IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD 158 OF 2020(NSJ)
CAUSE NO. FSD 203 OF 2020(NSJ)
CAUSE NO. ATT 29 OF 2021

IN THE MATTER of an application by Ciaran Joseph Keller to be admitted to practise as an Attorney-at-Law in the Cayman Islands

AND IN THE MATTER of section 4 of the Legal Practitioners Act (2015 Revision)

ON THE PAPERS

Before: **The Hon. Justice Segal**

Draft Judgment Circulated: **31 March 2021**

Judgment Delivered: **1 April 2021**

JUDGMENT

Introduction

1. I have before me an application made by Mr Ciaran Keller pursuant to section 4(1) of the Legal Practitioners Act (2015 Revision) (the ***Act***) to be admitted to practise as an Attorney-at-Law in the Cayman Islands for the limited purpose of appearing on behalf of Abraaj General Partner VIII Limited (***GP8***) (in its capacity as general partner of Neoma Private Equity Fund IV L.P., (***NPEF IV***)) in two related claims, namely Cause No. FSD 158 of 2020 (NSJ) (the ***Claim against NPEF IV***) and Cause No. FSD 203 of 2020 (NSJ) (the ***Jafar Proceedings***) (the Claim against NPEF IV and the Jafar Proceedings together being referred to as the ***Proceedings***).

2. Mr Keller is a junior barrister practising at Essex Court Chambers in London. He has been instructed by Ms Jennifer Fox of Ogier, the Cayman Islands attorneys for GP8, to come to the

Islands (or, in view of the continuing COVID 19 travel restrictions, appear before the Court remotely) for the purpose of appearing, acting and advising in the Proceedings.

3. The Proceedings, as Ms Fox explained in her affidavit in support of the application, involve substantial sums and complex issues of fact and law. The Claim against NPEF IV involves a claim by the joint official liquidators of Abraaj Holdings (***AH***) to recover payments made by AH to GP8 totalling the equivalent of over US$ 123,000,000. The joint provisional liquidators assert that the payments are recoverable as voidable dispositions made at an undervalue with intent to defraud creditors pursuant to section 146 of the Companies Act, as having been made with the intent to defraud AH's creditors within section 146(1)(b) and (2) of the Companies Act or as voidable preference under section 145 of the Companies Act. In the Jafar Proceedings, Mr Jafar claims that he was induced to advance sums totalling the equivalent of approximately US$ 350,000,000 to entities within the Abraaj group. He claims that Mr Arif Naqvi made fraudulent misrepresentations to him and that the sums were advanced, upon receipt, to other entities in the Abraaj group, including GP8. The claim is based on various causes of action including unlawful means conspiracy, liability in deceit for fraudulent misrepresentation, proprietary claims and claims for knowing receipt and unjust enrichment under UAE law. Ms Fox also noted there is a third set of related proceedings, namely Cause No. FSD 150 of 2020 (the ***Related Proceedings***), which is being case managed together with the Proceedings and involved another claim by the joint official liquidators of AH for the recovery of payments made by AH which was closely associated with (and was a parallel claim to) the Claim against NPEF IV.

4. Ms Fox, at [16] of her affirmation, states as follows:

> *"The [Proceedings]therefore involve complex legal issues of fraud and conspiracy, trusts and equity, including asset tracing, voidable preference and transactions at undervalue in insolvency, and conflicts of laws. These issues are to be determined in the context of a very high profile liquidation of the holding company of a private equity investment management group which is, at one time, reputed to have had US$14 billion of assets under management at the centre of the matter. Mr Keller's areas of legal expertise include fraud and asset tracing as well as insolvency related claims, specifically clawback claims, having acted in claims arising out of a number of high profile liquidations, a leading decision of the English Court of Appeal on transactions at an undervalue with an intention to defraud creditors and large and complex fraud and conspiracy claims."*

5. Ms Fox also noted that another junior barrister (Ms Sarah Tresman also of Twenty Essex) had previously been granted limited admission to act for one of the other defendants in the Jafar

Proceedings and the Related Proceedings. She invited the Court to grant the application "*having regard to the high value and complexity of the [the Proceedings taken together with the Related Proceedings] and the number of parties and legal teams involved*."

6. In their Written Submissions, Ogier point out that the formal requirements for evidence in support of the application set out in paragraphs 4 and 6 of Practice Direction 4 of 2012 (***PD4***) have been satisfied and submit that this application satisfies the "*unusual and special circumstances*" test in paragraph 7 of PD4. They refer to and rely on various matters relating to the Proceedings and Mr Keller:

(a). the Proceedings (and the Related Proceedings) involved high value, high profile and complex claims and litigation. They pointed out that the Proceedings and the Related Proceedings involved several parties and five Cayman law firms, requiring relatively large legal teams for all parties, including leading and junior counsel. The Proceedings and the Related Proceedings involved extremely high profile liquidations and high value complex legacy claims, with a complex factual matrix involving multiple jurisdictions.

(b). Mr Keller was a key part of the counsel team instructed by Ogier. Ogier had instructed Mr Andrew Ayres QC (of Twenty Essex) as Leading Counsel for GP8 and Mr Keller had been working as junior counsel closely alongside Mr Ayres QC "*for several months*". Mr Ayres QC had already been admitted on a limited basis to appear, act and advise in the Proceedings. According to Ogier, Mr Keller had "*an intimate knowledge of the facts of the case [and had] been crucial in the preparation of the defences to the AH JOLs' Claim against NPEF IV and to the Jafar Proceedings*." He also had considerable experience in the relevant legal subject matter of the Proceedings including fraud, asset tracing and insolvency related claims, private international law and claims under foreign laws.

(c). the granting (by another FSD Judge) of Ms Tresman's application for limited admission to appear for other defendants in relation to the Jafar Proceedings and the Related Proceedings.

(d). Ogier had only applied for the limited admission of one other junior counsel within the past year.

7. For the reasons given below, I have concluded that before making a final decision on whether to grant or dismiss the application, further evidence is required.

The applicable law

8. Section 4(1) of the Act states as follows:

> *"4(1) A judge shall have power to admit to practise as an attorney-at-law, for the purpose of any specified suit or matter in regard to which the person so admitted has been instructed –*
>
> *(a). by an attorney-at-law in the Islands;*
> *……*
>
> *any person who possesses the prescribed qualification, if such person has come or intends to come to the Islands for the purpose of appearing, acting or advising in that suit or matter, and an application for such admission is made in such manner as the judge may think fit."*

9. PD4 provides the manner in which an application for limited admission must be made. Paragraphs 3 and 7 are of particular relevance to this application.

> *"3. The application shall be supported by an affidavit sworn by the Applicant ("the Applicant's Affidavit") and also by an affidavit by the local Attorney-at-Law who, or a member of whose firm, has instructed the Applicant to come to the Islands for the purpose of appearing, acting or advising in the specified suit or matter ("the Attorney's Affidavit").*
>
> *……..*
>
> *7. …… the limited admission of junior counsel, solicitors or the equivalent will not normally be granted except in unusual and special circumstances which must be fully set out in the Attorney's Affidavit. [underlining added]*

10. In his judgment dealing with an application for the limited admission of (seven) junior counsel in connection with the AHAB litigation (reported at [2015 (2) CILR 338]) (***AHAB***) (a well-known and important decision, albeit not one cited by Ogier), the Chief Justice held as follows (as recorded in the headnote of the judgment) (underlining added):

> *"The limited admission of junior barristers and solicitors (rather than Queen's Counsel) was only to be allowed in unusual circumstances (as stipulated by Practice Direction No. 4 of 2012) and it was for the applicants to demonstrate special circumstances showing that admission was justified. Moreover, the Legal Practitioners Law, s.4 was to be construed so as to*

protect the Cayman legal profession from undue overseas competition, and in determining whether to grant admission the court was to consider (a) the availability of local lawyers; (b) the importance of promoting the growth of the local legal profession; (c) the need for the parties to have adequate legal representation, taking into account the nature of the case; (d) the expertise of counsel seeking admission; and (e) whether the work was to be conducted from the Islands. Though it had been established that the proceedings were highly complex and that there was insufficient time to recruit alternative local attorneys, it appeared that the JOLs had made a deliberate decision to manage the case from London, as only two local attorneys would form part of the litigation team (compared with at least 10 foreign lawyers), and it had not been shown that local attorneys could not have been recruited at an earlier stage in the proceedings, particularly as it would have been clear that a large amount of work would be generated by the case; the law firm had quadrupled in size since 2009; and other law firms had engaged additional attorneys to work on the case. Five of the applications would therefore be refused, though, given the complexity of the proceedings, two applications would be allowed

11. At [25], the Chief Justice said this (underlining added):

> *"25 While the LPL (and the Practice Direction) will regard more liberally a litigant's wish to instruct leading counsel from overseas, recognizing the relatively small and select cadre of silks available in the Islands, a different view must be taken of a desire to bring in junior counsel and solicitors from overseas. As already noted, these latter groups will typically bring with them the kind of experience and expertise which is in ready supply from among the local practitioners and it is for this reason that the LPL, the GCR, O.68 costs rules and Practice Direction No. 4 of 2012 are together construed as imposing a public policy requirement that unusual and special circumstances must be shown before such applications will be granted.*

12. In *AHAB*, there was an application for the limited admission of seven foreign lawyers to work with the relevant local firm of attorneys. The arrangement to be adopted for these foreign lawyers involved a rotation system. The system of rotation would bring each of the seven applicants to work in the Cayman Islands for bi-weekly or shorter stints until the conclusion of the trial but for the rest of their time, the bulk of their work and the economic centre of gravity of the case would remain in London. Three foreign lawyers had already been engaged and granted limited admission to act in the case (being leading counsel, a senior junior barrister and a London-based solicitor). The Chief Justice noted that the solicitor had exceptionally been granted limited admission since he was to have overall responsibility for discovery. It was anticipated that this would necessitate a review of millions of documents, taking many months and based on a specialised electronic document management system. While he would continue to conduct his work primarily from London it was expected that there would be increasingly frequent and longer visits to the Cayman Islands in order to provide advice to the client and support to leading counsel as a member of the litigation team

attending at Court. The Chief Justice dismissed the application in so far as it was based on the rotational system (noting that there was no evidence that other suitably qualified Cayman Islands attorneys could not have been engaged by the local attorneys to work on the on the case and that the grant of the applications in such circumstances would be contrary to the intention of the Act - which required that an applicant "*has come or intends to come to the Islands for the purpose of appearing, acting or advising in [the] suit or matter"* and contemplates the existence of a real and genuine need for the applicant to be present and working in the Islands for the suit or matter, not the sort of rotational and intermittent presence which could be regarded as aimed primarily, if not solely, at establishing the minimal presence within the Islands perceived necessary for the purposes of obtaining limited admission). However, he was prepared to and did grant limited admission to two further foreign lawyers. He said as follows:

> *"61. Being mindful nonetheless of the unusual and complex nature of the task confronting the [defendants] in their defence of AHAB's claim and of considerations (c) and (d) .... above, I am obliged to consider whether it would be appropriate to grant any of the applications at all.*
>
> *62. I accept that there would be a genuine need for two more lawyers to be present here to support the [defendants'] Cayman litigation team [and] that, at this late stage, it would no longer be feasible to recruit local attorneys for this particular engagement. Although this amounts to presenting this court with something resembling a fait accompli, the present objective is not to sanction the [defendants] for selective observance of the [Act]. As litigants, their ability to recover their costs if successful should be reasonably accommodated within the ambits of the law.*
>
> *63. I therefore grant the applications of two of the applicants, leaving it to the [defendants] to determine which two of the seven will come to work in the Cayman Islands for the rest of the duration of the action."*

13. I also note, for completeness, the requirements and approach of section 35 of the new Legal Services Act, which is not yet in, but is expected shortly to come into, force. Section 35(4) (c) and (5) state as follows (underlining added):

> *"(4)*
>
> *(c). in the case of an application to allow a person, other than a Queen's Counsel, or equivalent, and practising as such in any court of a jurisdiction referred to in section 32(3), to appear, to advise or to act in a specified suit or matter, <u>that there are exceptional circumstances to justify approving the application and for this purpose, the fact that the applicant law firm does not itself have sufficient capacity to act or to advise in the specified suit or matter shall not be considered an exceptional circumstance</u>.*

(5). A judge, when considering an application under subsection (1) made by a law firm, shall, in particular, consider —

(a). the complexity of the specified suit or matter and the need for a specialist in respect of the suit or matter;

(b). the professional experience and expertise of the person proposed to appear, to advise or to act in the specified suit or matter; and

(c). whether approval of the application would be consistent with public policy, including —

(i). the promotion of the legal profession and advocacy in the Islands, its sustainability, competence and advancement;

(ii). the promotion and maintenance of a fair and efficient court system in the Islands; and

(iii). the Grand Court Rules, 1995 (Revised).”

The present case

14. Each application for limited admission of a junior counsel requires a rigorous examination of all the relevant circumstances to see whether it can be justified, having regard to the need for the applicant currently to show “*unusual and special circumstances”* and taking into account the criteria identified by the Chief Justice in *AHAB* (and, once the Legal Services Act has come into force, having the regard for the need for the applicant to show “*exceptional circumstances*” and taking into account the criteria identified in section 35(5)).

15. The precondition that *unusual* and *special* circumstances must be shown makes it clear that there is a high threshold to be crossed before the Court will accede to such an application (and the new statutory language of exceptional circumstances, which seems to me to be a statutory codification of the approach in PD4, emphasises that the precondition will not easily be satisfied). There is effectively a presumption against the limited admission of junior counsel.

16. It seems to me that the complexity and scale of the litigation are not of themselves sufficient. They are important factors to be taken into account but the Court must also weigh and balance the other criteria when generally assessing whether the limited admission can be justified. The role to be performed by the junior barrister, the availability of similarly and suitably qualified local attorneys who could fill that role, the steps that have been taken to locate such attorneys and the balance of the legal team engaged to prepare for and conduct the litigation will, for example, also be of

considerable weight. It will be relevant for the Court to understand whether efforts were made at the earliest opportunity to involve local attorneys in the development and preparation of the case to be presented in the proceedings before the Court.

17. The timing of the application is also of significance. In the present case, as I have noted, Ogier in their Written Submissions referred to and relied on (although Ms Fox in her affirmation did not refer) the fact that Mr Keller had assisted Mr Ayres QC for several months and had been crucial in the preparation of the defences to the AH JOLs' Claim against NPEF IV and to the Jafar Proceedings. But it cannot be determinative that junior counsel has been long engaged in working on the case and become a key member of the legal team, since that would permit the easy circumvention of the requirements of PD4 (and of section 35(4)(c)) in every case. All that would be required would be to instruct junior counsel, give them time to work on and assume an important role with respect to the case and then apply for limited admission.

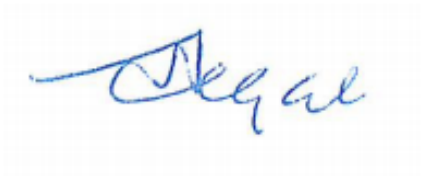
18. Of course, the effect of granting an application for limited admission is only to permit the participation of and recovery of the legal fees of the junior counsel from and after the time at which the application is granted. The focus of the Court's attention must be on the role to be performed by junior counsel and the extent to which that role can be justified having regard to the relevant factors. Where the role and the extent of the involvement of junior counsel is clear and limited, for example because junior counsel is to be admitted in order to allow him or her to travel to Cayman in order to make final preparations for and appear at the listed trial of the claim, then it may be easier to justify the granting of limited admission. In the present case, Ogier have not indicated whether Mr Keller's limited appearance is required by reference to and for the purpose of particular hearings or for trial preparation. The current procedural state of play in the Proceedings and the Related Proceedings is that the time for the filing and serving of replies by each of the plaintiffs, following the filing of defences, is 1 April 2021 and a case management conference is due to be set down for a hearing on the first available date after 21 April 2021.

19. In the present case, Ogier have given the impression that obtaining the limited admission of junior counsel is a *pro-forma* exercise that only requires evidence of substantial and complex litigation and a junior barrister who has the relevant expertise and experience in the area covered by the dispute and is working with and supporting leading counsel who is admitted in the proceedings. This seems to me to be a misunderstanding of what is involved. It needs to be demonstrated that the instruction of junior counsel can *exceptionally* be justified because

the role he/she is to perform is necessary, cannot in the circumstances be performed by local attorneys and does not adversely impact on the local profession because for example the legal team already involves or will involve a number of local attorneys who are or will be performing roles of substance. More evidence is, in my view, needed of the composition of GP8 legal team, the role to be performed by the junior barrister, the role to be performed by other members of the team, whether consideration was given to local attorneys performing the tasks given to the junior barrister and the reasons why a junior barrister is needed in the circumstances. It seems to me that it is necessary and appropriate to require the filing of further evidence in this case to deal with these other matters. I appreciate that the present case only involves an application for limited admission by one junior barrister, who is a highly regarded expert in the relevant subject matter of the proceedings and that the circumstances are very different from those of *AHAB* where admission was sought for a number of foreign lawyers, including a junior barrister (and that junior counsel and a number of the other foreign lawyers were admitted in *AHAB*). But this does not obviate the need for the evidence in support of an application for limited admission of junior counsel to be comprehensive and address all the relevant criteria and matters so as to establish the unusual and special (or exceptional) circumstances.

20. I note that reliance has been placed in this case on the fact that an application for limited admission has already been granted by another FSD judge to junior counsel (Ms Tresman) for other defendants in the Jafar Proceedings and the Related Proceedings. It appears that the application was granted on the basis that Ms Tresman's admission was needed to enable her to prepare for and appear at trial. Therefore, a party in a similar position to Ogier's client, GP8 in the Jafar Proceedings can and will be represented by junior counsel. The limited admission application will have been granted based on an assessment by the Court of the justification for admitting Ms Tresman having regard, *inter alia*, to the nature and complexity of the Jafar Proceedings and I would not wish to differ from that assessment made by one of my learned colleagues. But I have not been provided with any written reasons for the decision (if written reasons were sought or prepared) and so cannot assess the basis on which Ms Tresman's application was granted. Furthermore, and critically, the assessment of the nature and complexity of the relevant proceedings is only one factor to be weighed in the balance and taken into account and there will have been other facts and circumstances which were relevant to the application which may or may not be replicated or reflected in the present case. Each case, as I have said above, has to be separately and rigorously examined on its own facts in order to see whether the applicant has met the high threshold of unusual and special (or exceptional) circumstances. I recognise and take into account the need to ensure that all

parties to the same proceedings are fairly and similarly treated but for current purposes, without knowing more about the basis on which Ms Tresman was admitted, it seems to me that the mere fact that she was granted limited admission should not be and is not determinative of this application, nor should it alter my decision to require further evidence before reaching a final view on whether the granting of limited admission to Mr Keller is justified.



HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT