IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSES NO: FSD 150, 158 AND 203 OF 2020 (NSJ)

THE JOINT OFFICIAL LIQUIDATORS OF ABRAAJ HOLDINGS
(IN OFFICIAL LIQUIDATION)

Plaintiffs (FSD 150 and 158)

and

THE GHF GROUP LIMITED

Defendant (FSD 150)

and

NEOMA PRIVATE EQUITY FUND IV L.P.

Defendant (FSD 158)

AND BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff (FSD 203)

and

ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION) AND OTHERS

Defendants (FSD 203)

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Tom Smith QC instructed by Carey Olsen appeared for the AH Parties**
	Mr Stephen Atherton QC instructed by Walkers appeared for the GHF Parties
	Mr Andrew Ayres QC instructed by Ogier appeared for Fund IV
	Mr Michael Bloch QC instructed by Nelsons appeared for Mr Jafar
Heard:	**23-24 March 2022**
Draft judgment delivered:	**22 June 2022**
Judgment delivered:	**29 June 2022**

JUDGMENT IN RESPECT OF ISSUES ARISING AT THE DISCOVERY CMC HEARD ON 23 AND 24 MARCH 2022

Introduction

1. This is my judgment dealing with various issues arising on the summons dated 18 February 2022 (the ***Summons***) issued by the joint official liquidators (the ***JOLs***) of Abraaj Holdings (in official liquidation) (***AH***) in FSD Cause No. 150 (the ***GHF Proceedings***), FSD Cause No. 158 (the ***NPEF IV Proceedings***) and FSD Cause No. 203 (the ***Jafar Proceedings***). I shall refer to the JOLs and AH as the ***AH Parties*** and to the GHF Proceedings, the NPEF IV Proceedings and the Jafar Proceedings together as the ***Related Proceedings***. The Related Proceedings are being tried together pursuant to GCR Order 4, rule 4(1) and are jointly case managed.

2. The claims made and background to the Related Proceedings are set out in various judgments I have handed down, most recently the judgment dated 11 February 2022 in the GHF Proceedings. The GHF Group Limited (***GHF***) is the defendant to the GHF Proceedings and Neoma Private Equity Fund IV L.P (***NPEF IV***) is the defendant to the NPEF IV Proceedings. Mr Jafar is the plaintiff and AH, GHF General Partner Limited (***GPL***, referred to with GHF as the ***GHF Parties***), GHF and Abraaj General Partner VIII Limited (***GP8***) as the general partner of NPEF IV are the defendants in the Jafar Proceedings. Abraaj Investment Management Limited (in official liquidation) (***AIML***), which is a subsidiary of AH, is also involved in the events giving rise to and claims made in the Related Proceedings (I refer to the joint official liquidators of AIML as the ***AIML JOLs***).

3. A case management conference had been held on 29-30 November 2021. Following that CMC, I ordered that the parties should seek to agree a discovery protocol by 5pm on 9 February 2022. However, they were unable to do so despite extensive negotiations. Accordingly, the AH Parties issued the Summons.

4. The Summons seeks directions in relation to the manner in which discovery is to be conducted by the parties to the Related Proceedings and case management directions to trial. The Summons was

heard on 23-24 March 2022. At the hearing of the Summons, Mr Tom Smith QC appeared for the AH Parties (instructed by Carey Olsen); Mr Michael Bloch QC appeared for Mr Jafar (instructed by Nelsons); Mr Stephen Atherton QC appeared for the GHF Parties (instructed by Walkers); and Mr Andrew Ayres QC appeared for GP8 and NPEF IV (instructed by Ogier) (***Fund IV***).

5. The Summons seeks an order *inter alia* that "*Discovery is to be made by the parties to these proceedings in accordance with the discovery protocol to be annexed to the order made on [the Summons].*" The latest version of the draft discovery protocol (the ***Discovery Protocol***) was filed with the Court for the purpose of and considered during the hearing (I refer in particular to the version of the Draft Protocol handed up by Mr Ayres QC at the hearing on 24 March). The AH Parties also filed a draft order (once again I refer to the form of order annexed to the Fund IV's skeleton and with the documents handed up by Mr Ayres QC, the ***Draft Order***). In addition to an order that "*The Parties shall give discovery in accordance with the Discovery Protocol*", the Draft Order specifies a date (14 October 2022 being the date proposed which may now need to be revised) by which the parties conducting discovery under the Discovery Protocol are required to produce their documents and includes an order listing a further CMC in respect of technology assisted review (***TAR***) issues (which is agreed by the parties save for Mr Jafar), an order relating to the protection of privileged and irrelevant confidential information, and directions for the further conduct of the Related Proceedings to trial.

6. Evidence was adduced by all the parties. The AH Parties relied on the First Affidavit of Simon Conway (***Conway 1***) and Mr Conway's Second Affidavit (***Conway 2***). Mr Conway is one of the JOLs. The GHF Parties relied on the Ninth Affidavit of Mr Richard Lewis (***Lewis 9***) and Mr Lewis' Tenth Affidavit (***Lewis 10***). Mr Lewis is a director of GPL, which is itself the director of GHF. Fund IV relied on the Fifth Affidavit of Mr Neil Hayward (***Hayward 5***), the First Affidavit of Mr Sean Theron (***ST1***) and Mr Theron's Second Affidavit (***ST2***). Mr Hayward is a partner in KordaMentha Corporate in Sydney and Conflict Director of GP8. Mr Theron is a Principal, eDiscovery and Forensic Technology at Alvarez & Marsal Cayman Islands Limited, which is acting for Fund IV in relation to their discovery obligations. Mr Jafar relied on the Fourth Affidavit of Mr Steven Barrie (***Barrie 4***), the First Affidavit of Mr Giles Montgomery-Swan (***MS1***), the Second Affidavit of Mr Montgomery-Swan (***MS2***) and an affidavit of his own which was only filed (unsworn) shortly before the hearing. Mr Barrie is an attorney with and a Director of Nelsons, the Cayman Islands attorneys advising Mr Jafar. Mr Barrie's affidavit was only sworn and filed shortly before the hearing, on 18 March 2022. Mr Montgomery-Swan is the CEO of Affinity Technology Services (which traded under the trademark "*e-Finiti*") and a specialist in IT. He previously worked for entities within the Abraaj

Group and was tasked with overseeing IT for all such entities save for IT within the portfolio companies. Since the basis on which Mr Montgomery-Swan gave evidence and the weight to be given to his evidence was challenged by the GHF Parties and by Fund IV, I shall need to say more about his qualifications, expertise, and role in due course.

7. At the end of the hearing, the parties indicated that they wished to have more time to discuss and seek to reach agreement as to the manner in which privileged and confidential documents were to be discovered. I agreed to allow them further time for this purpose and on 7 April 2022 I was informed by Ogier that the parties had reached agreement on these matters. I was provided with a separate form of protocol relating to the discovery of privileged and confidential documents by the AH Parties, which provides that before any documents may be provided to Mr Jafar or any third party instructed by him, or assisting him, for the purposes of the Related Proceedings it must first be reviewed by Mr Jafar's Review Team (as defined in the form of undertakings as agreed by the parties and provided to the Court on 7 April 2022) who will consider whether it is privileged or confidential but irrelevant. I assume that the Draft Order will need to be amended to reflect this agreement.

8. At the hearing I confirmed and directed the drawing up of a formal order in respect of my earlier decision that Mr Jafar be required to produce a settlement agreement to which he was a party with Mr Arif Naqvi (***Mr Naqvi***). Following the production of the settlement agreement, the GHF Parties indicated that in light of their review of the settlement agreement they wished to seek permission to adduce further evidence, and to make further submissions in relation to the orders to be made on the Summons and the matters dealt with at the hearing. On 25 April 2022, Walkers wrote to the Court on behalf of the GHF Parties making an application for such permission and seeking further substantive orders to be made on the Summons. I granted the GHF Parties' application for permission to adduce further evidence and make further submissions and gave directions which allowed the other parties to do the same and a timetable within which to do so. My decision on that application is dealt with in a separate judgment (the Judgment on Part of the GHF Parties' Application by letter dated 25 April 2022), which was originally circulated in draft on 20 May 2022 but has now been supplemented as a result of the parties' further submissions. That judgment is being handed down at the same time as this judgment. The need to deal with that application has resulted in a delay in disposing of the Summons and the delivery of this judgment.

9. In summary I have decided that:

(a). the Summons is not, as the GHF Parties argued, seeking orders restricting and limiting the AH Parties' discovery obligations. The JOLs' application is not in form or substance an application pursuant to GCR O.24, r.2(5). The AH Parties and indeed all parties seek directions from the Court as to the manner in which they should, subject to further review and challenge, carry out their discovery obligations and ask the Court to make orders for and to a process that is in accordance with the overriding objective and properly proportionate. This requires the Court to undertake a balancing exercise weighing and taking into account the various factors I discuss below.

(b). the discovery process must be conducted and the parties' discovery obligations must be performed by reference to the issues in the case as established by the pleadings. The search must be for discoverable documents. The test for relevance in the Discovery Protocol should be defined with this in mind. Whether a document is relevant for discovery purposes depends on whether the information which it is reasonable to suppose it contains is relevant to a party's case including by enabling the party to advance his own case or damage his opponent's case. A party's case must be defined by reference to his or her pleaded claim in its general sense, as distinct from its detailed exposition and in the case of a defence by the pleaded defence in the sense of its general refutation of the plaintiff's claim. What matters for discovery purposes is the claim and defence to it in the broadest sense and not to the detailed particulars of either claim or defence. The agreed lists of issues (subject to the decisions I have made on certain points in dispute) for each of the Related Proceedings can and should be used by those conducting the discovery exercise but will not be determinative of the scope and extent of the parties' discovery obligations in the event of a dispute. I have reviewed the lists of issues which appear to me to be acceptable but I have not formed a view as to whether, and do not decide, that, they accurately or comprehensively set out or reflect the issues in the Related Proceedings. As I understood the parties' submissions, no one invited me to do so.

(c). I have considered and taken into account Mr Montgomery-Swan's evidence. In my view, there is no proper basis for ignoring it or treating it as of no probative value.

(d). I have decided that the custodians identified by the AH Parties together with Anuscha Ahmed, Khawar Mann and Mr Patel should be the custodians. I have accepted Fund IV's argument that the pleadings in their current form are sufficient to allow some discovery to be conducted in relation to their defences based on the alleged misappropriation of assets from Fund IV as currently formulated in Fund IV's pleadings.

(e). I have rejected the Fund IV's submission that the date range for Email Data and File Data should generally start on 1 June 2015. However, I consider that the discovery process should make provision for a targeted search for documents relevant to the misappropriation issue and defences with a start date of 1 January 2017.

(f). I have noted the details of the custodians that Mr Jafar has offered to list in Appendix G to the Discovery Protocol (which is to be non-exhaustive) but declined to rule on the dispute as to whether Mr Badr Jafar and Mr Majid Jafar should be treated as custodians. It would be wrong to decide the question of whether all or any documents and data held by Mr Badr Jafar and Mr Majid Jafar are to be treated as being in Mr Jafar's possession, custody, or power without further evidence and a further application (if the parties cannot reach agreement on the issue).

(g). the AH Parties' proposed approach for dealing with Device Data should be adopted.

(h). I consider that the parties should be allowed to adopt either of the two approaches for dealing with family documents which have been proposed.

(i). as regards the proposed directions to trial, I have concerns as to whether any dates can reliably be set at this stage and as to whether it is appropriate to define the issues on which expert evidence is to be permitted and given. It seems to me that it is premature to do so and that it would be preferable to decide the issue concerning experts after discovery and after the likely amendments to the pleadings have been filed. This approach argues in favour of a further CMC after the completion of the discovery process and if amendments to the pleadings are to made, after any amendments have been filed and served. However, since all parties are anxious and would clearly find it helpful to have the dates for all the steps leading up to the trial mapped out in a directions order, and at least a provisional order with respect to expert evidence, I am prepared to make an order for directions to trial but the parties will need to review the dates set out in and the terms of the Draft Order in light of this judgment and update time estimates and then provide a revised draft to the Court for my approval.

The documents to be discovered and the process for conducting discovery

10. The vast majority of the potentially relevant documents are within the possession, custody, and power of the AH Parties. This is because the Abraaj Group operated using shared IT systems without any clear segregation of financial records, documents and data between the different entities and funds, so that both the JOLs and the AIML JOLs have in their possession, custody, or power documents relating to the management, business, assets, and affairs of the GHF Parties and Fund IV (together the ***Fund Parties***) (the ***Fund Parties' Documents***). A significant proportion of the Fund Parties' Documents have been mixed and combined with the documents of AH. As a result, as was accepted by all parties, a disproportionate discovery burden falls on the AH Parties.

11. The total volume of data within the JOLs' possession, custody or power is vast. Following their appointment as joint provisional liquidators of AH in June 2018, the JOLs (who are partners in PWC) took steps to collect, secure, copy and retain electronic and hard copy documents, including emails, electronic files, finance and database systems data, data on personal devices and data on document management systems (***PwC Data***). They also had access to documents collected by the AIML JOLs, who are partners in Deloitte, who conducted a similar data preservation and collection exercise. The AIML JOLs also had access to electronic documents captured by Deloitte when acting pursuant to an engagement for the Abraaj Group prior to the appointment of the AIML joint provisional liquidators (***Deloitte Data***). The JOLs and the AIML JOLs entered into a data sharing deed which governed the terms by which the respective JOLs would share access to both the PwC Data and the Deloitte Data. The JOLs estimate that the data which they hold or to which they have access comprises (including the Deloitte Data) over 52TB (52,000GB) of digital data (***AH Data***), which is estimated to yield approximately 71 million documents.

12. The JOLs have further sub-divided the AH Data as follows:

(a). emails and attachments held on servers (***Email Data***).

(b). files stored on file servers and/or systems (***File Data***).

(c). finance and database systems data (***Finance Data***).

(d). data on personal devices, such as mobile phones and laptops (***Device Data***).

(e). data on document management systems (***DMS Data***).

(f). hundreds of boxes of archival documents (***AH Hardcopy***).

13. The AH Parties have modelled the costs of conducting a standard discovery exercise in respect of the documents within their possession, custody, and control. This includes the costs of data processing (scanning hard copy documents and ingesting the digital data into a format where it may be uploaded to an electronic review platform and applying de-duplication); uploading (loading the data into an electronic review platform in order properly to review the documents by for example running keyword searches etc.); storage costs (hosting charges for storing the digital data during the discovery process); and reviewing (attorney time costs for reviewing uploaded data and coding for relevance and privilege). For the purposes of their model, the JOLs assumed that 10% of the total uploaded documents would need to be reviewed. The JOLs and their PwC colleagues in London and Dubai have considerable experience in conducting e-discovery exercises. Using what they claim to be conservative assumptions, the JOLs estimated that the total cost of conducting a standard discovery exercise would be approximately US$52 million and considered that the exercise would take several years.

The JOLs' proposals

14. In these circumstances, the AH Parties considered that the time and costs associated with conducting a standard discovery exercise involving the search for and manual review of documents would be unreasonable and disproportionate. Accordingly, they formulated and put forward to the other parties a proposal for the manner in which they would give discovery which in their view would be in accordance with the overriding objective (of enabling the Court to deal with the Related Proceedings in a just, expeditious and economical way) and would represent a proper and fair balance between the scope of the document review exercise and the cost and time involved.

15. The AH Parties' proposals were extensively discussed with the other parties and subsequently revised and by the time of the hearing of the Summons a substantial measure of agreement had been reached and much of the Discovery Protocol was in an agreed form. However, a number of significant issues remained in dispute. These issues are summarised below.

16. The Discovery Protocol provides that the parties may elect to use a form of TAR in conjunction with a linear manual (i.e., human) review. TAR involves computer software learning how to code documents as relevant or privileged based on a review of a subset of the documents by human (attorney) reviewers. The software's predictions are then tested as part of the ongoing human review, and the feedback provided allows the software to be adjusted to enable it to improve its predictions. The accuracy of the software review can be measured using several different metrics, including "*precision*" (the percentage of the documents produced by the software that are correctly responsive) and "*recall*" (the percentage of responsive documents identified by the software). Parties typically seek to agree target metrics that represent an acceptable level of accuracy in the review. After lengthy discussions with the other parties, in which the AH Parties proposed that their TAR review of documents should be subject to a longstop at the point that a manual review of 1% of uploaded documents had been undertaken, the AH Parties have confirmed, in view of the objections received, that they will drop the longstop proposal and instead proceed on the basis that they will apply the TAR and see how it performs but will ask the Court to list a further CMC at which an application by the JOLs as to how to proceed could be considered by the Court if the TAR metrics proved not to be achievable or satisfactory. The AH Parties explained that they hoped that an application could be avoided but that listing a hearing date now would avoid subsequent delays if an application became necessary.

The Discovery Protocol

17. The purpose of the Discovery Protocol is to define the agreed approach between the parties with respect to the technical aspects of giving discovery. For example, the Discovery Protocol addresses, amongst other things, how documents will be identified and preserved, how family documents will be treated, how the parties will review and code the documents, naming conventions for documents and what occurs if privileged or confidential documents are inadvertently discovered. The Discovery Protocol envisages that each party's custodians will be identified in appendices to the protocol.

18. The Discovery Protocol contains a number of appendices as follows:

(a). Appendix A deals with the AH Parties' discovery proposals.

(b). Appendices B to D contain the lists of issues for discovery. There are separate lists of issues for each of the Related Proceedings. The lists have largely been agreed by the parties.

(c). Appendix E sets out the custodians for the GHF Parties (there will at least initially be none).

(d). Appendix F sets out the custodians for the Fund IV (there will once again, at least initially, be none).

(e). Appendix G sets the custodians for Mr Jafar.

(f). Appendix J deals with certain technical matters relating to file categories.

19. Paragraphs 2 – 4 of the Discovery Protocol set out a number of important provisions regarding the manner in which discovery is to be conducted and the impact of the Discovery Protocol on the parties' obligations to give discovery under and in accordance with the GCR (underlining added):

> *"2. The parties shall remain subject to the general obligation to give discovery of the documents which are or have been in their possession, custody or power relating to matters in question in the action in accordance with GCR, Order 24, rule 1(1) and other relevant provisions of GCR Order 24. Nothing in this Protocol is intended to dispense with or limit the parties' obligation to give discovery of Relevant documents (save where expressly agreed in this Protocol or otherwise ordered by the Court).*
>
> *3. The parties enter into this Protocol without prejudice to their rights to apply to the Court for the disclosure of any document in a party's possession, custody or power that is discoverable in the Related Proceedings (as defined below), including, but not limited to, an order for the service of a list of documents, whether or not verified by an affidavit, pursuant to GCR Order 24, rule 3 and an order for specific discovery pursuant to GCR Order 24, rule 7.*
>
> *4. This Protocol governs all document sources, both Electronic Documents and Hardcopy Documents (both as defined below), which will be included in the discovery process and provides instructions for how documents will be managed throughout the process, from initial identification through to production and inspection."*

20. Paragraph 7 of the Discovery Protocol states that (subject to the qualifications and reservations set out in paragraphs 2 and 3) the parties agree that its terms will apply to the discovery to be given by the AH Parties. Paragraph 7A states that the Parties agree that the GHF Parties and Fund IV are not obligated to provide discovery of documents in their possession from, or in their custody or power through, AIML, the AIML JOLs or the AH Parties. Paragraph 9 states that the parties will work with their listed custodians to identify sources of potentially Relevant (a defined term) documents and lists the categories or types of documents which are covered. There is a dispute over the definition of relevance to be used. The AH Parties, Mr Jafar , and the GHF Parties argue that relevance should be

tested by reference to the matters in issue as raised in the pleadings applying the test laid down in *Compagnie Fin. Et Comm. Du Pacifique v Peruvian Guano Co (1882) 11 QBD 55*. Fund IV argues that relevance should (at least initially) be tested by reference to the agreed list of issues. Fund IV proposed the following definition of relevance: "*in the context of discovery and/or a party's discovery obligations derives from the meaning in Order 24 of the GCR and, subject to the Overriding Objective, extends to all documents which relate to any matters in question as are raised by the Discovery List of Issues per the test set down in Compagnie Fin. Et Comm. Du Pacifique v Peruvian Guano Co (1882), 11 QBD 55. For the avoidance of doubt, this includes any document that may advance the party's own case or damage the case of an adverse party and any document which may fairly lead a party to a train of inquiry*."

The issues in dispute on the Summons

21. The issues in dispute relate to the following topics:

(a). the basis on which the JOLs seek the relief set out in the Summons in relation to custodians.

(b). whether discovery should be conducted and whether the test of relevance should be determined by reference to the agreed list of issues or the matters in issue as established in the pleadings.

(c). the admissibility and weight to be attached to the evidence of Mr Montgomery-Swan.

(d). the identity of the custodians whose emails will be searched for data and documents held by the AH Parties and Mr Jafar (the Discovery Protocol provides at [7A] that Fund IV and the GHF Parties are not obligated to discover or produce documents they have received from or have in their power through AIML, AIML's provisional liquidators, the AIML JOLs or the JOLs and the custodians whose documents will be searched for other documents in the possession, custody and power of Fund IV and the GHF Parties have been agreed)..

(e). the date range to be applied to searches of custodians' emails and File Data.

(f). the treatment of family documents, being individual emails within email chains, documents embedded in emails and attachments to emails (covered in the Discovery Protocol at [34] – [37]).

(g). how to review the Device Data, in particular which mobile phones, laptops and other devices should be searched for emails and other files?

(h). what are the appropriate directions to be given at this stage for the further conduct of the proceedings and what is the appropriate form of order to be made on the Summons?

Basis on which the JOLs' application is made and the test to be applied in determining the issues in dispute

22. There is a dispute between the parties as to the basis on, and the jurisdiction under, which the JOLs seek the relief set out in the Summons in relation to custodians.

23. The GHF Parties argued that the Summons was, in substance, seeking leave to reduce and modify the AH Parties', and excuse the AH Parties from their, discovery obligations. Mr Atherton QC submitted that the Summons must be treated as involving an application under GCR O.24, r.2(5). That sub-rule is in the following terms (underlining added):

> *"On the application of any party required by this rule to make discovery of documents, <u>the Court may</u> —*
>
> *(a). <u>order that the parties to the action</u> or any of them <u>shall make discovery</u> under paragraph (1) <u>of such documents or classes of documents only, or as to such only of the matters in question, as may be specified in the order</u>;*
>
> *or*
>
> *(b). if satisfied that discovery by all or any of the parties is not necessary, or not necessary at that stage of the action, order that there shall be no discovery of documents by any or all of the parties either at all or at that stage,*
>
> *<u>and the Court shall make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the action or for saving costs</u>.*

24. Mr Atherton QC argued that therefore the issue for the Court was whether the AH Parties had shown that the proposed restrictions on the ambit of their discovery obligations (by for example limiting the number of custodians whose documents needed to be searched) were justified as being "*necessary either for disposing fairly of the action or for saving costs*." The burden of proof was on the AH Parties and not on the GHF Parties.

25. Mr Smith QC disagreed. He said that his clients were not making an application under GCR O.24, r.2(5). They were therefore not required to establish that the exclusion of the custodians named by

the GHF Parties (and Fund IV) was justified in each case as being necessary for disposing fairly of the Related Proceedings or for saving costs.

26. Mr Smith QC argued that the Summons sought directions from the Court, in the exercise of its case management powers, as to the manner in which all the parties to the Related Proceedings (and not just the AH Parties) were, subject to further orders, to perform their discovery obligations. The Discovery Protocol did not just relate to the JOLs (and the AH Parties), although they were the main focus since they were in possession of most of the relevant documents. Mr Smith QC submitted that the Court when exercising its case management powers had to undertake a balancing exercise having regard to what was proportionate. The Court had to weigh the need to search for documents and the benefits of searching a particular custodian's documents (having regard to the probability that the custodian held relevant and unique documents) against the additional cost and time to be spent in conducting such searches.

27. It seems to me that Mr Smith QC is right. As I have already noted, the Discovery Protocol makes it clear (in paragraphs 2 and 3) that the parties remain subject to their general obligation to give discovery in accordance with GCR, O.24, rule 1(1) and that it is without prejudice to the parties' rights to apply to the Court for the disclosure of any document in a party's possession, custody or power that is properly discoverable in the Related Proceedings. There is therefore no modification to or reduction of the parties core discovery obligations. The Court is not being asked, using the language of GCR O.24, r.2(5), finally to order that the parties to the action shall make discovery *only* of certain documents or classes of documents. The parties wish the Court to give directions as to the manner in which they should, subject to further review and challenge, carry out their discovery obligations and to approve and establish a process that is in accordance with the overriding objective and properly proportionate. It is true that the Discovery Protocol will regulate the performance of the parties' discovery obligations and that until a further order the parties cannot be said to be in breach of those obligations if and to the extent that they act in compliance with its terms. But the AH Parties have not made an application which, as a matter of form or substance, is to be characterised as an application under GCR O.24, r.2(5). It cannot be said that they have applied solely for their benefit to have their discovery obligations limited to certain documents or classes of document.

28. I accept Mr Smith QC's submission (supported by Mr Bloch QC, as I note below) that in deciding on what approach should be adopted to the parties' discovery exercise, I should consider and have regard to what is required to give effect to the overriding objective (to deal with every cause or matter

in a just, expeditious and economical way). As [1.2] to the Preamble to the GCR says, dealing with a cause or matter justly includes, as far as is practicable, ensuring that the normal advancement of the proceedings is facilitated rather than delayed, saving expense, and dealing with the cause or matter in ways which are proportionate to the amount of money involved, the importance of the case and to the complexity of the issues. The Court, when dealing with the issues in dispute and settling on a suitable *modus operandi* for the discovery process, must balance the need to find all properly discoverable documents and data (thereby ensuring that the parties including the defendants are treated in a just way and, to use the language of GCR O.24, r.2(5) which is not directly applicable but sets out the importance of fair treatment in the context of discovery, for disposing fairly of the action) against the cost and time that will need to be spent in searching for and obtaining them. That means, as Mr Smith QC submitted, forming a view as to the likelihood that a proposed step in or aspect of the process will produce and locate discoverable documents, the expected costs to be incurred and time to be spent in taking that step or including that aspect of the process, and the impact of allowing the step to be taken or including the aspect of the process on the advancement of the proceedings. The Court must then decide, taking into account these matters, what is needed to ensure a fair process that is reasonably likely to find the discoverable documents at a proportionate cost and with minimum delays to the progress of the proceedings. It is, of course, now widely acknowledged and accepted that courts must do what they properly can to avoid unstructured discovery at an exorbitant cost and [with the potential for] serious delays.

29. I have mentioned discoverable documents. All parties were agreed as to the applicable test for determining which documents were to be discovered, and they each cited the main authorities on the point. A party is required to discover documents within their possession, custody, or power that (in the words of GCR O.24, r.2) relate to the matters in question in the action, which are determined by reference to the questions in the action (not the subject matter) which are not necessarily limited to the issues disclosed on the pleadings (*Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665 at 668 and 672). The test of whether a document relates, or is relevant, to the matters in question was authoritatively articulated by Brett LJ in *Compagnie Financiére du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55 at 63. The proper approach was well expressed by Colman J in *O Co. v M Co.* [1996] 2 Lloyd's Rep 347 at 351 (a case cited by the AH Parties and dealing with an application for specific discovery under RSC Ord. 24, r.7) (underlining and emphasis added):

> *"The excessively wide application of Lord Justice Brett's formulation of relevance [in Peruvian Guano] has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any factor other than the development of the*

*photo-copying machine. <u>That formulation must not, in my judgment, be understood as justifying discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn. On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it</u> **<u>in the broad sense which I have explained</u>**<u>. If the document or class cannot be demonstrated to be clearly connected to issues</u> **<u>which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of the proceedings</u>**<u>, if sufficient information were available, the application should be dismissed</u>.*"

30. Mr Smith QC argued that. in deciding what was appropriate and proportionate, it was important that the Court considered and focused on what was needed to locate documents and data that were relevant to the *issues in dispute*. The AH Parties had summarised as follows what they considered to be the key issues in dispute in the Related Proceedings at [65] of the written submissions:

(a). the solvency/insolvency of AH and the wider Abraaj Group at the time of the loans made by Mr Jafar (the ***Jafar Loans***) and payments to GHF and NPEF IV (the Jafar Loans were arranged between 21 and 28 December 2017 and the Payments were made between 23 December 2017 and 24 January 2018).

(b). the nature and extent of Mr Naqvi's control of AH and the wider Abraaj Group at the time of the Jafar Loans and payments to NPEF IV and GHF.

(c). Mr Jafar's knowledge of mismanagement, misgovernance and misappropriation of funds within the Abraaj Group *at the time* of the Jafar Loans (and so his reliance on and inducement to lend by reason of the Overarching Message).

(d). the circumstances in which the Jafar Loans were made and the subsequent movement of funds.

31. The AH Parties said that the differences in approach between the parties on the Summons was to a significant extent caused by a difference of view as to how to define the issues in dispute for the purpose of determining what was discoverable. They submitted that:

(a). in relation to the question of whether Mr Naqvi was the directing mind and will of GHF at the relevant times, it appeared that the GHF Parties considered that any document evidencing the performance of a sufficiently important function by persons other than Mr Naqvi will be relevant and must be disclosed. For example, emails from an Abraaj employee responding to questions from GHF's auditor were said to justify the inclusion of that employee as a custodian.

(b). in contrast, the AH Parties' position was that only documents that go to the issue of control over GHF being exerted by either Mr Naqvi himself (on the AH Parties' case) or the board of directors (on the GHF Parties' case), at the relevant times, are relevant to this issue and necessary to determine it. The Abraaj Group was a large organisation with hundreds of employees and, they said, it would be wholly disproportionate for discovery to have to be given of all the interactions of those employees with third parties and others which related to GHF.

(c). this divergence of approach did not just impact the parties' views on the custodians and date ranges that the AH Parties must search. If the GHF Parties' approach was adopted, the JOLs' document discovery would require the document reviewers to make wholly subjective judgment calls on whether a particular activity appeared to be sufficiently important in order to warrant production of a document and would inevitably result in the production of many millions of documents.

(d). it was also clear that Fund IV believed that the AH Parties must discover all documents that might assist them in establishing if, and how, moneys were misappropriated from NPEF IV. But discovery was not intended to present an opportunity for a fishing exercise. Furthermore, and fundamentally, if the AH Parties were required to identify any such documents, it would be impossible for them to do so without first carrying out a forensic investigation into the issue. Otherwise, seemingly any document evidencing or referring to a payment could conceivably form part of a fraudulent scheme. This would inevitably result in the production of millions of documents.

32. I accept that in deciding the issues in dispute on the Summons it is important to take into account and have regard to the range of documents that are properly discoverable in accordance with the test established by the authorities. But it is also important not to adopt too narrow an approach. In the passage from the judgment of Colman J in *O Co. v M Co.* cited by Mr Smith QC and set out above, the learned judge had referred to, "*substantial evidential materiality to the pleaded claim and the*

defence to it in the broad sense which [he had] explained." This broad sense was explained in an earlier passage in his judgment as follows (at 350) (underlining added):

> *"Whether a class of documents as a whole is relevant for discovery purposes must depend upon what information it is reasonable to suppose the documents of the class contain and whether such information may enable the plaintiffs to advance their own case or damage that of the shipowners. The "case" of the plaintiffs or the defendants respectively can be defined only by looking at the pleadings. <u>It must be defined by reference to the plaintiffs' pleaded claim in its general sense, as distinct from its detailed exposition and by the defendants' pleaded defence in the sense of its general refutation of the plaintiffs' claim. What matters for discovery purposes is the claim and defence to it in the broadest sense and not to the detailed particulars of either claim or defence. A document in a defendant's possession, custody or power which provides information as to a ground not hitherto pleaded in a cargo claim upon which it can be said that they failed to exercise due care of the cargo is just as relevant for discovery purposes as one which contains information as to a ground of want of due care which has already been pleaded</u>."*

33. It seems to me that Mr Smith QC adopted too narrow an approach in insisting that discoverable documents were limited to those which related directly to the precise manner in which claims and defences were currently pleaded (for example that it was only documents that evidenced or related to Mr Naqvi exercising direct control or through the board that were discoverable), and that the discovery process should be similarly constrained and narrow. It is certainly right that the discovery process must focus on and seek documents which are clearly connected to issues in the Related Proceedings, and that a fishing expedition is unjustified, but the relevant connection is to be determined in the "*broad sense*" described by Mr Justice Colman. Whether a document is relevant for discovery purposes depends on whether the information which it is reasonable to suppose it contains is relevant to a party's case including by enabling the party to advance his own case or damage his opponents' case. A party's case must be defined by reference to his or her pleaded claim *in its general sense*, as distinct from its detailed exposition and in the case of a defence by the pleaded defence *in the sense of its general refutation of the plaintiffs' claim*. What matters for discovery purposes is the claim and defence to it in the broadest sense and not to the detailed particulars of either claim or defence. A document in a defendant's possession, custody, or power which provides information as to a ground for the claim not hitherto pleaded is just as relevant for discovery purposes as one which contains information as to a ground which has already been pleaded. It is in my view wrong at this stage to exclude custodians or limit date ranges based on an unduly narrow view of the discoverable documents and the issues in dispute.

Discovery by reference to the issues in dispute or the list of issues – the definition of relevance?

34. As I have noted, Fund IV argued that relevance should (at least initially) be tested by reference to the agreed list of issues for each of the Related Proceedings. I have set out above the definition of relevance in the Discovery Protocol which Fund IV had proposed.

35. Fund IV had argued in their skeleton argument that providing discovery by reference to the lists of issues would focus discovery on the key issues necessary for the fair resolution of the dispute rather than requiring discovery on peripheral points of detail on the pleadings, saving time and costs. However, they had noted that since they had been relieved by the Discovery Protocol of any obligation to provide discovery of material obtained from AH, AIML, the AIML JOLs and the JOLs, the point was now of substantially reduced significance to them. During the hearing, Mr Ayres QC indicated that Fund IV had mainly been seeking to ensure that since the list of issues was a useful document and helped to focus on the core points in dispute it should be used and taken advantage of in the discovery process and that the parties should refer to it when undertaking discovery. However, he accepted that the list of issues could not be and was not determinative on any dispute as to what was discoverable. Such a dispute would need to be resolved by reference to the issues raised by the pleadings (in the broad sense I would add referred to by Colman J and discussed above).

36. Accordingly, it transpired that there was no dispute on this point since the other parties had always accepted that the list of issues should be used by each party in the discovery process. Mr Smith QC in his reply submissions at the hearing suggested that in these circumstances an appropriate approach was to draft the Discovery Protocol (and the definition of relevance) so as to make it clear that while relevance was ultimately to be determined by reference to the issues joined in and raised by the pleadings, the parties (in particular the AH Parties) when conducting their discovery would use and take into account the issues set out in the list of issues. This seems to me to the proper way to proceed.

