as it seeks to introduce them.

The April 2023 Judgment

42. As I explained in the April 2023 Judgment, in their unamended pleading the Claimants plead against Mr Khouri a claim in unlawful conspiracy. They also plead, as I concluded although Mr Khouri disputed, a claim for breach of his fiduciary duties as a director of UP and of Capital: see the April 2023 Judgment at para 18ff. I rejected the Claimants' submission that the Particulars of Claim included a claim against Mr Khouri for dishonest assistance on a breach of fiduciary duty: see para 25 of the April 2023 Judgment.

43. As Mr Richmond recognised, if deficiencies in a pleading might be cured by amendment, on applications of this kind the Court commonly gives a party the opportunity to make proper amendments rather than strike out the claims or give summary judgment because of the deficiencies. He therefore sensibly did not engage in his submissions on Mr Khouri's application only with the unamended pleading, but also addressed the Claimants' proposed amended pleading in the Second Draft.

44. Mr Richmond argued that, in view of the evidence now available to the Court and in all the circumstances, there is no real prospect of the Claimants establishing dishonesty or conspiracy against Mr Khouri; in reality all their claims against Mr Khouri depend on them doing so; and therefore the proceedings against Mr Khouri should be struck out.

45. Mr Dillon-Malone expressly disavowed any contention that my April 2023 Judgment precludes Mr Khouri from pursuing his application. However, in opposing Mr Khouri's application, he relied upon the reasons I gave in the April 2023 Judgment (at para 29ff) for concluding that the Claimants had shown "*real issues to be tried both that Mr Khouri as party to a conspiracy of the kind that they allege, and that he acted in breach of his fiduciary duties*" (para 34).

46. In outline, my main reasons were these. First, I considered it sufficiently arguable that Mr Khouri must have known that the investments underlying the P-Notes were largely UP's own shares, but nevertheless, he, together with Mr Alhammadi, instructed Julius Baer to buy the P-Notes; and that, again with Mr Alhammadi, he instructed Julius Baer to transfer the P-Notes to TAP. I referred to the Claimants' contention that the P-Notes were "*designed and intended to allow investments in underlying securities to remain anonymous whilst keeping the securities private from others*", and said that I saw no good reason that Capital should invest in UP shares in this way. I also referred to the Atif email and the Claimants' argument that Mr Khouri's failure to correct or explain Mr Alhammadi's misleading or incomplete response to Mr Atif is indicative of collusion with Mr Alhammadi.

The Claimants' evidence about Mr Khouri

47. In a witness statement in response to the evidence of Ms Malik, Mr Chaaban identified four points that, he suggests, refute any suggestion that the Claimants' case against Mr Khouri is fanciful. They are these:

    a. Mr Khouri was, at the relevant times, the CEO and Managing Director of UP, a director of Capital and one of the three members of its Investment Committee, which was tasked with making investments on behalf of Capital and overseeing investments that were made.

    b. Mr Khouri instructed Julius Baer to buy shares in UP, masked as P-Notes, and did nothing to correct Mr Alhammadi's description of them as "*Diversified Notes*".

    c. Mr Khouri signed on behalf of Capital the MA and the IMA, appointing TAP to be Capital's Investment Manager.

    d. Mr Khouri "*fabricated paperwork purporting to show a 'transfer' of the P-Notes to TAP*" when in fact they were delivered to Arqaam on the instructions of Mr Almheiri, Mr Alhammadi and Mr Khouri, converted into shares in UP and sold. Thus, it is argued, a front was created to cover the misappropriation of the assets.

48. Mr Chaaban also gave evidence about the difficulties that the Claimants have encountered in investigating the wrongdoing, and that they believe that documents have either been deleted or sent to personal email addresses so as to hide evidence of the fraud. He said that the Claimants' investigations continue, both internally and by seeking information from Julius Baer and others. The potential importance of Julius Baer's documents is obvious, not least documentation relating to Julius Baer transferring to Arqaam or elsewhere. He gives scant detail of the discussions with third parties, except to state that there are "*active*" discussions with Julius Baer, who "*appear now to be willing to provide documentation*", whereas others have either ignored requests for help or rebuffed them. In my judgment, Mr Chaaban puts forward sufficient evidence about the Claimants' chances of obtaining evidence from Julius Baer and its potential relevance to issues in the litigation is sufficiently obvious to satisfy the guidance given in the *Korea National Insurance Corp case sup. cit.* (see para 31 above), and I can and should properly have regard to this when assessing whether the Claimants have a sufficiently arguable case for the purposes of Mr Khouri's application.

