In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and -

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

(5) THE ESTATE OF HUNG WEN-HSIUNG, DECEASED

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

(7) WANG, RUEY HWA (aka "Susan Wang")

Defendants/Respondents

(8) WANG, VEN-JIAO (aka "Tony Wang")

(as joint administrator of the Bermudian estate of YT Wang)

(9) WANG, HSUEH-MIN (aka "Jennifer Wang")

(as joint administrator of the Bermudian estate of YT Wang)

Defendants

IN CHAMBERS-VIA VIDEOCONFERENCE

Date of hearing: March 2, 2021

Draft Ruling circulated: March 12, 2021

Ruling delivered: March 22, 2021

Mr Richard Wilson QC and Mrs Fozeia Rana-Fahy, MJM Limited, for the 8th Defendant ("Tony"/"D8")

Mr Mark Howard QC and Mr Jonathan Adkin QC of counsel and Mr Paul Smith, Conyers Dill & Pearman ("Conyers"), for the 1st to 4th and 6th Defendants (the "Trustees")

HEADNOTE

Application by one defendant to rely on witness statement from his wife alleging misconduct by other defendants in obtaining evidence from a third party witness- ancillary application for interrogatories- legal professional privilege-iniquity exception

RULING

Introductory

1. By a Summons filed on January 29, 2021, Tony sought an order that:

> "1. *The Eighth Defendant shall have permission to rely at trial upon the first witness statement of Lin Chien-Hui dated 28 January 2021.*
>
> *2. The Eighth Defendant shall have permission to rely at trial upon the hearsay notice dated 29 January 2021 in respect of statements made by Dr Chun-Chieh Wang.*
>
> *3. Pursuant to RSC 26/I and/or the inherent jurisdiction of the Court, an attorney at Conyers Dill and Pearman shall, by 4pm on 12 February 2021, file and serve on the Eighth Defendant an affidavit which answers the interrogatories set out at paragraph 44 of the nineteenth affidavit of Timothy Molton dated 29 January 2021…"*

2. This seemingly innocuous application was characterised in starkly contrasting ways. For Tony, the applicant, the Witness Statement of his wife, a former dentist now

housewife, Dr Lin Chien-Hui ("Alice") provided strong *prima facie* evidence of misconduct by the Trustees in obtaining evidence from one of their witnesses, Dr Chun-Chieh Wang. The application potentially engaged the public interest in overriding the privilege which normally cloaked the process of obtaining proofs of evidence from witnesses. For the Trustees, the application was yet another attempt to dissipate the energies their legal team wished to devote on trial preparations. In addition, if the application were to be granted, it would open up a new and largely peripheral front on a litigation battlefield which was already an extremely expansive one.

3. Far from being a premeditated tactical ploy, it seemed somewhat fortuitous that Dr Wang happened to be the doctor for various family members of Alice. The need to discuss medical matters with the good doctor provided an opportunity for her to express her "disappointment" with Dr Wang's decision to become a witness for her husband's bitter adversaries, the Trustees. In seeking to explain how he became a witness, he is said to have complained that he felt pressured both to provide a statement and to say things which he was unwilling to (and ultimately did not) testify to. Assuming, as appears to be the case, that the complaints were made, they were not at first blush trivial ones. In the hands of Mr Wilson QC, the complaints initially appeared to me to raise serious concerns.

4. Nonetheless, there was little doubt that granting the application would potentially expand the scope of issues to be canvassed before and at trial in relation to issues of peripheral relevance. The Trustees' counsel reminded me that I had already late last year permitted Tony to amend his pleadings to advance a forgery claim. It is undeniable that this new late claim sits uneasily alongside Tony's main case that YT Wang signed the October 31, 2012 Power of Attorney (the "POA"), but did so without the requisite mental capacity. The present application turns in large part on identifying the legal principles which regulate the process of obtaining proofs of evidence from witnesses in civil proceedings. These are principles with which I was not at all familiar. However, the application ultimately depends on a somewhat nuanced assessment of conflicting affidavit evidence.

The relevant evidence

5. Tony's primary claim is that the POA was invalidly executed because YT Wang lacked mental capacity at the relevant time. This issue will be most directly addressed through expert psychiatric evidence. However, also relevant to this issue will be the surrounding factual evidence in the form of medical records and eyewitnesses who interacted with YT Wang at the time. The Trustees rely on the evidence of, *inter alia*, two Taiwanese lawyers (one independent) who say they attended the Chang Gung Memorial Hospital (the "Hospital") on October 31, 2012 in relation to the execution of the POA.

6. For present purposes, the critical evidence that attorneys Yeh and Chang give (in their translated Witness Statements) is to the general effect that they asked Dr Wang how YT Wang was and he replied that the patient was "*compos mentis*". Dr Wang in his Witness Statement dated December 31, 2020 avers that he told them that the patient was "*in good condition*". He had previously satisfied himself that the patient was fit for receiving visitors. In the ordinary course of events, the potential inconsistency between these recollections about what Dr Wang said in a brief verbal exchange over 8 years ago would have been merely explored at trial. But Dr Wang, coincidentally the cardiologist for both Mr Yeh and several family members of Tony's wife, had cause to discuss medical matters with Alice after the doctor's Witness Statement had been served. And she seized that opportunity to seemingly berate the good doctor for electing to assist her husband's adversaries.

7. In a Witness Statement which is entirely credible on its face, she says that she first met Dr Wang before he was assigned to her father-in-law YT Wang and that he is the doctor for various family members (including her brother) today. They spoke on January 21, 2021 after she had read his Witness Statement because Dr Wang, who initiated contact, wanted to communicate to Alice his concerns about the health of her brother. After discussing her brother's condition, she says that she had raised with Dr Wang her "disappointment" that he had provided a Witness Statement to the Trustees against her husband. The doctor proceeded to explain the circumstances in which his own Witness Statement was given. According to Alice, Dr Wang stated:

    (a) that (non-lawyer) Roger Yang and (lawyer) Angela Lin were both present at the meeting when his Witness Statement was taken;

    (b) Roger Yang told him that it was the Chairman's intention that he give a statement: "*I know that the Chairman must have instructed. So I cannot refuse*";

    (c) he felt he was being directed by Roger Yang and Angela Lin to include things in his statement which he did not remember;

    (d) he was asked to say that he recalled a female lawyer being present. He did not recall this, so he did not include this in his Witness Statement; and

    (e) he was asked by Roger Yang and Angela Lin to say something about "*having clear consciousness*", but did not include this in his Witness Statement because he did not feel he could evidence to this effect.

8. What is immediately apparent from this account is that there is no suggestion whatsoever that Dr Wang was pressured into saying anything in his Witness Statement which he did not consider to be true. The Nineteenth Affidavit of MJM attorney Timothy Molton summarizes the import of Alice 's Affidavit as follows:

    "*40. In summary, it appears that the exercise of preparing Dr Wang's evidence involved:*

40.1 The exertion of improper pressure by both Angela Lin and Roger Yang;

40.2 The contamination of evidence by the presence of, and active involvement in witness proofing by, another witness (Roger Yang) who had already submitted a witness statement setting out the same events; and

40.3 The production of a witness statement that is misleading."

9. The Nineteenth Molton Affidavit also set out the following Interrogatories the Court was invited to compel the Trustees to answer:

> "*44.1 Were Roger Yang or any other of the PTC's witnesses (the 'Attending Witness') present when evidence was being taken from any of the PTC's witnesses (the 'Subject Witness') in addition to Dr Wang?*
>
> *44.2 If so, please identify:*
>
> *44.2.1 The name(s) of each Subject Witness.*
>
> *44.2.2 In respect of each such Subject Witness, the name(s) of each Attending Witness in attendance and the date on which they were in attendance.*"

10. The primary responsive evidence was provided by Ms Angela Lin (who qualified as a lawyer in Taiwan more than 25 years ago and is also admitted to the New York Bar) through her Second Affidavit. Firstly, she avers that she is aware of the applicable professional standards for, *inter alia*, obtaining evidence from witnesses, and has always complied with them. She cites various statutory regulatory provisions, but most pertinently refers to the Taiwan Bar Association Code of Ethics for Lawyers, paragraphs 2 and 3:

> "*A lawyer shall, upon accepting a matter, attend to the collection of evidences faithfully and investigate the case. Furthermore, he/she may interrogate a witness out of litigation proceedings with respect to matters relevant to the case or to evidential effect, but he/she shall not harass the witness or make improper use of the outcome of the interrogation. A lawyer shall not attempt to acquire evidences by intimidation, enticement, fraud or other unlawful means.*"

11. Ms Lin deposes as follows in relation how the Witness Statement of Dr Wang was prepared:

    (a) firstly she makes it clear that she does "*not waive any applicable privileges*" and refers "*only to the bare minimum of detail necessary*";

