



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 203 OF 2020 (NSJ)

BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

and

(1) ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)  
(2) GHF GENERAL PARTNER LIMITED  
(3) THE GHF GROUP LIMITED  
(4) ABRAAJ GENERAL PARTNER VIII LIMITED

Defendants

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**RULING IN RELATION TO FUND IV'S BANK STATEMENTS SUMMONS**

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**Introduction**

1. This is my judgment on the summons (the *Bank Statements Summons*) issued by Fund IV on 27 March 2023 as amended in draft on 21 April 2023 seeking specific discovery of unredacted copies of certain bank statements and other documents. The Bank Statements Summons was heard at the case management conference (the *CMC*) on 24-26 April 2023.

### The Fund IV Bank Statements Summons

2. On 21 April 2023, Ogier, on behalf of Fund IV, wrote to Forbes Hare, the Plaintiff's Cayman attorneys, enclosing an amended draft of the Bank Statements Summons. At the CMC Fund IV sought permission to amend the Bank Statements Summons, which the Plaintiff did not oppose and was granted. I therefore deal with the application for relief contained in the Bank Statements Summons as amended.
3. That relief is set out in [2] of the Bank Statements Summons as follows:
  - “2. Pursuant to Order 24, rule 1 and/or 3 and/or 7 and/or 20 of the Grand Court Rules and/or the Court's general case management powers and/or the liberty to apply in paragraph 24 of the Order dated 18 August 2022:
    - [2.1 Deleted]
    - 2.2 An order that Mr Jafar should, on or before 5 May 2023, produce all bank statements pertaining to the bank account for the statement with Bates number A\_CAY\_HDJ\_000205288 (as per the original bates numbers in the list of documents provided on 29 January 2023) for the period 1 December 2017 to 31 December 2018 which are in his possession, custody or power relating to matters in question in the Related Proceedings.
    - 2.3 An order that Mr Jafar should, on or before 5 May 2023, produce (i) all other bank statements for accounts held by him or on his behalf which are in his possession, custody or power relating to matters in question in the Related Proceedings, (ii) all documents in his possession, custody or power that evidence the source of the monies that were advanced to fund the Loans that are the subject-matter of the Jafar Proceedings, (iii) all documents in his possession, custody or power that evidence the receipt, dealings with and destination of any repayments of the Loans received, and which documents originate from or pertain to the period 1 December 2017 to 31 December 2018.
    - 2.4 An order that Mr Jafar should produce any documents in accordance with the terms of the Discovery Protocol.”

### The evidence in support

4. The evidence in support of the Bank Statements Summons is to be found in Mr Hayward's Tenth Affidavit (**Hayward 10**), his Fourteenth Affidavit (**Hayward 14**) and his Fifteenth Affidavit (**Hayward 15**). In Hayward 10 Mr Hayward explained that the Plaintiff had referred in ([3] of his Re-Amended Statement of Claim to a number of payments which he said were made from his bank account with the Bank of Sharjah with account number 01307-020246 (the **Jafar Outward Payment Account**). In [12] of its draft Re-Re-Amended Defence, Fund IV has put in issue the origin of the funds advanced by and the financing arrangements between the Plaintiff, his son

Badr Jafar and the Bank of Sharjah or another third party. Mr Hayward noted that the Plaintiff (at the time Hayward 10 was sworn) had only produced one bank statement in his data set, which had been heavily redacted. Ogier had written a letter dated 22 March 2023 to Forbes Hare and pointed out that other documents that the Plaintiff had produced on discovery referred to other accounts held or controlled by the Plaintiff, which were deployed in relation to the loans and which the Plaintiff claimed to have made (the *Loans*), and requested that the Plaintiff provide further information and documents. In Hayward 15, Mr Hayward summarised Fund IV's position as follows:

- “10 Fund IV's position is that: (i) Mr Jafar has not established that he was the source of all of the funds advanced pursuant to the First Loan and the Second Loan; and (ii) Badr Jafar was the true lender under the Third Loan. Paragraphs 46 to 58 of Hayward 12 provide the grounds upon which this position is advanced.
11. Presently, the only information that Mr Jafar has produced which goes to these issues is a bank statement for account number 01307-020246, which was sent as an enclosure to a letter to Ogier from Forbes Hare on 28 March 2023, and is partially redacted. However, when this bank statement was first produced it was so heavily redacted it showed only four entries (showing transfers to AIML and AH that are consistent with the alleged terms of the Loans) and did not reveal even the bank account number.
- 12 Paragraphs 34 to 42 of Hayward 10 set out the basis upon which [Fund IV] seeks bank statements for accounts held by Mr Jafar which relate to matters in question in the Jafar Action (i.e., relevant to [Fund IV's] position referred to at paragraph 10 above). I believe that such bank statements must exist, that Mr Jafar has or had them within his possession, custody or power; and it is necessary for them to be produced by Mr Jafar for the reasons I explain in Hayward 10 in order to resolve a number of disputed issues in the Jafar Action.
13. Paragraphs 49 to 52 of Hayward 14 explain why insufficient and inadequate discovery has been provided by Mr Jafar so far, as to the ultimate source, movement and treatment of monies advanced and repaid pursuant to the Loans. I believe that documents that evidence the source and movement of moneys advanced to fund the Loans as well as documents that evidence the receipt, dealings with and destination of any repayments of the Loans, will exist and will be or have been in the possession, custody or power of Mr Jafar. These are documents pertaining to money flows involving substantial sums of money and I consider it to be almost impossible that they do not exist. I also believe that this additional discovery is necessary in order to resolve a number of disputed issues in the Jafar Action, and particularly those identified at paragraph 10 above.”

#### **Fund IV's submissions**

5. Fund IV seeks the discovery of further documents relating to the ultimate source, movement and treatment of monies advanced and repaid pursuant to and in connection with the Loans made by the Plaintiff. Fund IV submitted that the Plaintiff's discovery had been incomplete (only one

redacted bank statement had initially been discovered) and that in order to establish whether the Loans were funded by the Plaintiff alone and whether consequently he had suffered loss as a result of the Loans not having been repaid in full (and that the unjust enrichment which he alleged was received by Fund IV was at his expense) it was necessary for the Plaintiff to provide not only an unredacted copy of the bank statement so far provided and other bank statements relating to the related bank account, but also other related documents which evidence the parties making and the purpose of payments into and out of the accounts, including payments made from the account following receipt of incoming payments (to identify the ultimate recipient of funds paid into the account). Fund IV also said that it needed to see any documents in the possession, custody or power of the Plaintiff that recorded any arrangements or understandings with Mr Naqvi regarding the recovery from or transfer of assets by him.

6. The payments made by the Plaintiff to Abraaj Holdings (*AH*) and Abraaj Investment Management Limited (*AIML*) that are said to constitute the Loans originated from the Jafar Outward Payment Account. The Plaintiff initially only produced a redacted copy of one statement (numbered 006) for the Jafar Outward Payment Account but subsequently produced an almost completely unredacted copy of that statement. This showed a nil balance before an initial debit entry recording a funds transfer to AIML. There were subsequently many payments into the Jafar Outward Payment Account but the statement did not reveal from whom and for what purpose the payments were made.
7. In addition to the Jafar Outward Payment Account, there is another related and relevant account, into which repayments from Mr Naqvi were made. This is another Bank of Sharjah account in the Plaintiff's name numbered 02307-020246 (the *Jafar Inward Payment Account*). Fund IV does not have a bank statement in respect of this account and so is unable to confirm the amounts paid into that account by Mr Naqvi and what then happened to those funds.
8. Fund IV argues that it needs to have discovery of documents relating to the subsequent movement of funds from these accounts for at least three reasons. First, the subsequent movement of funds is relevant to Fund IV's case that Badr Jafar was actually the lender for the third loan (discovery is warranted in respect of the transfer of funds into the Jafar Inward Payment Account so as to address who made the third loan). Secondly, it is necessary to establish what repayments, if any, were made to the Bank of Sharjah in order, *inter alia*, to determine the extent to which the Bank of Sharjah (rather than the Plaintiff) was at risk in relation to some of the Loans. Thirdly, it may matter which Loans have been repaid and how payments were appropriated to and as between the Loans. Fund IV also submitted that since various other bank accounts were referred to in the contemporaneous documents relating to the Loans, and it was wholly unclear whether payments

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were made, or routed through, these other accounts, discovery of relevant documents relating to such other accounts was necessary.

