



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

CAUSES FSD 150, 158 AND 203 OF 2020 (NSJ)

BETWEEN:

**THE JOINT OFFICIAL LIQUIDATORS OF ABRAAJ HOLDINGS
(IN OFFICIAL LIQUIDATION)**

Plaintiffs (FSD 150 and 158)

and

THE GHF GROUP LIMITED

Defendant (FSD 150)

and

NEOMA PRIVATE EQUITY FUND IV L.P.

Defendant (FSD 158)

AND BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff (FSD 203)

and

ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION) AND OTHERS

Defendants (FSD 203)

ON THE PAPERS

HEADNOTE

When documents are in the power of a party for the purpose of GCR O.24, r.1 and the Court's jurisdiction to give directions to a party subject to the discovery duty to write to third parties



JUDGMENT ON THE GHF PARTIES' APPLICATION BY LETTER DATED 25 APRIL 2022

Introduction

1. On 23 and 24 March 2022 a case management conference (the *CMC*) was heard in the Related Proceedings. My judgment dealing with the issues raised at the CMC (the *CMC Judgment*) was handed down on 29 June 2022 (reference should be made to that judgment for a summary of the background and the defined terms used to describe the parties and the Related Proceedings, save in so far as terms have been defined below).
2. At the CMC, I confirmed my earlier decision, previously communicated to the parties by way of an email sent by my personal assistant, that Mr Jafar be required to produce a copy of the settlement deed entered into between him and Mr Naqvi (the *Settlement Deed*) within fourteen days of the order to give effect to that decision being sealed. That order was issued and sealed on 25 March 2022 and Mr Jafar produced a copy of the Settlement Deed on that date.
3. On 1 April 2022, before the handing down of the CMC Judgment, Ogier, the attorneys for Neoma Private Equity Fund IV (*Fund IV*), wrote to the Court regarding the Settlement Deed and its relevance to the matters dealt with at the CMC. On 5 April 2022, Nelsons, the attorneys acting for Mr Jafar, responded (again in writing to the Court). Following this correspondence, I directed that the parties should by 19 April 2022 (subsequently extended to 25 April 2022 upon a request by the GHF Parties) make any application they wished to make for permission to file further evidence and make further submissions with respect to the matters dealt with at the CMC (the *Direction*).
4. On 25 April 2022, as contemplated by the Direction, the GHF Parties applied (the *Application*) by a letter from Walkers their attorneys (the *25 April Letter*), for the following relief:
 - (a). leave to file the First Affidavit of Jonathan Turner sworn on 22 April 2022 (the *Affidavit*).

- (b). leave to make further submissions with respect to the matters dealt with at the CMC.
- (c). subject to such leave being granted, that certain further directions be made upon the CMC with respect to Mr Jafar's discovery.
5. After having reviewed the Settlement Deed, the GHF Parties had concluded that it was relevant to a number of the issues raised at the CMC (as they related to the Jafar Proceedings). They considered that the Settlement Deed was relevant in particular to (a) the scope of Mr Jafar's discovery obligations (the identity of his custodians and the end date by reference to which his discovery was to be given) and (b) the date on which the trial was to be listed. The GHF Parties took the view that had they been in possession of the Settlement Deed, or aware of its terms, before the CMC, which they were not, their submissions on these issues would have been materially different.
6. On 28 April 2022, Nelsons wrote to the Court in an undated letter setting out (at [24]) Mr Jafar's response and opposition to the Application. Walkers replied on behalf of the GHF Parties in their letter dated 3 May 2022. All parties (including Fund IV) consented to the Application being dealt with on the papers.
7. On 17 May 2022, I distributed to the parties a draft judgment. The draft judgment dealt with the question of whether clause 16 of the Settlement Deed resulted in the documents of Mr Naqvi referred to in the clause being within Mr Jafar's power for the purpose GCR O.24. I said that I had decided that this issue could be dealt with conveniently before and without waiting for the handing down of the CMC Judgment but that I planned to deal with the question of the date ranges to be applied to Mr Jafar's discovery and what directions should be given in relation to the listing of the trial in that judgment (which I was then in the process of preparing).
8. On 20 May 2022, Ogier wrote to the Court requesting that I defer handing down judgment until after Fund IV had been able to file brief written submissions in relation to the Application. Ogier pointed out they had written to the Court on 6 May 2022 saying that if the Court was minded to make a determination as to whether or not Mr Jafar had power over the documents held by Mr Naqvi - which they submitted was not a matter dealt with or necessary to the relief sought by their clients at the CMC - then Fund IV would wish to have the opportunity to make brief submissions.

9. On the same day, 20 May, I confirmed that Fund IV should have the opportunity to make and file submissions on the Application, as they had indicated they wished to do in Ogier's letter of 6 May 2022 (which appeared not to have made its way to me). I gave directions permitting the filing of those submissions and for the filing of brief further submissions in response by the GHF Parties and Mr Jafar. On 23 May 2022, Fund IV filed their further brief submissions and on 25 May 2022 Nelsons wrote to the Court setting out Mr Jafar's position and Walkers wrote seeking clarification of parts of the draft judgment.
10. I have carefully reviewed all the submissions and the evidence, and revisited the question of what relief if any should be granted on the Application. I have concluded as follows:
- (a). the GHF Parties should be granted leave to file the Affidavit and to make further submissions. That part of the Application is therefore granted.
 - (b). the GHF Parties, supported by Fund IV, have sought in the Application an order directing Mr Jafar to write to Mr Naqvi to request that he provide documents to Mr Jafar as required by clause 16. The Application did not specify the terms or provide a draft of that request. The GHF Parties contemplate, as I understand it, that the form of the request will be settled by agreement or be approved by the Court after judgment on the Application has been handed down.
 - (c). the GHF Parties submitted that the order was necessary in view of and in response to Mr Jafar's failure to agree to write to Mr Naqvi or to set out in writing with precision when and how that would be done.
 - (d). the GHF Parties (and Fund IV) submitted that the documents covered by clause 16 are to be treated as being within Mr Jafar's power for the purpose of GCR O.24, r.1. In my view, clause 16 of the Settlement Deed *alone* does not result in all and any documents held by Mr Naqvi related to the Abraaj Group and to which clause 16 *could* apply, being in Mr Jafar's power.

