ND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 268, 269, 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

AND IN THE MATTER OF LONG VIEW II LIMITED

AND IN THE MATTER OF GLOBAL FIXED INCOME FUNDS I LIMITED

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

- and -

PRINCIPAL INVESTING FUND I LIMITED
LONG VIEW II LIMITED
GLOBAL FIXED INCOME FUND I LIMITED

First Respondents

- and -

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED
LV II INVESTMENT MANAGEMENT LIMITED
FLOREAT INVESTMENT MANAGEMENT LIMITED

Second Respondents

IN CHAMBERS

Appearances:

Mr Stephen Rubin KC instructed by Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner and the Non-Party Applicant

Mr Michael Bloch KC instructed by Mr Ben Hobden and Mr Alan Quigley of Forbes Hare for the Second Respondents

Before: The Hon. Justice Kawaley

Heard: 13-14 April 2023

Judgment Delivered: 16 April 2023

HEADNOTE

Confidentiality-privilege-whether respondents entitled to rely upon iniquity exception to privilege-whether confidential documents should be referred to in public or private hearing at trial-Cayman Islands Constitution Order 2009, section 7 (9), (10)(a)-Grand Court Rules Order 41 rule 9

RULING ON PETITIONERS' CONFIDENTIALITY SUMMONSES

Introductory

1. By a Summons dated 31 March 2023, filed on the eve of the trial of the Petitions which commenced on 3 April 2023, the Petitioners sought directions prompted to a material extent by the reference in the 2nd Respondents' Skeleton Argument to previously undisclosed confidential and privileged material acquired from affiliates which provided family office services to Mr Bruno Wang, the beneficial owner of the Petitioners.

2. Whether or not privilege attaches to certain documents falls to be decided in relation to three issues. Firstly, whether the iniquity exception applies to certain attendance notes said to evidence an attempt to pervert the course of justice by rewarding a witness for his evidence. Secondly whether or not Tom Lowe KC was acting professionally in advising Mr Wang. Thirdly, in circumstances where it seemed obvious privilege was not waived, whether privilege was waived in respect of certain documents attached to an Exhibit to an Affidavit filed with this Court and subsequently ordered to be sealed. In addition, it is common ground that any privileged material which does properly need to be referred to at trial should be referred to in private.

3. Although it is agreed issues of admissibility and relevance should be determined in the course of the trial, I am asked to decide at this stage whether contentious portions of the 2nd Respondents' Skeleton Argument can be read out in open Court on 17-18 April 2023 and addressed in the course of cross-examination in open Court or in camera. This approach may well be the most economical

way of dealing with the issue, as both counsel seemed to agree. On reflection, however, I do not believe it is possible to properly evaluate at this stage whether or not the interests of privacy trump those of open justice without also taking into account the import of the confidential information to the relevant issues at trial. Deciding now that all confidential matters should simply be heard in private would in my judgment be a 'treacherous shortcut' in open justice terms.

4. It might be thought that the relevance evaluation would be a straightforward exercise but the analytical process is complicated by three significant considerations. Firstly, Mr Hussam Otaibi (one of the 'Floreat Principals') warned Mr Wang in writing on 22 April 2021 that if he failed to seek an "*amicable separation*" and required Floreat to defend themselves against his allegations, "*I am concerned for you about the effect this will have on your reputation and the society relationships which you currently enjoy…we will instruct our lawyers to respond vigorously to your allegations and to deploy all of the material which we consider it is in our interests to deploy*". In light of this unsolicited promise to deploy damaging information against Mr Wang, I am bound to scrutinise the 2nd Respondents' attempts to deploy belated disclosed material emanating from a parallel commercial relationship with considerable care to avoid what appears on its face to be a very obvious attempt to abuse the processes of this Court in purported service of what would in reality reflect a dystopian view of the open justice principle.

