EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0005
(On appeal from the Commercial Division)

SHEIKH ABDULLAH ALI ALHAMRANI

Appellant

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

Respondents

Before:

The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Ms. Elizabeth Jones, QC, with her, Mr. Simon Hattan, instructed by Walkers, for the Appellants
Mr. Victor Joffe, QC, with him, Mr. Lynton Tucker and Mr. Phillip Kite, instructed by Ms. Colleen Farrington of Harneys, for the Respondents

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2013: July 2, 3, 4, 5, 9;
September 18.

Civil appeal – Private international law – Sharia law – Saudi Arabian conglomerate – One of the business assets held through a BVI company – All assets held in Sharia shares – Buy/Sell agreement made in Saudi Arabia relating to all jointly held assets – BVI company not included in a list of the jointly held assets valued – Dispute arising whether the shares in the BVI company were included in the sold assets – Expert evidence on Sharia law

accepted by judge – Whether judge right to hold agreement was not ambiguous – Judgment of the Saudi Board of Grievances – Whether that judgment final – Whether issue res judicata

The Alhamrani Group is a major conglomerate in the Kingdom of Saudi Arabia. It was inherited from their late father by 7 brothers and 2 sisters in Sharia law shares. Each son got one share and each daughter one half of a son's share. A dispute arose between one of the brothers, Sheikh Abdullah Ali Alhamrani ("Sheikh Abdullah") of the one part, and the remaining six brothers ("the Brothers") of the other part. The Saudi court known as the Board of Grievances proposed a settlement by a process of takharuj, or reconciliation by disassociation. This involved a valuation of the Group's assets by the one most familiar with the workings of the group of companies, and the other having the option of either buying or selling at the proposed valuation, not dissimilar to a Buy/Sell or shotgun agreement.

The Brothers conducted a valuation of all the assets. They presented an Offer Letter for the sale of all the jointly held assets which listed in Appendix 1 all of the companies they claimed had been valued. Sheikh Abdullah opted to buy. The Brothers preferred they be the buyers and placed obstacles in the way of his completion. Eventually, the Saudi Board of Grievances confirmed by Judgment 1080 and by a subsequent Judgment 1220 that the Brothers must hand over the assets to Sheikh Abdullah.

After a period of about one year the Brothers began to make a claim that one of the Group companies, Chemtrade/FOMEL, was not included in the sale. They pointed out that Chemtrade/FOMEL was not included in the list of companies listed as valued in Appendix 1 to the Offer Letter. All the evidence pointed to Chemtrade/FOMEL having been included in the valuation but omitted without explanation from the list. Additionally, for about a year after the sale was enforced by the Saudi Ministry of the Interior, the evidence was the Brothers were of the view that they had sold Chemtrade/FOMEL. They admitted this by their conduct, by their statements and in writing. However, they claimed this admission had been a mistake and that Chemtrade/FOMEL was not included in the sale. By agreement the dispute over the ownership of Chemtrade was litigated in the Commercial Court of the BVI under the principles of Sharia law.

The Saudi law experts called by the parties agreed on the principles which Saudi law uses to interpret the intention of parties to a Saudi contract. The court seeks to ascertain the objective intention of the parties and will first consider the text of the written instrument. The court is not looking for the subjective intention of the parties, but infers intention from all the surrounding circumstances. In considering the text of the agreement, the court will (a) take into consideration the background context of the agreement; (b) consider the agreement as a whole, not just the words used in isolation; and (c) look to find a meaning which takes into account all the words used. If the intention of the parties is still not clear, i.e., the contract is ambiguous, the court will go to a second stage. Here, it will weigh all the evidence, both before and after the contract was entered into, in order to help in ascertaining the intention of the parties. In Saudi law, where the contract is found to be ambiguous, extrinsic evidence is admissible to prove the intention of the parties. In this context, an acknowledgment made by a party against interest carries weight.

The judge accepted the evidence of the expert witness called by the Brothers that Judgment 1080, which incorporated the list of companies in Appendix 1 of the Offer Letter, resolved all disputes about the specifics of the companies and assets in Saudi Arabia as listed in the Appendices and with a price put against them. While the Brothers had originally agreed to the process of takharuj which would have included all the jointly held assets, what they had offered was something different, the assets of the Group with the omission of Chemtrade/FOMEL. Sheikh Abdullah had accepted that offer and could not now claim ownership of Chemtrade/FOMEL.

Held: dismissing the cross-appeal of the Brothers and allowing the appeal of Sheikh Abdullah, that:

1. The process of takharuj mediated by the Saudi Board of Grievances involved the Brothers valuing all the jointly held assets and offering them to Sheikh Abdullah at a price at which he could either buy or sell. On Sheikh Abdullah opting to buy and depositing the agreed purchase price a binding contract was entered into.

2. The preponderance of the evidence was that the contract was intended to reconcile the siblings by providing a clean break, with no assets continuing in joint ownership or partnership. That Chemtrade/FOMEL was intended by the Brothers to be included in this process of sale was evident not only from the context of the process of takharuj but also from their admissions both by their conduct, in oral statements, and in writing to that effect, and continuing for a period of a year before they began to claim the opposite.

3. Once an ambiguity in a Sharia law contract is recognised, the court must seek to ascertain the intention of the parties, admitting extrinsic evidence of actions and statements made by the parties subsequent to the contract, and accepting evidence of acknowledgments made by one party after the contract as proof of the original intention.

4. In the weighing up exercise the court was inexorably drawn to the conclusion that the testimony of the brothers that Chemtrade/FOMEL was not included in the sale was false. The court below fell into error in accepting the testimony of the expert for the Brothers, particularly his mistaken interpretation of the agreement for takharuj and his conclusion that the contract, and the judgments which upheld it, was a freestanding agreement which did not include Chemtrade/FOMEL, and was not part of a seamless process of takharuj which did include Chemtrade/FOMEL.

   Eckersley and others v Binnie and others (1988) 18 Con LR 1 applied; A/S Tallinna Laevauhisus v Estonian State Steamship Line and Another (1947) 80 Ll L Rep 99 applied; Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1 applied.

JUDGMENT

[1] MITCHELL, JA [AG.]: Sheikh Ali Mohamed Alhamrani ("Sheikh Ali") founded an industrial empire in the Kingdom of Saudi Arabia ("KSA"). After his death in 1976 his children inherited his estate in Sharia shares, i.e., one-eighth for each of his seven sons, and a half that, or one-sixteenth, for each of his two daughters ("the Sisters").[1] Their mother died in July 2006.[2] Sheikh Ali's estate consisted of holdings in several companies, trusts, joint ventures, real estate and personal property in Saudi Arabia and elsewhere. The principal companies of the conglomerate whose names reoccur throughout the trial include the Alhamrani United Company ("AUC"); the Alhamrani Industrial Group Company Limited ("AIG"); the Alhamrani Fuchs Petroleum Saudi Arabia ("AFPSA"); the BVI company, Chemtrade Limited ("Chemtrade"); and another BVI company, the Fuchs Oil Middle East Limited ("FOMEL"). A substantial part of the family's assets are held in what they call 'the Foreign Investments'. These companies and other entities are known as 'the Alhamrani Group.' The expression 'Foreign Investments' is a reference to family assets and investments held by certain Jersey Trusts.

[2] This dispute[3] involved a relatively small part of the total siblings' inheritance, i.e., their shares in Chemtrade. Chemtrade did no more than hold the Alhamrani Group's share in FOMEL. FOMEL is a joint venture company between Fuchs Petrolub AG ("Fuchs") and the Alhamrani Group, each holding 50% in FOMEL. Fuchs is a well-known German company with formidable expertise in the matter of lubricants. The structure to which Chemtrade was connected was somewhat complicated. FOMEL was held in equal shares by the Alhamrani family, through Chemtrade, and Fuchs. It was an export company, and as such it was advantageous for it to be physically located in the Jebel Ali Free Zone in Sharjah, UAE. It did not pay either KSA income tax or the religious impost similar to tithes

[1] His sons are as named above in the title to the case, and are referred to in this judgment in the shortened form as their father above, and as they were at the trial. The Sisters are Lady Noura and Lady Adawiya.
[2] She also left them property, but it is not involved in this dispute.
[3] I take the facts mainly from those not in dispute as found by the judge, omitting those not relevant to this appeal.

known in KSA as 'Zakat.' By a trade mark licence between Fuchs and FOMEL the latter was permitted to market Fuchs branded products manufactured by AFPSA, but only elsewhere than in KSA.

[3] AFPSA was held by the Alhamrani Group through AUC and AIG holding 68% and Fuchs holding the remaining 32%. APFSA, and its lubrication plant, was situated in Jeddah, KSA. By a trade mark licence agreement between Fuchs and AFPSA the latter was permitted to market Fuchs branded products, but only in the KSA. Although, generally speaking, all FOMEL's products were sourced from AFPSA, which blended the various lubricants on its behalf, there was no formal supply agreement between the two companies. This meant that in principle AFPSA could cease to supply FOMEL overnight, or could vary the prices which it charged to FOMEL at whim. Legally speaking FOMEL was no more than one of AFPSA's customers.

[4] The Alhamrani Group, as we have seen, owned 68% of AFPSA but only 50% of FOMEL. Fuchs from time to time suggested equalising these holdings, but Sheikh Mohamed would not agree to the proposal. As FOMEL's export business began to gather pace, the parties were left with a decision how to capitalise it. They decided that, rather than putting their hands in their pockets, AFPSA would supply FOMEL with product at cost or thereabouts and provide commercial infrastructure *gratis*.

