Litigation case update: when will a parent company have to give disclosure of a subsidiary's documen

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In the ongoing administration of the late Mr Osama Abudawood's estate, the Grand Court of the Cayman Islands has confirmed the test for when a parent company which is a party to litigation will have to disclose documents held by its non-party subsidiary companies (*In the Matter of the Estate of Osama Abudawood* (Unreported, Justice Kawaley, 27 July 2022, Cause No FSD 0134 of 2022 (NSJ)).

The case provides both a succinct summary of the law in this area and practical guidance on how the Court will approach the competing evidence of the parties when a specific discovery application is made against a parent company seeking documents held by its non-party subsidiaries.

Background

Mr Abudawood was domiciled in the Kingdom of Saudi Arabia and died intestate on 13 June 2017. He owned shares in WAFR Holdings Limited (**WAFR**) which were assets within his Cayman estate. WAFR in turn had various wholly owned subsidiaries, none of which were parties to the administration or part of the Cayman estate. The Administrator of Mr Abudawood's estate sought discovery of the subsidiary companies' documents, such as financial statements, a full statement of the portfolio investments, a fixed asset schedule, aged receivables, and loan agreements.

Finding

Order 24, rule 7 of the Grand Court Rules requires parties to proceedings (in this case WAFR) to make discovery of documents *"which are or have been in his possession, custody or power relating to any matter in question between them in the action"*. The issue before the Grand Court was whether the documents of WAFR's subsidiaries were within WAFR's "power", such that WAFR had to disclose the documents to the administrator.

An order for discovery was originally made on the basis that, among other things, the documents are relevant to the administration, without WAFR's right to access the documents being fully argued. The WAFR subsidiaries then appealed the discovery order on the ground that the subsidiaries' documents were not in the possession, custody or power of WAFR. Because the appeal ground had not been argued at first instance, the Court of Appeal (somewhat reluctantly) remitted the case to the Grand Court to give the administrator a chance to put forward evidence establishing the right of WAFR (and therefore the administrator) to access the subsidiaries' documents.

In remitting the case the Court of Appeal recited the well-known English authority which says that a common corporate structure is not of itself enough to compel disclosure: evidence of a presently enforceable legal right or an understanding or arrangement giving a parent company access to a subsidiary's documents is required. Moreover, it is not sufficient that consent could be obtained if the parent requested documents from its subsidiary.

Back in the Grand Court, Kawaley J decided that to order discovery of documents belonging to WAFR's subsidiaries, the administrator had to at least establish that:

1. WAFR had unfettered access to materials needed for the preparation of the Group's consolidated accounts and/or the documents sought by way of specific discovery and/or
2. that there was some prior arrangement or consent that WAFR can search its subsidiaries' records for discovery purposes

Kawaley J also decided that an arrangement or understanding pursuant to which the parent company "has in practice free access to the documents" of its subsidiaries will potentially support a finding that the documents are within the "power" of the parent company and accordingly discoverable.

While the Administrator was entitled to rely on circumstantial evidence to establish these points (which makes sense given that these matters would be internal to WAFR and not known to the Administrator), the evidential burden was still squarely with the administrator, and this burden proved to be problematic for the administrator in this case.

Although the WAFR subsidiaries only put forward a bare denial in evidence that there was no understanding or arrangement giving access to documents (with no documents to back the denial up), because the evidential burden was on the administrator Kawaley J found the bare denial, keeping in mind this was an interlocutory application without cross-examination, enough to reject the administrator's application. Because the administrator was unable to produce any evidence going behind the denial, Kawaley J found that the administrator had failed to prove that the documents of WAFR's subsidiaries were within WAFR's "power" pursuant to a practical arrangement or understanding which gave WAFR unfettered access to them.

Conclusion

Although this case was heard in the context of an administration and a parent-subsidiary relationship, the general test for discovery was being considered and applied and so this decision will be relevant to all litigation in the Cayman Islands involving Order 24, rule 7 discovery. The application of the test of **an arrangement or understanding pursuant to which a party *"has in practice free access to the documents"*** is not dependent on a parent-subsidiary relationship but has more general application.

As to the key takeaway for litigants to consider before making an application to compel discovery of non-party subsidiary documents, or to resist such an application when faced with one, to paraphrase Kawaley J from paragraph 43 of the judgment, proving that even clearly relevant documents held by non-party subsidiaries are within the power of the parent company is an inherently difficult forensic task if you are a stranger to the corporate group's internal affairs.

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