5. Secondly, the initial impression that it is obvious that the 2nd Respondents are solely seeking to engage in the crude character assassination of a client who has had the temerity to issue proceedings against them is complicated by an important material consideration. Natural justice clearly required that the Petitioners not be permitted to advance "good chap/bad chap" case without some critical analysis of the *bona fides* of their putative "good chap", Mr Wang. The Petitioners initially alleged a quasi-partnership relationship and a breakdown of the mutual relationship of trust between the 'partners'. Relevant to this was the Plaintiff's evidence about his vulnerability and dependence upon the Floreat Principals, matters which brought into play what 'manner of men' the various protagonists were. This case was sensibly abandoned before the start of the trial. It was also alleged in paragraph 10 (b) of each Petition that the Funds were "*formed with the principal purpose of enabling the Floreat Management…and the Floreat Principals…to wrongly obtain access to Mr Wang's assets and then to charge fees and otherwise exploit those assets as their own*". This plea was sensibly abandoned in the course of the hearing of the present application, with some judicial encouragement, substantially reducing (if not eliminating) the relevance of any evidence about the

character and/or credibility of Mr Wang and/or the Floreat Principals. By the end of the hearing, it seemed clearer that the merits of the Petitions now centrally revolve around questions of management probity. However, even that seemingly self-evident truth is a rose-tinted one as it is potentially heavily qualified by the pending application to re-amend the Defences due to be heard on 17 April 2023 (tomorrow).

6. Prior to the hearing, the 2nd Respondents abandoned any purported reliance on a freestanding "clean hands" defence. However by their Amendment Summons dated 12 April 2023, filed the day before the Petitioners' Confidentiality Summons was heard, leave was sought to file Further Voluntary Further and Better Particulars to particularise the existing un-particularised collateral purposes defence to advance an extraordinary new case. It is alleged that private investigators hired to observe suspicious conduct on the part of Mr Wang and Mr Pearson (one of the Receivers) overheard conversations in September 2020 and September 2021 suggesting that one of the Joint Provisional Liquidators appointed by this Court on 17 September 2021 ("JPLs") had been retained to help Mr Wang over a year before his appointment and was not impartial. This pending application potentially brings back into play the character and credibility of Mr Wang in the context of deciding whether the Petitions were presented for a collateral purpose. More significantly still for my part, it potentially undermines the reliance which this Court would otherwise have been able to comfortably place on the findings recorded in the JPLs Reports. This makes it even more difficult to fairly conclude at this stage that the deployment of any confidential material by the 2nd Respondents in support of this newly articulated defence can properly be heard in private.

7. Against this background, the most contentious Petitioners' 31 March 2023 Summonses can now be considered, hopefully in sufficiently comprehensive terms. Any matters not resolved which should have been can hopefully be dealt with on the papers.

Findings: Privilege

General findings

8. For the avoidance of doubt, I record that the Petitioners are entitled to an Order substantially in terms of paragraph 3.1 of the draft Order so that legally privileged material will only be referred to in private, subject to the Court determining whether or not privilege has been waived. This matter was agreed.

Whether Mr Lowe KC was acting professionally when advising Mr Wang

9. The 2nd Respondents submitted in their Skeleton Argument:

> "*157. Insofar as the privilege asserted by Mr Wang relates to communications between Mr Lowe and Mr Wang, the critical question is whether Mr Lowe was advising Mr Wang in a professional capacity, given Mr Lowe's evidence that he was not paid and was therefore apparently acting not in a (privileged) professional capacity as a legal advisor but in a (non-privileged) capacity as a friend.*
>
> *158. To the extent that there are documents which purport to record legal advice (or associated communications) given by Tom Lowe KC to Mr Wang or entities controlled by or associated with him, Mr Lowe states at paragraph 57 of his second affidavit, 'At some point Mr Wang asked me how he could pay me but we did not take the conversation further. We have not agreed anything. I have rendered no bill and, as far as I am concerned, he has no legal liability to me'. The inference arises from this that Mr Lowe was not acting in a professional capacity.*"

10. It was submitted in the Skeleton of the Petitioner and Mr Wang:

> "*42. Mr Lowe QC (now KC) is an experienced silk, practising from Wilberforce Chambers and a member of the Cayman Bar. As the court knows, he provided legal advice to Mr Wang from time to time. Documents relating to that advice form part of the Privileged Materials.*
>
> *43. It is suggested by 2Rs that there is some doubt as to this because they allege (which for the avoidance of doubt is not accepted) that Mr Lowe was not to be paid for his services and/or may not have been acting in a professional capacity. There is nothing in either of these contentions:*
>
> *43.1. As explained in Passmore on Privilege in a passage not cited by 2Rs, '[f]or a relationship to arise in which privileged advice can be given, there is no necessity that the client should agree to pay fees (or else there would be no scope for asserting privilege in the course of acting on a pro bono basis)'.*
>
> *43.2. It is obvious from Mr Lowe's evidence that he was advising Mr Wang in a professional capacity.*"

11. There may well be circumstances in which privilege is claimed in relation to advice received in informal circumstances which are too far removed from the typical lawyer-client relationship to qualify for the protection of privilege. The mere fact that advice was being given without fee is insufficient to displace legal advice privilege, particularly in circumstances where the Respondents'

own evidence (4th Hussam Otaibi Affidavit, paragraph 51.6) suggests that Mr Lowe KC has understated the extent of his advisory role. I find that there is no proper basis for a finding that Mr Lowe KC was not acting professionally and providing formal legal advice to Mr Wang.

The Attendance Notes and the Iniquity Exception

12. In their Skeleton Argument, the 2nd Respondents submitted, *inter alia*:

> "*162. An additional reason why privilege does not attach to two notes of a meeting in August 2019 is that the iniquity exception applies to them…*
>
> *163. The iniquity they reveal is that Mr Wang consulted Mr Lowe and his other legal advisers with a view covertly to making a payment or giving a benefit in kind to a witness …in return for evidence in Mr Wang's favour in proceedings in Jersey…*
>
> *164. Such conduct is obviously iniquitous and contrary to the interests of justice, which cannot be allowed to benefit from the cloak of privilege. It may have involved the commission of a criminal offence, although this Court need not reach a conclusion about that. Mr Lowe has given evidence that he was not a party to any iniquity, but it is not necessary for the Court to decide whether he was or not. Critically – and surprisingly – Wang 12 is silent on the matter…*
>
> *167. Since there is no confidence in an iniquity, there is no privilege in communications with a lawyer in furtherance of an iniquitous purpose. The nature and object of such communications is such that they never come within the scope of privilege in the first place: Passmore on Privilege §8.002. Since the matter is necessarily determined at an interlocutory stage, it is sufficient to show the iniquity to the standard of a strong prima facie case.*
>
> *168. Nature of iniquity. The iniquity which enlivens the exception is not confined to criminal offences, but 'extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice': Ablyazov [2014] 2 CLC 263 at §68. Put another way: 'all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances'…*" [Emphasis added]

13. The Petitioners submitted in their Skeleton Argument:

> "*45. 2Rs have sought to use this Summons as an opportunity to introduce yet another new argument on the crime-fraud exception to privilege. The argument relates only to attendance notes of a meeting which took place in August 2019, and so cannot affect the court's approach to the Privileged Material more generally. In addition, the argument is founded on more expert evidence served without the court's permission, an affidavit of Michael Beloff KC which manifests all of the same rule breaches referred to in ¶18 above*

in the context of the affidavit of Mr Mullan KC and should be excluded from the court's consideration.
46. This point should thus fall away. But in any event it is a bad one. The exception to privilege relied on, referred to by Mr Beloff as the 'iniquity' exception, is more accurately described, by the textbook he cites, as the 'crime-fraud exception'. The crime which Mr Beloff appears to contemplate is perversion of the course of justice by the making of undisclosed payments for a witness's evidence. This is an allegation of the utmost seriousness which the evidence simply does not support.

47. The relevant principles of (Cayman – ¶24 above) law are as follows:

47.1. Before the crime-fraud exception will be engaged without a trial of disputed issues (particularly in a case such as this where the 2Rs seek to raise the point as one of the issues for trial), it is necessary to show a strong or very strong prima facie case of criminal or fraudulent conduct: Al Sadeq v Dechert LLP [2023] EWHC 795 (KB) at [75] and [114].

47.2. There is nothing improper about a client seeking the advice of his lawyer on whether a proposed course of action would be lawful: O'Rourke v Darbishire [1920] AC 581 at 613 (Lord Sumner). What must be shown is conduct which amounts to an abuse of the ordinary solicitor-client relationship, and that the putatively privileged communication was made in furtherance of a fraudulent or criminal purpose: Al Sadeq v Dechert, in particular at [73] referring to BTA v Ablyazov.

48. On the facts there is not even a prima facie case of crime or fraud, still less a very strong case. Strictly for the purposes of answering the allegation of criminal/fraudulent conduct only, and without any waiver of Mr Wang's privilege, Mr Lowe KC explains the true position in Lowe 4 (the points he makes are also largely apparent from the text of the same attendance notes on which 2Rs seek to rely for this purpose)…

49. Accordingly, at its very highest, this is a classic O'Rourke v Darbishire example of lawyers being consulted on whether a proposed step is lawful, the lawyers advising against it, and the step not being taken. There is no basis on which privilege in respect of these discussions can be disapplied."

14. Even taking into account the Affidavit of Michael Beloff KC, which may properly be viewed as in substance an additional eminent legal submission from afar, I find no difference of substance in the respective legal submissions. By common accord the iniquity exception only applies, where an interlocutory finding is being made to permit the deployment of the otherwise privileged material at trial, if the party invoking the exception is able to establish a "*strong prima facie case*" of iniquity. It is not necessary to have regard to any evidential explanations as to what the attendance notes mean when they record discussions about possible payments to a witness between Mr Wang and his lawyers. The notes come nowhere near to supporting a *prima case* of iniquity, let alone a

strong *prima facie* case, as Mr Rubin KC rightly submitted. I find that the iniquity exception does not apply.

Has privilege been waived?

15. I do not understand that I am expected to resolve at this stage whether privilege has been waived in relation to advice received under the umbrella of Mr Wang's Supply of Services Agreement with a non-party to the Petitions, Floreat Private Limited ("FPL"). The case that privilege has been waived is a far from straightforward one, but is potentially affected by the pending Amendment Summons and the possible admission into evidence of the "Notes". In any event I decline to resolve this dispute at this stage.

16. For similar reasons, it is premature to decide whether Mr Wang's current waiver of privilege in relation to communications with Ernst & Young in relation to the appointment of Mr Borrelli as one of the JPLs should be expanded on the grounds set out in, inter alia, paragraph 106 of the 2nd Respondents' Skeleton Argument.

17. The one waiver argument which I was invited to resolve was whether Mr Wang waived privilege in the documents exhibited to the Second Affidavit of Alan Quigley sworn on and emailed to the Court on 24 August 2022 ("Quigley 2"). The parties' joint position on this issue was clarified in an email to the Court sent at 5.46 pm yesterday (Saturday). The position was summarised with admirable brevity and precision as follows:

> "*The parties are agreed that, in relation to the filing of the exhibit to Quigley 2, the issue between the parties is whether the exhibit was, as a matter of law, 'filed' in these proceedings in the sense that it can be said to have properly made its way onto the Court File in a way that may (on the Second Respondents' case) be legally relevant to waiver. The Second Respondents' case is that it has. The Petitioner's case is that it hasn't.*"

18. It is also now common ground that after the Exhibit was purportedly "filed" on 24 August 2023, Doyle J determined on the papers on 1 November 2022 that the Quigley 2 should be sealed. It is also agreed that an Order giving effect to that decision as of that date should now be perfected. Mr Rubin KC in oral argument referred the Court to the following provisions of GCR Order 41 (which is applied to winding-up proceedings by CWR Order 1 rule 4(2)):

> "***Filing of affidavits (O.41, r.9)***

> *9. (1) Every affidavit used in a cause or matter proceeding in the Court must be filed.*
>
> *(2) The exhibits to an affidavit shall not be filed and it shall be the duty of the party on whose behalf an affidavit is filed to preserve the exhibits for use by the Court.*" [Emphasis added]

19. As a matter of law, I find that when the Exhibit to Quigley 2 was emailed to the Court on 24 August 2022, it was not filed in the requisite legal sense at all. And so no waiver occurred based on the deemed 'publication' of any privileged documents contained therein by permitting them to be placed on the Court File. I commend the respective legal teams for restoring the civility that was temporarily breached behind the scenes in relation to this issue during the course the hearing.

Confidential Documents/Open Justice

20. Whether or not confidential information should be heard in public or private involves a contest between two familiar protagonists in opposing corners of the ring, 'Privacy' in one corner and 'Open Justice' in the other. It was accepted by the Petitioners that the Court should in any event reserve the question of the extent to which references to any privileged documents should be made in the final judgment. The Confidential Information Disclosure Act (2016 Revision), to which Mr Rubin KC referred, gives the Court a broad and clear jurisdiction to protect the sanctity of confidential information. Although open justice is an overarching constitutional principle, it is not an absolute or unqualified one; as Mr Bloch KC aptly put it, open justice is the "*default position*". Section 7 of the Cayman Islands Constitution Order provides:

> "(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.
>
> (10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court—
>
> (a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings…" [Emphasis added]

21. Because most of the confidential information the Petitioners and Mr Wang object to being exposed to the glare of public scrutiny is of doubtful relevance and appears at first blush to be deployed in a fulfilment of a pre-litigation promise on the part of one of the Floreat Principals to make the proceedings uncomfortable for Mr Wang, I find that:

(a) no reference should be made in open Court in oral opening to any of the impugned portions of the 2nd Respondents' trial Skeleton Argument (paragraphs 6-8, 42.5-42.6, 52.3, 123, 127-169, 362 and 363.4);

(b) the Court shall sit in private to determine whether or not any of the matters set out in paragraph 3 of the draft Order handed up at the hearing by the Petitioners' and Mr Wang's counsel:

(i) are relevant and need to be referred to at trial at all, and

(ii) as regards such of the said matters (if any) which are determined to be relevant, whether reference should properly be made to them in open Court or in private.

22. But for my inability to fairly assess the implications of the 2nd Respondents' Amendment Summons on this issue, I might well at this stage have been inclined to find that Mr Wang's tax affairs is one area were the interests of justice and the interests his private life constitutes a matter which should be heard in private. Highly persuasive support for this general approach may be found in the judgment of Elizabeth Gloster LJ (as she then was) in *Eurasian Natural Resources Corpn Ltd-v-Dechert LLP* [2016] 1WLR 5027 where she opined as follows:

> "*42. In my view, in such circumstances, the court might well take the view that, if there was any risk as to ENRC incriminating itself through the public deployment of such documents at trial, or leading the prosecuting authorities to a line of enquiry, any such hearing (either in whole or in part, in so far as it referred to the relevant documents) should be heard in private in order to protect the rights of ENRC, as the subject, or potentially the subject, of criminal proceedings to a fair trial, to the right not to incriminate itself and to the presumption of innocence under article 6 of the European Convention of Human Rights."*

23. King LJ concurred, but David Richards LJ (as he then was) only agreed with the cited privacy analysis to the extent that the relevant documents were privileged because the relevant authorities would have had alternative means of accessing non-privileged documents. This nuanced practical dissent illustrates the care which must be taken when considering imposing restraints on the open

justice principle, particularly in a case such as the present one in which (a) media interest has been expressed and (b) the Court has yet to determine the final scope of the issues to be tried.

Summary

24. The contentious issues arising from the Petitioners' and Mr Wang's Confidentiality Summons dated 31 March 2023 are resolved as follows:

(a) Mr Lowe KC was acting in professional capacity in advising Mr Wang, so privilege attaches to his advice;

(b) the iniquity exception does not apply to the Attendance Notes;

(c) privilege was not waived by emailing the Exhibit to Quigley 2 to the Court, because the Exhibit was not legally filed;

(d) no reference shall be made to the impugned matters in the 2nd Respondents' main Skeleton Argument in open Court, save to the extent that it may be determined that the matter is (1) relevant to an issue in the present proceedings and (2) should in the interests of open justice be canvassed in open Court.

25. I will hear counsel if required on the terms of the Order and costs, although it seems most sensible that costs should be reserved.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT