IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 150 AND 203 OF 2020 (NSJ)

IN THE MATTER OF SECTIONS 145 AND 146 OF THE COMPANIES LAW (2020 REVISION)

BETWEEN

SIMON CONWAY, MICHAEL JERVIS AND MOHAMMED FARZADI AS JOINT OFFICIAL LIQUIDATORS OF ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)

Plaintiffs

AND

THE GHF GROUP LIMITED

Defendant

AND BETWEEN:

ABDULHAMEED DHIA JAFAR

Plaintiff

AND

(1) ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)
(2) GHF GENERAL PARTNER LIMITED
(3) THE GHF GROUP LIMITED
(4) ABRAAJ GENERAL PARTNER VIII LIMITED

Defendants

JUDGMENT ON THE GHF PARTIES' FOREIGN DECISIONS SUMMONS

1. In paragraph 1 of their summons dated 7 September 2023 the GHF Parties seek a direction that certain documents referred to in Mr Conway's witness statement dated 21 July 2023 and

identified in Mr Lewis' Sixteenth Affidavit and defined by him as the "*Foreign Decisions*" are inadmissible as evidence in the Related Proceedings and that the Foreign Decisions be excluded from the bundle for the trial of the Related Proceedings (in respect of both FSD 150 of 2020 and FSD 203 of 2020). At yesterday's hearing, Mr Atherton KC, leading counsel for the GHF Parties, indicated that the GHF Parties were also seeking an order that the parts of Mr Conway's witness statement that referred to the Foreign Decisions be struck out and removed (even though relief in those terms was not referred to in the summons). I shall refer to the direction sought by the GHF Parties as the ***Foreign Decisions Direction***.

2. I have concluded that the GHF Parties' application for the Foreign Decisions Direction should be dismissed. I accept and agree with the submissions made by Mr Smith KC, leading counsel for the JOLs of Abraaj Holdings (***AH***) both as to the proper scope of the *Hollington v Hewthorn* rule (see *Hollington v F Hewthorn & Company Limited* [1943] KB 587) and as to its application on the facts of this case.

3. As to the applicability and scope of the rule in *Hollington v Hewthorn* it is plain that it remains good law in England and Wales and in this jurisdiction. The proposition of law for which the rule stands as authority is that opinions expressed and findings of fact made in a previous *in personam* judgment delivered by a court (in both civil and criminal proceedings) are inadmissible as evidence of the truth of those opinions and facts. Christopher Clarke LJ in *Rogers v Hoyle* [2015] QB 265 (CA) held that the rule remained good law, set out (at [39]) the foundation on which the rule must now rest and (at [32]) summarised the scope of the rule as being "*The rule extends so as to render factual findings made by judges in civil cases inadmissible in subsequent proceedings …*" (a similar formulation of the rule is adopted in the judgment below of Leggatt J at [88]). *Rogers v Hoyle* concerned the admissibility of an Air Accident Investigation Branch report in a negligence action so that Christopher Clarke LJ's observations are technically *obiter* in relation to the admissibility of previous judgments but they seem to me to represent an accurate and authoritative statement of the rule as it applies to previous judgments.

4. The rule applies not only to decisions of courts but also of similar tribunals. As Christopher Clarke LJ noted in *Rogers v Hoyle* at [34]), the rule applies to the findings of facts made by arbitrators. However, it does not apply to inquisitorial proceedings. Mostyn J noted in *Towuaghantse v General Medical Council* [2021] EWHC 681 (Admin) (which is cited in Phipson (20th ed at 43-79 fn 546) that the rule has long been held not to apply to inquisitorial proceedings and that regulatory proceedings are often quintessentially inquisitorial. I assume that none of the Foreign Decisions were made in relation to proceedings which are to be characterised as

inquisitorial. Mr Smith did not indicate that they were or rely on this exception to the rule, so I proceed on the basis that my assumption is correct.

5. But the authorities make it clear that the scope of the rule is limited. In *JSC BTA Bank v Mukhtar Ablyazov and another* [2016] EWHC 3071 (Comm) Mr Laurence Rabinowitz QC (sitting as a Deputy High Court Judge) said that the rule in *Hollington v Hewthorn* had in recent years been diluted but as Mr Smith submitted it seems to me that the examples given of dilution are better understood as identifying the outer limits of the application of the rule given its foundation and purpose. While Mr Rabinowitz's examples of what the rule does not prohibit are also *obiter* they seem to me to (as Mr Smith submitted) be supported by the authorities on which he relied. The three examples he gave, with the supporting authorities, are as follows (see [24] of his judgment):