    (b) an initial meeting with Dr Wang was arranged by Roger Yang for November 26, 2020. Mr Yang accompanied her and her legal colleague Miss Huang to the Hospital: "*Towards the end of the meeting, he indicated that he might*

be prepared to provide a witness statement and that he was willing to discuss the matter further with me";

(c) following the initial meeting, she had more than one further telephone discussion with Dr Wang to discuss what evidence he might give. Neither Mr Yang nor Miss Huang participated in these discussions. The doctor agreed to provide a witness statement;

(d) Dr Wang signed the Witness Statement after approving it;

(e) she is "*entirely satisfied that nothing was said at the meeting with Dr Wang (by Mr Yang, Miss Huang or me) or in any of my subsequent discussions with Dr Wang which could be regarded as the exertion of pressure on Dr Wang*";

(f) nothing was said at the meeting to the effect that the FPG Chairman William Wong had instructed Dr Wang to give evidence; and

(g) "*Nothing in my questioning…could be regarded as pressuring him to give false or inaccurate evidence.*"

12. Ms Sienna Huang in her First Affidavit also deposes that Dr Wang was not pressured in the course of the meeting which she attended together with Ms Lin and Mr Yang. In summary:

(a) it is disputed that that any improper pressure was applied to persuade Dr Wang to supply his Witness Statement by Mr Yang or by anyone at the initial physical meeting at the Hospital;

(b) it is disputed that that any improper pressure was applied to persuade Dr Wang to supply his Witness Statement by Ms Lin in her subsequent telephone discussions with Dr Wang; and

(c) it is averred that Dr Wang did not include in his Witness Statement anything which he did not wish to include in it and that it was necessary in the first instance to explore what evidence the doctor could potentially give.

13. In reply, Ms Anna Hwang refers to further Taiwanese professional conduct rules and avers that, *inter alia*, the following conduct would be improper:

(a) taking evidence from one witness in the presence of another with one witness suggesting what the other witness' evidence should be;

(b) attempting to pressure a witness to give or change his evidence; or

(c) intentionally presenting evidence which is misleading or incomplete.

14. In my judgment, the only important aspects of Alice's evidence which were not challenged was Dr Wang's reported account that he felt pressured to both (a) give

evidence and (b) include certain matters in his proposed evidence. At first blush, it was not easy to identify a straightforward basis for reaching an interlocutory finding that serious impropriety had in fact occurred. It was initially, somewhat wildly, complained that the Trustees had deliberately mis-translated what Dr Wang said about YT Wang's condition. It being established that an independent translator had in fact been used for the Witness Statement, this point was not pursued at the hearing.

15. Having summarised the salient portions of the evidence in outline terms, it is necessary to turn to the governing legal principles which inform how the evidence should be viewed.

Legal submissions

Tony's submissions

16. In oral argument, Mr Wilson QC submitted that, when considering whether Dr Wang's Witness Statement had been improperly obtained and prepared, the Bermudian law position applied, not the law which applied in Taiwan. However, it was not positively contended that the Taiwanese Code of Ethics promulgated different principles to those applicable under English and/or Bermudian law. Nonetheless, in the Skeleton Argument of the Eighth Defendant, it was submitted:

> "*15. Where, as in this case, the task of preparing witness statements has been delegated by the lawyers on record (Conyers) to another person (i.e. Lee & Li), the former remain under a duty to ensure that applicable standards are adhered to. This was confirmed by Toulson J (as he then was) in Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine) [2001] 2 Lloyd's Rep. 542 at §50 (emphases added):*
>
> > *'Moreover where parties are represented in litigation by solicitors (as is almost invariably the case in the Commercial Court), I would regard it as part of their duty to ensure, so far as lies within their power, that any witness statements taken after they have been instructed are taken either by themselves or, if for some reason that is not practicable, by somebody who can be relied upon to exercise the same standard as should apply if the statements were taken by the solicitors themselves."*"

17. It was further submitted:

> "*18. Moreover, as explained in the English Chancery Guide at §19.6: 'Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence'. To similar effect, the notes to the English Civil Procedure Rules (White Book 2020) provide as follows at 32.4.5 (emphases added):*
>
> > *'It is improper to put pressure of any kind on a witness to give anything other than their own account of the matters with which their witness statement deals. It is also improper to serve a witness statement which is*

known to be false or which it is known the maker does not in all respects actually believe to be true."

