



**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 THE PRIVILEGE SUMMONSES HEARD AT THE CMC ON  
24-26 APRIL 2023**

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## Introduction

1. I refer to my Ruling dated 30 April 2023 relating to the custodian summonses filed by Fund IV and the GHF Parties, which were heard at the CMC on 24-26 April 2023 (the **CMC**). This is my Ruling setting out my decision on the privilege summonses which were also heard at the CMC.
2. I have decided that Fund IV's and the GHF Parties' applications should be granted and that the Plaintiff should conduct a further review of the documents subject to a claim to privilege although the terms of that review shall be on a different basis from that sought by Fund IV and the GHF Parties. The terms on which the further review is to be conducted and of the orders I shall make are set out at [28] below.

## The privilege summonses

3. Fund IV seeks the following orders pursuant to its summons dated 27 March 2023 as amended (the **Fund IV Privilege Summons**) (the amendments were made in draft on 21 April 2023 and Fund IV sought permission to amend at the CMC which application, on the basis that the Plaintiff had confirmed at the CMC that he had no objection, I granted):

*“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:*

- 1.1 *An order that the Plaintiff in Cause No 203 of 2020 (NSJ), Abdulhameed Dhia Jafar ("Mr Jafar") (and the "Jafar Proceedings"), should, on or before 5 May 2023, serve a further and better list of the documents ("Further and Better List") that are referred to in Part 1 of Schedule 1 and Part 2 of Schedule 1 to the lists of documents that he provided on 29 January 2023 and 13 March 2023.*

- 1.2 *“Further and Better List” means a list that correctly enumerates the documents referred to in Part 2 of Schedule 1 of the Privilege Lists, so that documents that are not privileged are enumerated in Part 1 of Schedule 1 and only those documents to which a claim to privilege can properly be made are listed in Part 2 of Schedule 1.*
- 1.3 *An order that the Further and Better List itself clearly identifies:*
- (a) *which of the documents were originally included in Part 2 of Schedule 1 and which were moved to Part 1 of Schedule 1 on the basis that the claim to privilege over them was erroneous and they were not privileged;*
  - (b) *which of the documents were originally included in Part 2 of Schedule 1 and which were moved to Part 1 of Schedule 1 on the basis that they were only privileged in part and should not have been withheld in full;*
  - (c) *which of the documents in Part 2 of Schedule 1 formed part of the 2521 documents which were re-reviewed by Mr Thomas Southwell and which were verified to be privileged;*
  - (d) *which 20 documents were found on Mr Southwell's re-review to be "non-responsive" as set out in the letter from Forbes Hare dated 17 March 2023;*
  - (e) *which 679 documents had inadvertently not been produced in the original discovery on 29 January 2023 as a result of a system issue that affected Mr Jafar's original production; and*
  - (f) *which 800 additional "non-responsive (i.e. irrelevant)" documents that had previously been completely withheld from the original discovery on 29 January 2023 have been produced as slip sheets.*
- 1.4 *An order that Mr Jafar together with the responsible attorney at Forbes Hare should, at the same time as serving the Further and Better List, each swear and serve an affidavit verifying the same.*
- 1.5 *An order that Mr Jafar should, at the same time as serving the Further and Better List, give production of the documents referred to in the updated Part 1 of Schedule 1 thereto (and which have not previously been produced) in accordance with the Discovery Protocol appended to the Order of the Hon Justice Segal dated 18 August 2022.”*