The admissibility and weight to be attached to the evidence of Mr Montgomery-Swan

37. The GHF Parties submitted that Mr Montgomery-Swan's evidence was a mix of factual and purported expert opinion evidence, for which (as regards the latter) no permission had been given. The GHF Parties argued that Mr Montgomery-Swan's evidence was of no relevance, carried no probative weight, and therefore had no bearing on the issues arising for determination at the Summons. In summary, this was for the following reasons:

(a). first, Mr Montgomery-Swan had a conflict of interest and a conflict of duty. Mr Montgomery-Swan's evidence showed that he had previously worked for and had access to (and continued to have access to, through the data held by his firm Affinity Technology Services) the confidential records of various Abraaj entities, including those of the Fund Parties. It now appeared that he had been engaged by and was working with Mr Jafar in connection with the Related Proceedings. The GHF Parties considered that despite certain assurances given by Mr Montgomery-Swan, there was a real risk that information which was confidential or privileged to the GHF Parties (and, potentially, Fund IV and/or the AH Parties), may inadvertently be used or shared with Mr Jafar or those advising him. Furthermore, it appeared that at least some of the clients of Mr Montgomery-Swan's firm (Affinity Technology Services) had already expressed concerns regarding the possible disclosure of confidential information by Mr Montgomery-Swan. The GHF Parties referred to a letter dated 18 March 2022 from one of Affinity Technology Services' clients (Evercare) expressing its "*deep concern*" regarding Mr Montgomery-Swan's involvement in the Related Proceedings, his "*use of Evercare's information*" in the Related Proceedings, and his "*exploitation of* [his] *relationship with Evercare in connection with such activities, all without Evercare's consent*". Evercare said that Mr Montgomery-Swan's actions appeared to represent a breach of contractual and legal duties and obligations he owed and had sought "*further information to assess the extent of any damages to Evercare as a result of such conduct.*"

(b). second, the capacity in which he gave evidence, and the basis on which he was qualified to give such evidence, was not clear. The GHF Parties said that Mr Jafar had asked the Court to accept Mr Montgomery-Swan's opinions as evidence, in light of his "*significant experience*". However, those opinions were inadmissible opinion evidence. He was not an expert witness and in any event, his evidence did not comply with the requirements of GCR O.38 and Section B5.3 of the FSD Guide.

(c). third, Mr Montgomery-Swan's evidence was replete with bare assertions, statements of opinion, commentary, and submission. His evidence had no probative value. While he appeared to have some experience in the e-discovery field, the majority of that experience related to internal investigations, he had no legal experience (and no experience of the Related Proceedings) so his opinion regarding questions of relevance could have no weight and while he had sought to present himself as a neutral witness seeking to provide assistance, "*to the court and to the parties*" and as acting in the role of an independent expert, he was not doing so since he had assumed the role of an advocate for Mr Jafar. Furthermore, his opinions had repeatedly been contradicted by the documentary evidence.

38. Fund IV also submits that Mr Montgomery-Swan's evidence be given no weight (and that Mr Jafar's costs of producing that evidence ought to be disallowed in any event):

(a). Mr Montgomery-Swan had been inappropriately presented by Mr Jafar as a quasi-expert assisting all parties. But Mr Montgomery-Swan's efforts to persuade the Court to make a very limited order for discovery by the AH Parties were not impartial. He had taken instructions only from Mr Jafar (having been engaged following a telephone call with Mr Jafar himself on an unknown date), attended without prejudice meetings as a representative of Mr Jafar, and no details had been provided as to his remuneration. He was a partial and impaired witness and his "*evidence*" (to the extent it was even admissible) needed to be treated with considerable caution.

(b). like the GHF Parties, Fund IV was concerned and reserved its position as to whether Mr Montgomery-Swan or his company were in breach of their obligations to Fund IV. It was unsatisfactory that the basis on and capacity in which Affinity Technology Services continued to hold Abraaj data had not been made clear. Fund IV noted that Mr Montgomery-Swan and Mr Barrie in their evidence had confirmed that Mr Montgomery-Swan had disclosed Abraaj documents to or discussed Abraaj documents with Mr Jafar and were concerned that this had not been done with the requisite consents.

(c). at least part of Mr Montgomery-Swan's evidence in MS1 was false by Mr Montgomery-Swan's own admission. At paragraph 47 of MS 1, Mr Montgomery-Swan stated that: "*I have not provided any actual documentation to any of the parties in the Related Proceedings, nor have I described the content of any such documentation. My instruction is strictly limited to identifying those sources and locations which may contain certain documents.*" Yet, at [3] – [5] of his new replies (served prior to MS1), Mr Jafar had relied on an email said to have been sent from Arif Naqvi to his son Faaris Naqvi (the ***Faaris Email***). The gist of the Faaris Email was public knowledge as it had been recorded in public decision notices, but the recipient (i.e. Faaris Naqvi) was not a matter of public record (indeed, it was not known to Fund IV). Fund IV had raised how Mr Jafar learned of the identity of the recipient of the Faaris Email in correspondence and it had been revealed by Mr Montgomery-Swan in MS2 at [64] that he had "*imparted this information (i.e. Faaris' participation in this email) to Mr Jafar … However, this information was imparted to Mr Jafar in isolation of the document itself (i.e. I did not provide a copy of the email to Mr Jafar) and I imparted this information based upon my recollection from my investigations with the DFSA* [the Dubai Financial Services Authority] *in 2018*." Similarly, Barrie 4 had disclosed that Mr Montgomery-Swan had revealed to Mr Jafar information about specific documents possessed by the AH Parties, including a transcript of WhatsApp conversations between Arif Naqvi and Mr Jafar's son Badr Jafar. It followed, Fund IV submitted, that contrary to his earlier protestations in evidence, Mr Montgomery-Swan had discussed documents with Mr Jafar, including providing information that he learned in the course of his employment or engagement by Abraaj in the context of a regulatory investigation.

(d). also like the GHF Parties, Fund IV submitted that much of Mr Montgomery-Swan's evidence was in fact submissions and that other parts were mere opinion which could be of no assistance to the Court in circumstances where Mr Montgomery-Swan was expressing a view on the very issue before the Court. In addition, the opinions he had expressed were unsupported by proper explanations of his approach or a basis in fact. For example, Mr Montgomery-Swan had said that he modelled illustrative costs for the review of documents. But his methodology was inadequately explained (including how he estimated the document volumes and the costs of TAR review), and the other parties had had no proper opportunity to test or respond to it. He had also made various assertions as to where the parties were likely – or not likely – to find documents relevant to issues within the Related Proceedings but did so without an adequate basis to support his views. For example, in MS1 at [76] he had asserted that "*the parties are unlikely to benefit*" from discovery of Email Data from custodians other than the six he identified as other potential custodians "*either: (i) had no knowledge of Mr Naqvi's schemes and decisions; or (ii) do not hold documents that may be of assistance to the parties that cannot be obtained from the Email Data of the GMS Custodians*." Fund IV argued that Mr Montgomery-Swan could not possibly speak to the knowledge of those individuals – he only joined the Abraaj Group in May 2017 and worked as Head of IT (i.e. he had not been involved in the financial operations of the Abraaj Group and was, on his own account, given limited access to its IT systems) – or have had sufficient familiarity with the entirety of the underlying documentation so as to make such assertions as to the documents held by each custodian.

39. Mr Bloch QC submitted that these challenges and criticisms were unjustified. Mr Montgomery-Swan's evidence was of particular assistance in view of his knowledge of the Abraaj documents and systems and entitled to substantial weight. All the parties had put in evidence as to where it was appropriate to look for and capture data and then as to how best to review relevant documents and Mr Montgomery-Swan knew where to look as a result of his experience, not only at Abraaj, but in assisting in the investigations by the DFSA and others. The suggestion that he did not have something of value to contribute was perverse. Mr Bloch QC argued that Mr Montgomery-Swan was particularly well placed to do so. Furthermore the suggestion that his evidence should be disregarded because he was an advocate for Mr Jafar was extraordinary. All the parties were putting forward or relying on the views of their own experts, even if internal experts. The suggestion that Mr Montgomery-Swan had somehow acted improperly and therefore that his evidence should be disregarded was also extremely unfair, especially bearing in mind he was not before the Court. Mr Montgomery-Swan's evidence in MS2 had provided a satisfactory and clear explanation of what he had known regarding the Faaris Email. Mr Bloch QC noted that there was no application before the Court to strike out or prevent reliance on his evidence by reason of a breach of confidence or other impropriety. He said that it was obvious from his evidence that Mr Montgomery-Swan had drawn on certain relevant knowledge that he had as a result of the positions he had held that was of particular assistance in deciding who should be treated as a custodian with access to unique and relevant documents.

40. It seems to me that Mr Bloch QC is clearly right that in the absence of an application to strike-out or treat as inadmissible Mr Montgomery-Swan's evidence, it would be improper to ignore it. Nor is it sufficient, to justify it being ignored, that his evidence is contradicted by the evidence of other parties' witnesses, and his credibility is challenged by those witnesses and in the parties' submissions. As is well known, there are only limited circumstances in which a Court can dismiss evidence given by affidavit or witness statement without the witness being cross-examined. In order to reject Mr Montgomery-Swan's evidence without cross-examination it would be necessary to find that it was manifestly incredible. It seems to me that this it is not. The approach to be adopted was set recently discussed in the English Court of Appeal in *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [34] – [41]. In that case, Newey LJ (at [34]) referred to the following extract from the judgment of Rimer LJ in *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] BCC 612, that:

> *"it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor*

will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents …"

41. Accordingly, I have carefully considered and taken into account Mr Montgomery-Swan's evidence, (recognising the knowledge he has of the Abraaj systems and documents) with the other evidence filed by the other parties' witnesses, noting the disagreements and differences of view where they arise and the weaknesses in Mr Montgomery-Swan's evidence as identified in particular by the Fund IV and the concerns raised as to his impartiality and that he was seeking to give expert opinion evidence without the Court's permission. I set out below my conclusions on Mr Montgomery-Swan's evidence. I note that none of the parties invited me, despite the disagreements in the witnesses' written evidence and challenges to Mr Montgomery-Swan's credibility, to give directions for the cross-examination of Mr Montgomery-Swan or the other witnesses and I am satisfied that I can and should deal with the issues in dispute on the Summons without it.

Custodians

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – an overview

42. The AH Parties' proposal is that they should collect email data from nineteen custodians. The email data will be collected in unfiltered form and then be subject to a review process. The GHF Parties and Fund IV have identified a further eleven custodians (but seven of those identified by Fund IV were on the GHF Parties' list). Mr Jafar considered, based on Mr Montgomery-Swan's evidence, that six custodians would be sufficient. Of these, four were included in the custodians identified by the AH Parties and one was included in the GHF Parties' list (Ammar Azhar). The only individual that Mr Jafar alone considered should be added was Mr Sudeep Joshi.

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – the AH Parties' position

43. Mr Conway explained in Conway 1 the options and process for and the estimated costs of reviewing the AH Data. He noted (at [25]) that each GB of data costs USD$125 to transfer it from its raw state into the technology review platform that would be used (called Relativity) and US$32 per month for the data to be hosted there. The total cost of processing and hosting the 52,000GB of data held by the

AH Parties for a six-month discovery exercise would be, even excluding hardcopy documents, in excess of US$10 million. This estimate represents costs before any human review. As regards the selection of custodians, Mr Conway said that (underlining added):

> *"43. There are many hundreds of possible email custodians. The AH Parties' approach has been to identify those custodians that, based on their role within the Abraaj Group, might be reasonably expected to hold unique documents that are relevant to the issues in dispute.*
>
> *44. For example, a key issue in the proceedings is whether certain entities within the Abraaj Group were in relation to the transactions in issue controlled by (i) Mr Naqvi (which is the AH Parties' case and Mr Jafar's case); or (ii) the board of directors for that entity (which is the NPEF IV Parties' and the GHF Parties' case). The AH Parties have therefore focused on the persons who, on each party's case are said to be the controllers of the relevant entities.*
>
> *45. With that in mind, the AH Parties have ultimately proposed 18 custodians .... which are listed at paragraph 5.4 of Appendix A to the Draft Discovery Protocol. These include all of the management that were members of Mr Naqvi's inner circle, directors of AH, directors of AIML, directors of the Fund Parties and/or their general partners (including the directors of ADV1, a corporate director of certain of these entities). I exhibit ... the registers of directors for AH, AIML, ADV1, and the other relevant Fund Parties entities. Therefore, I believe that this proposal encompasses all the persons who, on any party's case, would have been in control of the relevant Abraaj Group entities for the purposes of the eventsat issue in the Related Proceedings."*

44. Mr Conway (at [49] of Conway 1) noted that the AH Parties' discovery proposal envisaged loading approximately 239GB of email data into the Relativity platform and that the additional twenty-five custodians originally requested by the Fund Parties and Mr Jafar would add a further 2,824.88GB (although the volume of documents could be expected to be reduced by adopting more limited date ranges for the searches and the de-duplication process).

45. The AH Parties argued that they had composed their list of custodians with their list of key issues clearly in mind and so as to ensure that they had identified and selected those custodians who, based on their role within the Abraaj Group, might reasonably be expected to hold unique documents relevant to those key issues. They had sought to ensure that their list of custodians balanced the need to locate the documents relevant to the issues in dispute against the need to avoid huge costs and substantial delays.

46. Accordingly the AH Parties considered, in reliance on Mr Conway's evidence, that the additional custodians identified by the GHF Parties and Fund IV were not justified when the balancing exercise was properly undertaken. First, the GHF Parties and Fund IV had failed to take into account or give sufficient weight to the need to limit or focus the discovery process on documents which related to the issues in dispute and the custodians who were likely to hold such documents. Secondly, when the range and nature of the documents which the AH Parties' custodians could be reasonably expected to hold was understood and taken into account, it could not be said that the additional custodians would be likely to hold further unique and relevant documents. As a result, the considerable further cost that would be incurred in searching these additional custodians, and the risk of serious delays in the proceedings, meant that such searches could not be justified. The GHF Parties and Fund IV's approach was excessively broad and disproportionate.

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – the GHF Parties' position

47. For the reasons set out in Lewis 9 and Lewis 10, the GHF Parties argued that it was *essential* that the AH Parties also give discovery by reference to the eleven further custodians they had identified. I set out below the names of each of these additional custodians (the ***GHF Parties' Custodians***) together with a brief summary of the reasons why the GHF Parties say that the emails and documents of these custodians needed to be searched (as set out in Lewis 9):

(a). Anuscha Ahmed – Ms Ahmed was between 11 April and 27 June 2018 a director of ADV 1 Limited (***ADV1***) which was a director of AH. Mr Lewis exhibited emails from Ms Ahmed which the GHF Parties said demonstrated that she was a conduit for AH board communications and attended AH board meetings in the key period from 2017-2018 and communicated with third parties in relation to relevant issues (including dealings with Mr Jafar and emails referring to alleged lapses in governance). A number of the emails were received or sent only by Ms Ahmed and included notes of meetings for her own use which appeared not to have been copied to anyone else. Mr Hayward's evidence (Hayward 5 at [23]) was that she was believed to have been heavily involved in the affairs of the Global Investment Committee and could reasonably be expected to have documents relevant to Issue 1(d) of the GHF Proceedings list of issues ("*Was the Global Investment Committee responsible for making investment decisions on behalf of the Abraaj Funds? Was Mr Naqvi its Chairman*?"*)*. Ms Ahmed had also attended the AH board meeting on 19 February 2018 (this was a meeting referred to for example in AH's Defence in the Jafar Proceedings before the amendment by Mr Jafar of his statement of claim, which took place shortly after articles had appeared in the Wall Street Journal raising concerns about the Abraaj Group's financial position and at which the result of discussions with the Dubai Financial Services Authority had been discussed). The GHF Parties relied on Ms Ahmed's presence at the board meeting as evidence of her position within the Abraaj Group and argued that she was likely to have documents relevant to the question (acknowledged by the AH Parties to be a key issue) of the extent to which certain entities within the Abraaj Group were, in relation to relevant transactions, controlled by Mr Naqvi or by their formal governance structures (the ***Control Issue***).

(b). Ovais Naqvi – Mr Ovais Naqvi was understood to have been a cousin of Mr Naqvi, was stated in his emails to be "*managing director of the Abraaj Group*" and was believed to have been a recipient of funds from AIML. Since he had held a management role and had family connections to Mr Naqvi he could reasonably be expected to have documents relevant to the Control Issue. He also appeared to have received misappropriated funds and could therefore reasonably be expected to have documents relevant to the misappropriation issue. Misappropriation was an issue in, and listed in, the list of issues for the GHF Proceedings.

(c). Raj Morjaria – Mr Morjaria was said to have been a key individual in relation to the accounts, funding, and transactions of GHF and of Abraaj Growth Markets Healthcare Fund (***AGHF***). Mr Lewis' evidence was that Mr Morjaria appeared to have had unique oversight of the amended AGHF platforms' finances, governance, and operations. Mr Lewis exhibited emails from Mr Morjaria in which AGHF's funding was discussed. The GHF Parties argued that Mr Morjaria could therefore reasonably be expected to have documents relevant to the Control Issue. He had, as the emails exhibited by Mr Lewis demonstrated, been heavily involved in the financial affairs of AGHF by asking whether cash could be used and for updates on the cash balances of all AGHF accounts. He could reasonably be expected to have documents relevant to issue 2 in the list of issues for the GHF Proceedings Action, namely the structure and operation of AGHF and issue 31 in the list of issues for the Jafar Proceedings which was circulated on 17 February 2022 by Ogier to all parties and agreed between all parties except for Mr Jafar (*Were the financial affairs and management (or governance) of AIML, AH, the AGHF, and NPEF IV from March to December 2017 materially sound or proper?*).

(d). Shahid Naqvi – Mr Shahid Naqvi was also understood to have been a cousin of Mr Naqvi and was stated in his emails to be "*principal*" *at* "*the Abraaj Group*." Once again, he had held a management role and had family connections to Mr Naqvi and could reasonably be expected to have documents relevant to the Control Issue and the misappropriation issue.

(e). Badruddin Hilal – Mr Hilal was the CFO of AGHF and a director of Abraaj Capital Limited and so had a role addressing investor queries in relation to use of funds received from investors and how they were invested. He also provided weekly reports to Ashish Dave on platform-level finance, banking and tax issues including funding needs and available cash, had oversight of funding requirements and cash availability, and was involved in "*some key discussions*" in relation to AGHF's funding from 29 September 2017 to 15 April 2018. Mr Lewis exhibited a number of emails from Mr Hilal or on which he was copied which referred to account balances, payments, membership of the board of various Abraaj entities and "*initiatives*" taken to "*get investor confidence and drawdown capital*."

(f). Khawar Mann – Mr Mann was CEO of AGHF and a partner of Abraaj Capital Limited. Mr Lewis says that Mr Mann was a recipient or originator of a "*large number of relevant documents*" from the inception of AGHF until after the appointment of the joint provisional liquidators in respect of AH and AIML and that the GHF Parties have identified documents in which Mr Mann discussed the role of Mr Naqvi and others engaging with investors in connection with the return of uninvested capital in late 2017 - early 2018. Mr Lewis further noted that the AH Parties had produced five email chains involving Mr Mann, evidencing the drafting or approval of correspondence prepared by Mr Naqvi in response to investors in AGHF and that the AH Parties had disclosed emails involving Mr Mann in support of the AH Parties' Defence in the Jafar Proceedings (as originally drafted). The GHF Parties argued that where a party relied on emails of an individual as being relevant to the issues in dispute it was to be expected that the person concerned would be treated as a custodian for the purpose of discovery. His position at AGHF meant that he could reasonably be expected to have documents relevant to the Control Issue, to issue 2 in the list of issues for the GHF Proceedings (see above). Furthermore, he could be expected to have documents relevant to issue 4(g) in the list of issues for the GHF Proceeding (*Did Mr Naqvi correspond directly with Healthcare Fund investors, on behalf of the AGHF, and/or draft and/or approve the wording of correspondence to be sent by others (including Mr Mann Mr Dave and Mr Vettivetpillai) when the AGHF investors began to express concerns over the course of 2017 regarding the cash balances of AGHF and how funds had been utilised having been drawn down from investors?).*

(g). Matthew McGuire – Mr McGuire was a director of ADV1 and of The Abraaj Healthcare Group Limited (***AHG***) and involved in crisis management from January 2018, which included orchestrating responses to the Wall Street Journal investigators and drafting communications to be presented by Mr Mann and Mr Naqvi. As a director of AHG and of ADV1 within the AH Parties' proposed email data date range (1 March 2017 to 18 June 2018) he could reasonably be expected to have documents relevant to the Control Issue and to issue 2 in the list of issues for the GHF Proceedings (see above). His involvement in crisis management meant that he could also reasonably be expected to have documents relevant to the allegations of misappropriation and the falsity of Mr Jafar's alleged Overarching Message (see the Amended Statement of Claim in the Jafar Proceedings at [19] – [23]).

(h). Ammar Azhar – Mr Azhar was the Regional Fund Controller of AGHF and one of AGHF's bank signatories. He was, with Mr Morjaria, "*a key individual*" in relation to AGHF's and GHF's accounts, funding, and transactions. The GHF Parties had identified numerous emails in which Mr Azhar discussed AGHF's funding and banking arrangements, going back to 2016, including instructions and information provided to KPMG to prepare in March 2018 the report relating to transfers from AGHF and GHF to AH. Once again, as a director of ADV1 within the agreed email data date range he could reasonably be expected to have documents relevant to the Control Issue and to issue 2 in the list of issues for the GHF Proceedings (see above).

(i). Asim Hameed – Mr Hameed was an employee of AH and although he held a predominantly administrative role he was involved in a number of communications regarding investments by Mr Jafar and appeared to have had a trusted role in connection with some important issues relating to AH. He had been referred to by Mr Naqvi as being part of the dedicated executive management team and was involved in the execution of relevant loan transactions and coordinating payment arrangements. In light of his role and position, and the documents he drafted, he could reasonably be expected to have documents relevant to the allegations of misappropriation and the falsity of the Overarching Message and issue 2 in the list of issues for the GHF Proceedings (see above).

(j). Ahsan Naqvi – Mr Ahsan Naqvi is the son of Mr Naqvi who was described in emails as an analyst working in Abraaj's central execution team in Dubai. Mr Lewis' evidence was that Mr Ahsan Naqvi was believed to have been the recipient of funds from AIML. The GHF Parties had identified emails between him and his father in February 2018 regarding the loans from

Mr Jafar (albeit that these emails were not sent from or to him at his Abraaj email address). The GHF Parties argued that he had held a position with the Abraaj Group which gave him access to relevant documents, had a familial connection to Mr Naqvi, and corresponded regarding the Jafar loans. He could reasonably be expected to have documents relevant to the Control Issue and whether the Overarching Message had been conveyed and relied on by Mr Jafar. The financial position of AIML was also one of the issues listed in the list of issues in the GHF Proceedings (issue 11) and issue 2(h) (*What happened to the aggregate amount of US$211,062,119 following receipt by AIML from GHF?*).

(k). Faaris Naqvi – Mr Faaris Naqvi is another of Mr Naqvi's sons who was described in emails as an analyst at the Abraaj Group. The GHF Parties argued that since he had held a position with the Abraaj Group which gave him access to relevant documents and had a familial connection to Mr Naqvi he could reasonably be expected to have documents relevant to the Control Issue. He also appeared to have received misappropriated funds and could therefore reasonably be expected to have documents relevant to the misappropriation issue.

48. The GHF Parties argued that the AH Parties' objection to their additional custodians was in reality driven by concerns as to costs and proportionality, rather than any point of substantive principle as regards relevance. In particular, the AH Parties appeared to be very concerned by the volume of discoverable documents from these additional custodians. But these concerns were inflated. The AH Parties themselves had acknowledged that the burdens of additional discovery would "*to some extent be reduced by date ranging and deduplication.*" In addition, the GHF Parties expected that the universe of documents held by the AH Parties would be significantly reduced at an early stage by the TAR software. They argued that in any event, provided that a proposed methodology for conducting discovery was reasonable in light of who was reasonably likely to have relevant documents, cost considerations should not be allowed to be determinative and dictate a decision as to whose or what documents were to be discovered. The requirements of the overriding objective did not prize economy and proportionality over the need for parties to give proper discovery in accordance with GCR O.24, r.1(1). Mr Jafar and the AH Parties had commenced the Related Proceedings, seeking many millions of dollars in damages and restitution from the GHF Parties (indeed from both of the Fund Parties) and they were entitled, as defendants, to insist on a process that would or was likely to result in the discovery of the core documents that were relevant to their defences. The GHF Parties submitted that they had taken cost and time considerations into account and identified a proportionate list of appropriate custodians (and the significant degree of overlap between the Fund Parties'

proposed custodians showed a common view as to whose documents needed to be searched to ensure that the defendants were being properly treated).

49. The GHF Parties argued that while some modifications to the standard discovery process may be warranted in light of the volume of discoverable documents in the hands of the AH Parties, the AH Parties were and should be required properly and fully to perform their discovery obligations.

50. The AH Parties challenged the justifications put forward by the GHF Parties with respect to each of the eleven GHF Parties' Custodians. These challenges can be summarised as follows:

(a). Anuscha Ahmed – the GHF Parties had not established that Ms Ahmed might reasonably be expected to have unique relevant documents relating to the issues in dispute. They had made no attempt to relate any documents that she might reasonably be expected to have to the issues in dispute. The only conceivably relevant issue was whether certain entities within the Abraaj Group, including NPEF IV and GHF, were in relation to the relevant transactions controlled by Mr Naqvi (which is the AH Parties' case) or the relevant boards of directors (which was Fund IV's and GHF Parties' case). However, relevant documents going to this dispute would be discovered by looking at communications between Mr Naqvi and Abraaj Group personnel and the relevant boards of directors. To the extent that Ms Ahmed was party to such communications, the same communications will be within the documents of Mr Naqvi and the boards of directors. The suggestion that Ms Ahmed's inclusion was required because she was responsible for posting material to the board of directors' iPads was misguided. That material formed part of the DMS Data that the AH Parties have agreed to produce. The 19 February 2018 board meeting was now irrelevant following Mr Jafar's Amended Statement of Claim. Affirmation or rescission of the Jafar loans was no longer an issue in dispute, or alternatively, no longer an issue in dispute the determination of which was necessary for the fair disposal of the Jafar Proceedings since Mr Jafar did not now advance a positive case on rescission.

(b). Ovais Naqvi – once again, there had been no attempt to identify the issue in respect of which Mr Ovais Naqvi might reasonably be expected to have relevant documents. To the extent that the GHF Parties had sought to justify Mr Ovais Naqvi's inclusion on the basis of his alleged receipt of misappropriated funds, the basis for doing so had not been properly established.

(c). Raj Morjaria – once again, there had been no attempt to identify the issue in respect of which Mr Morjaria might reasonably be expected to have relevant documents. To the extent that the GHF Parties sought to include Mr Morjaria as a custodian because of his involvement in AGHF's funding and so possible wrongdoing at AGHF, no such allegation was pleaded by the GHF Parties. Furthermore, the "*key correspondence"* exhibited by Mr Lewis which supposedly established Mr Morjaria's importance showed that it was likely that all his documents would be covered and captured by the AH Parties' custodians. For example, the final email in the chain of exhibited emails showed that the relevant emails were ultimately forwarded to Rafique Lakhani for a decision and he was one of the AH Parties' custodians.

(d). Shahid Naqvi – the same objection was made in relation to Mr Shahid Naqvi as was made to the inclusion of Mr Ovais Naqvi.

(e). Badruddin Hilal – in determining whether a potential custodian might reasonably be expected to have relevant documents, it was necessary first to identify the issue to which those documents must be relevant. The GHF Parties had made no attempt to explain why Mr Hilal might reasonably be expected to have unique relevant documents relating to the issues in dispute or to identify issues to which any documents he might have will relate. Furthermore, the emails exhibited by Mr Lewis would be discovered by the searches to be conducted of the AH custodians.

(f). Khawar Mann – the GHF Parties had failed again to identify an issue in dispute in relation to which Mr Mann was likely to have relevant and unique documents. Many of the email chains to which Mr Lewis had referred had been copied to Mr Naqvi and such emails, to the extent relevant, will be discovered given that Mr Naqvi was already a custodian. Mr Lewis had said that Mr Mann was party to email exchanges to which Mr Naqvi was not, Mr Naqvi and Mr Mann had different roles and Mr Mann was "*independent and solely responsible for a number of matters.*" But the only key issue in dispute to which these factors could relate was the extent to which Mr Naqvi had control of the AGHF as opposed to the directors and officers of GPL or ADV1. But relevant documents on this issue will be communications between Mr Naqvi and other Abraaj personnel including those directors and officers which will be disclosed by the searches to be conducted of the AH custodians. The AH Parties argued that, to the extent that Mr Mann was involved in emails that were never ultimately forwarded to Mr Naqvi or those directors or officers for some form of sign-off or guidance, then those emails could not be said to advance either side's case.

(g). Matthew McGuire – that fact that Mr McGuire held certain positions within the Abraaj Group did not, without more, make him a potential repository of uniquely relevant documents (in any event he appeared to have held the particular positions relied on after most of the key events in the Related Proceeding occurred). The mere possession of documents derived from his investigation into alleged misappropriation of funds was an insufficient basis for showing that he was likely to have uniquely relevant contemporaneous documents evidencing the alleged misappropriation.

(h). Ammar Azhar – again the GHF Parties had failed to identify an issue in dispute in relation to which Mr Azhar was likely to have relevant and unique documents. The emails exhibited by Mr Lewis at pages 456-463 of the exhibit to Lewis 9 did not support Mr Azhar's inclusion as a custodian. Mr Azhar was a sender or recipient of only three of the emails exhibited which discussed AGHF's funding, while Rafique Lakhani, who was one of the AH custodians, was a sender or recipient of nearly all the emails exhibited. Furthermore, the GHF Parties had not established that the emails exhibited at pages 464-500 of the exhibit to Lewis 9, which largely comprised correspondence with KPMG regarding the report relating to the transfers from AGHF and GHF, were relevant to any issues in dispute. To the extent that GHF Parties relied on the argument that the emails were relevant to the nature and extent of mismanagement at the AGHF, including the transfers of capital contributions for purposes other than investment, it was unclear what relevance these *ex post facto* communications had to that issue. It had not been established why or that Mr Azhar would be candid about these matters to KPMG.

(i). Asim Hameed – the fact that Mr Hameed held certain positions did not, without more, make him a potential repository of uniquely relevant documents. To the extent that Mr Hameed was close to Mr Naqvi, such that he might have relevant documents relating to the issue of Mr Naqvi's control over the Abraaj Group, any such documents would necessarily also be held by Mr Naqvi who was one of the AH custodians. With respect to the emails at pages 543-546 of the exhibit to Lewis 9, several of the AH custodians were senders or recipients of all but one of the emails. Furthermore, the fact that Mr Hameed allegedly drafted certain documents did not make him a potential repository of unique relevant documents (j). Ahsan Naqvi – the GHF Parties had failed to identify an issue in dispute in relation to which Mr Ahsan Naqvi was likely to have relevant and unique documents. As regards the emails to Mr Naqvi regarding the Jafar Loans, which had been relied on, Mr Naqvi was among the AH custodians and therefore such emails would be discovered to the extent relevant. The fact that emails had been from a non-Abraaj email address did not of itself justify his inclusion. The knowledge of Mr Naqvi's wider family in respect of the Jafar Loans was not relevant to any issue in dispute (in contrast to Mr Jafar, where the knowledge of his family members was relevant to the question of the extent to which he was aware of the matters in respect of which he alleges that he was misled by the Overarching Message).

(k). Faaris Naqvi – the fact that Mr Faaris Naqvi allegedly received misappropriated funds was insufficient. There was no pleaded allegation that he received any misappropriated funds or that his receipt of any such funds gave rise to any liability on the part of AH. There was also no basis for concluding that because he was apparently listed as a creditor of AH he might reasonably be expected to have documents relevant to the issues in dispute.

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – Fund IV's position

51. The additional eleven custodians proposed by Fund IV and their reasons for doing so were set out in Hayward 5 at [18] – [25]. The difference between the Fund IV's position and that of the AH Parties had originally been greater but had recently been reduced. Since Hayward 5 was sworn, the AH Parties had agreed to include Mr Selcuk Yorgancioglu as a custodian and Fund IV had agreed to remove Mr Mitali Atal and Mr Purshotam Ramchandan as custodians (provided that the AH Parties confirmed that the latter had ceased to have access to an Abraaj email address from April 2015). There is a substantial overlap between the further custodians identified by Fund IV and those identified by the GHF Parties (Fund IV had not included Mr Morjaria or Mr Hilal). But Fund IV have added fourfurther custodians to the GHF Parties' Custodians. These are Ms Ghizlan Guenez, Mahyar Ghassemi, Ashish Patel, and Adnan Siddiqui.

52. Fund IV argued that their additional custodians were justified (having regard in particular to the issues in dispute that were of particular importance to their defences and the overall complexity of the Related Proceedings, which the AH Parties and Mr Jafar had sought to downplay) and that they had adopted a reasonable and proportionate approach (having regard to the very large number of custodians who potentially could have been included – 785 and the limited number that Fund IV

sought to include– thirty in total taking into account the AH Parties' custodians). Furthermore, the AH Parties' evidence as to the additional cost that was likely to be incurred if these additional custodians were included had to be treated with caution.

53. Fund IV's' position (on custodians but also on date ranges and other issues) was based to a significant extent on the importance they attached to their defences based on their claim that NPEF IV was the victim of wrongdoing and the massive misappropriation of its assets. Fund IV relied on the prior misappropriation of its monies as a defence in both the NPEF IV Proceedings and the Jafar Proceedings. In the NPEF IV Proceedings, NPEF IV relied on the alleged prior misappropriation of funds to support its case that AIML – not AH – made the payments to it and that the payments were made to repay funds previously misappropriated and that NPEF IV has not in any event been unjustly enriched by receipt of the payments. In the Jafar Proceedings, NPEF IV relied upon the prior misappropriations to deny that it was enriched without cause. I set out below extracts from the Fund IV's pleadings which show the main parts (although not all) of the pleadings dealing with the misappropriation allegations.

54. Fund IV's defence in the NPEF IV Proceedings was set out at [9.4A] and [16.2A] of Fund IV's Amended Defence where it is averred that:

> *"9.4A. It is denied that the times relevant to these proceedings are limited to between 1 March 2017 and 18 June 2018. Substantial funds were misappropriated from [GP8] and the Fund [i.e. NPEF IV] prior to 1 March 2017 for which the Company and/or AIML was liable. The Company facilitated or caused the misappropriation of the Fund's funds including through its role as financier for AIML. In this respect:*
>
> *(a). It is averred (as [AH] itself previously averred in these proceedings) that from as early as 1 November 2012, there was extensive "commingling" (i.e. wrongful misappropriation and non-segregation) of cash across entities within the Abraaj Group (including the Fund).*
>
> *(b). It is averred (as [AH] itself previously averred in these proceedings) that between 2013 and 2017 [AH] borrowed to replace cash "missing" from Abraaj Funds (so as to disguise the wrongful misappropriation and non-segregation).*
>
> *(c). [AH] has failed to provide responses to the Fund's request for further and better particulars of the funds missing from the Fund as of June 2017.*
>
> *………*
>
> *16.1 It is admitted and averred that monies were misappropriated from the Fund. On the Plaintiffs' own case (paragraph 12), at least US$201 million was "missing" from*

the Fund – a euphemism for misappropriated. [AH] facilitated or caused the continued misappropriation of the Fund's funds including through its role as financier for AIML.