18. Tony's counsel argued in relation to the issue of privilege:

> "*46…Moreover, the interrogatories do not require the disclosure of any privileged communications. Rather, Tony simply seeks to establish which other of the PTCs' witnesses (if any) were present during the PTCs' witness proofing sessions – those are matters of fact.*
>
> *47. Further, and in any event, insofar as the answers to the interrogatories would engage privilege (which they do not for the reasons set out in the preceding paragraphs), the iniquity exception would apply: on any view, the evidence of Alice and Dr Wang constitutes 'strong prima facie' evidence that the conduct of the PTCs and their Taiwanese lawyers is improper and/or contrary to the interest of justice and/or outside of the ordinary scope of a lawyer-client relationship and/or an abuse of the lawyer-client relationship: see JSC BTA Bank v Ablyazov [2014] 2 C.L.C. 263 at §76 & 93; BBGP Managing General Partner Ltd v Babcock & Brown Global Partners [2011] Ch. 296 at §62; and the Court's ruling in these proceedings dated 5 August 2020, §75 and 92…*"

19. Mr Wilson QC in oral argument referred to the *BBGP Managing General Partner Ltd.* case (Norris J, at paragraphs 61-62) and the *Ablyazov* case ([2014] EWHC 2788 (Comm), Popplewell J at paragraph 68). Most significantly, he relied upon the following extracts from *Compania de Navegacion Palomar SA et al-v-Ernest Ferdinand Perez De la Sala* [2017]SG 14 where Quentin Loh J held as follows:

> "*282. In the NSW Court of Appeal decision of Day v Perisher Blue Pty Ltd [2005] NSWCA 110 ("Day v Perisher Blue"), it emerged during the course of the trial that witnesses for the defendant-tortfeasor, prior to the trial, had communications (via teleconference) with each other and other persons, including the solicitors for the defendant, with respect to the form and content of the evidence they were to provide. The defendant's solicitors had also prepared an extensive document for the defendant outlining 'possible areas of questioning (to be passed on to the respective witnesses)' and included suggestions as to the appropriate responses which would be in line with the defendant's case (at [22]). The trial judge did not address the plaintiff's attack on the credibility of these witnesses, whose evidence the trial judge accepted. On appeal, the issue was whether the trial judge erred in accepting the evidence of the defendant's witnesses in the light of the conduct of the witnesses and solicitors. The court held as follows (at [30]):*
>
> > *30 It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference*

with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken. What was done was improper. The process adopted was more concerned with ensuring that all the witnesses gave evidence which would best serve their employer's case. …

The trial judge's judgment was eventually set aside and a new trial ordered."

The Trustees' submissions

20. The Trustees argued that the critical principles were the fraud or iniquity exception to the privilege:

"*13… (1) The following principles are relevant:*

(a) As Kawaley AJ explained in his Ruling delivered in these proceedings on 5 August 2020, 'It is self-evident that in order to avoid diluting the public policy underpinning privilege, the circumstances in which the "fraud exception" will apply must themselves be exceptional.' …

(b) In Z v Z [2017] 4 WLR 84 at §14 Haddon-Cave J identified the following applicable principles '(1) Where legal advice is sought or given for the purpose of effecting fraud or "iniquity", it is not privileged … (2) The "fraud" exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense, but is used in a relatively wide sense …(3) The court must be satisfied in every case that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards. Each case depends on its own facts … (4) In any given case, the court must weigh the important considerations of public policy on which legal professional privilege is founded and the gravity of the charge of fraud on the other. The court must be slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application … (5) Each case depends on its own facts'.

(c)To engage the fraud/iniquity exception, a strong prima facie case of fraud must be established: see Buttes Gas and Oil Co v. Hammer (No 3) [1981] QB 223 at page 246, Lord Denning MR said: 'No privilege can be invoked so as to cover up fraud or iniquity. But this principle must not be carried too far. No person faced with an allegation of fraud could safely ask for legal advice. To do away with the privilege at the discovery stage there must be strong evidence of fraud such that the court can say: "This is such an obvious fraud that he should not be

allowed to shelter behind the cloak of privilege."'; see similarly Kawaley AJ's 5 August 2020 Ruling in these proceedings at §78-79 …'[79]…Lord Wrenby (at page 633) opined that the material relied upon by the applicant must be such as "would lead a reasonable person to see, at any rate, a strong probability that there was fraud, may be taken by the Court to be sufficient.'…

30. Finally, insofar as it is suggested that the mere presence of Mr Yang at the Meeting renders Dr Wang's evidence contaminated and of no, or reduced, weight, that is also wrong:

(1) In Compania de Navegacion Palomar SA v Ernest Ferdinand de la Sal [2017] SGHC 14, Quentin Loh J in the Singapore High Court gave guidance on witness training and coaching. At §283 he said: 'The extent to which witnesses in a civil case may properly discuss their evidence with one another or the solicitors of the party that had called them as witnesses before it amounts to impermissible preparation has not been directly addressed by the Singapore courts. In my judgment, the matter is obviously one of degree and very fact sensitive and I should not lay down any hard and fast rules other than to adopt the principles espoused in the English and Australian authorities referred to above. … Few will argue with the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words. This remains at the heart of civil litigation…If, like in Day v Perisher Blue [[2005] NSWCA 110], it became apparent that the intention of the witnesses discussing their evidence amongst themselves was to ensure that they would all 'speak with one voice' such that their evidence best served one party's case, then the court is entitled to find that the credibility of the witnesses have suffered as a result. In my view, this must be correct in principle and in law.'…"

21. As regards the scope of the privilege claim itself, reliance was placed on the following principles:

"*(1) Litigation privilege attaches to communications the dominant purpose of which were to seek or obtain evidence to be used in proceedings that have commenced: see Starbev GP Ltd v. Interbrew [2013] EWHC 4038 (Comm) per Hamblen J at §11; see similarly Tesco Stores Ltd v Office of Fair Trading [2012] CAT 6 at §25 & §46.*

(2) In the case of litigation privilege, 'The privilege belongs to the client…even in respect of lawyer-third party communications': B. Thanki, The Law of Privilege, (OUP, 3rd ed, 2018) at §3.113."

22. Mr Howard QC in oral argument submitted that where a lawyer was engaged in the process of obtaining evidence from a witness and a non-lawyer such as another witness was present, the "occasion" was still a privileged one. In relation to the question of whether privilege had been waived through the Trustees' response to the present application, reliance was placed on *PJSC Tafneft-v-Bogolyubov* [2020] EWHC 3225 (Comm) (Moulder J, paragraphs 35-47).

23. He did not directly challenge the proposition that good practice required lawyers to take proofs from witnesses separately, rather than together. Instead, emphasis was placed on the fact that according to Angela Lin's evidence, the meeting at the Hospital when Mr Yang was present was simply, in effect, a preliminary one.

Legal findings

Litigation privilege

24. In *Starbev GP Ltd v. Interbrew [2013] EWHC 4038 (Comm),* Hamblen J held as follows:

> "*11. The legal requirements of a claim to litigation privilege may be summarised as follows:*
>
> *(1) The burden of proof is on the party claiming privilege to establish it – see, for example, West London Pipeline and Storage v Total UK [2008] 2 CLC 258 at [50].*
>
> *(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for example, Sumitomo Corporation v Credit Lyonnais Rouse Ltd (14 February 2001) at [30] and [39] (Andrew Smith J); West London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); Tchenguiz v Director of the SFO [2013] EWHC 2297 (QB) at [52] (Eder J).*
>
> *(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, United States of America v Philip Morris Inc [2004] EWCA Civ 330 at [68]; Westminster International v Dornoch Ltd [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in Tchenguiz at [48(iii)]: 'Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility'.*
>
> *(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: Price Waterhouse (a firm) v BCCI Holdings (Luxembourg)*

SA [1992] BCLC 583, 589-590 (cited in Tchenguiz at [54]-[55]); West London Pipeline and Storage Ltd v Total UK Ltd at [52]." [Emphasis added]

25. I am guided by these principles in the present case. All the Trustees need do to establish that privilege attaches to the process of obtaining witness statements for use at trial in the present proceedings is to demonstrate that the relevant communications were made for the dominant purpose of that process.

