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Industry Information

## When are relevant documents in the “power” of a litigant and therefore discoverable?

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Under Order 24, rule 1 of the Grand Court Rules (“GCR”), a party is required to give discovery of “documents which are or have been in his possession, custody or power”.

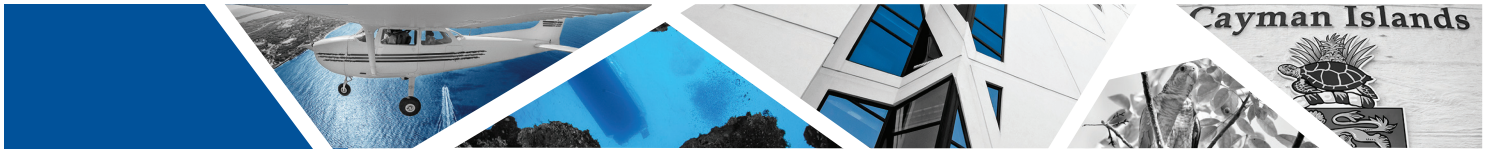
Given the importance of “power” to determine - and potentially significantly to expand - the scope of a party’s discovery obligations, it is perhaps surprising that there has, until recently, been a dearth of Cayman Islands case law regarding this aspect of GCR O.24, r.1. Practitioners will no doubt therefore welcome the elucidation of the test for establishing “power” now provided in two separate (unreported) decisions of the Grand Court, in (1) *Abdulhameed Dhia Jafar v Abraaj Holdings and others* (19 July 2022; Cause Nos: FSD 150, 158 and 203 of 2020); and (2) *In the Matter of Investar General Partner Limited and others* (27 July 2022; Cause Nos: FSD 146, 147, 148 and 196 of 2018).

### Rights of Access to Documents

Both judgments cite with approval the leading English authority of *Lonrho Ltd v Shell* [1980] 1 WLR 672, which establishes that a presently enforceable legal right to obtain the relevant documents from whomever actually holds them, equates to “power” over the documents. As noted in *Jafar*, this is intended to give effect to the principle of equality of arms, whereby if one party has a right to obtain information contained in a document they should be obliged to disclose it to the other parties if it is relevant to the determination of the litigation.

In the case of *Jafar*, an enforceable legal right to obtain documents arose by virtue of the terms of a Settlement Agreement between the Plaintiff, Mr Jafar, and a third party who had been involved in the alleged fraud underlying Mr Jafar’s claims. The Settlement Agreement provided, amongst other things, that the third party would “provide reasonable cooperation and assistance” to Mr Jafar for the purpose of litigation concerning certain allegedly unpaid loans (as these proceedings were), “such assistance to include...providing documents to [Mr Jafar]”. The Court was required, however, to determine whether the requirement of reasonableness in that clause fettered Mr Jafar’s right of access to the documents.

In the case of *Investar*, the parent company in question, WAFR Holdings Limited (“WAFR”), had no legal right of access to its subsidiaries’ documents. The Court went on to consider whether the test for “power” could still be met if WAFR enjoyed an existing arrangement or understanding with its subsidiaries, whether or not legally enforceable as a contract, which in practice provided WAFR with a right of access to such documents.



## Qualifications to a Right of Access

A litigant's "power" over a third party's documents will only arise where the right to obtain the documents is immediately exercisable and not qualified. *Jafar* confirms that it is insufficient to give a litigant "power" to obtain documents from a third party if that litigant's right to do so is (a) subject to the third party's consent, or (b) dependent on the exercise of a general discretion by the Court.

Segal J rejected Mr Jafar's contention that the reasonableness requirement in the Settlement Agreement (by which Mr Jafar's right of access arose) gave the third party a discretion to determine what was reasonable, thereby qualifying Mr Jafar's right to obtain documents to the extent that they did not fall within his "power". The question of what documents it was reasonable for the third party to produce would be a matter for any court required to determine the scope of the third party's contractual obligations, if necessary. It might be reasonable for the third party to produce certain documents and not others, but it was likely that he would be obliged to produce at least some documents. At this stage, it was proportionate for the Court to exercise its inherent case management powers to direct Mr Jafar to write to the third party for the purpose of identifying those documents which would be within Mr Jafar's "power".