4. The GHF Parties seek orders in the following terms, as set out in their summons also dated 27 March 2023 (the **GHF Parties Privilege Summons** and the GHF Parties Privilege Summons together with the Fund IV Privilege Summons is referred to as the **Privilege Summonses**):
- “5. Mr Jafar shall, further, by no later than fourteen days from the date of this Order procure that a complete re-review of all documents contained in Part 2 of Schedule 1 of the List of Documents, served by Mr Jafar on the other parties to the Related Proceedings on 13 March 2023 (being documents over which Mr Jafar asserts a claim of privilege), be carried out by an attorney or attorneys at Forbes Hare, Mr Jafar's Cayman Islands attorneys, and/or Mr Jafar's counsel admitted pro hac vice in these proceedings under the supervision of a partner at Forbes Hare (the "**FH Partner**") responsible for the conduct of Mr Jafar's case in the Related Proceedings (the "**Privilege Re-Review**").
6. Mr Jafar shall, further, in accordance with the Discovery Protocol and by not later than twenty-eight days from the date of this Order:
- (a) Serve an updated or supplemental List of Documents identifying:
- i) in Part 1 of Schedule 1 thereof the documents that: i) are New Documents; or ii) have been found, pursuant to the Privilege Re-Review, not to be privileged; and
- ii) in Part 2 of Schedule 1 only those documents to which, following the Privilege Re-Review, a claim to privilege (on the basis of and by reason of the Privilege Re-Review) is to be made,
- ("Updated List of Documents"); and
- (b) Give production of the documents enumerated in Part 1 of Schedule 1 of the Updated List of Documents.
7. Mr Jafar shall further procure the FH Partner to, at the same time as the service of the Updated List of Documents, swear and serve an affidavit which confirms:

- (a) *The precise steps taken by Mr Jafar in compliance with this Order and the 18 August 2022 Order;*
- (b) *Where and how such steps have been taken; and*
- (c) *That they are satisfied that any claims to privilege that are made in the Updated List of Documents are properly made.*

#### **The Plaintiff's privilege review and the Consent Order**

5. The Plaintiff's initial List of Documents was dated 29 January 2023 and referred to 54,350 documents and listed 25,520 of these in Part 2 of Schedule 1 of the List and therefore subject to a claim for privilege. The steps taken by the Plaintiff (and his advisers) for the purpose of conducting his discovery and determining which documents were subject to a claim to privilege were initially described in the Plaintiff's two process letters sent by Forbes Hare dated 27 January 2023 and 20 February 2023 (the *Second Process Letter*) and other correspondence between the parties' attorneys.
6. In both process letters Forbes Hare noted that there had been three main stages in the document review process following the collection of documents from the Plaintiff's custodians: first, the first pass review, second, the next stage review (of 138,279 documents) and thirdly a further review conducted by Forbes Hare (see [28] of the Second Process Letter). The first and second stages of the review were conducted by in-house lawyers employed by the Crescent Group, which is the group of companies in which the Plaintiff has a substantial interest. The Crescent Group lawyers conducting the next stage review were identified and their names listed (see [22] of the Second Process Letter). They are English or Australian qualified solicitors. No Cayman qualified attorneys were involved. As part of the further review, attorneys with Forbes Hare had reviewed

25% of the documents which had been marked as privileged as a result of and following the first two stages of the review.

7. Fund IV (and the GHF Parties) indicated shortly after receiving the Plaintiff's first List of Documents that they had concerns as to the reliability and adequacy of the Plaintiff's privilege review. Ogier, Fund IV's Cayman attorneys, noted in their letter to Forbes Hare (the Plaintiff's Cayman attorneys) dated 4 February 2023 that they regarded the fact that the Plaintiff was withholding almost half of his relevant documents on the grounds of privilege was an "*extraordinarily high proportion*" and that it was apparent from the Privilege Metadata Schedule that it was immediately clear that a significant number of the documents which the Plaintiff had claimed to be privileged could not be so. Ogier provided a non-exhaustive list of affected documents and stated that these obvious errors raised serious doubts as to the reliability and adequacy of the whole of the Plaintiff's privilege review.
  
8. Forbes Hare responded on 10 February 2023 saying that they did not accept that in the circumstances of this case the mere fact that a large number of the Plaintiff's relevant documents were subject to a claim for privilege was indicative of an inadequate privilege review. Forbes Hare noted that it should be unsurprising that a large number of the Plaintiff's documents were subject to privilege claims since he had had since late 2017 frequent cause to engage legal advisers to obtain advice in relation to anticipated litigation and that more than 40% of the 25,520 documents subject to the privilege claim were dated after 30 April 2019 when the Plaintiff's previous legal advisers had sent letters to Fund IV (and the GHF Parties) notifying them of his claims. Forbes Hare however had conducted a further review of the documents identified by Ogier and accepted that a number of Ogier's complaints were justified and that some documents had been erroneously treated as privileged when they did not contain privileged communications at all or when they contained only some material that was privileged. But they did not accept that

the identification of a “small number of documents which have been incorrectly categorised as privileged in the course of our client’s review” demonstrated “any cause for concern with [the Plaintiff’s] “overall review approach.””

9. The correspondence between the parties’ attorneys continued without agreement being reached as to how to address the concerns raised by Fund IV (and the GHF Parties). Accordingly, on 10 February 2023 Fund IV issued a summons (the **First Summons**) seeking relief in similar terms to that contained in the Fund IV Privilege Summons.
10. However, the First Summons was not heard because the parties subsequently reached an agreement as to the further steps that the Plaintiff should take in response to the issues raised with regard to his claim to privilege and privilege review. These further steps were recorded in a consent order (the **Consent Order**) dated 28 February 2023.
11. The recitals to the Consent Order recorded that the Plaintiff would file and serve an affidavit to be sworn by Mr Thomas Philip Southwell (**Mr Southwell**) setting out further details of the privilege review conducted by the Plaintiff and Mr Southwell’s first affidavit was subsequently sworn on 9 March 2023 (**Southwell 1**). The Consent Order also required the Plaintiff to conduct a further review of the documents included in his claim to privilege, to be conducted by Mr Southwell (the **Southwell Review**). The Consent Order states that:
  1. *The Plaintiff will procure as soon as possible a complete review of all documents over which the Plaintiff claims privilege which either (i) fall into Categories 2 to 14 inclusive in the Appendix to the letter from Ogier (Cayman) LLP to Forbes Hare dated 4 February 2023 as supplemented and amended by the Appendix to the letter from Ogier (Cayman) LLP to Forbes Hare dated 14 February 2023, or (ii) are documents sent by, or to, all other third parties where the identity of those third*

*parties does not itself suggest that the document is overwhelmingly likely to be privileged.*

2. *The review mentioned in paragraph 1 above is to be carried out personally by Mr Thomas Southwell, an English solicitor qualified since 1 March 2007.*
3. *The review mentioned in paragraph 1 above includes a review by Mr Southwell of the following documents that were previously identified as privileged by the Plaintiff:*
  - 3.1 *Documents that were sent to or from, or CCed or BCCed, an email address ending in the domains set out in Appendix 1 to this Order; and*
  - 3.2 *Documents that were authored or modified by, sent to or from, or CCed or BCCed a firm with one of the names set out in Appendix 2 to this Order.*
4. *The Plaintiff will, in accordance with the Discovery Protocol that is attached to the Order herein dated 18 August 2022 by 4pm on 10 March 2023:*
  - 4.1 *Serve an updated or supplemental List of Documents enumerating in Part 1 of Schedule 1 thereof the documents that are found pursuant to the review mentioned in paragraph 1 above not to be privileged and in Part 2 of Schedule 1 only those documents to which, following the said review, a claim to privilege can properly be made; and*
  - 4.2 *Give production of the documents enumerated in Part 1 of Schedule 1 of the updated or supplemental List of Documents.*

12. Mr Southwell provided some further details on the Plaintiff's privilege review process in Southwell 1 (at [7]). Mr Southwell noted that the Crescent lawyers had considered privilege during the next stage review and that the Cayman Islands attorneys then advising the Plaintiff (Nelsons) had, with Mr Luka Krsljanin, the English junior barrister who has been granted limited admission to appear in these proceedings, prepared written instructions which had been circulated to the Crescent lawyers conducting the review on how to approach and apply the applicable law regulating privilege. Mr Southwell also identified the attorneys at Forbes Hare (Mr Hobden a

8

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*



partner and Ms McLennan, a senior associate) who had conducted the privilege review. Mr Southwell stated that “*several hundred documents were also, on an ad hoc basis, sent to Mr Krsljanin, for consideration*” and that he, Mr Southwell, had discussed certain documents with Mr Krsljanin. The basis on which these documents had been selected was not explained. Mr Southwell noted that he had been told by Forbes Hare that their “*spot checks [being their review of some of the 25% of the documents over which privilege was claimed] did not cause them to be concerned as to the approach that had been taken to privilege*” (and that he had commonly seen errors of this kind in his 17 years as a solicitor) and then concluded that despite a “*small number of documents [having been] wrongly claimed to be privileged when, in fact, they are not*” (as set out in Forbes Hares’ letters dated 10, 22 and 24 February 2023) he was “*satisfied [that the privilege review had been] properly and diligently implemented by Mr Jafar’s lawyers [and] that the process for considering and determining claims to privilege was reasonable.*”

13. On 10 March 2023 Forbes Hare notified the other parties’ attorneys that the Southwell Review had been completed in accordance with the Consent Order. The results of the Southwell Review were then provided on 13 March 2023. On that date Forbes Hare sent an email attaching a further and updated List of Documents and revised schedules of documents. Part 2 of the new Schedule 1 set out the revised list of documents over which privilege had been claimed. However, Forbes Hare did not provide an explanation of the results of the Southwell Review. Ogier therefore sought such an explanation. Forbes Hare provided it by letter dated 17 March 2023. Mr Southwell had reviewed 2,521 documents (approximately 10% of the total number of documents that had been withheld for privilege). He had concluded that 500 (approximately 20%) of those documents were not privileged and that 527 (approximately 21%) of those documents were only privileged in part (so that these documents should have been redacted and disclosed).

14. On 22 March 2023 Ogier wrote to Forbes Hare setting out Fund IV's view that these results raised further serious concerns regarding the adequacy and reliability of the Plaintiff's privilege review. They argued that 41% of the 2,521 documents covered by the Southwell Review had been re-designated as a result of errors and that the overturning of such a significant proportion of the documents reviewed naturally raised serious concerns about the accuracy of the original review and the Plaintiff's claims to privilege over the remaining documents that were still subject to privilege claims (approximately 90% of the total). Ogier noted that these remaining documents included communications with in-house lawyers at the Crescent Group and that the claim to privilege appeared to be based on legal advice and litigation privilege. Ogier said that it was important for Forbes Hare to explain the basis on which these privilege claims had been made and the nature of any engagement by the Plaintiff of lawyers at the Crescent Group. On 24 March 2023 Forbes Hare responded and merely stated that the Plaintiff had "*sought and obtained legal advice from in-house lawyers at Crescent and communicated with those lawyers for the primary purpose of these proceedings (and other anticipated litigation).*" Forbes Hare rejected Ogier's claim that the re-designation of documents had any wider implications as to the adequacy of the Plaintiff's overall privilege review. They argued that the Plaintiff's claims to privilege had largely been vindicated by Mr Southwell's Review.
  
15. The Privilege Summonses, as I have noted above, were issued on 27 March 2023. The evidence in support of the Fund IV Privilege Summons is Mr Neil Hayward's tenth affidavit (***Hayward 10***) sworn on 27 March 2023 and fourteenth affidavit sworn on 19 April 2023; the evidence in support of the GHF Parties Privilege Summons is the first affidavit (***Cowan 1***) sworn on 27 March 2023 and second affidavit (***Cowan 2***) sworn on 19 April 2023 of Ms Nicola Cowan and the evidence in opposition to both Privilege Summonses is Mr Southwell's second affidavit (***Southwell 2***) sworn on 14 April 2023.

