



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 203 OF 2020 (NSJ)

BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

and

(1) ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)
(2) GHF GENERAL PARTNER LIMITED
(3) THE GHF GROUP LIMITED
(4) ABRAAJ GENERAL PARTNER VIII LIMITED

Defendants

RULING IN RELATION TO THE CUSTODIAN SUMMONSES HEARD AT THE CMC ON
24-26 APRIL 2023

Introduction

1. At the conclusion of the CMC on 26 April 2023 I informed the parties that I would let them have as soon as possible my decision in respect of the custodian summonses and the privilege summonses filed by Fund IV and the GHF Parties (I note that the AH JOLs support the applications for an order that Mr Badr Jafar (*Badr*) be treated as one of the Plaintiff's custodians). The parties urgently need to know the outcome of these applications so as to avoid

further delays that might put in jeopardy the trial date (the trial has been listed to begin in November this year).

2. I now set out a brief note of my decision on the custodian summonses. I provide below, in order to allow the parties to see the highlights of my thinking, an outline of my main conclusions but this should not be taken as a full or definitive statement of my reasoning. I also summarise my main findings as to the relevant facts. These are of course only findings made for the purpose of these interlocutory summonses and the exercise of the Court's case management powers and I do not intend them to affect the issues of fact that will arise and need to be decided at trial on the basis of a full examination (and cross-examination) of all the evidence.
3. I shall distribute a note dealing with my decision on the privilege summonses separately, later today or on Monday (a public holiday in the UK). I shall inform the parties on Monday or Tuesday of my decision on the remaining two summonses that were heard at the CMC, namely Fund IV's summons dated 27 March 2023 seeking additional discovery with respect to bank statements and the GHF Parties' summons, also dated 27 March 2023, seeking further discovery (by reason of asserted technical defects in Mr Jafar's discovery and production of documents).
4. I shall, if the parties wish me to do so, provide full written reasons for my decisions in due course.

The Custodian Summonses

5. Fund IV seeks orders in the following terms as set out in Fund IV's summons dated 27 March 2023 (*Fund IV's Custodian Summons*):

"1. An order that the Plaintiff in Cause No 203 of 2020 (NSJ), Abdulhameed Dhia Jafar ("Mr Jafar"), should, on or before 5 May 2023, give discovery of and produce all Electronic Documents (as that term is defined in the Discovery Protocol appended to the Order of the Hon Justice Segal dated 18 August 2022 (the "Discovery Protocol")) of either of Mr Badr Jafar or Mr Majid Jafar that are within the power of Mr Jafar, on the grounds that Badr Jafar and Majid Jafar are his agents, relating to matters in question in the Related Proceedings.

2. *An order that discovery and production of the documents referred to in paragraph 1 of this Summons should be in accordance with the Discovery Protocol as if Messrs Badr and Majid Jafar were listed as Mr Jafar's custodians in Appendix G to the Discovery Protocol."*
6. The GHF Parties seek orders in the following terms as set out in their summons also dated 27 March 2023 (*the GHF Parties' Custodian Summons*):
- “1. *Badr Jafar and Majid Jafar each be added as a Custodian (as defined in the Protocol for Discovery and Inspection appended to the Order of the Court herein dated 18 August 2022 (the "Discovery Protocol" and the "18 August 2022 Order" respectively)) in respect of the ongoing discovery obligations of the Plaintiff in FSD 203 of 2020 ("Mr Jafar") and that Appendix G of the Discovery Protocol be amended accordingly.*
 2. *Further, or alternatively, Mr Jafar shall, within seven days of the date of this Order, obtain the emails (together with attachments) that are relevant to the matters in question in FSD 150, 158 and 203 of 2020 (NSJ) (the "Related Proceedings") sent or received by Badr Jafar and Majid Jafar using "@crescent.ae" email accounts.*
 3. *Further, or alternatively, Mr Jafar shall, within seven days of the date of this Order, request in writing that Badr Jafar and Majid Jafar, by no later than fourteen days from the date of this Order, provide him with all documents within their possession, custody or power that they know to exist and that are relevant to the matters in question in the Related Proceedings, for the purposes of discovery by Mr Jafar in the Related Proceedings."*
7. I have concluded, having regard to the evidence filed for the purpose of Fund IV's Custodian Summons and the GHF Parties' Custodian Summons (together the *Custodian Summons*), that Fund IV and the GHF Parties have established that the documents (the *Documents*) in the possession of Badr relating to the negotiation, arranging, documenting, funding, advance, implementation, restructuring and his dealings in connection with or regarding the three loans which are the subject of the Plaintiff's claims in this action (the *Loans*) are documents in the

Plaintiff's power within the meaning of GCR O.24. However, in my view, they have failed to establish that the related documents in the possession of Mr Majid Jafar (*Majid*) are within the Plaintiff's possession, custody or power within the meaning of GCR O.24.

8. In my view, having regard to the true nature of the relationship between the Plaintiff and Badr, as revealed by the documents produced to date in discovery and adduced in evidence in support of the Custodian Summonses, as a matter of fact the Documents are to be regarded as within the Plaintiff's power. That evidence establishes reasonable grounds to infer that there was at least an understanding between Badr and the Plaintiff that the Plaintiff would have and be given by Badr free access to all such Documents. As the authorities make plain, such an understanding is sufficient for the purpose of establishing the existence of a power in accordance with GCR O.24 without the need for the understanding to be legally binding (although a mere expectation of compliance with a request for access to and the delivery of documents is insufficient).
9. The evidence shows that Badr was actively and extensively involved in detailed discussions with Mr Naqvi, Mr Nerguizian and the Plaintiff regarding the terms of the Loans, the parties to the Loans, the arrangements for making, funding and advancing the Loans and for getting the transactions completed. He was in regular and separate contact with Mr Naqvi during the critical periods in which the Loans were being arranged (often being Mr Naqvi's first point of contact as the WhatsApp messages reveal) and Badr discussed the key terms, and settled other issues relating to the funding and advance, of the Loans. The clear inference to be drawn is that he acted with the full knowledge and approval of the Plaintiff. It is clear, particularly in view of the need for urgency in light of the serious financial crisis being faced by Mr Naqvi and Abraaj, that the Plaintiff, Mr Nerguizian and Badr were working closely together as a team to respond positively to Mr Naqvi's funding requests and that Badr was required to take the lead in dealing with and resolving particular issues. It appears that all or virtually all emails (sent or received) were either sent between or copied or forwarded to the Plaintiff, Mr Nerguizian and Badr and there is no indication or question of communications, documents or emails being kept separate or confidential as between them. Indeed to make it possible for the Jafar team to work effectively there had to be complete openness and an understanding that all documents and communications generated by any of the members of the team would be shared with or would otherwise be available to all of them. It appears that they were so shared at the time that the Loans were put in place. It is in my view inconceivable that Badr could have at that time refused to provide the Plaintiff with copies of communications and documents generated as part of and for the purpose of agreeing and making arrangements for the Loans (including copies of

the WhatsApp messages) and there is no basis for concluding that such an understanding was intended to be limited in time. I appreciate that the Plaintiff's evidence is that he has requested documents from Badr and Majid but they have declined access to their documents. However, I regard this response as representing Badr's and Majid's (understandable) unwillingness to assist the Defendants rather than as evidence of the true relationship between and understanding with the Plaintiff. I also note that Badr and Majid have not given a blanket refusal to search for and produce documents. They appear to be anxious only to have to respond to a focussed and particularised request rather than a general one.

10. This understanding that Badr would provide the Plaintiff with access to all and any Documents arose in the context of a specific business transaction. It is not simply an aspect of their normal working relationship. The fact that the Plaintiff and Badr are father and son does not of itself prevent such an understanding having been reached (as the Plaintiff accepted). The Plaintiff 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). It is reasonable to infer (and the evidence supports the conclusion) that there was an understanding that the Plaintiff would have and be given access to all and any of the Documents. This was a matter of business need. The Plaintiff might at any point (including after the Loans had been made) need to see evidence of what Badr had said and discussed with Mr Naqvi and his communications relating to the Loans.
11. I say that there was *at least* such an understanding because it seems to me that there is some evidence that the Plaintiff by conduct authorised Badr to negotiate on his behalf so that he is to be treated as having authorised Badr to disclose information and make representations on the Plaintiff's behalf, and even to agree some terms. As regards representations, it seems to me that the Plaintiff would find it difficult to distance himself from and deny responsibility for statements made by Badr to Mr Naqvi which would in law constitute representations of fact. As regards agreeing terms, I accept that the evidence shows that the Plaintiff was the main decision maker and ultimately the contractual counterparty but he appears to have discussed the proposed terms with Badr and accepted agreements made by Badr. The treasury shares are an example in point. Mr Naqvi appears to have regarded the waiver of the need for the treasury shares to be provided as having been settled in and by his conversation with Badr and the Plaintiff did not demur (and there is no suggestion that the Plaintiff challenged Badr's ability and right to seek to settle certain terms). However, I accept that there is no explicit conferral of

authority by the Plaintiff on Badr and that the informal way in which the Plaintiff and Badr (and Mr Nerguizian) operated, and the Plaintiff's position as the senior figure in the Jafar team and ultimate decision maker, makes it more challenging to conclude that the Plaintiff intended to give Badr the right to bind him to any terms. I therefore prefer to base my decision on the existence of an understanding of the requisite kind rather than a formal agency relationship.

12. Lord Falconer submitted that it was of significance that none of the cases cited by the parties involved similar facts to the present case. I accept that there is no case whose facts are on all fours with this one (in particular one in which the Court has been called on to characterise and consider the relationship between individuals as members of a family or as corporate officers conducting negotiations in their personal capacity). But the differences do not, in my view, justify the conclusion that the Documents cannot be said to be in the Plaintiff's power. Each case has to be decided on its own facts in accordance with the principles established by the authorities (interpreted having regard to their facts).
13. I have noted and taken into account the WhatsApp messages exchanged between Badr and Mr Naqvi in June 2018 regarding Badr's role in arranging the Loans. It appears that Badr played a less direct and active role in relation to the discussions in mid-2018 regarding the rescheduling of the Loans. However, to the extent that he was involved as part of the discussions and negotiations conducted by the Jafar team, it seems to me that the same understanding regarding access to documents as I have held existed at the time that the Loans were put in place at the end of 2017 is to be treated as applying (to those rescheduling discussions).
14. As regards the impact of UAE law, there are two issues. First, is the question of the nature of the relationship and the existence of any understanding or agreement between the Plaintiff and Badr (and the Plaintiff and Majid) governed by the law of the UAE? Secondly, would the Plaintiff be acting in breach of applicable UAE law if he were to seek to access Badr's (and Majid's) documents without their consent? Lord Falconer made it clear during the hearing that for the purpose of the Custodian Summonses the Plaintiff accepted that (a) even if the governing law of any issue arising was UAE law, UAE law was to be treated as the same as Cayman law and (b) the risk that compliance with any order made on the Custodian Summonses might require or result in the Plaintiff being in breach of UAE law did not need to be taken into account when the Court was deciding what order to make on the Custodian Summonses (see the transcript of day 2 of the hearing at pages 71-79, in particular pages 73 and 75).

15. In all the circumstances, having regard to the overriding objective I consider that it is appropriate (and is both necessary and proportionate) to make an order that the Documents are to be regarded as within the Plaintiff's power and therefore that Badr should be treated as one of the Plaintiff's custodians for the purpose of the Discovery Protocol in respect of those Documents. I accept that in this case, where the Plaintiff's claims are based on loans which are alleged to have been agreed orally, it is both relevant and important that documents created by or sent to someone actively and closely involved in the material discussions are discovered.
16. As I understand it, Fund IV at this stage simply seeks an order that Badr be treated as one of the Plaintiff's custodians so that the Plaintiff is required to perform his discovery obligations in relation to the Documents. No issue arises at this stage as to precisely what steps the Plaintiff must take in order to discharge those obligations. The GHF Parties have, however, also sought an order that the Plaintiff be required "*within seven days ... to request in writing that [Badr], by no later than fourteen days from the date of this Order, provide him with [the Documents].. for the purposes of discovery by Mr Jafar in the Related Proceedings.*" It seems to me that the Plaintiff's discovery obligations in respect of the Documents will involve as a starting point a letter requesting copies of the Documents and this should be sent as soon as possible. But I do not consider it appropriate at this point to make an order to that effect. The Plaintiff will need, with the benefit of advice from his legal team, to decide what steps he is required to and should take and if he fails to act appropriately additional applications for further relief, in light of the action that the Plaintiff has taken, can be made.
17. The evidence as to Majid's actions and role is much more limited than that relating to Badr. While in principle I can see that it is likely that, to the extent that Majid was performing a similar role to that of Badr, and was actively participating in discussions and negotiations (particularly with respect to the proposed 2018 rescheduling of the Loans) as a member of the Jafar team, there would be a proper basis for inferring and concluding that Majid was subject to a similar understanding with the Plaintiff as that which I have held existed in relation to Badr, I have decided that the evidence is insufficient to support such an inference.
18. I have also concluded that the evidence is insufficient to establish that the documents held on the servers of companies within the Crescent Group including Crescent Enterprises (together **Crescent**) are within the Plaintiff's power for the purpose of GCR O.24 by reason of the Plaintiff's control of Crescent or the existence of an arrangement or understanding with

Crescent under which the Plaintiff is and will be given copies of any emails in the email accounts of any person whose emails are held on the Crescent email servers. As Fund IV acknowledged in their Skeleton Argument (at [73]), Mr Southwell, the deponent on behalf of Mr Jafar, has adduced very limited evidence in relation to the operation of Crescent and the Plaintiff's role in relation to it and in my view the evidence does not clearly establish the Plaintiff's powers in relation to Crescent or the nature and extent of any practice (arrangement or understanding) pursuant to which the Plaintiff has access to and will be given copies of emails sent by and to others with Crescent email accounts. The evidence indicates that the consent of those with their own email accounts may be needed and that, at least in relation to some of the Plaintiff's other custodians with Crescent email accounts, the consent of those custodians was sought and obtained before access was given.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
30 April 2023