Mr Khouri's response to the case against him

49. The thrust of Mr Khouri's argument was not that I was wrong to decide in the April 2023 Judgment that the claims against him in conspiracy and breach of his fiduciary duties as a director were arguable on the evidence then before the Court. However, he presented new evidence through Ms Malik's witness statements. Mr Richmond argued that all the claims against Mr Khouri required a finding that he was dishonest, intended to harm the Claimants, or in collusion with other Defendants; and that, having regard to all the evidence, it is simply no longer possible to infer that Mr Khouri acted dishonestly or in a conspiracy to harm the Claimants.

50. In broad summary, Mr Khouri's contention is that, when he was with the Claimants, he worked in a complex structure of corporate governance, where different persons and departments had their own roles and responsibilities, and that, while he was an authorised signatory for UP in his capacity as the CEO and later Managing Director, he properly relied on others to review and to vet the documents that he was required to execute.

51. As I have said, there were three members of the Investment Committee of Capital at the material times: Mr Alhammadi, Mr Nicoll and Mr Khouri. According to Mr Khouri, Mr Alhammadi had previously been employed by Julius Baer, and Mr Almheiri had appointed him to be the head of the Committee and to handle investments for UP: Mr Alhammadi "*comprehensively controlled*" the management of Capital and the accounts team at UP reported directly him. Mr Nicoll had previously worked "*in close coordination*" with Mr Alhammadi at Julius Baer. Further, UP's investment decisions were under the "*overarching supervision, guidance and control of … Mr Almheiri*". In these circumstances, Mr Khouri says, he relied on the financial expertise of Mr Alhammadi, the experience and recommendations of Mr Nicoll and the guidance of Mr Almheiri. According to Ms Malik, all meetings with Julius Baer "*were attended by Mr. Almheiri and Mr. Alhammadi primarily at the Palm Jumeirah residence of Mr. Almheiri*" and "*Mr. Khoury was never invited to attend any of these meetings nor was he privy to their contents*".

52. Ms Malik's evidence is that Mr Khouri understood that the instructions to Julius Baer to buy the P-Notes had been subjected to vetting procedures in accordance with the proper corporate governance procedures, and explicitly recommended by Mr Alhammadi and Mr Almheiri. Mr Khouri accepts that he signed the letters instructing Julius Baer to transfer the P-Notes to TAP, and he explains that he considered them to be "*legitimate and in line with the*" decision of the Investment Committee in June 2018. Further, with regard to the Atif email, Ms Malik's evidence is that Mr Khouri "*engaged in discussions with Mr. Almheiri and Mr. Alhammadi, and was reassured by both that the change in agency was justifiable and that the P Notes were diversified*".

53. Further, Ms Malik exhibited to her first witness statement three documents that are, on their face, letters to Mr Khouri from Mr Almheiri exonerating him from responsibility for decisions about the investment of UP's funds: they are said to have been handed to him by Mr Almheiri in the presence of (unidentified) "*third*

parties". They were not in evidence before the Court at previous hearings and Mr Khouri contends that they are inconsistent with the Claimants' case that he was complicit with others to defraud the Claimants and to misappropriate their assets.

54. In the first of these letters dated 1 February 2018, Mr Khouri was apparently instructed to transfer funds of UP, via Capital, to Julius Baer for investment in the equities market. It records that Mr Khouri had expressed concern about the investment in "*a non-core/development activity*". Mr Almheiri wrote that he and Mr Alhammadi were responsible both for the decision to invest in equities and for the selection of Julius Baer to make the investments.

55. Next, Mr Khouri relied on a letter to him dated 28 June 2018 about TAP replacing Julius Baer as managers of the equity investments. Mr Almheiri wrote that TAP had been "*selected by two members of the Investment Committee*" and that he had approved the decision. The letter instructed Mr Khouri to "*approve the appointment of the agency and sign the necessary documents*", and it recorded that Mr Almheiri absolved Mr Khouri from any responsibility for doing so and recognised that he was not "*specialized in investment matters*". I observe in passing that the appointment of TAP had apparently been anticipated in that Mr Trinkler had already become a director of FFM.

56. The third letter is dated 20 September 2018. According to Ms Malik, the context was that Mr Khouri questioned Mr Alhammadi's refusal to sell investments held by TAP notwithstanding that otherwise there would not be funds to pay salaries and other debts. Mr Almheiri wrote that Mr Alhammadi and Mr Nicholl had reported that TAP requested "*a longer term commitment on the investment portfolio*", and that it had been decided to agree to "*a three year lock-in of the funds*". The decision was said to have been taken on the recommendation of Mr Alhammadi despite its impact on liquidity. The letter instructed Mr Khouri to approve an addendum to the agreement with TAP so as to implement the decision.