9. At the CMC, Mr Ayres KC for Fund IV had argued that while the principal and primary basis upon which Fund IV sought the relief set out in the Bank Statements Summons was the need to establish the source of the funds used to advance the Loans and the destination of repayments, those were not necessarily the only financial issues that may arise in relation to the proceedings. He referred to [55] of Fund IV's draft Re-Re-Amended Defence which is in the following terms:

*“It is averred that the Plaintiff failed to mitigate his loss in failing to present a cheque of US\$46 million provided by Mr Naqvi in July 2018. GP8 reserves its right to plead to any further failure on the part of the Plaintiff to mitigate the loss and damage claimed after discovery and analysis of that discovery, including of his settlement agreement with Mr Naqvi and any dealings with Bank of Sharjah and/or Badr Jafar and/or any third party in respect of the loans.”*

10. Mr Ayres KC noted that this paragraph raised an issue concerning a cheque that was provided by Mr. Naqvi to the Plaintiff in July 2018 and that Fund IV was alleging that there had been a failure to mitigate loss as a result of the failure to present that cheque and to obtain payment. However, Fund IV did not know what had happened regarding presentation of that cheque and whether or not the Plaintiff had sought to present it and obtain payment of the funds.

### **The Plaintiff's position**

11. At the CMC, the Plaintiff did not oppose his being required to give further discovery in relation to these bank accounts and payments but objected to the width and drafting of aspects of the Bank Statements Summons.
12. On 26 April 2023, the last day of the CMC, Forbes Hare had written to Ogier confirming that the Plaintiff was prepared to conduct reasonable searches for and provide further discovery of bank statements relevant to the issues now raised on the pleadings following Fund IV having provided to the Plaintiff its draft Re-Re-Amended Defence on 22 March 2023. Forbes Hare noted that before that, Fund IV's pleaded position had been that the Plaintiff had made the payments constituting the Loans (pleaded at paragraphs [3(1)] to [3(4)] of the Plaintiff's Statement of Claim) and that the transfers pleaded at [4(1)] to [4(3)] of the Plaintiff's Statement of Claim related to Loans made by the Plaintiff. Accordingly, until 22 March 2023, the issues in respect of which discovery was now sought in the Bank Statements Summons were not in dispute. While maintaining that Fund IV's case that the Plaintiff was not the source of the funds advanced to AH and AIML was both hopeless on the facts and legally irrelevant in circumstances where the

Plaintiff was clearly the lender under the Loans, the Plaintiff accepted that there was now a need to conduct a further search for relevant documents. But this needed to be a reasonable, properly focussed search rather than the broad open-ended search apparently envisaged by the wording of the Bank Statements Summons. In particular, the Plaintiff objected that the discovery sought in the Bank Statements Summons: (a) did not refer to or reflect matters actually in dispute in the proceedings and went far beyond that which might actually be necessary for disposing fairly of the case; and (b) bore no relation to the actual banking arrangements in question in these proceedings. It was wrong, the Plaintiff argued, for Fund IV to seek to impose on the Plaintiff the broadest possible discovery. Rather the appropriate course was for the Plaintiff, with knowledge of the underlying banking arrangements and documents, to conduct a reasonable and proportionate search for documents that fell within his obligations of disclosure.

13. Forbes Hare in their letter dated 26 April 2023 set out further information regarding the manner in which the Loans had been funded and paid, the involvement of the Plaintiff and the Bank of Sharjah and of various other accounts. They said that the Plaintiff, in light of the matters so disclosed, was prepared to give discovery and production of the following:
  - (a) a summary listing, and copies, of fixed deposits evidencing the free funds held by the Plaintiff prior to Mr Naqvi's approach in December 2017 and which were transferred to the Jafar Outward Payment Account;
  - (b) a listing, and copies, of fixed deposits created by the Bank of Sharjah as collateral for the first and second Loans;
  - (c) bank statements of the overdraft accounts demonstrating the offsetting of the Plaintiff's collateralised fixed deposits against the amounts that he owed to the Bank of Sharjah once the first and second Loans went into default; and
  - (d) any other documents which support Fund IV's case (or the GHF Parties' case) as to the source of funding for any of the Loans or the distribution of any repayments of the third Loan, as set out in their Re-Amended, or Re-Re-Amended, Defences.
14. At the CMC, Lord Falconer for the Plaintiff submitted that the drafting of the Bank Statements Summons was too wide. He submitted that the order on the Bank Statements Summons should reflect and adopt the wording in the four points made in Forbes Hare's letter dated 26 April 2023 and set out above.

15. Lord Falconer made three main points. First, the date range of 1 December 2017 to 31 December 2018 which identified the period during which the relevant documents to be discovered had to have been created was too and unjustifiably long. Secondly, he argued that the wording in [2.3(iii)] of the Bank Statements Summons (*all documents in his possession, custody or power that evidence the receipt, dealings with and destination of any repayments of the Loans received, and which documents originate from or pertain to the period 1 December 2017 to 31 December 2018*) was too wide and would capture payments that were not related or relevant to the issues in dispute. Lord Falconer submitted that the basis of Fund IV's application (as reflected in Fund IV's skeleton and its evidence in support) was that it needed to see documents, including bank statements, that relate to the source of funding of the Loans or the distribution of any repayments. The wording used in [2.3(iii)] was wide enough to cover payments out of the \$50 million repayment by Mr Naqvi for the purpose of purchasing a house or going to the races and it could not be right that the Plaintiff be required to give discovery of such payments, which were not relevant to the issues in the proceedings. Lord Falconer submitted that the wording used in [13(d)] above that had been set out and proposed in Forbes Hare's letter dated 26 April 2023 was more appropriate and should be substituted for the wording in [2.3(iii)]. Thirdly, Lord Falconer submitted that in making its case in support of the language used in [2.3(iii)] Fund IV had impermissibly relied on grounds not set out in the evidence in support of the Bank Statements Summons. Fund IV's evidence did not deal with the case now made by Mr Ayres KC based on averments of the Plaintiff's failure to mitigate (as contained in [55] of Fund IV's Re-Re-Amended Defence). Fund IV should not be permitted to widen the basis of discovery to other matters beyond the grounds set out in its evidence in support and beyond the pleadings that Mr Ayres KC had referred to in his opening.
16. Mr Ayres KC said that Forbes Hare's letter dated 26 April 2023 should not affect Fund IV's application for relief in the Bank Statements Summons, since it had been received too late and the new information disclosed had not been put in evidence. In response to Lord Falconer's complaint about the dates selected by Fund IV, Mr Ayres submitted that they were appropriate. It was clear that there were relevant events that took place in 2018 and Fund IV had selected the end of that year as an end date to ensure that all relevant material was captured. The start date (of 1 December 2017) that had been selected was only about three weeks before the Loan advances were made and once again this was a reasonable date to use to ensure that all relevant material was captured. In response to Lord Falconer's objections to the scope of [2.3(iii)] of the Bank Statements Summons, Mr Ayres KC submitted that the wording was appropriate and only sought discovery of relevant documents, which were relevant to the issues in dispute, as set out in the pleadings. These included the issue relating to mitigation. In circumstances where the Plaintiff had failed to comply with his discovery obligations he should be subject to an order to do so, not

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an order which, in its terms, only limited his obligations to the most important issues in dispute. Mr Ayres KC submitted that the evidence in support of the Bank Statements Summons did not limit the basis on which relief was being sought to matters relating to the source of funding of the Loans or the distribution of any repayments, but accepted that it was fair to say that Fund IV's case had principally been put on that basis in terms of evidential matters.