> *"(1) Whilst a court cannot rely upon a bare finding of a prior court for example that a party has been negligent, it can rely upon the substance of the evidence which is referred to in the judgment of the prior court, including for example the contents of a document, the evidence given by a witness and the like: Rogers v Hoyle [2015] QB 265, [40], [48]-[49], [55] (Christopher Clarke LJ).*
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> *(2) Whilst the bare finding of a prior court is opinion evidence which a subsequent court cannot rely upon because the later court must make its own findings of fact, a reference in a judgment to the substance of evidence is itself evidence which the judge in a later case can take into account "in like manner as he would any other factual evidence, giving to it such weight as he thinks fit": Rogers (supra).*
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> *(3). Moreover, if the judge in a later case concludes that the matters of primary fact recorded in an earlier judgment justify the conclusions reached in that judgment, he is entitled to reach the same conclusion: Otkritie International v Gersamia [2015] EWHC 821 (Comm), [23] (Eder J)."*

6. It seems to me that this analysis is supported by the judgment of Smellie CJ in *In re GFN Corporation Limited* [2009] CILR 135 (see [35]-[36]). I do not read Mr Justice Clifford's judgment in *Kabushiki Kaisha Sigma v Trustcorp Ltd and ors* (19 August 2015, FSD 154 of 2013) as being inconsistent with this approach. It seems to me that the construction and explanation of Mr Justice Clifford's decision, given by Mr Smith, is right. As Mr Smith argued at [25] and [26] of the JOLs' skeleton argument, while Clifford J had in reliance on the rule in *Hollington v Hewthorn* rejected the submission that the findings and decisions of the Japanese courts could be admitted as evidence it had also been argued that the evidence of the Japanese court decisions were admissible by applying the rules relating to similar fact evidence and it had been in response to this argument that Clifford J had said that the relevant evidence could not be admitted as *"similar fact evidence, bad character evidence, or any kind of evidence"* (at [82]). Clifford J was not purporting to make a broader point of principle as to the scope of the rule in *Hollington v Hewthorn.* Mr Smith argued that the correct interpretation of Mr Justice Clifford's

statement required adding the words "*as evidence of the facts and findings made therein*" after the statement that "*similar fact evidence, bad character evidence, or any kind of evidence."* I agree. I do not regard *Kabushiki* as authority for the proposition that a previous judgment is always and automatically inadmissible in its entirety and must therefore be excluded from the trial bundle. If that were the ratio of the decision, I would be unwilling to follow it.

7. As regards the present case, as Mr Smith pointed out, a number of the Foreign Decisions are not judgments or tribunal decisions but transcripts of hearings or originating process issued in foreign proceedings. The rule clearly does not apply to these documents.

8. Mr Smith accepted that the opinions recorded in and the findings of fact made in the judgments and decisions included in the Foreign Decisions were not admissible as evidence of the truth of those opinions and facts. But, these decisions, he says, also contain a record and narrative of the evidence adduced which is admissible including a record of the evidence of witnesses who will be unable or unwilling to attend the trial in these proceedings. This record and narrative, or at least part of it, Mr Smith submits, is likely to be relevant to the issues to be decided at the trial in particular with respect to actions and influence of and control exercised by Mr Naqvi. The Foreign Decisions should be included in the hearing bundle and the JOLs should be given the opportunity to refer to relevant parts and cross-examine by reference to them during the trial. The Court will then be able to decide whether the parts referred to are admissible and what weight to give the (hearsay) statements made in them. Mr Smith said this approach was consistent with and supported by the approach adopted by Leggatt J and the Court of Appeal in *Rogers v Hoyle*. That approach was summarised by Christopher Clarke LJ as follows (at [54] and [55] of his judgment):

> *"54. The judge concluded that the whole of the report was admissible, it being a matter for the trial judge to make use of the report as he or she thought fit. Even if he had concluded that it contained some inadmissible material he would not have thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible.*
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> *55. Subject to the second and third grounds of appeal, I agree with this conclusion. It is not apparent to me that any part of the report should be regarded as simply expressing an opinion on matters of fact (as opposed to recording evidence) in relation to which the expertise of the AAIB has no relevance. But even if any part of the report was (or proves on close analysis hereafter) to have that character, the correct approach is as outlined by the judge."*

9. It seems to me that in the circumstances of this case, recognising as I have already noted that *Rogers v Hoyle* was not dealing with an earlier judgment, that I should follow the same approach. The Foreign Decisions may be included in the trial bundle and referred to by the JOLs save that

they will not be admissible as evidence of the truth of the opinions and findings of fact contained therein. Beyond this limitation, it will be for me, as the trial judge, to determine during the trial whether any other parts of the Foreign Decisions referred to are inadmissible and to the extent that parts are admissible and referred to and relied on, what weight to attribute to them.

10. I shall reserve a decision as to costs and defer that until I have made a decision on the remaining relief sought in the GHF Parties summons.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
3 October 2023