- (e). however, some of those documents may be (and indeed are likely to be) in his power. An assessment has to be made in relation to particular documents or classes of documents as to whether it would be reasonable for Mr Naqvi to produce them. It may also be necessary to assess whether Mr Naqvi is under no obligation to provide documents because of the provision in clause 16 of the Settlement Deed that stipulates that he is only required to take steps “*to the extent permitted by law and legal duties to which AMN is subject.*”
- (f). at this stage, it is not possible for the Court to determine which documents Mr Naqvi holds, which of those documents are relevant to and would be discoverable in the Jafar Proceedings if they were in Mr Jafar’s power, and which of those documents Mr Naqvi is obligated to provide to Mr Jafar pursuant to his obligation to provide Mr Jafar with reasonable assistance in accordance with clause 16 of the Settlement Deed. However, the evidence, albeit limited and in need of supplementation, supported by the parties’ submissions, does establish that Mr Naqvi is likely to hold relevant (and indeed important) documents which he is required to provide to Mr Jafar pursuant to his obligations under clause 16 of the Settlement Deed.
- (g). I do not consider that the confidentiality clause in the Settlement Agreement prevents Mr Jafar from handing over to the GHF Parties and Fund IV copies of documents which are obtained from Mr Naqvi and which Mr Naqvi is required to produce under clause 16 of the Settlement Deed.
- (h). it seems to me that in these circumstances, as a matter of jurisdiction, (based on the materials available to me on the Application and recognising that I have not heard oral submissions on the point) the Court has the power to direct Mr Jafar to write to Mr Naqvi for the purpose of identifying documents which are in his power, subject to the need to ensure that any steps which Mr Jafar is required to take satisfy the test of proportionality and the Court’s order is in accordance with the overriding objective. While the Court does not have the power to direct a party to take steps to bring into his power (or possession or custody) documents which are not already within his power, it seems to me that the Court can require a party to take proportionate steps to establish which documents in a class or pool of documents, which class or pool is likely to contain documents in his power, are

actually within his power. Writing a letter to Mr Naqvi and taking some follow-up action appears to me to be proportionate and not onerous.

- (i). it would have been preferable for this issue to have been further developed in correspondence and discussions between the parties before an application to the Court was made for a direction. That would have at least allowed the relevant background facts to have been established (and ideally put in evidence) and the terms of a request formulated for review and for submissions by the parties. Furthermore, Mr Jafar has expressed a willingness to cooperate with the GHF Parties and Fund IV. But it is difficult for me to judge at this point, without further evidence, whether this offer was genuine and adequately followed through (I have read the relevant correspondence but that only goes so far). The parties' conduct before the filing of the Application is likely to be relevant to and may well need to be the subject of further evidence for the purpose of a decision on the proper costs order to be made on the Application.
- (j). it seems to me that the proper course to follow is to invite the parties to seek to agree a form of letter to be sent to Mr Naqvi. I will allow them twenty-one days from the date on which this judgment is handed down to do so. I am prepared to make an order directing Mr Jafar to write to Mr Naqvi and to settle the form of letter if the parties cannot agree it within this time period. However, I would expect this to be unnecessary. If agreement on the form of the letter cannot be agreed within this timeframe then the parties will need, within seven days thereafter, to file a copy of the form of letter and order they invite the Court to approve and indicate whether they seek directions to file further evidence and a hearing to deal with the matter or whether they are content for the Court to settle the order and letter without such evidence and a hearing. It would be an unfortunate waste of time and money for this to be needed and so I very much hope that this will not be needed. If any party behaves unreasonably they will need to bear the consequences in costs.
- (k). as regards what is to happen after the letter to Mr Naqvi has been sent, the position will need to be reviewed in light of any response received from him. A decision as to what further action Mr Jafar needs to take is, to state the obvious, a matter that is best discussed and agreed by the parties in light of the circumstances and a real-world review of the available options. If agreement cannot be reached, a further application can be made to the

Court once the relevant background and facts have been established and put in evidence and the proper scope of the Court's jurisdiction to give directions in this context can be further considered and reviewed, with the benefit of a full citation of authority and the benefit of argument at a hearing (one question which arises is the extent to which this Court's case management powers in relation to discovery are different from those of the English Court). Once again, though, if an application is necessitated by the unreasonable conduct of any party or made prematurely, the party concerned can expect to suffer the consequences in costs.

- (l). Mr Jafar's discovery obligations with respect to the documents held by Mr Naqvi covered by clause 16 of the Settlement Deed need to be dealt with and set out separately in the Discovery Protocol. It would not be appropriate just to add Mr Naqvi to the list of Mr Jafar's custodians in Appendix G.
- (m). the appropriate order as to the costs of the Application should be dealt with at the same time as the costs order in respect of the CMC is considered and made.
- (n). at the CMC Mr Jafar did not seek any order from the Court limiting the inquiries that he is required to make or the extent of his obligations with respect to discovery. Accordingly, the CMC Judgment did not deal with or order that any end dates be applied at this stage to the searches conducted by Mr Jafar for the purpose of discovery. The GHF Parties' submissions in the Application regarding such end dates, and their argument that there should be no end dates for Mr Jafar's discovery, therefore do not arise for determination.
- (o). I have reviewed the submissions made regarding the possible impact of the Settlement Deed on the determination of when the trial is to be listed. However, none of these submissions affects or causes me to adjust what I said in the CMC Judgment on this issue.
- (p). this judgment replaces my earlier draft judgment.

Leave to file further evidence and make further submissions

11. I accept the GHF Parties' submissions on the question of whether they should be given leave to file further evidence (in the form of the Affidavit) and make the further submissions set out in Walkers' two letters (as those submissions are summarised in Walkers' letter dated 3 May 2022 at [6] and [7]). It seems to be clearly right that the Settlement Deed is relevant to and raises important issues concerning the scope of Mr Jafar's discovery obligations which were live and dealt with at the CMC and the GHF Parties were unable to deal with these issues at the CMC in view of the timing of the production of the Settlement Deed. I shall therefore grant such leave.

