The Court of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2021

B E T W E E N:

WANG, VEN-JIAO (Tony Wang)
(as joint administrator of the Bermudian estate of YT Wang)
Applicant / 8th Defendant

and

WONG, WEN-YOUNG (Winston Wong)
Plaintiff

GRAND VIEW PRIVATE TRUST COMPANY LIMITED
1st Respondent / 1st Defendant

TRANSGLOBE PRIVATE TRUST COMPANY LIMITED
2nd Respondent / 2nd Defendant

VANTURA PRIVATE TRUST COMPANY LIMITED
3rd Respondent / 3rd Defendant

UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED
4th Respondent / 4th Defendant

THE ESTATE OF HUNG WEN-HSIUNG, DECEASED
5th Respondent / 5th Defendant

OCEAN VIEW PRIVATE TRUST COMPANY LIMITED
6th Respondent / 6th Defendant

WANG, RUEY-HWA (Susan Wang)
7th Respondent /7th Defendant

WANG, HSUEH-MIN (Jennifer Wang)
(as joint administrator of the Bermudian estate of YT Wang)
8th Respondent /9th Defendant

Before: **Clarke, President**
Kay, JA
Subair Williams, JA

Appearances: Mr. Dominic Dowley QC of Counsel and Mrs. Fozeia Rana-Fahy, MJM Limited for the Appellant

Mr. Shephen Midwinter QC of Counsel and Mr. Paul Smith, Conyers Dill & Pearman Limited for the Respondents

Date of Hearing: **02 June 2021**

Date of Judgment: **11 June 2021**

JUDGMENT

Application for leave to appeal against trial judge's refusal of application to call hearsay evidence alleging professional misconduct in the taking of a witness proof – Whether a prima facie case of iniquity has been established as an exception to legal professional privilege - Legal Principles on Witness Preparation – Difference between Witness Training and Witness Coaching – The rule on Interrogatories RSC O. 26

Subair Williams, JA

INTRODUCTION

1 This is an application for leave to appeal which arises out of a mid-trial interlocutory application from the main action. By a summons dated 29 January 2021, the Applicant

("Tony") applied to Kawaley AJ for permission to rely on hearsay evidence of his wife's report of her conversation with a witness for the PTC Respondents regarding the pressure he felt during the taking of his witness proof. Under that same summons an application was also made for interrogatories seeking information about the presence of any other persons during the taking of the witness proofs for the other Respondent witnesses.

2 Having found that the application engaged issues of legal professional privilege and that the evidence had not established a prima facie case of iniquitous conduct as an exception to the privilege rule, the learned trial judge refused the whole of the summons application. Dissatisfied with paragraphs 24 to 48 of Kawaley AJ's 22 March Ruling, on 23 March 2021 Tony applied for leave to appeal by way of an *ex parte* Notice of Motion pursuant to Order II of the Rules of the Court of Appeal. The application was promptly refused on the papers for the reasons outlined in Kawaley AJ's 29 March 2021 Ruling.

3 This brings us to the present application for leave to appeal by Notice of Motion under Order II, Rule 3. Having considered the written and oral arguments eloquently made by Counsel for both the Applicant and the Respondents, I now give my reasons for finding that this application for leave to appeal should be refused.

THE BACKGROUND

4 Without having made any factual findings on the plethora of disputed issues, this Court broadly narrated the background to these proceedings in *Grand View Private Trust Company Ltd v Wong; Wang intervening* [2020] Bda LR 29 and *Tony Wang v Grand View PTC et al* [2021] CA (Bda) 3 Civ, 12 April 2021.

5 The statements made by Tony's wife, Mrs. Lin Chien Hui ("Alice") in her 28 January 2021 witness statement are the fuel for this round of litigation. Tony wishes to rely on Alice's evidence of statements made to her by Dr. Chun Chieh Wang ("Dr. Wang")

during the course of her telephone conversation with him on 21 January 2021. Dr. Wang's evidence is of some relevance to the disputed mental state of Wang, Yung Tsai ("Mr. YT Wang") on 31 October 2012 when, on the Respondents' case, he signed a Power of Attorney empowering his eldest son William W.Y. Wong ("William") to handle all of his personal financial affairs. That being said, the Respondents do not propose to rely on Dr. Wang's evidence as part of their expert evidence of Mr. YT Wang's mental capacity on 31 October 2012.

6 Ms. Chang Li-Yu ("Attorney Chang") states in her witness statement of 15 September 2020 [9-11] that she attended Mr. YT Wang's hospital room at Chang Gung Memorial Hospital ("CGMH") on 31 October 2012 when she formally witnessed him affix his signature to the impugned instrument. In addition, she contends that Dr. Wang was also present with other nurses in the hospital room on that fateful day when he confirmed his opinion that Mr. YT Wang was '*compos mentis and in a good mental state'*.

7 Corroborating parts of Attorney Chang's summary of what occurred in Mr. YT Wang's hospital room on 31 October 2012, Dr. Wang provided a witness statement dated 31 December 2020 wherein he said, *inter alia,* that Mr. YT Wang *"was in good condition on that day"*:

"***B. EVENTS ON 31 OCTOBER 2012***

*8. As I stated above, I have reviewed the witness statements of Attorney Yeh and Attorney Chang. That review has helped me to recall the date on which the events described below took place. I recall that on 31 October 2012, as a matter of routine practice, I arrived at YT Wang's hospital room at 7-ish a.m... Apart from having meetings with the medical team, I also checked the physical condition of YT Wang. I remember that Ms Li-Chu Yang (then Vice President of the Nursing Department of Linkou Chang Gung Memorial Hospital, hereinafter referred to as [()*__*"Ms Yang")*__ *informed me that later on she would bring Mr Roger Hsiu-Hsiung Yang* ***("Mr Yang")***

and two attorneys to visit YT Wang. I therefore checked and confirmed YT Wang's condition and make sure that it was appropriate for him to meet the visitors.

