Unfettered Access or an Existing Arrangement:

Giving Discovery of Subsidiaries' Documents

The recent decision in *In the matter of the Estate of Osama Abudawood* [FSD 196 of 2018] (unreported decision dated 27 July 2022)[1] has provided clarity on the scope of disclosure available from a company insofar as documents of that company's subsidiaries are concerned. The judgment follows debate before the Cayman Islands Court of Appeal on the issue wherein the CICA remitted the issue back to the Grand Court because of a lack of evidence on the point at first instance.

Justice Kawaley's ruling clarifies that unless a parent company has (i) unfettered access to its subsidiaries' documents; or (ii) some prior arrangement or understanding that gives it access to its subsidiaries' documents, those documents will not be classified as being within its 'power, possession or control' for the purposes of discovery. A link to the full judgment can be found here.

Administrator's Application and Court of Appeal decision

Sheikh Osama Abudawood died intestate in Saudi Arabia in 2017. Michael Pearson of FFP Cayman Limited was appointed by the Grand Court as the Administrator of his Cayman Estate pursuant to s.26 of the Cayman Succession Act. The Administrator sought discovery of documents from WAFR Holdings Limited, one of the Cayman companies in which Sheikh Osama held shares, which included a number of documents of WAFR's subsidiaries. Those subsidiaries were not part of the Cayman Estate and were not parties to any ongoing litigation.

After Justice Kawaley ordered WAFR to disclose the documents of its subsidiaries, WAFR appealed and the CICA determined that the key question which needed to be answered, relying on Lord Diplock's reasoning in *Lonrho v Shell*[2] and applying *Schlumberger*[3] and *Ardila*[4], was whether the Administrator could establish evidence that WAFR had an *"unfettered right of access to the subsidiaries' documents or some understanding or arrangement by which it had the right to achieve such access".* The CICA remitted that issue back to Justice Kawaley because the Administrator had not had the opportunity to put evidence before the Court to support his position that he had a right to WAFR's subsidiaries' documents.

The Court of Appeal had also made it clear that it did not consider that there was much merit in the Administrator's two principal reasons for suggesting that WAFR must have 'unfettered access' or some 'understanding' must exist to grant it access to its subsidiaries' documents: (i) it produced consolidated accounts; and (ii) WAFR had agreed to produce the documents swiftly if the Appeal failed.

It is also worth noting that the CICA judgment confirms that even thought the Administrator was a court appointed officer acting in a probate context, that did not provide any alternative or additional jurisdictional basis for granting discovery broader than what would be permitted under Order 24, Rule 7 of the Grand Court Rules.

---

[1] The administration of the late Sheikh Osama Abudawood's Cayman Islands Estate has been ongoing since early 2018. The main Court file is sealed however the judgment in question went up to the Court of Appeal and accordingly the CICA judgment and the consequential judgment on the Remitted Issue are publicly available.

[2] Lonrho Ltd v Shell [1980] 1 WLR 672

[3] Schlumberger Holdings Ltd v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat)

[4] Ardila Investments NV v ENRC NV [2015] EWHC 3761 (Comm)

Evidential Burden on applicant

When addressing the Remitted Issue, Justice Kawaley indicated that the burden lay on the party seeking discovery to show that there was both a right and a need for the discovery sought. In addition to relying on the aforementioned two points that WAFR produced consolidated accounts and had undertaken to provide the documents if ordered to do so, the Administrator also placed reliance on the fact that there were common directors across WAFR and its subsidiaries. WAFR, conversely, had sworn evidence from one of its directors that no arrangement or unfettered access existed, and no right existed under WAFR's constitutional documents. Further, whilst WAFR had given an undertaking to collate the relevant documents if required to do so, that did not mean that it had actually acted upon that undertaking or that it had a right to obtain those documents without requesting them from its subsidiaries.

In determining that the Administrator had failed to discharge the evidential burden on him, and therefore concluding that WAFR had no right to or unfettered access to its subsidiaries documents having considered the evidence before Him, Justice Kawaley also noted that *"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."*

Policy considerations

The judgment also addresses the position put forward by the Administrator that the documents must have been in WAFR's possession already because of the undertaking that it gave in the context of its application for leave to appeal the first instance judgment. In dismissing that argument, Justice Kawaley noted that "*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.*"

Comment and Conclusion

The overall outcome of the case is that GCR O.24, r.7 will only extend to a company's subsidiaries if the parent has either unfettered access or some enforceable legal right or understanding to the subsidiaries' documents. That will be good news to those operating companies, particularly holding companies, in the Cayman Islands where there is any litigation process afoot. Prior to the Remitted Issue being determined, there was a risk that a holding company could be ordered to produce all documents relating to its subsidiaries simply because it produced consolidated accounts or operated in the context of a family office. That position has now been clarified and narrowed so that the application of the test under Order 24, rule 7 of what would constitute 'power, possession or control' when applied to holding companies and their subsidiaries is clear.

Travers Thorp Alberga's Bhavesh Patel and Bryan Little, instructing Ben Valentin QC of Fountain Court chambers, successfully represented WAFR Holdings in this matter.