The Settlement Deed

12. The Settlement Deed, which is governed by English law and contains an exclusive jurisdiction clause requiring disputes to be determined by the English Courts, gives effect to an agreement between Mr Jafar and Mr Naqvi in relation to various claims made by Mr Jafar (and further claims which he might have) against Mr Naqvi connected with Mr Jafar's loans to AH and AIML. The Settlement Deed contains a definition of the **Debt** which covers Mr Jafar's loans to AH [dated 27 December 2017] (the **AH Loan**), Mr Jafar's loan to AIML (the **AIML Loan**) and AIML's liability to Mr Jafar in respect of the AH Loan. It also contains a definition of the **Claims** which covers any claims arising out of or connected with the Debt. Mr Jafar agreed to discontinue proceedings against Mr Naqvi in the UAE in relation to a cheque issued by Mr Naqvi and not to bring any further proceedings in the UAE arising out of or connected with the Claims. Mr Jafar also agreed to assign to Mr Naqvi part of the AIML Loan (being US\$100 million thereof). The balance of the Debt which Mr Jafar had not transferred and had retained was defined as the **Retained Debt** (it is not clear to me from the documents I have seen, including the deed of assignment in schedule 6 of the Settlement Deed, whether the intention and effect of these documents was to assign the entire amount of the principal of the AIML Loan together with interest thereon so that Mr Jafar no longer had any claims against AIML in respect of sums he claimed to have advanced to AIML). In return, Mr Jafar agreed not to bring any proceedings against Mr Naqvi arising out of or connected with the Claims and Mr Naqvi agreed to transfer various assets and rights to Mr Jafar and to assume a liability to Mr Jafar in respect of the Debt. In circumstances where AH and AIML entered official liquidation, Mr Naqvi agreed to pay up to US\$75 million of the Debt Shortfall. This is the difference between (a) the amount of the Debt

and (b) the total of (i) the net proceeds of sale received by Mr Jafar from the assets and rights, (ii) US\$33 million and (iii) any “distributions” received by Mr Jafar from AH, AIML or Mr Naqvi “resulting from any restructuring” before the date which is five years after the Completion Date (or, if earlier, the date on which the winding up of AH and AIML “reach conclusion”).

13. Clause 16 of the Settlement Agreement is in the following terms:

“AMN shall, to the extent permitted by law and legal duties to which AMN is subject, provide reasonable cooperation and assistance to ADJ and the ADJ Parties in relation to any steps taken by ADJ in relation to or arising from the Retained Debt, such assistance to include, but not limited to, meeting with and providing information and documents to ADJ and the ADJ Parties (and their legal and other advisers).”

The Application

14. In [18] and [19] of the 25 April Letter Walkers set out the relief that the GHF Parties were seeking as follows (underlining added):

“18. The GHF Parties consider that Mr Jafar should now confirm that he will approach Mr Naqvi and request documents from Mr Naqvi, pursuant to Clause 16 of the Settlement Agreement. Moreover, the terms of that request, should be set out in writing and provided to the Court and the Defendants to the Jafar Action. Such a course ought not to be problematic in light of Leading Counsel’s submission (made on behalf of Mr Jafar) at the Discovery CMC that Mr Jafar would (emphasis added), “endeavour to look wherever the court tells him he should endeavour to look, insofar as the order will include specific directions. However, he may well look elsewhere, too” (implying a sufficient and appropriate degree of willingness on the part of Mr Jafar to adopt the course the GHF Parties have submitted that he should). If Mr Jafar is not willing to give such confirmation, the GHF Parties submit that (in the circumstances) it would be appropriate for the Court, under its inherent case management powers, to direct Mr Jafar to request documents from Mr Naqvi, by reference to Clause 16 of the Settlement Agreement, in the manner outlined above.

19. For the avoidance of any doubt, and without prejudice to the direction sought in paragraph 18 above, the GHF Parties reserve all their rights, including as to the matters relevant to discovery raised by Clause 16 of the Settlement Agreement.”

15. The relief sought is that, in the absence of the requested written confirmation from Mr Jafar, the Court should direct Mr Jafar, pursuant to its case management powers, to write to Mr Naqvi (presumably in a form set out in the direction or otherwise approved by the Court) requesting

him pursuant to clause 16 to provide Mr Jafar with the documents covered by that clause (or at least some of them, as defined and set out in the request). The GHF Parties argued that these documents are (already) within Mr Jafar's power for the purpose GCR O.24, r.1. In Walkers' letter to the Court dated 3 May 2022, responding to Nelson's letter sent on 28 April 2022, they noted that since Mr Jafar had failed and not undertaken to give the requested confirmation, the requested relief was necessary at this stage.

The GHF Parties' submissions

16. The GHF Parties submitted that since Mr Jafar had a presently enforceable right to require Mr Naqvi to provide him with documents held by Mr Naqvi to assist him "*in relation to any steps taken by [him] in relation to or arising from the Retained Debt*", those documents were in Mr Jafar's power and that, since Mr Jafar had failed to undertake at all or in sufficiently clear terms that he would do so, the Court should now require Mr Jafar to exercise his right by writing to Mr Naqvi to require that he deliver up relevant documents.
17. The GHF Parties argued that on its proper construction clause 16 of the Settlement Deed created an unconditional right of a kind which satisfied the test established by the authorities for determining when documents were in a party's power for the purpose GCR O.24, r.1.
18. The GHF Parties relied on the well-known speech of Lord Diplock in *Lonrho Ltd v Shell Petroleum Ltd* [1980] 1 W.L.R. 627 (***Lonrho***) at [635]:

"...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. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power."

19. They also noted that *Lonrho* was referred to by this Court in *In the Matter of Qihoo 360 Technology Company Limited* [2017] (2) CILR 43, at [33] in the following terms:

"...as authority for the proposition that documents are within a litigant's power if he has a presently enforceable right to obtain them from the holder without the need to obtain the consent of anyone else."

20. The GHF Parties accepted that for documents to be in a party's power by reason of a contractual right to have them delivered up or to take copies, the right must not be conditional. But, they said, Mr Jafar's rights under clause 16 were not conditional, restricted, or qualified in any relevant sense.
21. In the 25 April Letter (at [13] and [14]) Walkers submitted that:
- “13. *Clause 16 obliges Mr Naqvi (to the extent permitted by law), to provide reasonable cooperation and assistance to Mr Jafar in relation to any steps taken by Mr Jafar in relation to or arising out from the Retained Debt (as defined), which steps include the pursuit of the Jafar Action. The assistance Mr Naqvi is obliged to give expressly includes providing information and documents to Mr Jafar and to his legal and other advisers. That obligation is not discretionary. Mr Jafar therefore has the corresponding (express or implied) legal right to request the provision of documents.*
14. *Mr Jafar's presently enforceable legal right, as contained in Clause 16, to obtain documents from Mr Naqvi means that those documents are within his "power" for the purposes of GCR O.24, r.1. Mr Jafar has a legal right to obtain documents from Mr Naqvi.*”
22. In their letter dated 3 May 2022, Walkers argued that clause 16's qualification of reasonableness to Mr Naqvi's compliance with any demand from Mr Jafar did not amount to a discretion to refuse the demand outright. It also did not represent a restriction on the power (right) given to Mr Jafar by clause 16.
23. The GHF Parties also submitted that the Settlement Deed did not prevent Mr Jafar from handing over documents obtained from Mr Naqvi in accordance with his discovery obligations in the Jafar Proceedings. The Settlement Deed made it clear that the clause 16 obligation was imposed for the purpose of allowing Mr Jafar to obtain documents held by Mr Naqvi that he needed in relation to steps taken in connection with the Retained Debt. The Jafar Proceedings were to be treated as such steps and the documents in question were needed by Mr Jafar in order to enable him to conduct and prosecute the Jafar Proceedings. The decision of Whitford J in the English Chancery Division in *Unilever Plc v Gillette (UK) Ltd* [1988] RPC 416 (**Unilever**) was therefore distinguishable and did not apply.

24. The GHF Parties noted that Mr Jafar’s position was that he had never sought to exercise any rights, or obtained any documents, under clause 16 and that the clause did not justify the designation of Mr Naqvi as one of his custodians. Mr Jafar took the view that the documents covered by clause 16 were not in his power. However, despite this, Nelsons had confirmed in their letter dated 14 April 2022 (at [14]) that Mr Jafar was prepared to discuss with all parties the use of clause 16 to seek discovery from Mr Naqvi and this had been reiterated in their letter sent on 28 April 2022 (at [31]). The GHF Parties rejected Mr Jafar’s argument that it was unnecessary and premature for the Court to make an order before such discussions had progressed. They considered that Mr Jafar had been given but had declined to take the opportunity formally to confirm that he would make a request to Mr Naqvi and that it was important that he did so since Mr Naqvi was likely to have relevant, and probably significant, documents. In these circumstances, the Court was entitled to and should now make an order and direct Mr Jafar to make the request.

Fund IV’s submissions

25. Fund IV supported the Application. They filed brief written submissions, in accordance with the directions I had given after the distribution of my draft judgment, focussed on the question of whether the documents covered by clause 16 were in Mr Jafar’s power. They considered that Mr Naqvi’s documents were of vital relevance and that Mr Jafar should be directed at this stage to exercise his rights under the clause and seek documents from Mr Naqvi.
26. As regards the proper construction of clause 16, Fund IV submitted that while the words “*reasonable cooperation and assistance*” might in a vacuum be seen as wide, in clause 16 they were circumscribed and had to be understood by the reference to “*in relation to any steps taken by [Mr Naqvi] in relation to or arising from the Retained Debt*”. Furthermore, while there could legitimately be a debate about what is and is not reasonable, it was wrong to describe Mr Naqvi’s obligation (and Mr Jafar’s right) as subject to a discretion. “*Reasonable*” imposed an objective standard, which was independent of Mr Naqvi’s wishes or decisions.
27. In addition, on the proper construction of clause 16, a demand by Mr Jafar to provide information and documents relating to the Retained Debt was automatically reasonable. Fund IV argued that even though clause 16 did not give Mr Jafar a general unfettered right of access to Mr Naqvi’s

documents, it did do so in relation to documents relating to the Retained Debt. It was *ipso facto* and necessarily reasonable for Mr Jafar to require the production of documents needed for that purpose. But, Fund IV said, even if that argument was not accepted, Mr Naqvi was to be treated as being subject to an absolute contractual obligation to provide those documents which it was reasonable for him to provide. In other words, assuming that Mr Naqvi was only under an obligation to provide a sub-set of his documents (because his obligation was only to provide those documents which related to steps taken by Mr Jafar in relation to or arising from the Retained Debt and which it was reasonable to require him to provide) once it had been established what those documents were (because it had been established which documents Mr Naqvi held that were relevant and related to the Jafar Proceedings and which documents it was reasonable for Mr Naqvi to be required to produce), Mr Naqvi had an unconditional obligation to provide them. Fund IV accepted that the question of what documents Mr Naqvi could reasonably be required to produce could not be resolved on the present application. It also did not matter that the party with the right to the documents had to take steps to enforce it. That was no reason for treating the right as subject to a disqualifying condition that prevented him having the relevant documents in his power. In the case of clause 16 of the Settlement Deed, unlike the facts in *Re Lombard Shipping and Forwarding Ltd* [1993] BCLC 238 (*Lombard*), the Court hearing an application for the enforcement of clause 16 would not have a general discretion to refuse to make an order for the provision of the documents. Unlike the facts in *Unilever*, Mr Jafar clearly had a right to receive documents for the purpose of giving discovery of them to the other parties (subject to the protections of the usual implied undertaking).

28. In Fund IV's view, the words in clause 16 which limited Mr Naqvi's obligation "*to the extent permitted by law and legal duties to which [Mr Naqvi] is subject*" simply ensured that Mr Naqvi was not required to undertake anything unlawful. They did not make Mr Jafar's rights conditional or qualified in a relevant sense.

Mr Jafar's submissions

29. Mr Jafar argued that the documents covered by clause 16 of the Settlement Deed were not in his power and, as I have already noted in my summary of the GHF Parties' submissions, that it was unnecessary and premature for the Court to give a direction at this stage. Mr Jafar had offered to discuss with all parties the use of clause 16 to seek discovery from Mr Naqvi and he considered

that until these discussions had taken place it was inappropriate for the GHF Parties to have made the Application and it would be wrong for the Court to give the directions sought therein.

30. Nelsons set out Mr Jafar’s position as follows (in Nelsons’ letter sent on 28 April 2022 at [24]) (underlining added):

- a. Mr. Jafar does not have power over Mr. Naqvi’s documents because he does not have an absolute, immediate, or free right of access to Mr. Naqvi’s documents. In Lord Denning MR’s words in Lonrho, Mr. Jafar does not have “immediate” power over the documents. Nor is he “on the factual realities of the case virtually in possession” of any of Mr. Naqvi’s documents, or [does he have] “a present indefeasible legal right to demand possession” (in the words of Shaw LJ in Lonrho).
- b. The GHF Parties submit that clause 16 of the Settlement Agreement is not discretionary: paragraph 13 of the Application. However, Mr. Naqvi’s provision of “reasonable cooperation” under clause 16 of the Settlement Agreement would necessarily involve an exercise of discretion, albeit a discretion fettered by the requirement of reasonableness. More importantly, as set out above, clause 16 does not grant an absolute right or unfettered access in respect of documents held by Mr. Naqvi.
- c. Given that the Settlement Agreement is itself subject to obligations of confidentiality, impliedly, any documents provided under it would likely be subject to obligations of confidentiality. Accordingly, Mr. Jafar does not have “power” over such documents.”

