

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

3 Cause No.: FSD 107 of 2019 (RMJ)

4
5 IN THE MATTER OF ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN PROVISIONAL
6 LIQUIDATION AND OFFICIAL LIQUIDATION FROM 11 SEPTEMBER 2019)
7 AND IN THE MATTER OF A DIRECTOR'S SERVICES DEED BETWEEN ABRAAJ

8 INVESTMENT MANAGEMENT LIMITED, MARK SKELTON AND OTHERS

9 BETWEEN: MARK SKELTON PLAINTIFF

10

11 AND: ABRAAJ INVESTMENT MANAGEMENT DEFENDANT

12 LIMITED (IN PROVISIONAL LIQUIDATION AND OFFICIAL
13 LIQUIDATION FROM 11 SEPTEMBER 2019)

14 IN OPEN COURT

15 **Appearances:** Mr. Richard Morgan Q.C instructed by Ms. Cherry Bridges of Ritch
16 & Conolly for Mr. Mark Skelton, Director of IGC General Partner
17 Limited

18
19 Mr. Guy Manning and Mr. Hamid Khanbhai of Campbells for
20 ABRAAJ Investment Management Limited (In Provisional Official
21 Liquidation as at the date of the hearing and in Official Liquidation as
22 at 11 September 2019)

23

24
25 **Before:** The Hon. Justice Robin McMillan

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27 **Heard:** 19, 20, 21 August 2019

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29 **Draft**

30 **Judgment:** 26 September 2019

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32 **Judgment**

33 **Delivered:** 14 October 2019



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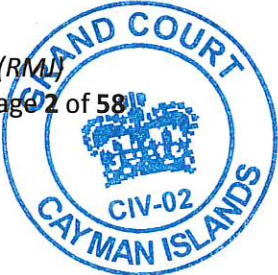
HEADNOTE

The applicable principles of contractual interpretation – The need to protect confidential information belonging to third parties –The law of contract and the law of agency distinguished.

JUDGMENT

Introduction

1. This matter arises from an Originating Summons dated 17 June 2019.
2. The Application is brought by Mr. Mark Skelton (“the Plaintiff”) (“the Conflict Director”) of IGCF General Partner Limited (“IGCF GP”) which is the General Partner of The Infrastructure and Growth Capital Fund L.P (“IGCF”, “the Fund”). The Application is brought against ABRAAJ Investment Management Limited (“AIML”) (“the Defendant”). At the time of the hearing of this matter AIML was in provisional liquidation. As result of an unrelated Order of the Court made on 11 September 2019, AIML is now in Official Liquidation.
3. As described by the Plaintiff at paragraph 19 of his Skeleton Argument dated 8 August 2019, the Plaintiff seeks production from AIML of IGCF GP’s and the Fund’s documents and information concerning what can be conveniently described as AIML’s ultimate management of both of these entities.
4. The Plaintiff asserts that the relief sought turns on the construction of a Director Services Deed (“the DSD”) which the Plaintiff as Director of IGCF GP had entered into with AIML, dated 17 September 2018.



1 5. Under Clause 17.8 of the DSD the Deed is governed by and shall be construed in
2 accordance with the laws of the Cayman Islands and the parties submit to the exclusive
3 jurisdiction of the Courts of the Cayman Islands.

4 6. The Originating Summons seeks the following relief:

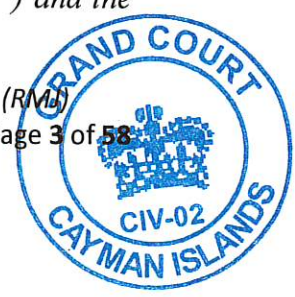
5 *“By this Summons, which is issued on the application of Mark Skelton of Duff & Phelps*
6 *Limited, The Shard, 32 London Bridge Street, London SE1 9SG, United Kingdom, the*
7 *Plaintiff claims against the Defendant Orders (i) that the Defendant do within fourteen*
8 *(14) days produce to the Plaintiff for inspection and copying all documents held by the*
9 *Defendant, whether in physical or electronic form, containing any information relating to*
10 *the property, business or affairs of IGCF General Partner Limited and/or the*
11 *Infrastructure and Growth Capital Fund L.P. in the period since 1 January 2006 and (ii)*
12 *all such other orders, directors or relief as may be necessary or appropriate to make*
13 *such Orders effective or (ii) such further or other Orders as may seem just or appropriate*
14 *on the grounds that the Plaintiff is entitled to the same pursuant to the terms of a*
15 *Director Services Deed executed by, amongst others, the Plaintiff and the Defendant in*
16 *September 2018.”*

17 7. In reply the Defendant has filed the following Notice dated 30 July 2019:

18 *“Notice Under O.28 r. 3(3)*

19 *Pursuant to GCR Order 28 rule 3(3), the Defendant hereby gives notice that, on the*
20 *hearing of the Originating Summons dated 17 June 2019 filed by the Plaintiff, the*
21 *Defendant will seek declarations and orders that:*

- 22 1. *the Plaintiff is not entitled pursuant to clause 4 of the Director Services Deed*
23 *dated 17 September 2018 (the “DSD”) (or otherwise) to receive information from*
24 *the Defendant in respect of which the Defendant owes a duty of confidence to any*
25 *third party other than IGCF General Partner Limited (the “IGCF GP”) and the*



1 *Infrastructure and Growth Capital Fund L.P. (“IGCF”) (“Confidential*
2 *Information”);*

3 2. *in complying with its obligations to provide information to the Plaintiff under*
4 *clause 4 of the DSD, the Defendant (acting by its provisional or if applicable*
5 *official liquidators) is entitled to search for and review documents in its*
6 *possession concerning the business, assets and affairs of the IGCF GP and IGCF,*
7 *to redact any Confidential Information from such documents prior to providing*
8 *copies of them to the Plaintiff, and to obtain legal advice in that regard (the*
9 *“Review and Redaction Process”);*

10 3. *within the meaning and subject to the terms of clause 4.4 of the DSD, the*
11 *reasonable costs incurred by the Defendant’s attorneys, provisional liquidators*
12 *and (if applicable) official liquidators in connection with the Review and*
13 *Redaction Process comprise costs incurred by the Defendant in complying with*
14 *its obligations under the DSD; and*

15 4. *(a) within the meaning and subject to the terms of clause 4.4 of the DSD, the*
16 *reasonable costs incurred by the Defendant’s attorneys, provisional liquidators*
17 *and (if applicable) official liquidators in connection with these proceedings*
18 *comprise costs incurred by the Defendant in complying with its obligations under*
19 *the DSD; or alternatively*

20 *(b) the Plaintiff shall pay the Defendant’s cost of these proceedings.”*

21 8. In relation to paragraph 4 of the Notice, the Defendant now relies only on sub-paragraph
22 4 (b), IGCF not being before the Court as a party.

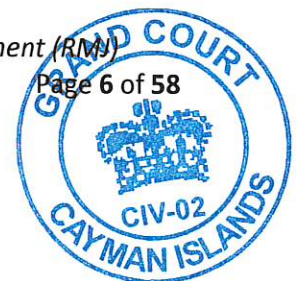
23 **The Abraaj Group**



- 1 9. At this preliminary point it is helpful briefly to summarize the context of the Plaintiff's
2 Application and of the Defendant's Notice.
- 3 10. The Abraaj group of companies ("Abraaj Group") is a collection of private equity funds.
4 Its holding company is Abraaj Holdings ("AH"), which is now in official liquidation in
5 FSD 95 of 2018 (RMJ). The Defendant acted as investment manager to over 40 private
6 equity funds in the Abraaj Group, with over 600 limited partners. AIML (acting now by
7 its Joint Official Liquidators ("JOLs")) continues to act as manager to certain funds.
- 8 11. Historically, throughout its management of those funds, AIML did not clearly segregate
9 information relating to one fund from another. This lack of segregation, for example,
10 resulted not only in documents relating to different funds being located in the same place
11 on a computer server, but also, to various documents containing information relating to
12 different funds. Since their appointment, by Order of Mr Justice McMillan dated 18 June
13 2018, the JPLs and now the JOLs of AIML have in part been engaged in collecting and
14 processing data relating to the many funds that AIML managed, for the purpose of
15 investigating the financial affairs of AIML and AIML's relationship with those funds.
16 This has included investigation of the flow of monies between AIML and the funds it
17 managed.
- 18 12. One fund within the Abraaj Group is the fund in this matter. The Plaintiff has been
19 appointed as a Conflict Director of IGCF GP, which is the general partner of the Fund.
20 As we have seen, the Conflict Director's appointment was made pursuant to the DSD to
21 which, amongst other persons, the Conflict Director and AIML were parties.
- 22 13. Under the DSD, the Conflict Director was given authority by the IGCF GP and the Fund
23 to represent them on the Liquidation Committee of AIML and in the liquidation
24 proceeding of AIML. In addition, the Conflict Director was given authority to pursue
25 "Conflict Claims". A Conflict Claim was defined in broad terms as a claim against
26 AIML, AIML Affiliates (as defined), as well as certain other persons.



- 1 14. Under the DSD, the Conflict Director also has a contractual right to copies of information
2 or documents available to AIML which relate to IGCF GP and/or the Fund. This
3 Originating Summons turns solely on the contractual rights and obligations that arise in
4 connection with the Conflict Director's right to information from AIML under the terms
5 of the DSD. The issues that arise are questions of the legal interpretation of the DSD.
- 6 15. By way of amplification, it should be stated that the Fund was organised pursuant to a
7 Restated Deed of Limited Partnership dated 30 September 2007 ("the LPD"). The Fund
8 was set up in 2006 within the Abraaj Group and was meant to have its funding resources
9 held in segregated accounts.
- 10 16. However, from a review of the available material, it also then became apparent that, prior
11 to the appointment of the JPLs, AIML had failed to segregate either the assets of the
12 Fund or information relating to its business or affairs, proper and complete books and
13 records had not been maintained and assets had been appropriated by AIML and/or
14 Abraaj Holdings ("AH") (AIML's parent company) for their own or unrelated use within
15 the Abraaj Group. The position adopted by the JPLs in relation to this improper
16 intermingling was that it prevented them from permitting the Plaintiff to access any
17 information unless and until it had been reviewed by them at the Fund's expense and all
18 information not obviously and directly relating to the IGCF GP or the Fund had been
19 redacted (defined by the JPLs as a "Confidentiality Review").
- 20 17. Continuing with the general overview, it is the case that AIML has since 2006 acted as
21 the agent of the IGCP GP in administering the Fund under the terms of an Investment
22 Management Agreement ("the IMA"). The IMA is governed by and to be construed in
23 accordance with the laws of England and is subject to the exclusive jurisdiction of the
24 courts of England.
- 25 18. In addition to its general duties as an agent to produce to its principal on request all
26 books, correspondence, emails and other electronic material under its control relating to



1 the affairs of the Fund and the IGCP GP, the Plaintiff contends that AIML also expressly
2 agreed to provide the IGCF GP specific documentation and “*such further information as*
3 *might reasonably be requested from time to time*” (clause 9.2.7 of the IMA). The Plaintiff
4 contends that AIML was not entitled to any additional payment to fulfil these obligations.

5 19. Following AIML going into provisional liquidation on 18 June 2018, its JPLs decided to
6 appoint the Plaintiff as a director of IGCF GP. Accordingly the Plaintiff and AIML (and
7 others) entered into the DSD pursuant to which, amongst other things, AIML contracted
8 to provide the Plaintiff with access to books and records and all information available to
9 AIML concerning the business, assets and affairs of the IGCF GP and the Fund (clauses
10 4.1 and 4.2 of the DSD), subject to payment of any reasonable costs incurred by AIML,
11 in complying with its obligations under the DSD (clause 4.4). As indicated above, the
12 issues raised by the Originating Summons turn on the construction of the DSD and
13 correspondingly, so do those raised by the Defendant’s Notice.

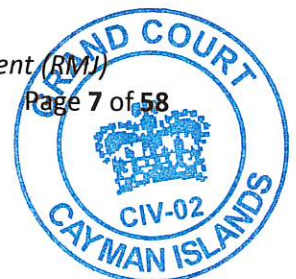
14 20. When, from September 2018, the Plaintiff initially sought access to information and
15 production of documents from AIML, it became apparent to him that he had been
16 provided with only a limited data set thus far.

17 **The Director Services Deed**

18 21. The construction of Clause 4 of the DSD is of course critical to the resolution of this
19 dispute. It is therefore both appropriate and necessary that it be set out in full and as
20 follows:

21 “4. *Information*

22 4.1 *the Conflict Director shall have an unrestricted right of access to all of the*
23 *Company’s and the Fund’s books and records, whether maintained by the*
24 *Company, AIML, an AIML Affiliate or otherwise.*



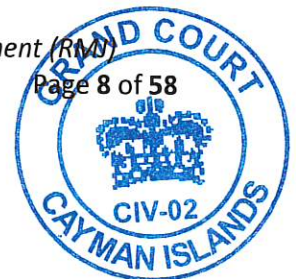
1 4.2 *The Company and/or AIML will promptly provide or procure the*
2 *provision to the Conflict Director of all information available to them*
3 *concerning the business, assets and affairs of the Company and the Fund*
4 *and will confirm to the Conflict Director whether they consider the*
5 *information provided to be accurate and complete in all material respects*
6 *at the time it is provided. Without limiting the generality of the foregoing,*
7 *the Company and/or AIML shall promptly provide to the Conflict*
8 *Director, or cause there to be provided to the Conflict Director, the*
9 *following information available to them:*

10 (i) *copies of all documentation relating to the Company and the Fund,*
11 *including contracts with service providers, valuation policies,*
12 *information provided to shareholders of the Company and limited*
13 *partners of the Fund (including marketing materials, performance*
14 *reports and financial information) and periodic unaudited and*
15 *audited financial reports;*

16 (b) *reasonable notice of all Board meetings, all relevant agendas and*
17 *supporting documents for such meetings, and minutes of such*
18 *meetings;*

19 (c) *properly certified or authenticated copies of the Company*
20 *Documents and all amendments and supplements thereto, and of*
21 *such resolutions, minutes, votes and other proceedings as may be*
22 *necessary or relevant to D&P or the Conflict Director for the*
23 *purposes of this Deed; and*

24 (d) *upon completion of such work, any forensic report prepared by the*
25 *AIML PLs regarding any claims or potential claims the Fund*
26 *and/or the Company may have against any entity or individual and*



1 *any underlying data relied upon to prepare the forensic report; for*
2 *the avoidance of doubt, the Conflict Director shall be authorized*
3 *by the AIML PLs, though not required by this Deed, to share such*
4 *forensic report and underlying data with the Advisory Board.*

5 4.3 *In addition, the Company and/or AIML will promptly correct any information so*
6 *provided to the Conflict Director if it subsequently appears that any such*
7 *information was or has become inaccurate or misleading in any respect. The*
8 *Company and AIML understand that the Conflict Director and D&P shall not be*
9 *liable for any inaccuracies therein.*

10 4.4 *Any reasonable costs incurred by the Company and/or AIML in complying with*
11 *their respective obligations arising under this Deed shall be paid by the Fund;*
12 *provided, however, that (a) the payment of such costs from any entity, including*
13 *Abraaj Holdings, AIML or any of their affiliates, (b) any costs of AIML or the*
14 *Company that are paid by the Fund shall be offset and deducted from any*
15 *amounts owing at any time by time by Fund to AIML under the Investment*
16 *Management Agreement or to the Company under the Partnership Agreement, as*
17 *applicable, (c) for the avoidance of doubt, the AIML PLs' costs of conducting an*
18 *independent forensic investigation relating to the Fund shall not be paid or*
19 *reimbursed out of the assets of the Fund unless otherwise agreed in writing with*
20 *the Advisory Board, and (d) in the event that the assets of the Fund are*
21 *inadequate to pay the costs incurred by AIML in full, the Company shall not be*
22 *personally liable for payment of any outstanding amount arising out of this clause*
23 *4.4.*

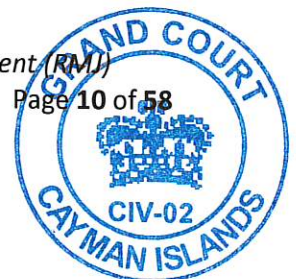
24 4.5 *As regards the costs incurred by AIML which are to be paid by the Fund pursuant*
25 *to clause 4.4 above:*



- 1 (a) AIML shall provide the Company with a breakdown of its costs incurred in
2 complying with its obligations arising under this deed on a monthly basis
3 for review and approval by the Conflict Director such approval not to be
4 unreasonably withheld;
- 5 (b) It shall be a condition of approval of any cost item exceeding a value of
6 US\$25,000 in any given month that AIML shall have (a) notified the
7 Conflict Director of its intention to incur costs in relation to the relevant
8 item in advance of those costs being incurred and (b) if requested by the
9 Conflict Director, AIML and the Conflict Director shall have entered into
10 good faith discussions to agree the necessity of the proposed expenditure
11 prior to AIML incurring the costs in question;
- 12 (c) The Conflict Director shall within 15 days of receipt of any breakdown
13 provided pursuant to clause 4.5 (a) confirm to AIML whether its costs are
14 approved and, where they are not approved in full, clearly identify the
15 costs which are not approved and provide a clear and detailed
16 explanation as to why such costs have not been approved;
- 17 (d) AIML shall have the right to respond to the Conflict Director in respect of
18 any unapproved costs and AIML and the Conflict Director agrees to enter
19 into good faith discussions to resolve any dispute which may arise
20 between the parties in respect of such costs;
- 21 (e) Subject to the provisions of clause 4.4, any costs approved by the Conflict
22 Director shall be paid to AIML within 30 days of approval.”

23 **The Affidavit Evidence**

24 22. The First Affidavit of Mark Skelton the Plaintiff is dated 17 June 2019. It consists of 144
25 paragraphs together with Exhibits. In light of the relatively contained issues for



1 adjudication by the Court, it is perhaps somewhat longer and more diffuse than
2 necessary, although it is no doubt intended to be as comprehensive and complete as
3 possible.

4 23. Mr. Skelton is a Managing Director of Duff & Phelps Limited in London and he belongs
5 to its Global Restructuring advisory practice. He is also a Chartered Accountant and a
6 UK Insolvency Practitioner with over 20 years' experience in debt advisory work and
7 restructuring.

8 24. He explains that he is the Conflict Director of IGCF GP, which in turn is the general
9 partner of the Fund. He then explains at paragraph 7 that he is "*contractually entitled*" to
10 the production of documents and other information relating to the operation of the Fund
11 by the Defendant.

12 25. Mr Skelton then describes the following background to the Fund and its working
13 arrangements at paragraphs 9-12:

14 *"B. Background to the present application and the circumstances of my appointment*
15 *Conflict Director of the GP*

16 *The Fund*

17 9. *The Fund was launched by the Abraaj Group, with Deutsche Bank and Ithmaar*
18 *Bank as sponsors, during Q4 2006. Focus was on investments in the Middle East,*
19 *North Africa and South Asia, split into primary and secondary focus countries,*
20 *with a further focus on specific business sectors, as set out at Schedule 1 to LPD.*
21 *The Fund had a target capitalisation of USD 2 billion, with no single investment*
22 *to be more than USD 300 million.*

23 10. *Although reference will be made to the LPD for its full terms and effect, core*
24 *terms included requirements that:*



- 1 10.1 *The Fund's funds be kept in accounts in the Fund's name, in respect of*
2 *which (i) the Fund be the sole designated beneficiary; and (ii) the funds*
3 *therein be used only for the purposes of the Fund (clause 5.11);*
- 4 10.2 *The Fund make Investments in accordance with the principles of Shari'a*
5 *and the Investment Objectives and Policy as more particularly set out in*
6 *Schedule 1 to the LPD (clause 2.5). Schedule 1 to the LPD identified the*
7 *three types of Investment opportunities that would be targeted as being (in*
8 *broad outline): investments in a Portfolio Company or an SPV, Shari'a*
9 *compliant equity securities, and other ownership interests (clause 1);*
- 10 10.3 *The GP should only make Investments in accordance with the Investment*
11 *Objectives and Policy unless it received the unanimous consent of the*
12 *Advisory Board (clause 5.4);*
- 13 10.4 *The Fund should not make new Investment after the end of the*
14 *Commitment Period (clause 5.3);*
- 15 10.5 *The GP should not raise finance or withdraw any funds or securities from*
16 *the Fund, except as expressly permitted by the LPD (clause 5.6). Despite*
17 *this restriction, due to both the way that AIML owed the Fund USD 426*
18 *million and at times the Fund appeared to have borrowed money from*
19 *AIML of up to USD 212 million. I discuss these matters in further detail in*
20 *later sections of this Affidavit;*
- 21 10.6 *Whilst operational, the GP should provide reports and information*
22 *regarding the Fund and its Investments prepared in accordance with the*
23 *European Private Equity and Venture Capital Association guidelines for*
24 *private equity funds from time to time (clause 9.3). The guiding principles*
25 *underpinning are guidelines that the information provided to investors*
26 *should be relevant, transparent, consistent and accurate; and*



1 10.7 *The Fund should target exit opportunities within five to seven years of*
2 *making an Investment and was not permitted to make new Investments*
3 *after the end of the Commitment Period (Schedule 1)."*

4 26. He then describes at paragraphs 13-17 how he came to be appointed:

5 *"Provisional Liquidation of AIML and appointment of Advisory Board*

6 13. *As the Court will be well aware, following presentation of a winding up petition*
7 *against AH, Joint Provisional Liquidators were appointed to both AH and AIML*
8 *on 18 June 2018 amidst allegations of substantial debts and mismanagement.*
9 *Stuart Sybersma and David Soden were appointed as the JPLs. Their appointment*
10 *by the Court was made on the basis that AIML was, or was likely to become,*
11 *unable to pay its debts within the meaning of section 93 of the Companies Law,*
12 *and that AIML intended to present a compromise or arrangement to its creditors.*

13 14. *By clause 6 of the LPD, AIML, as Fund Manager, was meant to have appointed*
14 *an Advisory Board, but to my knowledge, none had ever been constituted.*
15 *Following their appointment, the JPLs decided to appoint a number of the*
16 *Limited Partners ("LPs") to a newly constituted Advisory Board to, inter alia,*
17 *review conflicts of interest that may have arisen between the GP and/or AIML*
18 *(including funds managed or advised by AIML and/or the Fund. (The directors of*
19 *the GP subsequent to the appointment of the JPLs were: Tim Derksen of Deloitte*
20 *(the JPLs);*

21 *ADV 2 Limited (a Cayman company used within the Abraaj Group as a corporate*
22 *director); and Fatima Ameeri of Ithmaar Bank).*

23 15. *The Advisory Board, once constituted, determined that, in light of the perceived*
24 *conflicts with AIML's role as Fund Manager, it was appropriate for someone to*
25 *undertake an independent investigation into the Fund's assets and liabilities, and*



1 to determine whether the Fund might have any potential claims against Abraaj
2 entities or other third parties. In due course I was appointed as that person, in the
3 role of “Conflict Director” of the GP.

4 16. As part of my appointment, legal counsel negotiated on my behalf the terms under
5 which I was to be appointed to the GP’s board for the purpose of conducting this
6 investigation, pursuing any claims that arose out of the investigation, undertaking
7 certain other administrative functions with respect to the Fund and the GP, and
8 otherwise administering the affairs of the Fund. Those negotiations took place
9 between me, the JPLs and Ithmaar Bank (who were the holder of 24.5 percent of
10 the GP). Ultimately, those negotiations culminated in the terms of the DSD.
11 Morgan, Lewis & Bockius (“MLB”) and Ritch & Conolly advised the Advisory
12 Board in relation to the DSD, and the two firms were later retained separately by
13 me, in my role as Conflict Director, to assist with my mandate as contemplated
14 and authorised under the DSD.

15 17. The DSD was signed by the JPLs on behalf of AIML, and was signed by the GP,
16 the Fund and me. Accordingly, on 17 September 2018, I was appointed as the
17 Conflict Director of the GP by the GP’s board of directors, with consent of the
18 Advisory Board.”

19 27. It is extremely important to note that at the time of executing the DSD Mr. Skelton was
20 aware that the Abraaj Group was in difficulty and severely short of cash.

21 28. He explains at paragraph 11:

22 “11. Pursuant to the terms of the LPD (clause 5.1 (b)), the GP delegated its powers
23 and authority under the LPD to AIML, to which end the GP entered into the IMA with
24 AIML. Whilst it will be referred to for its full terms and effect, the IMA provided, amongst
25 other things, that:



1 11.1 *AIML was appointed as Agent for the GP to manage the assets of the Fund with*
2 *discretionary investment authority in accordance with the terms of the IMA and*
3 *the LPD (clause 3.2);*

4 11.2 *AIML was under a general duty to perform:*

5 11.2.1 *all fiduciary, investment and asset management (including administrative)*
6 *activities for and on behalf of the Fund;*

7 11.2.2 *all administrative functions for the Fund, which included the performance*
8 *of accounting, local administration, company secretarial and cash*
9 *management functions (clause 3.3);*

10 11.3 *AIML should use its best judgment, efforts and facilities and should at all times*
11 *and in all respects well and faithfully serve that Fund's interests (clause 3.6(a));*

12 11.4 *AIML would deal in good faith and with due diligence, and would use due skill*
13 *and care in performance of its duties (clause 7.1); and*

14 11.5 *AIML would produce and provide the Fund with investment and accounting*
15 *information in a variety of formats, including reports on Fund activity and*
16 *unaudited accounts and results, including "such further information as may be*
17 *reasonably requested from time to time by the [Fund]" (clause 9).*

18 12. *I exhibit the historic Register of Directors of AIML at [111-114], which shows*
19 *that, at the time of the launch of the Fund and throughout the period until the*
20 *collapse of the Abraaj Group, AIML was run by Mustafa Abdel Wadood, along*
21 *with Waqar Hassan Siddique and Thomas Speechley, all of whom, like the GP,*
22 *were connected to the Abraaj Group."*

23 29. He describes co-mingling at paragraphs 23-25:

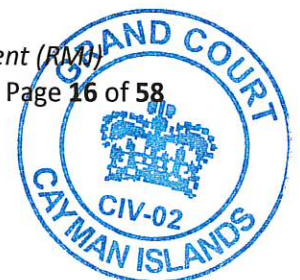


1 “Co-mingling of assets and documents within the Abraaj Group

2 23. *Having taken up my position as Conflict Director I set about investigating the*
3 *position of the Fund, what investments it had made and what had happened to*
4 *those investments. It was apparent from the outset that, despite the Fund having*
5 *apparently raised USD 2 billion in commitments, it had been severely short of*
6 *cash from its early days in early 2007. Since the commencement of the Fund,*
7 *there appeared to be significant co-mingling of cash between AIML and the Fund.*
8 *I was therefore particularly keen to establish matters in relation to the following*
9 *four issues at the start of my investigations: (i) whether the Fund had, according*
10 *to the historic Reports of the GP, raised USD 2 billion in commitments; (ii) the*
11 *costs that the Fund had incurred in relation to each of its investments; (iii) the*
12 *extent to which the Fund’s Limited Partners had paid for their interests in the*
13 *Fund, and (iv) to understand why the Fund Manager had borrowed significant*
14 *amounts from the Fund and vice versa.*

15 24. *Two points emerged from my investigations that underpin the reasons for this*
16 *application. First, my investigations confirmed that there appeared to be*
17 *extensive co-mingling of funds between Abraaj entities and various funds*
18 *(including AIML and the Fund), and second, there was no apparent discipline*
19 *with respect to file management and fund segregation from an operational*
20 *perspective.*

21 25. *From the evidence that I have seen, it appears that AIML was treated as the*
22 *treasury function of the wider Abraaj Group and that cash that it managed,*
23 *including the Fund’s cash, was not identified or managed with the degree of*
24 *formality that I would expect, either in accordance with the terms of the LPD and/*
25 *or the IMA or more generally in accordance with industry standards. Indeed, as*
26 *Arif Naqvi, the founder of the Abraaj Group, has acknowledged, the Abraaj*
27 *Group did not respect corporate form, and there was no proper segregation of*



1 *funds between AIML and the Fund as there should have been in accordance with*
2 *the terms of the LPD and IMA.”*

3 30. Once again, the Court notes that Mr. Skelton makes clear in these passages that it was
4 apparent “*from the outset*” that the Fund had been severely short of cash, that there was
5 extensive co-mingling of funds, and that there were serious issues as to “*file*
6 *management*”.

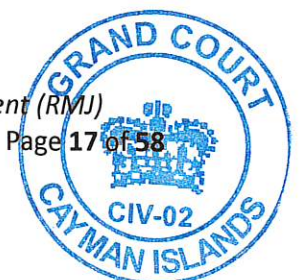
7 31. Mr. Skelton then examines in detail the nature of the filing deficiencies thus identified.

8 32. He summarises the position at paragraph 30-31:

9 “30. *What is clear from my work to date is that (i) AIML/AH deployed a number of*
10 *techniques with which they could extract value/remove assets and/or cash from*
11 *the Fund to benefit AH/AIML; and (ii) they were able to do so because of the*
12 *control AIML held, the poor controls put in place, and the significant mixing of*
13 *both funds and operations.*

14 31. *My investigations have been hampered by the fact that key documents and*
15 *correspondence to support material transactions put through the Fund’s accounts*
16 *were not saved or filed within the wider Fund network folder. It is apparent that*
17 *there are significant gaps in the documents saved to the Fund’s own network*
18 *folder (for example, the Fund folder does not contain a full set of Share Purchase*
19 *Agreements for each Fund investment (the “SPAs”), plus other key transaction*
20 *documents). This illustrates clearly the lack of discipline exhibited by Abraaj*
21 *employees with respect to file management, and is, in fact, consistent with the*
22 *picture presented by Mr Naqvi, as described above.”*

23 33. Mr. Skelton then proposes a solution in relation to confidentiality at paragraphs 35-40:



1 “35. In their Third Report to the Court dated 7 November 2018, the AH JPLs
2 explained that, following the review of the information to which they had access
3 so far, they had concluded, inter alia, that “...[AH] has co-mingled monies with
4 subsidiaries, affiliates and Abraaj Group managed funds since at least 2009”
5 [243.301, 243.278-243.317]. It is very clear from the results of our investigation,
6 that AIML co-mingled IGCF’s monies from the very start of the Fund in 2007.

7 36. It therefore appears that AIML and AH never observed any formality or
8 confidentiality and any confidentiality that was meant to have existed was either
9 never put in place or has long since been waived or disregarded.

10 37. In the circumstances, because the same people were managing AIML, the GP and
11 the Fund, their knowledge of all this information in relation to the whole Abraaj
12 Group was therefore possessed by each of AIML, the GP and the Fund at all
13 times up until the appointment of the JPLs.

14 38. It is also readily apparent that it must have been necessary for those acting for
15 AIML, much as it is now necessary for the JPLs, to have access to all this
16 information in order to understand what was happening to the assets under
17 management, what was happening to cash, and how transactions were recorded
18 in different ledgers so that they could be recorded in the correct books or omitted
19 where required, as is evidenced above. It is precisely this sort of access to
20 information that I need if am to have any chance of now understanding how AIML
21 was purportedly managing the Fund and its assets, and this is knowledge – in the
22 form of documents, ledgers, emails and the like – to which those acting on behalf
23 of the Fund had unrestricted access before the appointment of the JPLs.

24 39. The result of the data-sharing agreement now in place is that the JPLs, and their
25 counterparts acting in the provisional liquidation of AH, have been sharing, and
26 continue to share without restriction, all information gathered in relation to



1 *AIML, AH and the Abraaj Group (including all information/documentation in*
2 *relation to the Fund) in much the same way that AIML operated when it was*
3 *acting as the Fund’s agent under the IMA.*

4 40. *An important point to note is that if the data-sharing agreement were not in place,*
5 *the JPLs of AH would have no entitlement to the books, records or information of*
6 *the Fund. AH is the parent company of AIML and the Funds does not have any*
7 *contractual relationship with AH. It is only by virtue of the data-sharing*
8 *agreement between the AH and AIML JPLs, that AH continues to have access to*
9 *Fund information. However, the data-sharing agreement was agreed and entered*
10 *into without consulting the Fund, and the Fund has not agreed to give the AH*
11 *JPLs any access to its information, particularly as AH is likely to be a defendant*
12 *to legal proceedings brought by the Fund. I do not therefore consider that the AH*
13 *JPLs have any right to access the Fund’s information, irrespective of the*
14 *existence of the data-sharing agreement.”*

15 34. With great respect to the Plaintiff, it would appear that the Fund itself adopts a rather
16 more conservative approach to access to its own information than the Plaintiff does to
17 access to information belonging to other entities or individuals. Obviously the Plaintiff is
18 entitled to propound that point of view. The Court however has a broad responsibility
19 which it must discharge to be fair to everyone.

20 35. Turning more narrowly to access Mr. Skelton states at paragraphs 46-55:

21 *“Access given to the Fund’s books and records*

22 46. *Based on information provided by the JPLs, I understand that the wider combined*
23 *physical and electronic document set in their possession comprises approximately*
24 *6.6 million documents (the “Abraaj Database”). Despite the extensive co-*
25 *mingling of funds and lack of filing discipline within the Abraaj Group, I have*

1 *been given access to only extremely small proportion of the documents contained*
2 *within the Abraaj Database.*

3 47. *As I explain further below, the JPLs' legal counsel applied a number of Fund-*
4 *specific search terms to the Abraaj Database that had been provided by my*
5 *lawyers, MLB. The number of hits returned by those searches was 518,981 (the*
6 *"IGCF Responsive Documents"). I note that the search terms were provided at*
7 *an earlier stage of my team's investigations, and if the exercise were to be*
8 *repeated now, it would be necessary for those search terms to be significantly*
9 *expanded to account for the findings of my ongoing investigations.*

10 48. *The JPLs have not allowed me to have direct access to the electronic Abraaj*
11 *Database with the ability to apply search terms of my choice directly across that*
12 *dataset. As I explain further in section D below, the JPLs and I have engaged in*
13 *detailed correspondence regarding my access to the Abraaj Database, which I*
14 *believe is fundamental to giving me access to the Fund's own documents and*
15 *records and to satisfying the JPLs' obligations under the DSD. In place of direct*
16 *access to the electronic Abraaj Database, the JPLs have made their own*
17 *proposals, being that:*

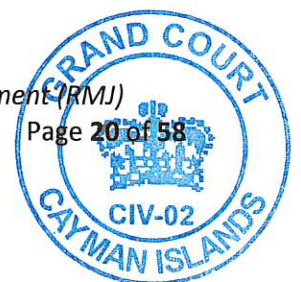
18 48.1 *I provide search terms to be run across the electronic Abraaj Database;*

19 48.2 *The JPLs, along with their Cayman legal counsel, Campbells, review*
20 *those responsive documents for Fund information;*

21 48.3 *At the same time, Campbells redact any information that they consider to*
22 *be confidential (at their sole discretion);*

23 48.4 *The JPLs again review the redactions by Campbells for any errors; and*

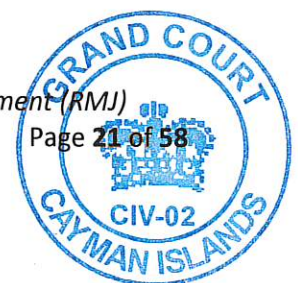
24 48.5 *The JPLs provide me with a redacted set of responsive documents.*



1 49. I cannot accept these proposals because they are inappropriate, unworkable,
2 time-consuming and expensive, a point to which I return in further detail in
3 Section E of this affidavit. The JPLs proposals also focus on emails, despite (and
4 which may not respond to search terms), and without which I will be unable to
5 properly undertake my investigations. Two notable examples are the AIML
6 General Ledger and AIML bank statements, which themselves are fundamental to
7 my investigations as to the actual cash flows of the Fund, as opposed to what has
8 been reflected in the Fund's records.

9 50. I understand that the JPLs have concerns about the release of confidential
10 information to third parties, and that such concerns underpin the reasons for their
11 proposals for release of information to me and my team. The Fund has been very
12 open and transparent with the JPLs as regards the scope of my investigations,
13 particularly as to the fact that I am seeking to determine how AH purportedly
14 acquired significant LP interests in the Fund, and a large determine how AH
15 purportedly interest in one portfolio company owned by the Fund. Accordingly,
16 my team and I have been surprised that the JPLs have not reciprocated with the
17 same level of transparency, it is notable that they have not identified the third
18 parties to whom duties of confidence are allegedly owed by AIML. In any event,
19 all the Fund seeks is visibility of its own information and documents, not those of
20 third parties, but in the current circumstances where the Fund's information is so
21 intermingled as to be inseparable from that of others, inadvertent access to third
22 party information is inevitable. To address their concerns around confidentiality,
23 I have previously made proposals regarding my direct access to the Abraaj
24 Database in materially the same form as the order sought in this application,
25 namely that:

26 50.1 access to the Abraaj Database be restricted to named individuals from my
27 team and the Fund's legal team;



1 50.2 each of those named individuals enter into appropriate confidentiality
2 undertakings; and

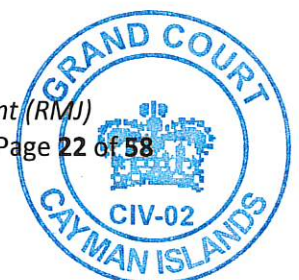
3 50.3 documents or information from the Abraaj Database cannot be used for
4 any collateral purpose save where permission has been granted by the
5 Court,

6 (the “Access Proposals”).

7 51. Regrettably, the JPLs have not agreed to the Access Proposals, nor have
8 they given any reasons as to why, despite the offer of appropriate
9 undertakings and agreement that any documents produced to me cannot be
10 used for any collateral purpose, the Access Proposals do not sufficiently
11 address their concerns.

12 52. I note that undertakings in materially the same form as the Access
13 Proposals were provided by the respective JPLs under the data-sharing
14 agreement, which suggests that the Access Proposals should indeed be
15 acceptable to the JPLs.

16 53. I am advised by Ritch & Conolly that the Court has previously approved
17 arrangements in other liquidations, such as the Sphinx liquidation, in
18 materially the same form as the Access Proposals. The Sphinx liquidators
19 were in a similar quandary as the AIML liquidators. In the Sphinx
20 liquidation, the Joint Official Liquidation (“JOLs”) owed to investors, the
21 JOLs sought directions from the Court and proposed a pragmatic process,
22 by which confidential information was disclosed on terms that the
23 recipients of the confidential information gave appropriate undertakings as
24 to confidentiality and/or the return of the documents (see the order made at
25 [244-253]). The Chief Justice had no difficulty approving that process.



1 *Accordingly, it is not necessary for the Court to treat this as a novel*
2 *application.*

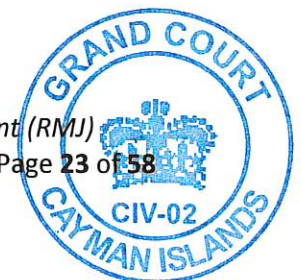
3 54. *Because I have been unable to accept the JPLs' proposals for access to the*
4 *Abraaj Database, the JPLs have so far provided me with access to the*
5 *following documents on their own terms:*

6 54.1 *From September 2018 to January 2019 the JPLs provided me with*
7 *approximately 2,700 documents. Accordingly to the JPLs, these*
8 *documents were taken from third party sources (e.g. banks),*
9 *specific Fund software (e.g. Peachtree) and, it would appear*
10 *(although it is not entirely clear), from the Abraaj Database.*

11 54.2 *In January and February 2019, the JPLs provided me with 10,642*
12 *documents from the Fund's own server. After performing basic*
13 *analytics over these documents, it appears that a large number of*
14 *the documents provided in September 2018 are duplicated within*
15 *these 10,642.*

16 55. *In summary, I have been provided with a total of approximately*
17 *12,000 documents, which represents approximately 0.18% of the*
18 *Abraaj Database, and approximately 2.31% of the IGCf*
19 *Responsive Documents, all of which have been provided through*
20 *the prism of the JPLs' own review, including redactions made*
21 *entirely at the JPLs' discretion. There is plainly a much greater*
22 *number of documents containing Fund information to which I have*
23 *not had access and to which access can only properly be granted*
24 *to me on the terms of the Access Proposals."*

25 36. Mr. Skelton adds at paragraph 57:



1 “57. *The JPLs have an obligation under the DSD to provide me with Fund information*
2 *“promptly”. It has taken the JPLs a number of months to provide me with access*
3 *to the documents from the Fund’s own server, and it appears likely that the JPLs’*
4 *proposals for my access to the Abraaj Database would take significant time and*
5 *incur significant cost (as I explain in more detail in Section E of this affidavit).”*

6 37. He reiterates at paragraph 67 that it is extremely difficult to draw any practical distinction
7 between AIML’s and the Fund’s information and records for the reasons set out in his
8 Affidavit that this fundamental point *“underpins this entire application.”*

9 38. He then sets out the communication between *“his team”* and Campbells with a view to
10 resolving matters.

11 39. The essential elements of the ongoing dispute are reflected at paragraphs 100-101:

12 *“Letter from Campbells to Ritch & Conolly dated 30 January 2019*

13 100. *Following my team’s request for the JPLs to set out their position as to why they*
14 *are not giving him access to AIML books and records, on 30 January 2019*
15 *Campbells wrote to the Advisory Board’s Cayman counsel, Ritch & Conolly,*
16 *stating that, amongst other things [357-361]:*

17 100.1 *The Conflict Director has no right to any books or records of AIML.*

18 100.2 *The JPLs do not need to justify to the Conflict Director why they are not*
19 *giving him access to AIML books and records.*

20 100.3 *The Court has no power to override the duties of confidentiality owed by*
21 *AIML to third parties.*

22 100.4 *Insofar as the Conflict Director wishes to obtain information relating to*
23 *Fund from AIML’s working papers or documents, AIML will have to*



1 review and redact that material, and the cost of that process is to be borne
2 by the Fund.

3 100.5 Campbells' letter acknowledges the fact that "AIML did not necessarily
4 segregate information relating to different funds in an orderly fashion"
5 [357,357-360].

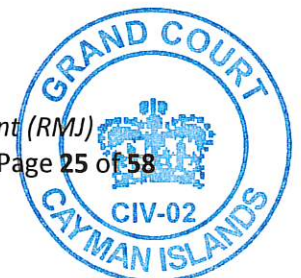
6 101. The Letter seemingly ignored the wider and important point that AIML, having
7 never strictly observed confidentiality and having breached its obligations and
8 duties towards the GP and/or the Fund, now seeks to rely on the strict legal
9 position as regards confidentiality to prevent disclosure documents to the Fund.
10 As a result of those breaches, it is axiomatic that certain documents labeled as
11 AIML documents will contain the Fund's information (in particular any
12 documents that record the use of the Fund's cash)."

13 40. An overview of the situation as contended is then put forward at paragraphs 112-116:

14 "The Conflict Director cannot access the Fund's own documents despite the existence of
15 a clear contractual right to them

16 112. Under clauses 4.1 and 4.2 of the DSD, as explained above, I have an unrestricted
17 right of access to the Fund and/or the GP's books, records and information,
18 which was agreed with the JPLs (see paragraphs 18 to 21 above). The approach
19 that the JPLs have taken so far has not been in accordance with that agreement,
20 resulting in an apparent breach of the DSD.

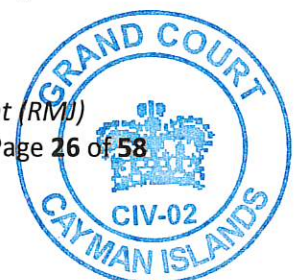
21 113. The Fund is currently being denied access to its own documents and information
22 in circumstances where the JPLs seek to draw a sharp distinction between
23 documents and information clearly belonging only to the Fund and/or the GP and
24 those arguably belonging to AIML or containing information that might relate to
25 other entities.



1 114. I have noted above the various different examples of (i) the complete disregard by
2 the Abraaj Group of any operational separation between AH/AIML, the Fund and
3 the funds under AIML's management; (ii) the disclosure and use of confidential
4 information belonging to AH, AIML, the Fund and the funds under AIML's
5 management through indiscriminate sharing amongst the Abraaj Group; (iii) the
6 significant and extensive co-mingling of Abraaj Group funds with the Fund's cash
7 (which has been described by Mr Naqvi as being the normal business practice of
8 the Abraaj Group); (iv) the unusually large intercompany movements of
9 approximately USD 3 billion from inception of the Fund to the end of 2017; (v)
10 the discrepancies between cash movements attributable to the Fund's Investments
11 and related journal entries; (vi) unexplained investment costs that do not have
12 any apparent economic rationale; and (vii) AH/AIML seeking to extract
13 cash/value from the Fund's investments for their own benefit.

14 115. As a practical matter, and in light of the behavior referred to above by AIML and
15 AH towards the Fund's assets and information, it is simply not possible to
16 retrospectively draw a line between (1) Fund information; and (2)
17 AIML/AH/other fund information. AIML was never run in a way that would allow
18 that be done, a point which we have made clear to the JPLs on several occasions,
19 and which the JPLs have themselves recognised (see, in particular, the statements
20 made by the AH JPLs in their First Report to the Court dated 18 July 2018, the
21 Data Sharing Agreement between the AH and AIML JPLs, and Mr Soden's email
22 to me dated 2 December 2018).

23 116. Moreover, the JPLs cannot in my view assert that confidentially now has to be
24 strictly observed when that is not what happened historically. The Fund, through
25 its representatives in AIML, has previously had access to all the information, and
26 the whole collapse into provisional liquidation has arisen solely as a result of
27 AIML's historic misconduct, which in itself amounts to clear breaches of the IMA
28 and LPD (on the basis of the information provided to date)."



1

2 41. The First Affidavit of Mr. Stuart Sybersma is dated 18 July 2019. Mr. Sybersma is the
3 Office Managing Partner of Deloitte & Touche, Cayman Islands and at the relevant time
4 was a Joint Provisional Liquidator (now a JOL) of AIML.

5 42. He explains the background at paragraph 4:

6 *“4. This affidavit is made in response to the Originating Summons dated 17 June 2019,*
7 *by the First Affidavit of Mark Skelton and its exhibit (“Skelton 1”, “MSI”), both of*
8 *which have been filed by Mark Skelton as the Conflict Director (the “Conflict*
9 *Director”) appointed to the Board of Directors of IGCF General Partner Limited*
10 *(the “IGCF GP”), which is the general partner of a private equity fund known as the*
11 *Infrastructure and Growth Capital Fund L.P. (“IGCF”, the “Fund”).”*

12

13 43. He states at paragraph 5 that the issue for the Court is *“a short one”*, turning on the
14 contractual interpretation of the DSD, and in particular clause 4 of the DSD.

15 44. Mr. Sybersma summarises the general nature of the dispute as he understands it at
16 paragraphs 7-8:

17 *“7. With two caveats, it is in fact common ground that, under clause 4.2 of the DSD,*
18 *the Conflict Director is entitled to copies of information or documents held by*
19 *AIML, whether in physical or electronic form, which contain information relating*
20 *to the business, assets and affairs of the IGCF GP and/or the Fund in the period*
21 *since 1 January 2006 (“IGCF-related Material”).*

22 8. *The two caveats are as follows. In relation to any material that it is proposed to*
23 *be produced to the Conflict Director, the JPLs’ position is that:*



1 8.1 *the JPLs are entitled to review such material and, where appropriate,*
2 *redact information in respect of which AIML owes a duty of*
3 *confidentiality to a third party (including other funds or investors in other*
4 *funds or employees) (“Confidentiality Review”); and*

5 8.2 *IGCF is contractually obliged to pay for the JPLs’ costs of the*
6 *Confidentiality Review and production costs (“Review and Production*
7 *Costs”), as part of the reasonable costs of AIML complying with its*
8 *obligations under the DSD, which clause 4.4 of the DSD expressly*
9 *provides are required to be paid by IGCF.”*

10 45. Mr. Sybersma then turns to what the Court considers to be the central question in these
11 proceedings at paragraph 9:

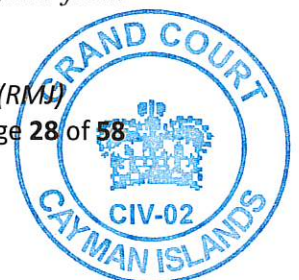
12 “9. *The need for the Confidentiality Review arises for the following reasons:*

13 9.1 *As the Conflict Director accepts he is not entitled to copies of information or held*
14 *by AIML, whether in physical or electronic form, which relate to:*

15 (a) *the business, assets or affairs of any other fund, the general partner of*
16 *such other fund, or investors in such other fund, which might include*
17 *Abraaj Holdings (“AH”) or entities controlled by AH (Other Funds*
18 *Material”), insofar as it is confidential to those other funds and investors*
19 *in those other funds; and/or*

20 (b) *personal data concerning employees or former employees (“Employees*
21 *Data”), insofar as it is confidential to those employees and former*
22 *employees and/or falls within any data protection regime.*

23 9.2 *Historically, and at the time of the JPLs’ appointment, IGCF was just one of more*
24 *than 40 private equity funds managed by AIML. AIML did not clearly separate*
25 *out information and documents that related to its management of one fund from*



1 *its management of another fund. Such mixed information was stored on servers to*
2 *which both AIML and AH (AIML's sole shareholder) had access. There is*
3 *therefore no repository of documents relating solely to IGCF to which the*
4 *Conflict Director could be given access. Documents relating to IGCF can only be*
5 *identified through conducting appropriate keyword searches of electronic data*
6 *and a manual search of physical documents which were (and still are) not stored*
7 *on the Abraaj servers (as explained in paragraphs 50 to 55 below).*

8 9.3 *The reality is that an individual document held by AIML may (and in many cases*
9 *does) contain a mixture of IGCF-related Material and other Funds material (and*
10 *may also contain Employee Data). In any such case, although the Conflict*
11 *Director is entitled to some of the information in that document (the IGCF-related*
12 *Material), he will not be entitled to some of the information in that document (e.g.*
13 *Other Funds Material and/or Employee Data).*

14 9.4 *Further, the JPLs are advised that AIML is under enforceable legal obligations*
15 *not to disclose some or all of the Other Funds Material and/or Employee Data to*
16 *the Conflict Director. This is because AIML owes duties of confidence to other*
17 *funds that it manages or has managed, and investors in those funds, in relation to*
18 *information that is confidential to them. AIML also owes duties of confidence to*
19 *employees and former employees in relation to private information which may be*
20 *confidential to them. An additional complication is that the Employee Data may*
21 *also be subject to data protection regimes in different jurisdictions."*

22 46. He continues at paragraphs 10-12:

23 "10. *The Conflict Director has previously accepted that, prior to providing IGCF-*
24 *related Material, the JPLs are entitled to carry out the Confidentiality Review and*
25 *that IGCF would bear the Review and Production Costs. That is how the parties*
26 *have proceeded to date, as explained in Section E below. Over the period of 11*
27 *months since the DSD was entered into, the JPLs have provided 13,035*



1 documents to the Conflict Director pursuant to the terms of the DSD. IGCF has
2 been invoiced for and paid invoices for assistance provided under the DSD
3 between December 2018 and April 2019, including these Review and Production
4 Costs. The Conflict Director has not previously disputed IGCF's obligation to pay
5 those costs.

6 11. The JPLs are and always have been willing and able to continue to provide
7 IGCF-related Material to the Conflict Director, on that same basis. The JPLs'
8 position is that the procedure adopted by the parties to date is how the parties are
9 contractually obliged to proceed.

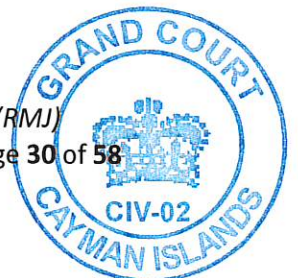
10 12. However, by the Originating Summons the Conflict Director now seeks an order
11 that the IGCF-related Material be produced without IGCF bearing the Review
12 and Production Costs. The Conflict Director also seeks such production within 14
13 days.”

14
15 47. Mr. Sybersma deals more specifically with the duty of confidence at paragraphs 21-23:

16 “Duties of confidence to funds and investors

17 21. The JPLs are advised that, by its very nature, the relationship between AIML and
18 the funds it managed is of a confidential nature. This is because, as a result of the
19 contractual delegation of certain functions by general partner of a fund to AIML,
20 AIML assumed responsibility for, amongst other things, investment and asset
21 management functions, as well as accounting, secretarial and cash management
22 functions.

23 22. This can be illustrated by, for example, clause 3.3 of the IMA between the IGCF
24 GP and AIML, which provides in relevant part that AIML had a duty to perform:

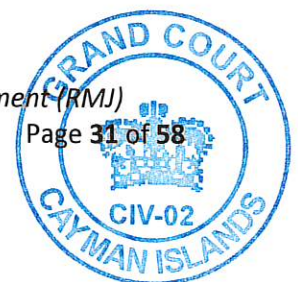


1 *“all fiduciary, investment and asset management...activities...” and “all*
2 *administrative functions for the Client, the Fund and its subsidiaries...*
3 *[including] performance of accounting, local administration... company*
4 *secretarial and cash management functions” (page 53 of MS1).*

5
6 23. *The investment management agreements between AIML and funds it has managed*
7 *typically also include an express provision which imposes a duty of confidence on*
8 *AIML. Again, the IMA between the IGCF GP and AIML provides an example:*

9 23.1 *clause 6.1 (b) of the IMA includes a representation by AIML that “[AIML]*
10 *shall treat as confidential all information pertaining to the Account and to*
11 *the Client and all other aspects of the relationship established by the*
12 *[IMA], except as may be necessary to comply with the regulations of any*
13 *governmental or self-regulatory organization or with the order of any*
14 *court or adjudicative body of competent jurisdiction or to effectively*
15 *perform its obligations and duties under this Agreement” (page 59 of*
16 *MS1); and*

17 23.2 *clause 18.1 of the IMA, entitled “Confidentiality”, provides in part that*
18 *“... neither of the parties hereto shall, either before or after the*
19 *termination of this Agreement, disclose to any person not authorized by*
20 *the relevant party to receive the same, any information relating to such*
21 *party or to the affairs of such party which is not already in public domain*
22 *(otherwise than as a result of a breach of this Clause) of which the party*
23 *disclosing the same shall have become possessed during the period of this*
24 *Agreement and each other party shall use its best endeavours to prevent*
25 *any such disclosures aforesaid” (pages 72 of MS1).”*



1 48. Mr. Sybersma further points out at paragraphs 24-27 that there may well also be data held
2 by AIML including confidential or private information relating to employees or former
3 employees of AIML.

4 49. He then emphasises, as the Court had previously noted, that the Conflict Director and
5 creditors of AIML and AH and have been reasonably aware of the “*amalgamation of*
6 *data*” on AH and AIML’s shared IT systems since July or August 2018, and prior to the
7 DSD being entered into (paragraphs 29-30).

8 50. He makes a factual observation at paragraph 33 that whether or not data was confidential
9 as between AIML and AH is not relevant to the Conflict Director’s own Application.

10 51. At paragraph 34 Mr. Sybersma disputes the Plaintiff’s allegation that “*the same people*”
11 were managing AIML, the IGCF GP and IGCF, and he asserts that AIML and IGCF GP
12 did not have the same directors at all times.

13
14 52. He deals at paragraphs 36-37 with the issue of whether mixed data can be separated as
15 follows:

16 *“Mixed Data can be Separated*

17 *“36. I disagree with the Conflict Director’s suggestion in paragraphs 42 to 45 of*
18 *Skelton 1 that AIML’s information cannot be separated from that of the Fund. I also*
19 *disagree with his assertion that the JPLs of both estates concluded that it would be*
20 *“practically impossible” to segregate data belonging to AIML from data belonging to*
21 *other entities, as he does at paragraph 32 of Skelton 1. He gives no reference for that*
22 *suggestion.*

23 37. *The JPLs have made it clear to the Conflict Director that the IGCF-related*
24 *Material can be separated from Other Funds Material and from Employee Data,*
25 *prior to it being produced to the Conflict Director. The process for that*



1 *separation is the Confidentiality Review and the Fund is to bear the Review and*
2 *Production Costs, as explained in Section E below.”*

3 53. At paragraph 44 Mr Sybersma states his recognition that the Conflict Director’s
4 entitlement to information or documents from AIML arises from and is contained in the
5 DSD. In the opinion of the Court this is a point which is both elementary and extremely
6 important.

7 54. Mr. Sybersma claims in effect at paragraph 45 that the books and records of the IGCF GP
8 and the books and records of the Fund have already been produced, and he emphasises at
9 paragraph 46 that what is at issue is material that falls within the scope of Clause 4.2 of
10 the DSD, which he states “*is wider than the books and records of the IGCF GP or the*
11 *Fund.*”

12 55. He adds at paragraph 49 that the JPLs (now JOLs) are advised that there is no provision
13 of the DSD which override duties of confidence owed by AIML to third parties, or would
14 require that AIML produce to the Conflict Director material in respect of which such a
15 duty is owed. The Court would simply add at this juncture that such assertions are
16 entirely unsurprising in all the circumstances.

17 56. Mr. Sybersma explains at paragraphs 52, 53 and 54 that the JPLs have collected data
18 from a large diversity of sources and the most relevant material is included within a
19 platform known as the Relativity Database, comprising approximately 7.3 million
20 documents, which included IGCF – related material, other funds material, employee data
21 and other information.

22 57. At paragraph 56 he makes the critical point that in collecting data the JPLs have not
23 found any server specific to IGCF.

24 58. He explains at paragraphs 63-64:



1 “63. *In particular, the Conflict Director has already received the books and records of*
2 *the IGCF GP and the books and records of the Fund identified by the JPLs,*
3 *including:*

4 63.1 *all available constitutional and statutory documents for IGCF, the IGCF*
5 *GP, and special purpose vehicles within the Fund;*

6 63.2 *all available IGCF general ledgers, which show cash flows in and out of*
7 *the Fund;*

8 63.3 *all available financial statements for IGCF and the IGCF GP; and*

9 63.4 *all available IGCF GP reports that were issued to limited partners in the*
10 *Fund.*

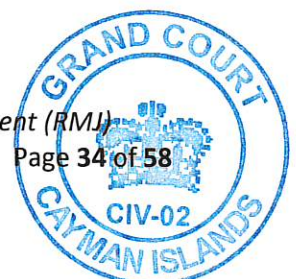
11 64. *In addition to books and records, the Conflict Director has received a significant*
12 *amount of IGCF-related Material falling within the scope of clause 4.2 of DSD.*
13 *This is largely found in email correspondence, as well as spreadsheets and*
14 *internal workings by the Abraaj investment team, in relation to specific tasks –*
15 *such as relating to consideration or management of specific investments.”*

16 59. He further explains at paragraphs 68-69:

17 “68. *Some documents have been withheld from production on the basis that they are*
18 *not material that relates to IGCF. For example:*

19 68.1 *A document that is unrelated to IGCF may appear in a family of*
20 *documents, some of which does relate to IGCF. An email might attach*
21 *documents relevant to different funds.*

22 68.2 *A document might be responsive to a search term that was produced by*
23 *the Conflict Director (e.g. “Sudeep Joshi”) but, on review, may not relate*
24 *to IGCF at all.*



1 69. *The numbers of documents that were in fact redacted do not tell the whole story.*
2 *Even documents that are not redacted need to be reviewed, which takes time and*
3 *involves cost. Further, in relation to documents that may need redaction, the level*
4 *of redaction needed will vary. Individual spreadsheets, for example, may*
5 *comprise several workbooks (tabs) and include large amounts of data running to*
6 *many columns and rows. Accordingly, it may take a substantial time to review*
7 *and apply redactions to a single spreadsheet. Individual emails or chains of*
8 *emails may require less time to review and redact.”*

9 60. Mr. Sybersma describes the ongoing operation in this manner at paragraphs 71-74:

10 *“Review and Production Costs have been invoiced to and paid by IGCF to date*

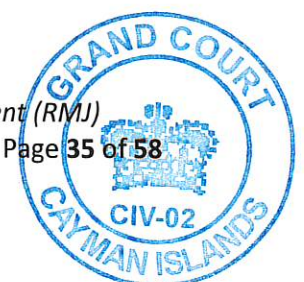
11 71. *The Conflict Director has previously accepted that the JPLs are entitled to carry*
12 *out the Confidentiality Review and that IGCF is to bear the Review and*
13 *Production Costs of the IGCF-related Material.*

14 72. *The JPLs have invoiced IGCF in relation to assistance provided to the Conflict*
15 *Director from 1 December 2018 to 30 April 2019, pursuant to clause 4.4 of the*
16 *DSD, including the Review and Production Costs.*

17 73. *The Conflict Director has caused the Fund to pay all such invoices in accordance*
18 *with clause 4.4 of the DSD.*

19 74. *The JPLs see no reason why this process should not continue, with the Fund*
20 *continuing to bear the Review and Production Costs, in accordance with the*
21 *terms of the DSD. Indeed, as noted in paragraph 13.4 above, AIML is not in a*
22 *position to carry out the Confidentiality Review as its own cost, and so it would*
23 *not be able to provide further IGCF-related material to the Conflict Director if*
24 *the Fund does not pay the applicable Review and Production Costs.”*

25 61. He concludes at paragraph 78:



1 “78. *AIML’s obligation under clause 4.2 of the DSD is to provide IGCF-related*
2 *Material to the Conflict Director “promptly”. The length of time which it actually*
3 *takes to review and provide such material depends on a number of factors,*
4 *including principally the number of search terms provided by the Conflict*
5 *Director, the number of “hits” responsive to those search terms, and whether the*
6 *Conflict Director requests that searches are carried out on documents which are*
7 *not currently stored in the Relativity Database or Egnyte. To date, searches for*
8 *IGCF-related Material have been carried out only on the Relativity Database and*
9 *Egnyte, and not over the hard copy documents referred to above.”*

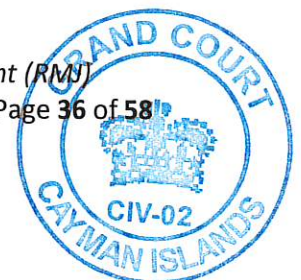
10 62. In terms of propriety and practicality, it is difficult for the Court to see how the
11 Defendant functionally can do any more.

12 63. Mr. Sybersma then sets out the process where those persons to whom the Defendant
13 owed duties of confidence in relation to information held by it may consent to disclosure
14 and how notices seeking confirmation of whether the recipients consented to disclosure
15 were conveyed to them.

16 64. He states at paragraph 84 that notices were sent to over 700 legal persons. Given the fact
17 that the JPLs had indicated in the notices that they would proceed on the basis that a
18 recipient was not willing to consent if no response was received by 15 July 2019, he
19 confirms that the “*vast majority*” of recipients have not consented.

20 65. The point is reiterated at paragraphs 91 and 92 that the IGCF GP and investors in IGCF
21 are themselves unwilling to give consent for any such disclosure. He then states at
22 paragraph 95:

23 “95. *So if another Abraaj Fund were seeking the same relief as the Conflict Director, it*
24 *appears that the Conflict Director and/or IGCF would likely object to disclosure*
25 *being given without a Confidentiality Review being undertaken in order to redact*
26 *material which was confidential to IGCF.”*



1 66. Finally, at paragraph 97.8 Mr Sybersma returns to the fundamental element of the
2 Defendants case:

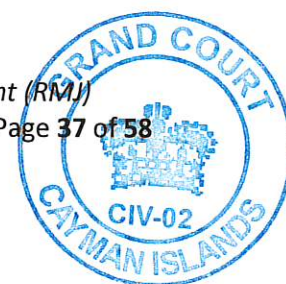
3 “97.5 The Conflict Director complains that he has not been able to progress or
4 conclude investigations that might allow him to assert claims against AIML
5 and/or claims against third parties. Even if that were correct (which is not
6 accepted), the JPLs are advised that there is nothing in the point, because the
7 extent to which the Conflict Director has or has not been able to progress his
8 investigations does not affect the contractual construction of the DSD, and in
9 particular IGCF’s obligation under clause 4.4 to pay the reasonable costs
10 incurred by AIML in complying with its obligation to provide information to the
11 Conflict Director.”

12 67. Mr. Mark Skelton’s Second Affidavit is dated 5 August 2019.

13 68. He repeats his earlier complaint at being placed in a worse position than previous AIML-
14 appointed Directors at paragraphs 13-16:

15 **“Third Party Confidential Information**

16 13. As Mr Sybersma accepts in paragraph 9.2 of his Affidavit, AIML intermixed
17 information relating to different funds in its physical and electronic documents
18 and maintained no clear delineation. Prior to his appointment, this intermingling
19 did not present a problem to IGCF (and indeed was a benefit to it because of the
20 way the group operated), as its directors (such as Wagar Hassan Siddique,
21 Mustafa Abdel Wadood and Arif Naqvi), as AIML “insiders”, apparently had
22 access to all physical and electronic documentation (as is reflected in the emails
23 produced by Mr Siddique and Mr Wadood showing liquidity needs across the
24 various funds managed by AIML, at [1/1-7]). Since my appointment, AIML, under
25 the control of the JPLs, has sought to exclude two of IGCF’s directors (namely



1 *me and another non-Abraaj director, Fatima Ameeri of Ithmaar Bank, whose*
2 *exclusion pre-dates the JPLs' appointment) from accessing that documentation.*

3 14. *It therefore appears that, as a matter of practical reality, AIML previously*
4 *accepted that an individual natural person in the guise of a director of a number*
5 *of GPs could and should have access to the universe of information and should*
6 *then decide what information belonged to each GP on a case by case basis, whilst*
7 *retaining confidentiality in other information that came to their attention.*

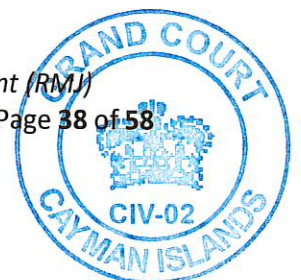
8 15. *As things presently stand, I am therefore in a worse position than any previous*
9 *AIML-appointed directors of IGCF in terms of access to the Fund's information,*
10 *and an asymmetry between IGCF directors has arisen because one director is a*
11 *Deloitte appointee (Timothy Derksen) who, I suspect, can access the wider set of*
12 *Abraaj information without restriction in his role as a director of the GP.*

13 16. *I now seek to do no more, and no less, than achieve the same position, namely*
14 *access to IGCF's information. If and insofar as confidential information*
15 *belonging to others comes to my attention, then I do not make any claim to it and,*
16 *as I have previously indicated to Mr Sybersma, I am willing and able to give an*
17 *undertaking that I will maintain that confidentiality."*

18 69. He complains at paragraphs 22-29 that in relation to the Fund's books and records
19 themselves there are significant gaps in what has been provided.

20 70. Once again, Mr Skelton summarises his contentions at paragraphs 32-39:

21 "32. *Clause 4.1 of the DSD provided for me to have an unrestricted right of access and*
22 *clause 4.2 provided for me to be provided promptly with all information available*
23 *to AIML. Clause 4.4 of the DSD provided for the Fund to pay AIML's reasonable*
24 *costs in complying with its obligations arising under the DSD, namely providing*
25 *me with access to books and records and promptly providing me with*
26 *information.*



1 33. *Although it will be a matter for submission, the wording of clause 4.4 of the DSD*
2 *does not provide for the Fund to pay Deloitte for doing anything, far less for the*
3 *Fund to pay AIML for procuring Deloitte to conduct an exercise for profit and*
4 *outside what AIML is required to do under the terms of the DSD.*

5 34. *Nowhere in the DSD is AIML obliged to conduct a confidentiality review; the*
6 *need for that step (if and insofar as it is necessary or appropriate) arises*
7 *separately to and independently of the DSD and falls to the account of AIML.*

8 35. *However, despite this position, and in order to gain some (very limited) assistance*
9 *from JPLs, the Fund has to date been prepared to meet invoices raised by the*
10 *JPLs (not even AIML). In the circumstances, the Fund has had no other option,*
11 *and had it not met those invoices (resulting in the Fund not obtaining the limited*
12 *information that it has), the Fund would have suffered further prejudice.*
13 *However, that no longer remains the position, in the following circumstances.*

14 36. *The JPLs have so far invoiced the Fund approximately USD 675,000 in costs in*
15 *relation to the Confidentiality Review. That “review” has been undertaken by*
16 *Deloitte (and, on the basis from a letter from Campbells at [4/21-62], I suspect*
17 *strongly that it has been outsourced to that firm and has not been conducted by*
18 *JPLs’ team) and Campbells, their Cayman lawyers.*

19 37. *I do not consider the amount invoiced either reasonable or necessary for AIML to*
20 *comply with its obligations arising under the DSD.*

21 38. *Even if the work were within the terms of the DSD, the Fund did not agree to pay*
22 *for AIML to outsource its obligations to commercial providers (Deloitte and*
23 *Campbells) whose charges are based on their business making profit, not on the cost*
24 *of AIML undertaking the work.*

25 39. *In the circumstances it is my position that neither AIML nor the JPLs are entitled*
26 *to invoice the Fund for undertaking the Confidentiality Review (defined below).”*



1 71. At paragraph 50 he records that because of the lack of information provided to him he has
2 not been able to progress his investigation. Prompt access to the Fund's information was
3 required so that he could then undertake investigations into the effect of "*historic*
4 *misconduct.*"

5 **The Written Submissions of the Plaintiff**

6 72. The Written Submissions of the Plaintiff are dated 8 August 2019.

7 73. At paragraph 19 the Plaintiff states that the relief sought turns on the construction of the
8 DSD, against the contractual background of AIML's duties to account to the IGCF GP
9 and the Fund "*as their agent*". With all due respect to the Plaintiff's case, in fact these
10 proceedings must be decided in accordance with the law of contract alone, rather than in
11 accordance with the law of contract and the law of agency combined.

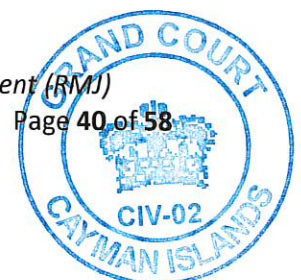
12 74. First, it is asserted that the Plaintiff is entitled as of right to have all of the IGCF GP's and
13 the Fund's books and records (paragraph 20.1.2). This is not in fact in dispute as a matter
14 of principle.

15 75. Equally, it is claimed that the Plaintiff is entitled as of right to prompt provision of all
16 information available to the Defendant concerning the business, assets and affairs of the
17 IGCF GP and the Fund (paragraph 20.1.2). Once again, this is not in fact in dispute as a
18 matter of principle, subject to what may be meant or not meant by the "*promptly*", which
19 is an issue for later consideration.

20 76. Secondly, there arises the issue of confidentiality expressed in paragraph 20.2 as follows:

21 "20.2 *If so, to what (if any) extent does any alleged duty of confidentiality owed by*
22 *AIML to third parties:*

23 20.2.1 *Entitle or oblige AIML not to perform its obligations under the DSD (and*
24 *if so, subject to what (if any) qualifications); or*



1 20.2.2 Entitle or oblige AIML to delay prompt provision of information (and if
2 so, subject to what (if any) qualifications); and, in either case,

3 20.2.3 If so, can any impediment or difficulty be addressed or ameliorated by P's
4 offer of a confidentiality undertaking?"

5 77. The answer to this question, as indicated above, is fundamentally one of contractual
6 construction.

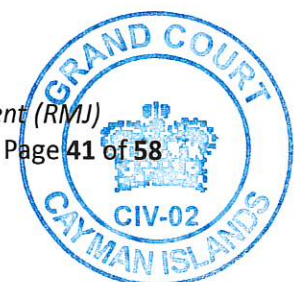
7 78. Thirdly, the Plaintiff asserts at paragraph 21.3:

8 "21.3 AIML has no entitlement to be paid for its Confidentiality Review, which is not an
9 obligation arising under the DSD (as would be required were clause 4.4 of the
10 DSD to be relied upon by AIML) and is not something for which AIML could
11 otherwise charge the GP or the Fund. The second of Mr Sybersma's two
12 qualifications, namely that the Fund is contractually obliged to pay for the JPLs'
13 costs (not even AIML's costs) of the Confidentiality Review is not a true and fair
14 construction of clause 4.4 of the DSD in the context of the GP's and the Fund's
15 entitlement to the documentation and information without any payment.

16 Further, the litigation costs sought within paragraph 4 of AIML's Notice under
17 Order 28 rule 3 (3) are not costs incurred in complying with AIML's obligations
18 under the DSD and are therefore not recoverable under that clause."

19 79. In regard to the scope of litigation costs at least as we have seen, the Plaintiff's
20 submission is accepted in relation to these particular and narrow proceedings.

21 80. The Plaintiff then examines what it describes as fiduciary duties to the IGCF GP and the
22 Fund on the part of the Defendant, claiming that under clause 3.2 of the IMA the IGCF
23 GP had appointed the Defendant as its agent, specifying the duties as set out in clause
24 3.3.



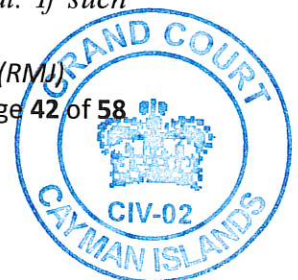
1 81. Notwithstanding the care with which this analysis is then developed, the Court is not
2 minded to adopt it, because in the instant case the Court is only addressing contract as
3 distinct from agency.

4 82. However, in the course of the Plaintiff's exposition, a legal issue arises under the law of
5 agency, which by broad analogy is said to be directly relevant to a proper interpretation
6 of Clause 4 of the DSD.

7 83. The argument is developed in this way at paragraphs 28-30, as forming a "factual matrix"
8 under which the DSD falls to be interpreted:

9 "28. *The absence of a defence to the obligation to produce information in*
10 *circumstances where the agent has intermixed information has also been the subject of*
11 *explicit judicial consideration. In Yasuda Ltd v Orion [1995] QB 174 at p.191 [Tab 7] D*
12 *to H Colman J held as follows:*

13 "Clause 4.2 provides that all the books, accounts and records and other usual
14 documentation relating to the agent's transactions on behalf of the principal
15 maintained by the defendants were to be available for inspection by the plaintiff.
16 That, on its proper construction, clearly includes all computer material. The
17 problem created by the fact that the defendants have kept records, in particular
18 their computer records, on a composite basis, including information not only
19 about the plaintiff's participation but also about the defendants' own
20 participation, as well as the participation of other pool members, and the
21 disclosure to the plaintiff of those records would involve disclosure of irrelevant
22 and to some extent confidential information, is one which has been created by the
23 defendants' own methods of administration of the agency. If they are to perform
24 their obligations to provide inspection of all such records as are relevant, but
25 object to disclosure of that which is irrelevant, it is for them to find some means
26 either of concealing the irrelevant (see Gerard v. Penswick (1818) 1 Swan. 533)
27 or of extracting that which is relevant from the mass of their material. If such

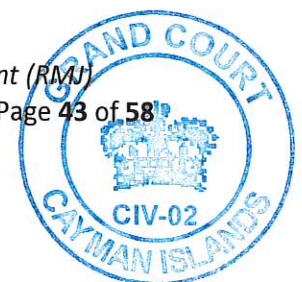


1 *means cannot be devised with sufficient expedition, the plaintiff will have to see*
2 *the irrelevant material in so far as it is inseparable from the relevant. The*
3 *computer database is, in my view, part of the records and, subject to what I have*
4 *said about concealment of irrelevant material, ought to be made available for*
5 *inspection. It is not open to the defendants to rely on the inseparability of*
6 *irrelevant material as a basis for declining to permit inspection, extraction and*
7 *copying of relevant material.”*

8 29. *This passage was approved in the judgment of Andrew Smith J in Equitas Ltd &*
9 *Anor v Horace Holman & Company Ltd [2007] EWHC 903 (Comm), at [27] [Tab 10],*
10 *where he said:*

11 *“Horace Holman are clearly right to make these admissions: see Bowstead &*
12 *Reynolds on Agency (17th Ed) para 6-88. Along with the duty to account in this*
13 *way, Horace Holman are also under a duty to provide to Equitas their records, or*
14 *copies of their records, in so far as they relate to transactions done as the agent*
15 *of Equitas or the members of syndicates who assigned their rights to Equitas. If,*
16 *as they apparently do, Horace Holman keep their records so that those relating to*
17 *Equitas are inextricable from records relating to other principals, that does not*
18 *excuse Horace Holman from providing Equitas with copies of the records relating*
19 *to their affairs when Equitas call for them. “It is for them to provide find some*
20 *means of extracting what is relevant from the mass of their material. If such*
21 *means cannot be devised with sufficient expedition, the [principal] will have to*
22 *see the irrelevant material in so far as it is inseparable from the relevant” :*
23 *Yasuda Ltd v Orion Underwriting Ltd, [1995] QB at 174 p.19F1 [Tab 7] per*
24 *Colman J.”*

25 30. *In the circumstances, prior to the conclusion of the DSD AIML was under an*
26 *existing obligation to produce to the GP all its books, records and other*
27 *information relating to its affairs without any entitlement to compensation and*



1 *without any entitlement to resist production on the grounds that AIML had made*
2 *it impossible to extricate information relating to GP and the Fund from that of its*
3 *other clients. It is against this factual matrix that the DSD falls to be interpreted.”*
4

5 84. At a later stage the Court will return to a consideration of both the *Yasuda* case and the
6 *Equitas* case. What is clear, however, is that neither authority deals with the law of
7 contract.

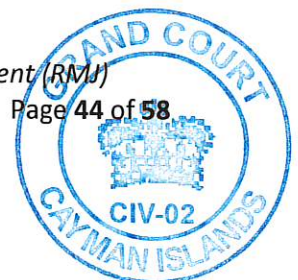
8 85. In addition, while the *Yasuda* case in the passage quoted in extremely general terms does
9 deal with “*records relating to other principals*” and likewise does the *Equitas* passages
10 quoted, there is no analysis whatsoever in either of these first instance judgments of the
11 obligations owed by the holders of records relating to other principals to those other
12 principals themselves.

13 86. In other words, each citation relates to the law of agency per se, and neither case provides
14 any forensic guidance as to how or why in the instance of relevant and irrelevant material
15 being intermixed the legal obligations of principals to third parties can be set aside.

16 87. Furthermore, there is no indication in the judgment of Colman J as to what is meant by
17 “*sufficient expedition*”. What may have been sufficiently expeditious in the circumstances
18 of 1995 may no longer be feasible in the circumstances of 2019, given the complex
19 expanded scope of computerization.

20 88. From what one can see in neither case was the consent of the principals or the lack of it
21 even considered at all.

22 89. In addressing the terms of Clause 4 of the DSD the Plaintiff makes the broad point at
23 paragraph 32 that these provisions of the DSD are to be read in the context of the IMA
24 and AIML’s existing obligations as agent for the IGCF GP and the Fund, both contractual
25 and fiduciary, which were objectively within the contemplation of the parties at the time



1 that the DSD was executed and which therefore form the factual matrix to that
2 agreement.

3 90. The point is elaborated at paragraphs 33-34:

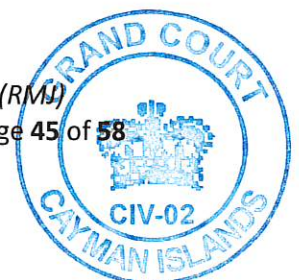
4 “33. *In this context and in conformity with the process articulated in the speech of*
5 *Lord Hodge in Wood v Capita [2017] AC 1173 at [10] to [13], [Tab 15] when the*
6 *rival contractual interpretations of P and AIML are tested against the existing*
7 *entitlement of the GP and the Fund to access to their own information, it is*
8 *apparent that the construction for which P contends is to be preferred.*

9 34. *The GP and the Fund were, and still are, entitled to be provided with all their*
10 *information expeditiously and without further payment, and if AIML has*
11 *intermixed the information of others with that information then it is for AIML to*
12 *find a solution at its own expense and without impeding the rights of the GP and*
13 *the Fund (and, by extension, P as a director of the GP) to expeditious access to*
14 *their information.*

15 35. *Thus, whilst the DSD might provide for AIML to have its reasonable costs of*
16 *providing access to books and records and prompt provision of information paid*
17 *by the Fund, nowhere in the DSD is there any obligation imposed on AIML to*
18 *conduct the Confidentiality Review.*

19 36. *That Confidentiality Review is therefore not an obligation “arising under this*
20 *Deed”. As such, the Confidentiality Review cannot be used to circumvent timely*
21 *contractual performance and the costs of such review are therefore not payable*
22 *by the Fund.”*

23 91. In effect, the Plaintiff repeatedly asserts what is called a broad matrix of contractual and
24 fiduciary obligations, together with the entitlement of the IGCF GP and the Fund to be
25 provided with all their information expeditiously and without further payment as they
26 claim, for the purpose of applicable contractual interpretation.



1 92. Whether this is ultimately the correct approach or whether it is over-broad and
2 misconceived is a matter to be determined in due course.

3 93. In fairness to the Plaintiff, the Court also records that in a Note of the Plaintiff's 7 Points
4 submitted towards the close of the hearing, the Plaintiff states:

5 *"The ultimate judgment of this Court should be rendered in accordance with general*
6 *principles of the law of contract, of application to all litigants in contract disputes where*
7 *a party in breach of its primary obligations seeks to pray in aid in defending that claim*
8 *the performance of other contracts."*

9 94. The problem with this comment is that it simply redefines the contractual problem rather
10 than assists in resolving it.

11 **The Written Submissions of the Defendant**

12 95. Upon the central issue in dispute, the Defendant poses the following question at
13 paragraph 14 of its Written Submissions dated 8 August 2019:

14 *"Prior to providing the IGCF-related Material, is AIML (acting by its JPLs or JOLs),*
15 *and as advised by its attorneys, entitled to review and, where appropriate, redact*
16 *information that is confidential to third parties to whom AIML owes a duty of confidence*
17 *("Confidentiality Review")?"*

18 96. It points out at paragraph 17 that *"significant material"* has already been provided to the
19 Conflict Director and that the invoices raised have been paid.

20 97. However, it is claimed, the Conflict Director appears now to seek production of the
21 IGCF-related material without the Defendant carrying out any Confidentiality Review.

22 98. It is submitted at paragraph 19 (d), that the Defendant is not able to provide confidential
23 information, because to do so without the consent of any given principal would be



1 actionable as a breach of confidence sounding in damages. The Court fully acknowledges
2 that this proposition appears to be correct and impeccable.

3 99. It is further pointed out that the Defendant being insolvent it cannot afford to bear the
4 cost of the review and production costs, so that any order to that effect may be impossible
5 to comply with or in vain.

6 100. Then at paragraph 22, as the Court has already identified, the Defendant states that the
7 principles of the law of agency do not arise on this Originating Summons.

8 101. The Court is reminded at paragraph 24 that the Defendant acted as agent to many
9 principals: AIML was investment manager to over 40 private equity funds with over 600
10 limited partners, to whom duties of confidence are owed in contract, agency and equity
11 (paragraph 27). In addition, there are duties of confidence owed to employees and former
12 employees.

13 102. The proposition that these confidences as such have been lost in information held by the
14 Defendant by virtue of a pre-existing data sharing argument is rejected (paragraph 29).

15 103. Not only is that said to be factually inaccurate (paragraph 32), but also it is said to be
16 legally incorrect. Paragraph 33 states:

17 *“The mere fact that one person sits on two boards of directors does not mean that the*
18 *person’s knowledge is to be attributed to both companies. Nor is it the case that anything*
19 *that may have been available to that person is to be attributed as within the knowledge of*
20 *both companies.”*

21 104. The risks to which the Defendant is vulnerable are then summarized at paragraphs 38-40:

22 *“38. The duties of confidence are live and enforceable against AIML. An aggrieved*
23 *person may pre-emptively seek injunctive relief preventing disclosure and/or*
24 *might seek damages for any loss caused to the plaintiff by reason of the disclosure*
25 *in breach of the duty of confidence.*



1 39. *To the extent that there has been any prior breach of confidence by AIML – which*
2 *has been asserted by the Conflict Director but it is not accepted by the JPLs – that*
3 *is legally irrelevant. Each new breach gives rise to a fresh cause of action against*
4 *AIML.*

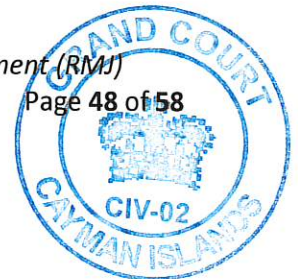
5 40. *No order of the Court on this Originating Summons (or, for that matter, in the*
6 *liquidation proceeding of AIML) would be capable of overriding the duties of*
7 *confidence referred to above, which arise in contract, the law of agency, and in*
8 *equity. For example, no obligation of general discovery arises under Order 24 of*
9 *the Grand Court Rules. Nor is section 4 of the Confidential Information*
10 *Disclosure Law 2016 relevant, as there is no “proceeding” in which AIML is*
11 *obliged to give evidence.”*

12 105. A helpful outline of the applicable principles of contractual interpretation are then set out
13 for the convenience of the parties and the Court, the Court adopts and will apply the dicta
14 set out at paragraphs 43-45 as follows:

15 “43. *Against that background, the Originating Summons turns on the interpretation of*
16 *clause 4 of the DSD. The principles relevant to the interpretation of contracts are*
17 *set out in Arnold v Britton [2015 AC 1619 (SC), as approved in the Cayman*
18 *Islands in Ennismore Fund Management v Fenris Consulting [2016 (1) CILR*
19 *282] (PC).*

20 44. *At paragraph 15 of Arnold v Britton, Lord Hodge said:*

21 *“When interpreting a written contract, the Court is concerned to identify the*
22 *intention of the parties by reference to “what a reasonable person having all the*
23 *background knowledge which would have been available to the parties would*
24 *have understood them to be using the language in the contract to mean”, to quote*
25 *Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para*
26 *14. And it does so by focusing on the meaning of the relevant words... in their*



1 *documentary, factual and commercial context. That meaning has to be assessed in*
2 *the light of*

3 (i) *The natural and ordinary meaning of the clause,*

4 (ii) *Any other relevant provisions of [the contract],*

5 (iii) *The overall purpose of the clause and [the contract],*

6 (iv) *The facts and circumstances known or assumed by the parties at the time*
7 *that the document was executed, and*

8 (v) *Commercial common sense, but*

9 (vi) *Disregarding subjective evidence of any party's intentions.”*

10 45. *The proper process of contractual interpretation involves an iterative process by*
11 *which each suggested interpretation is checked against the provisions of the*
12 *contract and its commercial consequences are investigated: Wood v Capita*
13 *[2017] AC 1173 (SC) at paragraph 12. In Wood, Lord Hodge also stated (at*
14 *paragraph 10) that:*

15 *“The Court’s task is to ascertain the objective meaning of the language which the*
16 *parties have chosen to express their agreement. It has long been accepted that*
17 *this is not a literalist exercise focused solely on a parsing of the wording of the*
18 *particular clause but that the court must consider the contract as a whole and,*
19 *depending on the nature, formality and quality of drafting of the contract, give*
20 *more or less weight to elements of the wider context in reaching its view as to that*
21 *objective meaning.”*

22 106. In terms of the facts and circumstances, the purpose of Clause 4, commercial common
23 sense and the objective meaning of the language which the parties have chosen to express
24 in their agreement, the Defendant then sets out below a series of relevant factors.

25 107. In construing clause 4 of the DSD, the Court must have regard to the relevant factual
26 matrix.



- 1 108 The DSD was entered into on 17 September 2018, some 3 months after the appointment
2 of the JPLs by Order dated 18 June 2018.
- 3 109. Prior to the DSD being entered into, the JPLs had filed their First Report dated 11 July
4 2018 and their Second Report dated 17 August 2018. Correspondingly, the JPLs of AH
5 had also filed two court reports in AH's liquidation proceeding.
- 6 110. Information known or reasonably available to the parties at the time of the DSD, and
7 therefore forming part of the factual matrix, included the fact that:
- 8 (a) AIML was insolvent and did not have any cash available to it beyond that which
9 was required to meet business critical payments;
- 10 (b) AIML acted as manager to around 40 private equity funds, principally formed of
11 limited partnership structures, with over 600 limited partners;
- 12 (c) AIML owed duties of confidence to funds and investors in those funds in relation
13 to the Confidential Information. AIML also owed duties of confidence to
14 employees;
- 15 (d) AIML and AH had used shared IT systems and that there was no clear segregation
16 of data, with the result that electronic data contained a mixture of data relating to
17 AIML and various entities; and
- 18 (e) The JPLs' forensic team had commenced investigation into the flow of monies
19 between funds and within the Abraj Group, which suggested some degree of co-
20 mingling of monies between individual legal entities.
- 21 111. These are important and compelling considerations in helping to identify the intention of
22 the parties by reference to "*what a reasonable person having all of the background*
23 *knowledge which would have been available to the parties would have understood them*
24 *to be using language in the contract to mean.*"



1 112. In the view of the Court, the Plaintiff essentially adopts and argues for an approach which
2 is both academic and frankly impracticable. It is an approach which may seem to be not
3 only contrary to law but in actual violation of the rights of other persons. Such an
4 approach is not in practical terms a persuasive or attractive one, no matter how
5 commercially expedient it may purport to be.

6 113. The Defendant reinforces its own argument at paragraphs 55-57:

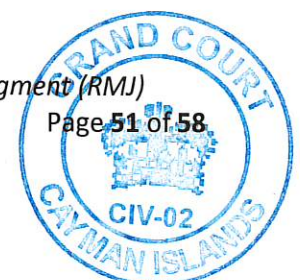
7 “55. *The obligation on AIML to provide the IGCF-related Material to the Conflict*
8 *Director arises under clause 4.2 of the DSD.*

9 56. *Conversely, no obligation is imposed on AIML under the DSD to provide*
10 *anything other than the IGCF-related Material, and the Conflict Director accepts*
11 *that he is not entitled to the Confidential Information.*

12 57. *It is therefore clear that AIML is entitled and needs to carry out the*
13 *Confidentiality Review prior to producing the IGCF-related Material to the*
14 *Conflict Director. The Conflict Director’s suggestion that he would disregard the*
15 *Confidential Information, if provided to him, misses the point. He is not entitled to*
16 *demand it in the first place.”*

17 114. While Clause 4.1 provides to the Conflict Director an unrestricted right of access to the
18 books and records of the IGCF GP and of the Fund, the Defendant argues that the
19 relevant obligation and the only relevant obligation is in Clause 4.2. It contends at
20 paragraphs 60-61:

21 “60. *The obligation encompasses provision of the Fund’s books and records, but it is*
22 *not limited to the books and records. It extends to “all information... concerning*
23 *the business, assets and affairs of [the IGCF GP] and the Fund” insofar as that*
24 *information is “available to [the IGCF GP or AIML]” – i.e. the IGCF-related*
25 *Material.*



1 61. *It is common ground that AIML has not yet provided all the IGCF-related*
2 *Material to the Conflict Director. For the avoidance of doubt, the JPLs' position*
3 *is that all books and records of the IGCF GP and/or Fund which are available to*
4 *AIML have been provided to the Conflict Director, as well as a significant amount*
5 *of wider IGCF-Related Material."*

6 115. The Court is then reminded at paragraph 63 that the Conflict Director has conceded that
7 he is not entitled to the confidential information, hence the need for the Defendant alone
8 to carry out the relevant confidentiality review.

9 116. In practice the Defendant accepts that it can extract the IGCF-related Material, but that it
10 requires a separation process (paragraph 66). Obviously this then attracts the reasonable
11 costs of compliance with the Defendant's obligations.

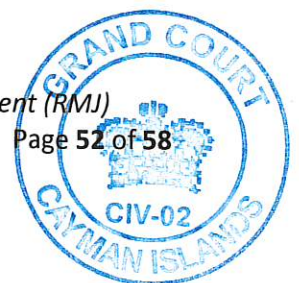
12 117. There is nothing persuasive in the evidence and information before the Court to indicate
13 that the compliance process is unreasonable or that the costs are exorbitant. An inability
14 to pay is one matter, but a simple refusal to pay is entirely another.

15 118. The Court fully recognises that the Defendant cannot produce the material in 14 days.
16 Such a request as made in the Originating Summons is highly unrealistic.

17 119. Nonetheless, the Defendant sets out its considered view of timing issues at paragraphs
18 77-79:

19 "77. *There is no basis for the Conflict Director to seek an order that any material be*
20 *produced within 14 days. It does not appear in clause 4 of the DSD.*

21 78. *The obligation in clause 4.2 is to provide documents "promptly". The obligation*
22 *to provide material "promptly" is to be construed against the relevant factual*
23 *matrix. That background includes the large volume of material, and the need for*
24 *AIML to carry out the Confidentiality Review.*



1 79. *Promptness is also a concept that is relative to the task at hand. Responding to an*
2 *email ‘promptly’ and selling a house ‘promptly’ necessarily connote very*
3 *different timescales. Mr Sybersma explains at paragraph 78 of Sybersma 1 that:*

4 *“The length of time which it actually takes to review and provide such material*
5 *depends on a number of factors, including principally the number of search terms*
6 *provided by the Conflict Director, the number of “hits” responsive to those*
7 *search terms, and whether the Conflict Director requests that searches are*
8 *carried out of documents which are not currently stored in the Relativity*
9 *Database or Egnyte. To date, searches for IGCF-related Material have been*
10 *carried out only on the Relativity Database and Egnyte, and not over the hard*
11 *copy documents referred to above.”*

12 120. The Court would add by way of comment that there is no basis for concluding that there
13 has been undue delay. What is prompt in one situation may not be considered prompt
14 under other circumstances and conditions. The Court fully accepts the Defendant’s
15 evidence that it is ready to act. Given that it is also hopelessly insolvent, the Court does
16 not accept that the Defendant is obligated to act with the alacrity which the Plaintiff
17 unilaterally demands.

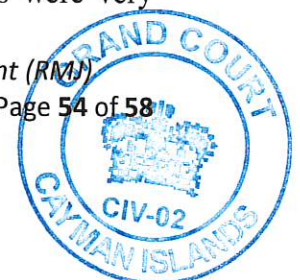
18 121. The Defendant then returns at paragraphs 88-89 to the decision in the *Yasuda* case and
19 correctly submits that the instant case is not one when an agent is relying on the
20 inseparability itself of irrelevant material as a basis for declining to provide inspection,
21 extraction and copying of relevant material, which was the basis for the orders made in
22 that case. On the contrary, as the Court understands it the Defendant here proposes to
23 separate the material but on an orderly basis and in a measured and practical way.

24 **The Findings of the Court**

25 122. These proceedings are concerned with the contractual relationship between the Plaintiff
26 and the Defendant and the extent and the nature of the obligations to which it gives rise.



- 1 123. The Court has set out at some considerable length in this Judgment the broad background
2 upon which the Plaintiff relies and in respect of which the Defendant has been required to
3 respond.
- 4 124. However, the fact that the Plaintiff derives his authority from IGCF GP and inferentially
5 from the Fund does not in itself draw either IGCF GP or the Fund into the specific
6 relationship defined by Clause 4 of the DSD. Clause 4 notably is headed "*Information*".
- 7 125. In this regard there is an important distinction to be drawn between clause 4.1 and clause
8 4.2. Clause 4.1 states that the Conflict Director shall have an unrestricted right of access
9 to all of IGCF GP's books and records. However clause 4.2 mandates that IGCF GP
10 and/or AIML will promptly provide or procure the provision to the Conflict Director of
11 all information available to them concerning the business, assets and affairs of IGCF GP
12 and the Fund.
- 13 126. The Court will return to the significance of the specific distinction in due course. At this
14 juncture it is sufficient to note that the Plaintiff as litigant stands alone, and therefore the
15 wider picture as to the Fund while obviously important is by no means determinative or
16 conclusive.
- 17 127. With that caution carefully borne in mind, the Court now turns to what it considers the
18 five crucial aspects of this hearing.
- 19 128. First, the Court must follow the guidance provided by Lord Hodge in the *Arnold* case. In
20 essential terms, how would these parties with all the background knowledge available to
21 them have understood the relevant language to mean? This approach is further
22 supplemented by Lord Hodge's statement in the *Wood* case identifying the Court's task
23 as being to ascertain the objective meaning of the language in which the parties have
24 chosen to express their agreement.
- 25 129. It is clear from the circumstances attendant upon the DSD, as duly amended that the
26 Defendant had suffered a great financial failure, and that its circumstances were very



1 grave. It is also clear that the Plaintiff was more than adequately informed as to the co-
2 mingling of assets and documents within the Abraaj Group.

3 130. It is inconceivable that a person of the Plaintiff's professional standing and distinction
4 would have failed to recognise the somber realities of the situation when he executed the
5 DSD. The JPLs on behalf of the Defendant equally would have been aware, and far from
6 contesting that awareness the Defendant explicitly relies upon it.

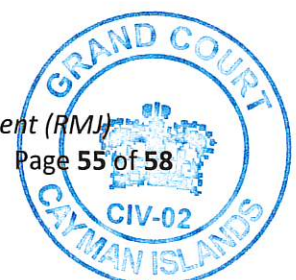
7 131. Accordingly this Court finds that the parties entered into the DSD fully informed as to the
8 context in which they did so. In light of that fact, Clause 4 must be interpreted not in an
9 academic manner as the Plaintiff effectively urges but in a manner that is realistic,
10 practical, measured and in keeping with its circumstances.

11 132. Secondly, in regard to the issue of what interpretation is realistic, practical, measured and
12 in keeping with the circumstances, it is now necessary to address the Plaintiff's central
13 contention.

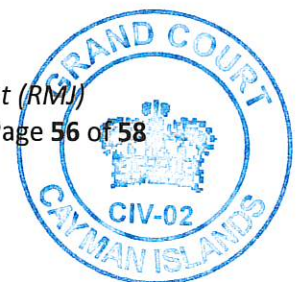
14 133. That contention is that if the Defendant has failed to maintain its records properly so that
15 information relating to the business and affairs of IGCF GP and the Fund are not
16 segregated from other confidential information and/or are not readily identifiable, then
17 that cannot be used as a reason for not performing Clause 4.1 and 4.2 of the DSD as
18 properly interpreted.

19 134. As we have seen, much emphasis has been placed upon the authority of the *Yasuda* and
20 *Equitas* cases. It is entirely clear from the former case that the precise decision derives
21 from a relationship of principal and agent, and not from a relationship of contract.

22 135. In the instant case there is a relationship of contract, and therefore it is unnecessary to go
23 beyond that relationship properly interpreted and in accordance with the guidance set out
24 above.



- 1 136. Furthermore, Colman J expressly refers to the defendant’s reliance on the inseparability
2 of irrelevant material as a basis for ordering access to all of it. In this case that
3 inseparability *per se* does not arise, and the Plaintiff has not sought to dispute this,
4 instead raising complaints solely as to the process of separation and as to the timing.
- 5 137. Thirdly, in relation to the *Yasuda* case no discussion even arose there as to the contractual
6 and fiduciary rights of third party principals, and whether it was indeed open to the Court
7 to issue declarations in respect of disclosure which would compel the defendant and those
8 conducting its affairs to breach their legal responsibilities. In the *Equitas* case Andrew
9 Smith J. has not provided any indication either as to how such an obstacle can be safely
10 resolved.
- 11 138. The Court also notes that in the *Yasuda* case declarations were sought by the Plaintiff, but
12 in this case what is sought is either a mandatory injunction or specific performance.
- 13 138. This is an issue of great concern to this Court. For the Court to order the disclosure of
14 such material not only would go beyond the declaration remedies sought and obtained in
15 the *Yasuda* case but also in doing so it would inevitably compel the Defendant and indeed
16 its current representatives to break the law. This would not only be wrong but would be
17 dangerously wrong.
- 18 139. Taking into full account these considerations, the Court concludes that the *Yasuda* case
19 has no application to the facts raised in these proceedings, and which are largely
20 uncontested. In the alternative, even if the *Yasuda* case has any theoretical application
21 this Court must decline to follow it as an aid to the interpretation of Clause 4.1 and 4.2.
- 22 140. Fourthly, with due consideration given to these preceding cogent and persuasive factors,
23 the Court now turns to consideration of the construction of Clause 4.
- 24 141. As previously indicated there is a significant distinction between the language in Clause
25 4.1 and 4.2. Whereas in the former instance the Conflict Director “*shall have an*



1 *unrestricted right of access*”, in the latter instance AIML “*will promptly provide or*
2 *procure ...all information available to them.*”

3 142. In the opinion of the Court available information is necessarily less than unrestricted
4 information. If, for example, information is legally privileged or if it is confidential
5 material belonging to third party principals who do not actively consent to its disclosure,
6 then it does not belong to a pool of information for which disclosure can be given.

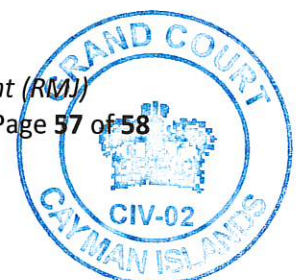
7 143. Putting the matter more prosaically information which is not available is unavailable.

8
9 144. Accordingly in the instant case confidential information belonging to third parties is not
10 subject to or even susceptible to disclosure in the intermixed form argued for by the
11 Plaintiff.

12 145. Fifthly, in addition, such information as is available for disclosure will be promptly
13 provided or procured, but in the context of the Defendant’s dire financial and
14 administrative circumstances, of which at all material times the Plaintiff was
15 comprehensively aware, “*promptly*” can mean no more than “*without unnecessary*
16 *delay*”. It certainly does not mean “*immediately*” nor any time frame proximate to
17 immediacy.

18 146. Taking fully into account the various matters set out in this section of the Judgment and
19 applying the appropriate modern principles of legal construction to Clause 4, the Court
20 determines that the Plaintiff’s Originating Summons must inevitably fail for the various
21 reasons identified and examined.

22 147. Furthermore, due to the practical and financial challenges which confront the Defendant,
23 the terms of Clause 4.4 and 4.5 in relation to incurring costs are entirely appropriate.
24 Clause 4.4 addresses the matter of reasonable costs incurred by the IGCF GP and/or
25 AIML in complying with their respective obligations arising under the DSD.



1 148. As far as AIML is concerned, and subject to the reservation which it has expressed to the
2 Court, these obligations are nonetheless wide-ranging and expensive and even at this
3 stage their full dimensions are not yet visible or apparent.

4 149. If Clause 4 is properly to be implemented that implementation includes Clauses 4.4 and
5 4.5 as characterised above.

6 **Conclusion**

7 150. The Plaintiff's Originating Summons is refused. The Defendant's Notice under O.28 r 3
8 (3) is upheld and the declarations and orders sought therein are granted, save for
9 paragraph 4 (a) which the Defendant no longer pursues in any event.

10

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12

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Rohi McMillan



14 **THE HON. JUSTICE McMILLAN**
15 **JUDGE OF THE GRAND COURT**