In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and -

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

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

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

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

Defendants/Respondents

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

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

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

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

Defendants

RULING ON SPECIFIC DISCOVERY APPLICATION

Plaintiffs' application for specific discovery-whether documents evidencing advice in connection with establishment of a defendant trust not protected by privilege because transaction was iniquitous-whether documents evidencing advice in connection with the establishment of a non-party trust within the power of any of the defendants-whether privilege of non-party lost by disclosure of documents in relation to different entities maintained in the same 'record' due to common legal representation of defendants and non-parties-waiver of privilege-whether deceased's waiver rights are transmissible to his estate-discretion to order inspection- Rules of the Supreme Court 1985 Order 24 rules 7 and 11

IN CHAMBERS-VIA VIDEOCONFERENCE

Date of hearing: June 10-12, 2020

Date of Ruling: August 5, 2020

Mrs Elspeth Talbot Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling, ASW Law Limited, for the Plaintiffs

Mr Mark Howard QC and Mr Jonathan Adkin QC of counsel and Mr Paul Smith, Conyers, for the 1st to 4th and 6th to 7th Defendants ("D1-4,6-7")

Mr Stephen Midwinter QC of Counsel and Mr Steven White and Mr John McSweeney, Appleby (Bermuda) Limited, for the 5th Defendant

Introductory

1. The Plaintiff's May 15, 2020 Summons (the "Summons") sought the following relief:

> "*1. An Order pursuant to Order 24 Rule 2 of the Rules of the Supreme Court 1985 that the Seventh Defendant do file and serve a list of documents which are or have been in her possession, custody or power relating to any matter in question in the action.*
>
> *2. An Order pursuant to Order 24 Rule 7 of the Rules of the Supreme Court 1985 that*
>
> *a. The First to Fourth and Sixth Defendants ("**the Trustees**");*
> *b. the Fifth Defendant; and*
> *c. the Seventh Defendant ("**Susan Wang**")*

be required to make an affidavit stating whether any of the specified documents or categories of documents identified in that part of schedules A and B attached hereto which is identified as being referable to them is or has at an time been in its/her possession, custody or power and if it was, but is not now, in its/her possession custody or power, stating when it/she parted with it and what has become of it.

3. An Order pursuant to Order 24 Rule 11(2) of the Rules of the Supreme Court 1985 and/or the Court's inherent jurisdiction (as applicable) that the Trustees do permit the Plaintiff to inspect the following categories of document in respect of which the Trustees and/or the Fifth Defendant and/or Susan Wang have objected to inspection on grounds of privilege (capitalised terms as defined in the Fifth Affidavit of Anthony R. Poulton, dated 13th May 2020).

a. The Gardere Documents
b. The Wang Family Accord Documents
c. The Baker McKenzie Documents
d. The Paul Weiss Documents
e. The GRT Trust Operation Documents
f. The redacted documents identified in schedule C attached hereto.

4. An Order pursuant to Order 24 Rule 3 and/or 5 that:

a. the Trustees and Susan Wang do forthwith and no later than 14 days hereafter produce, supply or otherwise make available to the Plaintiff and the agents or representatives duly appointed by him a list of the 'Ocean View Litigation Documents' (as defined in the Fifth Affidavit of Anthony R. Poulton dated 13th May 2020) being withheld from production on the grounds of privilege, detailing the date of the particular document, the author, the addressee, a brief description of its nature (without disclosing its contents) and the ground of privilege relied upon; and
b. verify the same by affidavit.

5. Further and/or other relief.

6. Costs."

2. The Plaintiff's draft amended Summons proposed to amend paragraphs 1 and 4 of the Summons as follows:

"*1. An Order pursuant to Order 24 Rule 2 of the Rules of the Supreme Court 1985 that the <u>Fifth Defendant and the</u> Seventh Defendant do each file and serve a list of documents which are or have been in her possession, custody or power relating to any matter in question in the action <u>(irrespective of whether such documents have already been listed by another party)</u>.*

4. An Order pursuant to Order 24 Rule 11(2) of the Rules of the Supreme Court 1985 and/or the Court's inherent jurisdiction (as applicable) that the Trustees do permit the Plaintiff to inspect the 'Ocean View Litigation Documents' (as defined in the Fifth Affidavit of Anthony R. Poulton dated 13th May 2020). In the alternative, an Order pursuant to Order 24 Rule 3 and/or 5 that…"

3. By the date of the hearing paragraph 1 was not contentious and D1-4, 6-7 asserted they had complied with paragraph 2. As regards paragraph 3, only sub-paragraphs e and f were still in issue. As regards paragraph 4, the Plaintiff primarily relied on the proposed amended prayer for an Order that the Ocean View Litigation Documents be inspected on the grounds that privilege could not properly be claimed.

4. The landscape portrayed in the respective Skeleton Arguments was transformed somewhat by the end of the hearing. Firstly further evidence was filed on both sides relevant to paragraph 3 of the Summons. Secondly D1-4, 6-7 through correspondence offered to carry out further searches and produce further documents. Thirdly the Plaintiff submitted a draft Order seeking relief not sought in the Summons or the draft amended Summons.

5. At the end of the hearing I granted the Plaintiff seven days to file short written reply submissions, addressing points that could not for time reasons be addressed orally by way of reply. I granted D1-4, 6-7 a further 7 days thereafter to file short written submissions addressing two areas their counsel was not able to respond to orally: (a) the evidence filed during the hearing which the Plaintiff's counsel only addressed in her oral reply (and foreshadowed addressing in her supplementary written reply submissions); and (b) the draft Order. In the event it was sensibly suggested that the terms of the Order should be addressed by counsel after this Ruling was delivered.

Governing principles and litigation context

6. Mrs Talbot Rice QC invited the Court to remember that although the 1st to 4th and 6th Defendants were trustees they were not professional trustees. The Plaintiff and D1-4, 6-7 were in reality involved in a family dispute. This justified the Plaintiff being suspicious as to whether discovery obligations were being properly discharged. Mr Howard QC invited the Court to remember that the discovery process had to be limited to proportional levels.

7. I accept both of these submissions. The family backdrop to the present dispute does require a heightened level of scrutiny of the discovery process. On the other hand the combination of litigation motivated by highly emotional family grievances and substantial litigation resources also creates a real risk that the discovery process may be carried out in a disproportionate manner.

8. Both rules invoked by the Summons confer discretionary powers on the Court. Order 24 rule 7 ("*Order for discovery of particular documents*") provides as follows:

> "*(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.*
>
> *(2) An order may be made against a party under this rule not withstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.*
>
> *(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.*"

9. That rule is closely connected to Order 24 rule 8 ("*Discovery to be ordered only if necessary*"), which provides:

> "*On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.*"

10. Order 24 rule 11 ("*Order for production for inspection*"), the second rule relied upon in the Summons, provides as follows:

> "*(2)Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.*"

11. That rule is closely connected to Order 24 rule 13 ("*Production to be ordered only if necessary, etc.*"), which provides:

> "*(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*"

12. Without need for recourse to the Overriding Objective, the relevant rules within Order 24 themselves superimpose a 'necessity' filter onto the broad discretion conferred on the Court to order specific discovery and order the production of documents for inspection under rules 7(1) and 13(1), respectively. The proportionality principles articulated in Order 1A of this Court's Rules are not directly engaged as there appears to be a level playing field and no risk of disproportionate sums being expended in costs relative to the size of the amounts in issue. I accept Mrs Talbot Rice QC's submissions in this regard. There is, however, a need to avoid the risk that so much time will be expended on discovery that the 12 week trial date fixed for next year will be lost and that the Court's resources will be abused. In this regard, very much as subsidiary considerations, the following goals of the Overriding Objective (Order 1A rule 1 (2)) must be borne in mind:

> "*(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*"

Findings: whether the New Mighty US Trust documents should be produced for inspection

The issues

13. The issues were helpfully summarised in the Plaintiff's Summary Reply Points as follows:

> "*2.2.1. whether documents relating to the formation of the New Mighty Trust (in particular Mr Harris's file on the formation of the New Mighty Trust), which are specifically sought by request 30 in Schedule A, are in Susan Wang's and/or Mr Hung's Estate's power such that they are disclosable by them:*
>
> *2.2.1.1. The Trustees, Susan Wang and Mr Hung's Estate say they are not because Mr Harris considers that he cannot release documents on his New Mighty file without the consent of all four of the trust managers of the New Mighty Trust.*

2.2.1.2. Dr Wong says they are because either Susan Wang or Mr Hung's Estate can call for a copy of that file. The Court was referred to Mr Harris's two affidavits and Ms Semko's two affidavits on this point, sections 17 and 27 of the Bermudian code of conduct (which, it was submitted, are broadly equivalent to the provisions identified by Ms Semko) and Hamilton & Dixon SIPP v Hastings Solicitors [2015] PNLR 17.