57. Mr Khouri also relied upon his exchanges with Mr Alhammadi and other events in late 2019, arguing that they are inconsistent with the Claimants' contentions against him. First, he referred to correspondence that is said to have followed an investigation by him into Capital's finances because it was having difficulties in meeting, as had been intended, its own cash requirements. After discussions with Mr Khouri, on 11 November 2019 Mr Krishna Subramanian, UP's Chief Financial Officer, sent an email requiring Capital to provide funds to pay salaries for October 2019. Mr Alhammadi responded by email dated 25 November 2018 that they had released some funds to cover his (Mr Alhammadi's) October salary. He also emailed Mr Khouri seeking confirmation that he was committed to pay his October salary and November salaries for all employees. Mr Alhammadi copied both his emails to Mr Almheiri.

58. According to Ms Malik's evidence, at about the same time, Mr Khouri learned as a result of a letter from SICO Financial Brokerage LLC ("**SICO**") that brokers had been acting on instructions from Mr Alhammadi and Mr Nicoll, contrary to a power of attorney provided by Capital to Mr Khouri. On the recommendation of UP's General Counsel, Mr Iain McGillivray, Mr Khouri gave SICO notice that only he was an authorised signatory to give instructions.

59. It is also Mr Khouri's case that he sought to convene meetings of the Investment Committee, and when he found his efforts were being frustrated, he arranged for Capital's investments with TAP to be investigated by Kellerhals Carrard, a firm of Swiss lawyers. Shortly afterwards, on 15 December 2019, Mr Khouri resigned his position, and on the same day, Mr Almheiri issued a direction to the employees of UP and Capital that they should report to Mr Alhammadi and accept instructions only from him, rescinding any authority of Mr Khouri, whom he described as the "*former Managing Director*".

60. Mr Khouri brought proceedings in the Courts of Dubai against UP, and UP, which was then controlled by Mr Almheiri and Mr Alhammadi, brought a counterclaim against him. Ms Malik observed that UP alleged that Mr Khouri was liable for "*serious breaches against the company causing the loss of millions of Dirhams*". She gave evidence that the counterclaim was dismissed, but there is no evidence about the result of Mr Khouri's claim.

61. Mr Dillon-Malone observed that the evidence of Mr Khouri's differences with Mr Alhammadi and Mr Almheiri in 2019 is not inconsistent with him acting together with them in 2018 to defraud the Claimants: the conspirators might have fallen out, he suggested. I accept that point, and regard as potentially more telling the evidence about the written assurances and instructions that Mr Khouri required and was given in 2018. I accept that, if the documents are genuine, this evidence is inconsistent with a scheme of the kind that the Claimants allege.

62. Unsurprisingly, the Claimants are not able to put forward any specific evidence that these letters are bogus. However, in response to Ms Malik's witness statement, Mr Chaaban said that "[t]*here are significant question marks about whether, when and in what circumstances such letters were generated – in English, it seems – including the extent to which they may impact the Claimants' claims against*" Mr Khouri.

63. The evidence on behalf of Mr Khouri is that he and Mr Almheiri regularly communicated in English, especially as to formal matters relating to the management of UP. There is no evidence that refutes this. Nevertheless, in my judgment the Claimants are entitled to test in a trial whether the letters are genuine and authentic, and the account about their provenance that Mr Khouri gives. If they are authentic, it is not at all obvious why he did not present them when he argued in 2023 that the Claimants' case against him was insufficient to continue the freezing order against him and that the Claimants did not have a reasonably arguable case against him. Although he had not then instructed Ms Malik's firm, Mr Khouri was represented by Mr Richmond and Mr Joseph, instructed by another firm of UAE lawyers. There is no evidence, and it was not said, that Mr Khouri found the letters only after the hearing in 2023; and there is no explanation why, if authentic, they were not put in evidence. I observe that Mr Almheiri was then a party to the proceedings and could have explained the letters which Mr Khouri says he received from him. Further, Mr Khouri did not oppose Mr Almheiri's application to strike out the claims against him, or then disclose the documents on which he now relies. This too is unexplained.

64. Mr Richmond argued that the case against Mr Khouri is based on inference, and I accept that. However, it is not unusual for a claimant to rely upon inference in a case such as this. I also accept that the proposed amendments add little, if anything, to strengthen the case against Mr Khouri in conspiracy. However, I concluded in 2023 that the original case in conspiracy gives rise to real issues between the Claimants and Mr Khouri, and this remains my view, despite Mr Richmond's suggestion that the case based on inference is weakened by the passage of time.

65. I am therefore not persuaded that the claim against Mr Khouri in conspiracy discloses no reasonable grounds for bringing the conspiracy claim. I reach this decision without taking account of the Claimants' argument that their case is likely to be strengthened by documentation from Julius Baer, but this consideration seems to me to lend further support for my conclusion that the claims should go to trial.

66. With regard to the claim for breach of directors' duties, Mr Richmond submitted that the Second Draft sets out numerous statutory duties, but it is vague about how each is said to have been breached: I come to this point later. However, his essential submission in that this claim simply re-shapes the conspiracy claim and requires a finding of dishonesty or collusion. I agree, but for reasons that I have explained, I do not accept that therefore the claim should be struck out.

67. Mr Khouri had another argument: it is based on Article 167 of UAE Federal Decree Law 2/2015 on Commercial Companies (and materially reenacted in Article 169 of UAE Federal Decree Law 32/2021): *"Any decision passed by the General Assembly to relieve the Board of Directors shall not prevent the finding of the liability lawsuit against the Board of Directors due to the errors committed by them during the performance of their duties. If the act giving rise to liability has been presented to and approved by the General Assembly, the liability lawsuit shall be forfeited upon the expiry of one year from the date of such meeting. However, if the act ascribed to the members of the Board is a criminal act, the lawsuit shall not be forfeited until the public case is forfeited"*. According to Ms Malik, at meetings of UP's General Assembly, it was resolved that UP might purchase its shares at a rate of up to 10% of the paid-up capital with a view to re-selling them,

authorising the Board to implement this. Further, at meetings of UP's General Assemblies on 20 April 2019, 18 June 2020 and 21 May 2021, the shareholders passed resolutions absolving the Board of Directors in respect of the financial years 31 December 2018, 31 December 2019 and 31 December 2020 respectively. There is no evidence about how such resolutions would be interpreted or given effect under UAE law. In these circumstances, I am not prepared to accept, on an application of this kind, that resolutions passed in these general terms effectively waive impropriety of the kind alleged in these proceedings or provide Mr Khouri with a defence to the claims against him. Indeed, Mr Richmond realistically relied upon the resolutions only in respect of any claims against Mr Khouri in negligence or negligent misstatement. Further, on the face of it, this argument would only answer UP's claims and not those of Capital.

68. For completeness, I mention that in Ms Malik's evidence and Mr Richmond's skeleton argument it was contended that the claim by UP should be struck out because it suffered no loss itself and this is not a case in which it can claim for reflective loss as Capital's shareholder. It suffices to say that the argument was abandoned by Mr Richmond at the hearing.

69. Therefore, despite Mr Richmond's attractive submissions, Mr Khouri's new evidence and arguments do not persuade me that I should depart from my conclusion in the April 2023 Judgment that there are real issues to be tried on the claims against Mr Khouri both in conspiracy and for breach of his fiduciary duties.

The Amendment Application

70. I therefore come to the Amendment Application. CPR rule 52(2) provides as follows: "*If his statement of case has been served, a party may amend it only with the written consent of all the other parties or with the Court's permission*". CPR rule 53(1) provides: "*The Court may allow an amendment whose effect is to add or substitute a new claim after the period of limitation has expired, but only if the new claim arises out of the same, or substantially the same, facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings*". No Defendant has suggested that any of the amendments sought by the Claimants are precluded by a limitation period.

The submissions on behalf of Mr Trinkler

71. I shall first consider the submissions on behalf of Mr Trinkler. As I see it, there were two main themes. First, Dr Ammann on behalf of Mr Trinkler referred to my description of the original (unamended) Particulars of Claim earlier in the proceedings as "*confused and confusing",* and argued that the proposed amended pleading is "*confusing, incomplete and therefore useless"*. This complaint is made by Dr Ammann in general terms: he did not identify any particular aspect of the proposed pleading that would cause difficulty to Mr Trinkler, other than the pleading of loss and damage, to which I shall come shortly. While there are parts of the amended proposed pleading which might justify a request for particulars, to my mind overall the Second Draft is distinctly clearer and more satisfactory than the unamended pleading.

72. Dr Ammann argued that the Claimants have not mitigated their loss, and that they have not brought into account any benefits that they have received under the June Agreement. The Claimants say that they have received nothing under the June Agreement, and, on the available evidence, there is no good reason to think otherwise. Of course, Mr Trinkler is entitled to raise this point in defence to the claim against him: I do not accept that it is a good reason to refuse the proposed amendments.

