



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

CAUSE NOS.: 146, 147, 148, and 196 of 2018 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2018 REVISION)

**AND IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIPS ACT (2018
REVISION)**

AND IN THE MATTER OF THE SUCCESSION ACT (2006 REVISION)

IN THE MATTER OF INVESTAR GENERAL PARTNER LIMITED

AND IN THE MATTER OF INVESTAR FOF PORTFOLIO L.P.

AND IN THE MATTER OF OSAN INVESTMENT PARTNERS L.P

AND IN THE MATTER OF WAFR HOLDINGS LIMITED

AND IN THE MATTER OF THE ESTATE OF OSAMA I ABUDAWOOD

(Consolidated Proceedings)

IN CHAMBERS

Appearances: Mr. Andrew De La Rosa of counsel and Mr. Charles Moore of Harneys, on behalf of the Administrator
Mr. Ben Valentin QC of counsel and Mr. Bhavesh Patel of Travers Thorp Alberga on behalf of WAFR Holdings Limited (“WAFR”)



Before: The Hon. Justice Kawaley

Heard: 27 May 2022

Draft Judgment

Circulated: 11 July 2022

Judgment delivered: 27 July 2022

HEADNOTE

Specific discovery-whether documents belonging to non-party subsidiary companies were within the possession, custody or power of the respondent parent company and required to be produced on discovery-governing principles-burden of proof-temporal scope of governing rule-Grand Court Rules Order 24 rule 7(1)

RULING ON ISSUE REMITTED BY COURT OF APPEAL

Introductory

1. The Applicant, Michael Pearson of FFP (Cayman) Limited, is the Administrator of the Cayman Estate of the late Mr Osama Abudawood (the “Deceased”), who died domiciled in the Kingdom of Saudi Arabia (“KSA”) on June 13, 2017. By a Summons dated June 26, 2020, the Administrator sought, *inter alia*:

“... 3. An Order that discovery of the records, documents and information by the Parties in whose custody, power or possession they are be made to the Applicant, as referred to in Section E of the said affidavit...”

2. Controversy centred on whether or not discovery needed to be given of documents belonging to and in the possession of WAFR’s subsidiaries. On November 5, 2020 for reasons set out in my Judgment herein dated January 6, 2021, I ordered, *inter alia*, that the discovery sought by the Administrator should be given by WAFR. The following findings explain the context in which the documents were sought:

“34. As regards the objections advanced by the Cayman Entities to the Administrator’s information requests, as set out at paragraph 69 of their Skeleton Argument, I rejected them for the following reasons:

- (a) I rejected the contention that information about the companies’ and limited partnerships’ subsidiaries fell outside of the scope of information the Administrator was entitled to seek. As regards the companies and partnerships I found that the practice of consolidated accounting undermined any suggestion that this was not information a shareholder or limited partner could legitimately seek. As regards the limited partnerships, I further found that the information sought fell within the generous ambit of “full information” which a limited partner was entitled to receive under section 22 of the ELP;*

- (b) I rejected the contention that the Administrator was not entitled to seek further underlying financial information on the grounds that an in specie*

transfer was all that would occur. Such an assumption was premature at this stage;

- (c) the bare submission that the need for further tax information about the Deceased and the various entities had not been adequately explained was insufficient to persuade me to reject the sworn evidence of the Administrator (Pearson 3, paragraph 30.4) that such evidence was required;*
- (d) the bare submission that the need for further copies of minutes in relation to the various entities had not been adequately explained was insufficient to persuade me to reject the sworn evidence of the Administrator (Pearson 3, paragraph 30.5) that such evidence was required;*
- (e) the objection at paragraph 69.5 of the Cayman Entities' Skeleton repeats the points dealt with under sub-paragraph (a) and (b) hereof;*
- (f) I firmly rejected the contention that the request for information about US Property Investments with a view to identifying any change in value of the investments was beyond the scope of the Administrator's proper role. This was primarily based on the half argument and half assertion, supported by Ayman 2, that the Administrator's sole duty was to make an in specie distribution. I found that it was premature to reach such a conclusion at this stage. I further rejected the assertion that the Administrator ought not to expend resources accounting for any rise or fall in the value of the Cayman Estate during the period of the administration. There was no suggestion that all Heirs were willing to indemnify the Administrator*



against liability in relation to any investment losses, the only obvious basis on which the proposed analysis might be said to be unnecessary.

35. The most important broad submission advanced against granting the further discovery sought at this stage was that the information was only needed if the Court was able to decide that a valuation in aid of some form of buyout or liquidation of the Heirs' interest was required. For reasons elaborated upon below, I critically found that the information sought was required at this stage because:

- (a) it was appropriate for a preliminary investigation to be carried out as to the existence of a Buyout Agreement; and*
- (b) a realistic view of the value of the Cayman Estate was necessary in aid of formulating meaningful preliminary conclusions on the future conduct of the administration.”*

3. The Order giving effect to that Judgment was appealed to the Cayman Islands Court of Appeal in relation to the discovery issue. In *WAFR Holdings Limited-v-Michael John Pearson (as Administrator of the Estate of Osama I Abudawood*, CICA (Civil) Appeal No. 3 of 2021, Judgment dated October 13, 2021 (unreported), the Court of Appeal (Sir Alan Moses JA) reached the following central conclusions:

“4. The argument is now focussed on the Administrator’s legal right to the documents. That right is contested by parties who have no interest in the estate but have interests in the business of WAFR and the subsidiaries. They were known, by reference to those representing them, as the TTA parties.

5. The essential issue is whether the Administrator has a presently enforceable right to obtain access to the documents categorised at Para. 30.3 of the Administrator, Mr Pearson’s third affidavit...

41. Reluctantly, I have come to the conclusion that the Administrator should be given the opportunity to see whether he can adduce before the judge the evidence or material he needs in order to justify his right to the documents which the judge has already ruled to be necessary to the proper administration of the Cayman estate. The stance taken by the TTA Parties was such that the need for such evidence escaped the parties and the judge. In those circumstances I would dispose of this appeal by ordering the issue I have identified to be remitted to the judge.”

4. At the hearing of the Remitted Issue¹, it became readily apparent that the evidence pertaining to the question of whether the subsidiaries’ document were within WAFR’s “power” depended on a nuanced evaluation of circumstantial evidence because the direct evidence was far from clear. How that evidence fell to be assessed also appeared to depend on a nuanced appraisal of the relevant legal principles on this limb of the discovery rules. Having already decided that it was appropriate in relevance terms to order discovery, I caution myself about the need to ensure that I approach this discrete issue on its own merits and, to borrow David Doyle J’s words, “*I guard carefully against any sub-conscious confirmation bias*”². Properly understood, the issue which has been remitted to this Court to decide is not, of course, a matter which I have already decided. Nonetheless, I did initially find that it was in general terms desirable that discovery should be given having regard to the status of the Administrator and the interests of the Estate. The Court of Appeal found that the governing jurisdictional principles were

¹ For the avoidance of doubt, I decline to consider the additional discovery issue raised by the Administrator in his Skeleton Argument on the grounds that it was not properly before the Court and was not addressed in oral argument.

² *Aspect Properties Japan Goda Kaisha-v-Cheng et al*, FSD 263/2021(DDJ), Judgment dated April 27, 2022 (unreported) at paragraph 88.



confined to GCR Order 24 rule 7(1) and that the probate context did not provide any alternative or additional jurisdictional basis for granting the discovery sought.

Governing legal principles

The Court of Appeal's decision

5. The Court of Appeal has helpfully already decided in general terms the legal principles according to which the Remitted Issue must be decided. Firstly, the governing rule is GCR Order 24 rule 7 on specific discovery, which provides as follows:

“(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of documents so specified or described is, or has at any time been in that other party’s possession, custody or power, and if not then in that other party’s possession, custody or power when that other party parted with it and what has become of it.” [Emphasis added]³

6. It was common ground that nothing turned on the fact that the current English rule has replaced the word “power” with “control”. Sir Alan Moses summarised the key English authorities in relation to the specific question of whether documents held by a subsidiary were within the parent company’s “power” as follows:

³ Paragraph 6 of the Court of Appeal’s Judgment while referring to GCR Order 24 rule 7 actually sets out extracts from Order 24 rule 2(1), but the critical words are identical in both rules so nothing turns on this discrepancy.

“8. *The essential principle was identified by Lord Diplock in Lonrho Ltd v Shell [1980] 1 WLR 672:*

‘Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase ‘possession custody or power’ the expression ‘power’ must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else’.

9. *Two English cases at first instance have applied the principle explained in Lonrho, where a subsidiary’s documents were sought from a 100% parent. In neither case was the existence of a common corporate structure sufficient to oblige the parent to give discovery.*

10. *In Schlumberger Holdings Ltd v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat), Schlumberger sought to revoke a number of the Defendant’s patents. It was a holding company of a large multinational group of companies providing oilfield services which included a number of subsidiaries [4]. The Defendant made a discovery application in which it required the Claimant holding company to search the records of other companies within the Schlumberger group. No disclosure was or could have been sought directly against those third parties because they were not within the jurisdiction [8].*

11. The judge concluded on the facts of that case that the documents sought were in the control of the holding company, Schlumberger, because general consent had already been given by the relevant third parties before the application was made, for the holding company to search for, inspect their documents and take copies.

12. Floyd J summarised the evidence and his approach at [21]:

'I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third-party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not in any way depend on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in the litigation, subject only to the caveats contained in paragraph 4 of



Mr Griffin’s witness statement concerning corporate acquisition documents and unreasonably onerous requests.”

7. Moses JA then proceeded to set out some observations of his own on those decisions (with which Goldring P and Morrison JA agreed) which provide valuable guidance on how the evidence should be assessed :

“13. It is instructive to consider the nature of the evidence which persuaded the judge that such general consent had been given.

14. The claimant’s, Schlumberger’s, disclosure statement had stated that it had carried out searches for documents at its facilities and in the files of its employees. In response to a further letter from the Defendants it had also disclosed that it had searched the personal files of the attorneys of two of its subsidiaries and a technical officer of one of its subsidiaries [11] and [12]. It stated in the letter that it had compiled the list “having taken into account all documents that may exist in the Schlumberger group and with the cooperation of other group companies” but it denied any obligation to extend disclosure to documents not within its own custody, power or control and denied that the obligation extended to group documents as a whole [13].

15. The judge concluded that the searches which had been carried out, even after the original disclosure was performed, were with the consent of the companies concerned ([14] and [15]).

16. It was this evidence which drove the judge to the conclusion I have cited at [21], that general consent had in fact been given.

17. That Schlumberger did not erode the principles to be derived from Lonrho was made plain in Ardila Investments NV v ENRC NV [2015] EWHC 3761 (Comm). It is not sufficient that consent could be obtained if it were asked from the subsidiary [5]. If there is no evidence of an existing right or understanding or arrangement giving a parent access to a subsidiary's documents then the parent does not have the necessary control over its subsidiary's documents.

18. Males J explained this principle:

'[13] First, it remains the position that a parent company does not merely by virtue of being 100% parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.

[14] Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access.'

19. The essential question, therefore is to determine whether there is evidence that WAFR already had unfettered access to the subsidiary companies' documents." [Emphasis added]

8. Having defined that issue, and the operational legal test for adjudicating it, the Court of Appeal concluded that the Administrator had not adduced sufficient evidence to justify the discovery order sought in relation to the records of WAFR's subsidiaries. Because this particular ground of objection was first raised on appeal, the issue was remitted to this Court to afford the Administrator a fair opportunity to adduce material justifying its specific discovery request. It is clear from the Court of Appeal's Judgment that the following facts and matters do not meet the requisite test in terms of demonstrating that the subsidiaries' documents are within WAFR's power:

- (a) the fact that WAFR produced consolidated accounts (Judgment, paragraphs 20-21); and
- (b) *"the fact that [WAFR] agreed to disclose the documents immediately should the appeal fail"* (Judgment, paragraph 40).

9. Three passages in Moses JA's Judgment elucidate the critical evidential terrain. Firstly:

"21. There is no evidence or material as to the circumstances in which the consolidated accounts were prepared or how WAFR, as holding company, obtained what was needed to prepare those accounts. Certainly, there is no evidence of unfettered access to the documents the Administrator seeks or some prior arrangement or consent for WAFR to search for them."

10. Secondly, as regards WAFR’s ability to access all the documents in compliance with its undertaking to comply with any order which might be made:

“40...it does suggest that WAFR saw no difficulty in obtaining the documents sought, should their disclosure be found to be justified. That itself might give some inference as to its power over the documents sought...”

11. Thirdly, as regards the evidential significance of WAFR raising the “power” point belatedly, later in the same passage Sir Alan Moses observed:

“...Had they not been in its power it is arguable, and this will be a matter for later, that it would have taken the point earlier.” [Emphasis added]

12. In summary, I find based on the Court of Appeal’s Judgment in relation to this specific matter, that acceding to the Administrator’s contested application for specific discovery from WAFR in relation to documents belonging to its subsidiaries requires the Administrator to establish one or more of the following facts:

- (a) that WAFR has unfettered access to materials needed for the preparation of the Group’s consolidated accounts and/or the documents sought by way of specific discovery; and/or
- (b) that there is some prior arrangement or consent that WAFR can search its subsidiaries’ records for discovery purposes.

13. It is also clear from the above *dicta* that:

- (a) the Administrator is entitled to rely on circumstantial evidence. This is unsurprising in a commercial context in which if an applicant for specific discovery were required to adduce direct evidence of matters within the sole knowledge of the respondent to the application, the “power” limb of GCR Order 24 rule 7(1) would rarely ever be engaged in real world terms; and
 - (b) the Administrator was expected to place before the Court additional evidence further to the evidence which was before me at the original directions hearing and before the Court of Appeal, because the issue was only remitted to afford him an opportunity to identify material which had not been placed before this Court because it was not known that it was required.
14. What is not entirely clear from the Court of Appeal’s summary of the legal principles is whether the arrangement or understanding has to be legally enforceable, as opposed to practically enforceable. The Court was not finally determining the discovery issue and was merely explaining why the evidence supporting the application was legally insufficient at that stage. The passage cited from *Lonrho Ltd v Shell* [1980] 1 WLR 672 suggests that the right to inspect must be legally enforceable. The references Moses JA made to *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat) and *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) at least imply that documents which a parent company has a practical right of access to may be considered to be within its “power”.



Findings: must the right of access be legally enforceable?

15. Mr De La Rosa for the Administrator submitted that it was not necessary for the right of access to the subsidiaries' records to be legally enforceable. This point was supported by extracts from two persuasive authorities, and was not incompatible with the Cayman Islands Court of Appeal's binding analysis. In *Pipia v BGEO Group Ltd* [2020] 1 WLR 2582, Andrew Baker J held as follows:

“10. The starting point is that a parent company does not exercise control over the documents of or held by its subsidiaries merely by virtue of its shareholding in those companies: Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627. A parent would have control over documents held by a subsidiary ... in one of two distinct circumstances:

- (i) *Where there is an existing arrangement or understanding, whether or not legally enforceable as a contract, that in practice provides the parent with a right of access to documents held by its subsidiary. The parties differed as to whether there is a requirement, or what is meant by any requirement, for an arrangement to qualify as conferring control (a “control arrangement”), that the right of access must be “free and unfettered”.*

- (ii) *Where the parent company has a presently enforceable legal right to obtain the documents from its subsidiary.” [emphasis added]*



16. In *Berkeley Square Holdings Limited v Lancer Property Asset Management Limited* [2021] EWHC 849 (Ch), Mr Robin Vos (sitting as a judge of the Chancery Division) held as follows:

“46. Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:

i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) the existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding

that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature.”

17. Mr Valentin QC relied on Lord Diplock’s statement that “*the expression ‘power’ must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else*”: *Lonrho Ltd v Shell* (at page 635G-H). He implicitly accepted that later cases suggested a more flexible approach, but argued that exceptional factual circumstances were always required for a non-legally enforceable ability to access documents to place the documents within the power of the parent company in the requisite legal sense. He commended to the Court as the best summary of the legal principles the judgment of Males J (as he then was) in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) (paragraphs, 10, 11, 13, 14 and 21). The following extracts from that judgment are most pertinent to the narrow legal point which is under present consideration:

“10. It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access.” [Emphasis added]

18. The *White Book 2022* paragraph 31.80, which was placed before the Court, cites with approval *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 where Toulson LJ held:

“40. In determining whether documents in the physical possession of a third party are in a litigant’s control for the purposes of CPR31.8, the court must have regard to the true nature of the relationship between the third party and the litigant...even if there were on a strict legal view no ‘right to possession’, for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR31.8(1). CPR31.8(2) states that for the purpose of CPR 31.8(1) a party has or has had a document in his control if the case falls within paragraphs (a)to(c). It does not state that a party has or has had a document in his control if, but only if, the case falls within one of those paragraphs.”

19. The conclusion that the English rule does not provide an exhaustive definition of what constitutes “control” confirms that in substance that rule is analogous to our own GCR Order 24 rule 7(1), which makes no attempt at all to define the precise parameters of the term “power”. I accordingly find that that an arrangement or understanding pursuant to which the parent company “*has in practice free access to the documents of*” its subsidiaries will potentially support a finding that the documents are within the “power” of the parent company and accordingly discoverable.

The burden of proof

20. The burden of proof (and/or persuasive burden) was not directly addressed in argument before me. It is rarely explicitly addressed because the legal position is too trite to warrant any sensible argument on the topic. In the present case the view I have taken of the evidential issues which have been decided having regard to the way the case was argued makes it appropriate for me to explicitly rehearse, fairly concisely, what these rudimentary governing principles are. The applicant for an order of specific discovery (and indeed for most forms of interim relief) assumes both (a) the burden of persuading the Court that the relief sought should be granted and (b) the evidential burden of proving that the requisite interlocutory factual findings should properly be made. In the trial context, it is nowadays considered to be undesirable to adjudicate the merits of a claim on the basis of the burden of proof rather than making positive factual findings when it is fairly possible to do so: see e.g. *Sharp v Adam* [2006] EWCA Civ 449 (at paragraph 74). In the interlocutory context it must generally be the case that the approach to the evidence, when it is untested by cross-examination, must be somewhat different to the position at trial. Interlocutory factual findings based on documentary evidence alone are implicitly always made on the assumption that:

- (a) the findings can safely be made without a full factual inquiry; and
- (b) the applicant for interlocutory relief has discharged the evidential and persuasive burden of demonstrating that it is appropriate both for:
 - (1) the interlocutory findings upon which the application is founded to be recorded in the applicant's favour, and

(2) the relief sought to be granted applying the relevant legal jurisdictional test.

21. Considering the Bermudian equivalent of GCR Order 24 rule 7, I briefly concluded in *Wong-v- Grand View Private Trust Company Limited* [2020] SC (Bda) 33 Com (5 August 2020):

“29...In my judgment the Plaintiff assumed the burden of establishing that the documents are within the power of Susan Wang and the Estate of Mr Hung, both (a) in their personal capacity and (b) for the purpose of disclosing the documents containing legal advice to third parties in litigation against them. I find that the Plaintiff has not discharged that evidential burden.”

22. The only similarity between that case and the present is that in both instances the question of the evidential burden was not considered to require express mention by counsel in argument before me. However, the Administrator’s counsel in the present case did implicitly assume the evidential burden when inviting the Court of Appeal to remit the “power” question to this Court. As Moses JA recorded in the Court of Appeal:

“38... Mr De la Rosa suggested that the matter ought to go back to the judge to give him the opportunity to establish the evidence or material which would, by analogy with Schlumberger, entitle him to the discovery he seeks...

41. ...I have come to the conclusion that the Administrator should be given the opportunity to see whether he can adduce before the judge the evidence or material he needs in order to justify his right to the documents which the judge has already ruled to be necessary to the proper administration of the Cayman estate.” [Emphasis added]

23. In the present case, based on the findings I have already made in relation to the initial specific discovery application, the Administrator has already discharged the persuasive burden and satisfied the Court that specific discovery should be ordered if the evidential basis for the application (as regards documents in the possession of third parties) can be made out by the Administrator. It is important to remember where the burden of proof lies because the Administrator’s counsel advanced at least one submission which seemed to subliminally invite the Court to assume that the burden lay on WAFR to prove that the documents were not in their power.

The evidence

24. The Hearing Bundle for the hearing of the Remitted Issue included one Affidavit filed by the Administrator in support of his case on the Remitted Issue, the Seventh Affidavit of Michael Pearson dated November 19, 2021 (the “Seventh Pearson Affidavit”). Section B (“*Further evidence in respect to the Remitted Issue*”) refers to correspondence between Harneys on behalf of the Administrator and Travers Thorp Alberga (“TTA”) on behalf of the Cayman Entities (referred to in the Court of Appeal as the “TTA Parties”). Section B then concludes with the following averment:

“9. I am advised by Harneys that the above matters and in particular the tax returns for ‘WAFR Holdings Limited D/B/A Saturn Property Investments LLC’ for the years ending 31 December 2017 to 2019 included in the Supplemental Paragraph 3 Documents listed in paragraph 7.2 above are matters for legal argument at the hearing of the Remitted Issue.”

25. This implies that no additional direct evidence is being adduced, only matters of argument based on documents received pursuant to the discovery given in March 2021,

which was after the initial hearing before me and accordingly not part of the record before the Court of Appeal. Clearly, however, the Administrator is also entitled to rely upon material which he had access to at the date of the directions hearing but did not address because the Remitted Issue was not engaged at that juncture. It is not easy to discern, on a preliminary or superficial analysis, how the material relied upon sheds meaningful light on the specific question of whether the subsidiaries' documents are under WAFR's control.

26. In section C (*“Other matters in respect to the Remitted Issue”*), the Administrator:
- (a) avers that WAFR's undertaking recorded in this Court's January 7, 2021 Order is a matter for argument;
 - (b) relies on paragraphs 87 and 88 of the Second Affidavit of Ayman Abudawood (*“Ayman 2”*), by way of response to the Court of Appeal's observation (Judgment, paragraph 21) that there is *“no evidence or material of the circumstances in which the consolidated accounts were prepared”*;
 - (c) avers, based on other documents received from Paget-Brown Trust Company Limited (*“PBTCL”*) before the original hearing that Ayman and Anas Abudawood are also directors of the subsidiaries (paragraph 13); and
 - (d) avers that WAFR's unaudited accounts for January 2019 *“are woefully inadequate for me to rely on”* having regard to the need to *“carry out a serious analysis of the value of the Cayman Estate”* (paragraph 14).

27. This confirms that the Court is being invited to decide the Remitted Issue on the basis of inference, most significantly in reliance upon the undertaking and the fact of common directorships ((a) and (c)). At first blush, point (b) is an academic point because paragraphs 87 and 88 of Ayman 2 do not appear to explain to any relevant extent how the consolidated accounts were prepared. Point (d) seems even more insignificant as the desirability of the Administrator obtaining further discovery says nothing about whether the information sought is properly discoverable.
28. The Fourth Affidavit of Ayman Abudawood (“Ayman 4”) is sworn in response to the Seventh Pearson Affidavit. Most significantly, he deposes as follows:
- (a) he has been advised that the critical legal test under GCR Order 24 rule 7 (1) is “*whether WAFR has an existing right or understanding or arrangement giving it unfettered access to its subsidiaries’ documents*” (paragraph 9);
 - (b) “*WAFR has no such right, and there is no such understanding or arrangement*” (paragraph 10);
 - (c) the constitutional documents of the subsidiaries do not afford WAFR any right as a shareholder to inspect their records (paragraphs 11-12);
 - (d) “*whilst it may request specific documents for the purpose of producing consolidated accounts, WAFR is unable to compel its directly owned subsidiaries to produce documents. Of course, that is the same position with respect to the indirectly owned subsidiaries.*” (paragraph 16);
 - (e) “*There is no existing right or understanding or arrangement giving WAFR unfettered access to its subsidiaries’ documents. Accordingly, the answer to the*

Remitted Issue is that the documents of WAFR’s subsidiaries’ are not within [its] power for the purposes of GCR O.24.” (paragraph 27)

29. Ayman 4, by its terms, sets out a very direct and robust refutation of the central tenets of the Administrator’s case on the Remitted Issue. The assertion that there was “*no existing right or understanding or arrangement giving WAFR unfettered access to its subsidiaries’ documents*” on superficial analysis seems conclusive. However the deponent could, arguably, only give positive evidence about the absence of any express rights, understandings or arrangements. What inferences may be drawn from the relevant primary facts, and whether or not such inferences support findings of implied or tacit understandings or arrangements, are (applying basic legal principles) matters of law for the Court. Based on the Administrator’s own legal framing of the “power” test, on the other hand, practical arrangements which were not legally enforceable potentially could also be taken into account. In this respect, Ayman 4 appears on a straightforward reading to contain positive averments both that no legally enforceable or unenforceable arrangements or understandings existed. It seems obvious without the need to refer to authority that if one is considering arrangements or understandings which are not legally enforceable that no distinction arises between express arrangements/understandings supported by direct factual evidence and arrangements/understands which arise by implication based on findings made by the Court as a matter of law.
30. This was potentially of pivotal significance because the Administrator was unable to file any responsive evidence challenging these sworn assertions. Instead, Mr De La Rosa invited the Court to place no weight on the bare denials of the existence of a qualifying arrangement because, *inter alia*:
- (a) no evidence had been provided of specific requests for documents being made by WAFR;

- (b) no evidence had been provided of any request for documents being refused; and
- (c) it appeared that documents for the entire group were maintained by the same service provider (PBTCL) which had initially provided information which made it clear WAFR had control of all documents.

31. Mr Valentin QC submitted that the Court should not go behind the unchallenged averments in Ayman 4 and should avoid placing insufficient weight on the formal corporate position. The legal position, he pointed out, was that shareholders of all companies in the Group had no legal right to inspect company records. The fact that the two brothers were directors of all companies in the Group was irrelevant, and the existence of a “family office” for the Group was insufficient to support an inferential finding that WAFR had control or power over all documents. The fact that PBTCL had mistakenly produced documents for the entire Group when requested to comply with the initial Order against WAFR was also insufficient to support the inference that the subsidiaries’ documents were within the parent’s power or control. Similarly, WAFR’s counsel submitted that although the Onyx valuation was based on information about the entire group, there was no evidence that WAFR provided all the information to the valuer.

32. In oral argument, it appeared to me, WAFR’s counsel essentially contended his client’s unchallenged evidence on the central issue was dispositive. The point was advanced, both in writing and orally, in a disarmingly understated manner:

“14. Although the Administrator had the opportunity to file evidence in response to Ayman 4, no responsive evidence was filed, and Ayman’s evidence as to the

absence of any existing right, understanding or arrangement giving WAFR unfettered access to its subsidiaries' documents is therefore unchallenged.”

33. The primary facts relating to the Administrator’s alternative “possession” argument were not in dispute. WAFR clearly acquired the right to produce the documents in fulfilment of its undertaking to this Court which was expressed in the following terms in the recitals to this Court’s January 7, 2021 Order refusing leave to appeal against my November 5, 2020 Order:

“AND UPON the Parties having agreed to an interim stay following WAFR’s undertaking that it will collate the documents by no later than 7 January 2021 in response to that part of paragraph 3 of the Order that seeks leave to appeal against, and it will provide those documents forthwith if its leave to appeal application is dismissed by the Court of Appeal, or if leave is granted, forthwith following dismissal of the appeal...”

34. The crucial question ultimately was not whether or not the documents have now been collected by WAFR pursuant to its undertaking to this Court so that they in general terms be viewed as being in its possession at the present stage. The question is whether or not these factual circumstances qualify as possession for Order 24 rule 7(1) purposes. The Administrator contends that these facts do indeed bring WAFR within the rule and WAFR, supported by the provisional views of the Court of Appeal, contend that the contrary is the case.

Findings: are the subsidiaries' documents within the "power" of WAFR?

Is there an unfettered legal right of access?

35. I find that there is no credible evidence that WAFR has any legally enforceable right of access to its subsidiaries' documents. The parent company adduced positive evidence which was not challenged or undermined to the effect that neither WAFR's shareholders nor WAFR qua shareholder of its direct and indirect subsidiaries has any right to inspect company records. Because of the express terms of the shareholder agreements, it is difficult to see how it is fairly open to this Court to infer that a legally enforceable right of access arises by implication as a matter of law.
36. The Administrator did not pursue, or seriously pursue, this dead-end argument at all. Instead the following more legally viable argument was advanced:

"17...where as a matter of factual reality a parent company exercises practical control over documents held by a subsidiary, this is sufficient to mean that the parent company has power or control for the purposes of disclosure." [Emphasis added]

Is there an unfettered legally unenforceable practical right of access based on an informal arrangement or understanding?

37. Applicants for discovery against parent companies in relation to documents in the possession of their subsidiaries will generally be ill-equipped to establish that documents held by the subsidiaries of the respondent parent company are within the parent's power. The relevant information as to the internal operational procedures within the group of companies will ordinarily be within the peculiar knowledge of the respondent. However

publically available information, or information revealed in the course of the commercial relationship between the litigation parties, may shed some light on the position. On the face of it, though, it is likely to take unusual circumstances for such voluntarily disclosed information to reveal sufficient detail about the inter-group operations to support a positive finding that as matter of practical reality the parent company has an unfettered right of access to its subsidiaries' documents for discovery purposes. While it might be argued that the law should be that a presumption arises in circumstances such as exist in the present case that the documents of the subsidiaries are discoverable, that clearly does not reflect the present legal position.

38. In evaluating the available evidence, it is important to distinguish material which affords grounds for suspicion from material which affords grounds for factual findings, whether as a matter of inference or otherwise. WAFR is a family-owned company and the parent of a group which has common directors and which prepares accounts (and has been valued) on a consolidated basis. All documents are maintained at a single “family office”. These facts constitute strong grounds for suspecting that the practical reality is that corporate formalities may be something of a chimera and that the parent can in fact access its subsidiaries' documents whenever it wishes to. This suspicion arises in part from the apparent ease with which WAFR was able to collate the documents to comply with its undertaking and in part from the fact that WAFR has elected not to lift the shroud of mystery which covers the question of how documents are collated for consolidated financial accounting or valuation purposes generally and/or how they gained access to them for the purposes of the undertaking given in this case. However, unless one is justified in ignoring (1) the positive denial that any arrangement or understanding exists, (2) the burden of proof borne by the Administrator, and (3) the entire corporate structure (which *prima facie*, absent veil-piercing⁴, one is not), it is not possible to infer from these

⁴ There is no suggestion that circumstances in this case justify piercing the corporate veil. In *Prest-v-Prest* [2013] 2 AC 415 at 488, Lord Sumption concluded that “*there is a limited principle of English law which applies when a*

core facts that WAFR has in reality an unfettered right of access in the requisite legal sense. Because it is unclear on the face of the evidence relied upon by the Administrator how in fact:

- (a) the auditors gained access to the subsidiaries' documents for the purposes of preparing the consolidated accounts;
- (b) Onyx gained access to the subsidiaries' documents for the purposes of preparing its valuation; and
- (c) how WAFR gains access to its subsidiaries' records (if it ever does) in relation to litigation generally and/or for general commercial purposes.

39. The common directorship factor, carefully considered, makes the evidential waters more murky than clear. Absent a window into precisely what inter-group communications occurred and generally occur, there is much room for debate as to what capacity the two brothers were acting in when they performed various acts in relation to documents belonging to different members of the Group. Further, in my judgment there is a fundamental distinction between (1) a state of affairs which I do infer must exist, namely that WAFR can potentially obtain whatever documents it needs from its subsidiaries because inter-group conflicts of interest will not ordinarily exist so requests made of subsidiaries are likely to be granted, and (2) the type of arrangement or understanding which the law requires for discovery purposes. A qualifying arrangement or

person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

understanding in my judgment must be reflective of an understanding or arrangement reached between the parent *qua* parent and the subsidiaries *qua* subsidiaries in relation to the general or specific basis upon which the parent will be able to access its subsidiaries' records. As Males J observed in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (at paragraph 13), “*an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control*”. Having regard to the common directorships and family nature of the Group, it further seems at least possible (absent cross-examination of Mr Ayman Abudawood on paragraph 27 of Ayman 4) that the two common directors:

- (a) may have failed to apply their minds to the question of the legal or administrative formalities as to how documents would be accessed across the Group in the event of litigation involving one company and not others and reached no identifiable understanding or arrangement at all;
- (b) may have been content to deal with access to documents on an *ad hoc* informal basis because this was easy to do within the corporate structure; and
- (c) did not to any discernible extent use their position as directors of WAFR to exercise practical control over the documents of the subsidiaries even though it must be the case that they exercised general corporate control over the affairs of the subsidiaries generally as directors of the parent company.

40. Against this distinctive family corporate background, the fact that WAFR belatedly raised the point that the subsidiaries' documents were not within their “power” is not quite as probative as it might otherwise have been. But even if this factor together with the other strands of circumstantial evidence the Administrator relies upon supported the inference that a qualifying arrangement existed between parent and subsidiaries, this

would not be dispositive. Because it would reflect the evidential picture without considering the direct evidence adduced in Ayman 4. In that Affidavit, Mr Ayman Abudawood avers, it bears remembering, as follows:

“27. There is no existing right or understanding or arrangement giving WAFR unfettered access to its subsidiaries’ documents. Accordingly, the answer to the Remitted Issue is that the documents of WAFR’s subsidiaries’ are not within [its] power for the purposes of GCR O.24.” [Emphasis added]

41. Mr De La Rosa was unable to muster any coherent basis on which this Court could reject this unambiguous sworn evidence. It cannot be ignored on the grounds that the Administrator was relying upon an implied agreement which was a matter of law a deponent was not competent to give evidence on. It might potentially have been challenged through cross-examination, had the Administrator had the temerity to launch a veil-piercing attack, alleging that the corporate structure was being improperly used as shield. There is no obvious basis for such an argument, which is presumably why it was not pursued. Far from putting documents beyond the reach of the Court, WAFR collected the documents it might be required to disclose and manifested its willingness to comply with the determination of the discovery issue by the Cayman courts. The company’s evidence is not on its face incapable of belief nor clearly contradicted by any other evidence. The deponent is ideally placed to address the relevant factual issues as one of the two common directors. It is true that the bare denial that any relevant arrangement or understanding exists is not substantiated with supporting documentation. There was no evidential burden on WAFR to prove that no such arrangement existed, so the failure to elaborate upon, for instance, how the auditors accessed the subsidiaries’ documents does not justify any adverse inferences being drawn against WAFR in this respect.

42. In my judgment Mr Valentin QC was right to submit that it was not properly open to me to reject this direct unchallenged sworn evidence refuting the existence of the arrangement or understanding the Administrator asked the Court to infer existed. As Harman J opined in *Re Corbenstoke Ltd. (No. 2)* (1989) 5 BCC 767 at 772G:

“I have not referred at any point to the evidence sworn in reply by Mr Gabr, which Mr. Highley attacked. I am of the view that no judge is entitled to disbelieve an affidavit—that is a document upon oath—or an affirmation unless the deponent or affirmant is cross-examined upon his affidavit so that the judge may be satisfied that he is not telling the truth. I do not say that there may not be some absolutely glaring example where documents can show that a document in a statement in an affidavit is untrue. But mere inferences as to the truth or untruth of a statement are impossible to draw from paper evidence.”

43. The Administrator has accordingly failed to discharge the evidential burden he assumed by pursuing the Remitted Issue of proving that the documents of WAFR’s subsidiaries were within its “power” pursuant to a practical arrangement or understanding which gave WAFR unfettered access to them. This is essentially because establishing that clearly relevant documents held by non-party subsidiaries are within the parent company’s “power” for the purposes of GCR Order 24 rule 7(1) is an inherently difficult forensic task when the discovery applicant is a stranger to the corporate group’s internal affairs. This rule is primarily designed for use in adversarial litigation but, as the Court of Appeal has clearly affirmed, there is no alternative more liberal discovery jurisdiction peculiar to the administration of estate arena. However, even within a winding-up proceeding, a liquidator using special statutory powers to gain access to the company’s books and records can only compel a person connected to the company to produce documents which

“belong to the company”⁵. A liquidator seeking other documents relevant to the liquidation would presumably have to rely upon GCR Order 24 rule 7.

Are the subsidiaries’ documents now in WAFR’s possession in any event?

44. In my judgment it is clear that in general legal terms the documents (which WAFR collected in accordance with the undertaking it gave to this Court as a condition for obtaining a stay of the specific discovery portions of this Court’s November 5, 2020 Directions Order) are now within WAFR’s possession. The question is whether the quality of this possession falls within rather than without the ambit of Order 24 rule 7(1).
45. WAFR’s counsel most significantly relied on the provisional view expressed by Sir Alan Moses on behalf of the Court of Appeal:

“14. The Court of Appeal correctly dismissed any significance to be ascribed to this fact in the following way (at [40]):

‘I do not place any weight on the fact that [WAFR] agreed to disclose the documents immediately should the appeal fail. That seems to me no more than an acknowledgement that it would comply with the Court’s order.’

15. Put another way, the fact that WAFR was able, on this occasion, to request and collate the documents that would be required to be produced by the Court’s order (if not set aside) does not mean that WAFR had an existing right, understanding or arrangement giving it unfettered access to its subsidiaries’ documents. It is not therefore a fact that supports the necessary inference of practical control.”

⁵ Section 103(3) of the Companies Act (2022 Revision) empowers the Court to order “*that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company*” [Emphasis added].

46. The primary submission initially appeared to be sound. The supplementary submission was not in any way responsive to the substance of possession point, which is that the Administrator does not need to establish the more elaborate “power” requirements at all. In oral argument Mr Valentin QC invited the Court to adopt the provisional view of the Court of Appeal. However it is important to remember that that Sir Alan Moses’ remarks were not made in the context of considering submissions on the “possession” limb at all. Those remarks provide only very indirect, though not insignificant, support for WAFR’s case that the possession limb is not made out. Mr Valentin QC further argued that there was no evidence that the documents were in the physical possession of WAFR and that the circumstances in which the undertaking was given constituted a “bespoke event”. As to physical possession, the authority to which reference was made, *Supreme Court Practice 1999* Volume 1 paragraph 24/2/8 states as follows:

“The foregoing rules are subject to the overriding consideration that O.24 is concerned with the physical possession or custody of documents, or the power to obtain such possession or custody.”

47. Mr De La Rosa was not necessarily right to contend that in circumstances where WAFR had admittedly collated its subsidiaries’ documents (or caused them to be collated) and undertaken to produce them if required to do so, the normal possession threshold had been crossed. The valid point that he was in substance advancing was that it was obvious that documents embraced by WAFR’s undertaking were clearly now either within WAFR’s possession, custody or power. However the Administrator’s counsel was unable to advance any coherent or convincing reasons as to why I should reject the admittedly Delphic provisional view of Moses JA that the context of the undertaking made it inappropriate to conclude that the requirements for “power” had been made out. On a strict reading of those provisional views they did not address the alternative

“possession” argument at all because this point was not (seemingly) canvassed before the Court of Appeal. But the distinction is ultimately meaningless.

48. In my judgment this point is best viewed as one those many matters of law and practice which provoke an instinctive judicial response and which rarely requires any explicit articulation of what the underlying reasoning is. If one is required to rationalize why it seems obvious that the fact of possession (or custody or power) in the context of an undertaking to the Court is not admissible evidence as whether or not the documents are in the possession, custody or power of the respondent for discovery purposes, it is not difficult to justify one’s instinctive conclusion. Two points of principle, one narrow and the other broad, are engaged and both can be discerned, albeit somewhat faintly, from paragraph 40 of the leading Judgment of the Court of Appeal in this matter.
49. Although Moses JA was only explicitly analysing the evidential significance of WAFR’s ability to comply with the undertaking with reference to the question of whether the documents were within its “power”, the tacit reasoning which underpinned his provisional view that this factor had no evidential significance applies with equal force to the “possession” limb of the discovery analysis. If the logical inference to draw from WAFR’s ability to give the undertaking to produce the documents was that this fact was *“no more than an acknowledgement that it would comply with the Court’s order”*, this inference applies with equal force to the question of whether the steps taken in relation to the undertaking should be construed as evidence that the documents were within the respondent’s possession (or indeed custody) as well. In other words, when one is determining whether or not documents are discoverable by a party, one is analyzing the possession, custody or power issue by reference to what is general factual position in relation to the documents at the time (usually, at least) when the application for discovery is made. What a litigant does or is able to do after an order for specific discovery has been made, under compulsion of a Court order, is simply not indicative of the connection which existed

between the respondent and the documents when the application was made. This is clear both from the terms of GCR Order 24 rule 7(1) itself and, less significantly, the terms in which the specific discovery request were expressed (see paragraph 1 above).

50. The relevant rule applies to any document (or class of document) which “*is, or has at any time been in that other party’s possession, custody or power*” [Emphasis added]. In short, a party’s liability to give discovery of documents *prima facie* attaches to qualifying documents the discoverability which is temporally confined to the period before and up to the date when a contentious application for discovery is being heard. What occurs after an order for discovery has been made, particularly where the *indicia* of possession entail compliance with an undertaking given to secure a stay of the discovery Order pending appeal (the facts in the present case) is simply irrelevant to deciding what the legal and factual position was when the application was made and/or heard. As Mr Valentin QC elegantly put it, the context in which WAFR did demonstrate its ability to produce the documents was a “bespoke event”.
51. The broader point of principle complements the narrower and more technical point. There is a strong legal policy that favours upholding the integrity of this Court’s orders and processes. In the appellate context, it is important to balance the interests of the ‘judgment creditor’ in being able to promptly enforce the judgment or order obtained and the opposing interest of the unsuccessful party who wishes to pursue appeal rights and obtain a stay of execution pending appeal. In the present case, I refused leave to appeal. WAFR undertook to comply promptly with this Court’s specific discovery Order if it failed to obtain leave to appeal from the Court of Appeal or if its appeal was dismissed and on this basis a stay pending its application for leave to appeal was granted. To make good its undertaking, WAFR gained access to its subsidiaries’ documents and collated them for prompt production of this Court’s November 5, 2020 Order was upheld. In the

event its appeal succeeded based on a new point, and the Remitted Issue was sent back to this Court to decide.

52. If it were permissible for the Court to use a litigant's steps to secure compliance with this Court's orders as fresh grounds for making adverse findings against them in relation to the subject-matter of a successful appeal, there would be no incentive for appellants to assist the Court and opposing parties by mitigating the adverse consequences of a potentially unsuccessful interlocutory appeal, particularly in the discovery context. So for this further policy reason I find that the circumstances in which the documents came to be within WAFR's possession (or custody) while it was pursuing its appeal rights may only sensibly be viewed as falling outside the ambit of possession or custody as contemplated by GCR Order 24 rule 7(1). The Administrator's case that the documents were in the possession of WAFR from the time the January 7, 2021 Order was made must accordingly be rejected.

Summary

53. For the above reasons I find that the Remitted Issue must be resolved by dismissing the Administrator's application for specific discovery of documents belonging to WAFR's subsidiaries. The grounds for this decision are that the documents, though relevant, have not been shown to have been (at a relevant time) within WAFR's possession, custody or power as required by GCR Order 24 rule 7(1). I will hear counsel if required as to costs and the terms of the Order.



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