

Discovery Series: The Cayman Court resolves custodian dispute in discovery judgment

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This article looks at a recent judgment in the Cayman Islands which addresses the approach the Court has taken to disputes over the selection of discovery custodians, which can significantly impact proceedings.

| The discovery phase

In the complex landscape of commercial litigation, the discovery phase is both a critical and potentially time consuming, costly stage. This necessitates a strategic approach from the involved parties. For this reason, parties will seek to balance their obligation to provide discovery to the other parties in the litigation, while trying to keep the exercise proportionate given the advent of 'big data' and the likelihood that a party may have a substantial volume of potentially relevant documents. In order to achieve this aim, the parties will usually negotiate the terms of discovery protocols which will form the framework for discovery (although the protocol will address other important points, such as setting technical requirements).

One parameter that can often be contentious is negotiating the relevant custodians to be included as part of the discovery search. Custodians are individuals or entities that are likely to hold documents that are considered relevant to proceedings. The greater the number of custodians, the greater number of documents that will likely be subject to discovery review so parties will try to limit the number of them where possible (while balancing that against seeking to ensure relevant documents will not be omitted from disclosure). However, sometimes following the exchange of discovery documents, it can become clear that documents are missing and a party ought to have included additional custodians.

When that party refuses to include that custodian voluntarily, the other parties are left with no choice but to issue an application asking the court to compel discovery from that custodian. This is precisely what occurred in *Jafar v Abraaj Holdings (in official liquidation) and others - FSD 203 of 2020 (NSJ)*, unreported 30 April 2023 (the judgment).

Background

The claim that was the subject of the judgment was brought by a wealthy Middle Eastern businessman, Mr Hamid Jafar, against (amongst others) two investment funds formerly managed by Abraaj group entities, The GHF Group and Neoma Private Equity Fund IV in respect of three loans of approximately US\$350 million (the loans). Mr Jafar claimed to have made these loans to certain entities in the Abraaj group in late 2017 following certain representations made by Abraaj's founder, Arif Naqvi. The Abraaj Group was a once the largest private equity firm in the Middle East, said to have assets under management of US\$14 billion at its peak, which subsequently collapsed in June 2018 amid allegations of fraud and mismanagement of funds.

A previous discovery judgment in these proceedings had ruled on the terms of a discovery protocol which stipulated discovery custodians to be included for the purposes of discovery by Mr Jafar ([see our earlier article in relation to this judgment and discovery protocols](#)). This initial custodian list excluded Mr Jafar's sons, Badr and Majid Jafar. Following discovery exchange, it became apparent to the other parties to the litigation that his sons were likely to hold unique documents that were relevant to the proceedings and so they ought to have been included in the discovery exercise. For this reason, a summons was issued which sought to have Mr Jafar's sons added as discovery custodians.

Legal issues considered

The main discovery obligation in the Cayman Islands is contained in Order 24, rule 1 of the Grand Court Rules (GCR) which says that a party must provide documents that are within their possession, custody and power relating to matters in question in the action subject to the Peruvian Guano test standard of relevance (which includes train of inquiry documents, as explained in more detail in our [previous Discovery Series article](#)). The question was whether Mr Jafar's sons' documents could be said to be within Mr Jafar's possession, custody or power within the meaning of Order 24 of the GCR.

The judge ruled that there was not enough evidence to support an inference that his son Majid Jafar and Mr Jafar had an understanding similar to that which existed in relation to his other son Badr Jafar and so Majid's documents would not be considered within Mr Jafar's possession, custody or power.

As to the documents of Badr Jafar, on the evidence it was shown that he was in possession of documents relating to the negotiation, arranging, documenting, funding, advancing, implementation, restructuring and his dealing in connection with the loans which were the subject matter of the proceedings. The judge reasoned that the evidence established reasonable grounds to infer that there was at least an understanding between Mr Jafar and his son that Mr Jafar would be given free access to his son's documents pertaining to the loans.

Accordingly, the judge held that an understanding is sufficient for the purpose of establishing that the documents were within Mr Jafar's power in accordance with O.24 of the GCR without the need for the understanding to be legally binding. However, a mere expectation of compliance with a request for access to and the delivery of documents is insufficient (see paragraph 8 of the judgment).

Factors considered in determining that there was an understanding that Badr Jafar would provide him with access to the documents in question included:

- that the understanding arose in the context of a specific business transaction, so was not simply an aspect of their normal working relationship
- the fact that Mr Jafar and Badr are father and son did not of itself prevent such an understanding having been reached
- Mr Jafar and Badr were acting together (collaboratively) in relation to a common business enterprise and in their joint interests in connection with a substantial business transaction (in relation to which Badr was considering contributing and may have contributed his own funds)
- there was evidence by the plaintiff's conduct which seemed to show that Mr Jafar authorised his son to negotiate on his behalf

Therefore, the judge concluded that it was reasonable to infer that there was an understanding that Mr Jafar would be given access to all documents relating to the loans because at any point (including after the loans had been made), he might have needed to see evidence of what his son had said and discussed with Mr Naqvi and his communications relating to the loans.

Conclusion

Therefore, having regard to the true nature of the relationship between Mr Jafar and his son as revealed by the documents produced in discovery, Badr Jafar's documents were considered to be within Mr Jafar's power within the meaning of Order 24 and this meant that he was ordered to give discovery of relevant documents in the proceedings.

This judgment shows that parties should give careful consideration at an early stage in ascertaining discovery custodians and ensuring that individuals that could have relevant documents are included in the scope of the discovery review. Failing to do so could mean facing a specific discovery application later on in the proceedings and having to conduct a second discovery review exercise, potentially causing delay or disruption to the proceedings.

This article is the second part of a discovery series, the first article in this series is available to read, outlining the [Grand Court's approach to discovery protocols](#).

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