9. YT Wang's hospital room was very spacious. On the other side of the hospital room was a sofa area for receiving family members and visitors. The adjacent room was a doctor's working room, which also served as a preparation room for the medical team.

10. 31 October 2012 was a Wednesday. I had at the time fixed cardiology out-patient clinic sections on Wednesday mornings, so I did not stay for very long in YT Wang's hospital room.

11. However, I recall that sometime after 8-ish a.m. on 31 October 2012, Ms Yang brought Mr Yang and two attorneys to visit YT Wang. One of the lawyers, Attorney Yeh, happened to be my cardiology patient. As I did not know in advance about any relationship between Attorney Yeh and YT Wang (including the Formosa Plastics Group and the Wang Family), when I met Attorney Yeh at the hospital room, both of us were very surprised. Therefore, I am certain that I met Attorney Yeh in YT Wang's hospital room on that day and exchanged greetings with him briefly.

12. I recall that the two attorneys asked me about YT Wang's condition and I told them that YT Wang was in good condition on that day.

13. I then went to the adjacent doctor's preparation room. I left shortly after because of my outpatient clinic section in that morning. Therefore, I knew nothing about what they discussed in the hospital room afterwards."

8 Alice, however, described her more recent contact with Dr. Wang in her witness statement as follows:

"…

*3. I graduated from the school of dentistry at the Kaohsiung Medical University in 1993. I got to know Dr Chun-Chieh Wang **("Dr Wang")** years before he was appointed as my father-in-law's co-leading physician. Dr Wang was (and still is) the doctor of various members of my family.*

4. Before I spoke to him on 21 January 2021 (and as a result of discussions with Tony) I was aware that Dr Wang had given a witness statement on behalf of the main defendants in this case, and I had read a copy of that witness statement in Chinese.

5. On 21 January 2021 at 6:04pm, I received a text message on my mobile phone from Dr Wang asking whether I was available for a call. In response to that message. I called Dr Wang at 6:42pm. Dr Wang told me that he had concerns about my brother's health conditions.

6. After we had discussed concerns about my brother, I raised with Dr Wang my disappointment about his witness statement in support of the main defendants who are against my husband in the claim. Dr Wang then explained to me how his statement was prepared and his recollection of certain matters covered by his witness statement.

7. He told me that Yang, Hsiu-Hsiung ("Roger Yang") and Lin Yao ("Angela Lin") were both present at the meeting at which his witness statement was prepared. At that meeting Roger Yang told Dr Wang that him providing a witness statement "[Chinese writing]". (I believe that this translates into English as "was the Chairman's intention"). I understood the reference to the "Chairman" to be to William Wong. Dr Wang said to me the following phrase in Chinese "[Chinese writing]". I believe that the English translation is "I know that the Chairman must have instructed. So I cannot refuse".

8. Dr Wang said that they both kept on telling him to include things in his witness statement that he did not wish to include because they did not correspond with his recollection. He told me in Chinese that "[Chinese writing]" (which I believe

translates into English as "they [Roger Yang and Angela Lin] kept talking, and honestly, I felt that my memory seemed to be guided [by what they were telling him]". In addition, he said that he felt that he was being "directed" (in English) to include in his statement certain matters which he did not specifically recall and that he felt "[Chinese writing]" (which I believe translates into English as "brainwashed") by what was being repeatedly suggested to him by Roger Yang and Angela Lin. I clearly recall the English word "directed" being used in our conversation. I should note that it is common for Taiwanese people to use English words occasionally in conversations spoken in Chinese.

9. Dr Wang told me that he did not specifically recall a female lawyer being present on 31 October2012. However, he said that it was repeatedly suggested to him by Roger Yang and Angela Lin that a female lawyer, Attorney Chang, was present. Dr Wang said he felt that they were trying to influence him so that he would agree that Attorney Chang was present with Attorney Yeh. However, Dr Wang refused to include that statement because he did not specifically recall that there was a female lawyer present and he had no knowledge of who Attorney Chang was until they told him.

I 0. He also said that Roger Yang and Angela Lin had asked him to state in his witness statement something about "having clear consciousness" "[Chinese writing]". I understood this to be reference to the mental state of my father-in-law. However, Dr Wang said he refused to include that statement because he did not feel able to give any positive evidence about it.

11. I want to make clear that I am very concerned not to cause any difficulties for Dr Wang who is a senior doctor at the Chang Gung Memorial Hospital. However, I feel strongly that the Court should know the true position."

9 Keen to rely on this evidence at trial, Tony filed his 29 January 2021 hearsay notice and summons application praying for an order in the following terms:

"*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 26/1 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. …"

10 The interrogatories are stated under paragraph 44 of Mr. Molton's nineteenth affidavit. The portion of the interrogatories with which we are concerned is as follows:

"*The Interrogatories*
44. For present purposes, and taking into account the impending trial, Tony simply seeks an order requiring a Conyers attorney to answer the following interrogatories:

44.1. Were Roger Yang or any other of the PTCs' witnesses (the "Attending Witness") present when evidence was being taken from any of the PTCs' witnesses (the "Subject Witness") in addition to Dr Wang?

44.2. If so, please identify:

44.2.1. The name(s) of each such Subject Witness.

44.2.2. In respect of each such Subject Witness, the name(s) of each Attending Witness in attendance and the dates on which they were in attendance.

11 The Respondents filed evidence from Ms. Yao Lin (otherwise known as Angela Y. Lin) ("Ms. Lin") and Ms. Tzu-Min Huang (otherwise known as Sienna Huang) ("Ms.

Huang”) in opposition to Tony’s 29 January 2021 summons. Ms. Lin is a partner in the Litigation and Dispute Resolution Department of the law firm Lee and Li (“Lee and Li”) which is instructed together with Conyers Dill & Pearman (“CDP”) by the PTC Respondents. Ms. Huang is a Senior Attorney at Lee and Li.

12 Ms. Lin deposed in her affidavit evidence sworn on 19 February 2021 that she was directly involved in obtaining Dr. Wang’s witness statement and that she believed that process to be protected by litigation privilege. Describing her professional record as ‘unblemished’, she stated that she has practised law for more than 25 years and that she has never before been the subject of allegations of the nature described in Alice’s witness statement.

13 Having outlined a summary of the ethical rules which guide her ordinary practice in taking witness proofs, Ms. Lin provided the following account of her interaction with Dr. Wang [13-21]:

“*13. On 26 November 2020, I, along with a senior attorney at Lee and Li by the name of Tzu-Min Huang (**"Miss Huang"**), met with Dr Wang at Chang Gung Memorial Hospital (**"the 26 November Meeting"**). Mr Yang had arranged that meeting at the request of the Trustees' legal team and he accompanied us. 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.*

14. Following the 26 November Meeting, I spoke to Dr Wang on the telephone on more than one occasion to discuss what he might be in a position to say in a witness statement. Neither Mr Yang nor Miss Huang participated in those conversations.

15. After Dr Wang had approved the Witness Statement, it was signed by him and submitted as evidence in these proceedings. I note that neither Mr Molton nor Alice Wang suggests that the Witness Statement, which was provided by Dr Wang in his native Chinese, contains any misleading or inaccurate statements. Dr Wang is a highly

educated person who understood the importance of accuracy in preparing the Witness Statement. I believe that the Witness Statement is true and accurate.

16. Alice Wang's witness statement describes what she says Dr Wang told her about the process by which he was persuaded to submit a witness statement in these proceedings. Without waiving privilege, I wish to explain briefly why her account is inaccurate.

17. All of my discussions with Dr Wang were conducted in a professional and respectful way. It is true that Mr Yang was present at the 26 November Meeting. There was nothing sinister or untoward about this, Mr Yang had arranged the meeting so his presence was neither surprising nor intimidating. Mr Yang is a polite and respectful person.

18. I am entirely satisfied that nothing that 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 involving the exertion of pressure on Dr Wang.

19. In her witness statement (at paragraph 7), Alice Wang refers to various things that Dr Wang is said to have told her about the 26 November Meeting, In particular, she says that, at that meeting, Mr Yang told Dr Wang that it was the intention of William Wong, the Chairman of FPG, that Dr Wang should provide a statement and that William Wong "must have instructed" Dr Wang to give evidence. I am not entirely clear what she is suggesting. However, I am certain that nothing to this effect was said to Dr Wang, whether by Roger Yang, Miss Huang or myself, at the 26 November Meeting or during any of the conversations between myself and Dr Wang. During those discussions, nothing was said which could be regarded as involving the exertion of pressure on Dr Wang.

20. There are two other incorrect suggestions in Alice Wang's witness statement:

(a) Alice Wang suggests that an attempt was made to put pressure on Dr Wang to give evidence that he did not actually recall about Attorney Chang's presence at the 31 October Meeting. I obviously do not know what Dr Wang actually said to Alice Wang about my conversations with him regarding Attorney Chang. I would expect Dr Wang to remember being asked detailed questions by me about many things, since it was part of my role to understand what he could, and could not, remember. Nothing in my questioning, however, could be regarded as pressuring him to give false or inaccurate evidence; and

(b) Alice Wang also gives the misleading impression that I tried to put pressure on Dr Wang to provide evidence concerning YT Wang's mental state which Dr Wang did not believe to be true. This is not correct. Dr Wang expressly approved the language and contents of the Witness Statement by signing it.

21. In summary, I believe, based on all my dealings with him, that Dr Wang genuinely believed the contents of the Witness Statement to be accurate and nothing in Alice Wong's witness statement causes me to change that belief."

14 Ms. Lin's account of the 26 November 2020 meeting with Dr. Wang was supported by Ms. Huang's affidavit evidence of 19 February 2021 wherein she said [11-13]:

"*11. My clear recollection is that the conversation during the Meeting was respectful and professional and that the meeting was conducted in a manner in which I would expect a meeting with a prospective witness to be conducted. In particular, nothing was said or done which might have amounted to the exertion of improper pressure on Dr Wang.*

12. I understand from Attorney Lin that she had one or more telephone conversations with Dr Wang following the Meeting. I did not participate in any of those conversations.

13. On 31 December 2020, I met with Dr Wang at Chang Gung Memorial Hospital to provide him with the final version of his proposed witness statement, the accuracy of which I understood he had already confirmed to Attorney Lin. He signed the witness statement in my presence."

15 Having assessed all of this evidence, Kawaley AJ found that the evidence did not establish a *prima facie* case of iniquitous conduct. The learned trial judge provided the following reasoning in his 22 March Ruling:

"*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.

16 Kawaley AJ further held that there was no proper basis upon which Tony could be entitled to an order for interrogatories or to leave to cross-examine other witnesses on their witness proof process since to do so would necessitate piercing the veil of legal professional privilege.

APPLICATION FOR LEAVE TO APPEAL

Tony's Proposed Grounds of Appeal:

17 On 29 March 2021 Kawaley AJ refused leave for Tony to appeal on the grounds set out in his draft Notice of Appeal. Those grounds of appeal are pleaded as follows:

"Ground 1

The Learned Judge erred in concluding that the PTCs' conduct was not "iniquitous".

The Learned Judge fairly acknowledged that he was "not at all familiar" with the "legal principles which regulate the process of obtaining proofs of evidence from witnesses in civil proceedings". It is respectfully submitted that the Learned Judge was led into error in respect of those principles by the PTCs' submissions.

Ground 2

The Learned Judge applied the incorrect test.

As the Learned Judge correctly concluded, Alice's evidence was entirely credible on its face. Moreover, on the two critical matters which it addressed, her evidence was not contradicted in terms. In those circumstances, the Court was bound to conclude that a prima facie case of iniquity had been established.

The Learned Judge was led into error by seeking to resolve at an interlocutory stage perceived conflicts in the evidence in circumstances where there was in fact no conflict on the critical issues. The Learned Judge's analysis – in which he sought to "resolve" perceived conflicts between evidence – was seriously flawed. The Learned Judge's three reasons for attaching "little weight to Alice's evidence" were also seriously flawed and could not properly have been relied upon as reasons for dismissing the Application.

Ground 3

The Learned Judge was wrong to preclude further investigation into the procedure for the taking of witness evidence (the "Disputed Procedure").

Having wrongly concluded that the Disputed Procedure was not materially improper and that it did not engage the iniquity exception, the Learned Judge further erred in refusing to allow Tony to make any further enquiries at trial as to "evidence collecting activities of the Trustees' legal team" (including the extent to which the Disputed Procedure was adopted more widely by the PTCs).

Ground 4

The Learned Judge was wrong to preclude Tony from relying upon Alice's evidence and the statements made to her by Dr Wang.

The PTCs cannot claim privilege in respect of the matters set out in Alice's witness statement. More fundamentally, however, confidentiality in the subject matter of Alice's witness statement has been lost in circumstances where Alice's witness statement has been expressly referred to by Tony, the PTCs and the Learned Judge in open court and reference to it was going to be (and has now been) made in a public judgment (the Ruling). In those circumstances, there is no conceivable basis for preventing Tony from relying upon Alice's evidence – which is of obvious importance to the substantive issues – at trial."

18 By way of relief, Tony seeks to have Kawaley AJ's decision set aside and in substitution of that decision he invited this Court to make an order permitting him to rely on his hearsay notice and Alice's statement at trial. Additionally, Tony appealed to this Court for an order compelling the Respondents to serve affidavit evidence in answer to the interrogatories.

19 In Kawaley AJ's 29 March 2021 Ruling on Tony's *Ex Parte* Motion for leave to appeal he concluded [16]:

"*Tony's proposed appeal is against a very decisive interlocutory decision that no prima facie case of iniquitous conduct has been made out and that there is no justification for exploring the peripherally relevant issues raised by his wife's Alice's evidence at trial. I find that the appeal has no realistic prospect of success and the ex parte application for leave to appeal should be dismissed*."

<u>Analysis and Findings on Tony's Application for Leave to Appeal</u>:

20 Counsel for both sides relied on authorities from England, Singapore and New South Wales, Australia for assistance on the relevant law. Mr. Dowley QC's overarching position was that an assessment as to whether there was a *prima facie* case of iniquity required the Court to look only at the quality of the evidence from the Applicant i.e. Alice's statement. He argued that any interlocutory finding for or against the

application to rely on Alice's evidence should be achieved without settling conflicting evidence on the issue.

21 Contending that there was a *prima facie* case of iniquity shown on Alice's witness statement, Mr. Dowley QC characterised the conduct of the Lee & Li lawyers as impermissible witness coaching. Going further than that, Mr. Dowley QC submitted that the mere presence of Roger Yang during the preliminary 22 November 2020 meeting at CGMH constituted iniquitous conduct.

22 On the subject of the interrogatories, Mr. Dowley QC argued that the fact of the presence of any other witness during the witness proofing process is not in and of itself privileged. Thus, on Tony's case, he is entitled to success on this application whether or not he fails on his grounds on iniquity. Mr. Dowley QC also put forth the argument that the questions asked under the interrogatories are questions which could be asked during cross-examination, in any event.

The Law on Witness Preparation and Witness Proofing

23 Mr. Dowley QC directed us to a 28 May 2021 trial transcript of Mr. Wilson QC's cross-examination of Ms. Susan Wang where he sought to explore the process by which her evidence might have been prepared. Mr. Mark Howard QC for the PTC Respondents robustly objected on the grounds of legal professional privilege stating; "*…I have never, in all my years at the Bar, ever come across people asking questions about a process by which somebody is proofed. It is fundamentally wrong*." Mr. Howard QC indicated that it was open to Mr. Wilson QC to ask whether a witness had attended witness preparation sessions in the form of witness training. But, he contended, an answer in the negative would bring an end to that line of questioning. However, Mr. Wilson QC maintained that his line of questioning was legitimate, citing the English High Court's decision in *Ultraframe (UK) Ltd v Gary Fielding et al* [2005] EWHC 1638 (Ch). Making good his submission, Mr. Wilson QC distinguished a cross-

examination about the process of witness preparation from a cross-examination on the proofing process, contending that only the latter was impermissible.

