

**EASTERN CARIBBEAN SUPREME COURT
VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHCOM 158 of 2010

BETWEEN:

CHEMTRADE LIMITED

Claimant

and

**[1] FUCHS OIL MIDDLE EAST LIMITED
[2] FUCHS PETROLUB AG**

Defendants

and

CLAIM NO BVIHC (COM) 89 of 2011

BETWEEN:

SHEIKH ABDULLAH ALI ALHAMRANI

Claimant

and

**[1] SHEIKH MOHAMED ALI ALHAMRANI
[2] SHEIKH SIRAJ ALI ALHAMRANI
[3] SHEIKH KHALID ALI ALHAMRANI
[4] SHEIKH MOHAMED ALI ALHAMRANI**

(as representative of the late Sheikh Abdulaziz Ali Alhamrani)

**[5] SHEIKH AHMED ALI ALHAMRANI
[6] SHEIKH FAHAD ALI ALHAMRANI**

Substituted Defendants

Appearances:

Mr Lynton Tucker and Mr James Brightwell for Chemtrade Limited and for Sheikh Mohamed Ali Alhamrani (in his own right and as representing the estate of the late Sheikh Abdulaziz Ali Alhamrani), Sheikh Siraj Ali Alhamrani, Sheikh Khalid Ali Alhamrani, , Sheikh Ahmed Ali Alhamrani and Sheikh Fahad Ali Alhamrani

Mr George Bompas QC, Mr Adam Holliman and Mr Jerry Samuel for Fuchs Petrolub AG

Miss Elizabeth Jones QC for Sheikh Abdullah Ali Alhamrani

2013: 27 February, 12 March

JUDGMENT

- [1] This is my decision on the question of the costs of these proceedings and on certain ancillary matters which were not finally disposed of by my judgment on the merits, handed down on 21 December 2012.
- [2] I do not propose to rehearse the facts and findings set out in and made in my earlier judgment in any detail. The first action in time (158 of 2010) is an unfair prejudice claim brought by the Claimant ('Chemtrade') against the second Defendant ('Fuchs') in respect of the conduct of the affairs of the first Defendant ('FOMEL'), in which Chemtrade and Fuchs are 50/50 shareholders ('the unfair prejudice action'). The second action in time (89 of 2011) was a claim by the Claimant in that action ('Sheikh Abdullah') to enforce what he claimed was an agreement, concluded in about August 2008, for the sale by the Defendants to that action ('the Brothers') of (inter alia) their shares in Chemtrade which the Brothers claimed were not comprised in the agreement ('the ownership action').
- [3] The unfair prejudice proceedings arose out of the fact Sheikh Abdullah, who had admittedly acquired, pursuant to the August 2008 agreement, the company ('AFPSA') which was FOMEL's sole supplier of product, threatened that if Fuchs attended meetings of the board of FOMEL he would cause the cost at which product was supplied by AFPSA to FOMEL to be raised and, later, to cease supplying at all. Since FOMEL's board was inquorate without the attendance of at least one Chemtrade and one Fuchs director, it followed that if Fuchs complied with this threat, FOMEL's board would cease to operate. Fuchs did comply, with the result that for almost three years FOMEL was without a functioning board. Chemtrade, still in the legal control of the Brothers, complained that by capitulating to Sheikh Abdullah's threat and paralyzing FOMEL's board, Fuchs had caused its affairs to be conducted in a manner unfairly prejudicial to Chemtrade. Chemtrade sought an order that Fuchs buy out Chemtrade, with an alternative claim for an order regulating the conduct of the company for the future. Fuchs counterclaimed for the appointment of liquidators to FOMEL.

- [4] The ownership case superseded proceedings which Sheikh Abdullah had earlier commenced in Saudi Arabia with a view to obtaining an order against the Brothers for the transfer of their Chemtrade shares. It followed upon a series of directions made in November 2011 for the trying of the two actions together and for the evidence and findings in the one set of proceedings to stand as evidence and findings in the other. On this basis the two cases were tried together over twenty nine days between 20 September and 27 November 2012. I gave a combined judgment on 21 December 2012.
- [5] In the ownership case I held that Sheikh Abdullah had failed to establish that the agreement of August 2008 included the Brothers' Chemtrade shares. In the unfair prejudice proceedings I found that Fuchs' conduct had been unfairly prejudicial, but refused to order that it buy out the Brothers, on the grounds that the Brothers' complaint could be dealt with by amending FOMEL's Articles of Association to provide that the quorum for board meeting was any two directors, with the Chairman retaining his casting vote.
- [6] Sheikh Abdullah is appealing my order in the ownership case and Chemtrade is appealing my order in the unfair prejudice proceedings. Fuchs is not appealing my ruling in the latter case.

