

Discovery Series: The Cayman court confirms the approach to be taken for navigating privilege in discovery reviews

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Following a privilege challenge, the Cayman court reminded parties that discovery exercises are to be overseen and led by Cayman qualified attorneys. This article examines the issues considered in that recent judgment.

Background to the judgment

In the Cayman Islands, parties to civil litigation are under an obligation to disclose all documents that are within their possession, custody and power relating to matters in question in the action (Order 24, rule 1 of the Grand Court Rules, **GCR**) subject to the *Peruvian Guano* test of relevance (including documents which themselves could reasonably lead to a further train of inquiry, as explained in more detail in our previous [article](#)).

The underpinning policy of discovery is to ensure that all parties have access to relevant information and documents necessary for the fair resolution of a case and thus allow justice to be determined. A party is obligated to disclose documents which are considered "relevant" and such documents are then set out in a list of documents with copies of them being produced to the other parties (in accordance with O.24, r.2 or r.3 of the GCR). An exception to the obligation to produce relevant documents is if a document is considered legally privileged. Parties are permitted to withhold documents from production on the basis that it is protected by a form of legal privilege such as legal advice privilege or litigation privilege. These documents should be referred to in general terms in a separate category of the discovery list with a sufficient statement of the ground of privilege being claimed (see O.24, r.5 of the GCR).

If a party wishes to challenge a party's refusal to disclose a document on the basis of privilege, they may do so by issuing a summons, which is what occurred and gave rise to the judgment of Justice Segal in *Jafar v Abraaj Holdings (in official liquidation) and others* - FSD 203 of 2020 (NSJ),

unreported 2 May 2023 (the judgment).

The claim

The claim that formed the subject of the substantive proceedings was brought by a wealthy Middle Eastern businessman, Mr Hamid Jafar (the **plaintiff**) against two investment funds (among others) formerly managed by Abraaj group entities, The GHF Group (**GHF**) and Neoma Private Equity Fund IV (**NPEF IV**) (together, the **defendants**) 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, to Mr Jafar. The Abraaj Group was 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. Mr Jafar sought repayment of the loans.

As set out in paragraphs 5 to 16 of the judgment, pursuant to a court ordered discovery protocol, the parties exchanged lists of documents wherein the plaintiff's list referred to a total of 54,350 relevant documents, with over half of them being withheld on grounds of privilege. The plaintiff had disclosed the metadata of the withheld documents, so based on that information (for example, where emails were sent to or from recipients who were not likely to be parties to privileged communications), the defendants were immediately able to see that a significant number of documents that had been claimed as privileged could not be so. Following correspondence between the plaintiff and the defendants, and certain attempts by the plaintiff to remediate the situation, the defendants each issued a summons seeking an order that the plaintiff conduct a re-review of the documents over which he was claiming privilege and serve an updated discovery list.

The arguments

The defendants argued that it was clear that something had gone seriously wrong with the plaintiff's review of privileged documents, where privilege had been claimed in respect of a very substantial number of important documents across a variety of categories. The defendants cited authorities in their submissions that explain that the court must be particularly careful to scrutinise the process supporting a claim for privilege to ensure where possible that the process is properly conducted with proper oversight by the attorney who is an officer of the court.

The plaintiff was of the view that the defendants' proposal for the plaintiff to conduct a further privilege review was not necessary or justified in the circumstances and not a proportionate response to the issues raised. The plaintiff did, however, recognise that serious problems had been identified with his privilege review. He offered to conduct a further random sample quality control re-review of 10% of the privilege documents and that a partner, who was the plaintiff's instructed Cayman attorney, would swear an affidavit to confirm if he was satisfied with the outcome further sample review.

Decision and outcome

A relevant factor was that much of the main document review, at first and second level, was carried out on behalf of the plaintiff by in-house lawyers employed by a group of companies in which the plaintiff has a substantial interest (as noted at paragraphs 6 and 25 of the judgment). No Cayman qualified attorneys were involved until the next stage of review. In Segal J's judgment, he decided that there were good grounds for requiring the plaintiff to conduct a further review of the documents which remained subject to a claim of privilege. He therefore ruled that:

- a review team led by the responsible partner of the plaintiff's Cayman attorneys would conduct a review of 50% of the documents which were marked as privileged and if the result of that review was that 10% or more of those documents were found to have been originally mischaracterised as privileged, the remaining balance of documents were to be reviewed
- an updated discovery list would be provided to the parties together with any further documents to be produced as a result of the re-review
- the plaintiff was to swear and serve an affidavit verifying the updated discovery list

Reasons for the decision

The key reasons that ultimately influenced the decision were as follows:

- the extent of and the manner in which the Cayman attorneys' involvement with the main document review was not clear. The work needed to be led and overseen by a senior Cayman qualified admitted
- the responsible partner of a Cayman firm has a duty to the Cayman court (as an officer of the court) to investigate his / her client's documents carefully to ensure that so far as possible there is a full and proper discovery of all relevant documents
- it was necessary to ensure the integrity of the plaintiff's document review process and consequential claims to privilege

Conclusion

The Cayman court has confirmed its expectations regarding the proper approach of litigants in Cayman proceedings and their legal teams for conducting discovery; in particular, their approach to privilege decisions and the appropriate degree of oversight of senior Cayman attorneys. This decision is a helpful summary of procedural best practice and the applicable principles.

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Key Contacts



Jessica-Leigh Knowles

Senior Associate

Cayman Islands

E: jessica-leigh.knowles@ogier.com

T: +1 345 815 1760

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