24 Mr. Dowley QC suggested that there is some lingering tension between Mr. Howard QC's trial objections on the scope of allowable cross-examination and Mr. Midwinter QC's concessions before this Court where it is stated in Appellant's written submissions [63-64]:

"*63. For the avoidance of any doubt, the Trustees do not contend (and do not believe that the Judge intended to suggest) that anything in the Ruling prevents Tony's counsel from asking any witness during cross-examination, including Mr Yang, questions of the kind which uninspired counsel often ask witnesses about the circumstances in which their statements were prepared without trespassing on privilege, such as:*

(1) Whether the witness discussed his or her evidence with other witnesses, or had sight of draft statements or proofs of other witnesses, before signing his or her statement (and if so what form those discussions took);

(2) (As part of the above) whether any other witnesses were present at meetings at which the witness's evidence was recorded or discussed;

(3) Whether the witness was put under pressure by anyone to give untrue evidence (and if so what form that pressure took); and/or

(4) Whether the witness has, in the event, given any untrue evidence in the sworn statement(s) to the Court.

64. The Trustees accept those are questions of a sort usually allowed in cross-examination, and they will not object if Tony wishes to ask them. Whether further questions by Tony in that vein are objectionable will be for the Judge to assess at the time they are put. It would be neither helpful nor productive for either the Trustees or

this Court to attempt to dictate in advance or in the abstract the appropriate scope of cross-examination which the experienced trial judge should allow."

25 From where I sit, I see no immediate cause for disapproval of Mr. Midwinter's sculpture of questions on what may ordinarily be put to a witness at trial. In *Thanki on The Law of Privilege* (Third Edition) ("*Thanki*") the authors helpfully distinguish between 'communications' to which privilege applies and 'underlying facts' which are, generally speaking, fair game in the course of cross-examination [3.12-3.13]:

"***3.12***

(1) Communications

Litigation privilege applies to 'communications' rather than to the facts so communicated. Oral communications are therefore just as capable of attracting privilege as written communications (although in practice it may be hard for an opposing party ever to know of the existence of oral communications).

3.13

Facts

Facts which are conveyed in communications subject to litigation privilege are not privileged. [Foot note 33 not quoted] *For example, while communications between a third party witness and a lawyer about what transpired at a particular meeting may be privileged, the actual underlying/acts-will not be. Hence the witness would be obliged to answer questions about what occurred at the meeting if they are summoned to give evidence for the other party, which the other party could do because, '[i]n the time honoured aphorism, there is no property in a witness'.* [Foot note 34 not quoted]. *Were this to be otherwise, material facts could effectively be concealed from the court by the simple expedient of recording them in a document created for the purposes of litigation. The only facts which are privileged are those facts the knowledge of which is derived by the client or the lawyer solely from privileged communications between each other, ie the subject of legal advice privilege.* [Foot note 35 not quoted]"

26 The general scope of permissible cross-examination on the circumstances in which statements are prepared is arguably beyond the scope of this appeal. However, it is necessary for us to address the legal principles which draw a dark marker between 'witness training' and 'witness coaching'. For assistance on this area of the law, we were referred to the judgment of the Singapore High Court in *Compania de Navegacion Palomar SA v Ernest Ferdinand de la Sal* [2017] SGHC 14, per Quentin Loh J [272-273]:

"*The law on witness coaching*

272 In my view, and this is something basic that every advocate worth his salt knows, witness familiarisation is perfectly legitimate. Except for a few lucky individuals, our memories are not infallible and dim with age. Generally speaking, the further one goes back in time, the older the witness is, the more inaccurate his recall will be. This means it is permissible to take the witness through his AEIC and then to assist his recollection of the facts by referring him to the key documents so that he is able to refresh his memory from these documents and their contents. That is also why the drafting of an AEIC is such an important exercise and it is the solicitor's duty to ensure that what goes into that AIEC, or any affidavit for that matter, is the witness's own "uncontaminated evidence" (see R v Momodou [2005] 2 All ER 571 at [62] ("Momodou")). Lawyers should never put words into the witness's mouth and should refrain from language that is not that of the witness. Neither should they put in events or matters that the deponent cannot recall. Time and again we see words and elegant phrases that a particular witness deposes to in his affidavits, but when cross-examination ensues, it is obvious that the words and language used are not familiar to the witness. The lawyer then exposes his client and his client's witnesses to confusion and great uncertainty in the hands of a competent cross-examiner, all of which is to the detriment of his client's case. This also happens when two or more witnesses use exactly the same words as each other in describing an event or a fact so that when one affidavit is found to be untrue or not quite true, it affects the credibility of the other deponents…

273 What is equally clear is that witness "coaching" is not permissible. Guidance and familiarisation by reference to documents becomes coaching when it seeks to supplement or supplant the witnesses' true recollection with another version of events. This includes giving advice to a witness to move away from his original answer to one which favours his case or the person calling him as a witness. It is also wrong to allow witnesses to collaborate on their answers so as to provide a version that is favourable to a party's case instead of relying on their honest recollection of what actually happened."

27 Mr. Dowley QC relied on a Practice Note from the English Court of Appeal in *R v Momodou (Practice Note)* [2005] 1 W.L.R. 3442 where Judge LJ described the distinction between 'witness training' or 'witness coaching' and 'witness familiarisation' as a 'dramatic' one [61]. Be that as it may, there has been some debate as to whether the narrative in *R v Momodou* on the inherent risks of witness training applies to civil proceedings since the reasoning provided in *R v Momodou* was customised to fit criminal proceedings in which there is a general prohibition on witness training and witness coaching. However, the Singapore High Court in *Compania de Navegacion Palomar SA v Ernest Ferdinand de la Sal* found the passages warning against witness training in *R v Momodou* to be relevant and applicable to civil proceedings [275]:

"*275 Judge LJ's guidance was of course given in the context of a criminal case. The extent to which the guidance in Momodou should apply in a civil case, and in particular, a complex civil case such as the present, was answered in Ultraframe (UK) Ltd v Gary Fielding and others [2005] EWHC 1638 (Ch) ("Ultraframe"). Lewison J considered the application of Momodou in civil cases and gave the following view (at [25]):*

> *There are, of course, significant differences between civil and criminal procedure. Not least, in civil cases evidence in chief generally takes the form of a pre-prepared witness statement, whereas in criminal cases it is elicited by (non-leading) question*

> *and answer; and in civil cases witnesses are normally permitted to sit in court while other witnesses are giving evidence, whereas in criminal trials this does not happen until the witness has given his own evidence; and even then it is unusual. In criminal cases witnesses do not see each other's statements or depositions; whereas in civil cases it is common for witnesses to see and respond to the statements of other witnesses. Nevertheless, the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words, remains at the heart of civil litigation too. In the light of the disappearance of oral evidence in chief from civil cases, it may be thought that the importance of the witness's own independent recollection in giving his evidence under cross-examination is all the greater.*
> *[emphasis added]*

276 However, Lewison J ultimately held that it was unnecessary on the facts before him to decide on the permissible limits of witness familiarisation in civil cases. He was of the view that that question raised very difficult issues which must be the subject of wide consultation before any conclusions could be reached (at [31]).

277 Indeed, whether and to what extent the principles in Momodou apply in civil cases is currently the matter of some debate in the United Kingdom (see Charles Hollander QC, Documentary Evidence (Thomson Reuters, 12th Ed, 2015) at para 29-10). In fact, Hollander QC goes further to question the desirability of extending Momodou to civil cases on the basis that these principles are not applied in practice and it would be unrealistic to apply these principles to witnesses in civil cases. He contends that group discussion of key issues is inevitable, and if handled responsibly, can actually improve the quality of the witness' evidence rather than detract from it (at para 29-09 and 29-10).

278 With respect, I am not sure I entirely agree with that view. The core principles of Momodou are integral to the adversarial process in the reception of evidence leading to the finding of facts in civil proceedings and I do not think it unrealistic to apply them to civil cases; on the contrary I think they equally should apply (see Ultraframe

at [25] cited above). What I can agree with is that with more complex civil cases, some group discussion early on in evidence gathering is inevitable but it always depends on the integrity of the lawyers to ensure it is handled responsibly and to remind potential witnesses of the dangers of coming to a common advantageous view when that is not the recollection of some of them. A good example occurs when the chief executive, who is a witness, insists on a version and his subordinates all fall in line, whether it is the truth or not. When the chain of consistency is broken at the weakest link, or one of the witnesses has an attack of conscience, the edifice collapses spectacularly. So the experienced lawyer knows that he does not take the chief executive's proof of evidence in front of the chief executive's subordinates."

28 While I would cautiously resist an absolute application of the reasoning in *R v Momodou* on witness training to civil proceedings, I accept that each case ultimately turns on its own particular facts as observed by Quentin Loh J, in *Compania de Navegacion Palomar SA v Ernest Ferdinand de la Sal* [283]:

"*283 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. I accept that the line between witness coaching and training and permissible witness familiarisation can be a very fine one, but that should not prevent a court from making that call and sort the wheat from the chaff. Even though that may be a judgment call, I think there must be very few and rare cases indeed where one can say the line has disappeared. 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 (see Ultraframe at [25]). If, like in Day v Perisher Blue, 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."

29 The judgment of New South Wales Court of Appeal in *Day v Perisher Blue* [2005] NSWCA 110 was tendered to us as a clear example of impermissible witness coaching. In that case Honour Judge Patten, sitting as the judge of first instance, dismissed Mr. Darrel Justin Day's personal injury claim against his then employer, Perisher Blue Pty Ltd. ("Perisher Blue"). On the facts, Mr. Day was struck by a skier in the course of his employment as he was loading skiers onto a J-Bar. His case was that this was caused by a breach of duty on the part of Perisher Blue.

30 On appeal, the Court was concerned with whether the trial judge erred in accepting the evidence of witnesses for Perisher Blue after it had emerged that those witnesses had conferenced with one another about their intended evidence prior to the trial. The Court of Appeal was also made aware of a pre-trial letter from Perisher Blue's lawyers which had surfaced during the Plaintiff's cross-examination of one of the defence witnesses. The letter, which is fully quoted in the Court of Appeal's judgment, was addressed to the defendant and copied to other witnesses, setting out a witness-by-witness summary of the evidence expected at trial. Additionally, the letter contained advice on what would be required of those witnesses to achieve Court-readiness.

31 This is the background to the following two grounds of appeal relied on by Mr. Day before the New South Wales Court of Appeal:

"*5. His Honour, insofar as he relied on the evidence of the respondent's witnesses erred, given the improper coaching of those witnesses.*

6. His Honour failed to give reasons or sufficient reasons for rejecting the appellant's submission as to the unreliability of the respondent's witnesses, given the coaching of those witnesses."