Separating the costs

- [7] I raised the question how, in these circumstances, costs were to be assessed. With some exceptions, the documents, evidence and general conduct of the proceedings was so intermingled that a Judge or Master attempting to attribute an item of expenditure to one rather than to the other case would be faced with an impossible task. I suggested that the best way to proceed was to identify items which on any footing were attributable to one only of the two sets of proceedings and to apportion the balance by reference to the amount of time spent at trial on each case, making a rough and ready assumption that preparation would have occupied the same basic split. There was no real objection to my proceeding in this way and I think that the only point I need to mention is that Ms Jones QC told me, without contradiction, that, with the exception of the disclosure given by Fuchs in the unfair prejudice proceedings, the bulk of disclosure in both cases had been carried out by Sheikh Abdullah, because he was the person who was in possession of the majority of the documents.
- [8] Although various methods of proceeding were canvassed, I have come to the conclusion that

(1) all the costs of the unfair prejudice proceedings incurred before my order of November 2011 should be costs in the unfair prejudice proceedings alone;

(2) existing costs orders obliging one or another party to pay the costs of another or others should stand; and

(3) parties should bear their own costs of interim applications in respect of which no orders for costs (other than costs reserved) have been made.

[9] On that basis, I now have to decide how the balance of the costs incurred should be apportioned.

[10] In reaching my conclusions on this point, I bear in mind:

(1) that both in the unfair prejudice proceedings and in the ownership proceedings evidence was led and relied upon by Chemtrade and Sheikh Abdullah respectively designed to show the interdependence (Sheikh Abdullah and Fuchs) or lack of it (Chemtrade) between FOMEL and AFPSA. This evidence was relied upon by Sheikh Abdullah in the ownership proceedings in an attempt to show that the Chemtrade shares must have been intended to pass under the agreement or alternatively were so intimately part of what did undeniably pass that they passed by operation of certain principles of Saudi law. Chemtrade relied upon the same line of evidence in the unfair prejudice proceedings to show that Sheikh Abdullah's threats leveled against Fuchs were in fact illusory, because FOMEL could have traded perfectly well independently of AFPSA. This evidence, therefore, and the preparation and cross examination necessary to adduce and challenge it, while different in thrust, is common to both the cases;

(2) apart from that, Sheikh Abdullah's evidence and cross examination in the ownership case centred upon (a) the proceedings in the Courts of Saudi Arabia which led up to and followed upon the making of the August 2008 agreement; (b) attempts by the Brothers to frustrate Sheikh Abdullah's purchase of the companies and property sold under the 2008 agreement; and (c) examination of what Sheikh Siraj, the second Defendant, meant by a letter he wrote to Fuchs dated 10 May 2009;

(3) a considerable mass of the evidence and cross examination in the unfair prejudice case (other than that referred to in paragraph [10](1) above) consisted of over-detailed and largely irrelevant material detailing and dealing with virtually the entirety of events occurring in the course of FOMEL's business after (and to some extent before) the dispute broke out. This appeared to have been intended originally to establish malpractice or misfeasance, or at any rate dereliction of duty, on the part of Fuchs in the conduct of FOMEL's affairs, but Mr Joffe QC, who

appeared for Chemtrade at trial, accepted at a very late stage that it did no such thing and that its only relevance was to demonstrate that (unsurprisingly) events had occurred which called for attention to be given to them at board level;

(4) the remainder of the evidence in the unfair prejudice case went to the extraction by Sheikh Abdullah and Fuchs of US\$18.5 million each from FOMEL's cash reserves during the period when FOMEL was without a functioning board. The facts were largely admitted, although there was a dispute, never satisfactorily resolved, whether Mr Untersteller, one of Fuchs' witnesses and a former director of FOMEL, ought to have been aware of the fact of Sheikh Abdullah's withdrawals. There was further evidence, not too time consuming, going to the issue of how frank Fuchs had been in keeping the Brothers informed after Sheikh Abdullah's withdrawals had come to its attention.