## Decision

17. I have decided to grant Fund IV's application and to make an order in the form set out in [2] of the Bank Statements Summons subject to some minor amendments, which I explain below. I accept Fund IV's submissions as summarised above.
18. I am not persuaded that the relief to be granted on the Bank Statements Summons should be tailored and limited by reference to the facts and matters disclosed in Forbes Hare's letter dated 26 April 2023. Had those facts and matters been put in evidence in advance of the CMC, in time to give Fund IV an opportunity to consider such further evidence, it might have been a different matter. But the Plaintiff had plenty of opportunity to do that and failed to do so. He cannot expect Fund IV to accept, or the Court to base its decision on, unverified facts which are only disclosed during (and late in) the hearing.
19. It seems to me that the date range proposed by Fund IV is reasonable and that discovery of documents in that date range is necessary and proportionate in the circumstances.
20. [2.2] and [2.3(i)] of the Bank Statements Summons seem to me to be acceptable, although I prefer the expression "*issues in dispute in the Related Proceedings*" to "*matters in question in the Related Proceedings*" (as I understand it, the Plaintiff has not objected to the reference to Related Proceedings here rather than to the Jafar Proceedings). It is clear that further bank statements need to be discovered, in so far as they are relevant to the issues in dispute. This includes, for example, bank statements for the Jafar Inward Payment Account and the earlier bank statements (before the statement numbered 006) for the Jafar Outward Payment Account in so far as they are relevant to an understanding of or relate to the funding of the Loans.
21. I accept that the grounds supporting Fund IV's application were set out in the evidence in support of the Bank Statements Summons and that no reference was made in that evidence to the [55] mitigation point. I also accept that it would be wrong to make an order the terms of which took

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the party subject to the order by surprise. But the terms of the order being sought by Fund IV were set out in the Bank Statements Summons and in my view there can be no objection to an order that requires the Plaintiff to discover documents relating to the operation of the identified bank accounts and the use of funds (including cheques) received (or which may have been received) in repayment of the Loans, where those documents are relevant to the issues in dispute in the proceedings. The issue raised in [55] of Fund IV's Re-Re-Amended Defence is one of the issues in dispute and relates to the use of funds received from Mr Naqvi in repayment of the Loans or which arguably could have been used to repay the Loans. I also do not consider that it is permissible to limit the Plaintiff's discovery obligation (in this one instance) to documents that support Fund IV's case. It may, of course, on occasion be permissible to tailor and limit a party's discovery obligations in that way but it would be difficult to justify doing so for one purpose only and, in any event, I do not consider that such a limitation is justified in this case.

22. [2.3(ii)] and [2.3(iii)] of the Bank Statements Summons are also acceptable save that both should be subject to the qualification, as it appears in [2.3(i)], that the documents are relevant to the issues in dispute. This is, of course, a qualification that applies to and affects the entirety of the Plaintiff's discovery obligations but it seems to me that it should be made explicit in [2.3] of the order to be made on the Bank Statements Summons and there is no justification for only qualifying [2.3(i)] but not [2.3(ii)] and [2.3(iii)]. This could be done by drafting wording that states that the discovery obligations in the whole of [2.3] are subject to that qualification or by including such wording in [2.3(ii)] and [2.3(iii)]. As regards [2.3(iii)] the wording needs to be tidied up by making the following changes (in red) in any event:

*“all documents in his possession, custody or power that evidence the receipt, dealings with and destination of any repayments of the Loans received, and which documents originate in or relate to ~~from or pertain to~~ the period between ~~the period~~ 1 December 2017 to 31 December 2018 to the extent that such documents are relevant to the issues in dispute in the Related Proceedings.”*

23. [2.4] of the Bank Statements Summons is obviously unobjectionable and was not opposed by the Plaintiff.

24. I do not propose to establish the timeframe for compliance with the order to be made on the Bank Statements Summons but will request the Plaintiff to propose and to seek to agree with Fund IV a reasonable date (or dates) for compliance. If agreement cannot be reached (and I do hope that agreement can be reached on this issue) then the parties should explain their positions when filing the draft order and I shall decide the point when settling the order.



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**The Hon. Mr Justice Segal**  
**Judge of the Grand Court, Cayman Islands**  
**3 May 2023**