The Cayman Grand Court's approach to Discovery Protocols

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Civil litigation conducted in the Cayman Islands involves a discovery process (also commonly known as disclosure in other jurisdictions) which is a stage in the litigation where each party must disclose relevant documents to each other. These documents are then used by the parties to build their cases and may later deploy them as evidence in the trial.

Discovery allows all parties to know before the trial begins what evidence may be presented and is designed to avoid "trial by ambush," where one side does not learn of the other side's evidence until the trial, when there's no time to obtain responsive evidence.

The procedural rules governing the discovery process are contained within Order 24 of the Grand Court Rules ("**GCR**") and are at least 30 years old.[1] However, during that time, there have been substantial advances in technology making discovery almost entirely electronic or eDiscovery based, especially since the advent of "big data" and the considerable growth in the volume of potentially relevant data held by organisations. In other jurisdictions, such as in the UK, detailed guidance is provided in the form of practice directions detailing how eDiscovery is to be conducted. The absence of such guidance in the Cayman Islands has meant that commercial litigators have needed to bridge the procedural gap for cases involving complex big data to enable parties to use these technological advances and they have increasingly done so through the use of a discovery protocol.

A judgment which provides guidance as to how parties can use a discovery protocol to grapple with big data was delivered by the Honourable Justice Segal (Segal J), in The Joint Official Liquidators of Abraaj Holdings ("**AH**") v The GHF Group limited et al (FSD 150, 158 and 203 of 2020 (NSJ)), unreported 29 June 2022 (the "**Judgment**"). This case considered the role of a discovery protocol in complex commercial litigation and resolved disputes as to certain of its terms. A discovery protocol generally provides a framework and imposes standard technical requirements for conducting discovery. While discovery protocols have been utilised in the Cayman Islands for a number of years, this was the first judgment considering contested terms

of a discovery protocol. The Judgment is therefore helpful for commercial litigators devising the appropriate discovery process in complex commercial litigation coming before the Financial Services Division of the Cayman Islands Grand Court.

Brief Background

The claims that were the subject of the Judgment were three claims which had been ordered to be tried together due to the overlapping nature of the parties, facts and documents. In brief, two of the claims were clawback claims brought by the liquidators of AH (the "**JOLs**" and together with AH, the "**AH Parties**") against two investment funds formerly managed by Abraaj group entities[2], The GHF Group ("**GHF**") and Neoma Private Equity Fund IV ("**NPEF IV**") and the other claim was brought by a wealthy Middle Eastern businessman, Mr Hamid Jafar, in respect of three loans of approximately US$350 million which he claimed to have made to certain entities in the Abraaj group in late 2017 (together referred to as the "**Proceedings**"), and certain of which were not repaid.

AH was the holding company for the Abraaj group. When the JOLs were appointed to AH in 2018, documents relating to various Abraaj group entities were collected, retained and secured. As a result, in the Proceedings AH was in possession of some 52 terabytes of data or roughly 71 million documents, of which a significant proportion of the GHF and NPEF IV documents were mixed with AH's documents.

This meant that the vast majority of the potentially relevant documents were "within the possession, custody, and power" of the AH Parties and therefore disclosable to the other parties[3]. Due to the substantial volume of documents, the AH Parties considered that a linear manual discovery review (ie one where each document is reviewed by a human) could potentially take years to complete and cost several millions of dollars, which was said to be disproportionate.

In these circumstances, the parties had been directed to seek to agree a discovery protocol and while much progress was made, the Court was asked to rule on remaining disputed terms. The main issues in dispute were:

1. The jurisdictional basis on which the AH Parties' were seeking relief and whether they were in substance seeking to limit the scope of the AH Parties' discovery under GCR O.24 r.2(5). .
2. Custom parameters to be included in the parties' discovery protocol dealing with:
    a. The identity of custodians to be searched by the AH Parties and Mr Jafar.
    b. The date range to be applied to searches of custodians and other data.
    c. Which devices of certain custodians should be searched for potentially discoverable

documents (such as laptops and mobile phones).

d. Technical parameters relating to use of technology-assisted review ("**TAR**") and the treatment of family documents.

The role of the Discovery Protocol

According to Segal J at paragraph 17 of the Judgment, the purpose of a discovery protocol "*is to define the agreed approach between the parties with respect to the technical aspects of giving discovery. For example, the Discovery Protocol addresses, amongst other things, how documents will be identified and preserved, how family documents will be treated, how the parties will review and code the documents, naming conventions for documents and what occurs if privileged or confidential documents are inadvertently discovered.*" The parties in the Proceedings also included appendices to their discovery protocol which contained, lists of issues to assist with focussing discovery and the relevant "data custodians" whose documents and data would be searched for each of the parties.

