In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff

- 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

Defendants/Respondents

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

Defendant

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

Defendant/Respondent

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

Defendant

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

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

Defendant/Applicant

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

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

Defendant

IN CHAMBERS-VIA VIDEOCONFERENCE

Date of hearing: December 17-18 and 21 2020

Draft Ruling circulated: December 22, 2020

Ruling delivered: December [ ], 2020

Mr James Weale of counsel and Mrs Fozeia Rana-Fahy of MJM Limited ("MJM") for the 8th Defendant (D8)

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

HEADNOTE

D8 application for discovery, inspection and interrogatories-whether further disclosure or responses required-application of practical control test to documents beyond the legal power of a party-legal advice given to trust companies in connection with preparation of power of attorney executed by deceased-whether joint interest privilege arose between party executing document and parties who formally obtained legal advice-whether joint interest privilege can be asserted on a basis inconsistent with a party's pleaded case

RULING

Introductory

1. The present Ruling seeks to dispose of three discovery-related applications made by D8 as the present litigation enters what may fairly be viewed as the final lap of interlocutory applications before the commencement on March 1, 2021 of a 3-4 months' long trial.

2. Protestations from the legal protagonists notwithstanding, one of the 'dark arts' in modern heavy-duty commercial litigation, it seems to me, is the pursuit of technically plausible discovery applications which, if granted, will potentially divert the respondent's legal team from their central trial preparation task. A pattern which has emerged in the present litigation, on all sides, appears to be as follows. A meritorious discovery request is made in correspondence. After toing and froing (to borrow Anthony Smellie CJ's phrase[1]), the request is substantially complied with. Notwithstanding substantial compliance, the application is pursued on a basis which will compel the respondent to divert considerable legal resources towards activities of questionable practical utility. The tit-for-tat character of these tactics was vividly revealed in the course of the wider suite of interlocutory applications with various parties placing express reliance on submissions made by their opponents in earlier applications.

3. The breadth and depth of the issues in dispute in the litigation as a whole makes it obvious that the predominant case management objective at this stage is ensuring that the parties are able to efficiently and proportionately prepare their cases in relation to the most important aspects of their respective cases. Fundamental fair hearing rights are designed to facilitate the vindication of substantive justice on the merits in real world terms, and both this Court's procedural rules and the substantive law of evidence are servants of these higher principles, not their master. This must be borne in mind when considering any interlocutory application which, if considered at an abstract technical level divorced from the critical elements of the present proceedings, could result in the foundational principles of case management being unwittingly undermined.

4. It must also be borne in mind that the parties also occasionally identify genuinely difficult and important points of principle, typically relating to legal advice privilege. Such points cannot be adjudicated in a purely pragmatic efficiency-driven manner. Such points must be decided, albeit based on a summary assessment of the facts, informed by a careful application of often less than straightforward legal principles to the available evidence. Despite the need for care, when such points arise on nearly the

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eve of the trial, they must be decided quickly, not least to afford the party against whom an important application is resolved, the opportunity to appeal.

5. The present applications fall into each of the above-mentioned categories. They entail:

   (a) D8's application for responses to his proposed Interrogatories in relation to the "Disputed Documents" to be verified by the Trustees on affidavit;

   (b) D8's application for the Trustees to provide a List of Documents in relation to documents concerning the personal affairs of YC Wang ("YCW") and YT Wang ("YTW") which were held by the Finance Department on the disputed basis that these documents were under the practical control of the Trustees; and

   (c) D8's application on the basis of joint interest privilege for disclosure of Li and Lee advice and related communications with the Trustees who formally retained them in connection with the preparation of the Power of Attorney purportedly executed by YTW on October 31, 2012, pursuant to which (*inter alia*) the Trustees contend assets were transferred with the authorisation of William Wong (acting as YTW's attorney) to the Ocean View Trust.

The Interrogatories application in relation to the Disputed Documents

6. This application was addressed at paragraphs 10-27 of '*Tony's Skeleton for Hearing on 16 to 18 December 2020*', filed and dated December 14, 2020. The Disputed Documents consist of the following documents the authenticity of which D8 challenges. Their significance and the related concerns were described in his Skeleton as follows:

> "*13.1. The purported power of attorney dated 31 October 2012 (#1948) (the 'Power of Attorney'). This document is central to the PTCs' case insofar as it is relied upon as conferring on William the ability to effect consent on behalf of YT Wang to the transfers into the Fifth Bermuda Trust. It is Tony's case that it is a dubious document for, inter alia, the following reasons: (i) the purported signature of Mr YT Wang which it purports to bear does not appear to be Mr YT Wang's signature; (ii) it was executed at a time when Mr YT Wang lacked capacity; (iii) the*

signing ceremony referred to in the PTCs' evidence is inconsistent with contemporaneous medical records; (iv) documents surrounding its preparation and execution appear to have been withheld (see below).

