

IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE FINANCIAL SERVICES DIVISION

Cause No: FSD 111 of 2018 (RMJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN OFFICIAL
LIQUIDATION)

IN CHAMBERS



Appearances: Mr. Tom Lowe Q.C. instructed by Ms. Jennifer Fox and Mr. Bryan Little of Ogier for the Applicant.

Mr. Guy Manning and Hamid Khanbhai of Campbells for the Respondent.

Before: The Honourable Mr. Justice Robin McMillan

Heard: 19 November 2020

Draft Judgment Circulated: 19 February 2021

Judgment Delivered: 25 February 2021

HEADNOTE

The principles underlying section 97(1) of the Companies Act (2021 Revision) – The requirement to protect third party confidentiality – The need to guard against multiplicity of legal proceedings in all the circumstances.

JUDGMENT

Introduction

1. This matter concerns a Summons Application dated 16 June 2020.
2. The Applicant is Abraaj General Partner VIII Limited ("GP8") on behalf of (i) Neoma Private Equity Fund IV LP. and (ii) Neoma Private Equity Fund IV (S), L.P. (together "NPEF IV", "the Fund", "the Applicant"). Historically, the Respondent was the investment manager to the Fund. The Fund is now managed outside of the Abraaj group.
3. The Respondent is ABRAAJ Investment Management Limited (In Official Liquidation) ("the Respondent") ("the Company") ("AIML").
4. The Summons seeks in relation to section 97 of what is now the Companies Act (2021 Revision) the following orders and directions:

- 1. That the Applicant and the Fund have leave to commence proceedings against the Company for an order requiring the Company to provide the Applicant and the Fund with the documents and information referred to in the draft Originating Summons that is exhibited to the Fifth Affidavit of Neil Christopher Hayward sworn in support hereof.*
- 2. That the costs of this application be provided for.*
- 3. Such further or other orders as the Court sees fit."*



5. The draft Originating Summons in turn seeks the following:

“By this Originating Summons, which is issued on the application of Abraaj General Partner VIII Limited (the "Plaintiff") whose registered address is c/o Maples Corporate Services Limited, PO Box 309, Uglan House, Grand Cayman, KY1-1104, Cayman Islands, the Plaintiff acting on its own behalf and in its capacity as general partner of Neoma Private Equity Fund IV, LP and Neoma Private Equity Fund IV (S), LP (the "Fund"), seeks

1. An account of all monies or assets belonging to the Plaintiff or the Fund received by the Defendant or received by any other person acting for or on behalf or on account of the Defendant and an account of all the dealings with such monies or assets by the Defendant or anyone acting for or on behalf, or on account, of the Defendant.

2. An order that the Defendant (through its Joint Official Liquidators) provide the Plaintiff with the following documents and information:

1. The full bank statements for any of the Defendant's bank accounts from the date of the first transaction pertaining to the Fund executed by the Defendant (or on account of the Defendant) to 18 June 2018, whether maintained by itself or a custodian, in which there are belonging to the Fund, or in which have been credited, any monies deriving from:

1.1 account numbered IBAN AE340230000001001833720;

1.2 any other bank account of the Plaintiff or the Fund;

1.3 any entity in which the Plaintiff or the Fund had directly or indirectly an investment of which the Defendant was aware; or



- 1.4 *any entity or individual who held such an investment as agent, nominee or custodian for the Fund including the Defendant or Abraaj Holdings Limited;*
 2. *the Defendant's full general ledger extracted from the Defendant's accounting system from 22 July 2008, being the date on which the Fund was first established, to 18 June 2018;*
 3. *the details of any cash flow forecasts and/or intercompany reconciliations with respect to account ledgers maintained for the Fund prepared by or for the Defendant since 22 July 2008 or recording any of the payments referred to in paragraph 1 above;*
 4. *all documents pertaining to transactions by the Fund justifying or relating to the receipt of sums in paragraph 1 above;*
 5. *Such further documents and information as may help adequately explain what the Defendant has done with the Plaintiff's and/or the Fund's monies or assets;*
3. *All further proper accounts, inquiries and directions; and*
 4. *Costs.*

The Plaintiff is entitled to the above relief pursuant to the terms of an Amended and Restated Limited Partnership Deed dated 28 June 2016 and an Investment Management Agreement dated 2008 (but executed on or around 22 July 2008); or by virtue of the Company's duty to



account; and pursuant to sections 21, 22, 29, 30, 31, 32, 33, 34 and 39 of (or otherwise arising under) the Exempted Limited Partnership Law (2018 Revision)."

6. There is then a further Summons Application also dated 16 June 2020 between the same parties and not yet listed for hearing. This separate Summons seeks relief under sections 110 and 114 of the Companies Act.

7. The further Summons seeks the following orders and directions:

"1. That the Company, through its Joint Official Liquidators (the "JOLs"), provide the Applicant with the following documents and information:-

1.1 The full bank statements for any of the Company's bank accounts from the date of the first transaction pertaining to the Fund to 18 June 2018, whether maintained by itself or a custodian, in which there are belonging to the Fund, or in which have been credited, any monies deriving from:

(a) account numbered IBAN AE340230000001001833720;

(b) any other bank account of the Applicant or the Fund;

(c) any entity in which the Applicant or the Fund had directly or indirectly an investment of which the Company was aware; or

(d) any entity or individual who held such an investment as agent, nominee or custodian for the Fund including the Company or Abraaj Holdings Limited ("AH");



- 1.2 *the Company's full general ledger extracted from the Company's accounting system from 22 July 2008, being the date on which the Fund was first established, to 18 June 2018;*
- 1.3 *the details of any cash flow forecasts and/or intercompany reconciliations with respect to account ledgers maintained for the Fund prepared by or for the Company since 22 July 2008 or recording any of the payments referred to in 1.1 above;*
- 1.3 *all documents pertaining to transactions by the Fund justifying or relating to the receipt of sums in 1.1 above; and*
- 1.4 *Such further documents and information as may help adequately to explain what the Company has done with the Applicant's assets;*

2. *The Applicant's costs of the application be paid as an expense of the liquidation to be taxed if not agreed;*

3. *Such further or other orders as the Court sees fit."*

8. It is of relevance to note at this stage that this second Summons seeks orders and directions within the winding up of the Company itself, whereas the first Summons seeks leave to commence proceedings outside the winding up of the Company.

9. In order to understand the scope of this section 97(1) Application, it is necessary to address both the relevant background and the applicable principles of law.

10. In support of these Summonses the Court has before it the Affidavits of Mr. Neil Hayward dated 15 June 2020, 15 June 2020, 20 August 2020 and 2 October 2020. The Court also has the Affidavit of Mr. Stuart Sybersma dated 20 July 2020.



11. Although the collective evidence is voluminous, it is important to emphasise that the legal principles themselves are well established and that when due weight is given to the principles and how in practice they operate the apparent complexity raised both in evidence and in legal argument can be resolved much more straightforwardly.

The Background

12. On 11 September 2019 the Court ordered that the Company be wound up.
13. The Fund managed by the Applicant as general partner is one of a number of investment funds formerly managed by the Company (the parent company of which is Abraaj Holdings (“AH”)) within an investment group which was formerly a major private equity investment group operated across markets in the Middle East and North Africa (“the Abraaj Group”).
14. The current situation is helpfully summarised in the Skeleton Argument of the Joint Official Liquidators of the Company (“the JOLs”) dated 6 October 2020 at paragraph 11:

“AIML is deeply insolvent and does not have enough assets even to pay in full the existing and approved expenses of the provisional liquidation, let alone the expenses of the official liquidation, none of which have been paid. In his affidavit, Mr Sybersma refers the Court to the First Report of the JOLs in the official liquidation; but the Court now has an updated picture from the Second Report of the JOLs dated 11 September 2020 (the “Second OL Report”), a copy of which will be made available to the Court at the hearing of the Leave Application. In particular:



- (a) *Around US\$6.5 million in JPLs' time costs and expenses (including the JPLs' legal fees and disbursements in the Cayman Islands, England and Dubai) are approved provisional liquidation expenses which have not been paid.*
- (b) *As at the date of the Second OL Report, in the official liquidation some US\$12.5 million in the JOLs' time costs and expenses (including legal fees and disbursements in the Cayman Islands, England and Dubai) have been incurred in the official liquidation.*
- (c) *Unlike during the provisional liquidation and the early part of the official liquidation, except for the Abraaj Pakistan Fund, AIML no longer manages any funds and so does not earn any management fees other than from that Fund.*
- (d) *AIML has no other certain or reliable cashflows and does not have the benefit of any insurance or funding that could respond to an order of the Court requiring the Company to carry out an account."*

15. Nonetheless the JOLs earlier state that there is some common ground with the Applicant at paragraph 9:

"9. For the purposes of the Leave Application (and the Documents Application), it is common ground that:

- (a) *prior to the appointment of the JPLs (i.e. in the provisional liquidation) there is evidence that the Company did not manage assets of the Fund in accordance with its duties and this included misappropriation of the Fund's assets for other purposes;*



- (b) *from information that the Company may have, the Fund may discover that it has causes of action against third parties; and*
- (c) *if the Fund is then successful in obtaining and enforcing judgments against third parties, there is also at least a possibility that may reduce the Fund's claim into the AIML estate."*

16. The JOLs then point out that the Fund is not in any special position in this regard. In other words, these featured common grounds apply equally to other funds which are also creditors in the AIML estate. This is an important observation to which the Court will return in considering how the governing legal principles should operate.
17. The Applicant in turn amplifies these matters at paragraphs 11- 14 of its Skeleton Argument dated 6 October 2020.
18. First, it states that it is now well known that the management of the Abraaj Group treated all of the entities under the Abraaj umbrella (including the Fund, AIML and AH) as though they belonged to a single company in the service of a single interest. The breaches of the duties to segregate assets resulted in the Fund's assets being commingled. It also seems that because of this improper commingling the underlying records of the movement of the Fund's cash and assets cannot be separated from the records of other entities showing the movement of their cash and assets.



19. Secondly, it states that there is ample evidence to show that the Fund's assets were paid away to, amongst others, other Abraaj entities including AH, other investment funds, companies within the Abraaj structure and Naqvi related companies. There is a great deal of evidence that suggests NPEF IV's funds have ended up being misapplied or misappropriated in circumstances where there are likely to be claims to recover such funds.
20. Thirdly, it asserts that at the same time the threatened claims to which Mr. Hayward referred in Mr. Hayward's Fourth Affidavit have now materialised: on 14 July 2020 the AH JOLs issued a writ in the Grand Court seeking US\$123,799,700 from the Fund, and on 10 September 2020 Mr. Jafar (who is referred to further below) issued a Writ, also in the Grand Court, seeking US\$267,000,000 (less assets worth an estimated US\$35-55 million which he says have already been received from Mr. Arif Naqvi) from the Fund.
21. The Applicant summarises the difficulties concerning the Fund at paragraphs 17- 19:

"17. In almost all of the cases in which Fund assets appear to have gone missing, it seems that monies ended up being debited to AIML's accounts either as a result of being transferred out of GP8's bank accounts or being diverted directly to AIML. From that point onward, the path of the funds is unclear. When the Fund received payments from AIML it is unclear how those payments were funded, whether they are associated with funds paid out by the Fund, and how the receipts were justified by AIML.



18. GP8 requires access to AIML's bank statements, general ledger, cash flow forecasts, intercompany reconciliations, and transaction records in order to investigate what has happened to the Fund's assets. Those documents are essential to identifying the recipients of Fund monies made by AIML while acting as NPEF IV's delegate. What is sought is the basic information that any forensic accountant or auditor would expect to receive in order to identify the recipients of payments made from AIML's accounts.

19. Unfortunately, GP8 presently has insufficient information to assess the viability of the potential proprietary claims. GP8 has no records from which it could establish the full extent of the commingling of the Fund's assets with those of other Abraaj Group entities or where AIML placed funds taken from or on behalf of the Fund. GP8 also lacks a sufficient explanation to understand the rationale for transactions, fund flows showing the identities of all recipients of monies from the Fund, the amounts received and the circumstances of receipt”.

22. Mr. Neil Hayward who is the authorized Conflict Director of the Applicant, sets out the nature of these difficulties at paragraphs 14- 15 of his Fourth Affidavit dated 15 June 2020:

“14. There is no dispute over the fact that GP8 is a creditor of AIML. Indeed, I am currently serving as a member of AIML's liquidation committee on behalf of the Fund. However, in addition to being a creditor, GP8 (on behalf of the Fund) expects the Fund to have proprietary claims to assets transferred by AIML to third parties including entities or persons under its control. The Fund is likely to have certain proprietary



claims against AIML itself. For example, I am aware from communications from the JOLs themselves that there are some instances where Fund IV's money was paid to third parties (see an email from Isobel Henley to Benjamin Dunlap dated 14 February 2019 at pages [404-405]). GP8 intends to pursue claims against third parties who have received funds when it is able to do so. Unfortunately, GP8 presently has insufficient information to assess the viability of these potential proprietary claims, in particular it has insufficient documents and information confirming the identities of all recipients of monies from the Fund, the amounts received and the circumstances of receipt. The information sought on this application is critical to GPB's ability to pursue claims. As discussed below, in some instances the information is also necessary to enable GP8 to defend the Fund against claims that have been threatened against it.

15. *As discussed further below, under the terms of the Fund's core constitutional documents, GP8's duties were delegated to AIML, which acted as the Fund's investment manager from its inception in 2008 until AIML was replaced as manager in July 2019. Because it has become evident that the Fund's assets were passed to third parties, it is essential that GP8 is provided with all relevant information about AIML's dealings with those assets during that period. This information is required so as to enable me to undertake all necessary investigations and discover the whereabouts of the Fund's assets. It is also important that GP8 is put into possession of this material without further delay so that its ability to recover assets is not undermined.*



Unfortunately, my investigations have been substantially prejudiced by AIML's refusal to provide GP8 with essential information."

The Director Services Deed

23. A complicating factor in terms of the background is that on 7 August 2018 a Director Services Deed ("DSD") was entered into by Mr. Hayward and his employer at the time Alvarez & Marshal, GP8, NPEF IV and AIML whereby *inter alia* Mr. Hayward agreed to provide services as a Conflict Director of GP8.
24. Access to information is provided for in clauses 4.1, 4.2, 4.3 and 4.4 of that Deed. In other words, it is contractual in nature and scope.
25. An essentially identical deed was considered by this Court in *Mark Skelton v. Abraaj Investment Management Limited (In Provisional Liquidation and Official Liquidation from 11 September 2019)* (Unreported Cause No. FSD 107 of 2019 (RMJ)).
26. In approaching these identical provisions and terms, the Court notes at paragraph 34 that it has a broad responsibility which it must discharge to be fair to everyone.
27. In arriving at specific conclusions as to the construction of the Deed in that case, the Court also has made the following important observation at paragraphs 128- 131:

"128. First, the Court must follow the guidance provided by Lord Hodge in the Arnold case. In essential terms, how would these parties with all the background knowledge available to them have understood the relevant language to mean? This approach is further supplemented by Lord Hodge's statement in the Wood case identifying the



Court's task as being to ascertain the objective meaning of the language in which the parties have chosen to express their agreement.

129. It is clear from the circumstances attendant upon the DSD, as duly amended that the Defendant had suffered a great financial failure, and that its circumstances were very grave. It is also clear that the Plaintiff was more than adequately informed as to the co-mingling of assets and documents within the Abraaj Group.

130. It is inconceivable that a person of the Plaintiff's professional standing and distinction would have failed to recognise the somber realities of the situation when he executed the DSD. The JPLs on behalf of the Defendant equally would have been aware, and far from contesting that awareness the Defendant explicitly relies upon it.

131. Accordingly this Court finds that the parties entered into the DSD fully informed as to the context in which they did so. In light of that fact, Clause 4 must be interpreted not in an academic manner as the Plaintiff effectively urges but in a manner that is realistic, practical, measured and in keeping with its circumstances."

28. In professional standing and distinction there is no objective reason to regard Mr. Hayward in any different light from that in which the Court regarded Mr. Skelton.
29. Nonetheless, the position at this juncture is that while the Respondent sees no reason for the Applicant to venture outside the parameters of the agreement executed on its behalf, nonetheless the Applicant in contrast asserts that it is entirely at liberty to do so and that the Court through the medium of this Application is unconstrained in accommodating it.



The Governing Law

30. Before examining the principles of law themselves it is first necessary to set out the position of the JOLs as to what they describe as rights and duties.