16.2 The reality, as set out above, is that the Fund is the victim of significant financial abuse orchestrated by at least Mr Naqvi, and for which at least [AH] is liable. The loss sustained by the Fund (on whose behalf [GP8] acts) is uncertain but runs into hundreds of millions of US dollars

16.2A Paragraph 9.4A is repeated. The misappropriation of monies from the Fund for which [AH] and/or AIML is liable commenced prior to 1 March 2017. GP8 reserves the right to plead further in relation to the same following discovery from [AH]. Without prejudice to the generality of the foregoing, as of 28 December 2017, in excess of US$123,799,700 was due to the Fund from [AH] and/or AIML by reason of misappropriations of its funds. Pending discovery, such is to be inferred from:

16.2A.1 The contents of an email dated 5 June 2016 from Mr Rafique Lakhani to Mr Naqvi recording that, as at 30 June 2016, the Company was projected to owe around US$316 million to the Fund. Given the absence of any loan agreement or other entitlement on the part of the Company and/or AIML to make use of or hold monies held by AIML and/or GP8 on behalf of the Fund, any obligation to repay or restore funds to the Fund arose due to misappropriation of the Fund's assets.

16.2A.2 The contents of the anonymous tip-off emails to employees of Hamilton Lane (an investor in the Fund) in September 2017 stating that the Fund was the "biggest sufferer" of financial impropriety and had "funded the Abraaj Holdings balance sheet for years", with funds drawn down for the Fund having been used as working capital of the wider Abraaj Group.

16.2A.3 The contents of an email dated 11 December 2017 from Mr Lakhani to Mr Naqvi stating that there was a payable due to the Fund of US$174.7 million prior to its year end audit. Given the absence of any loan agreement or other entitlement on the part of the Company and/or AIML to make use of or hold monies held by AIML and/or GP8 on behalf of the Fund, any obligation to repay or restore funds to the Fund arose due to misappropriation of the Fund's assets.

16.2A.4 The liquidation analysis prepared by Houilhan [sic] *Lokey dated 18 May 2018 which stated that the Company owed the Fund US$94.6 million. Given the absence of any loan agreement or other entitlement on the part of the Company to make use of or hold monies held by AIML and/or GP8 on behalf of the Fund, any obligation to repay or restore funds to the Fund arose due to misappropriation of the Fund's assets.*

16.2A.5 The contents of the "Draft – Project Cheetah 2 Report" commissioned by AIML, and produced by Deloitte Professional Services (DIFC) Limited, and provided to the Company's Board in May 2018 recording, inter alia, that (i) from July 2016 to December 2017, over US$214 million of the Fund's cash was transferred to or on behalf of AIML, and (ii) as at 31

March 2018, over US$99 million due to the Fund from AIML by reason of the misuse, by the Company and/or AIML, of the Fund's monies.

16.2A.6 The contents of a Fund Information Request, dated 12 June 2018 and sent to fund investors, recording that, as of 12 June 2018, AIML owed APEF IV at least US$94,537,618 by reason of the misappropriation of funds held by, or due to, the Fund.

16.2A.7 The contents of: (i) the Decision Notice issued by the Dubai Financial Services Authority (ii) the Superseding Indictment and (iii) the SEC Amended Complaint, each of which record the misappropriation of at least US$250 million of the Fund monies by AIML prior to September 2017 and substantial funds due to the Fund as a result."

55. Fund IV's defence in the Jafar Proceedings was set out at [7.4] and [47.3] of its Re-Amended Defence, Fund IV averred that:

"7.4 During the period in which [Mr Jafar] was a director of AH (i.e. prior to October 2010) AIML failed to properly segregate [NPEF IV] and Manager cash. As a general pattern, funds received which were not used for investments were swept to AIML and booked as a receivable from AIML in a single intercompany account entitled "Payables – Abraaj Capital" and funds transferred to AIML were not ringfenced and were deployed for improper purposes and not for the benefit of Fund IV. It is to be inferred that there were other misappropriations and failures to segregate investors' funds in respect of Fund IV and/or other entities within the Abraaj Group, and that [NPEF IV] and/or other entities within the Abraaj Group suffered financial difficulties continuing to the date of the Loans.

……..

47.3 In any event

(a). Pursuant to the Loan Agreements, title to the monies advanced by the Plaintiff was transferred to AH and/or AIML. It is not alleged by the Plaintiff that those transactions did not transfer valid title to the monies advanced.

(b). In breach of its obligations under the Management Deed Relating to the Abraaj Buyout Fund IV LP (dated on or about 22 July 2008), the Limited Partnership Deed dated 22 July 2008 (as amended and restated on 30 September 2008, further amended and restated on 27 May 2012, and further restated and amended on 28 June 2016) and its fiduciary duties to act in good faith in the best interests of Fund IV and Fund IV's investors, including not to hold money belonging to Fund IV in AIML's own bank account, to avoid conflicts of interest, and to avoid profiting from its position at the expense of Fund IV's investors, AIML improperly used Fund IV's monies to make payments to other Abraaj Group entities (including AH) to which they were not entitled, and failed to remit monies to Fund IV to which it was entitled, which AIML was not permitted to do, in order to hide cash shortfalls within the Abraaj Group.

(c). *AIML purported to give credit for some of the cash and other assets misappropriated from Fund IV/GP8 and/or wrongfully caused not to be received by Fund IV by recognising a receivable to the Fund, recorded in an internal Abraaj account (the "***Intercompany Account***)". AIML adjusted the Intercompany Account to reflect what it considered to be the net financial position as between itself, AH and Fund IV.*

(d). *As of 27 December 2017, at least US$150.8 million had been wrongly misappropriated from Fund IV and/or GP8. As at 27 December 2017, AIML owed sums in excess of the value of the payments made to Fund IV by AH (at the direction and on behalf of AIML).*

(e). *The payments to GP8 were made to repay sums misappropriated from GP8 and/or Fund IV by AIML and/or in partial discharge of obligations owed by AIML or AH to GP8 or Fund IV and were received in good faith.*

(i). *The payments were made by AH at the direction and on behalf of AIML, with the intention of repaying sums previously misappropriated from GP8 and Fund IV by AIML and/or in partial discharge of obligations owed by AIML to GP8 or Fund IV. AH facilitated or caused the continued misappropriation of such funds including through its role as financier for AIML.*

(ii). *Alternatively, AH received consideration for the payments made to GP8.*

(iii). *GP8 and/or Fund IV received good title to any funds received from AH and/or AIML through a disposition vesting ownership of the monies.*

……."

56. As can be seen from these extracts, the Fund IV avers that the alleged misappropriation commenced from no later than 1 November 2012 with AH borrowing to replace cash "*missing*" (i.e. misappropriated) from Abraaj funds from 2013 to 2017 (as was originally pleaded by the JOLs themselves). Fund IV noted that the JOLs current pleading averred that by June 2017 (i.e. very shortly after the start date for the data and document search proposed by the AH Parties) approximately US$201 million was missing from Fund IV as a result of "*commingling*" (i.e. the wrongful appropriation of Fund IV's monies). However, neither the JOLs' nor Mr Jafar had admitted that sums in excess of US$150.8 million were due to Fund IV by reason of the misappropriation by AH and AIML. It therefore appeared that the extent of the misappropriation was considerably greater than the amount admitted or accepted by the AH Parties and that therefore the historic misappropriations were a live issue in both the NPEF IV Proceedings and the Jafar Proceedings.

57. Fund IV also submitted that it was necessary to treat the evidence adduced by the AH Parties as to the supposed costs of their discovery process with caution. They argued that the AH Parties' repeated

objections to including Fund IV's proposed AH custodians on the ground that doing so will result in the duplication of documents and data failed properly to reflect the impact of the de-duplication process. If they were correct about the high risk of duplication, once the de-duplication process had been applied, there will be few extra documents and very little will be required of the AH Parties. If they were not right about the risk and level of duplication, however, there will be a substantial volume of additional unique data that the AH Parties are refusing to process. Furthermore, to date the AH Parties had processed only a very small proportion of their data so Mr Conway's evidence was based only on speculation as to the possible position upon processing. It was not based on any reliable empirical observation or testing. In addition, Fund IV submitted (in reliance on the evidence of Mr Theron) that the rates identified in Conway 1 for the processing of data by PwC were high. They were excessive and could not be considered to be market rates in circumstances where the JOLs (senior employees of PwC) had engaged PwC to carry out eDiscovery (without having provided any explanation as to why this was done or the basis for the fees).

58. Fund IV relied on many of the reasons and justifications put forward by the GHF Parties in respect of the custodians they had both identified. I therefore do not need to summarise the evidence or repeat those arguments here. But there were a number of additional points made by Fund IV (the evidence being in Hayward 5) which I should briefly mention:

(a). Anuscha Ahmed – Fund IV relied, as the GHF Parties had recently done, on Mr Hayward's belief that Ms Ahmed had been heavily involved in the affairs of the Global Investment Committee and was likely to hold a great number of documents relevant to the misappropriation of funds from NPEF IV as well as her reported role as a member of what Mr Hayward described as "*Mr Naqvi's "Central Execution Team*", said to be a group of employees who were most loyal to Mr Naqvi. Fund IV also relied on emails to Ms Ahmed from Mr Jafar to notify AH of the assignment of his rights to Auctus.

(b). Shahid Naqvi – he was believed to have received misappropriated funds from Abraaj Group entities.

(c). Khawar Mann - he had been named as head of Healthcare in a list of interviewees for an investigation into Abraaj with the code name Cheetah 1, was an addressee of an email from the Gates Foundation and attended the 19 February 2018 board meeting.

(d). Matthew McGuire – he had been COO of the Abraaj Group and a director of AIML from 3 April 2018.

(e). Asim Hameed – he had been a director of Silverline Holdings (***Silverline***), a company through which Mr Naqvi had misappropriated money including from NPEF IV and of which Mr Naqvi was the sole shareholder. He had also been an associate director of and received funds from AIML.

(f). Faaris Naqvi – he had apparently been the recipient of funds form Abraaj Group entities and was listed as a creditor of AH.

59. The AH Parties argued that the Fund IV's defences and claims based on misappropriation did not justify adding further custodians to those they had identified:

(a). in Fund IV's Amended Defence to the NPEF IV Proceedings, Fund IV had made various unparticularised allegations that AH had caused or facilitated the misappropriation of funds from NPEF IV.

(b). the case on misappropriation had, on any view, been very thinly pleaded. The AH Parties submitted that Fund IV had failed properly to plead a case supporting the allegations made in the third sentence of [16.2] of Fund IV's defence in the NPEF IV Proceedings that "*in excess of US$123,799,700 was due to the Fund from the Company and/or AIML by reason of misappropriations of its funds.*" The allegation had not been particularised by reference to certain identified payments said to constitute that sum or why the relevant payments were made so that the AH Parties did not know how the sum was constituted or why it was to be treated as a misappropriation. The Amended Defence failed to identify any specific conduct which AH was alleged to have done, nor did it articulate any cause of action against AH arising in connection with AH's alleged involvement in misappropriation of funds from NPEF IV. This was in contrast to the position adopted by the GHF Parties who had pleaded a detailed case identifying specific payments. Further, none of NPEF IV's proposed custodians appeared to have held any position at AH.

(c). discovering documents from custodians who Fund IV only believed to have been involved in misappropriation of funds from NPEF IV, without any connection to AH, did not form part of the AH Parties' discovery obligations. The AH Parties were not required to conduct a general investigation into the misappropriation of NPEF IV's funds within the Abraaj Group under the guise of discovery.

(d). it would be impossible for a document reviewer to know whether a particular document was relevant to allegations which had not been broken down in terms of payment dates, payees, and reasons for the payments.

(e). if Fund IV wished to pursue this issue, they should properly plead a case. Before then, the AH Parties would provide copies without any date range restriction of all the Finance Data they had. Fund IV will then be able to review this financial information, with details of the relevant payments, together with NPEF's own bank statements and financial records, and the properly plead and particularise its case, if it can do so.

(f). in these circumstances, the AH Parties objected to the inclusion in the list of issues relating to the NPEF IV Proceedings (as issue 52) of the following issue proposed by Fund IV: "*As of 27 December 2017, had at least US$150.8 million been wrongly misappropriated from [NPEF IV] and/or GP8*".

60. Fund IV argued that the AH Parties were wrong on this point and that their position was overstated. The AH Parties were wrong to say that they could not reasonably be expected to provide discovery on the misappropriation issue at this stage and that it was first necessary for details of how and when the misappropriations arose to be pleaded out. The issue was raised and joined in the pleadings as currently drafted and the parts of the pleading to which the AH Parties had referred had not been struck out. As the reservations in their pleadings had made clear, Fund IV were unable to provide the required further particulars in circumstances where the relevant documentation that would enable them to do so was held by the AH Parties. Fund IV submitted that the pleadings were sufficient to allow discovery to be conducted and issue 52 in the list of issues relating to the NPEF IV Proceedings was appropriately framed for the purposes of discovery. The AH Parties simply had to identify documents relevant to the use of Fund IV's monies and how much was owed to them by AIML and AH.

61. I have already explained the AH Parties' position in relation to the GHF Parties' reasoning with respect to each of the GHF Custodians. The AH Parties' objections apply equally to Fund IV's

position where it follows the GHF Parties' reasoning. But the AH Parties also objected to the separate arguments relied on by Fund IV. The following is a summary of their main points:

(a). Ovais Naqvi – as noted above, the AH Parties argued that Fund IV's unparticularised allegations of misappropriation against AH did not justify the discovery of related documents until the facts on which the claim was based were properly particularised. Until then, Fund IV's requests for documents must be treated as an unjustified fishing expedition. Moreover, Fund IV's pleaded case against AH, alleging involvement in the misappropriation of funds, did not allege that Mr Ovais Naqvi was involved in the misappropriation of funds from Abraaj Group entities or received any funds as a result of any such misappropriation for which AH was liable.

(b). Khawar Mann – the AH Parties argued that the 19 February 2018 board meeting was now irrelevant given Mr Jafar's Amended Statement of Claim. Affirmation or rescission of the Jafar Loans was no longer an issue in dispute, or alternatively, an issue in dispute the determination of which was necessary for the fair disposal of the Jafar Proceedings, since Mr Jafar did not advance a positive case on the rescission point. Fund IV had relied on the AH Parties averment that Mr Mann had sent correspondence that had been approved by Mr Naqvi to argue that there might be draft versions of relevant documents in Mr Mann's possession that Mr Naqvi never received. But that, the AH Parties argued, was irrelevant to the issues in dispute. The relevant issue was whether Mr Naqvi had exercised plenary control over the AGHF. The fact that Mr Mann might have draft versions of documents which were latterly approved by Mr Naqvi has no bearing on that issue.

(c). Asim Hameed – it was insufficient for Fund IV to rely on Mr Hameed's asserted association with Silverline. Fund IV did not plead any allegations in respect of Silverline and its role in misappropriation of funds in its Amended Defence in the NPEF IV Proceedings.

62. There were, as I have noted, also four additional custodians that Fund IV had identified. Fund IV argued that Mr Ghassemi and Mr Patel were important custodians because they appeared to have had an involvement in the operation or investments of NPEF IV. On that basis, they were likely to have documents specifically relevant to Fund IV:

(a). Mr Ghassemi had been a managing director at Abraaj from 2016 to 2019 and had previously been a member of its investment team. He had been a director of Abraaj Capital from September 2005 to April 2015. He had been identified in a report prepared by Deloitte in April 2018 code named the Cheetah 2 report as a key member of the Abraaj management team (which was supported by other documents) who had knowledge of NPEF IV's operations or was involved in one or more of NPEF IV's investments.

(b). Mr Ashish Patel had also been a managing director at Abraaj but for a longer period, from 2011 to 2019. He had also been identified in the Cheetah 2 report as a key member of the Abraaj management team (which was once again supported by other documents) who had knowledge of NPEF IV's operations or was involved in one or more of its investments.

(c). Mr Siddiqui was a senior Abraaj employee whose involvement with the Abraaj Group went back to 2004. He was general counsel and had been interviewed as part of the Cheetah 2 report. Fund IV submitted that he was somebody who had knowledge of the alleged co-mingling and misappropriation of Fund IV's assets so that he may have relevant data. The test of whether it was reasonably likely that these individuals held unique documents which were relevant to the issues in dispute was satisfied in each case.

(d). Ms Guenez had been Mr Naqvi's secretary and was allegedly a recipient (either directly or indirectly) of misappropriated funds from Abraaj Group entities.

63. Mr Smith QC argued that the Fund IV had failed to (and had made no attempt) to link the proposed additional custodians to the issues in the case. It was not enough to say and show that a custodian was likely to hold documents relevant to the operations, finances, and collapse of the Abraaj Group. It was necessary to show that they were likely to hold documents relevant to the issues in the Related Proceedings. This is what the GHF Parties and Fund IV had failed to do.

64. Mr Smith QC said that if the Court ordered the search of all the additional custodians identified by the GHF Parties and Fund IV there was an acute risk of further substantial expense and delays. Where there was a high probability of a custodian having relevant documents, devoting a substantial amount of time to searching their documents was justified. But where there was only a low probability, much less, if any, time was justified. The Court had to balance the time and costs and effort involved in reviewing vast amounts of further data against the likelihood of significant, unique, relevant

documents being produced. Accordingly, the Court should give considerable weight when undertaking the balancing exercise to the AH Parties' evidence that the majority of documents that had been identified by the Fund Parties as the basis for their claim that additional custodians needed to be added to the list of custodians would be documents that would be discovered in any event because they would be in the documents of the custodians identified by the AH Parties.

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – Mr Jafar's position

65. As regards the discovery to be given by the AH Parties, Mr Jafar submitted that none of the parties should be required to enlarge on the data sources or custodians which they are proposing to search in the absence of credible evidence that the additional data sources or custodians could be expected to yield something which would warrant the associated expense and delay. The key question should be whether, on the evidence, there was a significant chance that limiting the discovery parameters in the manner proposed by Mr Jafar or the AH Parties will cause an injustice to the Fund Parties.

66. Mr Bloch QC noted that Mr Jafar had adduced evidence from Mr Montgomery-Swan (who was someone who was able to form a reliable view on the discovery process, based on his own first-hand experience as an employee within the Abraaj Group, his involvement in the investigation of the Abraaj Group's affairs and his expertise as an IT specialist) as to what documents had been created, and what discovery process was most likely to produce relevant documents in a cost-effective and proportionate manner. Mr Jafar considered that this evidence supported a more limited and narrower review than that proposed by the AH Parties. Mr Jafar proposed six custodians in reliance on the evidence contained in MS1 at [71], which set out the custodians that would according to Mr Montgomery-Swan yield sufficient discovery without the omission of material evidence. These were Mr Naqvi, Rafique Lakhani, Waqar Siddique, Ashish Dave, Ammar Azhar and Sudeep Joshi.

67. All of these save for the last two individuals were included in the AH Parties' list of custodians. As I have noted above, the GHF Parties have also argued that Mr Azhar be treated as a custodian. As the AH Parties noted, Mr Jafar had included Mr Joshi as a custodian based on Mr Montgomery-Swan's evidence but had not spelled out why Mr Joshi was considered to be reasonably likely to hold unique documents which were relevant to the issues in dispute. MS 1 at [75] merely stated that all his six suggested custodians were "*trusted individuals … who facilitated [Mr Naqvi's] schemes and executed his decisions*".

68. In his written submissions, Mr Bloch QC had said that Mr Jafar fundamentally objected to the Fund Parties' position that further custodians were required in addition to those proposed by the AH Parties. The GHF Parties' and Fund IV affidavits did not make out a *prima facie* case for the inclusion of any of the custodians beyond the nineteen accepted by the AH Parties. Mr Jafar challenged the position taken by the GHF Parties and Fund IV and submitted that "*fundamentally*" neither Mr Lewis nor Mr Hayward had given any considered evidence as to the time and cost ramifications of including the substantial number of further custodians they had identified, and how that was to be weighed against the value that would realistically be derived from their inclusion. In any event, the evidence of Mr Montgomery-Swan should be preferred. He was able to give evidence drawn from his own extensive experience and understanding of the functioning of Abraaj, which was the best possible evidence to enable the Court to determine which custodians should be interrogated. Furthermore, he had given clear and credible factual evidence, based on his direct review of the Abraaj email boxes, that Mr Naqvi tended to email (or copy in) a small list of his close associates.

69. Mr Jafar considered that the costs implications of the Fund Parties' proposals for further custodians were "*horrifying*." Mr Montgomery-Swan had estimated the cost implications of the various proposals and had set out his updated views in three tables in MS2 at [31]. Mr Jafar had summarised Mr Montgomery-Swan's cost estimates assuming the application of keyword searches by content in his written submissions as follows. If Mr Jafar's proposal was implemented 282,208 documents would need to be searched, the cost of the manual review would be US$3,121,220 and the cost of the review using TAR would be US$1,560,610. If the AH Parties' proposal was implemented, one million documents with a total data size of 1,261GB would need to be reviewed, with a cost of US$11,060,000 for manual review and US$5,350,000 for reviewing with TAR. If the GHF Parties' proposal was implemented, 20,980,000 documents with a total data size of 10,601GB would need to be reviewed, with a cost of US$232,038,800 for manual review and US$116,019,400 for reviewing with TAR. If Fund IV's Proposal was implemented, 3,750,000 documents with a total data size of 4,186 GB would need to be reviewed, with a cost of US$41,475,000 for manual review and US$20,737,500 for reviewing with TAR. Mr Jafar also noted that the other parties' proposals had significant implications for the discovery timetable and the likely trial date. The AH Parties' proposal could be performed within a matter of 4-6 months, but the GHF Parties' and the Fund IV's proposals would take much longer and significantly and detrimentally delay the trial date.

70. However, during the hearing Mr Bloch QC indicated that Mr Jafar accepted that the scope of the discovery exercise to be conducted by the AH Parties was primarily a matter for them, provided that

their chosen approach would not derail (and unduly delay) the Jafar Proceedings. Mr Bloch QC said that Mr Jafar's only concern was that whatever was done would not be prohibitively expensive or take a prohibitively long time. He said that Mr Jafar was generally satisfied that the approach proposed by the AH Parties would not derail the Jafar (or the Related) Proceedings, although he did have a serious concern as to whether the discovery exercise could be properly conducted using TAR. Mr Bloch QC submitted that a critical issue was whether TAR could operate effectively so as to allow the discovery process proposed by the AH Parties to work. The problem with TAR was that it needed clear and simple instructions and there was a serious concern that the current list of 178 issues could not effectively be taught to the computer conducting the TAR. After having dropped their proposal for a longstop, the AH Parties were in effect just proposing to give the TAR process a trial to see how it worked. This made sense provided the AH Parties were at least confident the process will be effective and efficient. Mr Bloch QC argued that it was not clear on what basis the AH Parties had concluded that they were able effectively to conduct a TAR-assisted exercise – an exercise they did not believe they could do as at June 2021 – and noted there was no reference in Conway 1 or Conway 2 to a meaningful pilot exercise having been conducted, which might have instilled sufficient confidence that such an exercise was feasible. Mr Jafar had noted and proposed an alternative approach. This involved the filtering of the initial universe of data by using key word search terms and appropriate Boolean connectors so as to reduce and produce a manageable number of documents which could then be reviewed by the other parties in whatever way they thought fit. Nonetheless, as Mr Bloch QC put it during his submissions, Mr Jafar recognised that "*if the AH Parties [were] truly confident that their proposal [was] going to work,… it [was] likely to commend itself to the Court*."

71. But Mr Jafar did not support the wider discovery being sought by the GHF Parties and Fund IV because this would create a serious risk of the Jafar (and the Related) Proceedings being derailed. Mr Bloch QC supported Mr Smith QC's submissions on the issue of further custodians.

The parties' submissions as to who should be a custodian for the purpose of searching documents in Mr Jafar's possession, custody, or power

72. As regards Mr Jafar's own discovery, Mr Bloch QC noted that Mr Jafar was not seeking any order from the Court limiting the inquiries that he was required to make or the extent of his obligations with respect to discovery. He said that it was not in Mr Jafar's interests that his discovery exercise be subject to challenge (so as to avoid the possibility of adverse inferences being drawn against him

by reason of a lack of or failure in his discovery) and so he was, as a general matter, prepared to provide discovery in the manner requested by the other parties.

73. Mr Jafar's position was set out in Barrie 4 at [12] – [19]. Mr Jafar initially proposed two custodians. Himself and Mr Varoujan Nerguizian. Mr Nerguizian is Mr Jafar's banker and CEO of the Bank of Sharjah. In response to the request made by Fund IV, Mr Jafar agreed to add as custodians various external legal advisers and other professionals being Mr Tushar Singhvi, Mr Richard Negele, Mr Jalil Asif QC and Mr Richard Ernest. Mr Barrie confirmed that since Mr Jafar now had in his possession all the files and documents of Mr Ernest as well as those of Ms Margot MacInnis and Mr Hugh Dickson, he will be able to and will provide discovery of those documents. Mr Bloch QC noted that Mr Jafar reserved the right to seek the additional costs involved in having to search these additional custodians in the event that he succeeded at trial and that discovery would be subject to the arrangements to be put in place to protect privileged documents.

74. Mr Bloch QC confirmed that Mr Jafar was prepared to provide discovery going back to 2002 (although once again he reserved the right to seek the additional costs involved in having to do so in the event that he succeeded at trial).

75. The AH Parties, the GHF Parties (see Lewis 9 at [113] – [117]) and Fund IV (see Ogier's letter to Nelsons dated 10 March 2022) also wished to add as custodians one or both of Mr Jafar's two sons, Mr Badr Jafar, and Mr Majid Jafar.

76. The AH Parties' position was that, at the very least, Mr Jafar should include Badr Jafar as one of his custodians. Badr Jafar was a non-executive director at AH at the time that Mr Jafar made the Jafar Loans, and the AH Parties considered that it was a reasonable inference that Mr Jafar (who held interests in Abraaj investments) and his son discussed matters relating to the Abraaj Group and the Jafar Loans. The AH Parties said that it was material that Badr Jafar appeared not to have used an Abraaj email address, when he was copied into certain relevant email correspondence to which reference is made in AH's Re-Amended Defence in the Jafar Proceedings. The AH Parties argued that in these circumstances, it was obvious that Badr Jafar was a potential repository of unique relevant documents discovery of which was necessary for the fair disposal of the Related Proceedings.

77. Mr Lewis had in his evidence said that both Mr Badr Jafar and Mr Majid Jafar should be included as custodians without giving an explanation as to why.

78. Mr Hayward did not deal with Mr Badr Jafar and Mr Majid Jafar in his evidence, although as I have said Fund IV's attorneys, Ogier, had in correspondence indicated that they should both be included as custodians. At the hearing, Mr Ayres QC said that Fund IV reserved their position as to whether documents held by Mr Badr Jafar and Mr Majid Jafar could be said to be in Mr Jafar's power. Mr Jafar's evidence had been filed at the last minute so that Fund IV had not had the opportunity properly to consider it or file responsive evidence. The picture was incomplete and Fund IV needed to establish the facts before finalizing their position. Mr Ayres QC said that Fund IV understood that Mr Badr Jafar and Mr Majid Jafar may have performed an agency role on behalf of Mr Jafar in arranging the Jafar Loans which could be grounds for establishing that Mr Jafar could require them to produce documents and therefore that such documents were in his power. Mr Ayres QC also noted that Fund IV may wish to seek discovery from Mr Badr Jafar and Mr Majid Jafar as non-parties. He said that in the circumstances he was not asking the Court to make any ruling on this point at this stage.

79. Mr Jafar's position was recorded in the evidence of Mr Barrie (in Barrie 4 at [17] and [18]). This was that the documents held by his sons were not in his possession, custody, or control so that they could not be made to be custodians. Nonetheless, Mr Jafar confirmed that all relevant communications with his two sons which he held would be produced by him and their communications with Mr Nerguizian which he holds will also be produced by him. Mr Jafar had also filed shortly before the hearing an approved but unsworn affidavit (which Mr Bloch QC undertook would be sworn and filed shortly after the hearing) to the same effect.

80. Mr Bloch QC submitted that the GHF Parties and Fund IV had adduced no evidence to show and had failed to establish that the documents of Mr Badr Jafar and Mr Majid Jafar were documents in Mr Jafar's power (they were clearly not in his possession or control). It was necessary for Mr Jafar to have an immediately enforceable legal right to obtain the documents and he did not. His adult sons were under no obligation to provide documents to him. Furthermore, the English authorities, which Mr Bloch QC submitted this Court should follow, established that a party could not be ordered or required to use best endeavours or take steps to obtain documents which were not within his power. Mr Bloch QC submitted that if his sons did not hold documents that could be treated as being within Mr Jafar's power, the Court could not make an order that required those individuals to be treated as Mr Jafar's custodians for the purpose of discovery. Mr Bloch QC submitted, in reliance on the

judgment of the English Court of Appeal in *Dubai Bank v Galadari*, The Times, 14 October 1992, that under the Rules of the Supreme Court, on which the Grand Court Rules were based, the English court had no power to require a party to bring documents into his or her possession, custody or power. In that case the judge had made an order that a party use all lawful means available to it to obtain possession custody or power of the documents. The Court of Appeal had allowed an appeal and held that the judge had no jurisdiction to make such an order. Furthermore, in *Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation* [2022] 1 WLR at [57] – [59], Peter MacDonald Eggers QC sitting as a deputy High Court judge had held that the court did not have jurisdiction to order a party to exercise "*best endeavours*" to obtain a document which was outside its control and held by a third party. He said this:

> *"57 In Phones 4U v EE Ltd [2020] EWHC 1921 (Ch), Roth J considered the decision in Dubai Bank v Galadari (No 6), but made it clear at para 61 that the order sought was "for a step towards the practical exercise of that established jurisdiction, by seeking to identify documents that fall under the defendants' control" (this was affirmed by the Court of Appeal at [2021] 1 WLR 3270, para 31). Accordingly, Roth J was not suggesting that the court could extend the jurisdiction to order disclosure of documents which are not in a party's control. See also Unicredit Bank AG v Euronav NV [2021] EWHC 1753 (Comm) at [21]–[23]. Cf Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB) at [30]–[35].*
>
> *58. Of course, the court does have an express power under CPR r 58.14 to require a party to exercise best endeavours to obtain documents from third parties even though the documents are not in that party's control, but that power exists only "in proceedings relating to a marine insurance policy" and often or invariably only in respect of "scuttling allegations" (Probatina Shipping Co Ltd v Sun Insurance Office Ltd [1974] QB 635, 641–642). This, therefore, is an exceptional power and the absence of any rule in the CPR permitting a similar order to be made in other circumstances indicates that there is no such wider power.*
>
> *59. Therefore, the court has no jurisdiction to make an order requiring a party to exercise best endeavours to obtain or request a third party to produce documents for disclosure which are not already in the party's control."*

The parties' submissions as to who should be a custodian for the purpose of searching the documents held by the AH Parties – discussion and decision

81. As I have already noted, it seems to me that the Court, when settling a suitable *modus operandi* for the discovery process, must balance the need to find all properly discoverable documents and data against the cost and time that will need to be spent in searching for and obtaining them. The Court

must focus on finding a fair process that is reasonably likely to find the discoverable documents at a proportionate cost and with minimum delays to the progress of the proceedings.

82. As I have also already noted, whether a document is relevant for discovery purposes depends on whether the information which it is reasonable to suppose it contains is relevant to a party's case and the reference to a party's case is to be understood in wide terms, as including the general basis on which the claim is made or the general refutation on which the defence is based. Documents can be relevant for this purpose and in this sense even if the particular point to which it relates has not (yet) been pleaded.

83. Cost and time are certainly important factors in the equation and taking them into account may require and result in the justice on offer "*being rougher*." As Jacob LJ said in *Nichia Corporation v Argos Ltd* [2007] EWCA Civ 741 at [51] (an authority cited by Mr Jafar):

> *"[A] system which sought such "perfect justice" in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with a lesser procedure even though it may result in the justice being rougher. Putting it another way, better justice is achieved by risking a little bit of injustice."*

84. This is a case in which the substantial volume of data in the hands of the AH Parties makes it imperative to ensure that the expense of the process is proportionate and contained. There is a serious risk that a failure to do so will make the Related Proceedings unaffordable and unmanageable. The objective of a just and fair process will thereby be undermined. The risk of substantial delays has the same effect.

85. But fairness remains an important factor as well, particularly in a case such as this one where (a) the parties who are pressing for more limited discovery are the plaintiffs while those who wish to expand the list of custodians are the defendants who are concerned to ensure that they have a proper opportunity to establish their defences (that is without engaging in a fishing expedition and looking for documents without any basis for thinking that they have a real defence and that the documents may be relevant to it) and (b) importantly, those defendants currently do not have access to their own documents and data and need to ensure that the discovery process is sufficiently wide ranging to capture as many of the relevant documents as possible.

86. In relation to each disputed custodian therefore it is necessary to ask (a) what documents and data the custodian is reasonably likely to have and the volume and form of those documents and that data; (b) the likelihood that the information which it is reasonable to suppose is contained in those documents and data will be relevant to a party's case, understood in the wide terms I have described above; (c) the likelihood that the information will be held by and discovered from one of the AH Custodians or another custodian who has been added to the list; (d) the likely additional cost of adding the custodian in question and (e) the amount of additional time that will need to be spent in dealing with and reviewing the custodian's documents and data. With the answers to these questions, the Court can then balance the factors identified above and form a view as to whether the addition of the custodian is justified in all the circumstances.

87. It is also relevant in my view to take into account the fact that discovery can and will be conducted in stages. As I have noted, the Discovery Protocol makes it clear (in paragraphs 2 and 3) that the parties remain subject to their general obligation to give discovery in accordance with GCR, O.24, rule 1(1) and that it is without prejudice to the parties' rights to apply to the Court for the disclosure of any document in a party's possession, custody or power that is properly discoverable in the Related Proceedings. Accordingly, if it turns out that the documents and data produced as a result of the review of the data held by the selected custodians indicate that another custodian whose documents has not been searched held relevant documents it will be possible then to arrange for a search of that further custodian's data and documents, and probably to do so on a more focused and targeted basis.

88 I have considered the evidence of each of the parties on an equal footing and without giving particular weight to the evidence of the JOLs. As they acknowledged, they were not seeking or entitled on this application to the deference that the Court shows to the commercial or professional judgments of officeholders when considering sanction applications or other applications relating to their conduct of the liquidation.

89. I have concluded that there is sufficient evidence to justify the use of TAR and that the approach proposed by the AH Parties is reasonable and proportionate. I have also not been persuaded that Mr Montgomery-Swan's evidence that only the six custodians he identified were needed should be preferred to the evidence of Mr Conway, Mr Hayward, and Mr Lewis. Mr Montgomery-Swan clearly has considerable knowledge and experience of reviewing Abraaj data and documents and his detailed accounts of the relevant data sources and what was required to undertake the discovery process were helpful. I took note of his modelling and estimates of the number of documents that each of the

alternative approaches would generate and the likely costs involved. But inevitably he was required to apply his judgment and it was often unclear as to how this had been done. One example will suffice. At [129] of MS1 he noted that he had "*modelled, albeit with an element of extrapolation (owing to the complexities of the exercise) the search terms for file content searches* ..."....". Having carefully reviewed all his evidence, I decided that it was not safe or appropriate to rely on his evidence or opinions to justify a very limited discovery exercise and to ignore the contrary evidence of the other parties.

90. I have carefully considered the parties' evidence and submissions and, taking into account the factors and adopting the approach I have described above, have concluded as follows:

(a). Anuscha Ahmed – she should be added. The evidence indicates that she is likely to hold unique documents relevant to senior level decision making with the Abraaj Group including in relation to the Global Investment Committee and Mr Naqvi's role. As I have noted, the emails produced by Mr Lewis show that she made notes of meetings and sent them to herself via her emails. The evidence indicates therefore that it is likely that she will hold potentially significant and relevant documents that will not be discovered by looking at communications between Mr Naqvi and Abraaj Group personnel and the relevant boards of directors. It is clear that this information will be relevant to the Control Issue and Issue 1(d) of the GHF Proceedings list of issues. It also appears that her involvement was for a relatively limited period so that the volume of documents and data that she holds will not be substantial.

(b). Ovais Naqvi – he should not be added. His management role was unspecified and it was certainly not established that he had undertaken any relevant or significant tasks. His family connections to Mr Naqvi were not particularised and it was mere speculation to suggest that he would have relevant documents. His alleged receipt of misappropriated funds was also unparticularised and was insufficient with the other matters relied on to justify the additional expense to be incurred by searching his data and documents.

(c). Raj Morjaria – he should not be added. The evidence did not establish that it was likely that he would have unique documents which would not be held and captured by the searches of the AH Parties' custodians. Furthermore, as I note below, I have decided to include Mr Mann, who was the CEO of AGHF and would therefore be expected to have received all or most of the documents relating to AGHF platforms' finances, governance, and operations which it was said that Mr Morjaria held. In the circumstances, I am not satisfied that excluding Mr Morjaria risks seriously prejudicing the GHF Parties' conduct of their defence and I consider that the evidence relied on is insufficient to justify the additional expense to be incurred by searching his data and documents.

(d). Shahid Naqvi – he should not be added, for the same reasons as those I have given in relation to Mr Ovais Naqvi.

(e). Badruddin Hilal – he should not be added. The evidence did not establish that it was likely that he would have unique documents which would not be held and captured by the searches of the AH Parties' custodians. For example, as the AH Parties submitted, the important weekly reports that Mr Hilal prepared were sent to Mr Dave who is an AH Custodian. Furthermore, it seems to me that Mr Mann, who was the CEO of the AGHF and a partner of Abraaj Capital Limited, is likely to have many if not all of the documents which Mr Hilal would have received in his capacity of the CFO of AGHF and a director of Abraaj Capital Limited.

(f). Khawar Mann – he should be added. It seems to me that the evidence establishes that Mr Mann held senior positions in Abraaj entities, was involved since the early days of AGHF, was directly involved in engaging with investors in connection with the return of uninvested capital i– late 2017 - early 2018 and had a close working relationship with Mr Naqvi that make it likely that he held documents and data that were relevant to the Control Issue, the structure and operation of AGHF, and the funding and financial position of AGHF. I consider that on balance his inclusion and the additional cost involved in searching his data are justified. I am not satisfied that the evidence shows that it is likely that a material percentage of his data will be held by the AH custodians (for example Mr Naqvi).

(g). Matthew McGuire – he should not be added. The evidence did not establish that it was likely that he would have unique and contemporaneous documents which would not be held and captured by the searches of the AH Parties' custodians.

(h). Ammar Azhar – he should not be added. The evidence did not establish that it was likely that he would have unique documents which would not be held and captured by the searches of the AH Parties' custodians or Mr Mann and Ms Ahmed. There was likely to be very substantial and probably total overlap with Mr Mann who was the CEO of AGHF and was only a director of ADV1 after June 2018.

(i). Asim Hameed – he should not be added. It was admitted by the GHF Parties that he held a relatively low-level role (his role was predominantly administrative) and the evidence was insufficient to establish that he was likely to have unique documents which would not be held and captured by the searches of the AH Parties' custodians so as to justify the additional expense involved in searching his data.

(j). Ahsan Naqvi – he should not be added, for the same reasons as those I have given in relation to Mr Ovais Naqvi. It seems to me that the emails between him and Mr Naqvi are not sufficient to justify the additional expense that would be incurred in searching his data and documents.

(k). Faaris Naqvi – he should not be added, for the same reasons as those I have given in relation to Mr Ovais Naqvi.

91. As regards Fund IV's four further custodians, I have concluded as follows:

(a). I accept Fund IV's argument that the pleadings in their current form are sufficient to allow some discovery to be conducted in relation to their defences based on the alleged misappropriation of assets from NPEF IV as currently formulated in Fund IV's pleadings. It is true that those pleadings are based on assertion (that NPEF IV's funds were paid away improperly and that AH facilitated or caused the continued misappropriation including through its role as financier for AIML) and inference (that there was misappropriation, based on the huge amount of sums admittedly owed to NPEF IV and transferred from it in circumstances indicating that the funds were needed to facilitate and cover up the fraud perpetrated by Mr Naqvi and his acolytes, on the absence of any proper justification for the transfer of the funds or indication that the funds were paid away for a legitimate purpose such as by way of a loan and on the results of certain third party investigations and decisions which had concluded that there had been a misuse of NPEF IV's monies). It is also true that the particulars provided to support these assertions and inferences are limited and that no particulars are provided as to the date, amount and purpose of individual payments that are challenged or as to who did what on behalf of AH to make it liable to NPEF IV for the asserted misappropriations. It is also correct, as the AH Parties assert, that Fund IV has not pleaded a cause of action against AH which would result from AH's alleged facilitation or causing of the misappropriation, so that the AH Parties are unable to see the precise legal basis for the asserted liability of AH to NPEF IV (it remains to be seen whether Fund IV needs to issue a counterclaim to make good a cross-claim against AH – and AIML – rather than simply relying on a defence to the claims made against it).

(b). however, while these deficiencies will need to be dealt with in due course, they do not and should not, in my view, disentitle Fund IV from having the benefit of some discovery at this stage – where it is clear that they need to have discovery in order to be able to do so (i.e., to deal with these deficiencies). At this stage, Fund IV make clear in their pleadings, they cannot provide further particulars (and cannot reasonably be expected to do so) without the benefit of and until after discovery (Fund IV also note that the AH Parties have failed to provide responses to Fund IV's request for further and better particulars of the funds missing from NPEF IV as of June 2017). Fund IV's pleadings currently stand intact and have and are not, as they point out, subject to a strike out or other challenge at this stage.

(c). in my view the limited particulars currently provided in the pleadings are sufficient to identify the nature and basis of Fund IV's defence for discovery purposes. The related documents are discoverable in accordance with the test articulated by Mr Justice Colman to which I refer above. In the circumstances, while some care will need to be taken to ensure that the discovery process is properly focused, I agree with Fund IV that, despite the concerns expressed by the AH Parties, discovery can be conducted by identifying documents that relate to (i) payments made by NPEF IV to AIML and AH save for those which were made pursuant to a loan agreement or other proper authority, (ii) the decision making by those acting for NPEF IV relating to those payments, (iii) the state of indebtedness as between NPEF IV and AH and AIML, and (iv) the use to which the funds paid by NPEF IV were put. The provision of only the basic Finance Data is in my view insufficient. It will not provide Fund IV with the range of documents they need to see in order to be able to further formulate their defences. Providing more documents beyond the Finance Data should reduce cost and expense by giving Fund IV access to a wider range of data in the first round of discovery thereby obviating the need for wide ranging supplemental requests for further searches. The discovery at this stage from custodians likely to hold unique documents relevant to these matters is likely to enable Fund IV to amend and particularise their defences more rapidly and efficiently than if they had to wait for a phased discovery process to produce the key documents relevant to their misappropriation defence. They should be able after the first stage of the discovery process, perhaps after having identified a narrow range of further searches that need to be done, be in a position to amend and better particularise their pleadings.

(d). I do not expect the AH Parties, nor do I consider that the AH Parties will need, to conduct a general investigation into the misappropriation of NPEF IV's funds. They will instead, preferably with the agreement of Fund IV, need to formulate suitably targeted searches to discover documents that relate to the issues raised by the misappropriation defence.

(e). it follows from what I have said that I also accept Fund IV's submission that issue 52 in the list of issues for the NPEF IV Proceedings is appropriate and may be included.

(f). Mr Patel should be added as a custodian but Ms Guenez, Mr Ghassemi and Mr Adnan Siddiqui should not be custodians. It seems to me that the evidence shows that it is likely that Mr Patel will hold documents and data relating to NPEF IV's operations and investments, which are likely to provide information regarding the payments made by NPEF IV, in particular what payments were made, when and why, and the extent of the commingling of its assets with AH, AIML and other members of the Abraaj Group, which information is relevant *inter alia* to NPEF IV's misappropriation defence, the commingling issue and NPEF IV's financial position, which are issues in the NPEF IV Proceedings. It also seems to me that the evidence is sufficient to establish that this information is likely not to be held by the AH Custodians or the other custodians who I have added to the list of custodians. But Mr Ghassemi appears to be likely to have the same information so that there is no justification for also adding him as a custodian and Mr Patel is to be preferred because he was continually in office for a longer period. I also do not think that adding Mr Siddiqui can be justified if Mr Patel is included as a custodian. The evidence does not show that Mr Siddiqui is likely to have materially different documents or data and consequently the extra cost that would be incurred in searching his documents and data cannot be justified. The evidence relating to Ms Guenez was very limited. Her position as Mr Naqvi's secretary and the unparticularised allegation that she received misappropriated funds do not establish that she is likely to hold relevant and unique documents and are insufficient to justify the additional expense to be incurred by searching her data and documents

The parties' submissions as to who should be a custodian for the purpose of searching documents in Mr Jafar's possession, custody, or power – discussion and decision

92. As Mr Bloch QC made clear, Mr Jafar is not seeking any order from the Court limiting the inquiries that he is required to make or the extent of his obligations with respect to discovery. The only issue which arises is who is to be included in Appendix G to the Discovery Protocol as Mr Jafar's custodians. In view of Mr Jafar's position as explained by Mr Bloch QC, that list will be, as the amendment to the definition of Custodians in paragraph 6.5 of the Discovery Protocol provided, non-exhaustive and without prejudice to Mr Jafar's discovery obligations.

93. Mr Jafar has agreed that he, Mr Nerguizian, Mr Tushar Singhvi, Mr Richard Negele, Mr Jalil Asif QC, Mr Richard Ernest, Ms Margot MacInnis and Mr Dickson will be custodians (although since Mr Jafar has in his possession all the files and documents of Mr Ernest, Ms MacInnis, and Mr Dickson he will be able to arrange for the searches to be done without the need to seek the assistance of these parties). As I understand it, Mr Jafar has agreed to conduct his searches for a date range starting on 1 January 2002.

94. The outstanding dispute relates to whether Mr Badr Jafar and Mr Majid Jafar should be treated as custodians. I agree with Fund IV that I should make no order at this stage on this issue. It would be premature and based on incomplete evidence.

95. It would in my view be wrong to decide the question of whether all or any documents and data held by Mr Badr Jafar and Mr Majid Jafar are to be treated as being in Mr Jafar's possession, custody, or power. The evidence filed by Mr Jafar is very limited and was filed very late. The other parties have not had a proper opportunity to file evidence in response. If the parties are unable to agree on the approach to dealing with the documents held by Mr Badr Jafar and Mr Majid Jafar, and the AH Parties, the GHF Parties and/or Fund IV wish to apply for an order that the documents held by Mr Jafar's two sons are discoverable, they may do so and file proper evidence in support of such an application, to which Mr Jafar would be able to respond. At that stage the Court would be in a position to decide the issue.

Date ranges for Email Data and File Data

96. The AH Parties originally proposed that only email data created between 1 March 2017 and 18 June 2018 (the date on which the JPLs were appointed) should be uploaded, with narrower date ranges to

be applied for certain custodians (as set out at [63] of the AH Parties' skeleton argument). The AH Parties selected this period on the basis that it covered the key events in the Related Proceedings, and therefore would in their view lead to the discovery of documents which were relevant to the issues in dispute in the Related Proceedings and material for their fair resolution. As Mr Smith QC explained during the hearing in response to a question from me, 1 March 2017 was selected because "*the relevant events [occurred between] December 2017 and January 2018 [and the date range goes] back nine months prior to [the earlier date].*" This was, Mr Smith QC submitted, a reasonable approach.

97. The AH Parties have subsequently agreed to extend the date ranges for certain searches (on certain defined issues) in response to a proposal made by the GHF Parties (as set out at [67] of the AH Parties' skeleton argument and in Carey Olsen's letter of 16 March 2022 at [20] — [25]). As Mr Lewis explained in Lewis 9 (at [78] – [83]), on 4 March 2022, the GHF Parties had made a detailed open proposal regarding the AH Parties' discovery. This was set out in Walkers' letter of that date. The proposal sought to narrow the searches to be carried out in respect of three specific issues, namely:

(a). Mr Jafar's knowledge/reliance on the Overarching Message/inducement (***Issue 1***).

(b). Mr Naqvi as AH's directing mind and will (***Issue 2***).

(c). the scheme by which AH financed the acquisition of AH shares (***Issue 3***).

98. For each of these issues, the proposal identified certain keywords and date ranges that should be applied for the purpose of the TAR and relevance review:

(a). as regards Issue 1, the GHF Parties proposed a date range of 2002 to 18 June 2018 and suggested a number of search terms.

(b). as regards Issue 2, the GHF Parties proposed a date range of ranging "*from at least June 2015 (with the AH JOLs to propose a precise date) to 18 June 2018*" and once again suggested a series of search terms.

(c). as regards Issue 3, the GHF Parties requested that the AH JOLs propose a date range to match their pleading that the scheme was in operation for *"several years*" and suggested various search terms.

99. The GHF Parties also put forward a variety of search terms (which were not issue specific) which would be used to search documents created in the period from 5 June 2015 to 18 June 2018 (subject to updating the list from time to time).

100. The AH Parties and the GHF Parties had further discussions and an agreed approach was settled. As was confirmed in the AH Parties' written skeleton, in addition to collecting data for the period 1 March 2017 to 18 June 2018, they would also undertake key word searches over wider date ranges with the key words designed to capture documents that may be relevant to the three issues set out above (which the AH Parties referred to as targeted searches):

(a). in relation to Issues 1 and 3, the AH Parties will conduct the targeted keyword searches (subject to certain typographical corrections) across the date ranges proposed by the GHF Parties for Issue 1 and as regards Issue 3 across the date range of 1 June 2015 to 30 April 2019.

(b). on Issue 2, the AH Parties rejected two of the keyword sets, which together generated over 500,000 hits, but have otherwise accepted the proposed date range of 1 June 2015 to 18 June 2018 for the remaining keywords (subject to certain typographical corrections).

(c). as regards the general searches, the AH Parties agreed to conduct a manual search of the documents set out in the Annex to Carey Olsen's letter dated 16 March 2022 by reference to the agreed search terms but only within the range of 1 March 2017 to 18 June 2018. As Carey Olsen noted in that letter:

> *"24. The GHF Parties have also proposed that the AH Parties search for certain categories of documents which will be provided "in any event". Our clients' position in respect of this proposal is as follows:*
>
> *a. The AH Parties are prepared to conduct a reasonable search for the categories of documents listed in the annex to this letter. Once again, our clients are prepared to agree to this with a view to narrowing the issues in dispute in advance of the CMC, and without admission as to whether there is any basis in the pleadings for these documents to be provided.*
>
> *b. As should be uncontroversial, however these are not the AH JOLs'*

documents, and there is no guarantee that the AH JOLs will be able to locate all of the documents in each category. The AH JOLs are not committing to undertake a limitless search for all the categories of document.

c. While these documents will not be subject to a relevance review, any privileged material will be withheld from discovery in the usual way.

25. We hope our clients' agreement to these additional targeted searches will resolve the dispute concerning the date ranges for Email Data. <u>With these additional searches in place there is no possible justification for extending the period for which Email Data will be reviewed (ie without reference to keywords) outside of the AH Parties' proposed date range of 1 March 2017 to 18 June 2018</u>."

101. Subject to what is said in paragraph 100 above and the qualifications set out in Carey Olsen's letter dated 16 March 2022 and the enclosed annex, the GHF Parties have accepted the AH Parties' start date of 1 March 2017 both as regards the main data collection exercise and as regards the search of the documents in the Annex to Carey Olsen's letter. But they stipulated that they did not agree that "*there is no possible justification for extending the period for which Email Data will be reviewed*" and reserved their rights in that regard.

102. Fund IV do not go along with that compromise. They do not accept that the start date for the main data collection exercise should be 1 March 2017. They argue for 1 June 2015. Fund IV argued that in respect of all issues other than Issue 1, discovery ought to be provided in respect of documents created between 1 June 2015 and 18 June 2018 (although they proposed shorter date ranges for four specified custodians as identified below). The misappropriation of NPEF IV's funds prior to 1 March 2017 remained relevant to Fund IV's defence. Fund IV argued that in the NPEF IV Proceedings, the JOLs had originally pleaded (and therefore accepted) that the alleged misappropriation of funds from NPEF IV commenced no later than 2012. The JOLs had, Fund IV claimed, amended their statement of claim in a transparently tactical attempt to buttress their position on discovery. The pleadings continued to refer to instances of misappropriation of funds from NPEF IV as early as 2014 (and, Mr Ayres QC contended, as could be seen from the DFSA decision notice he took me to in his reply submissions, the evidence showed that the misappropriation of NPEF IV's assets accelerated after the June 2015 financial year end). Despite these important earlier dates, Fund IV had, in the interests of the efficient resolution of the Related Proceedings, proposed a start date of 1 June 2015 (without prejudice to their right to seek discovery from an earlier period if the misappropriation of funds from NPEF IV remained in dispute following the provision of initial discovery and production). This was

subject to carve-outs for certain custodians in order to reduce the costs of discovery. A shorter date range of 1 September 2017 to 18 June 2018 could be used in respect of the emails of Charles Jonathan, Mr Montgomery-Swan, Paul Morris and Bisher Barazi. Those individuals were only engaged in investigations into the financial affairs of the Abraaj Group and the proposed date range should be sufficient to capture the contents of those investigations.

103. Mr Ayres QC submitted that Fund IV should be treated differently from, and were if necessary entitled to wider discovery on this issue than, the GHF Parties. This, he submitted, was because in particular AGHF was a much younger fund than NPEF IV. If, as was assumed to be the case, AGHF came into being in 2016 it was reasonable and to be expected that it would accept a date range starting in 2017. However, NPEF IV's position was different since it was not only an older fund but it also claimed that it had been the victim of asset misappropriation which had started as early as 2012. The AH Parties had recognised that their choice of 1 March 2017 had been based on pragmatic considerations and a broad-brush approach. Fund IV could, Mr Ayres QC said, have sought a start date going back to 2012 but they recognised that would be unreasonable. They had also adopted a pragmatic approach based on their case regarding misappropriation, and considered that a date after 2012 and before 2017 was appropriate. Their selection of 1 June 2015 was a reasonable and proportionate choice.

104. In relation to Issue 1, Fund IV accepted the date range agreed by the AH Parties and the GHF Parties but did not want to limit and fix once and for all the key words to be applied by the AH Parties when searching documents within that range. Fund IV were content for the AH Parties to use the agreed key words initially but would wish to be able to suggest and if necessary require that further searches be done by reference to additional key words on an iterative basis. This approach is agreed by the AH Parties.

105. Mr Smith QC submitted that Mr Ayres QC had been unable to justify a different approach from that agreed by the AH Parties and the GHF Parties. He argued that NPEF IV was not in a different position from the GHF Parties. Even though AGHF was a much younger fund, it had also been operating in 2015 and 2016, which were the years during which Fund IV sought the extended discovery. Mr Smith QC asked rhetorically why if the agreed targeted searches were good enough for the GHF Parties, whey were they not good enough for Fund IV? He submitted that Fund IV's proposal would increase the data to be searched and reviewed by two and a half times and that this was unjustifiable.

106. I sympathise with the Fund IV's concern that since on their case there were very significant payments and actions before 1 March 2017 which constituted and gave rise to the misappropriation of NPEF IV's assets it is necessary for discovery to be given of documents and data created before then. But even after taking into account Fund IV's evidence that the AH Parties' cost estimates may well be high and still somewhat speculative, it appears that requiring discovery to be given from 1 June 2015 in the manner proposed by Fund IV will cause very substantial additional expense. This is not seriously in dispute. It is a factor to be given considerable weight. So is the risk of material delays in the conduct of the proceedings (an issue of particular concern to Mr Jafar, as I explain below). It seems to me that extending the start date for the general collection of data to 1 June 2015 is unjustifiable. But I do consider that it would be proportionate to add a further targeted search of documents using search terms and keywords relevant to Fund IV's misappropriation defences to start from 1 January 2017 and continue to 18 June 2018. Fund IV will have the benefit of some discovery but in relation to documents created within a more limited date range than they would wish. I think that bringing forward the start date to 1 January 2017 is appropriate since it will allow all documents created during 2017 to be reviewed. This will provide a slightly longer period but I would hope will not increase costs substantially. This will allow the results of the discovery exercise to be reviewed and consideration given as to whether further focused discovery over a longer period is then justified in relation to the misappropriation issue. An initial discovery exercise, albeit by reference to a more limited date range than Fund IV would wish to use, will give them an opportunity to have the benefit of some substantial discovery so they can further formulate their defence and consider further how they can further particularise, and the extent to which they need to amend, their pleadings. They will then be in much better position to make a more detailed and substantiated case as to what further discovery is needed and how it can be focused and justified.

Device Data

107. The AH Parties have offered to review each of the five mobile phone devices and Email Data and File Data from Mr Naqvi's laptops (as identified in Annex G to the letter dated 4 June 2021 from Carey Olsen). The GHF Parties have agreed with this, subject to the proviso that the question of Device Data may need to be revisited in due course. That is accepted by the AH Parties. As Mr Smith QC explained during the hearing, a number of devices have been located (as set out in that Annex G) and the AH Parties intend to review, at least initially, some of those devices, being those relating to Mr Naqvi. Device Data relates to data stored on these devices. Data that has been the subject of email communication will be stored on a file server and otherwise caught as File Data and any data

otherwise held on data management systems will be caught as DMS Data. The importance of searching for Device Data was therefore to find data that has only been stored locally. Accordingly, the AH Parties anticipated that there would only be a small pool of such documents and had therefore proposed a limited initial search to test this assumption. The JOLs accepted, Mr Smith QC said at the hearing, that if contrary to their expectations, there turned out to be a large volume of undiscovered documents on the laptops and phones then a more extensive search may well be justified.

108. Fund IV argued (see [41] of their skeleton argument) that there were good reasons for requiring an immediate search of all devices. They identified the devices they wished to have searched in their amendments to [5.2] and the definition of AH Device Data in the Discovery Protocol. There were a substantial number of additional devices. Fund IV accepted that their proposal was not cost free but only involved a proportionate additional expense. Fund IV offered three reasons justifying their approach as follows:

(a). as the Related Proceedings concern alleged frauds committed by individuals within the Abraaj Group, including the systematic misappropriation of many millions of dollars of NPEF IV's monies, there was good reason to believe that the email data was incomplete, either by reason of deletions or deliberate efforts made to avoid using Abraaj email addresses. As Mr Hayward's evidence (see Hayward 5 at [28(c)]) showed, there is evidence of the deliberate use of non-Abraaj email addresses, a direction by Mr Naqvi for employees to delete Mr McGuire's email data (which Mr Charles Jonathan actioned) and Mr Naqvi's collection of sensitive hard copy documents from the Abraaj office in Dubai (to be taken out by the back door). This evidence was based on what was said in the book *The Key Man* by Simon Clark and Will Louch, originally published in 2021, which contained "*an account of the investigation into the Abraaj Group by two journalists of the Wall Street Journal*" (see Hayward 5 at [16(d)] and fn 7). It justified, Fund IV submitted, the inference that it was likely that steps had been taken to conceal the wrongdoing. The Device Data was likely to be the only location where any of this material may be found and it may well be that interrogation of native files produced by individuals or private documents will cast light upon the misappropriation of funds and the financial position of the Abraaj Group at material times.

(b). since the TAR process will already be applied to a substantial body of documents, the incremental cost of discovery of the Disputed Device Data will be limited to the costs associated with uploading and processing that additional data (there was no reason to suppose that the TAR will require additional training to address the Device Data).

(c). there was nothing to be gained from postponing discovery or a decision on this issue until after the initial discovery exercise had been completed since the parties were unlikely to be in a materially better position to address the matter then. The proposed analysis of Mr Naqvi's devices will have no bearing upon whether the other devices will contain unique documents or not and postponing discovery will merely result in delay and increased costs. Furthermore, if the additional Device Data was largely empty disk space or duplicate material, then the targeted extraction of Device Data and use of de-duplication software will establish this relatively quickly and at relatively low cost.

109. Mr Smith QC argued that there was an insufficient basis for concluding, at least at this stage, that that the Email Data was incomplete or that there were likely to be unique documents on the other devices. The material in *The Key Man* was not probative. The AH Parties also rejected the second justification. Mr Conway's evidence (see Conway 1 at [62]) made it clear that the additional searches proposed Fund IV would not only involve a limited additional expense. It was, to use Mr Conway's words, "*plain that a very significant amount of data would be involved*" and consequently more material cost. Mr Smith QC also argued that there were practical benefits to be obtained by proceeding in stages and not reviewing all the devices to begin with. Limiting the searches in the way proposed was a measured and proportionate approach to balancing costs and the needs to locate relevant documents. If the search of the Device Data did produce unique and relevant documents, that may be a sufficient justification for adopting a different approach.

110. I accept Mr Smith QC's submissions on this issue. I am concerned that searching the substantial number of additional devices proposed by Fund IV will materially increase an already expensive discovery process for benefits that have yet to be clearly established. I accept that in fraud cases, revealing and important messages and data might be found on the personal devices used by those involved in the fraud. But at present the suggestion that such documents will be found on the devices of parties other than Mr Naqvi is based on speculation. I also note Mr Montgomery-Swan's evidence on this issue. In my view, it is preferable first to undertake the searches in respect of Mr Naqvi's devices to see what they reveal and of the Email Data to see what they produce and the extent to which any evidence can be found to support the suggestion that the other devices will contain relevant

data. The staged approach, which has been accepted as appropriate by the GHF Parties, seems to me the proportionate and proper approach to adopt.

Family documents

111. It appears that there are two approaches being proposed. The AH Parties consider both approaches to be acceptable. All the parties other than Mr Jafar consider that the the parties should adopt a slip sheeting approach. This will mean that they will not discover the full family of documents but instead blank out any particular family document which contains privileged/irrelevant confidential/irrelevant personal data so that a blank “slip sheet” appears in its place. Mr Jafar's position is that irrelevant family documents should be replaced by a slip-sheet, but he sees no reasonable justification for incurring costs in processing his own irrelevant documents and reviewing the other parties’ irrelevant documents. During his reply submissions at the hearing, Mr Smith QC said that the AH Parties, in these circumstances, suggested that the parties should be allowed to adopt either approach, as they saw fit, without the Court forming a view on whether one was unacceptable. It appeared from Mr Bloch QC’s statement of Mr Jafar’s position on this issue at the hearing, that Mr Jafar would not object to this approach.

112. I am content to proceed on this basis.

Directions to trial

113. The Draft Order sets out directions and a timetable leading to trial. The AH Parties and the Fund Parties were in agreement on the broad timetable proposed in the Draft Order.

114. In outline, the Draft Order provides:

(a). that the Parties are required to give discovery in accordance with the Discovery Protocol.

(b). that a further CMC be provisionally listed in case a further application is needed, as I have discussed above, to resolve issues relating to the TAR process.

(c). for the arrangements to be made to protect privileged and confidential information. As I have noted in paragraph 7 above, I assume that paragraphs 5 – 7 of the Draft Order will need to be amended to reflect the agreement which the parties have reached as referred to in Ogier's letter of 7 April 2022.

(d). that the Parties produce the documents resulting from the searches to be conducted by 14 October 2022.

(e). that witness statements be exchanged by 3 April 2023.

(f). that the parties be at liberty to adduce expert evidence (and arrangements regarding the provision of such expert evidence) on four issues:

(i). UAE law.

(ii). whether AH was unable to pay its debts within the meaning of that term in section 145(1) of the Companies Act (2022) Revision.

(iii). the value of the cash and assets that Mr Jafar received from Mr Naqvi which are referred to in [55(2)(b)] of Mr Jafar's Amended Statement of Claim in the Jafar Proceedings as at the date on which Mr Jafar received them.

(iv). the value of the assets that were misappropriated from Fund IV as referred to in Fund IV's Amended Defence in the NPEF IV Proceedings.

(g). that there be a pre-trial review before the end of July 2023 with a time estimate of two days.

(h). that the parties shall by 7 April 2022 attend the Listing Office to fix the date for trial which shall not be before 1 October 2023 with a time estimate of six to eight weeks.

(i). for trial bundles, skeleton arguments, and liberty to apply.

(j). that costs be reserved save that Mr Jafar's costs in respect of MS1 and MS2 and of Barrie 4 be borne by Mr Jafar in any event.

115. As was accepted by all parties at the hearing, even if I was prepared to make the order in relation to the date by which discovery was to be completed, the date in the Draft Order would need to be reviewed by the parties in light of this judgment. The same was the case with respect to the date proposed for the exchange of witness statements.

116. The AH Parties objected to the inclusion of the order giving Fund IV permission to adduce expert evidence on the misappropriation issue. Mr Smith QC made it clear at the hearing that the AH Parties were not inviting the Court to shut out and prevent Fund IV from having expert evidence on this issue. Rather, they considered that it was premature to make an order at this stage before Fund IV had been able to review the results of the discovery process and further particularise and amend their pleadings as it was clear, and accepted by Fund IV that they would need to do.

117. Mr Jafar also strongly supported the proposal to give detailed directions to trial at this stage. But Mr Bloch QC submitted that the Draft Order should be amended to state that the trial should not take place before 1 April next year rather than 1 October. Mr Jafar's position was that it was important that there be an early trial date and that the Court should establish a timetable that would facilitate that to the extent it could properly be done. Mr Jafar had a number of reasons for taking this position. First, the main events which will form the subject of the trial took place nearly five years ago and this will pose a challenge to the witnesses and their ability to recollect what occurred. Secondly, and importantly, the Fund Parties were time limited. They were in the process of realising their assets. Mr Jafar considered that the Fund Parties should hold in reserve a full allowance for the sums for which they may be liable plus a provision for the costs they may be ordered to pay. The Fund Parties had not provided any assurances that they were making appropriate provisions and therefore any material delay in the trial threatened to render any judgment of no value. The risk to Mr Jafar resulting from such delays was a matter to be taken into account when considering the extent and scope of the discovery exercise since, for example, the addition of the large number of further custodians and the expanded date range sought by Fund IV risked serious delays in the litigation process.

118. I can see the benefits of establishing a timetable, and of setting out the dates for completion of the key steps in the proceedings up, to trial. I must say that I have concerns as to whether any dates can reliably be set at this stage in view of the potential impact of the substantial and lengthy discovery process, the prospect of further stages in the discovery process and further applications in relation thereto and the likelihood of there being material amendments to the pleadings once discovery has been completed. I also have concerns as to whether it is appropriate at this stage to define the issues

on which expert evidence is to be permitted and given. It seems to me that it is premature to do so at this stage and that it would be preferable to decide that question after discovery and after the likely amendments to the pleadings have been filed (at which point the likely witnesses of fact and the matters on which they will give evidence will be clear and the issues on which expert evidence is needed can be determined with precision). This approach would argue in favour of a further CMC after the completion of the discovery process and if amendments to the pleadings are to made, after any amendments (assuming agreement or any permission to amend that is needed is forthcoming) have been filed and served.

119. But, since all parties are anxious and would clearly find it helpful to have the dates for all the steps leading up to the trial mapped out in a directions order, and assuming that they wish me to give directions beyond the filing of any amendments to the pleadings even after having read my reservations, I am prepared to make such an order. But I will do so on the basis that I fully anticipate that a variety of amendments to the directions will be needed.

120. If directions are and permission is to be given now for expert evidence, effectively on a provisional basis, then it seems to me that Fund IV should be given permission in the terms set out in paragraph 10.4 of the Draft Order, if only to put down a marker on this issue. But I would expect the drafting of the permission and the scope of the issues to be addressed by Fund IV's expert to be revisited and that either an amendment made to the expert's scope of work will be agreed or an application to the Court to amend paragraph 10.4 will be made before the expert is instructed and starts work. I have considered whether it would be preferable, as the AH Parties contended was appropriate, to omit paragraph 10.4 and leave a decision on whether to permit expert evidence in relation to the misappropriation issue to be made by the parties or in the absence of agreement by the Court in due course. But I have concluded that if the other issues on which expert evidence is to be given are to be included at this stage, paragraph 10.4 should also be retained. I accept that it is highly likely that the other issues will need to be dealt with by expert evidence and not agreed and that there remain material questions as to nature and scope of any expert evidence on the misappropriation defences (which will heavily depend on what amendments are made to Fund IV's pleadings) but there are open questions too, at least in my mind, as to whether other issues will require expert evidence and if the parties wish to adopt an approach that involves giving directions at an early stage and on a provisional basis, it is fairer and preferable to include all the issues which the parties currently contend should be subject to expert evidence.

121. As regards the dates included in the Draft Order, the parties will in any event need to consider further and seek to agree revised dates for each of the stages in the process in light of this judgment and an updated assessment as to the appropriate timetable from now. I have considered Mr Bloch QC's arguments regarding the timing of the trial date but I do not see, in view of the current state of play and the likely time it will take to progress through the discovery process and the filing of witness and expert evidence (in light of the history of the conduct of these proceedings and despite Mr Bloch QC's optimism about the number of factual witnesses, the extent of live expert testimony and the range of disputes between the experts) that a trial date before October next year is realistic. I therefore do not consider that it is appropriate to amend the Draft Order in the manner proposed by Mr Jafar. If of course the proceedings progress rapidly and an early trial date proves to be realistic it will be open to the parties to apply to amend the directions on the basis of updated evidence. If Mr Jafar is seriously concerned about the risk of the Fund Parties paying away and distributing assets without making proper provision for their potential liabilities to Mr Jafar before the trial, and if he does not receive assurances that are acceptable to him (I make no comment at this stage as to whether Mr Jafar is entitled to any assurances and undertakings and note that to date undertakings have been sought but not given), he will need to consider whether he is entitled to and should apply for suitable relief to protect his position. But his at present unsubstantiated concerns cannot justify setting an unrealistic trial date, even if it is only a "*not before*" date.

122. I certainly endorse the pleas and demands from some parties for cooperation and compliance with Court ordered deadlines to ensure that the proceedings can progress to trial as rapidly as possible.

123. I shall invite counsel to review the Draft Order in light of this judgment and to seek to agree revised dates and a revised form of order to be filed with the Court for my approval. This should be done within 21 days of the date on which this judgment is handed down. If the parties are unable to reach agreement within that timeframe counsel should file with the Court the forms of order that each of the parties seek with brief submissions explaining their position and I shall deal with the remaining disputes on the papers without the need for a further hearing.

Segal

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
29 June 2022