32 On my assessment of *Day v Perisher Blue Pty Ltd* the Court of Appeal were focused more on the iniquitous intention and purpose of the witness conferencing rather than the mere fact of any occurrence of witness training. It is evident from the below portion of the judgment of Sheller JA [30] that the Court of Appeal concluded that the law firm's real intention behind the collective conferencing with Perisher Blue's witnesses was to influence the witnesses into speaking of one accord, whether or not that was consistent with their true recollection:

"*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. This realisation makes particularly sinister the precept in the Witness Protocols for Court Cases and Arbitration Hearings, "Not about facts about credibility".*"

33 In allowing the appeal and ordering a retrial, the Court of Appeal judgment held [35]:

"*35 I regard what happened here as of sufficient seriousness prima facie for the papers to be sent to the Legal Services Commissioner. While I accept that it is arguable that the various witnesses' credibility could have survived the attack made upon it in reliance on the solicitors' letter and the teleconference, the trial Judge's failure to*

deal with these submissions leads to the conclusion that in the result his Honour failed to have regard to critical evidence. Accordingly the verdict and judgment must be set aside and a new trial ordered; compare Mifsud v Campbell (1991) 21 NSWLR 725 at 728."

34 *Day v Perisher Blue Pty Ltd* highlights the importance and profound responsibility given to practising members of the legal profession in their preparation and proofing of witnesses. It follows that where that professional responsibility is used for a fraudulent or iniquitous purpose, the protection of privilege must be lost.

35 In my judgment, none of the authorities cited before us lend support to Mr. Dowley QC's pinnacle submission that the mere presence of any other witness during the witness proofing or preparation process automatically constitutes iniquitous conduct. In each case, the Court will first assess all of the evidence of the relevant facts and circumstances and then draw reasonable inferences on the underlying purpose or intention behind the impugned conduct.

Assessing whether the Evidence establishes a *Prima Facie* Case of Iniquity

36 Advancing Tony's second ground of appeal, Mr. Dowley QC submitted that the learned judge erred in his attempt to resolve perceived conflicts on the evidence at an interlocutory stage. Mr. Dowley QC contended that the exercise of identifying whether there was *prima facie* case of iniquity did not require the judge to settle any competing evidence.

37 What is seemingly ignored by this argument is that any analysis as to whether a *prima facie* case of iniquity has been shown calls for an assessment of the totality of the written evidence before the Court. How otherwise might such a task be properly discharged? It could not reasonably be suggested that the learned judge ought to have ignored the evidence of Ms. Lin and Ms. Huang any more than the evidence from Alice.

38 However, I do accept that it could fairly be said that the learned judge, perhaps unwittingly, flirted with a misapprehension that Alice's evidence, taken in isolation, did not give rise to a *prima facie* case of iniquity. In his 22 March 2021 Ruling he set out a preliminary analysis as follows :

> "*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.* [Bold font added for my emphasis]
>
> *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.*"

39 It seems that the judge took the view that if you look at Alice's evidence by itself and without any other evidence (including, presumably, that of Dr Wang himself) there was improper pressure, in the form of an "*attempt to procure favourable (and possibly false) evidence*" and that this could not be regarded as trivial. However, it is not wholly clear whether the judge meant that, notwithstanding that improper pressure, there was no iniquity because Dr. Wang did not in fact succumb to any improper pressure exerted on him. If that was what he meant, I would not agree with him. The attorneys would not rescue themselves from a charge of iniquity merely because their improper attempts failed.

40 But I suspect that what the judge meant was that, in the light of (a) what Dr Wang told Alice, *videlicet*, that he **felt** pressured (although he also said "*that they both kept telling him to include things in his witness statement that he did not wish to include*"); (b) the context in which he spoke to Alice, namely to respond to her complaint that he had signed a statement which was unhelpful to Tony; and (c) that in the end he did not sign anything with which he did not agree, there was no improper pressure, rather than an understandable feeling of discomfort by a witness when matters were put to him for consideration. Such an analysis would not, itself, be based on Alice's statement **alone** and is difficult to square with the first sentence of paragraph 8 of Alice's statement.

41 Haddon-Cave J, sitting in the Family Division of the English High Court, explained the iniquity exception to the rule of legal professional privilege in *Z v Z* [2017] 4 WLR 84. He said [14]:

The fraud or "iniquity" exception

"*14 There is, however, a "fraud" exception. The following statements of principle are pertinent: (1) Where legal advice is sought or given for the purpose of effecting fraud or "iniquity", it is not privileged (per Schiemann LJ in Barclays Bank, at p 1249, who noted that the use of the word "iniquity" in this context stemmed from Bingham LJ in Ventouris (supra)). (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 (per Munby J in C v C, at para 35 citing Schiemann LJ in Barclays Bank, at p 1249). (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 (per Goff LJ in Gamlem Chemicals Co (UK) Ltd v Rochem Ltd (unreported) 7 December 1979—cited by Schiemann LJ in Barclays Bank, at p 1249). (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*

(per Vinelott J in Derby & Co Ltd v Weldon (No 7) [1990] WLR 1156, 1173). (5) Each case depends on its own facts (per Goff LJ in Gamlen (supra))."

42 Citing *Z v Z* in his own Ruling of 5 August 2020 (Ruling on Specific Discovery Application) Kawaley AJ provided a detailed outline of the legal principles governing what he described as the "fraud exception". The balancing exercise to be struck between guarding the public's interest in legal advice being protected by privilege and the public's interest in unveiling fraudulent or iniquitous conduct was adroitly simplified by Kawaley AJ as follows [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…*"

43 In *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.'*"

44 The appearance of competing characterisations of what is required for a "*prima facie*" case is potentially illusionary. In the usage of terms such as "strong" and "obvious" when describing the quality of evidence required, the real driving force is directed to ensuring two matters: first, that the evidence is properly assessed so that privilege is

not overborne on the basis of scantily clad allegations of fraud or iniquity or evidence which is impressive only when viewed in isolation from the opposing evidence; and, second, that, when properly assessed, the evidence provides a sufficiently cogent foundation for holding that any claim to privilege is to be defeated, on an interlocutory basis, by reason of what can properly be regarded as iniquity.