- [11] On a crude time basis and in terms of factual evidence only Sheikh Abdullah's case in the ownership proceedings occupied about eight days of Court time while the evidence in the unfair prejudice proceedings occupied some thirteen days. The expert evidence in the ownership case occupied two days, more or less. Time spent on submissions was broadly speaking evenly split, but with Mr Bompas QC, for Fuchs, being rather more economical of time. On a necessarily rough and ready basis, it seems to me that Court time was split 45% on the ownership proceedings and 55% on the unfair prejudice proceedings. The expert evidence, however, is likely to have been supported by very much less in the way of disclosure and general preparation than the factual evidence and I consider that this should be reflected in an adjustment to weight the trial costs 40% to the ownership proceedings and 60% to the unfair prejudice proceedings.

Costs payable by Sheikh Abdullah

- [12] Ms Jones QC accepts, as she must, that Sheikh Abdullah should in principle pay the Brothers' costs of the ownership proceedings. I therefore start from the position that Sheikh Abdullah must pay 40% of the Brothers' agreed or assessed overall costs of this litigation. But Miss Jones QC submits that he should not have to pay 100% of that 40%.
- [13] Relying on CPR 64.6(6), Miss Jones QC says, first, that the Brothers' untenable insistence that there was no contract between the Brothers and Sheikh Abdullah was maintained until the point was conceded in the cross examination of the Brothers' expert. She says that the reason for this stance was because the Brothers were concerned that if the case proceeded on the basis of contract, they would be exposed to submissions and cross examination based upon their intentions at the time, whereas relying upon the judgment alone would, they hoped, defuse that issue. In the end the point went away,

but I agree with Miss Jones QC that it is a matter to be taken into account is deciding what Sheikh Abdullah should be ordered to pay.

[14] Next, Miss Jones QC submits that the Brothers were prepared to mislead the Court over the meaning of the letter of 10 May 2009 and as to the content of a conversation between Sheikh Siraj and Mr Fuchs¹ over their insistence that they had not attempted to obstruct - or derail altogether - Sheikh Abdullah's completing his purchase;² over their attempts to procure that banks would insist upon the giving by the Brothers of worthless guarantees in order to make them appear to be the victims of a serious wrong;³ and, finally, the attempt to colour withdrawals from AFPSA between contract and completion.⁴ I think that there is force in these criticisms and agree that they should be reflected in the costs order.

[15] Miss Jones QC also relies upon the fact that it was Sheikh Abdullah who, for the reasons which I have given above, had to give the bulk of the disclosure in the proceedings. He also prepared the trial bundles. It is said that these tasks were made considerably more burdensome by requests and applications from Hameys, acting for Chemtrade and the Brothers, including applications for further disclosure in respect of matters referred to in amendments to Chemtrade's pleadings which were found not to support its allegations of unfair prejudice. The chronological trial bundles themselves expanded from 20 to around 56 bundles by the time they were ready for trial.

[16] In my judgment there is force in all of these complaints, which should be reflected in a discount. I bear in mind the mandatory provisions of CPR 64.6(6). Doing the best I can in the light of the objections made by Miss Jones QC, it seems to me that it will be just if Sheikh Abdullah is required to pay 28% (70% of 40%) of the Brothers'/Chemtrade's agreed or assessed costs of the combined proceedings overall incurred from and after the commencement of the ownership proceedings within this jurisdiction..

Costs payable by Fuchs

[17] Mr Bompas QC, for Fuchs, says that Chemtrade has not succeeded in the unfair prejudice proceedings. He says that it was seeking a buy out order, as Mr Joffe QC confirmed in his opening. Chemtrade did not get a buy out order. Further, it is appealing the judgment to the Court of Appeal with the object of obtaining one. So, says, Mr Bompas QC, it cannot regard itself or be treated as having won. The proper order in these circumstances should be that there is no order as to costs.

¹ Judgment paras [66] and [67]

² Judgment para [44]

³ Judgment para [57]

⁴ Judgment para [59]

- [18] I cannot accept that submission. The fact that Chemtrade failed to obtain a buy out order did not add to the length or expense of the proceedings. The remedy which I did in fact award does not alter the fact that all of Fuchs' defences to the claim failed. Fuchs' counterclaim was dismissed. I see no reason for applying any discount in consequence of the fact that Chemtrade failed to persuade me that it was entitled to be bought out by Fuchs.
- [19] Where I am entirely with Mr Bompas QC, however, is over his submission that disclosure and cross examination was inordinately extended for the purpose of pursuing matters that I ultimately found to be irrelevant. There was no basis for holding that the conduct of FOMEL's business on the ground during the period in question had caused Chemtrade any prejudice whatsoever or was in some way engineered by Fuchs to the detriment of the Brothers. This was a major issue upon which Chemtrade failed and in my judgment it is just to reflect that fact in my order. It is impossible for me to arrive at any scientific reduction without going through the transcripts line by line, something which I am not prepared to do, but having sat through the proceedings I believe that I can say with confidence that at least 50% of documents deployed, evidence in chief and cross examination in the unfair prejudice proceedings was devoted to this topic. As I have mentioned, Mr Joffe QC accepted, at the end of the trial, that these matters did not go to the question of prejudice, but were merely illustrative of the fact that events had taken place upon which a functioning board could properly have sat in consideration. I am sure that if it had been put like that in the first place Mr Bompas QC would have had no hesitation in accepting the proposition. The need to explore virtually the entirety of FOMEL's business history would have been avoided.
- [20] In my judgment, therefore, Fuchs should pay 30% (50% of 60%) of Chemtrade's agreed or assessed costs of the combined proceedings overall.

Third party costs orders

- [21] Chemtrade and the Brothers sought third party costs orders. Mr Lynton Tucker, who appeared together with Mr James Brightwell on these applications, urged me to make orders under CPR 64.10 that Fuchs be liable together with Sheikh Abdullah for the costs of the ownership proceedings and that Sheikh Abdullah be liable together with Fuchs for the costs of the unfair prejudice proceedings. The essential rationale for seeking such orders was that throughout the proceedings Sheikh Abdullah and Fuchs had made common cause.
- [22] That is undoubtedly true as a matter of fact, but in my judgment the fact does not justify the making of either of the orders sought.
- [23] The jurisdiction to make third party costs orders exists in order to ensure that those persons (other than or in addition to, the nominal parties themselves) who are

responsible, or jointly responsible, for proceedings being prosecuted or defended are made to compensate, or share in compensating, a successful party who obtains an order for payment of his costs. I was referred to a number of English authorities on the exercise of the parallel jurisdiction under section 51 of the Senior Courts Act 1981. There is no need for me to mention any of them, since their recurring thread, that such orders are only to be made when it is just to do so, requires no elaboration.

[24] I can see no reason why Fuchs should be made to bear any part of the costs incurred by the Brothers in defending the ownership proceedings. Fuchs did not instigate those proceedings, did not fund them, did not prejudice the Brothers' defence of them, and will gain no benefit as a result of the judgment. When I asked Mr Tucker whether, if the ownership proceedings had been conducted separately from and before the unfair prejudice proceedings had been commenced, it would have been just to oblige Fuchs to pay the Brothers' costs, he had no answer. That was not because Mr Tucker was at fault in failing to identify an answer – it is because there is no answer. The fact that the ownership proceedings were tried together with the unfair prejudice proceedings makes no difference.

[25] The position is not as straightforward in respect of the unfair prejudice proceedings. It was the menaces of Sheikh Abdullah which set off the chain of events which culminated in the bringing of the proceedings. In my judgment, however, that makes no difference, because it has no connection with the prosecution or defence of the unfair prejudice proceedings themselves, which is what this particular jurisdiction is concerned with.

[26] On 5 October 2011, however, Fuchs and Sheikh Abdullah entered into an agreement under which Sheikh Abdullah agreed to indemnify Fuchs against any sums which it might be obliged to pay to Chemtrade as a result of the proceedings. Further, Fuchs was to keep Sheikh Abdullah fully informed of the progress of the proceedings; to consult him before taking any steps in them; and to accept, as it did, a non-binding obligation to follow directions given to them by Sheikh Abdullah.