## Must the Right of Access be Legally Enforceable?

In *Investar*, Kawaley J considered that certain English cases subsequent to *Lonrho*, suggested a more flexible approach to the question of a parent company's "power" over documents held by its subsidiaries, which did not necessarily require that the right of access be legally enforceable.

Consequently, and given that GCR O.24 makes no attempt to define the precise parameters of the term "power", Kawaley J held that an arrangement or understanding pursuant to which a parent company "has in practice free access to the documents of" its subsidiaries would potentially support a finding that the documents were within the "power" of the parent company and therefore discoverable. The Court, however, clarified that a mere "expectation that the subsidiary will in practice comply with the requests made by the parent company" was not sufficient to amount to "power". The Court would need to be satisfied that the requisite arrangement or understanding was in place between the parent and subsidiary in relation to the general or specific basis upon which the parent would be able to access its subsidiary's records.

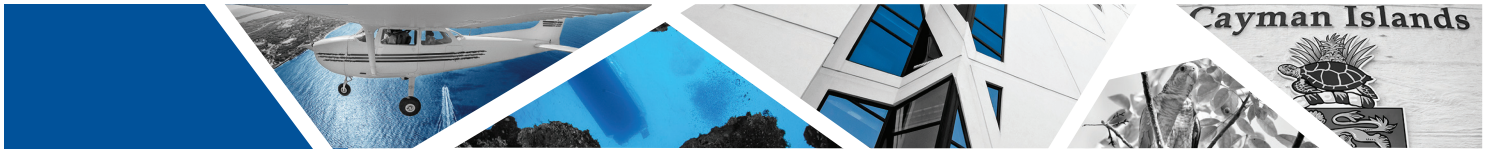
There were grounds for suspicion that WAFR had access to its subsidiaries' documents, including that the group of companies (i) was family owned, (ii) shared common directors between the companies, (iii) prepared accounts on a consolidated basis, and (iv) maintained all documents at a single family office. However, Kawaley J declined to infer from these facts that WAFR had an unfettered right of access in the requisite legal sense because the Court was bound to take into account (1) the positive denial by WAFR that no arrangement or understanding was in place; (2) the burden of proof borne by the party making the discovery application; and (3) the corporate structure of the group in respect of which veil-piercing was not appropriate in the circumstances.

## Comment

Although the question of a litigant's power over documents held by a third party is highly fact-specific, these judgments bring welcome clarity to the applicable principles, and within two of the more common contexts in which this issue may arise in Cayman Islands litigation.

As shown by *Investar*, the Court will employ some measure of flexibility in assessing the potential "power" of a parent company over its subsidiaries' documents, such that a right of access need not necessarily be legally enforceable. However, cogent evidence of any qualifying arrangement or understanding actually in place will be required. As a result, and as noted by Kawaley J, establishing that relevant documents held by non-party subsidiaries are within the parent company's "power" is "an inherently difficult forensic task when the discovery applicant is a stranger to the corporate group's internal affairs".

As can be seen from *Jafar*, the establishment of "power" over third party documents should be more straightforward where a contractual right of access exists. In these circumstances, unless the terms of the contract provide for a particular qualification to the right, the scope of the litigant's discovery obligations are expanded to encompass those relevant documents to which he is entitled. A requirement in the agreement that it must be "reasonable" for the third party to comply with the litigant's document request is unlikely in itself to be a sufficient qualification to put all relevant documents held by the third party beyond the litigant's "power".



Walkers represented the successful applicants in the case of Jafar, who previously had successfully applied to the Court to compel disclosure of the Settlement Agreement by which Mr Jafar's right of access to the third party's documents arose.

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