Whether the Evidence in fact established a *Prima Facie* Case of Iniquity

45 I have found no basis for criticism of Kawaley AJ's consideration of both Alice's evidence and that of Ms. Lin and Ms. Huang in the context of all of the other evidence before him. His evaluation of that evidence is unimpeachable as it was measured and reasonable. For these reasons, I find that we have no cause to interfere with the learned trial judge's findings that a *prima facie* case of iniquitous conduct was not established.

Ground 3

The Learned Judge was wrong to preclude further investigation into the procedure for the taking of witness evidence (the "Disputed Procedure").

46 Since the judge was not, in my view, wrong to conclude that there was no *prima facie* evidence of iniquity, there is no basis for the complaint that he was wrong to preclude further investigation into "the Disputed Procedure", i.e. what the Applicant said had happened in the case of Dr Wang. Further, in the light of the position taken by the Respondents, there will be on objection to questioning of the limited nature indicated in paragraph 24 above.

Ground 4

The Learned Judge was wrong to preclude Tony from relying upon Alice's evidence and the statements made to her by Dr Wang.

47 The Applicant makes this complaint on an assertion that any confidentiality relating to these statements has now been lost. As to that, it seems to me that, the judge, having

decided that no *prima facie* case of iniquity had been established, was fully entitled to decide, on a case management basis, that the evidence of Alice should not be used.

<u>The Application for Interrogatories</u>

48 Mr. Dowley QC considered Tony's application for interrogatories to be independently meritorious, irrespective of the Court's findings on the iniquity grounds. He submitted that the application should be granted as the subject of the questioning does not trespass on legal privilege territory and would be admissible under cross-examination.

49 The relevant procedural rules governing an application for interrogatories is under Order 26 Rule 1 of the Rules of the Supreme Court which provides:

"*26/1 Discovery by interrogatories*

1 (1) A party to any cause or matter may apply to the Court for an order—

(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter, and

(b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

(2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the application for such leave is made.

(3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness."

50 RSC O.26 requires a Court to grant leave on an application for interrogatories only to such extent as is necessary to fairly dispose of the action. The questions proposed by the application call for information about the presence of persons during the witness proofing process. This could only be perceived as an attempt to poke behind the Court's decision for the protection of privilege to remain undisturbed by the rejected allegations of iniquitous conduct. In this case, the judge properly found that the evidence was not sufficiently probative of iniquitous conduct on the part of Ms. Lin. This leaves Tony with no foundation for asserting that the information sought is needed to fairly dispose of the matter.

51 In my judgment, Mr. Midwinter QC's objection that this application is, or is the beginning of, a peripheral attack on the Court's finding against iniquitous conduct has real force for the reasons outlined by the learned judge in both his 22 March and 29 March Rulings. In addition, it seems to me entirely open to the judge to decline, as he did, to order interrogatories, for case management reasons.

Whether Leave to Appeal should be granted

52 It is well-established law that an applicant will not be given permission to appeal in cases where there is neither a realistic prospect of success nor an issue of public importance. The authors of the 1999 White Book Order provide the below commentary [59/14/18]:

"*Circumstances in which leave will be granted- The general test which the Court applies in deciding whether or not to grant leave to appeal is this: leave will normally be granted unless the grounds of appeal have no realistic prospects of success (Smith*

v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538; [1997] 4 ALL E.R. 840, CA). The Court of Appeal may also grant leave if the question is one of general principle, decided for the first time (Ex p. Gilchrist, Re Armstrong (1886) 17 Q.B.D. 521, per Lord Esher M.R. t 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes L.J., in Bubkle v. Holmes [1926] 2 K.B. 125 at 127)."

53 This formulation of the test was endorsed by a 1999 English Court of Appeal Practice Direction which was referred to in Bank of Credit & Commerce International SA v Ali, Husain and Zafar [2001] EWCA Civ 636 [para 39]:

"The relevant test for granting leave to appeal are [sic] *set out in the Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027. The general test, and the test on points of law, are as follows:*

> *"2.8.1 . .The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. . . .*
>
> *2.9.1 Permission should not be granted [on a point of law] unless the judge considers that there is a realistic prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case. . ."*

Permission to appeal is not usually given on the Judge's findings of primary fact but may be given in appropriate cases where the question is whether the Judge drew the correct inferences (Practice Direction, paragraph 2.10.1)."

54 It was not suggested before us that the grounds of appeal imported issues of public importance. So, the question of leave to appeal is contingent on whether the grounds of appeal have any realistic prospect of success. Of course, Tony's prospect of success is not an exercise of estimation for this Court as we have had the benefit of hearing the parties' full submissions on the proposed grounds of appeal.

55 Having considered the evidence and the submissions from both parties, we have found that there is no such prospect of success. Accordingly, leave to appeal should be refused.

CONCLUSION

56 For all of these reasons, I find that Tony's application for leave to appeal should be refused.

57 Nothing in this judgment is intended to preclude Tony from filing and relying on a hearsay notice in respect of Alice's report of Dr. Wang's statement that he did not specifically recall the presence of a female lawyer at CGMH on 31 October 2012. Such reliance involves no breach of privilege.

58 I would invite Counsel for Tony to draw up an order to give effect to this Ruling. Subject to any submissions that may be made within 21 days in writing, the Respondents shall have their costs here and below.

KAY, JA

59 I agree.

CLARKE, P

60 I agree.

C.S.G.S. Clarke

CLARKE, P

Maurice Kay

KAY, JA

SUBAIR WILLIAMS, JA