The fraud or iniquity exception

26. In *Z v Z* [2017] 4 WLR 84 (at paragraph 14) Haddon-Cave J held:

> "*(1) Where legal advice is sought or given for the purpose of effecting fraud or 'iniquity', it is not privileged …*
>
> *(2) The 'fraud' exception is not confined to cases of criminal fraud or cases of civil fraud in the narrow sense, but is used in a relatively wide sense …*
>
> *(3) The court must be satisfied in every case that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards …*
>
> *(4) In any given case, the court must weigh the important considerations of public policy on which legal professional privilege is founded and the gravity of the charge of fraud on the other. The court must be slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application …*
>
> *(5) Each case depends on its own facts…* "

27. Earlier on in the present proceedings (*Wong-v-Grandview Private Trust Company et al* [2020] SC (Bda) 33 Com (5 August 2020), I held:

> "*75. In my judgment there is clearly only one concept, which involves balancing two competing public interests. On the one hand there is the public interest in legal advice being privileged; and on the other hand, there is the public interest in permitting privilege being used to shield fraudulent or other seriously wrongful misconduct. It is self-evident that in order to avoid diluting the public policy underpinning privilege, the circumstances in which the 'fraud exception' will apply must themselves be exceptional…*"

28. I also found in the context of that application that the party seeking to invoke the iniquity exception to deprive another party of the protection of privilege must establish a *prima facie* case of conduct sufficiently serious to outweigh the public policy dictates of protecting legal professional privilege. These are the same principles I am guided by in the context of the present application.

Legal principles applicable to obtaining evidence from potential witnesses in civil proceedings

29. There are apparently no detailed Bermudian professional rules governing how witnesses should be proofed. Nor does it appear the applicable legal principles have been considered by a local court. The Barristers Code of Professional Conduct 1981, which has legislative force, provides:

> *"57. A barrister may properly seek information from any potential witness but he should disclose his interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.*"

30. This provides only very general support for the proposition that when obtaining evidence from a potential witness, the evidence they can or wish to give should not be "subverted". Reference was made in argument to the English and Taiwanese professional rules. I find most persuasive (in terms of elucidating the Bermudian law position) common law authorities as to what the general law requires in terms of good practice for obtaining evidence from potential witnesses. These general principles are all supportive of the shared public policy imperative of upholding the criminal prohibitions on perjury (and cognate offences). Such criminal offences are ultimately designed to both:

    (a) vindicate civil litigants' fair hearing rights under section 6(8) of the Bermuda Constitution; and

    (b) uphold the integrity of the administration of justice and promote respect for the rule of law.

31. I accept the submissions of Mr Wilson QC that the following English principles should be found to apply to the taking of evidence for use in Bermudian proceedings. Firstly, the English *Civil Procedure Rules* (White Book 2020) provide as follows at 32.4.5:

> "*It is improper to put pressure of any kind on a witness to give anything other than their own account of the matters with which their witness statement deals. It is also improper to serve a witness statement which is known to be false or which it is known the maker does not in all respects actually believe to be true.*"

32. In *Aquarius Financial Enterprises Inc v Lloyd's Underwriters (The Delphine)* [2001] 2 Lloyd's Rep. 542 (at paragraph 50), Toulson J held*:*

> "*Moreover where parties are represented in litigation by solicitors (as is almost invariably the case in the Commercial Court), I would regard it as part of their duty to ensure, so far as lies within their power, that any witness statements taken after they have been instructed are taken either by themselves or, if for some reason that is not practicable, by somebody who can be relied upon to exercise the same standard as should apply if the statements were taken by the solicitors themselves.*"

33. There is no basis for doubting that in general terms, the lawyers of Lee and Li who were involved in obtaining witness statements from, *inter alia*, Dr Wang are governed by

comparable legal and professional standards to those applicable under Bermudian law. The most important principles are that no false evidence should be obtained with a view which may ultimately mislead a court.

34. As regards the propriety of a witness being involved when evidence is being obtained from another witness, I do not find that there is any absolute prohibition on another witness being involved or present. However, I am guided by the decision in *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110 (applied by the Singapore High Court in *Compania de Navegacion Palomar SA*) and the critical finding that:

> "*30 It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses.*"

35. This *dictum* was approved by the Singapore High Court in *Compania de Navegacion Palomar SA.* However, Mr Howard QC referred to the following observations of Quinton Loh J in the latter case (at paragraph 283) which I gratefully adopt:

> "*'The extent to which witnesses in a civil case may properly discuss their evidence with one another or the solicitors of the party that had called them as witnesses before it amounts to impermissible preparation has not been directly addressed by the Singapore courts. In my judgment, the matter is obviously one of degree and very fact sensitive and I should not lay down any hard and fast rules other than to adopt the principles espoused in the English and Australian authorities referred to above. … Few will argue with the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words. This remains at the heart of civil litigation…*"

Findings: threshold issues

Are the communications between the Taiwanese lawyers and/or Roger Yang and Dr Wang prima facie protected by privilege?

36. The evidence before the Court clearly supports a finding that the communications between lawyer Angela Lin and FPG employee and/or Trustees' witness Roger Yang and Dr Wang in connection with his providing his Witness Statement are protected by litigation privilege. The communications clearly took place for the dominant purpose of obtaining evidence for use in these proceedings, not merely after their commencement, but after the case had been listed for trial. There is no suggestion that non-lawyer and witness Mr Yang communicated with Dr Wang in the absence of the Trustees' lawyers.

Is the "fact" of whether Roger Yang or other third party witnesses were present when other witnesses were interviewed beyond the scope of privilege?

37. Mr Wilson QC advanced the interesting argument in support of the interrogatories application to the following effect: the Trustees could not assert privilege over the mere fact of whether Mr Yang or other witnesses were present when other witness statements

were obtained. This proposition was unsupported by any authority. Mr Howard QC submitted that the entire context of taking proofs was protected by privilege and that the Court ought not, in effect, pry into litigants' pre-trial evidence-collection processes.

38. In my judgment the starting assumption must be that the identity of persons who attend a meeting between a potential witness and a party's lawyer (the dominant purpose of which is to collect evidence for use in legal proceedings) will be privileged. Whether that starting assumption is displaced by the fraud/iniquity exception, or some other exceptional circumstances, will depend on the facts of each case.

39. In the present case I find that the pivotal question which is dispositive of both (a) the application for leave to rely on the Witness Statement of Alice and (b) the interrogatories application is the following one. Has sufficiently serious misconduct occurred to justify lifting the protective cloak of privilege over the Trustees' witness proofing process?

Has a prima facie case of iniquitous conduct been made out?

40. Alice's hearsay evidence, taken at its highest without considering the evidence of Ms Lin, supports the following potential findings relevant to Tony's application:

    (a) Mr Yang, another witness, was present when Dr Wang was interviewed in connection with his Witness Statement;

    (b) Dr Wang felt pressured to provide a statement as a result of being told by Roger Yang that the Chairman had instructed that this should occur;

    (c) Dr Wang felt pressured by Angela Lin and Roger Yang to confirm facts he did not recall;

    (d) Dr Wang did not succumb to this perceived pressure and signed a Witness Statement the contents of which he was satisfied with; and

    (e) Dr Wang was not sufficiently concerned about the pressure to which he was subjected to either withdraw his Witness Statement or to make some form of personal complaint about the way he was treated. Indeed, he only raised the issue when talking to Alice about medical matters and seeking to assuage her disappointment that Dr Wang was a witness for her husband Tony's adversaries.

41. This evidence, standing by itself, clearly supports potential findings that the Trustees' Taiwanese lawyers acted improperly by pressurizing Dr Wang to give evidence and by seeking to influence the content of his evidence by feeding him the recollections of Roger Yang, another witness. Even if it was unchallenged, and this Court was unable to regard as trivial a mere attempt to procure favourable (and possibly false) evidence, I would nonetheless conclude that what occurred was insufficient to result in privilege being lost.

42. It must be acknowledged that Alice's evidence on its face raises serious allegations of impropriety which come close to supporting a finding that iniquitous conduct has

occurred. In my judgment the fact that the central truth of Dr Wang's Witness Statement is not impeached, combined with the context in which he made his complaints, are pivotal considerations. The misconduct which Alice's evidence suggests occurred would not, on balance, raise sufficiently powerful public policy concerns to displace the countervailing constitutional and public policy imperatives underpinning legal professional privilege. As this evidence was challenged in several important respects, this step in the analysis is only a preliminary one.

43. It is not disputed that Mr Yang was present and I have found that the desired Bermudian practice is that, when a witness' evidence is being taken, other witnesses should not participate in the process in a manner likely to contaminate the interviewee's evidence. However, this is not a mandatory statutory or common law requirement. And as Quentin Loh J observed in *Compania de Navegacion Palomar SA v Ernest Ferdinand de la Sal* [2017] SGHC 14, "*the matter is obviously one of degree and very fact sensitive*". It is disputed that Dr Wang was pressured to provide a statement or pressured to include in his statement anything which was not true. Ms Lin's evidence, viewed in isolation, supports the following findings:

    (a) Roger Yang was only present at a preliminary meeting with Dr Wang at the Hospital when preliminary inquiries were made about whether the doctor could give helpful evidence. This was because he had arranged the meeting;

    (b) Dr Wang was not in any way pressured to provide a statement by the lawyer or by Mr Yang;

    (c) Dr Wang was not in any way pressured to alter the contents of his evidence by the lawyer or Mr Yang;

    (d) Dr Wang was asked questions designed to ascertain what he could remember (implicitly, these questions were likely based on what Roger Yang or other witnesses had already said) and made no commitment to give evidence at the initial meeting; and

    (e) Dr Wang was substantively interviewed later, by Angela Lin alone, by telephone. Only then did he agree to provide a statement. He only signed the Witness Statement in a form that he was happy with.

44. Having regard to Angela Lin's evidence, standing by itself, I would obviously find that no material impropriety occurred. It was perhaps technically improper (from a Bermudian perspective) to involve Mr Yang in the initial meeting with Dr Wang, because there was a risk of Dr Wang's evidence being contaminated by Mr Yang's recollection of what occurred in 2012. Being asked whether he recalled certain facts by a lawyer is different to being asked whether you recall certain facts by, or in the presence of, another witness to the same events. However, I would find that no substantive impropriety occurred because Dr Wang was admittedly (according to Alice's report of his complaints) not actually pressured to include matters in his Witness Statement which he did not recall. Nor was he, according to Ms Lin, pressured to give evidence.

45. On any view of the evidence, therefore, I would find that privilege has not been lost due to iniquitous conduct. Looking at the evidence overall, and if it was necessary to resolve the significant conflicts between Alice's account of Dr Wang's complaints and Angela Lin's account of how the Witness Statement was obtained, I would reach the following conclusions:

    (a) no improper pressure was applied to Dr Wang to give a statement at the initial Hospital meeting, because he was afforded an opportunity (which he took) to consider his position;

    (b) I see no reason to reject Ms Lin's evidence that, from her perspective, no improper pressure was applied to obtain Dr Wang's cooperation. As Mr Howard QC submitted, lawyers are entitled to apply some 'pressure' in seeking to obtain evidence to advance their clients' case. The mere fact that Dr Wang may have subjectively felt pressured does not mean that objectively speaking, undue pressure was applied;

    (c) I see no reason to reject Ms Lin's evidence that Dr Wang was not pressured to give, in effect, false evidence. It is inherently improbable that a senior lawyer in good standing would commit such grave professional misconduct in relation to a senior cardiac specialist at the potential witness' own place of employment. It is more inherently likely that the questions put to Dr Wang were advanced at the preliminary meeting to inform an initial decision as to whether to ask him to give evidence, as Ms Lin deposes. It is entirely plausible that Dr Wang, assuming Alice's evidence to be true, may have misconstrued the purpose of the questions;

    (d) overall I would attach little weight to Alice's evidence of Dr Wang's complaints because:

        (1) the best possible evidence would be the direct evidence of the doctor himself;
        (2) the context in which the complaints were made create serious doubts as to whether they were to a material extent exaggerated to assuage the upset wife of a party he decided to give evidence against; and

        (3) by her own account, Dr Wang provided a truthful Witness Statement, and was not influenced by any suggestions which were put to him in any event.

Can the circumstances in which Dr Wang's Witness Statement was obtained be explored at trial?

46. In the course of argument I suggested that it ought to be open to Tony to explore the subject-matter of the interrogatories through cross-examination of Roger Yang at trial. In light of the conclusions I have now reached on the scope of litigation privilege and the fact that no material improprieties with the process through which Dr Wang's Witness Statement was obtained occurred, that preliminary view must now be revised. It is implicit in the primary findings which I have made that there is no sufficient

evidential foundation presently before this Court to justify lifting the veil of privilege in relation to the evidence collecting activities of the Trustees' legal team in the present case at trial.

Disposition of Tony's Summons

47. It follows that the communications between Angela Lin and/or Roger Yang and Dr Wang in connection with the production of his Witness Statement are protected by litigation privilege. The application to rely on Alice's Witness Statement which concerns those communications must be refused. For the same reasons, the application for interrogatories about whether Mr Yang (or witnesses) participated in the proofing of other witnesses must be refused.

48. In the result, Tony's January 29, 2021 Summons must be dismissed. Unless any party applies to be heard as to costs, Tony shall pay the Trustees' costs of the application to be taxed if not agreed on the standard basis.

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IAN RC KAWALEY
ASSISTANT JUSTICE