31. Mr. Sybersma states at paragraphs 20- 21 of his Thirty-Eighth Affidavit dated 20 July 2020:

“Rights and Duties

20. *With two caveats, the AIML JOLs accept that (i) GP8 is entitled in contract and/or in equity to documents or information created during the course of AIML’s role as investment manager of NPEF IV, insofar as they relate to the management of the Fund; and (ii) under the terms of the DSD which binds GP, NPEF IV and the Conflict Director, the Conflict Director is entitled to copies of information or documents held by AIML, whether in physical or electronic form, which contain information relating to the business, assets and affairs of GP8 and/or the Fund (“NPEF IV-related Material”).*

21. *The two caveats are as follows. In relation to any material that it is proposed to be produced to the Conflict Director and/or GP8, the JOLs’ position is that:*

(a) the JOLs are entitled to review such material and, where appropriate, redact information in respect of which AIML owes a duty of confidentiality to a third party (including other funds or investors in other funds or employees) (“Confidentiality Review”); and



(b) *NPEF IV is contractually obliged to pay for the JOLs' costs of the Confidentiality Review and production costs ("Review and Production Costs"), as part of the reasonable costs of AIML complying with its obligations under the DSD, which clause 4.4 of the DSD expressly provides are required to be paid by NPEF IV."*

32. As we shall see, these propositions are important because in relation to the account and the information specified in the Applicant's draft Originating Summons there must be demonstrated for legal purposes an arguable case to be litigated. In the opinion of the Court, there is in this instance at least an arguable case to be litigated. However, while that may be the beginning of the matter it is far from being the end of it.

33. Section 97 states:

"Avoidance of attachments and stay of proceedings

97. (1) *When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.*

(2) *When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void."*



34. In *(1) BDO Cayman Ltd (2) BDO Trinity Ltd v. Ardent Harmony Fund Inc. (In Official Liquidation)* (Unreported, Cause No. FSD 74 of 2020 (MRHJ)) Ms. Justice Ramsay- Hale summarises the law and practice at paragraph 24:

“24. The principles to be extracted from the case law governing section 97 leave are that:

- (1) The applicant for leave must first establish an arguable case to be litigated;*
- (2) If it establishes an arguable case, the Court then has to consider whether it would be fair, in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of that litigation. The Court’s discretion is wide and unfettered - there is no presumption in favour of or against giving leave - and each case turns on its own facts;*
- (3) In deciding what would be fair, the Court can give s. 97 leave subject to conditions subject to a consideration of what would be fair, in the context of the liquidation as a whole.”*

35. This summary follows an extensive review of the leading authorities which the learned Judge has previously set out at paragraphs 13- 19 and which this Court respectfully adopts:

“13. The rationale for requiring leave to bring proceedings is succinctly set out in Vagrاند v Fielding, a decision of the Full Court of the Federal Court of Australia on which BDO relied in this application, where the Court said this:

“The reason for imposing a requirement of leave, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New



South Wales Supreme Court, in *Thompson v Mulgoa Irrigation Co Ltd.* (1893) 4 BC

(NSW) 33:

'All that s 140 means is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard. Before any action can be brought or continued against a company, the court must investigate the intended litigation.'

14. *The unfettered discretion to grant leave provides the Court with a "free hand to do what is right and fair according to the circumstances of each case": Re Aro Co Ltd [1980] Ch 196, 209, citing Vaisey J. in In re Grosvenor Metal Co. Ltd. [1950] Ch. 63, 65 and applied by Smellie CJ in AHAB v Saad [2010] CILR 1 553.*

15. *In AHAB, Smellie CJ also observed that,*

"71...It must follow that I may not take a singular view of what may be "right and fair" from the point of view only of AHAB in the case. I accept, as Pumfrey J. observed in Enron Metals & Commodity Ltd. v. HIH Casualty & Gen. Ins. Ltd. (11) ([2005] EWHC 485 (Ch), at para. 4) that—

'...fairness in this context is fairness in the context of the provisional liquidation or liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration of the interests of the creditors as a whole and of the capacity of the provisional liquidators or liquidators to deal with the burden of the proposed litigation.'



72. Consideration must be given to what conditions may be imposed upon lifting the stay to mitigate that burden in determining whether the stay should be lifted. The conditions which may appropriately be placed upon the lifting of the stay will also be determined according to the circumstances...”

16. *In the Cayman Islands case of In the Matter of Wimbledon Fund Spc (In Official Liquidation) Grand Court Unreported, 8 January 2019, Parker J held:*

“66. The threshold question is whether the applicant for leave has shown that he has a claim worth entertaining. This test has been expressed in a number of ways. The rationale is that the company in liquidation and its liquidators should not be burdened by defending a futile claim.

“67. Mervyn Davies J expressed the test as “an arguable case” in Re Exchange Securities [1983] BCLC 186...”

17. *Parker J went on to hold:*

“71. It is only if the Court [is] satisfied that the threshold test is met that it moves to consider whether to grant leave ... and in this regard the Court’s discretion is broad and unfettered.”

18. *In undertaking this initial threshold inquiry, the Court “is not required to investigate the merits of the underlying dispute, beyond satisfying itself that there is a genuine arguable claim”: see Cosco Bulk Carrier Co Ltd. v Armada Shipping SA [2011] EWHC 216 Ch, para [48].*



19. One of the factors to be taken into account is whether the relief sought can be obtained in the liquidation. In *Gardner v Lemma Europe Insurance* [2016] EWCA Civ 484 at [2]: Patten LJ observed that,

“[t]he imposition of an automatic stay is designed to avoid the unnecessary expenditure of assets otherwise available for distribution amongst creditors and to support the replacement of a creditor's right to establish a claim by judgment in an action with a right to lodge a proof of debt... Consistently with this, leave to commence proceedings will only be granted by the court when it is right and fair to do so in all the circumstances and is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings: see Re Exchange Securities & Commodities Limited [1983] BCLC 186 at 196...”

36. In *Ogilvie-Grant and Anor v. East* (1983) 1 ACLC 742 McPherson J states at page 744 that the purpose of such a restriction is that, without the relevant restriction, a company in liquidation would be subjected to a multiplicity of actions *“which would be both expensive and time consuming as well as in some cases unnecessary.”*

37. In addition, this Court notes with approval the salutary observation of Patten LJ in *In the matter of Lemma Europe Insurance Company Limited (in liquidation)* [2016] EWCA Civ. 484 at paragraph 2:

“The imposition of an automatic stay is designed to avoid the unnecessary expenditure of assets otherwise available for distribution amongst creditors and to support the replacement of a creditor's right to establish a claim by judgment in an action with a



right to lodge a proof of debt. This process is inherently less expensive and carries with it a right of access to the Companies Court in the event that the proof is rejected: see Rule 4.83 of the IR 1986. Consistently with this, leave to commence proceedings will only be granted by the court when it is right and fair to do so in all the circumstances and is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings: see Re Exchange Securities & Commodities Limited [1983] BCLC 186 at 196.”

38. These propositions provide strong reinforcement for the learned *dicta* of Smellie CJ in the *AHAB* case, adopting an observation by Pumfrey J, that fairness in this context is fairness in the context of the liquidation as a whole. In particular, where do the interests of the creditors as a whole lie and what is the capacity of the liquidators to deal with the burden of the proposed litigation?
39. In practical terms these are questions which will almost necessarily answer themselves in examining the factual circumstances of a winding up.

The Legal Submissions of the Applicant

40. The Applicant states at paragraph 6 of its Skeleton Argument that one of the Applicant’s primary arguments is that a fund has a legal, non-discretionary entitlement to an account in equity, contract and statute, and essentially that without leave being granted there is a risk of material prejudice. The reasoning is stated thus:



“The legal right to an account is fundamental to the relationship that existed between AIML and the Fund. It represents one of GP8’s pre-existing rights and it is not one that abates with a winding up order.”

41. It is further submitted in paragraph 8 that all that is sought is the right to advance a certain legal argument:

“There is no reason why, if leave is given under Section 97, that the substantive claim for an account cannot be heard together with the existing application under Sections 110 and 114. That is simply a question of case management which would ensure that the arguments could be considered together. No more evidence or discovery is needed. It is already fully prepared: the most that can be said is that the argument concerning an account may add a couple of hours to the hearing.”

42. With great respect, the issue is not quite so narrow. It may well be convenient to the Applicant to have such additional recourse, but the Court has to balance carefully against that what would be fair in the context of the liquidation as a whole, particularly in circumstances where specific statutory mechanisms have already been provided in sections 110 and 114.

43. The Applicant elaborates on the sources of alleged unfair prejudice and concern at paragraphs 21- 24:

“21 The AIML JOLs' position is that they are prevented from providing full and detailed information because of the alleged duties of confidence which AIML purportedly owes to recipients of the Fund's money. Their confidentiality review



results in much relevant accounting information being withheld and other information being produced only through an unacceptably slow process.

- 22 *That confidentiality review has accordingly become a massive roadblock which has prevented GP8 properly investigating the Fund's own proprietary claims against AH or any other entity which may have wrongfully received its assets from AIML or AH. Mr Hayward's investigations have been substantially prejudiced by AIML's refusal to provide GP8 with essential information. Failure to provide it could lead to the Fund suffering irremediable prejudice, not least because of the application of any potential limitation periods.*
- 23 *There is something palpably unjust in the fact that AIML has wrongfully paid away the Fund's money to third parties and, when the Fund asks AIML to identify those third parties or provide details of the illicit transfers, has relied upon its purported duties of confidence owed to those same recipients in order to refuse to provide such information to the Fund. Those supposed constraints are not even a product of the liquidation. AIML is itself relying on private law rights. It is for these reasons that GP8 now feels compelled to challenge the assumption that this confidentiality review is or continues to be acceptable for an accounting party in the position of AIML and, if leave is given under Section 97, GP8 can argue that case."*



44. These expressed concerns in practical terms closely reflect the concerns expressed by the Plaintiff in the *Skelton* case, although here they do so outside the particular contractual context of that case.
45. However, in the *Skelton* case it is important to note that this Court made a broadly based observation which extended beyond the scope of what had there been argued to be a broad matrix of contractual and fiduciary obligations leading to a need for full and unqualified disclosure of information.
46. This Court emphatically has stated at paragraphs 142- 144:

“142. In the opinion of the Court available information is necessarily less than unrestricted information. If, for example, information is legally privileged or if it is confidential material belonging to third party principals who do not actively consent to its disclosure, then it does not belong to a pool of information for which disclosure can be given.

143. Putting the matter more prosaically information which is not available is unavailable.

144. Accordingly in the instant case confidential information belonging to third parties is not subject to or even susceptible to disclosure in the intermixed form argued for by the Plaintiff.”



47. The Applicant goes on to identify entirely correctly that in relation to section 97(1) there is a threshold requirement to demonstrate a case with a sufficiently solid foundation. Paragraph 28 states:

“28 As to merits, there is always a threshold requirement to demonstrate a case with a sufficiently solid foundation. “The threshold question is whether the applicant for leave has shown that he has a claim that is ‘worth entertaining’.” Re Wimbledon Fund (Unreported, Grand Court, 8 January 2019, Parker J) at paragraph [66] [Auth/7]. Because the Court is careful before burdening liquidators with time consuming proceedings, it will not require the defence of a “futile claim,” (see Re Wimbledon Fund at paragraph [66] [Auth/7]). The question at this stage is whether the claim is genuine and/or seriously arguable.”

48. The Court readily agrees with these propositions and indeed with the submission that here the claim is genuine and seriously arguable, subject in principle to the observations in the *Skelton* case as above identified.

49. The Applicant then acknowledges that in terms of fairness the context is fairness *“in the context of the liquidation as a whole.”*

50. However, it is submitted that because of the peculiar character of the legal proceedings for which leave is sought here the Court cannot approach the issue simply upon an assessment of the question of expedience. Paragraph 33 seeks to explain this distinction:



“33 However, the issue is quite different when, as here, there are no competing solutions. The Court ordinarily cannot shut out a would-be plaintiff from ordinary proceedings with prima facie merit, if that relief could not be sought in the liquidation. That would be a back-door deprivation of rights. All that is sought by this application is for GP8 to be able to advance its claim. It would not matter to the Fund/GP8 if this could be heard in AIML’s liquidation and this application is only made because it cannot be.”

51. It is then emphasised that the purpose of the Applicant's application for leave to issue the Originating Summons is to enable it to advance a further legal argument at a further date, when a statutory hearing will take place in any event. Paragraph 40 states:

“40 At the substantive hearing it may be possible to identify with references to the particular factual context in which these applications are made, the differences between the jurisdiction under Sections 110 and 114 of the Companies Law compared with the arguments which can be made with respect to an account in equity or pursuant to contract or statute. Those distinctions are too detailed for investigation at the present hearing.”

52. The Applicant points out at paragraph 41 that in the *Skelton* Judgment the Court had addressed one of the arguments that was potentially available to the Fund in this case *“but avowedly did not deal with a broader analysis based on the incidents of a legal duty to account.”*



53. Notwithstanding the contractual basis of the earlier decision, the Applicant states that the Court did not refer to the Plaintiff's arguments based on agency principles and on the authorities of *Yasuda Fire and Marine Insurance Co. of Europe Ltd v. Orion Marine Insurance Underwriting Agency and Another* [1995] QBI174 and *Equitas and Another v. Horace Holman and Company Ltd* [2007] EWHC 903 (Comm).

54. The Applicant characterises this Court's previous approach in this way:

"(a) In argument it noted (see [HB2/3/1216-1218/82-94]) that neither case deals with the law of contract and that neither case dealt with competing obligations to other principals or provided forensic guidance on how intermixed material could be set aside or what Colman J meant by "sufficient expedition" (see [HB2/3/1218/85-88]). When making its findings, the Court also noted that Yasuda [Auth/22] did not apply because the Defendant was not relying on the inseparability of the material (see [HB2/3/1228/121]).

(b) In its findings, reflecting that "much emphasis had been placed upon ... Yasuda and Equitas", the judgment concluded:

"it is entirely clear that the precise decisions arise from a relationship of principal and agent, and not from a relationship of contract. In the instant case there is a relationship of contract, and therefore it is unnecessary to go beyond the relationship properly interpreted in accordance with the guidance set out so far"



55. For completeness it should also be noted that the Court went further and pointed out at paragraphs 85 and 86 of the *Skelton* Judgment:

“85. In addition, while the Yasuda case in the passage quoted in extremely general terms does deal with “records relating to other principals” and likewise does the Equitas passages quoted, there is no analysis whatsoever in either of these first instance judgments of the obligations owed by the holders of records relating to other principals to those other principals themselves.

86. In other words, each citation relates to the law of agency per se, and neither case provides any forensic guidance as to how or why in the instance of relevant and irrelevant material being intermixed the legal obligations of principals to third parties can be set aside.”

56. It was in relation to this specific subject that this Court expressed, and still expresses, great concern.

57. The Court adds at paragraph 88 of its prior Judgment that from what one could see in neither authority was the consent of the principals nor the lack of it even considered at all.

58. The central proposition expressed by the Applicant in this important regard is expressed at paragraph 47 of the Skeleton Argument, viz., that the fiduciary's obligation to account would, it will be argued, not permit a confidentiality review to further hold up production of relevant records. Based on the Court's previous reasoning and the need to be fair to everyone in the context of the liquidation as a whole, this central proposition is clearly highly problematical in terms of justifying leave being granted at this time.



59. The Applicant goes on to describe AIML's equitable accounting obligation and submits that the basis of the duty to account is the fiduciary relationship, and in addition that the duty of the fiduciary to provide an account is not dependent on showing misconduct. This is entirely unexceptionable in terms of meeting the threshold requirement, but in circumstances where affairs and funds have been intermingled care must be taken with the adoption of these generalisations.
60. This unfortunate misconception as to the scope of the accounting recourse and remedy is amply illustrated by paragraph 49 of the Skeleton Argument:

"49 It is irrelevant that AIML has now ceased to be the investment manager so that the ongoing fiduciary obligation of loyalty has come to an end. The principal is, prima facie, entitled to have the account delivered up to him upon request. Following the termination of the relationship, the fiduciary must hand over all documents and electronic records and correspondence concerning the client's affairs which have been prepared by the agent in the course of the agency and are retained. Otherwise the principal would be left in a state of ignorance as to his affairs and the transactions entered into on his behalf (Yasuda [Auth/22] at page185)."



61. As we have already seen, there is specific provision in section 114 for the inspection of documents by creditors in any event. Neither the *Yasuda* case nor the *Equitas* case addresses the challenges posed by winding up on the basis of insolvency nor do these authorities assist in any way with the difficulties confronting Joint Official Liquidators responsible for a winding up in the Cayman Islands.

62. Nonetheless in support of its argument that AIML cannot rely on third party confidentiality, the Applicant makes the following submission at paragraph 51:

"51 The second aspect of AIML's duty as an accounting party (which is also undermined by the confidentiality review) is about timing and cost:

(a) An accounting party must at all times be ready to provide the accounting information Pearse v Green (1819) 1 Jacob & Walker 136 (also reported at 37 ER 327) [Auth/9] where Sir Thomas Plumer MR held that it is the first duty of an accounting party to be constantly ready with his accounts.

"It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect, as was remarked by the Lord Chancellor in Lord Hardwicke v. Vernon (14 Ves. 500. And see White v. Lincoln 8 Ves. 363), they all stand in the same situation, to be constantly ready with his accounts." (emphasis added)



(b) *The confidentiality review is (a) an inordinately expensive and time-consuming process so that AIML has not been “constantly ready” to provide the information but has done so in dribs and drabs over many months (b) the confidentiality review is extraordinarily expensive (whereas if there was no such review costs would obviously be minimal).”*

63. How AIML would fund this constant state of readiness is not explained. The real issue however is not whether AIML can rely on third party confidentiality but whether in law and in fact it can breach it. Once again, this is a question to which there is only one ready lawful answer.
64. If leave is granted, it will then be argued that by virtue of the applicable rules the principal must see all the relevant material, meaning unqualified and unrestricted provision irrespective of whether it would expose the Joint Official Liquidators to legal and professional jeopardy. In that sense at least it is clear to the Court that not granting leave can be equally important as and ultimately more important than actually granting it.
65. The Applicant makes the further point at paragraph 58 that refusing leave, when the Applicant has a *prima facie* serious/genuine claim, would be to deprive it of a legitimate right. With great respect, deferment of a right and deprivation of a right are entirely different, and it is properly conceivable that such a continued deferment may well be deemed necessary for the practical and protective purposes of a winding up.



66. Finally, it is claimed at paragraph 62(3) that the Applicant's reasoning represents a distinction between the present case and every other in which leave is sought under section 97. What causes the Court some difficulty with this submission, *inter alia*, is as to the manner in which the statutory mechanisms in section 110 and 114 can allegedly fail to accommodate the situation in a realistic, responsible and flexible way. Surely that is what they are intended to do.

The Legal Submissions of the Respondent

67. The JOLs in turn submit that leave should be refused because once a company has been ordered to be wound up the jurisdictional gateway to accessing its documents is section 114 of the Companies Act, as stated at paragraph 4 of their Skeleton Argument.

68. In practice that may well be so for most purposes, but while there is no entitlement to inspection under section 114 nonetheless the Court would be most reluctant to adopt a categorical view that because of section 114 all alternative recourse is automatically barred.

69. There may well be circumstances where as the Applicant asserts here a party can rely on what private law rights it had prior to the winding up and seek leave accordingly. The Court would not be disposed to bar such private rights where the conditions are appropriate to allow them.

70. Probably of somewhat greater pertinence is the JOLs' alternative submission in paragraph 5 that where the same relief (however that may be defined) can be conveniently dealt with in the winding up then leave should not be granted absent special circumstances.



71. Turning to the substantive merits of the application, the JOLs state at paragraph 6:

“6. As for the private law remedy of an account, leave should not be granted because it would not be fair or just, from the perspective of the official liquidation as a whole. Amongst other things, it would have the effect that the JOLs are forced to investigate and adjudicate one creditor’s claim, at the expense of the whole estate, at a time where there are no assets to distribute to unsecured creditors (and approved liquidation expenses of the provisional liquidation have not even been paid in full).”

72. Put even more succinctly, they state at paragraph 10 the proposition that the Fund is not in any special position. The points in issue apply equally to other funds which are also creditors in the AIML estate.

73. They contend that a private law right to information or documents or to an account can no longer be enforced in the ordinary way by an action, and the creditors are confined to a collection enforcement procedure. As the Court has indicated above, it cannot see its way to accepting what may with great respect be called this absolutist view. It is enough to state that any departure from this general approach should be extremely carefully scrutinised before it might be adopted, bearing in mind the need for fairness and balance.

74. The JOLs make the following important and persuasive submission at paragraph 2. In *Wright v. Eckhardt Marine* [2004] IAC147, a Cayman Islands appeal to the Privy Council, Lord Hoffman states at paragraph 27:

“The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against



the company are stayed (although the stay can be enforced only against creditors subject to the personal jurisdiction of the Court). The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue."

75. In very elementary terms therefore it is most important to observe that there is one large picture rather than a host of smaller ones.
76. As the JOLs contend in relation to section 97(1) the starting premise is that generally proceedings should not be permitted against a company in liquidation.
77. They also accept that, subject to the threshold issue, the Court has freedom to do what is right and fair according to the circumstances. In this context proper consideration must be given to the interest of the creditors as a whole and of the capacity of the JOLs to deal with the burden of the proposed litigation (paragraph 16).



78. For this reason, the cautionary remarks above of Patten LJ in *Gardner v. Lemma Europe Insurance* [2016] EWCA CIV 484 at paragraph 2 are especially instructive.

79. The JOLs continue at paragraph 18:

“In Re Exchange Securities [1983] BCLC 186, the applicants sought to bring proceedings by way of writ for, amongst other things, accounts and inquiries as to the funds entrusted to the defendant for investment. Refusing leave, it was held at pages 195-196 that:

(a) if the proposed action for which leave is sought raises issues which can be conveniently decided in the course of the winding up then, in the absence of special circumstances, permission to bring the action should be refused;

(b) there is a positive benefit in having the issue decided in the liquidation proceedings as this should be less expensive and quicker than an independent cause of action; and

(c) as the liquidator is obliged to act even-handedly as between each class of claimant, the settlement of claims through the winding-up proceedings will normally not cause prejudice to any particular class of claimant.”

80. In contrast they argue that on an application under section 114, the Court considers, as a matter of jurisdiction, whether the making of any order for inspection would be for the purpose of the winding up. If so, then the Court will consider, as a matter of discretion, whether making the order would be just and beneficial.



81. They reiterate at paragraph 26 that the authorities are clear that, where the same application can be conveniently dealt with in the liquidation, leave should be refused, absent special circumstances (e.g. *Exchange Securities*). In this case, the Fund has already filed a summons in the liquidation proceeding seeking identical relief; it follows that the Fund accepts that the same relief is available in the liquidation proceeding. They submit that the Documents Application will be determined by the Court irrespective of the outcome of the Leave Application.

82. The crux of their opposition is then set out at paragraph 27:

“27. The Applicant's evidence at paragraph 15 of Neil Hayward's Fifth Affidavit is that, if leave is refused, the same arguments will be made under the Documents Application, to the extent possible. Where the relief sought is identical, the JOLs indicated in correspondence that, on the Documents Application, the Fund "may rely on what it alleges are its legal rights arising out of the written agreements or the general law, to the extent necessary and relevant to its application for relief under sections 110 and 114 of the Companies Law". It is not however necessary for the Applicant to rely on any such rights, because there is no requirement for an applicant under section 114 to demonstrate any legal or equitable right to access the documents which it seeks to inspect. There is therefore no reason for the Applicant to pursue the Leave Application in respect of paragraph 2 of the draft Originating Summons.”



83. However, the JOLs do not confine themselves to stating that a creditor does not have an entitlement to inspect the company's documents once a winding up order has been made. They formally state the same point in relation to leave for the Applicant to pursue an action for an account.

84. They make once again the following pragmatic submission at paragraph 31:

"A liquidation provides a class remedy. If and when there are sufficient assets in the estate to permit a distribution to creditors, the liquidator will adjudicate all creditors' claims. The liquidator investigates the company's affairs from the documents and any oral examinations before carrying out a financial reckoning in order to determine, in a quasi-judicial capacity, the value of each creditor's claim. That is tantamount to an account at a class level. Indeed, that exercise goes further than the taking of the account sought in paragraph 1 of the draft Originating Summons; it also results in the appropriate relief consequent upon the taking of the account, namely the admission of a claim in the liquidation in respect of any amount shown by the account to be due to the Fund from AIML."

85. This Court considers that it is inevitable that the objective that would be pursued if leave is granted is to carry out tasks in relation to documentary production and accounting only in respect of one creditor but at the expense of all creditors. It would also unarguably cause the AIML estate to incur further expense when the estate does not have the resources to do so. Frankly in the opinion of the Court this would create a most unattractive and damaging position.



86. This course would also incidentally raise the risk of postponing a dividend being made to unsecured creditors.
87. In other words, as the JOLs claim, there is no benefit to the AIML estate as a whole but instead a detriment to it on any view, and potentially a major detriment at that.
88. Apart from these important considerations the JOLs submit that logistically and financially there is the further problem as set out at paragraph 35:

“Indeed, if AIML is ordered to account to the Applicant that would impose an undue burden on the estate, in the circumstances. AIML does not have the funds (or access to external funds) to enable it to perform such an account. Accordingly, AIML does not have the funds to be able to comply with an order that it account to the Applicant. Lifting the stay would therefore be an exercise in futility.”

Conclusion

89. The Court has concluded that leave should not be granted to commence the proceedings identified in the Applicant's draft Originating Summons. This is so even though its case is arguable and sufficiently solidly founded.
90. In arriving at this conclusion the Court has carefully considered what would be fair in the context of the liquidation as a whole. A number of reasons have led the Court to this conclusion.
91. AIML is deeply insolvent, with no current resources to pay in full the existing and approved expenses of the prior provisional liquidation or the expenses of the current liquidation.



92. The situation of the Fund in this instance in relation to commingling is similar to that of a number of other funds where there has been commingling with the AIML estate. It would be unfair to give any one fund a preferential position over any other fund.
93. The contractual provisions of the DSD arrangements were freely entered into by Mr. Hayward and he like Mr. Skelton would inevitably have been aware of the sombre realities of the financial circumstances. This is so regardless of Mr. Hayward's assertion at paragraph 8 of his Sixth Affidavit that he did not know of the commingling issue at the time.
94. The Court must give careful attention to the risk of a multiplicity of actions ensuing where successive leaves may be granted. The position could quickly become not merely time consuming and expensive but frankly unsustainable.
95. The Court must also take into account the capacity of the JOLs to deal with proposed litigation, and the Court is not satisfied that it is in the interest of the winding up for them to assume that prohibitive and demanding burden at this time.
96. The Court has a responsibility to ensure the protection of third-party confidentiality and legal privilege. Whether the nature of the difficulty is described in contractual or fiduciary terms, the Court has concluded that documentary materials which have been commingled in the manner described cannot simply be released to the Applicant at the present time and in the manner contemplated by the Applicant. The Court has previously expressed its extreme concern at this approach and it does so again.



97. Taking all of the various factors into account the Court is of the view that the pending sections 110 and 114 proceedings provide the most prudent and constructive way forward. As the JOLs put it, the statutory provisions amount to an accounting at a class level, while at the same time allowing the Court to make such orders as it deems fit.
98. Accordingly, the Summons Application is refused.

Robin McMillan

Mr. Justice Robin McMillan

Honourable Judge of The Grand Court