



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

IN THE MATTER OF AN APPLICATION UNDER GCR O.63, r.3(5)

ON THE PAPERS

JUDGMENT

The Application

1. The Joint Official Liquidators (**JOLs**) of Abraaj Investment Management Limited (**AIML**) apply by letter dated 28 March 2023 (the **Campbells Letter**) from their attorneys Campbells, pursuant to GCR O.63 r.3(5) and Practice Direction No. 1 of 2015, for leave to inspect the Court file in the proceedings with cause numbers FSD No. 150, 153, 203 of 2020 (the **Consolidated Proceedings**). In particular, the JOLs seek a copy of the settlement deed between Mr Arif Naqvi and Mr Hamid Jafar (the **Deed**). The parties to the Consolidated Proceedings are Mr Jafar, Abraaj Holdings (in Official Liquidation) (**AH**), GHF General Partner Limited (**GHF**), the GHF Group Limited (**Group**) (GHF and Group are together the **GHF Parties**) and Abraaj General Partner VIII Limited (**GP8**).
2. The application is opposed by Mr Jafar. None of the other parties to the Consolidated Proceedings have opposed the application.

3. The JOLs and Mr Jafar have confirmed that they are content for the application to be dealt with on the papers by reference to the facts, submissions and authorities referred to in the Campbells Letter and the objections set out in a letter dated 15 June 2023 from Mr Jafar's attorneys, Forbes Hare. By an email from Campbells to the Court dated 2 August 2024 and an email from Forbes Hare to the Court dated 12 August 2024, both parties confirmed that this remained their position and that there were no further developments or matters on which they wished to rely or draw to the Court's attention.

The JOLs' submissions

4. The JOLs note that the Court had ordered Mr Jafar to produce a copy of the Deed to the GHF Parties and GP8. Following such copies being delivered, the GHF Parties relied on the terms of the Deed and the Deed was adduced in evidence in relation to their application for orders relating to Mr Jafar's discovery obligations (the Deed was exhibited to an affidavit of Mr Jonathan Turner of Walkers on behalf of the GHF Parties which was not sealed on the Court file and no application for sealing was made). In particular, the GHF Parties sought an order directing Mr Jafar to write to Mr Naqvi to request that he provide documents to Mr Jafar as required by clause 16 of the Deed. I dealt with that application on the papers and summarised and referred to various provisions of the Deed, and in particular discussed the terms and effect of clause 16 of the Deed, in my written judgment dated 19 July 2022 (the *Judgment*).
5. The JOLs assert that they have a legitimate interest in seeing and receiving a copy of the Deed. They explain that Mr Jafar has filed a proof of debt in the AIML liquidation in respect of sums he claims are owed to him by reason of an alleged loan to AIML and dishonoured cheques allegedly drawn by AIML in favour of Mr Jafar. In addition, the JOLs say that one of the contingent assets of AIML may be valuable litigation (including proprietary) claims against Mr Naqvi (who is a former director of AIML) relating principally to Mr Naqvi having wrongfully transferred or caused to be transferred assets or funds of AIML. The JOLs note that, from the Judgment, it appears that by the Deed Mr Naqvi compromised and settled some of the very claims that form the basis of Mr Jafar's proof of debt in the AIML liquidation, in consideration for Mr Naqvi transferring certain assets to Mr Jafar. The Deed will therefore be relevant to the JOLs' adjudication

of Mr Jafar's proof of debt and also to the question of whether Mr Naqvi transferred to Mr Jafar assets over which AIML has a proprietary claim.

6. The JOLs note that GCR O.63, r.3(5) provides that "*The Court may give leave on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings*" and that there is no requirement to serve the application on any other party or to put any party on notice. They rely on the judgment of Sir Donald Nicholls V-C in *Dobson v Hastings* [1992] Ch 394 (where the English court considered an equivalent rule under the Rules of the Supreme Court O.63 r.4) for the proposition that the Court's discretion to grant leave is to be exercised having regard to all the circumstances. They also rely on the open justice principle and note that in *Re Sphinx* FSD 16 of 2009 (ASCJ) (unreported, 30 January 2017), Smellie CJ had reiterated that open justice was a fundamental principle of the common law, as well as being enshrined in the Cayman Islands Constitution, and had said that "*Where documents have formed part of the Court's decision-making process at a public hearing, the principle of open justice has a part to play. In those cases, if the applicant can show a legitimate interest in having access to the documents, the Court should lean in favour of allowing access to the documents in accordance with the principle of open justice.*"
7. The JOLs submit that, accordingly, it was established that where a document on the Court file (a) formed part of the Court's decision-making process and (b) the applicant had a legitimate interest in having access to it, the Court had good (and even strong) reasons for exercising its discretion by granting leave. The JOLs say that the Court should do so in this case.
8. The JOLs submit that it does not matter that the GHF Parties' application had been dealt with without a hearing. They also submit that it is clear that the Deed is no longer confidential. The Deed had entered the public domain as a result of being exhibited to Mr Turner's affidavit and having been summarised and referred to in the Judgment. The JOLs submit that exhibits form part of, and are not separate from, the affidavit itself. As A. L. Smith LJ said in the English Court of Appeal in *Re Hinchliffe* [1895] 1 Ch 117 (at page 120): "*When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in*

the affidavit.” Furthermore, as Lord Woolf MR had said, also, in the English Court of Appeal in *Barings v Coopers & Lybrand* [2000] 1 WLR 2353 (EWCA) at [52], once a document has been “*read by the judge, in or out of court, as part of his responsibility for determining what order should be made, [the document] should be regarded as being in the public domain.*”

Mr Jafar’s position

9. Forbes Hare note that the Deed contains confidentiality provisions preventing Mr Jafar from disclosing it to third parties and that Mr Jafar has a contractual obligation to resist any application for disclosure.
10. Mr Jafar does not accept that the Deed has lost its confidential characteristics as a result of it being referred to in the Judgment. Furthermore, and additionally, Mr Jafar submits that the open justice principle is not the only consideration to be taken into account by the Court. The fact that the document is subject to strict confidentiality terms was significant and should be given great weight by the Court. The need to protect the confidentiality of the document must trump the requirements of the open justice principle. Forbes Hare noted that there was no suggestion in the former Chief Justice’s judgment in *Sphinx* that the documents in respect of which inspection was sought were of a confidential nature.

Discussion and decision

11. In my view, having regard to all the circumstances, the JOLs’ application should be granted.
12. It seems to me that the JOLs’ summary of the applicable legal principles is right. They have established that they have a legitimate interest in seeing the Deed. It is clear that the Deed was referred to in an affidavit filed with the Court without any order being made for the sealing of the Court’s file to preserve the confidentiality of the Deed. It is also clear that I reviewed and discussed the terms of the Deed for the purpose of deciding the GHF Parties’ application for an order that required Mr Jafar to exercise his rights under the Deed. It was therefore reviewed for the purpose of deciding what order the Court

should make and formed part of the Court's decision making process. In my view, as a result, the Deed entered the public domain and any opposition to the JOLs' application based on the need to keep the Deed confidential and preserve its status as a confidential document is without foundation and must fail.

13. The Deed was, of course, not referred to in (or exhibited to) an affidavit filed on behalf of Mr Jafar but this does not affect the position with respect to confidentiality. The Deed must still be treated as having entered the public domain as a result of it being referred to in affidavit evidence and relied on and referred to by the Court as part of its decision making on the GHF Parties' application. Had it been thought necessary to preserve the confidentiality of the Deed and prevent it from entering the public domain, an application to seal the Court file so as to avoid the Deed being made public could have been made but was not. There is no suggestion that the GHF Parties were not at liberty to refer to the Deed or put it in evidence.
14. Nonetheless, I have taken into account Mr Jafar's position and his continuing obligations under the Deed. But he has not suggested that he will be in breach of his confidentiality obligations if the JOLs' application is granted (indeed his opposition may be seen as having been necessary to ensure that he was not in breach).



The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
12 September 2024