[5] While there had previously been a suggestion for a merger between the two companies, and another for a complete delinkage, neither bore fruit. Instead, in 2006 there was carried out what was called an operational merger. Thereafter, FOMEL's offices and presence in Sharjah were reduced to the minimum necessary for keeping a presence there for tax purposes, and all FOMEL staff operated out of AFPSA's offices in Jeddah, though separate accounts were kept.

[6] The assets held by the siblings jointly with each other in the Group were under the overall watch of the Group's 'General Accounts Department' located at Group headquarters in Jeddah. The General Accounts Department provided regular

statements of what was called 'the Sons' Account' to the siblings. As the learned trial judge found, the expression the Sons' Account was used by the siblings sometimes to refer to the General Accounts Department, sometimes to describe the property which it managed, and sometimes also the bank accounts which held the cash belonging to the family.

[7] The dispute between the siblings which first broke out at the end of 1999 was, essentially, between Sheikh Abdullah and the Sisters on the one hand, and the remaining brothers ("the Brothers") on the other hand. In September 2000, with a view to settling the dispute, a Disengagement Agreement was entered into between the siblings. Under this agreement, broadly speaking, the Foreign Investments would go to Sheikh Abdullah's party and everything else would go to the other party, led by Sheikh Mohamed.

[8] To effect this disengagement, it was necessary for all the assets to be valued in order to establish what, if any, balancing payment needed to be made for a fair division. A body of independent accountants undertook the task. They prepared a schedule of family assets and liabilities which the siblings considered. FOMEL was included in the list of assets in a section headed 'interests in unlisted trading companies.' This 2000 Disengagement Agreement was, however, declared void by a Saudi court at the end of 2003 for reasons which are not material. The judgment which set aside the Disengagement Agreement restored the *status quo ante* and ruled that 'the partners shall keep their shares in all the companies, partnerships, assets and foreign and domestic investments.' However, Sheikh Abdullah, from the time the Disengagement Agreement was entered into, did not take further part in the siblings' business. He continued to control the Jersey Trusts, while the Brothers remained in control of the Saudi assets.

[9] In the absence, so to say, of Sheikh Abdullah, five of the Brothers set up a new company in Saudi Arabia known as 'Intertrade'. Intertrade's business was to be a distributor for TATA brand motor vehicles and other industrial projects. Although Sheikh Abdullah had no involvement with Intertrade and was not a shareholder, the

Brothers used money from AUC, in which he was a shareholder, to fund Intertrade. Sheikh Abdullah became aware of this and started legal proceedings in a division of the KSA commercial court known as the 'Board of Grievances' for an order of sequestration over AUC's assets. The Board of Grievances made an order to that effect on 14th November 2007. However, fearing that such an order might entitle Nissan to terminate AUC's valuable distributorship, the sequestration order was suspended by consent on 1st December 2007 by the appellate division of the Board of Grievances. Meanwhile, the Brothers commenced legal proceedings in Jersey against Sheikh Abdullah and the trustees for what they considered to be their mismanagement of the Jersey Trusts. No details of these proceedings, or their eventual settlement, ever emerged at the trial. All these various proceedings ran on for several years.

[10] The experts on Saudi law called by the parties at trial made it clear that the Saudi courts commonly intervene of their own motion in pending litigation before them in order to achieve settlement of disputes, and are ready to take an active role in promoting and achieving settlement. The evidence at trial indicated that this mediation involves some procedures that are not familiar in the BVI, including entering into correspondence with one party that is not always shared with the others, and holding meetings with one side in the absence of the other. It might allow the party attending the meeting to take a copy of the minutes kept by the court, but refuse to allow another interested party to do so. At some point in late 2007, the Board of Grievances began to explore the possibility of mediation of the litigation between the siblings.

[11] On 11th December 2007, Sheikh Abdullah wrote the Chairman of the Board of Grievances asking to be provided with the last eight years' balance sheets of the companies in which the parties were interested, and with the last nine years' balance sheets for the Sons' Account. He had by this time been out of the management of the companies for several years. The Chairman sent Sheikh Abdullah's letter to Sheikh Mohammed asking him to provide Sheikh Abdullah with

the balance sheets. This he did not do. Sheikh Abdullah wrote the Chairman again on 20th January 2008 repeating his request. This time he attached a list of the 11 companies whose balance sheets he wanted to see, and one of them was FOMEL.

[12] On 10th February 2008, Sheikh Abdullah, together with a lawyer representing the Sisters, met with the Board of Grievances. The Board of Grievances proposed a peaceful and amicable settlement of the dispute. Sheikh Abdullah was amenable. The proposal of the Board was reduced to writing, the main part of which read:

> "... it was resolved that they will accept the proposal of the Appellate Court by which all the companies, partnerships, share holdings, funds and all trades and investments in Saudi Arabia and abroad as registered in the financial statements will be valued by Mohammed Ali Alhamrani in his capacity as President of the Group of Companies and the other commercial activities and is aware of all the financial statements and knows the value of all the assets more than anyone else and that he will value the share of each of the Siblings of Ali Alhamrani keeping in mind that the share of each male is twice that of each female, and that his brother Abdullah Ali Alhamrani and his sisters Noura and Adawiah will have the choice of either selling their shares or buy the shares of Mohamed and his brothers in all the partnerships as mentioned above in Saudi Arabia and abroad."

The Board of Grievances court was suggesting the Sharia law process, called in Arabic 'takharuj', in relation to all the partnership assets. The process is also described in English as 'reconciliation by disassociation.' I understand this to mean that the family would become once again reconciled by disassociating themselves from the cause of the strife, the jointly held business interests. This process was to involve a valuation by Sheikh Mohamed of all the companies, partnerships, shareholdings, funds and all trades and investments in Saudi Arabia and abroad owned by the siblings as registered in the financial statements, and Sheikh Abdullah and the Sisters would have the choice of either selling their shares or buying the shares of the Brothers at the value per share set by Sheikh Mohamed. The result of the proposed process of takharuj was to be what in plain English may be called a 'shotgun agreement' or a 'buy/sell agreement'. Takharuj would, consistent with the previous failed Disengagement Agreement, provide a 'clean break,' with no assets continuing in joint ownership or partnership.

[13] The following day, 11th February 2008, Sheikh Mohamed attended on the Board of Grievances. A similar proposal was put to him. He did not immediately accept it. The day after that he attended once more together with Sheikhs Siraj and Abdulaziz and this time they confirmed to the Board of Grievances that the Brothers agreed with the proposal. In their filed defence, the Brothers admit that the Board of Grievances proposed a valuation of all assets in joint ownership both within and outside of Saudi Arabia. The valuation was to be conducted by Sheikh Mohamed and the choice whether to buy or to sell was to be that of Sheikh Abdullah and the Sisters. Sheik Mohamed was to value all the assets, both those situated in KSA and outside. He was to present an Offer Letter to this effect to Sheikh Abdullah and the Sisters on 12th April 2008. Though there was no minute of the terms of Sheikh Mohamed's agreement, as the learned trial judge found, the proposal the Board of Grievances put to him must have been in similar terms as those contained in Sheikh Abdullah's copy of the minute of 10th February 2008. The Brothers accepted that the minute obtained by Sheikh Abdullah was an accurate statement also of the terms that they agreed to.

[14] On 13th February 2008, Sheikh Mohamed proceeded to arrange for the valuation. He instructed Mr. Vaiz Karamat, the Group Finance Director, to arrange a valuation of the Group's assets to be conducted by the Group's auditors Deloitte & Touche ("Deloitte"). On 16th February 2008, Mr. Karamat wrote to Mr. Sajid, his then assistant, telling him in turn to arrange the valuation, 'for the whole group (every single asset)', and then to divide by eight shareholders. Property not owned by all the siblings was to be excluded from the valuation.

[15] Deloitte, as a starting point for their work, used the valuation that had been prepared for the 2000 Disengagement Agreement. Valuations of certain non-company owned lands were carried out by a Mr. Binmahfooz while other non-company assets were valued in-house. On 24th February 2008, Deloitte attended on Sheikhs Siraj and Abdulaziz and made a preliminary presentation on the methodology they proposed

to use in the valuation process. They showed slides referring to a valuation of 'the Alhamrani Group.' This slide material, which was in evidence, included references to all 11 principal companies including FOMEL, the Group share of which was held by Chemtrade. Chemtrade itself, which was merely a holding company, was not listed or mentioned by name during the valuation process. Neither were the disputed Foreign Investments held in Jersey included in the valuation materials, because of the difficulty at that time of attributing a reliable value to them.

[16] On 2nd March 2008, Sheikh Abdullah wrote to the Board of Grievances referring to his earlier meeting with them the previous day. He repeated his 'very urgent and important' request for, among other things, the balance sheets of the companies and what he described as the 'General Accounts Department of Sons'. He complained that he had received only a small portion of the 121 balance sheets he had requested, and he pointed out that their production should present no difficulty to Sheikh Mohamed as the Companies Law of KSA required their production each year. He attached to his letter a schedule showing which balance sheets he had received and which he had not. Included in the schedule was FOMEL, for which he stated he had received the balance sheet for 2006, but not those for 2000 to 2007. He complained that Sheikh Mohamed had not been in compliance with the law since the year 2000, which it will be recalled was the year that he ceased to be involved in the management of the Group.

[17] On 9th March 2008 the Chairman of the Board of Grievances wrote a letter, or affidavit as it calls itself, at the request of Sheikh Abdullah. In this letter the Chairman of the Board of Grievances explained the process of reconciliation then underway. He wrote:

> "In order to complete the conciliation, it is solicited to suspend all the cases filed against each other in the companies, partnerships, funds, all investments, internal and external trade in or out-side the Kingdom subject of the conciliation among them until knowing the outcome thereof."

In early March, Sheikh Abdullah applied to the Jersey court to stay the Jersey Proceedings on the basis that an agreement for a comprehensive, worldwide

settlement had been reached. For the purpose of this application he attached the letter of the Chairman of the Board of Grievances.

[18] On 11th March 2008 the Brothers approached the Board of Grievances by letter seeking permission to temporarily exclude the assets of the Jersey Trusts from the Buy/Sell Agreement. They needed to ask permission because the process of takharuj that they had agreed to necessarily involved a valuation and sale of the shares in the Jersey Trusts. Eventually, it was agreed that the Jersey Trusts would be temporarily excluded from the valuation, though they continued to be included in the agreement to disassociate until such time as they could be properly valued. In all their dealings with each other and with the Board of Grievances the Jersey Trusts are referred to as 'the Foreign Investments'. Chemtrade and FOMEL, though incorporated in the BVI were not considered by the members of the family to be a part of the 'Foreign Investments'.

[19] On the same day, 11th March 2008, Deloitte made a presentation on their valuation to Sheikhs Mohamed, Siraj and Abdulaziz. The documents from that presentation were in evidence. The engagement letter and valuation presentation all referred to 'the Alhamrani Group', and included FOMEL in its assets. Deloitte valued the assets at SR168m per share. Sheikh Mohamed was concerned about certain deductions which he considered ought to be made. For example, the valuation was based on assumptions about the value of the business conducted by some of the assets which were not correct. At the same time, he instructed them to prepare figures as to what the Brothers could afford to pay, if they were to be the buyers. This 'affordable price' was to take account of the cost of necessary bank borrowings to fund the purchase and the capability of the retained businesses to service the debt. None of these considerations related to FOMEL.

[20] Deloitte came up with a revised valuation of the jointly held assets at an 'affordable price' per share, when taking into account the concerns raised by Sheikh Abdullah, of SR150m. The Deloitte calculation of an affordable price being ready, on 23rd March 2008, Sheikh Abdulaziz emailed each of the Brothers advising them of a

meeting scheduled for 25th March 2008 with Deloitte and the Group Finance Department in the following terms:

> "This is to inform you that a meeting will take place in the Group head office on Tuesday 25 March 2008 at 11:00 am. The purpose of this meeting is to discuss the out come [sic] of the valuation prepared by Deloitte and agree on the price to be submitted to the Grievance Board on April 12, 2008."

[21] On 25th March 2008, all the Brothers except Sheikh Fahad attended the scheduled meeting with representatives of Deloitte. Also present were the Group Finance Director, Mr. Karamat, his deputy, Mr. Sajid, and Dr. Tawfiq Hamdan, the Alhamrani Group's in-house lawyer. At trial there was a dispute about the outcome of the meeting. It was Sheikh Abdullah's position that the Brothers arrived at an agreement to offer SR150m per share. His witness was Mr. Sajid who testified to that effect. The Brothers' evidence was that while there was a general consensus that SR150m was the right price, the figure was not finally agreed upon until sometime later. Sheikh Mohamed testified that the Brothers would never have concluded an important family agreement such as this was in the presence of employees. The issue is important because the Brothers say they agreed on the price with FOMEL excluded from the assets to be sold. Sheikh Abdullah says it is important because the figure was based by Deloitte on the inclusion of FOMEL. Their presentation to the Brothers indicated that FOMEL's income was needed to make the purchase price affordable. At the time, the Brothers expected to be the successful purchasers, and they had no interest in excluding assets from the offer. It was in their interest as purchasers to include all the assets. Besides, this was what they had agreed to do. The judge, however, preferred the evidence of Sheikh Mohamed and found that no concluded agreement on price was reached at that meeting.

[22] There was produced at trial a copy of a draft 'Minutes' of the meeting of 25th March 2008 prepared by Mr. Hamdan by which it is apparent that he was attempting to draft an agreement for signature by the Brothers to a valuation per share of SR150m. There was no evidence that the draft agreement or minute of the meeting

of 25th March was ever signed by the Brothers. They denied ever having done so, and it contains one obvious error in recording Sheikh Fahad as being present when it is agreed that he was absent. The judge concluded that he could not rely on the draft as evidence of an agreement by the Brothers on 25th March of a valuation of SR150 per share inclusive of FOMEL.

[23] On 1st April 2008, the Brothers again met with the Board of Grievances asking for permission to exclude the Foreign Investments from the valuation. They gave no hint that they were intending to exclude FOMEL.

[24] On the appointed date, 12th April 2008, the Brothers presented their Offer Letter signed by Sheikh Siraj. This Offer Letter, (omitting the usual words of salutation and assurances of piety), reads as follows:

> "We would like to refer to the conclusions which the members [of the Board], acting in their capacity as the reconciliation committee arrived at [on 10th February 2008] to entrust Mohammed Ali Alhamrani – in his capacity as the chairman of the Alhamrani Companies, in charge of managing them, and who knew more about the affairs of the companies than anyone else – with the task of valuing the companies and funds which are jointly owned by the parties in the dispute, so that he might submit, within sixty days of the date mentioned, the value corresponding to a single share, with the result that Abdullah Ali Alhamrani, and the two sisters Noura and Adawiah Ali Alhamrani, would have the option of either selling their shares to Mohammed Ali Alhamrani and his brothers Siraj, Khalid, Abdulaziz, Ahmed and Fahd Ali Alhamrani, or of purchasing from them.
>
> It was on that basis that all of us, headed by our brother Mohammed Ali Alhamrani, took part in the work of compilation and valuation. From the data arrived at in our accurate analysis of the results of the valuation, we agreed, with complete conviction, that the price corresponding to all the shares of the partners is 1.2 billion Saudi Riyals (one billion two hundred million Saudi Riyals). Therefore, the price corresponding to the share of a female, that is to say the share of each sister, is seventy-five million Riyals, and the price corresponding to the share of a male is the share of two females, is the share of each brother, and is one hundred and fifty million Riyals. Thus, the brother Abdullah Alhamrani, and the two sisters Noura and Adawiah, have the option of either selling to us, or purchasing from us, at that price. We for our part are very ready to accept either of the two options and to put it into effect to the letter.

> Because we are doing this, we are guided by what was said by Allah the Most High, namely "Don't belittle the things of others" and by the saying of our Prophet, "No harm no prejudice". Because we are offering this price as an unambiguous and final offer, let us adhere to it irrespective of whether we are sellers or purchasers. We are thus acting in accordance with the proverb "Anyone who makes you equal to himself is not treating you unjustly," and are at the same time confirming that we arrived at this price solely on the basis of the data obtained from a fair valuation of the share, including not only the rights linked to this share, but also the obligations and guarantees attached to this share for the benefit of third parties.
>
> It goes without saying that the valuation was restricted to all the funds, properties and partnerships contained in shares in the companies, real estates, and movable property, located inside the Kingdom of Saudi Arabia in accordance with what is stated in the enclosed appendix No 1. As regards the foreign investments, it was difficult, or rather it was impossible, for us to carry out a valuation which was fair and satisfactory for all the partners in those investments, because the amount which will be included in the joint ownership, and the amount which each partner will receive of that ownership, is still the subject of a legal dispute being examined by the competent foreign Courts. The determination of that ownership will remain pending until the final judgment is passed regarding it. This is in accordance with the enclosed appendix No. 2, drawn up by the Court which is competent to examine the dispute. At the time when the final judgment is passed regarding that ownership, then, the value of the share in the foreign investments can be determined."

This Offer Letter expresses itself to be made pursuant to the agreed process of takharuj. It specifies a price of SR150m per Sharia share. The evidence was that this price was considered by the Brothers an 'affordable price', i.e., one which they could afford to pay if they were to be the buyers. The Offer Letter goes on to expressly exclude certain land in Rawdah, upon which were situated the houses of Sheikh Mohamed and the Sisters, and provided that the Rawdah land should be transferred to Sheikh Mohamed whether Sheikh Abdullah bought or sold.

[25] The Offer Letter attached as Appendix 1 a list of 10 companies and real estate which were the assets said to have been valued. FOMEL and Chemtrade were not included in Appendix 1. The Offer Letter also attached as Appendix 2 a set of documents relating to the Foreign Investments or Jersey Trusts which had been excluded by agreement from the valuation. No explanation is offered in the letter as

to why FOMEL and Chemtrade are missing from the list of assets that had been valued. Thus, on the one hand, the Offer Letter refers back to the agreement to disengage by takharuj in relation to all the assets, which would include all the 11 companies, in which the siblings were partners, expressly excluding only two assets. On the other hand, it attaches as Appendix 1 a list of 10 companies from which Chemtrade/FOMEL is missing. The case of the Brothers at trial was that it should have been clear to Sheikh Abdullah that Chemtrade/FOMEL was deliberately excluded from the Offer Letter. Sheikh Abdullah's case is that the process of takharuj involved all the jointly held assets, and he had not agreed to Chemtrade's exclusion. His claim at trial was that, although neither Chemtrade nor FOMEL was expressly listed in Appendix 1, the bearer shares in Chemtrade, and accordingly the Group's interest in FOMEL, were included in the Offer Letter and were part of the sale assets. It was Sheikh Abdullah's case that this was a classic example of an ambiguity.