[27] I do not think that this agreement means that Sheikh Abdullah should be made directly liable to Chemtrade for any of its costs of the unfair prejudice claim. Chemtrade was suing Fuchs in any event. It made no difference to Chemtrade's chances of success or failure, or to the amount of costs which it incurred, or to its ability to recover costs, that Sheikh Abdullah was indemnifying Fuchs and that he had the right to be consulted on steps in the proceedings and to give non-binding directions. It might have made a difference to Chemtrade's ability to settle the proceedings, but no evidence was adduced to suggest that an offer of settlement was ever made, let alone rejected at the insistence of Sheikh Abdullah. From first to last Fuchs was the real defendant in the action. It was fully solvent and able to meet any costs orders made against it. It seems to me that in such circumstances a third party can safely enter into the sort of agreement which was

made in this case without having to be concerned that by doing so it may become exposed to a direct liability for the claimant's costs. An interest in outcome is insufficient on its own to ground exercise of this jurisdiction. Different considerations might come into play were such an agreement to be entered into with a claimant, but I do not need to address that here and say nothing about the topic.

- [28] For these reasons I decline to make an order that Sheikh Abdullah be directly liable to Chemtrade for any part of the costs of the unfair prejudice claim.

Share certificate #2

- [29] The Chemtrade shares were originally issued as bearer shares to the children of the late Sheikh Ali M Alhamrani in sharia shares. The certificates appear to have been retained by Sheikh Mohamed. In late 2009 the bearer shares were exchanged for registered shares, with 62.5 such shares intended to be beneficially owned by each male sibling.
- [30] By a deed dated 19 December 2009 entered into by the Brothers, it is recited that each of them is the legal and beneficial owner of his own 62.5 shares and that Sheikh Abdullah has wrongfully claimed to be the beneficial owner of Chemtrade. As a result, the deed recites, it is anticipated that costs may be incurred by the Brothers in disposing of Sheikh Abdullah's claims, in respect of which the Brothers claim an indemnity charged on the 62.5 shares comprised in certificate #2. In the operative part of the deed the Brothers acknowledge that they hold the shares comprised in certificate #2 ('the Shares') as trustees, but say, in clause 3, that they do not acknowledge that Sheikh Abdullah is entitled to have the Shares transferred to him. Clause 4 declares that nothing in the deed prejudices the Brothers' lien over the shares for any costs, expenses or liabilities incurred by the Brothers in respect of liabilities other than arising out of the ownership claims made by Sheikh Abdullah.
- [31] In the ownership proceedings Sheikh Abdullah claims delivery up of the Shares comprised in certificate #2. The Brothers counterclaim for a declaration that the Shares are subject to the terms of the deed which I have just summarized. I did not deal with this issue in my judgment, and I must now decide it.
- [32] The deed is governed by the law of the British Virgin Islands. It embodies an attempt by trustees *de leur tort* to charge the property with which they have intermeddled in their own favour, without either the consent of the true owner or an order of a Court of competent jurisdiction. To that extent it is invalid. Sheikh Abdullah, accordingly, is absolutely entitled to an immediate transfer of the Shares. An instrument of transfer of the Shares, duly executed by the four surviving registered holders and accompanied by the relative certificate(s), must be delivered to Sheikh Abdullah or at his direction not later than 4 pm BVI time on Wednesday 27 March 2013, time being of the essence. In default, the Registrar of the High Court or her Deputy is authorized pursuant to section

25 of the West Indies Associated States Supreme Court Act,⁵ on the written request of Sheikh Abdullah or his duly authorized representative certifying that the Shares have not been transferred, to execute, without further order, an instrument of transfer of the Shares and to deliver the executed document to Sheikh Abdullah or to his duly authorized representative. Such order will operate to cancel⁶ the certificates which presently relate to the Shares. Following service of the order upon it, Chemtrade must rectify its register of members accordingly and issue Sheikh Abdullah with a fresh certificate showing him or his nominee as owner of the Shares.



Commercial Court Judge

12 March 2013

⁵ Cap 80

⁶ by virtue of equity's jurisdiction to cancel documents which have become invalid