73. Mr Trinkler also argued that the Claimants did not take proper steps to prevent or mitigate their loss, including by pressing charges against Mr Al Mulla to recover from him the shares that he is said to hold. Again, this is a matter for argument in defence of the claim, and it might justify requiring the Claimants to provide particulars of their damage claim in response to a properly formulated request. It is not a reason for refusing the proposed amendments.

74. Secondly, Dr Ammann complains that the Claimants have not provided documents relating to its account with Julius Baer, despite my order of 13 May 2024 that they should use best endeavors to do so. There is no

sufficient reason to think that the Claimants have not been seeking documentation from Julius Baer, and Mr Chaaban's evidence indicates that their efforts are likely to bear fruit.

75. Finally, Dr Ammann cited the decision of the Supreme Court and Privy Council in *Jogee v R, Ruddock v R [2016] UKSC 8, [2016] UKPC 7*, arguing that the "[Joint Enterprise] *has been overruled"* by the judgment. I do not consider that the judgment in *Jogee* has any relevance to this case: it is about criminal responsibility of an accessory to an offence, and not about civil claims.

Mr Klar's arguments

76. Dr Daburon set out in a witness statement observations on the proposed amendments on behalf of Mr Klar. Like Dr Ammann, he submitted that the amendments would be merely "*cosmetic"* and would not disguise the paucity of hard facts that the Claimants can present in support of their claims and in particular their claims against Mr Klar; and, like Dr Ammann, he contended that the Claimants do not properly plead their alleged damage.

77. Mr Klar has not applied to have the claims against him stuck out, or for summary judgment. Many of the arguments that have been raised on his behalf might properly be advanced on such an application. They do not seem to me reason to refuse the Amendment Application. The proposed amendments do not answer all the criticisms of the case pleaded against Mr Klar that might be made, but, in my judgment, they clarify the case that the Claimants bring against him.

The proposed amendments

78. I must now consider in more detail the proposed amendments, which are extensive. I shall do so by reference to the Second Draft, which the Claimants presented after I had made some initial observations about the First Draft (including that it sought to amend the claims and relief sought against the Defendants against whom judgment in default had already been entered judgment) and which remedied some of the deficiencies in the First Draft.

79. The Second Draft is divided into section A to R. Section A (paras 1 to 5) is headed "*Preliminary*", and it purports to introduce the claims made by the Claimants. In the First Draft, this section was defective in that it included an allegation that was not included in the body of the pleading that it purported to summarise. In the Second Draft, the offending sentence was removed (and an obvious typing error corrected). I allow the amendment introducing these paragraphs as revised in the Second Draft.

80. Section B (paras 6 to 20) comprises sub-sections headed "*Description of the Parties*", "*Assets*", "*The Claim in Outline*", "*Orders Impacting the Parties*", "*The June 2023 Settlement Agreement*", and "*Reservation of Rights*". In their revised form in the Second Draft, the amendments in these paragraphs are unobjectionable, and I allow them. I also permit the Claimants, if so advised, to correct an apparent slip in para 6l, and to change "*Mr Almansoori"* to "*Mr Almheiri*".

81. At section C (paras 21 to 29) of the Second Draft, a section headed "*Key Developments in the Proceedings to Date*", the Claimants propose to set out some of the procedural history of the proceedings. This is not appropriate for inclusion in the Particulars of Claim: it does not set out allegations relied upon in support of the claims. I refuse permission for these amendments.

82. At section D (paras 30 to 63) is a section headed "*Known Sequence of Events*". The proposed amendments do not seem to me objectionable, and I permit them.

83. The Claimants do not propose to amend section E (paras 64 and 65), "*Jurisdiction*".

84. Section F (paras 66 to 82) proposes to introduce claims in deceit or negligent misstatement against Mr Khouri, Mr Trinkler, FFM, Mr Klar and Mr Khiara. Section G (paras 83 to 84) proposes to introduce a claim in

negligent misstatement against Mr Almansoori. I have already explained that I refuse the application to amend in so far as it would introduce a claim against Mr Khouri (paras 66 to 70). The claim against Mr Trinkler is pleaded at paras 71 to 74: in his submissions, Dr Ammann did not make specific reference to this new claim. I permit the amendment to introduce it, although I observe that an application for particulars of the damages said to result from this allegation might well be justified. The same applies to this claim against Mr Klar. FFM, Mr Khiara and Mr Almansoori did not resist the amendments against them, and I permit them.

85. Section H (paras 85 to 93) is headed "*Breach of Directors' Duties – Khalifa Alhammadi, Ahmed Khouri, Dahi Almansoori, and Jorg Klar*". In the First Draft, the Claimants set out 13 duties that are said to have been owed under UAE statutory provisions by Mr Khouri, Mr Klar and Mr Almansoori in their capacities as directors of UP, and seven further duties that Mr Khouri is said to have owed as a director of Capital. The main criticism of this Section in the First Draft was, in the words of Ms Malik: *"No specificity or particulars are provided as to the breach of any of such duties. The Claimants simply plead that each of a vast range of duties were breached by a very limited number of acts"*. Although, in my judgment, in the case of many of the alleged duties, it is pretty clear how the relevant Defendants are said to have been in breach of them, and any uncertainties could be readily clarified by a request for particulars, this was not so in the case of all of the duties. I pressed Mr Dillon-Malone about this on 10 September 2024 and in the Second Draft, the Claimants omitted four of the alleged duties of Mr Khouri, Mr Klar and Mr Almansoori in their capacities as directors of UP, and two duties alleged against Mr Khouri as a director of Capital. I consider that the allegations of breach of the remaining duties are sufficiently pleaded to permit the amendments.

86. However, Mr Khouri has another criticism of this Section. The Claimants rely in support of their case with regard to three of the duties of directors of UP upon Article 84 of the UAE Federal Decree Law 2/2015 on Commercial Companies (as amended). This is a provision which is concerned with *"managers"* of companies, and the Claimants do not plead that Mr Khouri, Mr Klar and Mr Almansoori were managers at the material times. Mr Dillon-Malone responded to that criticism by asserting that under UAE law, all directors are taken to be managers for the purposes of the statute (or at least of this Article). Whether or not that is so, it is a proposition of UAE law that is not self-evident and has not been pleaded by the Claimants. It should have been. I refuse permission to amend to plead Article 84.

87. Section I (paras 94 to 101) pleads claims in dishonest assistance on breaches of fiduciary duties. Section J (paras 102 to 113) pleads claims under the FSMR. I do not consider that the Defendants made any significant or specific criticisms of these Sections of the Second Draft, and I permit the amendments.

88. Section K and Section L plead claims against defendants against whom judgments have been entered and are not relevant for present purposes.

89. Section M (paras 124 to 132) pleads the claim in unlawful conspiracy against FFM, Mr Trinkler, Mr Khiara, Mr Klar, Mr Khouri and Mr Almansoori. Ms Malik's main observations on the amendments of this claim is that many of them do not concern Mr Khouri, that the Claimants have not found additional evidence against Mr Khouri, and that their case against him is refuted by the new materials presented in support of his application. As I have already explained, I am not persuaded that the conspiracy claim should be struck out, and I permit the proposed amendments of it.

90. The Defendants make no specific criticisms of the proposed amendments to Section N (paras 133 to 135), *"Equitable relief";* Section O (para 136), *"The Claimants' loss and damage"*; or Section P (paras 137 to 138), *"Joint tortfeasor"*. I permit those amendments.

91. Ms Malik made two criticisms of Section O (para 136), *"The Claimants' loss and damage"*. First, it is said that the Claimants' pleading does not take account of or give credit for recovery under the June Agreement. As I have said, the Claimants respond that nothing has been recovered and so nothing is to be brought into account. Mr Richmond also submitted that the Claimants were obliged to bring into account sums that have not been recovered but are *"likely to be recovered under the ... agreement"*. That is not, to my mind, self-evident and in any case there is no compelling evidence about whether the Defendants are *"likely"* to

recover any money under the June Agreement, or, if so, how much. This is a point for Mr Khouri to plead in defence of the claim but not a reason to refuse permission for the proposed amendment.

92. Ms Malik's second complaint that the pleading does not *"properly explain each claimant's alleged loss"*. As I understand it, this is essentially the point that Mr Richmond said in his oral submissions is not pursued. I permit the amendment of Section O.

93. The Claimants do not propose to amend Section R (paras 144 to 145), *"Interest"*.

94. On the first day of the hearing on 10 September 2024, I made some criticism of the amendments to the prayer for relief, and in the Second Draft this was amended accordingly. However, it includes a prayer for damages in deceit and negligent misstatement against (among others) Mr Khouri. I refuse permission for that amendment, otherwise I permit the proposed amendment to the prayer as revised in the Second Draft.

Mr Khouri's application to strike out the proceedings against him on the grounds of abuse of process and/or the Claimants' failure to comply with court orders

95. I shall consider together Mr Khouri's two other arguments that the proceedings against him should be struck out: that they are an abuse of process and/or that the Claimants have failed to comply with Court orders. They give rise to these questions: (i) whether the proceedings are an abuse of process; (ii) whether the Claimants have failed to comply with Court orders in a material way; and (iii) if the answer to question (i) or (ii) is yes, whether it would be proportionate, just and in accordance with the overriding objective to strike out the proceedings. The first two questions are often related in cases such as this; in *Wearn v HNH International Holdings Limited [2014] EWHC 3542 (Ch)*, Barling J summarised the position as follows (at para 67):*"The guiding principle is that delay alone, even if it is inordinate and inexcusable, cannot be an abuse of process; but such abuse may arise when delay is combined with some other relevant factor (such as the absence of intention to take a case to trial)"*. Thus, *"*[i]*nordinate and inexcusable delay does not amount to abuse of process. However, it may do if it involves a wholesale disregard for the rules of the court with full awareness of the consequences"*: *The Owners and/or Bailees of the Cargo of the Ship Panamax Star v The Owners of the Ship Awk [2013] EWHC 4076 (Admlty),* per Hamblen J, at para 40.

96. Before coming to Mr Khouri's arguments on this point, another general principle relating to the third question (whether it would be proportionate, just and in accordance with the overriding objective to strike out the claim) should be noted. In *Broxton v McClelland [1995] EMLR 485 at 498*, Simon Brown LJ said that: *"Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse so as to prevent a plaintiff from bringing an apparently proper cause of action to trial"*. In *Mueen-Uddin v Secretary of State for the Home Department [2024] UKSC 21,* Lord Reed (at para 42) cited this dictum with approval and observed that it has been widely accepted.

97. Mr Richmond argued that the Claimants are guilty of *"inordinate delay"* in pursuing the proceedings: he pointed out that they were issued some two years ago, and three years after the Claimants became aware that the UAE Federal Prosecutors were investigating Mr Alhammadi's activities. He submitted that this slow progress has caused prejudice in that it has aggravated the risk of the recollection of Mr Khouri and the other Defendants of "*key events*" deteriorating. He did not identify specifically any such events: in view of the nature of the allegation at the heart to this case, I am not persuaded that any significant risk of prejudice of this kind has been demonstrated.

98. I accept that the Claimants appear not to have pursued the proceedings efficiently or as vigorously as might be expected in view of the nature of and the background to the claims, but I do not accept that they are to be criticised for all of the apparent delays. Specifically, a significant part of the delay is attributable to the Claimants' decision to serve the proceedings on some of the Defendants (including TAP, Mr Trinkler and Mr Klar) in Switzerland (and did not apply to serve them by an alternative method under CPR rule 19). In view of the difficulties that might otherwise be faced in enforcing any judgment of the Court, I do not criticise them for doing so and, indeed, the Defendants have not done so. Nor is this a case in which there has been a long

period of complete inactivity on the part of the Claimants, that suggests that they might not really intend to pursue these claims (or, as it is sometimes put, are "*warehousing*" them).

99. Next, Mr Richmond relied upon criticisms that I had made of the original Particulars of Claim. However, in my ruling of 7 November 2023, I decided that the shortcomings were not such as to justify striking out the proceedings. I see no reason to revise that conclusion.

100. Mr Richmond also submitted that the Claimants have made *"only negligible attempts to further investigate relevant facts"*, although they are *"in possession of all the relevant documentation"*. This is inconsistent with Mr Chaaban's evidence that *"prejudicial documents"* have apparently been deleted, presumably by persons responsible for the supposed fraud on the Claimants, and with his evidence about the efforts that the Claimants have made and continue to make to effectively find gaps in their information. There is no proper reason to reject Mr Chaaban's evidence about this.

101. Nor am I impressed by Mr Richmond's arguments that the claims against Mr Khouri should now be struck out because, as I have said, the Claimants failed to comply with my order of 11 March 2024 for the provision of security for Mr Khouri's costs, with the sanction of having the claims against him to be struck out if the Claimants failed to do so. By the 9 May 2024 Judgment (and for the reasons as I explained especially at para 65), I granted the Claimants relief from this sanction, notwithstanding that the Claimants had previously failed to comply with cost orders against them timeously, and the criticisms that they had made of the disclosure by the Claimants when applying for freezing orders and proprietary injunctions. I see no reason to revise my conclusion that, despite the failure to comply with the order on 11 March 2024 and other orders of the Court, nevertheless, having regard to considerations of justice and the overriding objective of the CPR, the Claimants should be relieved of the sanction of having their proceedings struck out. Mr Richmond argued that the Claimants have failed to make the proper disclosure about the correspondence that Ms Malik exhibited to her witness statement in support of Mr Khouri's application and about its *"corporate governance procedures"*, but I find nothing unusual or remarkable in the procedures that Ms Malik described that called for disclosure of them, and the provenance in the correspondence is too obscure for me to criticise the Claimants for not disclosing it.

102. Finally, Mr Richmond relied upon the status of the Claimants' claims against the other Defendants. First, he referred to the proceedings being struck out against Mr Almheiri, which he submits was because of the Claimants' *"defective pleading"*. That submission does not reflect the full reasons for my decision: I put my conclusion as follows at para 63 of the 23 May 2024 Judgment: *"The Claimants have had every opportunity for putting their pleading in order. It still does not set out a case against Mr Almheiri that is properly particularised or coherent or plausible. There is no reason to think that, given another chance, the Claimants could all remedy those deficiencies"*. I struck out the proceedings because, on the material then available, I saw no prospect of the Claimants properly pleading a case against Mr Almheiri.

103. Mr Khouri also relied on the June Agreement whereby the Claimants are said to have settled their claims against Mr Alhammadi, Ms Alhammadi and others. First, it is said that the Claimants will be bound to bring into account sums recovered or likely to be recovered under the June agreement. I have already explained why I am not impressed by that argument.

104. More generally, it was submitted that, in view of the June Agreement the proceedings against Mr Khouri were not *"worth the candle";* a metaphor used by Lord Phillips MR in *Jameel (Yousef) v Dow Jones Company Inc [2005] EWCA (Civ) 75* to express the conclusion, in the context of defamation, that *"because the action could not achieve, to any significant extent, the legitimate objective of protecting the claimant's reputation in this jurisdiction"*: see *Mueen-Uddin v Secretary of State for the Home Department* (*sup. cit.*) at para 81 per Lord Reed. The basis of Mr Richmond's argument that this is such a case appeared to be that *"a draft settlement agreement* [was approved] *with Mr … Alhammadi and other key respondents to their claim"*, and since their claim *"appears to be secured"*, there is no good reason for the Claimants to pursue *"such minor players"* as Mr Khouri. I am not persuaded by that argument. The Claimants are claiming a very substantial sum against the Defendants; there is no good evidence that they have security which would enable them to recover their

full claim from the parties to the June Agreement; and they are entitled to proceed against others in order to do so. For the same reasons, I am not persuaded by Mr Richmond's alternative argument that the proceedings should be stayed pending ascertainment of clarification of how much the Claimants are likely to recover under the June Agreement: to my mind a stay would not be consistent with the overriding objective of the CPR.

105. For completeness, I should add that it was argued on Mr Khouri's behalf that, if I otherwise rejected his arguments and allowed the proceedings against him to be pursued, I should do so only on the condition that the Claimants pay into Court the sum of AED 4,886,875, which is said to be proper security for Mr Khouri's costs up to and including the trial. In my judgment of 11 March 2024, [2024] ADGMCFI 0003, I declined to order security for Mr Khouri's costs beyond the completion of disclosure. I see no good reason to revise that decision. Any application for further security can be made when there is a more certain basis for assessing what costs are likely to be incurred.

Conclusions

106. I therefore refuse Mr Khouri's application to have the proceedings against him struck out or stayed, and I refuse his alternative application for summary judgment. I permit the amendments proposed by the Claimants in the Second Draft only to the extent explained in this judgment.

107. The Claimants are to draft, file and serve an amended pleading in accordance with what I have permitted by 5.00 pm on 29 November 2024. If any Defendant objects to the Claimants' draft on the grounds that it does not correspond with what I have permitted, he (or it) should serve and file a notice of objection by 5.00pm on 6 December 2024. Any application for costs should also be made by 5.00pm on 6 December 2024. Unless there is good reason to do otherwise, I intend to resolve any objections and any costs applications on the papers and without an oral hearing.

108. I regret the delay in giving judgment on this matter and am grateful to the parties and their representatives for their patience. None of the delay is attributable to them in any way.

Postscript to the Judgment

109. After I had concluded this judgment, I received a copy of an email to the Court from Clyde & Co referring to evidence filed upon the Appeal Application to which I refer in paragraph 24 above. They invited me to "*consider*" in relation to the Amendment Application and Mr Khouri's application certain paragraphs of a witness statement of Mr Almheiri. Thus, the Claimants seek in this informal way to put more material before the Court long after the conclusion of the hearing. Unsurprisingly, Mr Khouri asked for time to consider and respond to it. I comment only that the material that the Claimants ask me to consider makes no difference to any of my decisions or to the reasoning of my judgment, and I disregard it. In these circumstances, there is no need for the Defendants to respond.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
15 November 2024