IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC(COM) 89 OF 2011

BETWEEN:

SHEIKH ABDULLAH ALHAMRANI

Claimant/Judgment Creditor/Respondent

And

(1) SHEIKH MOHAMED ALI M ALHAMRANI
(2) SHEIKH SIRAJ ALI M ALHAMRANI
(3) SHEIKH KALID ALI M ALHAMRANI
(4) SHEIKH MOHAMED ALI M ALHAMRANI
as legal representative of the late SHEIKH ABDULAZIZ ALI M ALHAMRANI
(5) SHEIKH AHMED ALI M ALHAMRANI
(6) SHEIKH FAHAD ALI M ALHAMRANI

Defendants/Judgment Debtors/Applicants

Appearances:

Ms. Elizabeth Jones QC and Ms.Lucy Hannett instructed by Messrs Walkers BVI for the Claimant; Mr. Linton Tucker QC and James Brightwell instructed by Messrs Harney Westwood & Riegels for the Defendants

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2017: January 25, 26; March 8

JUDGMENT

Introduction

(1) The 6 Applicants, Sheikhs Mohamed, Siraj, Khalid, Ahmed and Fahad Alhamrani and the estate of Sheikh Abdulaziz Alhamrani (through his personal representative Sheikh Mohamed), (whom I shall collectively refer to as the "Brothers" as they have been called throughout these proceedings) have applied for a stay of execution of any Order for payment of costs in favour of the Respondent, their brother Sheikh Abdullah Alhamrani ("Sheikh Abdullah"), made pursuant to the applications by him for assessment of costs in the High Court and Court of Appeal in relation to the substantive proceedings between the parties (the "Chemtrade Proceedings") and the assessment of costs in relation thereto (the "Costs Orders").

(2) Sheikh Abdullah has brought a cross application for attachment of the sum of $3million held in the accounts of the Brothers' solicitors. A Provisional Attachment of Debt Order was made with respect to this Application by Wallbank J on 5th October 2016 with the date for the hearing of the Application for the Final Attachment Order being listed for 25th January 2017 concurrently with the Brothers' Stay Application. At the commencement of the hearing, leading counsel for the Brothers and Sheikh Abdullah indicated their agreement that the result of the attachment application will abide the decision of the Court on the Stay Application without the need for further argument thereon. As a consequence the parties did not address me on the Attachment Application and I propose only to make the relevant Order thereon as part of my Order on the Stay Application.

(3) The Costs Orders are the four Orders made on 30th June 2016 by Mr. Justice Eder in the sums of $7,804,361.20 with interest from 18 September 2014; $934,026.83 and $436,697.33 with interest from 10th June 2015; $152,474.68 with interest from 1 October 2014; and $500,000 towards the costs of the assessment applications which costs, as well as the costs of assessment of those costs, are yet to be determined. The interest on all quantified costs run at the statutory rate of 5% per annum and the total liability of the Brothers in respect of costs quantified to date has approached $11,000,000 even after they set off the certain costs in their favour (the Hardan Disclosure Application and Hardan Appeal Costs) which were agreed in the sum of $89,017 plus interest and $7,924.

(4) The Brothers have appealed the Orders of Eder J on the assessments and this appeal was heard by the Court of Appeal on 31st January 2017. As at the date of this judgment, the decision on that

appeal has not yet been rendered. There does not appear to be any real dispute that even on the best case scenario for the Brothers on their appeal, it is likely that their ultimate liability for costs will still be several millions of dollars.

(5) The Brothers are also subject to a costs order from the Privy Council in the sum of £338,780.95 which does not form part of their current Application. The Brothers have not made any payment with respect to costs, including the Privy Council costs, to date.

(6) Sheikh Abdullah resists the Application for the stay.

The Chemtrade Proceedings

(7) A brief history of the substantive underlying proceedings will put these Applications into context.

(8) The Chemtrade Proceedings arose from a dispute between the Brothers and Shiekh Abdullah concerning the ownership of the majority shareholding in Chemtrade Limited, a BVI company ("Chemtrade"). I take the following summary of these proceedings from the judgment of the Privy Council in the matter.

(9) Sheikh Abdullah sought a declaration from the BVI Court that he had become the owner of the 75% shareholding in Chemtrade when he accepted in August 2008 the Brothers' written offer dated 12 April 2008 of sale of various assets. This offer was governed by the law of Kingdom of Saudi Arabia ("KSA") and was made following what I can somewhat loosely refer to as the exercise of the conciliatory process of the Saudi court.

(10) The value of Chemtrade is derived from its 50% shareholding in another BVI company, Fuchs Oil Middle East Limited ("FOMEL"), a joint venture with the Fuchs group out of Germany. FOMEL markets Fuchs branded lubricants and related products manufactured by AFPSA, another joint venture company with the Fuchs group, in the Middle East region. The purchase price for the assets acquired by Sheikh Abdullah was paid in September 2009.

(11) The narrow issue (in the words of Lord Clarke in the Privy Council) whether the Chemtrade shares were included in the assets which Sheikh Abdullah purchased from the Brothers occupied 29 trial days in the BVI High Court in 2012 and a further 5 days in 2013 on appeal to the Eastern

Caribbean Court of Appeal, which reversed the trial judge's Order and held that the Brothers' Chemtrade shareholding was included in the assets acquired by Sheikh Abdullah in 2008. The Brothers' applied for and were granted a stay of execution of the Court of Appeal's Order and appealed to the Privy Council. The stay from the Court of Appeal was made on condition that the Brothers should provide security for their undertakings in the sum of $3million, which was done by lodging this sum in their local solicitors' account. The appeal to the Privy Council was dismissed in November 2014 after a 2 day hearing in July 2014 although an indication of their Lordships' thinking on the matter was revealed by their decision that they did not need to hear Sheikh Abdullah's counsel at the hearing.

(12) There was then a return trip to the Court of Appeal in 2014 on the Brothers' application to release the $3million/Sheikh Abdullah's application to freeze these funds in the BVI. The Court of Appeal (Michel JA) refused the Brothers' Application and ordered that this sum be frozen and should remain the BVI. After this, the only remaining issue between the parties became the quantification of the costs of several trial and appeal days that the matter took in this jurisdiction as the Privy Council costs were assessed in London.

(13) The assessment of costs itself took four days before Eder J. in June 2016. The Brothers have appealed his Orders and a 2 day hearing was listed before the Court of Appeal for this appeal at the end of January 2017. The Brothers also made this Application for the stay of execution before me which itself took two days of hearing.

Villa Said ownership structure

(14) At the centre of this Stay Application lies Villa Said in Paris, France or perhaps more precisely the structure under which this property is held. The Alhamrani family acquired this property in the late 1980s primarily as a holiday residence. The title to the Villa is held by a Dutch company, SAVI (NL) BV, of which the sole director is Intertrust Netherlands BV. The shares of SAVI (NL) BV are owned by a Delaware company, SAVI (Inc) USA. The evidence is not entirely clear as to who are the directors of this company. Sheikh Abdullah was President of this company at least initially and Mr. Mohamed Joumaa is its vice President. SAVI (USA) Inc's shares are held by Deutsche Bank Trust Company as trustee under a New York law trust ("Villa Said Trust") created by agreement with Sheikh Abdullah. The beneficiaries under this trust are: Sheikhs Ahmed, Fahad, Khalid, the estate of Sheikh Abdulaziz and Sheikh Abdullah as to one sixth share each and their sisters, Lady

Noura and Lady Adawiah (whom I shall refer to as the "Sisters" as has been done throughout these proceedings), as to one twelfth share each. Sheikhs Mohamed and Siraj do not claim any beneficial interest in the property.

(15) Villa Said was occupied by the Sisters until about 2009 and has been unoccupied thereafter. Although the evidence is that the property is in less than its optimal condition, it has been valued at roughly €7million in March 2016, down from an earlier valuation of €9.9million in October 2010, and listed at €8.7million by estate agents retained by the Brothers' agent, Mr. Hamdan. Upon the sale of this Villa, it may be expected that the net proceeds will be passed up the structure and be eventually held by the Trustee as shareholder in SAVI USA and that upon determination of this Trust, these proceeds will be distributed to the beneficiaries. The Brothers, however, are concerned that they may not be placed in the position where they can ensure that their share of these funds are used to meet their liabilities (or part thereof) under the Costs Orders except with the assistance of this Court.

(16) The concern to which I have just referred arises because there appears to be a deep rooted distrust between the Brothers on the one hand and Sheikh Abdullah on the other hand. While this may have been longstanding and is certainly evident from the ferocity with which each side conducted the Chemtrade Proceedings, it has reared its head in the evidence filed in relation to the disposition of Villa Said.

(17) The Brothers' case is that Sheikh Abdullah is in control of the structure through which the property is held and of the property itself. In 1988 he was described as the President of SAVI USA. Under the terms of the Trust, the Trustee, who holds the shares in SAVI USA, does not control the operations of that company. The Brothers also complain that Intertrust, has indicated that it will only act on the instructions of SAVI USA, the shareholder of SAVI BV. The inference is that the entire structure under which Villa Said is held is controlled through SAVI USA which itself is controlled by Sheikh Abdullah. Sheikh Abdullah does not deny his control of the structure.

(18) The Brothers' evidence is that Sheikh Abdullah also controls the property itself in that he holds the keys and decides who will be granted access to the property.

The Stay Application

(19) The Brothers' Application is made under CPR Part 26.1(2)(q) and/or under the inherent jurisdiction of the Court for a stay of execution pending the application of the Brothers' interests in the net proceeds of sale of Villa Said in France towards payment of their liabilities arising from any such costs orders. The Brothers also seek an Order that there should be no payment of the sum of $3million currently held by their BVI solicitors which has been frozen pursuant to the Order of Michel JA on 1 October 2014 pending the application of the Brothers' interests in the net proceeds of sale of Villa Said in France towards payment of their liabilities arising from any the costs orders.

(20) The nub of the Brothers' submissions on this Application is that they have reasonable grounds for fearing that (i) Sheikh Abdullah had delayed the sale of the property over the several years since 2009 when the Brothers initially indicated their interest in selling this property; and (ii) that he will use his influence over the Villa's ownership structure to prevent them from using their share of the proceeds of sale in satisfaction or partial satisfaction of the costs liability. They submit that Sheikh Abdullah himself has created a link between the sale of the property and the satisfaction of the costs liability from the proceeds of such sale so that it is just that a stay be granted to ensure that this link is not severed by him.

(21) I was referred to **Canada Enterprises Corporation Ltd v McNab Distillers Ltd [1987] 1 WLR 813**. In that case the English Court of Appeal allowed an appeal against the refusal of a stay of execution of a summary judgment. The special circumstances that were alleged in that case was the existence of a cause of action between related parties to the parties to the judgment which amounted to a de facto but not de jure cross claim as it existed against the controlling parties of the judgment creditors. In **Burnet v Francis Industries Plc [1987] 1 WLR 802**, Ralph Gibson LJ referred to this case as establishing a principle that a stay could be granted where the justice of mutual relations between the parties so demands. I agree.

(22) I must therefore consider the link argued by Mr. Tucker in light of these decisions. In my view the essential difference between those cases and this is that there is no element of mutuality here as in **Burnet** and **Canada Enterprises** and the link here is much more tenuous than in those cases. In the instant case, the Brothers merely seek to realise and apply their interests in the Villa Said holding structure but Sheikh Abdullah does not make a claim on their interests. Bingham LJ's analysis in **Burnet** is instructive. Even where one eschews the references to the cross claim, the strength of the relationship and the element of mutuality are still relevant factors on which the

court should be satisfied and these have not been made out in the instant case. The lack of mutuality in the instant case is demonstrated by the fact that the link on which the Brothers rely is entirely self-determining in the sense that it is axiomatic that there will be no recovery from the Villa Said structure until the property has been sold and the net sales proceeds distributed upon the determination of the Trust. There is therefore strictly no need for an Order for a stay in relation to that part of the costs that are to come from those proceeds. The real question therefore is whether there should be a stay in relation to any other part of the costs that are not expected to come from the proceeds. It is in relation to these excess costs that the real issue whether the stay of execution should be granted will arise.

The relevant history

(23) The material part of the story begins in September 2009 when Mr. Hamdan, a Lebanese lawyer acting on behalf of four of the Brothers who hold an interest in Villa Said, wrote to lawyers for Sheikh Abdullah and the Sisters indicating that those Brothers wished to realise their interest in the property. The timing of this correspondence may not have been entirely coincidental as it was in mid-September 2009 that the Brothers received the purchase price for the assets transferred to Sheikh Abdullah based on his acceptance of their offer letter of May 2008 and the dispute that blossomed in the Chemtrade Proceedings had arisen at the end of June 2009. In any event there was no substantive response by Sheikh Abdullah to this correspondence.

(24) Approximately 13 months after this initial correspondence, Mr. Hamdan wrote again in October 2010 to the Sisters, this time enclosing a valuation report on Villa Said which opined that the property was valued at €9.9million. This appeared to provoke the required reaction as a mere fortnight later, the Sisters' lawyer responded indicating that the Sisters were content for the property to be sold. At this point, given the Brothers' previous understanding (which was yet to be confirmed in writing) that Sheikh Abdullah had also wanted to sell the property, it appeared that all parties were ad idem on the matter of sale and Mr. Hamdan wrote on 8 December 2010 to Sheikh Abdullah seeking agreement on the marketing of the property and mode and timing of the sale. There was no response to this correspondence.

(25) Sixteen months later, on 13 April 2012, Mr. Hamdan wrote again, this time to Forsters LLP, English solicitors whom he had been informed by Deutsche Bank acted for Sheikh Abdullah. His efforts were finally rewarded when Forsters responded on 4 September 2012 asking him for specific proposals inter alia as to how the proceeds of any sale should be dealt with. This

response came shortly before the commencement of the trial in the BVI of the Chemtrade Proceedings by which time the reality of the cost of those proceedings must have started to hit home.

(26) Correspondence resumed in January 2013 after the conclusion of the trial in the BVI High Court, which had ruled in favour of the Brothers on the ownership of the Chemtrade shares. Mr. Hamdan by his letter dated 18 January 2013 indicated the Brothers' position that the property should be sold at the best possible price and the trust structure should be wound up. There was no response to this letter.

(27) Mr. Hamdan wrote again to Forsters on 17 August 2015, approximately 31 months later, by which date the substantive BVI proceedings and appeals had come to an end and only issues of quantification of the costs due from the Brothers to Sheikh Abdullah remained to be resolved. This was the beginning of what I may call the critical phase of correspondence between the parties in relation to this Application. In this letter, Mr. Hamdan complained of evasive behaviour by Sheikh Abdullah and that the only conclusion that he could draw is that "[Sheikh Abdullah] is acting in a way that necessarily has the effect that my clients receive nothing from their interests in Villa Said thorough the SAVI structure, and are deprived and continue to be deprived of the millions that they should have received". He also invited Forsters to advise him forthwith what steps are being taken to sell the property and bring the structure to an end if they did not accept that conclusion.

(28) Forsters eventually replied a month later on 18 September 2015, shortly before the quantification hearing for the costs in the Privy Council, pointing out the Brothers' liability for the costs of the BVI proceedings and the claims by Sheikh Abdullah against them in KSA for their alleged removal of funds from companies there after the date on which the Saudi Court had determined that those companies belonged to Sheikh Abdullah. Forsters continued "Pending receipt of such proposals (i.e. as to how sums due from the Brothers to Sheikh Abdullah were to be paid) and payment of all sums due Sheikh Abdullah is not minded to take any steps which would transfer property to your clients. If your clients do not properly engage with repaying Sheikh Abdullah and the various companies, then Sheikh Abdullah would propose that Villa Said is sold and that the proceeds of sale of Villa Said so far as they relate to your clients' interests be utilised to make those payments of costs and other liabilities." Mr. Hamdan's response a few days later while disputing the Saudi claims against the Brothers stated "You refer to FOMEL costs and seek to link a sale of Villa Said to those costs" and "We understand the suggestion to be that Villa Said should be sold (as

everyone has been saying should happen for years) and that the proceeds of sale so far as relating to the interests of my clients be used to meet my clients' liabilities if and when determined. Our clients deny your client's allegation about Saudi liabilities but do acknowledge that the Privy Council has imposed a FOMEL costs liability in favour of your client subject to assessment. If a sale takes place, and if the structure is broken with the assent of the interested parties, then a source to our clients which has been denied by your client, will indeed be available so far as required for the purpose."

(29) Forsters repeated the proposal that the Brothers' share of the proceeds of sale be applied towards their debts to Sheikh Abdullah in their letter dated 15 October 2015. They also indicated that (i) they had asked Mr Hamdan for his clients' proposals on a number of occasions and Villa Said had not been put on the market while they wait those proposals; (ii) French (and perhaps other) tax advice is required as to the best method of sale and that Sheikh Abdullah is content for [the property] to be put on the market as soon as the tax position is clear; and (iii) there is no prospect of [the Brothers] receiving any money from the sale of Villa Said but they will be given credit for sums received from the sale after reimbursement of costs necessary to maintain the structure and any costs associated with the sale. Mr Hamdan responded 11 days later on 26 October 2015 confirming his agreement that his clients' FOMEL costs come out of their share of the net proceeds of sale of Villa Said.

(30) The next correspondence from Forsters on 11 November 2015 was decidedly less amicable as they now accused Mr. Hamdan's clients of being engaged in a strategy to delay and avoid the costs orders in Sheikh Abdullah's favour. They insisted that there was no justification for the Brothers' refusal to release the $3million held by their BVI solicitors and stated "Our client is willing for the balance of the costs to be paid out of the proceeds of sale of Villa Said if those proceeds are available for the simple reason that he believes that your clients will never pay him any of the money they owe him unless they have to, whether in relation to the costs of the BVI action or the money they took from the Alhamrani Group prior to the takeover in late 2008."

(31) The pace of the exchange of correspondence continued to increase as the parties became entrenched in the positions that had been revealed correspondence between them between August and November 2015. Mr. Hamdan responded to Forsters on 19 November 2015 stating that the Brothers acknowledged their liability to pay the FOMEL costs but do not "accept that they should be denied the ability to meet the liability from a fund which would have been available to

them but for your client's defaults … The point is that funds would and should, but for your client's default, now be available to meet those costs; and so far there is a balance to be paid you have the benefit of the injunction over the USD3 million fund."

(32) The parties agreed in late 2015 that the property be valued and that the costs of any valuations be met from the proceeds of sale with any legal costs incurred by the parties being borne by the parties. Mr. Hamdan sought access to the property so that he could accompany the valuer and his access was refused. The result was that Mr. Hamdan asked the valuer merely to update his valuation from 2010 without conducting a further inspection. This updated report showed that the property had lost approximately €3million in value between 2010 and 2015. Nevertheless the estate agents retained by Mr. Hamdan, who were given access to the property in February 2016, listed the property at €8.7 million, just about €1.2million less than the 2010 valuation.

(33) The parties agreed in March 2016 that remedial works to the property were necessary and Sheikh Abdullah agreed to bear one sixth of the cost of such works. Mr. Hamdan arranged for the contractors to do this work which was completed in May 2016. The terms of engagement for the estate agents were settled only in late June 2016, on the eve of the costs assessment hearings before Eder J. and after the Brothers' solicitors had indicated their intention to make this Application for a stay of execution.

(34) Even though the parties were in more frequent communication between late 2015 and early 2016, the Brothers still complain of delays caused by Sheikh Abdullah during this period in relation to the valuation of the property, the introduction of the property to estate agents, the giving of instructions to estate agents and the provision of tax information on the companies, SAVI BV and SAVI USA.

(35) The property was finally put on the market at the end of June 2016. No sale has been concluded to date.

(36) The Brothers' other complaint is that they fear that even if the property is sold, their share of the net proceeds will not be applied towards the satisfaction of their costs liability unless the stay is granted.

(37) They complain that a situation has been engineered whereby from December 2015, only Forsters, which represents the minor beneficial interest of Sheikh Abduallah in the property, has

direct contact with Intertrust and that Intertrust has refused to meet with Mr. Hamdan who represents the majority beneficial interests in the property. Intertrust's reticence takes on greater significance in light of its position that it will only act on directions from the Trustee or SAVI USA. The Trustee, however, has indicated in correspondence dated 29 March 2016 to Mr. Hamdan that its role under the Trust is limited to that of custodian for the SAVI USA shares and that the Trust deed expressly states that it is not responsible to any beneficiary in any way for the management, assets or liabilities of SAVI USA with the result that it has no authority or responsibility with respect to the sale of Villa Said and any direction with respect to such sale should come from SAVI USA and not the Trustee. The Trustee added that the distribution of the shares of SAVI USA would require an Order from the appropriate New York court or a settlement agreement among the beneficiaries in light of the drafting error on the deed, which reflected Sheikh Siraj, rather than Sheikh Abdullah, as the holder of a one sixth share in the property.

(38) The effect of the above, say the Brothers, is that Sheikh Abdullah has ultimate control via SAVI USA over the sale and distribution of any proceeds of sale. The Brothers point to the fact that Forsters was able to get Mr Joumaa to sign the resolution by SAVI USA as the sole member of SAVI BV approving the appointment of the estate agents in June 2016 whereas he never responded to Mr. Hamdan's letter in 2010 as evidence of Sheikh Abdullah's control over him.

(39) The Brothers also raise further concerns to show that there were real grounds for their distrust of Sheikh Abdullah: (i) that Sheikh Abdullah had shown the propensity to help himself to monies under his control as seen by his withdrawal $18.5million in FOMEL funds during the course of 2010, which he had refused to pay back after he had lost the High Court trial in the Chemtrade Proceedings; (ii) he asserted in February 2013 a claim on behalf of AFPSA against FOMEL for retrospective charges on goods and services AFPSA had supplied to FOMEL between 2008 and 2013; (iii) he has commenced fresh proceedings in KSA against them and based on his previous behaviour there arises the risk that he will seek to set off the sums claimed in those proceedings instead of the existing costs liability against their interests in the proceeds of sale of the property; and (iv) he overstated the expenses of maintaining the property and the structure deliberately so as to cause a proportionate reduction in their interests in any proceeds of sale.

(40) The Brothers' distrust of Sheikh Abdullah is reciprocated as he submits that (i) it is common ground among the parties that the BVI money judgments are not enforceable in Saudi Arabia; and

(ii) this Application is simply part of the Brothers' strategy of delay and frustration of the Costs Orders by making no real effort to satisfy them.

(41) Sheikh Abdullah denies the allegations of delaying the sale referring principally to the long gaps in the correspondence from Mr. Hamdan and the latter's inability or refusal until late 2015 to make the proposals that Forsters had requested in 2013 with respect to how the proceeds of sale were to be deployed.

(42) He further denies that there is a risk that the Brothers will not have their share of proceeds of sale applied to the debt on the basis that: (i) he was proven in the end to have been entitled to the Chemtrade shares so the withdrawal of funds is irrelevant; (ii) two of the Brothers, Sheikhs Mohamed and Siraj, have no interest the property and so cannot benefit from the stay and yet have made no proposals for payment of the costs liability; (iii) the Brothers have made no attempt or proposals for the payment of the costs of the Privy Council hearing which are not the subject of the stay application; and (iv) the Brothers' interest in the property will not in any event satisfy the costs liability in full and they have made no proposals as to how the balance of that debt will be paid and do not even offer the frozen funds in partial satisfaction of the debt.

(43) Sheikh Abdullah counters that it is the Brothers who cannot be trusted as (i) they put forward a false case in support of their defence in the ownership proceedings; (ii) the Court of Appeal has already made a finding of a risk of dissipation against the Brothers in freezing the $3million; and (iii) the Brothers themselves in any event made substantial withdrawals of company funds while they were in control of the disputed companies which they have not repaid and for which he has now had to bring further actions in KSA. His position is that the Brothers have no intention to pay the costs liability, notwithstanding their statements to the contrary, and that this application is merely part of a strategy to delay payment and so force him to accept a lower sum in satisfaction of the costs.

(44) There have been recent decisions from the Court of Appeal in KSA in the new Saudi proceedings to which the Brothers have made reference, the effect of which is that the claims have been remitted to the first instance court in which they were brought for Sheikh Abdullah to establish that that court has jurisdiction over such claims.