16. In Southwell 2, Mr Southwell noted that for the purpose of the Southwell Review he had reviewed, as had been agreed by Fund IV and the GHF Parties, those documents which fell within the categories of documents that had been identified by Ogier as being subject to erroneous claims to privilege and which had been sent to or from or copied to email addresses or recipients who were not likely to be parties to privileged communications. His review had confirmed that 2,001 documents (approximately 80% of the total) contained privileged material; of those documents 1,494 were wholly privileged and 527 were partially privileged and therefore required redaction; 500 documents were not privileged and 20 were irrelevant. He considered that he had therefore re-reviewed the documents which the parties had identified as most likely to be subject to erroneous privilege claims. He noted that although Ogier had raised a number of well-founded concerns about the Plaintiff's claims to privilege they related only to a small number of documents (88 documents). Those documents had now been re-reviewed and where appropriate produced. He also agreed with Forbes Hare that the results of the Southwell Review could not sensibly be extrapolated and applied to the remainder of the Plaintiff's privilege review. The documents he had reviewed were those that the parties considered were most likely subject to erroneous privilege claims. The remaining documents included documents that in his view were overwhelmingly likely to be privileged. These documents included documents exchanged between the Plaintiff and his legal advisers and documents which had been created after the date on which the Plaintiff had sent his letter before action. As regards the involvement of Forbes Hare in the Plaintiff's privilege review, Mr Southwell considered that they had been "*suitably involved in the discovery exercise, having carried out spot checks of documents in the course of that review, including 25% of documents marked privileged.*" Furthermore, Mr Krsljanin's involvement provided an indication that the review had been properly conducted. Mr Southwell concluded (at [88] of Southwell 2) that:

*“Although I recognise ... that I identified mistakes in the course of [the Southwell Review] in my experience such mistakes are typical in any large document review exercise. I have previously sworn evidence that I am satisfied that the process for considering and determining claims to privilege was reasonable. I maintain this belief and assessment.”*

17. Ms Cowan said that the Southwell Review supported the conclusion that there must have been a serious misunderstanding by one or more members of the Plaintiff’s review team as to the requirements of a proper legal advice privilege claim, with many instances of emails having been marked as privileged simply because the distribution list included a lawyer, regardless of the context (for example the party for whom the lawyer was acting) or content of the email. She disagreed with and challenged Mr Southwell’s assertions and claims.
  
18. Mr Hayward argues that the 41% error rate involves an unacceptably high margin of error which calls into question the Plaintiff’s claims to privilege over the substantial number of documents that were not included in the Southwell Review. Mr Hayward also disagreed with and challenged Mr Southwell’s assertions and claims. He notes that the documents included in the Southwell Review were identified by reference to the metadata (which had revealed that the senders and recipients were unlikely to be parties involved in privileged communications) but that it was entirely possible that the claim to privilege in respect of the other documents not included in the Southwell Review was fundamentally misconceived for a different reason, which would not be revealed by the relevant metadata relating to such documents. He also considered that Mr Southwell was not right to assert that communications between the Plaintiff and the in-house legal team at the Crescent Group were very likely to be privileged. It remained unclear whether these lawyers were acting for the Plaintiff. Such a claim needed to be substantiated at least to some degree. The Plaintiff had to date failed to produce any engagement letter or similar document explaining the terms on which Crescent Petroleum had agreed to make available its in-house legal team to provide legal services to the Plaintiff. Mr Hayward also argued that only

12

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*

limited reliance could be placed on the Forbes Hare review of some of the 25% of the documents subject to privilege claims in circumstances where they (and the Plaintiff) had failed to explain what issues or defects they had found and what steps, if any, they or others had taken to deal with and resolve such issues (or defects). It was possible that issues with the c. 25% of documents had been identified but that the review of the balance of the documents had not been reconsidered or redone to remove the effect of such issues. Mr Hayward also said that in order to be able to assess the impact of the Southwell Review, and the significance of the Plaintiff's errors, the Plaintiff needed to provide Fund IV with details of the documents which were now produced but which had previously been withheld on the basis of an erroneous claim to privilege.

#### **Recent further random sample review by Forbes Hare**

19. On the day (a Sunday) before the CMC was due to begin (23 April 2023) Forbes Hare wrote to Ogier and Walkers to provide details of a further document review (the **Random Sample Review**) that they had conducted “*in order to demonstrate the robustness of [the Plaintiff's] document review, and to give comfort to [Fund IV and the GHF Parties].*” Forbes Hare had reviewed a “*representative random sample of the documents*” which the Plaintiff claimed to be privileged but which had not been subject to the Southwell Review (23,124 documents in total). 10% of these documents (2,313) were selected at random, divided into eight batches and were reviewed by a team comprising Mr Southwell, “*three senior lawyers who are former members of Crescent's in-house legal team,*” a current member of Crescent's in-house legal team who was said to be very familiar with the documents and Ms McLennan of Forbes Hare. Forbes Hare said that Ms McLennan had reviewed 289 of the selected documents and re-reviewed numerous documents in three other batches. She also discussed the random review in detail with Mr Southwell (who reviewed a batch of documents and re-reviewed some other documents). Forbes Hare stated that “*Ms McLennan is confident that the Random Sample Review was properly carried out ... [and]*

13

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*

... would be content to prepare an affidavit to that effect.” The result of the further review was as follows. Of the 2,313 documents reviewed, the review team concluded that 109 documents had been wrongly withheld on grounds of privilege, giving an error rate of 4%. Forbes Hare stated that the Plaintiff believed that none of the 109 documents were significant to the litigation or prejudiced his case. Forbes Hare said that this review had demonstrated that the likely error rate in the pool of documents not covered by the Southwell Review is “*reasonable for an exercise of this sort.*”

#### **The parties’ submissions in outline**

20. Fund IV and the GHF Parties submitted that it was clear that something had gone seriously wrong with the Plaintiff’s privilege review. Privilege had been claimed incorrectly in respect of a very substantial number of important documents, across a variety of categories where the claims were obviously bad. They argued, for the reasons given by Mr Hayward and Ms Cowan, that the Southwell Review and the Random Sample Review were insufficient to enable them and the Court to be properly satisfied that material errors were not to be found in the substantial number of the Plaintiff’s documents subject to a claim to privilege, which were not covered by the Southwell Review. Fund IV and the GHF Parties cited the authorities that explain that the Court must be particularly careful to scrutinise the process supporting a claim for privilege and where possible ensure that it is properly conducted with proper oversight by the attorney who determines whether to claim privilege as an officer of the Court. They submitted that it was necessary and appropriate that the Plaintiff be required to conduct a further review (a re-review), for which a partner at Forbes Hare would take responsibility, of the documents withheld by him for privilege and which were not included in the Southwell Review. The Plaintiff and the responsible partner at Forbes Hare should swear further affidavits to verify the remaining claims to privilege. While not suggesting that the Plaintiff or his legal team have withheld documents deliberately with

14

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*

knowledge that there was no proper claim to privilege, they argue that the substantial number, and the nature, of the admitted errors revealed to date demonstrates that the Plaintiff's review of his documents for the purpose of determining when to claim privilege, has not been carried out adequately or properly.

21. The Plaintiff submitted that the further review sought by Fund IV and the GHF Parties was not necessary, not justified in the circumstances and not a proportionate response to the issues raised concerning his privilege review. As Mr Southwell had said in Southwell 2: (a) those documents which gave rise to the greatest concern and risk of mischaracterisation had been identified and reconsidered in the Southwell Review - the documents that needed to be produced from this dataset had now been produced; (b) the remaining documents were *prima facie* privileged and had been subject to a proper and sufficient review process which had involved members of Forbes Hare to an appropriate extent and which had been conducted by them together with suitably experienced English and Australian qualified lawyers with the support of Mr Krsljanin, who had been granted limited admission in this jurisdiction, so that there was a low risk of there being further material errors in the claims to privilege; and (c) this low risk of further error was supported by the results of the Random Sample Review.
  
22. Despite these submissions and while maintaining his opposition to the Privilege Summonses, the Plaintiff did recognise that serious problems with his privilege review had been identified and indicated that he was anxious to assist in reaching a prompt and complete resolution of the outstanding concerns raised by Fund IV and the GHF Parties in order to ensure that further applications were unnecessary and that the trial date was not put in jeopardy. To that end, Forbes Hare had written to the other parties on 26 April 2023, the third day of the CMC, and confirmed that the Plaintiff offered to conduct a further review of the remaining documents in respect of which privilege was claimed. Forbes Hare noted that after the Southwell Review, 23,124

15

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summonses Ruling*

documents which were not covered by the Southwell Review were subject to a privilege claim. 10% of those documents had been subject to the Random Sample Review, leaving a balance of 20,811 documents subject to the claim to privilege (the ***Remaining Privileged Documents***). The Plaintiff offered to conduct a further review of 25% (5,202 documents) of the Remaining Privileged Documents; these documents would be selected at random to ensure that they were representative and included documents passing between the Plaintiff and the in-house lawyers at Crescent; the further review would be conducted by two senior associates and the responsible partner at Forbes Hare; that partner would provide an affidavit swearing satisfaction with the further review process within two business days of its completion and on the basis that if that partner was not satisfied that the further review had been properly conducted more work would be done to eradicate the problems identified.

### Decision

23. It seems to me that there are good grounds for requiring the Plaintiff to conduct a further review of the documents (the ***Further Documents***) which remain subject to a claim to privilege (being those documents which remain subject to a privilege claim after the correction of the errors identified by and the production of documents no longer subject to a privilege claim following the Southwell Review and the Random Sample Review).
24. This is necessary to ensure the integrity of the Plaintiff's document review process and consequential claims to privilege. It seems to me that the errors identified initially by Ogier and Walkers and then by Mr Southwell in the Southwell Review indicate weaknesses and failures in the privilege review process that are likely to affect the whole process and cannot safely be assumed to be confined to the documents reviewed to date. It seems to me that Mr Hayward (and Fund IV and the GHF Parties) was right not to accept Mr Southwell's (and the Plaintiff's)

16

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*



contention that the errors and issues with the privilege review were likely to be confined to, or only serious in relation to, the documents which have been re-reviewed to date. I accept that the reasons given by Mr Southwell and Forbes Hare suggest that the Further Documents *may* be privileged but the assessment of whether a privilege claim can properly be made requires an exercise of judgment and the errors identified to date call into question whether the process has been properly managed and conducted. The results of the Random Sample Review are, I accept, an indication that the error rate affecting the Further Documents is likely to be substantially lower than that found by Mr Southwell but in the absence of affidavit evidence confirming in more detail the process and results of the review, and a review of more than just another 10% of documents randomly selected, it is in my view insufficient.

25. I also have concerns as to the manner in which the Plaintiff's main document review was staffed and conducted, or at least the extent to which and manner in which Forbes Hare's involvement and their position has been dealt with in the evidence. While the in-house legal team at the Crescent Group are no-doubt properly qualified and diligent, they needed from the outset to be led by and their work overseen by a senior Cayman qualified and admitted attorney (either alone or with a similarly senior English qualified solicitor or barrister). It was clearly necessary as well as helpful that Mr Krsljanin had prepared written instructions for the Crescent lawyers conducting the review and that Mr Hobden and Ms McLennan had conducted the privilege review at stage three of the process (and that they had consulted Mr Krsljanin in relation to a substantial number of the documents). But it is not clear that such senior attorneys or solicitors were available to the main Crescent Group in-house legal team when they were conducting the core stage two review to deal with questions, no explanation has been provided – even in general terms – as to the basis on which documents were selected for the purpose of seeking Mr Krsljanin's advice and the results of Forbes Hare's stage three review have only been reported and put in evidence indirectly and in unhelpfully general and anodyne language (as I have noted Mr Southwell reported that he

17

230502 – *In the Matter of Jafar v Abraaj Holdings (in official liquidation) and others – FSD 203 of 2020 (NSJ) – Privilege Summons Ruling*

had been told by Forbes Hare that their “*spot checks [being their review of some of the 25% of the documents over which privilege was claimed] did not cause them to be concerned as to the approach that had been taken to privilege.*” Forbes Hare cannot, of course, be expected to disclose details of their work that could reveal the nature or content of the privileged material, the issues they had identified or their detailed thought processes, but they are expected, when credible questions are raised as to the legitimacy of claims to privilege, to give a clear confirmation that they consider the process adopted to have been reasonable and to give a sufficiently clear account of the process and approach they adopted to support that statement. The responsible partner at Forbes Hare has a duty to this Court (as an officer of the Court) to investigate his/her client’s documents carefully, to ensure that, so far as is possible, there is a full and proper discovery of all relevant documents. He/she needs to show that he/she has concluded on reasonable grounds that the Plaintiff’s view as to what is discoverable is to be accepted. Forbes Hare have recently recognised in their letter dated 26 April 2023 the need to be clearer as to what they have done and found and to state clearly and explain the basis for their conclusion that the process undertaken by the Plaintiff was reasonable. They were right to do so.

26. I note that all parties are anxious to ensure that any further review, while not disproportionate, is sufficiently thorough to ensure that its results will resolve all reasonable doubts and disputes so that further applications which might put the trial date in doubt can be avoided.
27. I also note that many if not most of the remaining concerns raised by Fund IV and the GHF Parties relate to the claims to privilege in respect of the communications between the Plaintiff and the in-house legal team at the Crescent Group in circumstances where it has not been explained whether all or part of that legal team were acting for the Plaintiff and where difficult judgment calls may be needed when assessing whether some or all of the relevant communications attract privilege.

28. I have decided that the following further steps need to be taken:
- (a) a team from Forbes Hare, led by the responsible partner with advice from Leading and Junior counsel (the *Forbes Hare Team*) shall review and refresh the instructions given to the document review team in relation to the assessment and determination of whether documents (the *In House Lawyers Documents*) passing between the Plaintiff (and his custodians) and in-house lawyers employed by companies in the Crescent Group are properly to be treated as privileged (the *Privilege Assessment Instructions*);
  - (b) the Forbes Hare Team shall identify all of the In House Lawyers Documents that are part of the Further Documents and review them again in light of the revised Privilege Assessment Instructions to determine which of the In House Lawyers Documents should continue to be subject to a claim for privilege and which should not be;
  - (c) the Forbes Hare Team shall also review 50% of the other Further Documents (that is the Further Documents excluding the In House Lawyers Documents) to determine which of those Further Documents should continue to be subject to a claim for privilege and which should not be. If the result of that review is that 10% or more of those Further Documents are found to have been mis-characterised as privileged (either in whole or part), the Forbes Hare Team shall review the balance (i.e. all) of the Further Documents;
  - (d) the Plaintiff shall serve an updated list of the documents (the *Updated List*) that are referred to in Part 1 of Schedule 1 and Part 2 of Schedule 1 to the lists of documents that he provided on 29 January 2023 and 13 March 2023;

- (e) the Plaintiff shall at the same time as serving the Updated List swear and serve an affidavit verifying the same;
  - (f) the responsible partner at Forbes Hare shall, also at the time that the Updated List is served, swear and serve an affidavit explaining the steps that were taken in relation to the further review (and the orders to be made on the Privilege Summonses) and, if he/she holds this view, that he/she considers that the process adopted for the conduct of the further review of the Further Documents was reasonable in the circumstances and that he/she considers there to be reasonable grounds for the Plaintiff's claims to privilege made following the completion of the further review; and
  - (g) the Plaintiff shall also at the time that the Updated List is served give production of the documents referred to in the updated Part 1 of Schedule 1 thereto (and which have not previously been produced) in accordance with the Discovery Protocol appended to the order dated 18 August 2022.
29. I would note that I do not consider it to be appropriate to require the responsible partner at Forbes Hare to swear to and take responsibility for the Plaintiff's privilege claims and discovery. An attorney is not required to be satisfied by and to verify or validate his/her client's statement regarding the documents to be discovered or any claim to privilege. It is to be noted that in *Renova* (Foster J, unreported, 30 November 2010) the Cayman attorney (a partner in Maples and Calder) who was required to swear an affidavit regarding the steps taken by the *Renova* parties to comply with Justice Foster's order, was only required to swear to the steps taken.
30. I have not set out the timetable for taking the steps set out above. The Plaintiff and Forbes Hare need to consider what a reasonable and realistic timetable would be recognising that the further

review needs to be completed urgently. I shall request them to propose and seek to agree a timetable with the other parties. They should propose a timetable by 4pm Cayman time on 4 May 2023 (and before then, if possible). If agreement can be reached on the timetable, the relevant timing can be included in the draft order for my approval. If agreement cannot be reached, the parties should set out their different proposals when the draft order is filed and I shall then rapidly decide on what timetable is to be adopted. The draft order should be filed no later than 4pm Cayman time on 10 May 2023.



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