13.2. Until recently, the PTCs asserted that the final electronic version of the Power of Attorney was held within the offices of Lee and Li (the 'Lee and Li Draft'), but that that document was/is privileged (Conyers' letter of 4 November 2020). As explained below, only after Tony issued an application for an order (on unless terms) of the Lee and Li draft, did the PTCs – through Roger Yang – produce a purported final electronic draft of the Power of Attorney. It therefore appears to be the PTCs' position that an important legal document was finalised by a non-lawyer without the involvement of Lee and Li. In any event, it is clear from the metadata relating to the latter document that an earlier draft is likely to exist (see below).

13.3. The purported 26 July 2012 Memorandum (#1937) (the '26 July Memo'). The 26 July Memo purports to record an alleged conversation on 'a certain day in October 2010' which is now said to have constituted an 'oral mandate' by YT Wang to William Wong. The oral mandate has now assumed central importance to the PTCs' case following the amendments introduced by the PTCs' Draft Amended Defence and Counterclaim served on 17 October 2020 (see §133). The 26 July Memo gives rise to immediate and obvious concerns, not least how and why it took 21 months to record an allegedly crucial discussion and why it was prepared after the serious deterioration in YT Wang's physical and mental health. Furthermore, Tony has disputed that the purported signature of Mr YT Wang on the 26 July Memo is in fact Mr YT Wang's signature.

13.4. By their letter of 4 November 2020, Conyers asserted that 'no electronic version of the 26 July Memo has been retained'. Given that it was created within FPG and given the vast resources (and, it is to be inferred, vast IT resources) within FPG, the suggestion that all records (of a relatively recent document) have been lost or destroyed is inherently improbable. It is to be inferred that further drafts are in fact held within the Finance Division, but that proper searches have not yet been undertaken.

13.5. The purported 14 December 2011 Report (#3526) (the 'December Report'). The December Report is the subject of an entire section of the witness statement of Roger Yang (Section C, §31-38) who gives a detailed account of an alleged meeting with inter alios Madam Chou and her younger brother and purports to record elaborate details of what Madam Chou's brother said during that conversation. In fact, as explained in Madam Chou's evidence (second witness statement, §36) – which is confirmed by official Taiwanese immigration records – her brother had left Taiwan in 2001 and did not return until he died: he could therefore not possibly have been in attendance at the alleged meeting which the December Report purports to record. The above matters give rise to serious and obvious concerns as to the provenance of the December Report as well as Mr Yang's evidence.

13.6. The original hard copy of the December Report is said not to have 'been retained'. An electronic version has been produced, but the metadata suggest that that version is not the original draft. It is to be inferred that the Finance Division holds a further draft (or drafts).

13.7. The purported 31 October 2012 report (#3529) (the "Summary of Execution"). This document is closely connected to the Power of Attorney: it purports to be a contemporaneous note (apparently prepared in anticipation of a potential dispute as to the validity of the Power of Attorney) summarising the procedure adopted to execute the Power of Attorney. The same concerns about the Summary of Execution apply as to the Power of Attorney itself. The concerns about the Summary of Execution are exacerbated by the recent shift in Roger Yang's evidence in response to metadata which the PTCs only produced after the October Application.

13.8. The PTCs have asserted that the original hard copy of the Summary of Execution has "not been retained". It appears from the metadata that the electronic version of the Summary of Execution that has been produced is not the original version of the Summary of Execution. It is to be inferred that a further version is held within the Finance Division.

13.9. The purported 26 July 2012 minutes (#3528) (the "26 July Minutes"). No translation of this document has been provided by the PTCs. However, it is understood that the 26 July Minutes purport to record the approval inter alia of a resolution that cash dividends (totalling NTD 324 million) received by the WJY Charitable Trust, be used to acquire further shares in FPG. Moreover, the 26 July Minutes in the PTCs' disclosure record that Mr YT Wang was physically in attendance at, and indeed chaired, the meeting. It is notable that, notwithstanding that the two documents are apparently unrelated, the 26 July Minutes were purportedly produced on the same date as the 26 July Memo in circumstances where Mr YT Wang's physical and mental health had very substantially deteriorated. Further information provided by the PTCs in response to Tony's applications, and acquired by Tony following his recent inspection of the 26 July Memo, gives rise to extremely serious concerns:

13.9.1. On 4 November 2020 (Conyers' letter, §12-13 [CMC-E5/12/2], the PTCs revealed for the first time that: (i) no electronic version of the 26 July 2012 Memo 'had been retained'; and (ii) the hard copy version which had been produced by the PTCs in their Re-Amended List of Documents (the 'Disclosed Version') was in fact a 'draft document'.