31. Mr Jafar argued that on the proper construction of clause 16, Mr Naqvi’s obligation to provide information and documents was subject to the requirements of “*reasonable cooperation and assistance*.” Mr Naqvi was only obligated to produce documents where it could be said that doing so constituted the provision of reasonable cooperation and assistance to Mr Jafar in relation to any steps taken by him with respect to the Retained Debt.

32. Mr Jafar submitted that this requirement (that it was only where the production of documents was required by Mr Naqvi’s obligation to provide reasonable cooperation and assistance to Mr Jafar that Mr Naqvi was required to produce documents) imposed a substantive restriction on Mr Jafar’s rights which prevented them being treated as absolute and unqualified for the purpose of GCR O.24, r.1. The authorities made it clear that an absolute right is required for a power to arise. Mr Jafar relied in particular on the judgment of Shaw LJ in the Court of Appeal in *Lonrho* [1980]

QB 358 (*Lonrho CA*) at 375G where he said that “a document can be said to be in the power of a party for the purpose of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession ... or otherwise has a present indefeasible legal right to demand possession.”

33. In addition, the assessment of reasonableness was multi factorial, and will involve consideration of all the circumstances. As a result, Mr Jafar’s rights were subject to such an assessment and therefore qualified. Mr Jafar also argued that as a result, Mr Jafar’s clause 16 right was analogous to a clause in a deed or contract which required a party to obtain the consent of another party where that consent was “not unreasonably to be withheld.” The party whose consent was needed was still able to, and the relevant right was still subject to, the exercise of a discretion.
34. Furthermore, Mr Jafar said, Fund IV had (at [(8)(c)] of their written submissions) acknowledged that Mr Jafar did not have an unfettered right to access Mr Naqvi’s documents and that concession was sufficient to establish that Mr Naqvi’s documents were not in Mr Jafar’s power.
35. Mr Jafar argued that since the documents subject to clause 16 were not in his power, the Court had no jurisdiction to require him to take steps to obtain and disclose them. I summarised Mr Jafar’s submissions and referred to the authorities he relied on in relation to this point at [80] of the CMC Judgment. The two main authorities were the judgment of the English Court of Appeal (allowing an appeal from the judgment of Morritt J (as he then was)) in *Dubai Bank v Galadari*, The Times, 14 October 1992 (*Galadari*) and the judgment of Mr Peter MacDonald Eggers QC sitting as a deputy High Court judge in *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation* [2021] EWHC 2904 (Comm).
36. Mr Jafar also submitted that practical considerations were essential to the analysis of whether or not Mr Jafar had power over any of Mr Naqvi’s documents because as was said in *Hollander on Documentary Evidence*, 14th Ed., 9-025, “[o]ne point not always appreciated is that the legal analysis as to whether a document is within the control of a party has to be seen in the light of the factual position, and not merely as a matter of law... The starting point is: as a matter of fact is the document in the control of the party?” Mr Jafar argued that as a practical matter if he did in fact make a request, it would in the first instance be for Mr Naqvi to determine what steps, if

any, to take and what documents, if any, to produce. He might well refuse to produce any documents. For example, Mr Naqvi might assert that his mobile phone was not something he was reasonably required to provide or that sources of data had been confiscated by investigating authorities or prosecutors and were no longer accessible by him. There was no evidence before the Court which could satisfy the Court that Mr Naqvi will provide any, or any relevant and non-duplicative, documents in response to a request made by Mr Jafar. As such, there was no basis to conclude, as a matter of fact, that Mr Jafar had power over the documents. Furthermore, it would be unreasonable to suggest that on the proper application of GCR O.24, Mr Jafar must be required to pursue onerous and costly proceedings in order to establish what is or is not reasonable in terms of the discovery of documents. Fund IV had failed to take into account the extremely onerous burden that Fund IV (and the GHF Parties) sought to place on Mr Jafar.

37. Mr Jafar also argued that the order sought in the Application was unacceptably vague. It would be unacceptable and unworkable for the Court simply to direct that Mr Jafar “*request documents*” from Mr Naqvi, without any regard to the types or classes or dates of such documents.

Discussion and decision

38. The scope of Mr Jafar’s discovery obligations only required adjudication at the CMC to a limited extent.

39. In the CMC Judgment, I dealt with the position with respect to Mr Jafar’s discovery and at [92] I said this:

“As Mr Bloch QC made clear, Mr Jafar is not seeking any order from the Court limiting the inquiries that he is required to make or the extent of his obligations with respect to discovery. The only issue which arises is who is to be included in Appendix G to the Discovery Protocol as Mr Jafar’s custodians. In view of Mr Jafar’s position as explained by Mr Bloch QC, that list will be, as the amendment to the definition of Custodians in paragraph 6.5 of the Discovery Protocol provided, non-exhaustive and without prejudice to Mr Jafar’s discovery obligations.”

40. Mr Jafar had agreed to list a number of individuals, including himself, as custodians in Appendix G (see the CMC Judgment at [93]). There was a dispute at the CMC as to whether Mr Badr Jafar

and Mr Majid Jafar, Mr Jafar's sons, should also be treated as custodians but I declined to make an order at this stage since to do so would be premature and based on incomplete evidence.

41. But the Application now raises further issues relating to Mr Jafar's discovery obligations. It seems to me that two issues are capable of being dealt with at this stage, at least in part, namely the question of whether on the proper construction of the Settlement Deed, Mr Jafar's rights under clause 16 of the Settlement Deed are sufficient to result in some or all of the related documents held by Mr Naqvi being treated as within Mr Jafar's power and the question of whether, in light of the determination of the construction/power point, it is appropriate now to direct Mr Jafar to write to Mr Naqvi and, if so, in what terms.

42. The terms and effect of clause 16 of the Settlement Deed can in my view be summarised as follows:

- (a). Mr Naqvi's contractual obligation is to *"provide reasonable cooperation and assistance to [Mr Jafar] and the ADJ Parties in relation to any steps taken by [Mr Jafar] in relation to or arising from the Retained Debt."*
- (b). the obligation to *"provide reasonable assistance"* includes an obligation to provide *"information and documents"* to Mr Jafar.
- (c). Mr Naqvi's obligation to provide *"information and documents"* remains subject to the reasonableness qualification. Assistance includes providing information and documents. But Mr Naqvi is only required to provide *"reasonable assistance"* and so he is only required to provide information and documents where and to the extent that it is reasonable for him to be required to do so. Determining what is reasonable will, to put the point shortly and generally, require a review of all the relevant circumstances and an assessment of what parties in the position of Mr Naqvi and Mr Jafar acting reasonably could be expected to need and do, having regard to the purpose of clause 16 in the context of the Settlement Deed as a whole. Whether Mr Naqvi can be said to be obligated to produce particular documents will depend on what documents Mr Jafar asks for, why they are needed,

whether Mr Naqvi has access to them and what steps Mr Naqvi needs to take to produce them.

- (d). Mr Naqvi is also only required to provide information and documents “*in relation to any steps taken by [Mr Jafar] in relation to or arising from the Retained Debt.*” It appears to be accepted by all parties that steps taken and to be taken by Mr Jafar in and for the purpose of the Jafar Proceedings satisfy this requirement and include action taken by Mr Jafar in performing and discharging his discovery obligations. In my view, that is right.
- (e). Mr Naqvi is also only required to provide information and documents “*to the extent that*” doing so is permitted by (applicable) law and the legal duties to which he is subject. Putting the point another way, Mr Naqvi is not under an obligation to do anything which would give rise to a breach of applicable law or legal duties binding on Mr Naqvi.
43. As will be apparent from my summary above, I do not accept Fund IV’s submission that a demand by Mr Jafar to provide information and documents relating to the Retained Debt will be automatically reasonable. I do not read clause 16 as saying that Mr Naqvi is obligated to honour any document request. Providing documents is one of the activities that Mr Naqvi can be required to undertake in order to discharge his obligation to provide reasonable assistance. But any particular document request must still be reasonable, and Mr Naqvi is only obligated to satisfy reasonable document requests (and to provide documents when it is reasonable to require him to do so and to the extent reasonably required to satisfy the purpose of the clause, that is to assist Mr Jafar in the litigation he has commenced in respect of the Retained Debt).
44. I also reject Mr Jafar’s submission that since Fund IV had accepted that Mr Jafar did not generally have an unfettered right to access Mr Naqvi’s documents they had conceded that the rights under clause 16 of the Settlement Deed were qualified and incapable of satisfying the test for the existence of a power. It is clear that Fund IV did not concede this. Their point was that clause 16 itself gave Mr Jafar sufficient rights to meet the test for the existence of a power. Further, I do not accept Mr Jafar’s contention that Mr Naqvi has a discretion under clause 16 to determine or decide what is reasonable (that is ultimately a matter for the Court which has to adjudicate a dispute in relation to the clause and the scope of Mr Naqvi’s obligations thereunder) or that the

operation of the reasonableness requirement in clause 16 should be understood as analogous to the requirement that consent should not be unreasonably withheld in a provision which limited a party's right to refuse to give its consent by such a requirement.

45. The authorities establish that it is insufficient (to give the party a power to obtain a document) (a) that a party has a right to obtain or inspect documents from a third party which can only be exercised with and is therefore subject to the consent of that or another third party and (b) for a party to have a right, the exercise or enforcement of which is dependent on the exercise of a general discretion by the Court. But is it sufficient to have a right to inspect that is not subject to either of these conditions or qualifications but is qualified by the need to show that it is reasonable to require the third party holding the documents to produce them (as reasonable assistance which he is obligated to provide under a contract)?
46. It seems to me that the legal analysis of what is required to satisfy the requirements for a power can be summarised as follows:
- (a). as the parties agree, “*power*” means a presently legally enforceable right to obtain the relevant documents from whomever actually holds them.
- (b). as Lord Diplock said in *Lonrho* at 627 (underlining added):
- “...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. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future.”*
- (c). in the Court of Appeal in *Lonrho CA*, Shaw LJ emphasised that the right to obtain the documents must be immediately exercisable and not qualified (in the sense of being defeasible), so that the party was in reality “*virtually in possession*” of the documents. I

have quoted the relevant passage at 375 above but it is worth quoting again with my underlining added:

“a document can be said to be in the power of a party for the purpose of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession ... or otherwise has a present indefeasible legal right to demand possession.”

- (d). the right to obtain documents will be treated as defeasible and qualified, and therefore insufficient to give rise to a power for the purpose of GCR O.24, r.1, if its exercise and enforcement is subject to the Court’s general discretion. Accordingly, it is not sufficient that a party has a statutory right to obtain documents from another party if enforcement of the right requires an application to Court for an order to deliver up and the Court has a general discretion as to whether to make the order sought. In *Lombard Vinelott J* had to consider whether, in a case where the Secretary of State had a statutory power or right to require an administrative receiver appointed in respect of a company whose director the Secretary of State was seeking to disqualify to deliver up documents, the documents held by the administrative receiver were in the Secretary of State’s power such that he could be required to discover them. It was argued by the director that under section 7(4) of the UK’s Company Directors Disqualification Act 1986 the Secretary of State had a presently enforceable legal right (and a present indefeasible legal right) to require administrative receivers to produce all the documents in their custody which the Secretary of State reasonably required and that if an order for discovery was made against the Secretary of State, he could reasonably require production of all books, papers and other records relevant to the director's conduct as a director to which the order for discovery related. Vinelott J set out his conclusions as follows (at 243-244) (underlining added):

“I have, after some hesitation, come to the conclusion that that submission is not well founded. If an administrative receiver refuses to comply with a request by the Secretary of State (which he might do, on the ground, amongst others, that to comply with the request would require undue expenditure of time and money in searching through the companies’ records to identify documents within the ambit of the request) the only remedy of the Secretary of State is to apply to the court under r 5 of the Insolvent Companies (Reports on Conduct of Directors) (No 2) Rules 1986 for an order directing compliance. The court clearly has a discretion whether to

make such an order and as to the person by whom the cost of securing compliance ought to be borne. No doubt the court would normally make an order at the request of the Secretary of State if satisfied that compliance with it would not place any unreasonable burden on the administrative receivers. But it cannot be said that the court would be bound to do so and that the court has no discretion except to determine on whom the cost of compliance is to fall.”

- (e). nor is it sufficient if a party who is claimed to have documents in his power has a contractual right to call for information and documents but not for the purpose of disclosing them in the relevant legal proceedings. It was so held in *Unilever*. In that case, in a patent infringement action, it was accepted that the defendants had no documents relating to the manufacture of the product, which they had bought from an associated company in the United States, however, the plaintiffs submitted that the defendants were entitled to require the associated company to produce such documents by reason of a term in a licence agreement between them. The relevant term (clause 2(a)) said that the associated company would “*make available to [the defendant] during the period of this agreement all technical information and know-how relating to The Products and the manufacture and sale thereof which is or shall be at the free disposal of [the associated company] and [the associated company] hereby grants [the defendant] for the period of this Agreement only a non-exclusive world-wide licence to use such technical information and know-how (including all such technical information and know-how as may have been made available by [the associated company] to [the defendant] prior to the date hereof) in connection with the development, manufacture and sale of The Products.*” The licence agreement also contained a confidentiality clause (under which the defendant undertook to keep the information to which it was entitled under the agreement confidential). Whitford J held that disclosure by the defendant to the plaintiff of the information sought by the latter would be a breach of that clause and therefore that the licence agreement did not give the defendant a right to call for information for the purpose of disclosing it in the infringement proceedings. Clause 2(a) did not give the defendant any right to call for information outside its use in connection with the specific purpose provided for in the clause.
- (f). where pursuant to a contract or otherwise a party has a *prima facie* right to the production of various documents or classes of documents but the right may not apply to some of the documents or the person holding the documents may be able to justify not producing them, the Court must consider the position with respect to particular documents or classes of

documents to see whether they are on the facts covered and subject to the right to production and whether the person has, again on the facts, a proper basis for refusing production. Toulson LJ (as he then was) made this point in the English Court of Appeal in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 when reviewing the judge's order compelling the defendants to produce documents (pursuant to CPR 31.8) held by a third party which related to trusts which they had established and under which they were discretionary beneficiaries. It was argued that the defendants had as beneficiaries under the trusts a right to require the third party, as trustee of the trusts, to give them copies of the documents. It was accepted that a beneficiary's right to seek disclosure of trust documents was best approached as one aspect of the Court's inherent jurisdiction to supervise the administration of trusts, rather than as a proprietary right. No beneficiary has an automatic right to disclosure of anything which can be described as a trust document. In deciding whether to order disclosure, a Court may have to balance competing interests of different beneficiaries, the trustees and third parties. Disclosure may have to be limited and safeguards may have to be put in place. As to whether in this context a trust beneficiary could be required to produce on disclosure documents held by the trustee, Toulson LJ said this (underlining added):

“45. *I do not think that it is either necessary or possible to give a cut and dried answer to the question whether and when a court may make an order under CPR 31.8 against a beneficiary in relation to a trust document not in the beneficiary's physical possession. In many, perhaps most, cases such an order would not be proper, because it would be contrary to the proper interpretation and purpose of the rule to order disclosure of a document whose production depends upon the exercise of a consent by a party over whom the litigant has no control or on the exercise of a discretion by the court; but I would not go as far as to say that an order might never be made under CPR 31.8 against a beneficiary in respect of a trust document which was not in his physical possession. It would depend on the nature of the document and the terms of the trust. It is possible to envisage circumstances in which a trustee would have no ground on which to oppose production of a document and the beneficiary would have a right to an order compelling its production. In summary, I do not accept Mr Tregear's broad argument that the status of the Appellants as former beneficiaries of itself provided sufficient foundation for an order under CPR 31.8 or, in this case, under CPR 71.2, and I do not understand that to have been the basis on which the judge made the order.”*

- (g). so Toulson LJ considered that even where a decision as to a beneficiary's entitlement to obtain particular documents from a trustee required a review involving weighing and assessing competing interests, it was possible that an order could be made against the beneficiary on the basis, under CPR 31.8, that the documents which the trustee could be required to provide were in the beneficiaries control because he had a right to obtain, inspect or take copies of them. The learned Lord Justice's views are of course expressed somewhat tentatively and are based on the rules for disclosure under the CPR which are different from those under GCR O.24. But they seem to be helpful and to set out the correct approach, and in my view the applicable rules under the CPR are sufficiently similar on this point to make Toulson LJ's view applicable or at least powerfully persuasive.
- (h). the point is that in order to be disqualified as sufficient to give rise to a power, the right to receive a particular document has to be defeasible or subject to conditions. A right to be provided with documents by the holder of the documents where the cost, expense, and effort to which the holder will be put is reasonable (having regard to the circumstances and in light of the purpose of the contractual provision creating the right) is an unqualified right to receive the documents which it is reasonable for the holder to produce. Where it is necessary to, and ultimately the Court must make an assessment of competing factors in order to, determine whether there is a right to the production and delivery up of a particular document, the party with the right may be taken to have certain documents in his power where on the facts he would be entitled to have them disclosed and their holder would have no defence or grounds for resisting such disclosure. While the Court must be cautious to avoid extending the concept of power beyond its established scope of a presently enforceable and indefeasible legal right, if and when the Court can determine that the circumstances establish that the right exists, there is a relevant legal right which satisfies the test for the existence of a power.
- (i). as Toulson LJ also noted (albeit in respect of CPR 31.8), a decision on whether documents are in the power of a party must be based on the proper interpretation of GCR O.24, r.1 having regard to its purpose. That purpose is to respect and give effect to the principle of equality of arms. This requires that where one party has a right to obtain information contained in a document they should be obliged to disclose it to other parties if it is relevant

to the determination of the proceedings unless there is a proper justification for not doing so. The Court should interpret and apply GCR O.24, r.1 so as to ensure that a party to litigation is required to discover those documents which he ultimately has a right to receive from a third party, even if the right can only be confirmed as existing following a review of the facts and circumstances that establish whether it is reasonable for the third party to be required to deliver them up.

47. Applying these propositions, it seems to me that clause 16 of the Settlement Deed *alone* does not result in *all and any* documents held by Mr Naqvi related to the Abraaj Group and to which clause 16 *could* apply being in Mr Jafar's power for the purpose of GCR O.24, r.1. However, some of those documents may be in his power and on the available evidence it is likely that some of Mr Naqvi's documents are in Mr Jafar's power.
48. An assessment has to be made in relation to particular documents or classes of documents as to whether it would be reasonable for Mr Naqvi to produce them. It may be reasonable for Mr Naqvi to produce some but not others. Mr Naqvi will then not be obligated to deliver up and Mr Jafar will not have a right to receive the documents in the latter category. There will be no right which can engage GCR O.24, r.1 and result in those documents being treated as in Mr Jafar's power. But Mr Jafar will have a right to delivery up of the documents in the former category which will be in his power for the purpose of GCR O.24, r.1. It will also be necessary to establish whether Mr Naqvi claims to be and is relieved of the obligation to deliver up particular documents in reliance on the provision in clause 16 of the Settlement Deed that states that Mr Naqvi is only required to take steps "*to the extent permitted by law and legal duties to which AMN is subject.*"
49. In order to *decide* whether any particular document or classes of documents are within Mr Jafar's power I would need to form a view as to the proper construction and scope of the reasonableness requirement in clause 16, to have the parties identify particular documents or classes of documents which they claim Mr Naqvi is obligated to produce pursuant to clause 16 and to have the parties adduce all the relevant evidence that supports their position. It may be necessary to have evidence as to Mr Naqvi's position as to which documents he is obliged to provide (although of course, as I have already mentioned, if there is a dispute with Mr Naqvi as to the interpretation of clause 16 an application to the English Court may be required to determine the issue as between Mr Jafar and Mr Naqvi).

50. But while I am unable, at this stage, to reach such a decision it seems to me, as I have noted above, that the allegations made in the pleadings and the evidence regarding Mr Naqvi's position and activities allow me to conclude at least for the purpose of the Application that it is likely that Mr Naqvi held, and may still hold, relevant documents which in Mr Jafar's hands would be discoverable and that he is obligated to provide to Mr Jafar at least some of these documents pursuant to his clause 16 obligation to provide reasonable assistance.
51. In my view, the confidentiality clause in the Settlement Deed does not prevent Mr Jafar from being able to disclose documents received from Mr Naqvi to the other parties to the Jafar Proceedings. Clause 17 of the Settlement Deed states that “[e]ach Party undertakes to keep this Deed and the transactions contemplated by it confidential and not to disclose such information otherwise than: (i) to its professional advisors on terms that they keep it confidential; (ii) to an AMN Party or ADJ Party on terms that they keep it confidential; or (iii) as required by law.” However, clause 16 makes it clear that the cooperation and assistance that Mr Naqvi is obliged to provide is for the purpose of assisting Mr Jafar “in relation to any steps taken by ADJ in relation to or arising from the Retained Debt” which must be understood in my view as including steps to enforce and bring proceedings in relation to the Retained Debt. Clause 16 therefore expressly contemplates that Mr Jafar may, and must be construed as permitting Mr Jafar to, use any documents and information produced by Mr Naqvi for the purpose of conducting the Jafar Proceedings, including by giving discovery as required by and in accordance with the applicable procedural rules. The documents or information which Mr Naqvi is required to provide pursuant to his obligation to provide reasonable assistance are intended to be available for use in the proceedings relating to or arising from the Retained Debt.
52. It is clear that I cannot require Mr Jafar, for the reasons he gave and having regard to the authorities he cited, to take steps to obtain and collect from third parties documents which are not currently in his power. There is a limit to the Court's jurisdiction in this respect. However, it seems to me that I can, in the exercise of the Court's case management powers, require Mr Jafar to take steps, as part of the process for properly performing his discovery obligations under GCR O.24, to identify (and which are necessary for the purpose of identifying) documents that are in his power, where the evidence establishes that it is at least likely that he is entitled to receive from Mr Naqvi some relevant documents, subject to the need to ensure that any steps which Mr

Jafar is required to take are proportionate. It seems to me that the Court's jurisdiction to give case management directions with respect to the discovery process extends that far, subject - when determining what steps Mr Jafar should be required to take - to the need to have regard to the overriding objective and to respect the need for proportionality. In this context I would note, recognising of course the differences between the GCR and the CPR, the approach taken by the Sir Geoffrey Vos MR in the English Court of Appeal in *Phones 4U Ltd (in administration) v EE Ltd and others* [2021] EWCA Civ 116 (**Phones 4U**) in particular at [25]-[28]).

53. In *Phones 4U* Mr Justice Roth had ordered the second to the eighth defendants to write to individuals, described as personal material custodians, to request them to give certain e-disclosure providers (IT consultants) engaged by the defendant that had employed them, access to their personal mobile telephones and emails. The expressed purpose was to enable those consultants to search for work-related communications relating to the employer's business that would be passed to the relevant defendant for a disclosure review to be undertaken. As Sir Geoffrey Vos MR noted (at [14]), Mr Justice Roth had distinguished his order from that overturned by the Court of Appeal in *Galadari* because it fell within the Court's established jurisdiction *as it sought to identify documents that were under the defendants' control*.
54. The English Court of Appeal in *Phones 4U* rejected the challenge made both to the voluntary nature of the judge's order and the requirement to write to third parties (see *Phones 4U* [42] and [46]-[48]).
55. I appreciate that neither *Phones 4U* nor *North Shore Ventures Ltd* were discussed by counsel in their written submissions (although Walkers did cite *Phones 4U* in a footnote – footnote 15 - to their letter of 3 May 2022). I have therefore considered whether it is necessary to give the parties an opportunity to make further submissions by reference to these authorities. However, I have concluded that it is not necessary to do so (for the purpose of respecting the need for procedural fairness). The questions of whether the Court has jurisdiction to make an order directing a party to write to and seek documents from a third party, and if it does the manner in which it should exercise that jurisdiction, were directly raised by the Application and the parties were given the opportunity to make their submissions setting out their legal analysis and to cite such authorities as they wished to refer to in relation to those questions. The GHF Parties, as I have noted, mentioned *Phones 4U*. As I have explained, the order to be made on the Application at this stage,



following the handing down of this judgment, will be of limited scope and if further orders are sought that will require Mr Jafar to take further steps beyond writing a letter to Mr Naqvi, then further applications and submissions will be needed and I anticipate that an oral hearing will be required, so that the parties will have the opportunity to make further submissions and deal with *Phones 4U* or *North Shore Ventures Ltd* at that stage. The discovery issues raised at the CMC and then in the Application, which in many respects are only preliminary and designed to facilitate the first stage of the discovery process, have already taken up a substantial amount of time and expense and it seems to me that allowing more time for further submissions after the handing down of this judgment will not promote the overriding objective or assist the parties in advancing these proceedings promptly or in managing them at proportionate expense.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
19 July 2022