The legal principles

(45) The court has the statutory jurisdiction to grant a stay of execution on the application of a party before pursuant to the West Indian Associated States Supreme Court Act Cap 80 section 18. On an application for a stay, the Court may make any order as shall be just. As stated by Lord Blackburn in **Metropolitan Bank v Pooley (1885) 10 App Cas 210,** the jurisdiction is an old one that existed in equity before the enactment of the Supreme Court Act through the court informing its conscience upon affidavits. The jurisdiction is deliberately wide as the court needs to determine where the balance of justice lies in any given situation.

(46) Nevertheless, there has been guidance from case law, especially with respect to stays of execution of money judgments into which category these costs orders fall. Here the general rule is "No Stay". In **Makhoul v Foster ANUHCVAP 2009/014** at paragraph 3 George-Creque JA (as she then was) stated "The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour particularly after a full trial on the merits." This is even more so, in my opinion, when the Applicants for the stay have exhausted all their appeals.

(47) George Creque JA continued at paragraph 5 to approve the dicta of the English Court of Appeal in **Hamilton Suddards Solicitors v Agrichem International Holdings 2001 EWCA Civ. 1915** at para 13 "Whether the court will exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay." She also emphasized the need for full frank and clear evidence in support of the Application for the stay.

(48) In **Marguerite Desir v Sabina James Alcide SLUHCVAP2011/30**, the Court of Appeal considered an application for stay of execution of the Order of the court below improbating a registered deed of sale of property in St Lucia pending the determination of an appeal against that decision. Edwards CJ (Ag) confirmed at paragraph 21of the judgment that the court's discretion to grant or refuse a stay is unfettered after stating earlier at paragraph 3 "The Court has power … to stay execution of a judgment pending appeal. We have particularly borne in mind that our jurisdiction to grant a stay is abused on the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refuses a

stay; and the evidence in support of the application should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting a stay. The court must hold a balance and give full and proper weight to the starting principle that there must be good reason to deprive a successful claimant of the right to enforce her judgment. The mere existence of arguable grounds of appeal is not enough, by itself, a good reason".

(49) The court's task is therefore to determine from the evidence of the parties where the lesser risk of injustice lies, either in the grant or refusal of the stay while keeping in mind the general rule of no stay: see **Winchester Cigarette Machinery Limited v Payne [1993] WL 963008**.

(50) The question therefore is whether the Brothers' have demonstrated on the evidence that there are special circumstances in this case that are sufficient to displace the general rule of no stay so that the refusal of a stay will on balance cause them to suffer greater injustice than that which Sheikh Abdullah will suffer if the stay were granted.

Legal argument and discussion

(51) Mr. Tucker QC who appears for the Brothers with Mr Brightwell submitted that the application was not based on the prospect of ruination if the stay were not granted, nor was it based on the existence of an actionable cross claim that may exceed the amount which the Brothers may eventually be liable to pay. Instead he grounded the application on the de facto control by Sheikh Abdullah of an asset in which certain of the Brothers had an interest so that it lay within his power to make this asset available to the Brothers to satisfy the judgment debt.

(52) The second and related limb of this argument is that Sheikh Abdullah himself in correspondence with the Brothers (both via their respective legal representatives) has accepted that the costs liability should in part be met by the Brothers' interest in the proceeds of sale of Villa Said, thereby creating a link between the costs liability and the sale of Villa Said.

(53) Mr. Tucker then submitted that the injustice to the Brothers arises because Sheikh Abdullah has wrongfully obstructed the sale of Villa Said with the result that this fund (i.e. their share of the sales proceeds) that should be available to the Brothers to meet their liability to him has not

become available and has been diminished (as seen from the difference between the 2010 and 2016 valuations).

(54) The Brothers' concern is that unless a stay is granted, the property may never be sold or if sold, the proceeds in which they are interested may be applied towards other alleged liabilities owed by them to Sheikh Abdullah so that the fund from which the costs liability should be paid may never become available to make that payment.

(55) To meet the uncontested fact that Sheikhs Mohamed and Siraj have no interest in the property, Mr. Tucker submitted that (i) the Brothers who have the interest are agreed that the proceeds of sale can be applied towards the liability of all the Brothers; and (ii) if a stay were not granted, Sheikh Abdullah could enforce the costs judgments against Sheikhs Mohamed and Siraj who would then have an unanswerable claim for contribution against the other Brothers who would thereby be placed in a worse position as this would not take account of their interests in the property which Sheikh Abdullah will retain.

(56) I must start on the premise that Sheikh Abdullah wishes to recover the substantial costs that he has been awarded and on the further premise that the general rule is that execution should not be stayed. This is not contested by the Brothers. The further premise is the Brothers' concession that the BVI judgments are not enforceable in KSA so that in the absence of a voluntary payment of these costs by the Brothers, which has not occurred or even been offered to date, Sheikh Abdullah must look to assets outside of that country to satisfy these judgments. The only evidence of such assets is that relating to the interests of certain of the Brothers in Villa Said and that of all the Brothers in the $3million frozen in the BVI.

(57) Why then would Sheikh Abdullah rationally want to take steps to prevent the sale of Villa Said? The evidence is that the property is expensive to maintain; that he has had to bear these costs himself for over a number of years; and none of the family members seems to have any interest in living in it. The only way in which this asset is to be made available to satisfy the judgment debt is by sale. The property has been on the market since mid-2016 and the Brothers have led no evidence that Sheikh Abdullah is actually blocking any potential sale of the property or that there was even the possibility of a sale during the intervening period of 2009 to 2016. Mr. Tucker indicated that there is no indication that there would have been difficulty in selling the property if it had been put on the market at an earlier date. As there was no specific evidence directed to this point other than Mrs Crabbe's speculative statement in her second affidavit "If Sheikh Abdullah

had not delayed progress with Villa Said then it may have already been sold …" I find that I can give no weight to the possibility that the property may have been sold prior to the date of hearing of the Stay Application.

(58) Even if Sheik Abdullah had obstructed the sale, this would not deny or defeat the interests of the Brothers in the property. That interest arises under the terms of the Trust which sits at the top of the structure under which the property is held. I must assume that the Brothers who contributed to the purchase price of the property must have agreed to this structure when it was established several years ago and in so doing must have contemplated the inherent complications in the sale of the underlying property. Therefore if the property were to remain in the current structure, the Brothers would be in exactly in the same position as they have always been as the ultimate beneficial owners of Villa Said which is held under a structure controlled by Sheikh Abdullah. Justice does not require me to put the Brothers in a better position than that in which they put themselves since the 1990s when they agreed the ownership structure.

(59) The main thrust of the Brothers' submissions is that Sheikh Abdullah holds a form of de facto security for the costs liability in the form of his control over the sale of the property. This control they say arises from his control of the structure under which the property is owned and his control of the physical property itself. The purpose of the stay therefore is to ensure that he realises this security and applies the proceeds towards the liability. The security is said to arise because of Sheikh Abdullah's proposal in late 2015 that the property should be sold and the sales proceeds should be applied to the payment of "costs and other liabilities" of the Brothers. This proposal it is said created a link between the satisfaction of the costs liability and the proceeds of sale of the property that would be unconscionable for Sheikh Abdullah to break.

(60) I do not see how this argument can succeed where the Brothers insist that they are not basing their application on an enforceable claim. If they have no right to have the judgment satisfied from the sale proceeds, then Sheikh Abdullah has no obligation to ensure that this is done. In the absence of an obligation and there being no argument that he is estopped from acting otherwise than in this manner by convention or change of position on the part of the Brothers, his conscience cannot be affected if he acts otherwise.

(61) Our Civil Procedure Rules do not limit a judgment creditor to enforcing his judgment in any particular manner and do not prohibit him from seeking to enforce the judgment in different ways concurrently. The Brothers' argument can be distilled to its basic component that Sheikh Abdullah

should be limited to enforcement of the costs liability in one way only, at least in the first instance. In my view, the making of a proposal in negotiations, the exact terms of which, as seen from subsequent correspondence between the parties, were not accepted by the other side does not affect the conscience of the proposer so that he is unable thereafter to exercise his legal rights. It must be remembered that the initial proposal from Sheikh Abdullah through Forsters on 18 September 2015 was for the payment from the proceeds of sale of the Brothers' costs and other liabilities. The Brothers' response through Mr. Hamdan on 27 September 2015 was to deny the potential Saudi claims and to agree only that the costs liability be paid from the proceeds of sale. Forsters' response on 15 October 2015 was to insist that the proceeds of sale be applied to "pay the sums which your clients owe [Sheikh Abdullah]". The parties were not entirely ad idem at this point.

(62) In any event the Brothers' argument does not address the fact that neither the proposal made by Sheikh Abdullah nor the counterproposal made by the Brothers in the September 2015 correspondence was that the set off from the proceeds of sale of Villa Said must be the first or only recourse of the judgment creditor or that the proposal was being made with prejudice to his, i.e. Sheikh Abdullah's, other rights as a judgment creditor. Absent a specific agreement or even proposal in those terms, I find that the Brothers cannot rely on the link or de facto security that they say arose from the exchanges to say that justice demands that Sheikh Abdullah should not be allowed to enforce his judgment for costs against them until and unless they are able to apply their share of the net proceeds of sale of Villa Said towards this liability and only thereafter should Sheikh Abdullah be able to exercise his general rights as a judgment creditor to go after any available asset of the judgment debtors. Simply put, the link is at best tenuous and the Brothers have not shown that it is anchored on anything more than Sheikh Abdullah's acceptance of the reality that the sales proceeds together with the frozen funds may be his only potential recourse for the satisfaction of the Brothers' costs liability.

(63) I also find that the argument that it would be unjust that Sheikhs Mohamed and Siraj would not be able to be subrogated to the de facto security that Sheikh Abdullah has over the property by virtue of their payment of the entire liability of all the Brothers similarly does not stand up to scrutiny.

(64) I accept that in principle, as illustrated in the judgment of Andrew Smith J in **Dar al Arkan v Al Refai [2015] EWHC 1793**, that the relationship between co-judgment debtors may be relevant to the issue whether the stay should extend to all the judgment debtors even where only some of

them may show an arguable interest in not having the judgment enforced against them immediately. However, as a general rule the rights of the judgment debtors *inter se* are not of concern to the judgment creditor and the factual situation in Dar al Arkan bears no resemblance to that in this case so as to give rise to similar considerations as to where the justice may lie.

(65) The submission concerning these Brothers suffers from the difficulty that if Sheikh Abdullah were to enforce his judgments against Sheikhs Mohamed and Siraj, there would be no obligation on their part of to enforce any rights to contribution against the other Brothers or to do so until the property has been sold. The argument is that if the remaining Brothers were forced to contribute to Sheikhs Mohamed and Siraj, they would lose the advantage of having the proceeds of sale of Villa Said applied towards the costs liability. While this may be so if the contribution were enforced before the sale of the property, the key factor is that the other Brothers will not be denied, as they submit, their interest in the property or in the proceeds of its eventual realisation to reimburse them any such contributions as there can be no basis on which Sheikh Abdullah can retain such interests, in the event of a sale, unless he is able to enforce some other judgment or an unrecovered part of these judgments against those proceeds or unless the trusts on which the shares are held are such as to not permit the Brothers to determine them. In either of such cases, there will be no valid basis for complaint by the Brothers.

(66) The nature of the link that has been advanced by the Brothers also means that it is at least arguable that Sheikh Abdullah remains at liberty to enforce against the sale proceeds of Villa Said any other liabilities of the Brothers to him as they do not argue that the link means that the proceeds are to be used exclusively for the satisfaction of the Costs Orders. If their argument is that he created the link in the 18 September 2015 correspondence, they must live with the link that he created, i.e. one that extends to all their liabilities. If the link depended on their agreement, then it is the agreement, and not the link, that should have been at the centre of their case and that clearly was not the position adopted by the Brothers.

(67) The Brothers' concern is that there is a risk, based on his previous conduct, that Sheikh Abdullah will misrepresent the existence of liabilities of the Brothers to set off against their share of the sales proceeds of Villa Said. I find that the existence of such risk has no bearing on the consideration for the grant of a stay of execution in these proceedings. If Sheikh Abdullah seeks without justification to deprive the Brothers of their share of the sales proceeds, there are without doubt remedies available to the Brothers to protect their entitlement that would not require a stay

of execution of the Costs Orders. It is therefore incorrect for the Brothers to conflate their need for protection against this risk with their need for a stay of execution in these proceedings.

(68) If the Brothers are fearful whether the proceeds of sale will be applied "as they should be", it was up to them to ensure that Sheikh Abdullah's powers of such proceeds were adequately circumscribed. The link does not achieve this. A court cannot intervene in the relationship among the parties to strengthen the link. The other fear that Sheikh Abdullah will cause Intertrust to relinquish control of the sales proceed to himself, acting via SAVI USA is not a matter that I feel that this court can properly address as it lies between Dutch and Delaware companies in relation to French property that is ultimately held by a New York Trust. The Brothers will need to show that they have standing to challenge any action by Intertrust if they claim that it is acting incorrectly. A BVI court cannot, by sidewind, confer such standing. In any event, the Trustee has given the written assurance that it will not vary the distribution of the shares in SAVI USA, the asset of the Trust, from the terms set out in the Trust Deed in the absence of agreement among the relevant parties or an Order of the New York court. It seems to me that this is a significant protection for the Brothers' interests that exists without the need for a stay from this Court.

(69) It is a question of fact whether Sheikh Abdullah did obstruct the sale of the property. While it is correct that he did not state a position until several years after the initial contact, there is a difference between a refusal to agree to the sale, which must be his right, and an obstruction of the sale, which can only arise after agreement.

(70) The Brothers cannot show that any obstruction prior to the determination by the Privy Council in 2014 of the final rights of the parties was material to the prejudice that they claim in this Application. It was only then that their liability to pay costs would have materialised and it is only in 2016 that the quantum of this liability would have been finally determined (subject of course to their appeal on quantum). As the nub of their claim is their ability to rely on the fund arising from the sale to meet their liability in costs, the existence of that fund before the costs liability arose is irrelevant to the determination whether justice lies in the grant or refusal of a stay. Prior to the determination of that liability, the link on which they rely did not exist and could not exist as one end of this link had not yet come into existence. If they had received those funds in 2009 or any time before the decision of the Court of Appeal in the Chemtrade Proceedings, they would have been free to dispose of their share of those funds.

(71) As I have indicated earlier in this judgment, the pace of the correspondence picked up in August 2015 after a 31 month hiatus once all appeals in the Chemtrade Proceedings had been exhausted. The material period in which any obstruction would have become relevant was after Sheikh Abdullah had created the link on which the Brothers now rely in September 2015 and up to the hearing of the Application. Having reviewed the correspondence between the parties during this period, I find that the Brothers have not satisfied me that Sheikh Abdulla obstructed the sale during this period. I must also take into account the role of Intertrust, the director of SAVI (NL) BV, owner of the property. There was no evidence of Dutch law before me. BVI legal principles are that it is the directors who make the decision to dispose of a company's property and not the beneficial owners of the parent company. If therefore the property was unoccupied, deteriorating and expensive to maintain, why didn't the director resolve to sell it during the relevant period? The Brothers did not suggest a response to this question.

(72) Even if I am incorrect in this finding, I am of the view that any obstruction would only become relevant if it had actually prejudiced the Brothers. They claim that the prejudice arises because of the loss of value of the property between 2010 and 2016. However, I must consider that the evidence shows that the latter valuation was not a full valuation as was the earlier valuation and the loss of value that the Brothers claim is really in the abstract as no one knows whether the property would have fetched this price at the relevant time. The evidence shows that the real estate agents are marketing the property at €8.7million, it does not show whether the property would have been marketed in 2010 or at any time subsequently at the valuation figure or at a higher price or the probability that it would have been sold at that price. I have already made the finding that I cannot put any weight on Mrs. Crabbe-Adams' evidence of the possibility of a sale prior to 2016.

(73) I therefore find that the Brothers have not satisfied me that they have been prejudiced by any delay in the putting the property on the market between 2010 and 2016 or that any such prejudice should not be laid at least in part at the feet of the director of the company owning the property.

(74) Mr. Tucker also argued that the stay is just because the Brothers have a real prospect of success on their appeal against the Costs Orders that will result in the costs liability being reduced below the sum of the value of their interests in the proceeds of sale of Villa Said and the frozen sums in the BVI.

(75) It appears to be common ground that the Brothers' interests in the sale proceeds will be approximately $4million on the assumption that the property is sold for the current asking price. This, taken with the $3million that is frozen in the BVI, will create a fund of approximately $7million. The Brothers' evidence did not provide a considered opinion on the figure or range that the Court of Appeal may be likely to consider as appropriate if it were to set aside Eder J's Costs Orders. They appear to say that at least a reduction of $3.8 million should take place. However, even if these arguments were entirely successful, there would still be a liability of roughly $7.5million (subject to interest and also to the Brothers' further success on Ground 1 of their Appeal). As I cannot speculate on the extent of the possible reduction of the costs liability in the event that the appeal were successful, I can only give the Brothers' chances of success a limited weight in my determination whether the grant of the stay would be just in all the circumstances. In any event, the Court of Appeal in **Desir** stated that the existence of arguable grounds of appeal is not by itself a sufficient reason to grant a stay. I cannot say on the current state of the evidence that the Brothers' have demonstrated more than this.

(76) The overarching consideration for the grant of the stay, nevertheless, has to be that the Brothers have made no attempt since June 2016 (or prior to that since the date of the determination of quantum of costs in the Privy Council appeal) to satisfy the costs liability. Their response is that they have "made it clear that they intend to comply with the Costs Orders". I find that by their silence, they have done the complete opposite. By not making any proposals as to how and when these Orders will be satisfied save by reference to the timing of receipt of the sales proceeds, they have made it absolutely unclear whether or when they intend to satisfy the entire liability. This is moreso as the Brothers insist that impecuniosity is not a factor in their application and further insist that the funds frozen in the BVI should not be released until the proceeds of sale are available. They advance that Sheikh Abdullah is protected by the interest accruing under the Judgments Act but such protection must be illusory if there is a risk that there may be no payment at all.

(77) Equally, although at this stage of the proceedings, the amount due under the Costs Orders exceeds the Brothers' likely share of the sales proceeds and the frozen sum, the Brothers have not offered as the price of the stay to pay or even to show that they have made readily available a sum that would meet the excess. I find this to be significant and that it is not a proper answer, as Mr. Tucker sought to do, merely to state that the court can impose conditions on the stay.

(78) The other overarching consideration is that it is common ground that the BVI Costs Orders cannot be enforced in KSA. No evidence was lead that the Brothers hold assets outside of KSA and in a jurisdiction in which the Costs Orders can be enforced. If therefore the frozen sum and the sales proceeds are the only sources for enforcement of the Costs Orders, the matter logically is only about a stay of the enforcement against the frozen sum until the sale of Villa Said and the unwinding of the trust so that distributable proceeds are available for execution. In the absence of other assets, there is a de facto stay of execution against the Brothers' interests in the Villa Said sale proceeds until these actually come into existence.

(79) It is almost inconceivable that success on the Brothers' appeal will reduce their liability to an amount less than the frozen sum which represents only around 25% of the total liability including costs at this stage. Could justice then be better served by preventing access by the judgment creditor to the sum of $3million while he waits to get a further sum of $4million? I cannot see how this can be answered in favour of the stay.

(80) I have to presume, based on the evidence of the holding structure for Villa Said, that there will need to be some cooperation among the parties with interests in order to unwind the trusts. Ms Jones QC who appeared for Sheikh Abdullah raised the issue that if the stay were to be granted, what incentive would there be for the Brothers with interests to cooperate in this process? I find this to be a valid concern that remained unanswered at the end of the day by Mr. Tucker.

(81) Interest accrues under the Judgments Act Cap 35 on the costs liability at a rate of 5% per annum. The effect is that if a stay is granted indefinitely as is sought as there is no fixed date for the realisation of the sale proceeds of Villa Said, a considerable part whatever fund that may come into existence as well as the existing frozen fund, will go towards interest and a corresponding larger amount of principal will remain outstanding with little hope of satisfaction on the present evidence. This consideration is strongly against the grant of a stay.

(82) Ms Jones QC submits that this Application is all about putting pressure on Sheikh Abdullah to accept a reduced amount of costs. In **Kaneria v Kaneria et al [2016] EWHC 2823 para 18**, Ms Newman QC sitting as a Deputy Judge stated "The modern court will not be used as a weapon in a senseless war". I endorse this statement fully. I also endorse that learned Deputy Judge's approach at para 22 of the judgment that "It is not the court's job to assist one party in putting needless pressure on the other" As was the position found by the Deputy Judge in that case, the

Applicants here have lost sight of the sensible way forward, which is to face up to the fact that they are likely to be the net debtors and should implement a set off which they know is inevitable.

(83) Sheikh Abdullah cannot be condemned to remain in a state of limbo for making a suggestion that was based on common sense and an appreciation of the reality of the situation. This is effectively what the Brothers seek. Any past transgressions of his, on which I make no finding, should properly be dealt with in the courts that have jurisdiction over those matters. Their relevance diminishes rapidly if the Brothers cannot produce any finding by a court of competent jurisdiction with respect to those allegations and appear not even to have considered it worthwhile to pursue such claims.

(84) Similarly, I do not consider that any significant weight should be given to the considerations whether the Brothers claims in the Chemtrade Proceedings were false or whether they are equally guilty of misappropriation of funds from Chemtrade and related companies in KSA. The substance of claims in the Chemtrade Proceedings has been determined. The claims against the Brothers for misappropriation will be determined in KSA. Neither has relevance to the issue of the stay of the Costs Orders.

(85) I agree with Ms Jones' submission that the Brothers are merely seeking an indulgence from the court and are only offering their word that they will satisfy the balance of the costs liability not covered by the proceeds of realisation of Villa Said and the BVI fund of $3million. They pray in aid words such as "wrongful" and "unjustifiable" to describe the conduct of Sheikh Abdullah without demonstrating why such conduct is to be impugned or how they have been prejudiced in real terms except by making unsubstantiated allegations that he should have acted more expeditiously with respect to the proposed sale of the property.

Conclusion

(86) Having therefore considered the evidence of the Brothers and the submissions of the parties, I find that the Brothers have not demonstrated the existence of special circumstances that should displace the general rule of no stay.

(87) Mr. Tucker reminded me of the Court's power to grant the stay with conditions as may be necessary to meet the justice of the case. I decline to do so in light of my findings that no special circumstances have been shown to exist. In my view, the grant of a stay subject to conditions

means that the Applicant has at least established on the evidence the basis for a stay. This has not been done in the instant case.

Orders

(88) The Brothers' Application for a Stay of Execution is dismissed and the Brothers shall jointly and severally pay the costs of this Application to Sheikh Abudullah.

(89) I final Order for Attachment of the fund held by the Brothers' solicitors is granted and the Brothers shall pay the costs of that Application to Sheikh Abdullah. Counsel for the parties shall lay over an agreed Order within 7 days failing which the Court will determine the terms of this Order.

(90) There shall be liberty to apply

(91) The parties shall have 21 days from the date of this judgment to reach agreement on costs, failing which the following directions will apply:

a. that Sheikh Abdullah should prepare his schedules of costs, which shall include costs In relation to the preparation of these schedules, of the Application for the Stay and of the Application for the Attachment Order, and serve such schedules on solicitors for The Brothers within 7 days of the expiration of that period. The Schedules shall be in a form to permit notation thereon of objections by the Brothers and responses thereto by Sheikh Abudullah;

b. The Brothers' solicitors shall serve on solicitors for Sheikh Abdullah within 14 days of service of the schedules their objections to any items or figures on the schedules and any submissions in relation to the costs sought therein.

c. Sheikh Abdullah's solicitors shall serve their responses to the objections and any submissions in reply within 14 days of service of the Brothers' responses and submissions.

d. Sheikh Abdullah's solicitors shall thereupon lodge with the Court and serve on the Brothers' solicitors:-

    i. The complete schedules showing the initial entries, objections and responses;

    ii. One bundle comprising the Brothers' written submissions and the Sheikh Abdullah's reply submissions together with authorities.

e. The costs shall be assessed on paper by a Judge of the High Court or on his further direction by a Master of the Court.

John Carrington QC
Acting Judge
8th March 2017