[26] By a letter of 19th May 2008, Sheikh Abdullah, contrary to the expectation of the Brothers, elected to purchase the Brothers' shares. His letter reads:

> "Reference is made to the letter from Mr. Siraj Ali Alhamrani, in which he was acting on his own behalf and on behalf of his brothers Mohammed, Khalid, Abdulaziz, Ahmed and Fahd, who are the children of Ali Mohammed Alhamrani, and which was addressed to His Excellency Sheikh Mohammed Alamin Ashanqiti, the Chairman of the Board, was dated 6.4.1429 A.H. corresponding to 12.4.2008 A.D., and stated that you valued the shares of the partners in the joint companies and funds and arrived at a sum of one billion two hundred million Riyals (1,200,000,000 Riyals), so that the price which corresponds to the share of each of the sisters comes to seventy-five million Riyals, and the price which corresponds to the share of each of the brothers is the share of two females and comes to one hundred and fifty million Riyals. Thus, we and the two sisters Noura and Adawiah will have the option of either selling to them, or purchasing from them, at that price. I would like to inform Your Excellences that we have decided to purchase the brothers' share (and the sisters' share so long as they wish to sell their shares by a separate agreement), while reserving my right to claim what was not included in the brothers' statement which was attached to their offer enclosed with their above-mentioned letter."

Sheikh Abdullah was now bound in contract in Sharia law to purchase the Brothers' shares for the price agreed. This is the contract out of which the dispute arose.

[27] Initially, Sheikh Abdullah requested, and the Board of Grievances upheld, a right to do due diligence, but the Brothers refused to permit this. When the Brothers' lawyer complied with his demand for the previous three years' balance sheets he supplied those only for the 10 companies listed in Appendix 1. The Brothers, as the learned trial judge found, attempted to put obstacles in the way of his purchase. They tried to get the Group's bankers to declare that Sheikh Abdullah would not be acceptable to them as general manager of the Group. They attempted to persuade the banks to write letters saying that they would call the Group's loans unless they were provided by Sheikh Abdullah with equivalent security. On 25th June 2008 the Brothers wrote the Chairman of the Board of Grievances seeking to introduce new terms. In particular, they required advance payment of 50% by certified bank draft within 7 days of the acceptance of the Offer Letter and the balance within 6 months. Further, within 30 days of the acceptance of the Offer Letter Sheikh Abdullah was to deliver letters addressed by him to the banks which hold the Brothers' guarantees releasing the selling brothers from their guarantees and assuming sole responsibility for them. They asked for a stipulation that each of the Group's bankers must execute a release of each of them from their liabilities. The Brothers did all this because they wanted to be the buyers, not the sellers, of the Alhamrani Group.

[28] On 7th July 2008, the proposed new terms were rejected by Sheikh Abdullah by letter to the Chairman of the Board of Grievances. He wrote:

> "… another important issue mentioned in the letter is the request that our reply should be within two weeks as of the date we received the budget of the year 2007 that we have receive [sic] from the Boart [sic] six months ago. Our reply to this is that the alphabetic of purchasing companies is to see the budgets of the three previous years of the company to enable the purchaser to have a clear image before purchasing. However, we are talking about purchasing of (11) companies some of them are partnership [sic] and other [sic] are limited liabilities and the study of the budgets of three previous years for each company besides other important data and information as well as contracts of loans and dealerships shall not be an easy job that can be done within two weeks ..."

Sheikh Abdullah did, however, in this letter, agree that the Rawdah land should be excluded from the purchase. He made it clear that he would not transfer it to Sheikh Mohamed, but would retain his interest in it. The letter repeated that he wished to do due diligence in relation to the 11 companies which he was purchasing. The learned trial judge found that there was general confusion which seems to have reigned at the time, and he did not put much weight on Sheikh Abdullah's insistence on 11 companies. Indeed, the correspondence at this time indicated that Sheikh Abdullah mistakenly believed that FOMEL belonged to AFPSA, and was not a separately-owned Group company. Sheikh Abdullah confirmed that he accepted the condition of delivering 50% of the purchase price, but only after he had obtained the information he was seeking on the companies, and with the other 50% to be paid within 6 months thereafter. He repeated in his conclusion to the letter that he reserved his right to claim anything not mentioned "in their statement attached to their letter dated 06/04/1429H", i.e., the appendices to the Offer Letter.

[29] The Brothers' demands were repeated in a letter of 28th July 2008 to the Board of Grievances. They sought to impose a time limit of two weeks on Sheikh Abdullah, and if he did not pay for their shares within that time, they sought an order that he must sell to them.

[30] On 5th August 2008, Sheikh Abdullah lodged the purchase price with the Board of Grievances and stated that he would no longer seek to conduct due diligence. As the judge found, he abandoned his attempts to carry out due diligence. He requested the Board to order the Brothers to transfer the sold assets to him.

[31] On 10th August 2008, Sheikhs Siraj and Abdulaziz met with the Board of Grievances to complain that Sheikh Abdullah had failed to procure their releases from the bank guarantees. The minutes of that meeting reveal that the Board advised the Brothers that Sheikh Abdullah had deposited the 50% and his guarantee as to the balance. However, he had not been able to obtain the releases of the Brothers' bank guarantees. He had requested that his personal guarantee be accepted as a

release of their liability. The Brothers' position was that Sheikh Abdullah's performance was incomplete as he had not obtained releases of the bank guarantees from the banks themselves. Also, the time he had taken in rendering his incomplete performance showed that he was incapable of fully performing the contract. The time had now come, they urged, for the Board to order Sheikh Abdullah to sell his share to them as he was incapable of meeting the requirements of his purchase in full. They followed up the meeting with a letter of the same date to the Board requesting it to oblige Sheikh Abdullah and the Sisters to sell their shares to the Brothers.

[32] On 11th August 2008, the Board of Grievances delivered its decision on the issues which had arisen between the parties in the pending litigation before it since the Offer Letter had been accepted by Sheikh Abdullah. This decision, which was referred to throughout the trial as "Judgment 1080," reads in part:

> "The Court Department convened in order to adopt the necessary procedures regarding the judgment which completes that reconciliation by disassociation which took place between on the one hand [Sheikh Abdullah] and, on the other, firstly [the Brothers], and secondly their two sisters ...
>
> "… This Court therefore proposed that there should be reconciliation between, on the one hand, the plaintiff [Sheikh Abdullah] and, on the other, [Sheikh Mohamed] and their two sisters Noura and Adawiah. ... . The reconciliation was to take place by disassociation, either by the plaintiff and the two sisters purchasing their brothers' share in all the companies, real estate and other matters in which they have a joint share, or by the plaintiff and the two sisters selling those companies, real estate and other matters to their brothers, who are the defendants. In the interests of achieving justice when this proposal was carried out, so that none of the parties would feel that fraud had occurred, the Court added to its proposal the notion that the defendants, who are Mohamed Bin Ali Alhamrani and his other brothers, should assess the value of all the companies, real estate and other matters which were jointly owned, and should assess them at an equitable value, considering that these assets are in the defendant's [sic] power, so that this means that the defendants have a better knowledge of the value of these assets than do other persons. Thus they would assess the sold items at a price which, in their opinion, was the same irrespective of whether the item was being sold or bought at that price. Therefore, their brother who is Abdullah the plaintiff, and the two sisters Noura and Adawiah, would have the choice between, on the one hand, purchasing their brothers' shares in

all the companies and property and, on the other, selling their shares in those assets to their brothers who are the defendants. This would be done in accordance with the valuation arrived at by the defendants.

"Abdullah and the two sisters agreed to that proposal. ... [The Brothers] agreed to the Court's proposal which included an assessment of all the companies and other property in which the persons concerned were partners. That assessment would be performed by him and his other brothers who are the defendants, and would assess the property at an equitable price, so that their brother Abdullah, and the two sisters could, after the assessment had been performed, carry out the purchase or sale for the amount at which Siraj and his brothers had assessed the property.

"... They all stated that they agreed to what had been stated previously, namely that they should assess the companies and other property jointly owned between them and their brother Abdullah and their sisters Noura and Adawiah. They stated they would submit that assessment within a period of no more than two months, starting from that date and ending on 6.4.1429 A.H. The minutes of the proceedings concluded with that statement, and everyone signed the minutes.

On Saturday 6.4.1429 A.H. corresponding to 12.4.2008 A.D., Siraj Bin Ali Alhamrani, the defendants' attorney, submitted, to His Excellency the Chairman of the Board for the Settlement of Complaints, a deposition which bore the same date and in which Siraj and his brothers gave the required assessment. ...

…

Judgment in a dispute between relatives causes ill will among them and makes them dislike one another. This is in contrast to reconciliation, as the latter, in the majority of cases, produces approval on the part of the two parties and breaks down the psychological barrier between them. That is what made this Court desire that reconciliation should take place in the above mentioned manner.

This reconciliation has been offered and accepted in the manner stated previously in the present judgment, and the purchaser has adhered to the sellers' requirements which accord with the canonical law of Islam and with the regulation. Disassociation was carried out by means of reconciliation between Abdullah Bin Ali Alhamrani who is the plaintiff, and his brothers who are the defendants whose names have been mentioned previously. This was done by the plaintiff's purchasing all the defendants' shares in what is shared between them, companies and anything else inside the Kingdom of Saudi Arabia which are mentioned under paragraphs A, B and C of the present judgment, including rights and liabilities, and hence this

> Court considers that the reconciliation has been performed by means of the Court ...
>
> > …
> >
> > 3. If there are some shareholdings or anything else shared *[or other joint shareholdings]* which are not mentioned as understood from paragraph C of the letter from the defendants' attorney dated 25.7.1429 A.H. (28/7/2008), then the purchasing by Abdullah Ali Alhamrani of the contents of the three lists stated in the aforementioned items A, B and C will not preclude him claiming his share therein.
> >
> > …
>
> Therefore, the Seventh Department of the Court of Appeal, issues the following judgment:
>
> > Firstly: The reconciliation is to be completed which has taken place between Abdullah Bin Ali Alhamrani and his brothers, and the reconciliation is to be binding.
> >
> > Secondly: The brothers who are selling and are represented by their attorney Siraj Bin Ali Alhamrani, are to hand the sold items over to the purchase [sic] immediately and, immediately after handing over has been completed, are to consult this Court for the purpose of receiving that value of the sold item which consists of cheques and guarantees."

It is to be noted that Judgment 1080 did not discuss whether FOMEL or Chemtrade was included in the sale assets. There was at that time no dispute about that, both parties having, as the learned trial judge found, believed that they were included. The Brothers appeal against this finding of the judge.

[33] Not happy with Judgment 1080, on 1st September 2008 the Brothers wrote to the Board of Grievances asking for a review of the judgment. On 6th September 2008 and on 14th September 2008 the Brothers wrote again to the Board of Grievances. Essentially, they protested that there was as yet no agreement and therefore no conciliation, principally because Sheikh Abdullah had not obtained a release of the bank guarantees that they had previously given. They continued to protest that they should be considered the buyer.

[34] On 22nd October 2008, the Court of Appeal of the Board of Grievances delivered their second and final decision on the controversy. This second decision has been referred to throughout the trial as 'Judgment 1220'. The judgment recited all of the facts of the dispute and the proposal for reconciliation by disassociation. It cited all the correspondence submitted to it and the details of the dispute that had arisen since its delivery of Judgment 1080. In the end, it confirmed Judgment 1080 and dismissed the Brothers' petition for its reconsideration.

[35] Despite these judgments, the Brothers refused to hand over the sold assets to Sheikh Abdullah. Indeed, as the learned trial judge found, after Judgment 1220 had been delivered, the Brothers caused AFPSA to pay them a SR20m dividend and FOMEL to pay them a US$3m dividend. The Brothers also removed various corporate and other documents from the premises.

[36] On 3rd December 2008, the Ministry of Internal Affairs, the department with authority to enforce such a judgment, acted to enforce Judgment 1080. They took possession of the companies and buildings referred to in the Appendices to the judgment and handed them over to Sheikh Abdullah. FOMEL and its plant and assets, which were administered from the Group's offices and which Sheikh Abdullah now took possession of, passed into his hands without complaint from the Brothers between December 2008 and November 2009.

[37] On 30th March 2009, Sheikh Abdullah wrote to the Chairman of the Board of Grievances complaining that there were matters which were outstanding. These matters included the bearer shares in Chemtrade, and a business known as One Stop.

[38] On 1st April 2009 Sheikh Abdullah wrote to HRH Prince Naif Bin Abdulaziz, the Minister of Internal Affairs, raising issues of non-implementation of the judgment. In particular he complained that the Brothers had unlawfully withdrawn large amounts of money from the companies' funds subsequent to the delivery of Judgment 1220, and they had refused to hand over the ownership of various properties including

Chemtrade and One Stop. He sought enforcement of the judgment and for the Brothers to be compelled to hand over the deeds of various items of real estate as well as the shares in Chemtrade and One Stop.

[39] The next relevant development as found by the learned trial judge was on 5th April 2009 when the Brothers wrote to Trident Trust in the BVI, the local agents for Chemtrade, advising,

> "A. That changes in the directorship of FOMEL are contemplated. It is anticipated that Sheikh Mohamed Ali M Alhamrani and Sheikh Siraj Ali M Alhamrani will resign as directors in favour of Sheikh Abdullah Ali M Alhamrani.
>
> B. That the following changes in relation to Chemtrade are contemplated: -
>
> a. That the current directors will resign as directors in favour of Sheikh Abdullah Ali M Alhamrani; and
>
> b. That current shareholders will transfer their shares in Chemtrade to Sheikh Abdullah Ali M Alhamrani."

The letter went on to request copies of the registers of shareholders and directors and an indication of the corporate formalities necessary to achieve these objectives, together with draft resolutions, stock transfer forms, letters of resignation, and any other documents considered necessary. The following day Trident replied with the requested information and documents. The learned trial judge found that this correspondence suggested that the Brothers believed at this time that their interests in Chemtrade and FOMEL had been included in the sale.

[40] On 27th April 2009, Dr. Stefan Fuchs and Mr. Alf Untersteller of Fuchs wrote to Sheikhs Mohamed and Siraj calling a meeting of the Board of Directors of FOMEL on 18th May in Jeddah and provided an agenda for the meeting. This agenda included a discussion of FOMEL's ownership and 'prospects and ways to manage the situation'.

[41] Before the proposed meeting could take place, Sheikh Siraj responded to Fuchs on 10th May 2009 ("the May 2009 Letter") to the following effect:

> "I am in receipt of your letter dated 27th April 2009, referring to [FOMEL]. I regret to inform you that we will not be able to meet in the capacity of Board Directors of the aforementioned company – Fuchs Oil Middle East Co – for we were forced to transfer the assets and all shares of CHEMTRADE and therefore the "Company" to Sheikh Abdullah A. Alhamrani.
>
> On the other hand, I believe the relationship we built for the past two decades is a solid relation far beyond a normal business relation. Together we have witnessed growth and successes and set the stage to grow even further, it is unfortunate that we had to part for extenuating circumstances.
>
> Accept our apologies for any inconvenience the above may have caused, wishing you continued success and good health".

In his evidence, Sheikh Siraj explained that this letter 'misrepresented' the true position. The Brothers at the time feared that they would be compelled to sacrifice Chemtrade. In other words, they would be compelled to cave in to Sheikh Abdullah's demand for transfer of the Chemtrade shares in order to secure payment of the purchase price. The judge was not able to accept this explanation. He found from this and other evidence that it was clear that Sheikhs Siraj and Mohamed then believed that Chemtrade formed part of the sale.

[42] On 18th May 2009, Stephan Fuchs and Sheikh Siraj met. At this meeting Sheikh Siraj confirmed the contents of the May 2009 Letter. Mr Fuchs' note of the meeting was put in evidence. The relevant part of it states that:

> "On 18 May 2009 I met Sheikh Siraj in a hotel. We exchanged mutual assurances of our on-going friendship. He has finally accepted that his brother Abdullah has assumed the shares in the ALHAMRANI Group, but is still waiting for his money. CHEMTRADE, and, as a consequence, FOMEL too will be transferred to Abdullah."

Again, the Brothers tried to explain away this conversation. Sheikh Siraj testified that he told Mr. Fuchs the exact opposite. But, the learned trial judge could not accept this evidence and he found that the note must be accepted at its face value as an accurate note of what Sheikh Siraj had said.

[43] On 1st June 2009, Sheikh Siraj emailed Sheikh Mohamed advising that:

> "I explained to him what turn of events took place in the last few months since I met him last, and we did not want to sell but due to the ignorant judiciary system here things took a turn we did not want but it is irreversible now."

There is a handwritten note in Arabic on a print-out of that email (an English translation of which was put in evidence by the Brothers) and that the learned trial judge accepted was in Sheikh Mohamed's handwriting. It says in part:

> "I want to remind you that we are still (formally and legally) partners in [FOMEL], therefore we must remain in touch and reach an understanding with our partners therein until we are through and done with respect to this company also."

As the learned trial judge found, this exchange clearly indicated that, at least as of this time, both Sheikhs Siraj (who held the power of attorney for the other brothers) and Mohamed were of the view that Chemtrade and FOMEL had indeed been included in the sale, though the two of them remained only formally and legally their owners. Contrary to their evidence at the trial, there was nothing to substantiate their testimony that they had originally deliberately excluded FOMEL and Chemtrade from the Offer Letter both in the valuation and in the list of companies being sold.

[44] The parties continued to question each other's performance of their relevant obligations under the contract. Eventually, by letter of 12th September 2009 to the Ministry of Internal Affairs, Sheikh Abdulaziz, on behalf of the Brothers, agreed to transfer certain real estate and the assets of the business known as One Stop to Sheikh Abdullah.

[45] On 14th September 2009, the Ministry of Internal Affairs produced the 'Handing Over Report' confirming the handing over of the listed assets, and authorising the Board of Grievances to release the purchase price to the Brothers. The Handing Over Report contained five recitals. The first recorded that the parties had no problem with respect to the contents of Appendix 1, from which it followed that they were

'clear for both parties and implementable.' The recital continued by stating that Appendix 1 was unambiguous. There was therefore nothing outstanding to prevent completion. If either party had complaints 'beyond the statements included within [Judgment 1080]', it could bring separate proceedings to resolve them. The document concluded by recording that in light of the matters referred to in the recitals, the purchase price had been handed over on 13th September 2009.

[46] Subsequent to the filing of this Report, and without handing over the Chemtrade shares, the Brothers obtained from the Board of Grievances the purchase price which Sheikh Abdullah had deposited. As permitted by the Handing Over Report, Sheikh Abdullah did indeed commence proceedings in Saudi Arabia claiming that Chemtrade had been intended by both parties to be included in the Buy/Sell Agreement.

[47] On 12th October 2009 in a telephone conversation between Sheikh Siraj and Stefan Fuchs, a note of which made by Stephan Fuchs and which was put in evidence, Sheikh Siraj is recorded as confirming that:

> "... he and his family have clarified all the legal points with Sheikh Abdullah. This includes the transfer of CHEMTRADE (parent company of FOMEL). Apparently, there are technical problems with the transfer of the share certificates, which should be resolved soon."

[48] On 5th November 2009, Sheik Siraj asserted for the first time to Mr. Stefan Fuchs that the Brothers had not sold Chemtrade. The learned trial judge found that while initially the Brothers were of the opinion that Chemtrade was included in the sale, there came a point where they changed their mind. There was evidence that this change of mind may have begun as early as June 2009. But, it was not until 5th November that this change of mind was communicated to Fuchs.

[49] On 19th December 2009, Chemtrade cancelled the existing bearer shares on the instruction of the Brothers, and replaced them with 500 issued shares. This was, however, not discovered by Sheikh Abdullah until July 2010.

[50] On 12th January 2010, Sheikh Abdullah issued proceedings in Saudi Arabia concerning the ownership of Chemtrade. The Handing Over Report clearly referred to his right to make this claim. Paragraph 1 of the Report stated that the court recognised that while there was no issue as to certain parts of the judgment, there was an issue about others, and the party with the allegations beyond what was listed might file a separate case about them. In the process of this litigation, on his application, on 6th September 2010, the Saudi court issued Stop Notices in relation to the Chemtrade shares. These proceedings in the KSA were later discontinued when the parties agreed to litigate the issue in the courts of the Virgin Islands. These proceedings are the "Ownership Case", the subject of this appeal.

[51] On 24th November 2010, the Brothers, in the name of Chemtrade, issued what have been called the 'Unfair Prejudice Proceedings' against Fuchs. These proceedings alleged that Fuchs co-operated with Sheikh Abdullah in his take-over of the FOMEL asset in Saudi Arabia, which the Brothers alleged had not been a part of the Buy/Sell Agreement, nor was it included in the Saudi judgments relating to the contracts between the parties. The appeal in the Unfair Prejudice Proceedings is dealt with separately.[4]

[52] The trial of both the Unfair Prejudice Proceedings and the Ownership Case took place before Bannister J in the Commercial Court between 20th September and 2nd November 2012. It is his judgment in relation to the Ownership Case delivered on 21st December 2012 that constitutes the subject of this appeal.

[53] The essential complaints by Sheikh Abdullah against the findings of the learned trial judge are that:

(1) the Brothers had set the price of SR150m only by reference to the assets which are listed in Appendix 1 to the Offer Letter;

[4] Chemtrade Limited v Fuchs Oil Middle East Limited et al, Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2013/0004 (delivered 18th September 2013, unreported).

(2) in view of his findings of untruthfulness on the part of the Brothers as set out in the paragraph below, the judge should have approached the Brothers' evidence with caution, and should not have accepted it unless it was corroborated by contemporaneous documents;

(3) he preferred the evidence of the Brothers' expert witness Dr. Al-Ghazzawi to the evidence of Sheikh Abdullah's expert, Sheikh Al-Gasim with few exceptions; in particular he preferred the evidence of Dr. Al-Ghazzawi to the effect that the Offer Letter was not ambiguous and amounted to an offer to sell the property listed in Appendix 1 and excluding Chemtrade; further he erred in interpreting the contract by deciding which expert's interpretation he preferred;

(4) Sheikh Siraj was simply mistaken when he said in his May 2009 Letter that FOMEL was included in the Sale Agreement;

(5) there was as a matter of Saudi law no room for the admission of extrinsic evidence in order to ascertain the intention of the parties;

(6) what was supposed to be the effect of the Buy/Sell Agreement cannot be determinative of what was offered, because the intention of the parties is to be gathered only from the terms of the Offer Letter and Judgment 1080 which confirmed it;

(7) if the Brothers had done what the Board of Grievances had proposed, and what they had agreed to do, they would have put forward everything in the Deloitte Valuation at a price of SR168 per share, whereas what they did was to offer only the listed assets at a price of SR150m per share; the Brothers did not offer what the Board of Grievances had proposed and Sheikh Abdullah had not paid what the Board of Grievances had proposed; the eventual

purchase by Sheikh Abdullah was not the culmination of a seamless process beginning on 12th February 2008 and ending on 19th May 2008; and the bargain struck was not what the Board of Grievances had in mind in February 2008;

(8) there may be some stand-alone claim that Sheikh Abdullah may be able to make arising out of the failure of the Offer Letter to match the proposal which the Board of Grievances made in February 2008, but if so he must be left to pursue it in the Saudi courts.

[54] The essential complaints by the Brothers in their cross-appeal against the judgment of the learned trial judge are his findings that:

(1) the Brothers believed that FOMEL was included in the Sale Agreement and that was the plain meaning of their May 2009 Letter;

(2) Sheikhs Mohamed and Siraj had given misleading evidence in relation to several matters, namely: the meaning of the May 2009 Letter and the conversation with Mr. Fuchs of 18th May 2009; their insistence that they had not tried to obstruct or derail Sheikh Abdullah's purchase; the Brothers attempts to procure that the 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; and the attempt to 'colour' their withdrawals of cash from AFPSA between contract and completion.

[55] Sheikh Al-Gasim was called by Sheikh Abdullah as his expert on Saudi law. The Brothers called Dr. Al-Ghazzawi. The learned trial judge found that Sheikh Al-Gasim has a higher legal qualification, has been a judge in a Sharia Court, and is a Sharia law adviser to a number of significant Saudi institutions. In this case, he was giving expert evidence for the first time, and spoke through an interpreter. Dr. Al-Ghazzawi, by contrast, had a doctorate in Comparative Islamic Law and other

academic qualifications, and spoke perfect English. He was a member of various international associations, including the American Bar Association and the International Bar Association. He was the managing partner of a Saudi law firm with a practice in international trade and commerce.

[56] It was common ground, when the dispute over the ownership of Chemtrade arose in the court below, that the contract between the parties fell to be determined by the learned trial judge pursuant to principles of Sharia law and not common law rules of contract. Both expert witnesses agreed on the principles which Saudi law uses to interpret the intention of parties to a Saudi contract. The judge accepted that the court seeks to ascertain the objective intention of the parties and will first consider the text of the written instrument. The court is not looking for the subjective intention of the parties, but infers intention from all the surrounding circumstances. The words of the contractual text are not determinative. In considering the text of the agreement, the court will: (a) take into consideration the context of the agreement; (b) consider the agreement as a whole, not just the words used in isolation; and (c) look to find a meaning which takes into account all the words used, and not prefer a meaning that has to disregard certain words. If the intention of the parties is still not clear, i.e., the contract is ambiguous, then the court will go to a second stage. Here, it will weigh all the evidence of the conduct and statements of the parties before and after the contract was entered into, in order to help in ascertaining the intention of the parties. In Saudi law, the experts were agreed, where the contract is found to be ambiguous, extrinsic evidence is admissible to prove the intention of the parties. In this context, an acknowledgment made by a party against interest (or 'confession' as the translation from the Arabic has it) carries weight.

[57] Because the appellant contends that the learned trial judge did not approach the Offer Letter in its proper context in coming to the conclusion as he did that on its face the agreement was not ambiguous, it will be necessary to look at the context and to determine whether it was in fact relevant to the issue of interpretation and should have been taken into account of by the learned trial judge. If I find that the

agreement between the parties was ambiguous, then I must consider whether the learned trial judge was correct in not going to the second stage of weighing all the evidence, either before or after the agreement, in order to ascertain the intention of the parties. The search is for the objective intention of the parties. If there is ambiguity, Saudi law will take into account not only the contextual matrix, background and aim of the contract, but also extrinsic evidence such as the parties' subsequent acts and statements.

[58] The learned trial judge very helpfully went into detail in his judgment concerning the evidence of all the witnesses. He analysed the testimony of both experts, both their evidence in chief by way of their Reports, and on cross-examination. Sheikh Al-Gasim was of the view that the contract, and hence the judgment, was ambiguous as to whether Chemtrade was included in the sold assets. Dr. Al-Ghazzawi was of the contrary view. His Report was to the effect that Judgment 1080 arranged an unambiguous settlement between the Brothers and Sheikh Abdullah. Non-listed assets were expressly excluded by the judgment from the buy/sell process. As the learned trial judge found, this aspect of his Report was in error. The 'expressly excluded assets' that Dr. Al-Ghazzawi referred to in his Report were the Jersey Trusts. However, the learned trial judge found that that error did not invalidate his other conclusions. He was firm in cross-examination in his view that the terms of the judgment show that its effect was restricted to the assets listed in Appendix 1. He was confident that a Saudi court would not declare a contract valid unless it could find in it the specified subject matter of the agreement and the specified price. Here, he testified, the Court of Appeal of the Board of Grievances plainly had no difficulty in determining both of these issues and had confirmed the contract. The listing of the assets in Appendix 1 was determinative. Chemtrade/FOMEL was excluded from the subject matter of the agreement, he testified, because it was not specifically included.

[59] Dr. Al-Ghazzawi was of the view that the May 2009 Letter was not helpful. Although he accepted that a party may not resile from a confession made in the course of civil

proceedings, the May 2009 Letter was not a confession at all. It was merely an assertion which was contrary to the facts, given as a reason for not attending a meeting. Also, it was inconsistent with the findings of a judgment which had been confirmed on appeal, and was therefore not evidence that the Chemtrade shares had been sold. Dr. Al-Ghazzawi was of the view that the fact that in February 2008 the Board of Grievances had asked the parties to arrange a settlement covering all jointly owned property both within and without KSA was not relevant. The Board, he testified, had dealt with the agreement that the parties had actually reached, not the agreement that had originally been sought.

[60] The learned trial judge concluded on the ownership issue by assessing the expert evidence. As between the two experts he preferred the evidence of Dr. Al-Ghazzawi. Not only was he better qualified, he found, but his evidence was more authoritative, coherent and better structured than that given by Sheikh Al-Gasim. The learned trial judge expressed himself as having complete confidence in what Dr. Al-Ghazzawi told him, and complete confidence that he was, unlike Sheikh Al-Gasim, giving his independent opinion on the questions put to him. He preferred the evidence of Dr. Al-Ghazzawi that there was no ambiguity in the Offer Letter or in Sheikh Abdullah's acceptance of it. He agreed with Dr. Al-Ghazzawi that it was not possible to read the Offer Letter as amounting to anything other than an offer to sell the property in KSA as listed in Appendix 1. Chemtrade was neither listed in Appendix 1 nor situate in KSA. The Offer Letter, he concluded, flagged up to the Board of Grievances, and thus to Sheikh Abdullah, that the offer was confined to assets within the Kingdom. He therefore accepted the evidence of Dr. Al-Ghazzawi that as a matter of Saudi law there was no room for an admission of external evidence in an attempt to ascertain the intention of the parties as to the Chemtrade shares. He accepted his evidence that the May 2009 letter did not bear the weight that Sheikh Abdullah sought to put on it. He accepted Dr. Al-Ghazzawi's opinion that the letter was simply wrong. Not only that, he found that it was not an acknowledgment, admission or confession of anything. It was not made in proceedings then on foot, nor was it made to Sheikh Abdullah or to any

representative of his. Sheikh Siraj had testified that he had made a mistake, and the learned trial judge accepted that evidence.

[61] The Brothers relied on the finality of the judgment as superseding the earlier agreement. They pointed out that even Sheikh Abdullah relied on the judgment when he sought to have it enforced by the Ministry of the Interior. Dr. Al-Ghazzawi, their expert witness, was, as we have seen, of the view that Judgment 1080 resolved all disputes related to the shares of the assets. He was of the view that the judgment was 'deserving of every respect' because it resolved all disputes about the specifics of the companies and assets in Saudi Arabia as listed in the Appendices and with a price put against them. Further, it had been confirmed by the highest court that it consisted of a fixed amount and a specific list of assets. It was a final judgment, it was very clear, it contained no ambiguity. There had been a specific offer made, and a final acceptance of that offer. Anything outside the specific list of assets did not concern the judge anymore. Further, it had been specifically enforced by the Ministry of the Interior which had obliged the Brothers to transfer the shares and the land into Sheikh Abdullah's name. He was adamant that no acknowledgment by the Brothers that an asset not mentioned in the list was in fact included in the judgment could be taken into account. Such an admission could not affect the finality of the judgment. It was this view which the learned trial judge adopted in arriving at his decision.

[62] Though he accepted the evidence of Dr. Al-Ghazzawi that neither the Offer Letter, nor Judgment 1080 which confirmed it, was affected by ambiguity, the learned trial judge stated that he would go on in his judgment to consider as a free standing argument what the position would be if it were found that they were ambiguous, and that the specific terms of the Offer Letter must yield to context. His conclusion was that the Offer Letter had not provided what the Board of Grievances had requested. It had not been based on a value of the total assets of the Group. It had instead set out specific subject matter and a specific price for it. Sheikh Abdullah had purchased the property listed and described in the Offer Letter at a price quoted.

He found that it was not possible to treat the eventual purchase by Sheikh Abdullah of the property listed at the price quoted as the culmination of a seamless process beginning on 12th February 2008 and ending on 19th May 2008. The bargain struck was, quite simply, not what the Board of Grievances had in mind in February. He therefore concluded that if Sheikh Abdullah's claim had been adjudicated in the courts of KSA and under Saudi law, it would have failed. Consequently, it failed in the Virgin Islands.

[63] The first question, then, for this Court is whether it is satisfied that the decision of the court below was wrong because it erred in law in applying the appropriate principles of Sharia law, or erred in fact in finding that the contract was not ambiguous. The second question for this court is whether the learned trial judge was correct in his finding as to the intention of the parties. The learned trial judge, as we have seen above, found that while the Brothers had intended to sell FOMEL, the form of words they used in the Offer Letter did not have that effect and therefore they were entitled to rely on the terms of the Offer Letter which excluded any mention of Chemtrade or FOMEL. This is a good principle of common law. But, is it good Sharia law?

[64] Judgment 1080 expressed that its purpose was 'to adopt the necessary procedures regarding the judgment which completes that reconciliation by disassociation.' It expresses the need for the court 'to order that reconciliation.' That need for Judgment 1080, we have seen, had arisen from the dispute between Sheikh Abdullah and the Brothers about whether Sheikh Abdullah was in a position to purchase. The judgment recited that the reconciliation was to take place by 'takharuj', translated as 'disassociation'. The expert evidence was that this word in Sharia law means 'exiting from a partnership by selling the shares to another party.' It is thus apparent that the early part of Judgment 1080 relates to '*all*' of the joint assets. There is no suggestion in Judgment 1080 that one of the jointly held companies was to be excluded.

[65] In Eckersley and others v Binnie and others,[5] Bingham LJ in a dissenting judgment gave the following guidance in relation to the approach an appeal court should take both to the advantage enjoyed by the judge below of having seen the demeanour of the witnesses and in resolving conflicts of expert evidence:

> "The Court of Appeal has jurisdiction to entertain such appeals in cases such as this, and the appeal is by way of rehearing. But the Court of Appeal is a court of review. It does not approach the resolution of factual issues as if the sheet before it were blank. It has to be persuaded that the trial judge, who is the primary judge of fact, has plainly erred. Very rarely, if ever, will the court be so persuaded if the trial judge's conclusions rest on his assessment of the credibility and demeanour of witnesses, because this assessment is one which the judge who sees and hears the witnesses may make, and judges who only read the transcript and the documents cannot. This advantage enjoyed by the trial judge must never be overlooked or devalued. But, while fully recognising and respecting the advantages enjoyed by the trial judge, the Court of Appeal should not abdicate its duty of review. If all the evidence on a point is one way, good reason needs to be shown for rejecting that conclusion. If the overwhelming weight of evidence on a point is to one effect, convincing grounds have to be shown for reaching a contrary conclusion. Where the trial judge has founded on a witness's oral evidence, the court will not uphold the finding if persuaded that it is not justified on a fair construction of what the witness actually said. The court will not support the dismissal of a witness's evidence where this rests on what is shown to be a misunderstanding, or a wrong impression.
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> In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason. The advantages enjoyed by the trial judge are great indeed, but they do not absolve the Court of Appeal from weighing, considering and comparing the evidence in the light of his findings, a task made longer but easier by possession of a verbatim transcript usually (as here) denied to the trial judge."[6]

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[5] (1988) 18 Con LR 1.

[6] At pp.77-78.

[66] It is trite law that expert evidence on foreign law is evidence of fact.[7] Even where the challenge is to a finding of primary fact, there may well be circumstances apart from the manner and demeanour of the witness which bear directly on the credibility of that witness's evidence and which may warrant an appeal court in differing from the assessment of the judge below, even on a question of fact turning on the credibility of witnesses whom the appeal court has not seen.[8]

[67] The approach of the court to such evidence was set out by Scott LJ in A/S Tallinna Laevauhisus v Estonian State Steamship Line and Another:[9]

> "The general rule of English private international law, that foreign law is in our Courts a question of fact, is fundamental, although it does not inhibit the Court from using its own intelligence as on any other question of evidence. The material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country and the burden of proof rests on the party seeking to establish that law. The Court is free to scrutinise both the witness and what he says as on any other issue of fact. The translation from the foreign language must be proved by a duly qualified interpreter; but even when a proved or agreed translation takes the place of the foreign document, it is still primarily the function of the expert witness to interpret its legal effect in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it if it applied correctly the law of that country to the questions under investigation by the English Court. His function necessarily extends to interpretation as well as application in the light of the general law of that country. The degree of freedom which the English Court has in putting its own construction on the written translation of foreign statutes before it, arises out of, and is measured by, the right and duty to criticise the oral evidence of the witness. If he says that the foreign statute bears a meaning which is patently inconsistent with the words of the English translation, the Court is entitled to reject his construction unless he goes further and proves some extraneous rule of law, written or unwritten, of the foreign country which compels that apparently forced interpretation."

I accept that this reflects equally the correct approach to foreign documents and not just foreign statutes in the Virgin Islands.

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[7] Dicey, Morris & Collins: The Conflict of Laws (15th edn.) Rule 25(1).
[8] Coghlan v Cumberland [1898] 1 Ch 704, CA per Lord Lindley MR at 705.
[9] (1947) 80 Ll L Rep 99 at 107, cited with approval by Moore-Bick J in Glencore International AG v Metro Trading International Inc (Formerly Metro Bunkering and Trading Company) and Others [2001] CLC 1732.

[68] Moreover, the appeal court may be impelled by the inherent probabilities of the case to depart from the opinion of the trial judge formed upon his assessment of the witnesses. The position was described as follows by Goff LJ in Armagas Ltd v Mundogas SA (The Ocean Frost):[10]

> "Furthermore it is implicit in the statement of Lord MacMillan in *Powell v. Streatham Manor Nursing Home* [[1935] AC 243] at p. 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case."

[69] To the classic and well-known statement of Lord Thankerton[11] on the respect the Court of Appeal must pay to the conclusion of a trial judge as to the credibility of a witness who has given evidence before him, Lord Thankerton has added this rider: 'It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.'

[70] A decision which was not properly open to the judge below on the evidence amounts to an error of law in respect of which an appeal court should intervene unless it can be shown that the judge's decision was plainly and unarguably right notwithstanding his misdirection of himself.[12] Where the correctness of a finding of primary fact or inference is in issue the role of the appellate court is to determine

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[10] [1985] 1 Lloyd's Rep 1 at 57.
[11] Watt (Thomas) v Thomas [1947] AC 484 at 487-488.
[12] Dobie v Burns International Security Services (UK) Ltd [1985] 1 WLR 43, per Sir John Donaldson MR at 48H-49C.

whether the finding or inference is wrong, giving full weight to the advantages of the trial judge.[13]

[71] In my view, the learned trial judge's acceptance of the evidence of Dr. Al-Ghazzawi that the Offer Letter, the resulting contract, and Judgment 1080 were not ambiguous flew in the face of what on any plain reading of them was an obvious inconsistency. That the price per share proposed in the Offer Letter was based on the inclusion of the Alhamrani Group's share of FOMEL's assets should have been clear. First, the Brothers had agreed to include all the assets in arriving at a valuation and a price. Second, Deloitte had had come up with a valuation per share of SR150m on the basis that FOMEL was included. Third, the income of FOMEL was demonstrated by Deloitte in the evidence to be necessary for the Brothers to be able to afford to buy out Sheikh Abdullah and the Sisters. Fourth, the Offer Letter stated throughout its body that it was a valuation of all the assets inside KSA. It seems clear that the list of companies that had been valued by the Brothers given at Appendix 1 was mistaken in omitting Chemtrade/FOMEL. The resulting contradiction between the body of the Offer Letter and the list in Appendix 1 created an ambiguity. The agreement and the judgments that followed were all affected by the same ambiguity.

[72] Once an ambiguity is recognised, the court applying Sharia law must seek to ascertain the true intention of the parties. The agreement between the parties is to be interpreted in context, and not, as would be done at common law, by looking only at the words of the agreement, ignoring all pre-contract discussions and negotiations. At common law extrinsic evidence in relation to a concluded contract is admissible only in a claim for rectification, and not as an aid to interpretation. By contrast, in Saudi law extrinsic evidence is admissible in the interpretation of an ambiguous contract. The court is entitled to take into account actions and statements made by the parties subsequent to the date of the contract.

[13] Datec Electronics Holdings Ltd and others v United Parcels Service Ltd [2007] 1 WLR 1325.

[73] It was evident from the conduct of the Brothers and their correspondence, both prior to and subsequent to the agreement to engage in the process of takharuj, that they expected FOMEL to be included. The evidence accepted by the learned trial judge was that the Brothers at all times prior to and subsequent to their agreement intended to include FOMEL. This evidence included not only the May 2009 Letter in which the Brothers indicated to Fuchs that they had sold Chemtrade, but also their other statements and writings related above in which the same admission was made. They allowed Sheikh Abdullah to take possession of the FOMEL premises and assets in KSA without once raising an objection until a year had passed. The experts were agreed that such acknowledgments are admissible by a Saudi court as proof of original intention, though Dr. Al-Ghazzawi was more cautious in applying the principle given that he had already made up his mind that there was no ambiguity. The learned trial judge not only disbelieved the explanations of the Brothers as to their erroneous statements to Fuchs that they had included Chemtrade in the sale, but he held they were deliberately false. He also found as a fact that the Brothers had campaigned to stop Sheikh Abdullah from buying rather than selling. This included, he found, their putting together false evidence in Saudi Arabia in order to make them appear to be the victims of a serious wrong. These findings were compelling evidence of the unreliability of the testimony of the Brothers that they had never intended to include Chemtrade.

[74] It is the function of a Saudi court, and therefore of the court below, to determine from the context what the intention of the parties was at the time they made the contract, and not to place reliance on some of the words of the contract to the exclusion of the context. There was no dispute between the experts on Saudi law on the importance of the court discovering intention of the parties in the formation of a contract. The preponderance of the evidence was that the effect of the Buy/Sell Agreement did not depend on the clearly erroneous list of companies in Appendix 1 which omitted FOMEL/Chemtrade. The essence of the agreement was for total disassociation in respect of everything recorded in the financial statements, i.e., everything in which the siblings were partners. The Brothers had at all times done

what the Board of Grievances had proposed and what they had agreed to do, as their actions subsequent to Sheikh Abdullah's acceptance indicated. There was no evidence, other than the Brothers' assertion, that their valuation of a share at SR150m depended on the exclusion of FOMEL to produce an affordable price. The documentary evidence was clear that Deloitte's original valuation of SR168m was reduced to SR150m solely to take account of various uncertainties and other considerations put forward by the Brothers, which at no time included the omission of FOMEL. Judgment 1080 says that the Offer Letter was the 'required assessment' by the Brothers 'of all the companies and other property in which the persons concerned were partners'. This was powerful evidence that the Offer Letter did not flag up to the Board of Grievances that it was something different from the agreement which had been reached in February.

[75] In any weighing up exercise called for in Eckersley and others above, one is inexorably drawn to the conclusion that the testimony of the Brothers that Chemtrade was not included in the sale was false. There was admissible extrinsic evidence here as to the intention of the parties but which the learned trial judge, in my view, failed to give proper weight to. In my view, the learned trial judge fell into error in not rejecting, as Lord Scott recommended in the A/S Tallinna Laevauhisus case above, Dr. Al-Ghazzawi's mistaken interpretation of the finality of Judgment 1080 and Judgment 1220, particularly his mistaken dismissal of the agreement for takharuj and his conclusion that the contract, and the judgments which upheld and enforced it, was a free-standing agreement which did not include Chemtrade/FOMEL, and not part of a seamless process of takharuj which did include Chemtrade/FOMEL.

[76] Given my findings above, I do not consider it necessary to deal with the Saudi principles of 'ithra bila sabab' and good faith and fairness. I do not see how they assist Sheikh Abdullah when there can be no doubt, given the evidence before the learned trial judge, of what the intention of the parties was at the time they entered into the agreement to settle their litigation by the process of takharuj. Nor do I

consider it necessary to go into all of the many challenges to the learned trial judge's findings of fact. They are in my view peripheral to the principal issue which the court below and now this court are called on to deal with. Nor is there any point in my ordering a retrial, as the Brothers suggest should occur if this court were to find that Sheikh Abdullah's appeal succeeds.

[77] No issue of *res judicata* arises as urged in this appeal, even if the Brothers had pleaded it. Nor has the issue of merger in judgment been pleaded or argued. This is not a case where issue estoppel or cause of action estoppel can be urged. Neither Judgment 1080 nor Judgment 1220 dealt with the issue of the inclusion of FOMEL in the sold assets. How could they have? Both judgments were delivered at the time when there was no question of FOMEL having been excluded. Both parties believed and intended at the time of these judgments that FOMEL was included. On no occasion was the Board of Grievances asked to consider or to make a ruling on whether FOMEL was included. Neither judgment was, therefore, determinative of the exclusion of FOMEL. The same applies to the Handing Over Report. Indeed if the Saudi court was of the view that Sheikh Abdullah could not claim FOMEL one would expect the court to say so. Dr. Al-Ghazzawi was clearly mistaken in coming to the conclusion he did.

[78] I therefore dismiss the cross-appeal of the Brothers. I allow the appeal of Sheikh Abdullah, and I set aside the judgment in the court below and order the Brothers to transfer the shares in Chemtrade to Sheikh Abdullah or to his order. In the event that is not done within 28 days of the date of this judgment, then the Registrar of the High Court will execute any necessary transfer forms and Chemtrade's local agent in the Virgin Islands or wherever else the company is now located will effect the necessary change to the company's registers.

[79] I have read the submissions of the parties as to the costs of this appeal, and, pursuant to rule 65.13 of the Civil Procedure Rules 2000, I order that the Brothers pay Sheikh Abdullah's costs of the appeal and of the trial in the court below to be assessed if not agreed.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Louise E. Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal