



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

**CICA (Civil) Appeal No 3 of 2021
(FSD 146/2018, 147/2018, 148/2018 & 196/2018 (IKJ))**

BETWEEN:

WAFR HOLDINGS LTD

Appellant

AND

MICHAEL JOHN PEARSON

(As Administrator of the Cayman Estate of Osama I Abudawood)

Respondent

BEFORE: The Rt. Hon Sir John Goldring, President
The Hon. C Dennis Morrison, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: Mr Ben Valentin QC (via Zoom) instructed by Bhavesh Patel of Travers Thorp Alberga for the Appellant
Mr. Andrew De La Rosa instructed by Charles Moore of Harneys for the Respondent.

Heard: 6 September 2021

Draft circulated: 4 October 2021

Judgment delivered: 13 October 2021

JUDGMENT

The Rt. Hon Sir Alan Moses:

1. Sheikh Osama I Abudawood, domiciled in the Kingdom of Saudi Arabia, died intestate on 13 June 2017. The Respondent was appointed administrator to the Sheikh's Cayman estate pursuant to section 26 of the Succession Act (2006 Revision).
2. The Sheikh owned shares in WAFR Holdings Limited (WAFR) which it is accepted were assets within the Cayman estate. WAFR, however, had various wholly owned subsidiaries, some of which are not Cayman companies and some of which have wholly or partially owned subsidiaries. Those subsidiaries are not parties to these proceedings and are not part of the Cayman estate.

3. The Sheikh's seven heirs are entitled to percentages of the estate under Saudi Arabian Sharia law of inheritance. But the issues as to the administration of the Cayman estate are not relevant to this appeal. The Administrator sought discovery of subsidiary companies' documents such as financial statements, a full statement of the portfolio of investments, a fixed asset schedule, aged receivables, and loan agreements. It is unnecessary to itemise those documents in greater detail because there is now no argument as to whether their disclosure was necessary to the administration of the Cayman estate.
4. The argument is now focussed on the Administrator's legal right to the documents. That right is contested by parties who have no interest in the estate but have interests in the business of WAFR and the subsidiaries. They were known, by reference to those representing them, as the TTA parties.
5. The essential issue is whether the Administrator has a *presently enforceable right* to obtain access to the documents categorised at Para. 30.3 of the Administrator, Mr Pearson's third affidavit, the nature of which I have outlined above.
6. It was no longer disputed that the Administrator was entitled to discovery against WAFR by virtue of GCR O.24. By r.7

"subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents..... which are or have been in his possession, custody or power relating to any matter in question between them in the action".

7. But Mr Valentin QC, on behalf of the Appellant, did contend that that provision provided no legal authority to seek disclosure of the documents of WAFR's subsidiaries.
8. The essential principle was identified by Lord Diplock in *Lonrho Ltd v Shell* [1980] 1 WLR 672:

"Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase "possession custody or power" the expression "power" must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else".

9. Two English cases at first instance have applied the principle explained in *Lonrho*, where a subsidiary's documents were sought from a 100% parent. In neither case was the existence of a common corporate structure sufficient to oblige the parent to give discovery.
10. In *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat), Schlumberger sought to revoke a number of the Defendant's patents. It was a holding company of a large multinational group of companies providing oilfield services which included a number of subsidiaries [4]. The Defendant made a discovery application in which it required the Claimant holding company to search the records of other companies within the

Schlumberger group. No disclosure was or could have been sought directly against those third parties because they were not within the jurisdiction [8].

11. The judge concluded on the facts of that case that the documents sought were in the control of the holding company, Schlumberger, because general consent had already been given by the relevant third parties before the application was made, for the holding company to search for, inspect their documents and take copies.
12. Floyd J summarised the evidence and his approach at [21]:

“I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party’s documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third-party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not in any way depend on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in the litigation, subject only to the caveats contained in paragraph 4 of Mr Griffin’s witness statement concerning corporate acquisition documents and unreasonably onerous requests.”

13. It is instructive to consider the nature of the evidence which persuaded the judge that such general consent had been given.
14. The claimant’s, Schlumberger’s, disclosure statement had stated that it had carried out searches for documents at its facilities and in the files of its employees. In response to a further letter from the Defendants it had also disclosed that it had searched the personal files of the attorneys of two of its subsidiaries and a technical officer of one of its subsidiaries [11] and [12]. It stated in the letter that it had compiled the list *“having taken into account all documents that may exist in the Schlumberger group and with the cooperation of other group companies”* but it denied any obligation to extend disclosure to documents not within its own custody, power or control and denied that the obligation extended to group documents as a whole [13].
15. The judge concluded that the searches which had been carried out, even after the original disclosure was performed, were with the consent of the companies concerned ([14] and [15]).
16. It was this evidence which drove the judge to the conclusion I have cited at [21], that general consent had in fact been given.

17. That *Schlumberger* did not erode the principles to be derived from *Lonrho* was made plain in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm). It is not sufficient that consent could be obtained if it were asked from the subsidiary [5]. If there is no evidence of an existing right or understanding or arrangement giving a parent access to a subsidiary's documents then the parent does not have the necessary control over its subsidiary's documents.

18. Males J explained this principle:

"[13] First, it remains the position that a parent company does not merely by virtue of being 100% parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.

[14] Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

19. The essential question, therefore is to determine whether there is evidence that WAFR already had unfettered access to the subsidiary companies' documents.

20. In the instant case, all that the Administrator can rely upon is the fact that WAFR produced consolidated accounts; there is nothing else.

21. There is no evidence or material as to the circumstances in which the consolidated accounts were prepared or how WAFR, as holding company, obtained what was needed to prepare those accounts. Certainly, there is no evidence of unfettered access to the documents the Administrator seeks or some prior arrangement or consent for WAFR to search for them.

22. It might be thought that that was the end of the matter. But it is not. It is necessary to consider at what point the issue now before this court arose and how Kawaley J came to make the Order.

When the Point Emerged

23. The point now taken by the Appellant was not taken before the judge. One seeks in vain for any suggestion that even though the Administrator had the right to discovery from WAFR it had no such right to do so from the subsidiaries. As the judge recorded in his judgment, the TTA Parties sought to identify the relevant principles in relation to administration of the Cayman estate [19] and contended, on the basis of those principles, that the discovery sought was unnecessary [21]. Accordingly, the judge said:

“[23] Save for items (3) and (4), the main thrust of the objections was that the discovery requests were unjustified because the administrator’s function is limited to making an in specie distribution without undertaking any detailed evaluation exercise. The legal right of the Administrator to make the discovery requests in general jurisdictional terms were not positively challenged. It was not contended that the Deceased would have been unable to request the information sought had he been alive”.

24. The Administrator had argued that the Court had an inherent jurisdiction to order discovery in light of the Deceased’s status as a shareholder of WAFR [24 (a)]. He did not advance the argument on which he now relies in the Respondent’s Notice under GCR Order 24. He also relied on the statutory right to discovery in favour of a limited partner under section 22 of the Exempted Limited Partnership Law but that is of no relevance to the instant appeal.
25. The judge dealt with the issue of jurisdiction shortly, because the jurisdictional bases were not subject to challenge [25]. He ruled that the Court had an inherent right to grant discovery derived from section 11 of the Grand Court Act (2015 revision) which provides for the court to have the same jurisdiction as Her Majesty’s High Court in England and Wales as constituted by the Senior Courts Act 1981. He said:

“[26](2) this court possessed the same power to order such discovery as the English High Court was empowered to grant in probate matters derived from the gap-filling provisions of section 46 of the Succession Act....

(3) in the light of the need to have regard to (a) the particular context of an administrator seeking directions from this Court in relation to the administration of an estate and (b) an investor’s general right to receive information about his investment, while GCR Order 24 potentially provided a useful framing for how the discretion to compel discovery should be exercised, those principles were of no real assistance in the present context. This was not an application for discovery against an adverse party for documents which, litigation apart, the applicant would not be entitled to seek.

[27] ...it is impossible to conceive of a more fundamental task for an administrator of an estate than the collection of information about the deceased’s assets apart from gathering in or securing the assets themselves.The Administrator was clearly entitled to obtain such documents and information which the deceased would have been entitled to compel WAFR to provide.”

26. Later the judge developed his views about the need for the Administrator to have discovery of the documents sought from the subsidiaries. He emphasised the Administrator’s own assessment of where the best interests of the estate lay. He said:

“[31] This factor had added resonance in circumstances where the Cayman entities did not oppose the discovery application on grounds that there was no prima facie entitlement for the

administrator, standing in the shoes of the Deceased, to obtain the information sought. Rather the Cayman Entities centrally contended that material sought fell outside the properly delineated parameters of the administration of the Cayman Estate.”

27. It is clear that the case concerned not the right of the Administrator to disclosure but whether it was necessary for him to deploy it. The judge assumed, because he thought it had not been argued, that the Administrator, standing in the shoes of the deceased as shareholder of WAFR, did have a right to discovery of documents from its subsidiaries.

28. By its Notice of Appeal, the Appellants took issue with the legality of that approach. They contended that the shareholders’ rights were determined by the company’s constitutional documents and by the Companies Act, neither of which gave the shareholder the right to compel production of information *“about the Company itself, let alone its subsidiaries.”* (para. 2(a) Memorandum and Grounds of Appeal).

29. The Grounds continue:

“(c) A shareholder of the Appellant has no right to call for the documents of its subsidiary companies. The Administrator of that shareholder’s estate therefore has no more extensive right.”

30. The Grounds then dispute the suggestion that a point of jurisdiction had not been taken:

“(d) the Appellant’s position has always been that the subsidiaries of WAFR are outside of (sic) the Estate over which the Administrator has been appointed and that accordingly documents, records and information relating to those companies are materials to which the Administrator has no entitlement”.

31. In his skeleton argument, Mr Valentin QC persisted in the argument that the point had been taken. He contended at paragraph 4:

“Although the immediately owned subsidiary companies’ documents might potentially be disclosable by WAFR in adversarial litigation against WAFR, the Summons was not concerned with discovery in adversarial litigation but instead with directions in the administration of an intestate Cayman estate and moreover, an estate which does not include WAFR’s shares in subsidiary companies.”

32. One of the footnotes to this paragraph refers to the trilogy of cases starting with and including *Lonrho* cited above. But the point is nowhere separately developed, as with customary frankness, Mr Valentin QC acknowledged. One could be forgiven for missing it. This becomes all the more apparent in light of the Respondent’s Notice which contended that the Judge had been wrong to say that there was no jurisdiction to make the order pursuant to Order 24 of the GCR. The judge had taken the view that the administration was not an *“adverse proceeding”* within the rules. The Administrator contended that that was wrong.

33. At the outset of the hearing before us Mr Valentin QC helpfully made clear that he accepted that O.24 did apply. Thus, there was no dispute that the proceedings were adversarial so as to trigger the right to discovery under GCR Order 24(1) and specific discovery under rule 7 (*supra*). The judge had thought that the Probate and Administration Rules applied and thus the Rules of the Grand Court did not apply ([26(1)] and O1 r.2(3)). At this hearing Mr Valentin QC acknowledged, fairly, that that was incorrect.
34. Thus, it is apparent that there was no longer any challenge to the right of the Administrator to WAFR's documents. Nor did Mr Valentin QC pursue the points taken in his skeleton argument as to the limitations imposed on a shareholder to obtain information by the constitutional documents of the company and the Companies Act (2020 Revision). The crux of his argument relied on the cases I have cited above and the contention that consolidated accounts were an insufficient basis for seeking the subsidiaries' documents.
35. He stressed the dangers of relying on the production of such accounts: if production of consolidated accounts allowed a shareholder in a parent to seek information about subsidiaries, then that would be a powerful incentive to Cayman companies not to produce consolidated accounts.
36. The stark change of emphasis in the conduct of the appeal placed Mr De La Rosa, on behalf of the Administrator, in difficulty. The Administrator had not had to argue before the judge the points which emerge in *Schlumberger* and *Ardila*. He had not appreciated the need, because of the approach of the TTA parties, to establish evidence of WAFR's unfettered right of access to the subsidiaries' documents or some understanding or arrangement by which it had the right to achieve such access.
37. It was clear, at the hearing of the appeal, that the Administrator has not been able hitherto to do so and all he could rely upon was the consolidated accounts. Mr De La Rosa did attempt to rely upon common law principles but they have no bearing on the principle in *Lonrho*. They do not assist as to access to Third Party documents.
38. But Mr De la Rosa suggested that the matter ought to go back to the judge to give him the opportunity to establish the evidence or material which would, by analogy with *Schlumberger*, entitle him to the discovery he seeks.
39. There should be finality. There are already multifarious proceedings. The point now taken seems obvious, at least so far as identification of the relevant principles are concerned. Mr Valentin QC objects to the Administrator having a second bite of a cherry at which, to put it at its highest, he had previously only nibbled.
40. But it does seem to me that the failure to take the point squarely before the judge is of significance. Quite apart from creating difficulty for the Administrator, it does suggest that WAFR saw no difficulty in obtaining the documents sought, should their disclosure be found to be justified. That itself might give some inference as to its power over the documents sought. I do not place any weight on the fact that it agreed to disclose the documents immediately should the appeal fail. That seems to me no more than an acknowledgement

that it would comply with the court's order. But the reality is that WAFR and the TTA parties only took the point as to what documents were or are in WAFR's power after it had lost the point as to whether there was any need for disclosure. Had they not been in its power it is arguable, and this will be a matter for later, that it would have taken the point earlier.

41. Reluctantly, I have come to the conclusion that the Administrator should be given the opportunity to see whether he can adduce before the judge the evidence or material he needs in order to justify his right to the documents which the judge has already ruled to be necessary to the proper administration of the Cayman estate. The stance taken by the TTA parties was such that the need for such evidence escaped both sides and the judge. In those circumstances I would dispose of this appeal by ordering the issue I have identified to be remitted to the judge.

The Hon Dennis Morrison, Justice of Appeal

42. I agree.

The Rt. Hon Sir John Goldring, President

43. I also agree.