



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

**FSD CAUSE NO. 108 OF 2022 (IKJ)**

**IN THE MATTER OF SECTION 92 OF THE COMPANIES ACT (2022 REVISION)**

**AND IN THE MATTER OF GLOBAL CORD BLOOD CORPORATION**

**IN CHAMBERS**

**Appearances:**

Mr. David Chivers KC instructed by Ms. Fleur O’Driscoll and Mr. Alan Quigley of Forbes Hare for the Petitioner/Applicant

Mr. Victor Joffe KC instructed by Mr. David Lewis-Hall, Mr Damon Booth and Ms. Yuan Wen of Appleby (Cayman) Ltd. for the Litigation Steering Committee (“LSC”)/Respondent

**Before:** The Hon. Justice Kawaley

**Heard:** 10 August 2023

**Draft Judgment circulated:** 11 August 2023

**Judgment delivered:** 14 August 2023

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*Application for the production of documents referred to in affidavits-jurisdiction to order production in winding-up proceedings-governing principles-burden of proof for challenges to claims of privilege-balancing requirements of fairness and proportionality where production sought in relation to application to set aside a judgment under Court’s inherent jurisdiction*

**JUDGMENT****Introductory**

1. Petitioner applies by Summons dated 13 July 2023 (the “Production Summons”) for the LSC, representing the Company (which is in provisional liquidation) for the purposes of defending the Petition, to produce certain documents. The documents are sought for deployment at a hearing scheduled for 15-16 August 2023. That hearing relates to the Petitioner’s Summons dated 9 December 2022 (the “Set Aside Summons”), which seeks to set aside this Court’s Judgment dated 29 July 2022 (the “July Judgment”) on the grounds that it was procured by fraud.
2. Central to the allegation of fraud is a forged bank statement relied upon by the Company at the July 2022 hearing. It purported to show that the Company had received the consideration for the Cellenkos Transaction which involved the purported issuance of new shares and the purported failure of a resolution proposed at an Extraordinary General Meeting purportedly convened by the Petitioner which, if valid, would have changed the management of the Company. I appointed the Joint Provisional Liquidators (“JPLs”) on 22 September 2022 at an *ex parte* on notice hearing which the Company did not attend based in large part on the forgery allegation. With the takeover battle continuing on various jurisdictional fronts, the Company’s former management have undeniably provided little material assistance to the JPLs.
3. The Production Summons seeks documents which the Petitioner contends the former management should be compelled to produce because it is very material to the fair disposition of the Set Aside Summons.
4. The documents sought may be summarised as follows:
  - (a) an unredacted copy of the bank statement and translation which were exhibited to the Fourth Affirmation of Chen Bing Chuen Albert (“the “Bank Statement”);
  - (b) a copy of the email and attachment referred to in paragraph 30 of the Eighth Affirmation of Chen Bing Chuen Albert dated 23 May 2022;

- (c) a copy of the email and attachment referred to in paragraph 15 of the First Affirmation of Wu Xuan dated 23 May 2023 sending a bank statement to Chen Bing Chuen Albert (“Albert”);
- (d) a copy of an email chain between the Company and Carey Olsen sent around 16 September 2022 (which was partially redacted on the grounds of privilege) which was exhibited to the Eighth Affirmation of Albert.

### **Jurisdiction to order production**

- 5. There is no doubt that this Court must be jurisdictionally competent in some circumstances to order the production sought in the context of just and equitable winding-up proceedings. Nonetheless, a genuine dispute as to the precise parameters of that jurisdiction was raised through careful argument.
- 6. Mr Chivers KC for the Applicant ultimately argued that although there was no express provision in the Companies Winding Up Rules (“CWR”) corresponding to Grand Court Rules (“GCR”) Order 24, rule 10, the Court could use its general discovery powers applying the same principles by analogy in circumstances similar to ordinary civil litigation. Mr Joffe KC insisted that this Court could not use its inherent jurisdiction to fill a gap in the CWR. But if it could order the production sought, GCR Order 24, rule 14 should be the touchstone and the Order sought should not be granted *“unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.”*
- 7. GCR Order 24, rule 12 does not apply to winding-up proceedings. CWR Order 3, rule 12 (1) provides that on the hearing of the summons for directions in contributory winding-up proceedings:  
  
*“...the Court shall give such directions as it thinks appropriate in respect of the followings matters —... (i) discovery and inspection of documents...”*
- 8. That express power to give such directions as the Court considers appropriate for discovery can only sensibly be understood as conferring jurisdiction to order general or specific discovery, or none at all. While the Court is required to consider matters such as discovery at the summons for directions stage, I am satisfied that by necessary implication, discovery orders can validly be made

at any stage of a winding-up proceeding under this rule. There is no express power corresponding to GCR Order 24, rule 10:

*“Inspection of documents referred to in pleadings and affidavits (O.24, r.10)*

*10. (1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring that party to produce that document for the inspection of the party giving the notice and to permit the party to take copies thereof.*

*(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as the party does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents the party objects to produce and on what grounds.”*

9. Nor is there an expression provision dealing with production pursuant to GCR Order 24, rules 10-11, although the following provisions in GCR Order 24, rule 14 are potentially more pertinent:

*“(1) No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.” [Emphasis added]*

10. Mr Joffe KC rightly contested the propriety of the Petitioner’s purported reliance on the Court’s inherent jurisdiction in a way which was inconsistent with the CWR:

*“7. The alternative basis in the Production Summons invokes the court’s inherent jurisdiction but that likewise must be rejected. The precise scope and wording of a power analogous to the GCR provision was never articulated by the Petitioner. In reality, the Petitioner is suggesting that the same power exists under the court’s inherent jurisdiction which, with respect, must be wrong.*

8. **First**, it is wrong in principle to use the inherent jurisdiction to expand or merge a set of civil procedure rules with procedural rules contained in bespoke and specialist areas of practice:

8.1 It is settled as a matter of principle that the inherent jurisdiction is unavailable where it is inconsistent with the civil procedural rules. The rationale is clear: it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: **Texan Management Ltd v Pacific Elec. Wire & Cable Co. Ltd** [2009] UKPC 46 at §57 per Lord Collins ....

8.2 Although the inherent jurisdiction may supplement the rules of court, it cannot be used to lay down procedure which is contrary or inconsistent with them, and therefore where the subject matter of an application is governed by the civil procedure rules it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction: **Texan Management Ltd** at §57 ....

9. **Second** and as a corollary of the above, our courts have repeatedly recognised that in the absence of express power in the CWR the court cannot, on the basis of exercising its inherent jurisdiction, create that power. To do otherwise would be to “vary the scheme for the winding up of companies in this jurisdiction laid down by the Winding Up Rules”: **HSH Cayman I GP Limited v ABN Amro Bank NV London Branch** [2010 (1) CILR 114] at §27 . This is because any such analogous power would be inconsistent with the overall scheme of the CWR which subjects the process of discovery and inspection of documents to that of a directions hearing under Order 3, rule 12(1) CWR. Any discovery and inspection of documents would, therefore, turn on whether it is necessary and relevant for the fair disposal of the petition for just and equitable winding up. That narrow power of discovery is sufficient for the statutory objective. It would be contrary to principle and precedent to allow an alternative discovery regime to co-exist with that which is expressly stated under the CWR.”

11. As I observed in the course of argument, one of the interesting aspects of advocacy is that counsel frequently find themselves taking different positions on similar legal points in different proceedings. In the present case, Mr Chivers KC sought to persuade me to use the Court's inherent

jurisdiction to apply a statutory rule which did not directly apply “*by analogy*”. In *Singularis Holdings Limited-v-PricewaterhouseCoopers* [2014] UKPC 46, he succeeded in persuading the Privy Council that applying a statute by analogy where it did not actually apply was impermissible. This prompted Lord Collins to trenchantly observe that such an approach was “*wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional.*” Context, of course, is everything. And Mr Joffe KC was in my judgment correct to fundamentally argue that the Court cannot use its inherent jurisdiction to simply apply provisions of the GCR which do not apply to winding-up proceedings “*as if*” they did apply, particularly since the CWR selectively decided to formally apply certain aspects of the GCR.

12. The only express jurisdiction conferred by the CWR to order discovery is under CWR Order 3 rule 12(1)(i). The question is what principles should inform this broad discretionary power? In my judgment under the GCR, the broad assumption is that discovery will be the norm and a comprehensive code is set out for dealing with various situations likely to arise, including specific discovery generally and the production of documents referred to in pleadings and affidavits. As far as GCR Order 24, rule 10 is concerned, there is in practice a starting assumption that any document referred to should be produced because litigants have an unfettered right to serve a notice calling for production. The same assumption cannot possibly apply in the winding-up context where no corresponding right to seek production exists under the CWR. After all, liquidators often file affidavits exhibiting confidential reports; creditors appealing against the rejection of their proofs may often file affidavits referring to commercially sensitive material. Winding-up proceedings, certainly before a winding-up order is made, do not generally determine substantive legal right. I therefore reject Mr Chivers KC’s tempting submission to simply hold that where the winding-up proceedings are akin to ordinary civil litigation, the GCR Order 24, rule 10 approach should be followed.
13. The specific jurisdiction which is conferred by the CWR is a broad jurisdiction to make discovery-related orders to the extent the Court considers it appropriate. That jurisdiction is more similar to the specific GCR rule upon which Mr Joffe KC relied, by way of fall-back if his ambitious primary submission that no jurisdiction existed at all was rejected. GCR Order 24, rule 14 (1) in slightly more particularised terms articulates the overarching discretionary considerations which apply to the exercise of “*any of the aforementioned*” discovery-related powers including, *inter alia*:

- (a) an order for general discovery (rule 3);
  - (b) an order for specific discovery (rule 7); and
  - (c) an order for the production of documents referred to in pleadings or affidavits (rules 10-12).
14. Having found that CWR Order 3, rule 12 (1) (i) confers a power to order general or specific discovery, there is clearly potential correspondence between the jurisdiction this Court would exercise in proceedings governed by the CWR. Whether that potential is realised will depend on the facts of each case. And where the procedural context which arises in a winding-up proceeding is indistinguishable from that in civil proceedings to which the GCR applies, it will almost invariably be because a general or specific discovery order is sought under CWR Order 3, rule 12 (1) (i). What this Court would do under GCR Order 24, rule 10 (as read with GCR Order 24, rule 14(1)) cannot serve as a useful or valid guide to the approach under the CWR, because there is no corresponding jurisdiction. It would be wrong to apply the practice under Order 24, rule 10 in the CWR context “as if” it applied because (a) it does not apply, and (b) no corresponding jurisdiction exists under the CWR.
15. This Court clearly has jurisdiction to compel the production of the documents sought but there is no starting assumption that production should be ordered because they are referred to in affidavits, unless (in effect) the respondent raises an issue as to the appropriateness of the request. In seeking to decide how to exercise the CWR discovery jurisdiction in relation to contributories’ petitions and to determine when it is appropriate to make a general or specific discovery order:
- (a) the corresponding jurisdiction under the GCR requires regard to (1) the fair disposal of the proceeding and (2) saving costs. This is clearly a more particularised way of expressing when it will be “appropriate” to make a discovery order;
  - (b) where a discovery application is made under the CWR in circumstances which are procedurally similar to circumstances which would arise under the GCR, the practice under the GCR Order 24, rule 14(1) will be analogous and highly persuasive as to the approach which should be adopted in the winding-up context;

(c) the practice under the GCR will not be dispositive because the CWR discovery jurisdiction is expressed in more open-ended terms. However, where there is no material distinction between the winding-up jurisdiction and the general civil jurisdiction, it will generally be desirable for legal clarity and consistency that the same procedural approach is adopted in each jurisdictional context.

16. In the present case where the production order is sought in relation to an application to set aside a judgment on the grounds that it was obtained by fraud, this is quintessentially a generic civil issue not coloured in any material way by the fact that it arises in the context of winding-up proceedings. This Court should obviously approach the application in essentially the same way it would when dealing with a comparable application for specific discovery under the GCR.

#### **The wider context: the Set Aside Summons**

17. The merits of the Production Summons can only properly be evaluated in light of the wider context in which it is made. The Petitioner seeks the relevant production on the grounds that the material is needed for the fair disposal of the Set Aside Summons. Its Skeleton Argument for that forthcoming hearing critically describes the main issue for the Court's determination as follows:

*“45. The Petitioner asks that the Court set aside (or review) the July Judgment. No sealed order was made and hence the Court has a complete (albeit judicial) discretion in that respect. The Petitioner does not need to show that the order (because there was none) is interlocutory subject to an express or implied liberty to apply, or that the Judgement was tainted by fraud, although both of these tests could, if necessary, be satisfied as set out below.”*

18. The LSC's Skeleton for the Set Aside Application characterises the main issue for that hearing as follows:

*“29. In the premises, the LSC respectfully submits that given the way the Petitioner itself has pitched its case, the application to set aside the July Judgment must be adjourned to trial so that witness evidence can be properly explored and, where appropriate, challenged.*



30. That is *particularly* so when it is not only the Company's previous evidence (by, *inter alios*, Albert) which is being alleged to be dishonest, misleading and fraudulent, but when there are also very serious allegations going the *other way* in the LSC's evidence in opposition to the Set Aside Summons, particularly regarding the provenance of the Guangfa Statement."

19. The Set Aside Summons itself (which anticipated a 2-day long hearing) seeks the following relief in relation to the July Judgment:

*"1. That the Judgment made by this Honourable Court on 29 July 2022 (the 'July Judgment') be set aside pursuant to the Court's inherent jurisdiction."*

20. Accordingly, on the face of the Summons itself the Petitioner does not seek to set aside the July Judgment on the sole grounds of fraud.
21. This provides further general support for Mr Joffe KC's broad submission at the hearing of the Production Summons that the outstanding evidence sought is only arguably "necessary" (if at all) for the purposes of cross-examination at trial.
22. Against this background, the merits of the application can be dealt with shortly.

### **The merits of the Production Summons**

#### **(1) Unredacted copy of the Guangfa Bank Statement**

23. The Petitioner was clearly entitled to an Order requiring the production of an unredacted copy of the bank statement which the LSC admits had been forged. In the event, the JPLs obtained a copy a few weeks before the hearing and made it available to the parties. I see no need to make an Order, but the Petitioner was clearly in principle entitled to one at this stage.

**(2) Email and attachment referred to in paragraph 30 of the Eighth Affirmation of Albert**

24. The production request sought an electronic copy of the email Albert says he received during preparations for the July 2022 hearing which attached the Bank Statement. He now says he cannot retrieve the email. The request was based on the premise that GCR Order 24, rule 10 applies by analogy. The LSC says the application should be refused because the Court should accept that the deponent cannot produce the email. Alternatively, it is not necessary for it to be produced at this stage in advance of the presently scheduled Set Aside Application.
25. The deponent's averments that it is not possible for him to locate the email are unsatisfactory on their face. However, I find that the Petitioner has not shown that it is necessary for production to be ordered at this stage because the material would only credibly be required to be deployed in cross-examination at trial. The Petitioner's primary case at the hearing of the Set Aside Summons is that cross-examination is not required. The application is adjourned with liberty restore.

**(3) Email and attachment referred to in paragraph 15 of the First Affirmation of Wu Xuan**

26. This request is for the electronic record of the email Ms Wu sent to Albert attaching the Bank Statement. For same reasons as set out in relation request (2), I adjourn this application with liberty to restore.

**(4) Email chain between the Company and Carey Olsen sent around 16 September 2022 (which was partially redacted on the grounds of privilege) which was exhibited to the Eighth Affirmation of Albert**

27. This email relating in part to instructions from Carey Olsen in relation to the *ex parte* application on notice to appoint the JPLs is said to be likely to confirm or undermine Albert's explanation as to why he chose not to explain the Bank Statement sooner than he did. The redactions are not satisfactorily explained but I cannot summarily determine that privilege has been improperly claimed. If privilege were to be held to be waived, this would require a further hearing in relation to a matter which could only seriously be material for cross-examination at trial. The Petitioner's primary case is that the impugned Judgment can be set aside without such cross-examination at all. I adjourn this limb of the relief sought generally with liberty to restore.

**Conclusion**

28. The Court has jurisdiction to compel the production of the specific documents sought under CWR Order 3, rule 12(1)(i) where the Court is of the view that this is appropriate. An applicant must generally show that the production sought is necessary for fair disposal of the relevant application or to save costs, the corresponding test under GCR Order 24, rule 14 (1).
29. The Petitioner was entitled to an Order in respect of the first of the four production items, but no Order is required because, thanks to the JPLs, it has now been produced. All other heads of relief are adjourned with liberty to restore, if needed after the Set Aside Summons has been determined.
30. I will hear counsel on the terms of the Order and costs which should probably be reserved.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**