The discovery protocol in the Proceedings contained a number of important provisions as to the manner in which discovery was to be conducted and the impact the discovery protocol would have on the parties' obligations under the GCR. Importantly, the parties remained subject to GCR Order 24 and it was stated explicitly that *"[n]othing in* [the] *Protocol is intended to dispense with or limit the parties' obligation to give discovery of Relevant documents*"[4]. All parties agreed that the applicable test for determining which documents were relevant and should therefore be disclosed were those documents that "relate to the matters in question in the action" as articulated in a longstanding line of precedents including *Compagnie Financiére du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55, albeit the discovery exercise would be assisted by agreeing lists of issues. As a result of those precedents, the relevance test for discovery in the Cayman Islands is considerably broad in scope[5].

The parties were also at liberty to apply to the Court in respect of any defective discovery or disputes as to the adequacy of the discovery provided, including pursuing applications for specific discovery.

Issues that were considered by the Court

Issue 1: Jurisdictional basis for limiting discovery obligations under the Discovery Protocol

Segal J agreed with arguments put forth by the AH Parties that in substance they were not seeking to limit their discovery obligations but rather were asking the Court to exercise its case management powers and give directions as to the manner in which they should carry out their discovery obligations and for the Court to approve and establish a process that was in

accordance with the Overriding Objective and properly proportionate[6].

The Court when settling on a suitable approach for the discovery process, will therefore seek to balance finding all properly discoverable documents and data thereby ensuring that parties are treated in a just way, against the time and costs spent in searching for and obtaining relevant documents.

Issue 2: Custom parameters to be included in the parties' discovery protocol

Due to the large amount of data involved, the AH Parties sought to limit in so far as possible (i) the number of custodians whose data and documents were to be searched; (ii) the applicable date range(s) to be used for searches in respect of those custodians and their data sources; and (iii) the number of devices and data sources to be included in the search. The AH Parties' argued that their approach sought to identify custodians, date ranges and data sources that they considered might reasonably be expected to hold unique documents relevant to issues in dispute and which struck the appropriate balance when taking into account cost considerations and proportionality[7].

NPEF IV and the GHF Parties emphasized that the Overriding Objective also requires the Court to deliver justice, and which does not prize economy and proportionality over the need for parties to give proper discovery, and the scale of the discovery exercise should be proportionate to the sums involved and the importance and complexity of the issues. Mr Jafar and the AH Parties had commenced the Proceedings, seeking hundreds of millions of dollars from the defendants and they were entitled to insist on a process that would or was likely to result in the discovery of the documents that were relevant to their defences. The fund parties accepted that some modifications to the standard discovery process were warranted, indeed the content of the discovery protocol reflected this fact, but not so curtailed so as to result in the AH Parties not providing discovery of documents which were said to be relevant to their defences.

In the Judgment Segal J again emphasised that the Court must balance the need to find all properly discoverable documents against the cost and time in searching for and disclosing them. Segal J found that the Court should therefore focus on finding a fair process that would make it reasonably likely that discoverable documents would be found at a proportionate cost and with minimum delays to the progress of the proceedings.

In applying the principles from the Overriding Objective to determine the identity of the appropriate custodians, the Court asked certain questions such as: (i) what documents and in what form of data were the documents held by that custodian (ii) what is the likelihood that relevant information would be contained in those documents; (iii) what is the likely additional costs of the exercise and (iv) how much time would likely be required in dealing with the proposed custodian's data.[8] Segal J also adopted a similar approach in determining

applicable date ranges and sources of device data to be searched by the parties, and approved the use of TAR as it was found to be reasonable and proportionate.[9]

Concluding remarks

In absence of a practice direction in the GCR for the conduct of e-discovery, parties are likely to use a discovery protocol to regulate the performance of the parties' discovery obligations and agree to permit the use of technical discovery tools such as TAR.

This judgment shows that when dealing with issues in discovery, the Court will have regard to the Overriding Objective and will seek to strike a balance between ensuring a fair, just process and while at a proportionate cost with minimum delays to the progress of proceedings.

Footnotes

[1] Order 24 of the GCR is substantially based on the old Rules Of the Supreme Court (known as the RSC) which governed the rules and procedure in England and Wales until 1997 when they were replaced by the Civil Procedure Rules. For this reason, discovery in the Cayman Islands has some significant differences from the disclosure process in England and Wales.

[2] The Abraaj Group was a high-profile private equity firm in the Middle East which collapsed in 2018 amid allegations of fraud, mismanagement and comingling of funds.

[3] Order 24, r.1(1) of the GCR.

[4] Paragraph 19 of the Judgment.

[5] This is because the Peruvian Guano test includes a requirement for the parties to give discovery of "*train of inquiry*" documents, which means disclosure of documents which may result in the identification of further relevant documents.

[6] See paragraph 1.2 to the Preamble to the Grand Court Rules.

[7] Paragraph 43 of the Judgment.

[8] Paragraph 86 of the Judgment.

[9] Paragraph 89 of the Judgment.

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