13.9.2. On 27 November 2020 (Conyers' letter, §22-23 [CMC-E8/38/4]), the PTCs asserted that it is the practice of FPG's Charitable Foundation Unit to 'overwrite' electronic copies of meeting minutes with the consequence that such electronic documents are effectively wiped from the record and that the only record retained is a hard copy printout of the 'final' version held by the Bank of Taiwan. It has not been explained – on the basis of that astonishing assertion – how the PTCs came to obtain a printout of a draft version.

13.9.3. On 30 November 2020, pursuant to a physical inspection which had been arranged at Lee and Li's offices, the PTCs produced for the first time a different version of the 26 July Minutes (the 'New Version') from the Disclosed Version. Moreover, the New Version (which was purportedly drafted by the same minute-taker (Mr Long Wang) as the Disclosed Version) indicated that Mr YT Wang was not in fact present at the alleged meeting at all.

> *14. Save for the December Report (which gives rise to other concerns), each of the Disputed Documents is indicative of a disturbing pattern in which documents purporting to constitute and/or evidence Mr YT Wang's consent have been drafted by those within FPG in circumstances where no consent could have been given by Mr YT Wang by reason of his lack of capacity. This has direct significance in the context of the Fifth Trust (the Ocean View Trust), but also raises wider concerns. The above concerns are compounded by the paucity of other documents within the PTCs' disclosure surrounding the production of such documents and the PTCs' unwillingness/inability to produce certain of them (or drafts of them)…*"

7. The complaints set out in D8's Skeleton were, understandably, based on the evidence filed and correspondence exchanged as at the date when the Skeleton was prepared. It was also argued that the range of the Interrogatories was entirely proportionate, compared with the far greater number of queries the Trustees had raised in relation to documents the authenticity of which they challenged. The Trustees' Skeleton dated December 15, 2020 (at paragraphs 72-90) responded to all these complaints with typical vigour. It was pointed out that only one document (the Power of Attorney) was pleaded as bearing the forged signature of YTW. The pithy conclusory submission was as follows:

> "*89. Tony Wang appears to maintain that answers to the Proposed Interrogatories should be provided on affidavit by a director of the Trustees. Tony Wang has not explained why that is necessary or proportionate, given that answers have already been provided in correspondence from CDP.*
>
> *90. RSC Order 26 rule 1(3) states: '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.' (emphasis added). In this case the Trustees have not merely offered to answer the Proposed Interrogatories, they have actually done so via their lawyers. In those circumstances it would be a waste of time and resources for them to provide precisely the same information on*

affidavit, especially when there is no basis for challenging the veracity of the information provided in correspondence."

8. Mr Weale in his oral argument sought to create an aura of suspicion around the disclosure given in this regard. He described the position in relation to the July 26, 2012 Minutes as "*murky*". However, Mr Adkin QC expressed bemusement as to what further information his clients could reasonably be expected to produce. In my judgment, all reasonable requests for clarification in relation to the Disputed Documents set out in the Interrogatories in their original and modified form were satisfactorily answered by Conyers in their letter of December 14, 2020, was received after his Skeleton had been filed:

   (a) the location of the Original devices question was satisfactorily addressed at paragraphs 9-11;

   (b) the earlier drafts question in relation to the Power of attorney, the Memorandum dated July 26, 2012 and the Internal reports were satisfactorily addressed at paragraphs 12, 14 and 15 respectively;

   (c) the availability of the Original devices and metadata-data questions were satisfactorily addressed at paragraphs 11, 16 and 17, respectively;

   (d) when the Trustees came into possession of the Disputed Documents was satisfactorily addressed at paragraphs 19-23;

   (e) (it was already common ground that Interrogatory 5 had been satisfactorily answered, save for the need for verification by affidavit); and

   (f) the question of the location of electronic versions of various documents was satisfactorily addressed at paragraphs 25-32 of Conyers' December 14, 2020 letter.

9. Mr Weale in his oral reply insisted with considerable conviction that serious concerns existed. However, I found that the general tenor of the enquiries strongly reflected a form over substance approach giving rise to a strong suspicion of a tactical desire to bog down the opposing legal team in peripheral procedural steps.

10. Notwithstanding my frequent observation in this and previous hearings that contentious discovery issues should be verified on oath, I find that in all the circumstances of the present application, no sufficient justification has been made out for requiring the positions volunteered in correspondence to be verified by the Trustees on oath. Such a requirement should only be imposed where there are grounds for anxiety about relying on the assertions advanced by a party's lawyers.

Summary of findings on Disputed Documents

11. Accordingly, this limb of D8's applications is dismissed. Unless any party applies to be heard as to costs by letter to the Registrar on or before January 22, 2021, D8 shall be awarded the costs of this aspect of D8's applications up to and including December 14, 2020, and the Trustees shall be awarded the costs thereafter, to be taxed if not agreed on the standard basis.

The Finance Division Documents

12. The Trustees have produced various documents which have been voluntarily supplied by Mr Roger Yang, employed, *inter alia*, in the Formosa Plastics Group ("FPG") in what has variously been described as the "Finance Division", "Finance Department" and (most recently) the "Executive Projects Department". D8 centrally contends that these documents are in law within the Trustees' power, so that full discovery should be given by list accompanied by a clear explanation of what documents Mr Yang has actually searched for and/or been asked to search for.

13. Mr Weale in his Skeleton advanced the following legal submissions the accuracy of which were not directly challenged:

> "*50. The relevant principles in this context have been considered in a number of English authorities including at appellate level. Those authorities establish that 'control' (the equivalent test to 'possession, custody or power') may be established insofar as the evidence suggests that a defendant enjoys practical control over documents held by a third party even though such a defendant has no legal right to obtain such documents. The key authorities are briefly summarised in turn below.*
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> *Schlumberger Holdings v Electromagnetic Geoservices [2008] EWHC 56 (Pat)*

50.1. The claimant was a holding company. The defendant sought a disclosure order which would require the claimant to search for records of companies within the group. Floyd J (as he then was) held that, whilst the mere fact that such companies were within the same group was insufficient (on the basis of the House of Lords' decision in Lonrho v Shell [1980] 1 WLR 627), it was appropriate to make an order for disclosure in circumstances where the evidence showed that such companies had freely cooperated in providing documents to the holdings company. At §21, he said this: 'I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here in my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation…' (emphasis added)

North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11

50.2. The Claimant sought a disclosure order pursuant to the Court's jurisdiction to require a judgment debtor to produce documents relating to his assets (CPR 71.2). The Court proceeded on the basis that there was no relevant distinction as to the requirements for 'control' in this context between CPR 71.2 and the general disclosure provisions in CPR 31.8. The debtors (Messrs Fomichev and Peganov) asserted that documents held by a trustee were not within their control on the basis that he was no longer a beneficiary of the relevant trust.

50.3. At first instance, the applicant submitted, based on the evidence, that 'in real life' the respondents would be able to access to the documents. The

first instance judge acceded to the application as follows (quoted at §20 of the appeal judgment):

'It seems to me (and it is not submitted to the contrary) that the court can in certain circumstances simply require a party to produce a document. It is of course the case that it would not do so as a matter of course. But I think Mr Sinclair is right that in practice if such an order is made it is reasonable to suppose that Mr Fomichev and Mr Peganov will be able to comply with it. I am told that the beneficiaries of the trust are their wives and their children. If that is the position then it seems to me to be wholly unrealistic to suppose that if Mr Fomichev does not keep copies of these documents himself then there is no way in which he would be able to obtain copies.' (emphasis added)

50.4. On the basis of the evidence before him, the Judge concluded that it was appropriate to make an order simply requiring the respondents to produce documents which it was 'reasonable to suppose' that they would be able to obtain pursuant to the true relationship between the judgment debtors and the trustee and/or the beneficiaries thereby putting the onus on the judgment debtors to explain why such an order was not complied with.

50.5. The Court of Appeal upheld the judge's order. In his lead judgment, Toulson LJ (as he then was) held that (at §40):

'In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of 'right to possession' in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency. But even if there were on a strict legal view no 'right to possession', for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents

were nevertheless within the control of that party within the meaning of CPR 31.8(1).' (emphasis added)

Ardila Investments NV v ENRC [2015] EWHC 3761 (Comm)

50.6. The applicant sought an order requiring a parent company to disclose documents by its wholly-owned subsidiaries. The application failed on the facts: the relevant evidence consisted merely of a provision in a shareholders' agreement to the effect that the defendant would keep the claimant informed of certain matters relating to its subsidiaries; there was no evidence to suggest any relevant arrangement. Males J (as he then was) explained the principles established by the above cases as follows (at §10 & 14): 'It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access… … a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access.' (emphasis added)

50.7. As the above authorities make clear, in the context of an interlocutory application, it is inappropriate for the Court to resolve a disputed issue as if it were a trial. Rather, the Court is required to consider where there is 'material from which the court can conclude' or it is 'reasonable to suppose' that documents can be obtained from a third party.

51. The above principles are explained by C. Hollander QC in Documentary Evidence (13th ed.) at §8-13 as follows, under the heading 'Where the Affiliate is Accustomed to Give Access':

'Where the court considers that the evidence in relation to control looks murky, it may reach a conclusion that is not obviously consistent with the need to find a legally enforceable right. All of North Shore Ventures,

Schlumberger and Grupo Torres are examples of the court finding ways round the problem created by unsatisfactory evidence asserting that the deponent had no legally enforceable right. So too in Global Energy Horizons Corporation v Gray Sales J held that on the evidence an inference was to be drawn that a non-party was in practice able to call upon and use documents held by a related company and would have a right to take copies of those documents for his own purposes and therefore that the test of 'practical control' set out in North Shore and Schlumberger was satisfied.' (emphasis added)

52. The Court will have noted that, in the context of the PTCs' Application against Tony, it is the PTCs' position that Tony's alleged ability to obtain the cooperation from the Second Family in producing documents is sufficient to render such documents within Tony's possession, custody or power (Pearman 9, §25-28). Having taken that position against Tony, it is not open to them to contend that different principle should apply to the PTCs."

14. In the Trustees' Skeleton, these principles were only indirectly disputed in the following way:

"71. *As to the second way Tony Wang seeks to demonstrate the Trustees' 'power' over the EPD's documents concerning the Founders' personal financial affairs:*

71.1 The Court of Appeal in Lonrho [1980] 1 QB 358 addressed the possibility that in 'one-man company' situations, a sole-shareholder's practical control over their company might be so complete as to place its documents within their 'power'.

71.1.l. Lord Denning MR at p.371 said:

'I would like to say at once that, to my mind, a great deal depends on the facts of each individual case. For instance, take the case of a one man company, where one man is the shareholder – perhaps holding 99% of the shares, and his wife holding 1% -where perhaps he is the sole director. In those circumstances, his control over that company may be so complete – his 'power' over it so complete – that it is his alter ego. ...But in the case of multi-national companies, it is important to realise that their position with regard to their

subsidiaries is very different from the position of one-man companies.'

71.1.2. Shaw LJ said at 375-376:

'In the end I have come to view that a document can be said to be in the power of a party for the purposes of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession (as with a one-man company in relation to documents of the company) or otherwise has a present indefeasible legal right to demand possession from the person in whose possession or control it is at that time. ...

There are no doubt situations, such as existed in B v B (Matrimonial Proceedings: Discovery) [1978] Fam 181, where on the established facts a company is so utterly subservient or subordinated to the will and the wishes of some other person (whether an individual or a parent company) that compliance with that other person's demands can be regarded as assured. Each case must depend upon its own facts and also upon the nature, degree and context of the control it is sought to exercise.'

71.2 In order to demonstrate that the Trustees have 'power' over the EPD's documents on the basis of 'practical' or 'effective' control, Tony Wang therefore needs to show something akin to the EPD being the Trustees' 'alter ego' (to use Lord Denning's words) or to show that the EPD is utterly subservient to the Trustees will so that compliance with their demands is assured (to use Shaw LJ's words).

71.3 Tony Wang has come nowhere near establishing that the Trustees have that level of control over the EPD…."

15. However, in his oral argument Mr Adkin QC summarily dismissed his opponent's legal analysis as a "red herring". In the course of Mr Weale's opening submissions I suggested that the practical control principle was analogous to the approach adopted by the courts in the arena of freezing injunctions where an "extended definition" of assets is applied to assets over which a parent company has no legal control but enjoys *de facto* control. D8's counsel seemed reluctant for me to stray beyond the safe bubble of his submissions lest my decision be infected by legal error. Yet he advanced what I considered to be a strikingly similar rationale in the discovery context for a practical control rule. A party ought not to be permitted to escape a legal obligation by relying on legal formalities which are wholly at odds with practical reality. Here, Mr Weale

submitted that it was unsatisfactory for the Trustees to be able at their own election to obtain documents which would assist their case from the Finance Department without being subject to a corresponding obligation to seek out and disclose documents which would undermine their case.

16. As Lord Denning observed in *Lonrho* in a passage upon which the Trustees' counsel relied, "*a great deal depends on the facts of each individual case*". In the present case (a) the Trustees' directors include persons who may fairly be viewed as 'Lords of the FPG Manor', (b) the Trustees purport to have actually asked Mr Yang to search for all relevant documents and (c) they further aver that he has actually done so. The substantial opposition to the present application is most importantly that no more reasonably needs to be done, although it is further (to my mind unconvincingly) suggested that he cannot be expected to do any more.

17. In all the circumstances I find that the Finance Division/Finance Department/Executive Projects Department documents relating to the personal affairs of YCW and YTW, which Mr Yang has been able to access at the request of the Trustees for the purposes of discovery in the present case, are subject to the practical control of the Trustees. I find that it "*appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation*": *Schlumberger Holdings v Electromagnetic Geoservices* [2008] EWHC 56 (Pat) (per Floyd J-as he then was) at paragraph 21.

18. It does not follow that the Trustees should be ordered to require Mr Yang to carry out an entirely fresh search again. Paragraph 14(3) of the 10th Scott Pearman Affidavit goes some way towards satisfying me that there can be no justification for requiring a comprehensive renewed discovery exercise in relation to these documents. That would be a disproportionate exercise with no corresponding tangible procedural benefit. I accept that the Trustees' lawyers have asked Mr Yang to search for all relevant documents.

19. However, the most important gap in the evidence which Mr Weale identified was the lack of clarity as to precisely what relevance test Mr Yang applied and in relation to what time-frame. Moreover, these searches have been carried out in circumstances where the Trustees' formal legal position has been they were not legally required to make discovery of these documents at all. As I indicated at the end of oral argument I was minded to do, I find that the Trustees should produce one or more Affidavits or Affirmations (similar to the evidence I invited the Plaintiff to adduce in relation to his journals):

    (a) explaining what relevance test was applied by Mr Yang when he initially carried out his search for documents relating to the personal affairs of YCW and YTW;

(b) explaining what document time period (if any) was embraced by the searches already carried out;

(c) confirming that all relevant documents relating to the Founders to which Mr Yang and/or the Trustees have practical access, wherever they may be kept, have been or will be produced; and

(d) to do so by January 8, 2021.

20. Based on a whistle-stop tour of the pleadings, Mr Weale helpfully illustrated that documents created as early as 1994 (when certain companies were incorporated) are potentially relevant. This was in response to my invitation to clarify what time period was potentially involved. With this guidance having been provided, there is no need for any formal time limit to be imposed in the Order drawn up to give effect to the present Ruling.

Summary of findings on Finance Division documents

21. Accordingly, I find that the Trustees should by January 8, 2021 file Affidavit evidence explaining with greater specificity than they have to date what documents Mr Yang has searched for, within what document date range (if any) and confirming that all relevant documents within the practical control of the Trustees relating to the personal affairs of YCW and YTW have been or will be disclosed.

22. Unless any party applies by letter to the Registrar by January 22, 2021 to be heard as to costs, the Trustees shall pay D8's costs of the present application to be taxed if not agreed on the standard basis.

Joint Interest Privilege

23. D8's Skeleton introduced the joint interest privilege point as follows:

> "*28. The Power of Attorney purported to confer on William Wong authority to 'handle and dispose of… all of my [i.e. Mr YT Wang's] assets, and to handle all matters relating to my assets' and set out various complex provisions as to what such authority entailed including in respect of, among other matters, the bringing and defending of legal proceedings. On any view, it was both a complex and an extremely important document in the context of Mr YT Wang's personal and financial affairs. Moreover, the only person whose pre-existing rights were likely to be affected by the execution of the Power of Attorney was Mr. Y.T. Wang himself.*
>
> *29. At the time of its purported creation, Mr YT Wang was in his 90s. It is Tony's case that anyone who interacted with Mr YT Wang at the time would have*

appreciated that he lacked capacity (Tony's first witness statement, §167-183 [B6/1/46-51]). Even the PTCs' evidence accepts that "his condition was variable" and that Mr YT Wang would only have been able to understand the meaning of the Power of Attorney "at the right time" (William Wong's first witness statement, §167 [B2/5/30]).

30. Particularly in the circumstances described above, it would be absurd to suggest that Mr YT Wang himself was not (at the very least) included as a person who was jointly interested in the production of Power of Attorney (drafts of which are said by the PTCs to be privileged) and in any legal advice given in relation to the preparation and execution of the Power of Attorney. He is quite obviously the one person above all others to whom legal advice was (or, at least, should have been) directed in relation to the Power of Attorney which related exclusively to his personal affairs…."

24. The central legal principles which Mr Weale commended to the Court included the following:

"*39. As explained in Thanki on The Law of Privilege (3rd ed) at §6.07-6.08:*

'Joint privilege can also arise where, even though party A and party B have not jointly retained a lawyer (and only one of them is party to the relevant lawyer-client relationship), they have a joint interest in the subject matter of the communication. The defining characteristic of this aspect of joint privilege is that the joint interest must exist at the time that the communication comes into existence… in other words, the documents must come into being for the furtherance of the joint purpose or interest…

If a joint interest exists then the same principles as those set out above in relation to the joint retainers will generally apply. Accordingly, neither party can assert privilege against the other in respect of communications coming into existence at the time the joint interest subsisted; hence each party to the relationship can obtain disclosure of the other's (otherwise privileged) documents so far as they concern the joint purpose or privilege.'

40. The above passage was cited with approval and applied by Morgan J in Love v Fawcett [2011] EWHC 1686 (Ch) who then sought to apply those principles by seeking to identify the purposes which could found a joint interest (at §18):

> *'The relevant purpose, in my judgment, is to identify when a communication between Mr Barry and Northam is confidential to those two and when it is not confidential so that (in the latter case) Mr Barry is entitled to pass the information in question onto Mr Love and indeed Mr Love is entitled to have access to the matter communicated. If one puts the question in that way and focuses upon the purpose for which Mr Barry was instructed and the way in which Mr Love was or was not interested in that purpose, I make the following findings…*'"

25. The central elements of the Trustees' position were set out in their Skeleton as follows:

> "*67. The partner at Lee and Li who was responsible for the advice provided in connection with the Power of Attorney was Yao Lin (also known as Angela Y. Lin). Ms Lin is a very experienced lawyer. She has worked at Lee and Li for over 25 years and has served as the Chairperson of the ADR Committee, Chairperson of the International Affairs Committee, director and standing supervisor of the Taipei Bar Association, and Vice-Secretary-General of the Taiwan Bar Association: see paragraph 7 Lin 1. Having reviewed her working files, Ms. Lin has sworn an affidavit in response to Tony Wang's Power of Attorney Application ("Lin 1") in which she explains that:*
>
> > *67.1. Her clients were the first to fourth Trustees, see paragraph 14 Lin 1, 'Our instructions in relation to the Power of Attorney were received in or around early October 2012 and formed part of ongoing advice being rendered by my firm to the First to Fourth Trustees, Lee and Li having been instructed by them in connection with litigation which had been commenced and/or which might be commenced by Winston Wong'.*
> >
> > *67.2. YT Wang was not her client, see paragraph 15 Lin 1, 'I do not understand the basis for the assertion in paragraph 10 of Mr Molton's 11th Affidavit that the Power of Attorney was 'purportedly prepared for or on behalf of YT Wang'. My firm was not advising YT Wang nor anyone acting on behalf of YT Wang in connection with the preparation of the Power of Attorney.'*
>
> *68. That evidence is conclusive of the critical question which arises on this application. There is no basis on which to gainsay it, and it is unclear to the Trustees in light of that evidence whether, and if so on what basis, this application is maintained. The Power of Attorney Application should be dismissed with costs.*"

26. As far as the law is concerned, in oral argument Mr Weale contended that the crucial question was whether or not there was a joint interest in the "subject-matter" of the relevant legal retainer. Mr Adkin QC countered that the critical analysis was the "relationship" between the third party (YTW) and the instructing clients (the Trustees); recognised examples were the relationship between a trustee and a beneficiary and a company and its wholly-owned subsidiary. However, he sensibly accepted that the categories of qualifying relationship were not closed. He submitted that "*a joint interest should not be lightly inferred*": Bankim Thanki QC (ed.), '*The Law of Privilege*', Third Edition paragraph 6.08. Mr Adkin QC acknowledged that the legal position was not crystal clear, while Mr Weale insisted that in the present context the position was very simple indeed.

27. In my judgment the relevant legal test is clearly a somewhat flexible one, making a binary choice between these two factors, subject-matter and relationship, inappropriate. Whether a joint interest in the subject-matter of a legal retainer exists requires an analysis of both the subject-matter of the retainer and the relationship between the parties. In the present case, the Power of Attorney on its face purports to confer broad authority on William Wong to deal with all of YTW's personal assets. This creates a strong initial inference that any advice obtained in relation to the drafting of the Power of Attorney would be highly relevant (in a general sense) to the interests of the person who was intended to execute the document. My instinctive feeling from the outset was that D8's counsel was right to submit that the Trustees' position was absurd.

28. However, it is important to analyse what the legal elements of a qualifying joint interest are with greater specificity. Mr Adkin QC relied on *Thanki* at paragraph 6.10 for the proposition that (quoting Burnett J-as he then was- in *R (Ford)-v-Financial Services Authority)* [2011] EWHC 2583 (Admin) at paragraph 40):

> "*It is necessary to distinguish between advice being given to an individual as a client from advice which is given to another, but which impacts on his personal position. It is the former which supports a claim for joint privilege, not the latter.*"

29. That proposition is potentially dispositive of the present application. It finds general support from *Love-v-Fawcett* [2011] EWHC 1686 (Ch) at paragraphs 18-19 (the applicant would bear the burden of solicitors' fees and was involved in instructing them). Less direct support was provided by another passage to which Mr Adkin QC referred, Charles Hollander QC's *'Documentary Evidence'*, at paragraph 19-16:

> "*….in Brown…what the court is really holding is that the relationship between the parties is really such that if during the course of the relationship one party*

> *had asked to see the privileged documents of the other, the latter could not have refused.*"

30. Mr Weale submitted that it was obvious that YTW could have obtained access to the Lee and Li advice had he asked for it, and suggested I could properly ignore Ms Lin's evidence because she had not addressed the important consideration of what the purpose of the retainer was. This seemed a powerful argument. Because if the critical question is what relationship existed between YTW and the Trustees, and whether there was a joint 'commercial' interest in instructing Lee and Li, there would be a yawning chasm in the First Lin Affidavit. What the purpose of obtaining the advice over which privilege is asserted (and I appreciate that privilege was asserted over drafts and instructions, not merely advice) was is wholly (or largely) unexplained.

31. If, on the other hand, the critical framing is that articulated by Burnett J (as he then was) in *R (Ford)-v-Financial Services Authority)*, then the purpose of the retainer is not, standing by itself, the key criterion. Rather, it is important to analyse what was the relationship between the parties in relation to the relevant retainer. What is most important is whether the person asserting a joint interest in the privilege claimed by those who formally instructed lawyers was a *de facto* client.

32. Accepting that the authorities are far from clear as to precisely what the legal test for joint interest privilege is, in the context of the factual matrix of the present case, I find that it is insufficient to support a claim to joint interest privilege on the part of D8 as the administrator of YTW's Estate merely to demonstrate the undeniable fact that any advice given to the Trustees in relation to the Power of Attorney "*impacts on his personal position*". I find that the analysis of Burnett J in *R (Ford)-v-Financial Services Authority* is most persuasive.

33. In terms of general legal policy, for a start, the Court ought <u>not</u> lightly conclude that lawyers giving advice to A are deemed to have been, in effect, giving advice to B despite the fact that:

    (a) the lawyers did not consider B was a client; and

    (b) by necessary implication they did not become subject to a duty of care to B in rendering such advice (applying the classic *Hedley Byrne-v- Heller* [1964] AC 465 principles).

34. There may well be various legal contexts in which it might be obvious that the instructing client and a connected third party (e.g. a co-purchaser of a house) had joint interests even though A retained, instructed and paid the lawyers and B took no active

part at all in the lawyers' retention. In such contexts, it would be obtuse for a joint privilege claim to be denied. In the present case, as Mr Adkin QC forcefully pointed out, on D8's own primary case, the Trustees and the aging and ailing YTW (whose capacity was in doubt) had potentially adverse interests. On that case, the Trustees were seeking to effectuate a transfer of YTW's assets into a trust against his own true wishes. There is no basis in these circumstances for assuming or inferring that the advice was obtained for the benefit of YTW in circumstances where a senior Taiwanese lawyer in what appears to be a leading Taiwanese firm deposes in the following critical terms:

> "*14. Our instructions in relation to the Power of Attorney were received in or around early October 2012 and formed part of ongoing advice being rendered by my firm to the First to Fourth Trustees, Lee and Li having been instructed by them in connection with litigation which had been commenced and/or which might be commenced by Winston Wong ("Winston")…*
>
> *15… My firm was not advising YT Wang nor anyone acting on behalf of YT Wang in connection with the preparation of the Power of Attorney… The work on the preparation of the Power of Attorney was genuinely undertaken by my firm in October 2012 at the instruction of the First to Fourth Trustees.*"

35. However one characterises the relationship between YTW and the 1st to 4th Defendants in October 2012, I find that D8 has failed to establish, as the law requires him to do, that YTW in his personal capacity had a joint interest in the Lee and Li retainer. There is no evidence that he was involved in instructing Lee and Li or paying their fees. There is no evidence that Lee and Li purported to render advice for the benefit of him or his personal interests. There is positive and credible evidence that Lee and Li did not consider they were acting for YTW.

36. It is essentially common ground that YTW did <u>not</u> personally financially benefit from the transactions effected by the Power of Attorney Lee and Li were retained to draft. The instructing clients on any view were seeking to 'deprive' YTW of his personal assets (or assets over which he had some degree of control). Any countervailing personal interests vested in YTW favouring his retention of the assets covered by the Power of Attorney were not joint interests, shared with the Trustees, but adverse ones.

37. In these circumstances, rather like the banker obtaining security over one spouse's joint interest in family assets to secure the client spouse's business debts, Lee & Li would arguably have been obliged to invite YTW to obtain independent advice in relation to the transaction, had he sought personal advice from them. Viewed in this contextual way, the joint interest claim lacks any meaningful coherence.

Summary of findings on Lee and Li documents and joint interest privilege

38. I refuse D8's joint interest privilege claim. I see no need to consider:

    (a) the interesting and even more elusive question as to whether D8 is in any event debarred from asserting a joint interest claim which is inconsistent with his pleaded case; or

    (b) whether (which seems doubtful) discretionary grounds for refusing relief would exist even if the joint interest privilege claim was made out.

39. Unless any party applies to be heard as to costs by letter to the Court by January 22, 2021, the Trustees' costs of this limb of the present applications shall be paid by D8 to be taxed if not agreed on the standard basis.

Dated this 30th day of December, 2020

SIGNED

_____

IAN RC KAWALEY
ASSISTANT JUSTICE