2.2.1.3. Although not a point addressed orally, Dr Wong further notes (in order to ensure that the Court has the correct information) that Susan Wang is a director of New Mighty Private Trust Company Limited, as was stated by Mr Poulton in his reply evidence on this application. Although the Trustees issued an un-evidenced denial of this proposition in their skeleton argument, a company search dated 16th June 2020 (annexed hereto) shows that Susan Wang is a director of New Mighty PTC, alongside Sandy Wang, William Wong and Wilfred Wang. Susan Wang must therefore give discovery, in the List she has now agreed to provide, of all relevant documents in her physical custody, in whatever capacity she holds them, including but not limited to documents in her custody as trust manager and as a director of New Mighty PTC (see B v. B [G3/3]).

2.2.2. If the New Mighty formation documents are within Susan Wang and/or Mr Hung's Estate's power, whether Susan Wang can object to their being inspected by Dr Wong on grounds of privilege:

2.2.2.1. Susan Wang says the documents are privileged and she can assert that privilege against Dr Wong: she prays in aid the bankruptcy decision in Schlosberg v Avonwick which establishes that privilege is not property which automatically vests in a bankrupt's trustee in bankruptcy.

2.2.2.2. Dr Wong says privilege cannot be asserted against him, as personal representative of his father's estate, because it could not have been asserted against his late father were his late father alive9 and as personal representative of his late father's estate, he stands in the shoes of his father.

2.2.3. If the New Mighty formation documents are within Susan Wang and/or Mr Hung's Estate's power and privilege in them cannot be asserted against Dr Wong as YC Wang's personal representative, such that prima facie they fall to be disclosed and inspected, whether the Court should exercise its discretion against their production:

2.2.3.1. Susan Wang contends that these documents are of only peripheral relevance and production of them in this action would circumvent or interfere with litigation taking place in the District of Columbia between different parties, namely Yueh Lan's executors and the New Mighty Trust.

2.2.3.2. Dr Wong's response is that these documents are obviously relevant and an important part of the jigsaw of this case (as set out in Schedule A request 30 [A1/10/203] and paragraphs 138-150 of his skeleton argument), and that there is no prejudice to Susan Wang or Mr Hung's Estate or to the New Mighty Trust whose position is protected by the implied undertaking relating to disclosed documents. Thus, the only prejudice that will arise is prejudice to Dr Wong who, absent the order sought, will be deprived of documents relevant to the action and thereby suffer a litigious disadvantage.

2.2.4. Whether the New Mighty formation documents are within ***the Trustees' possession or custody:***

2.2.4.1. Dr Wong says they are by virtue of them having been uploaded to the Trustees' database held by Skadden (and thereafter reviewed by the Trustees' lawyers), such uploading having created copies of the documents which copies are in the Trustees' possession or custody;

2.2.4.2. Dr Wong says that those copies are not privileged in the Trustees' hands: privilege in the original documents belongs to Mr Harris's clients (Susan, Sandy, William and Wilfred Wang, and Mr Hung in their individual capacities and, in the case of Mr Hung, in his further capacities as e.g. shareholder of the relevant companies). The Trustees now have copies of those original documents. The Trustees cannot assert privilege over the copies it has;

2.2.4.3. The Trustees are therefore obliged to disclose them and permit inspection of them.

2.3. If there is no privilege in the New Mighty formation documents as against Dr Wong (see above), it follows that the redactions made to the documents identified in rows 173-179 of Schedule C (which are indisputably in the possession/custody of the Trustees) should be uncovered (whatever else happens to the Schedule C redactions)."

14. It may readily be seen that the issues in dispute are far from straightforward and raise important points of principle relevant to how business and professional people acting in multiple capacities in relation to connected but distinct entities organize their document management and retention systems.

Whether documents specifically sought by request 30 in Schedule A, are in Susan Wang's and/or Mr Hung's Estate's power such that they are disclosable by them

15. The documents sought were described in the relevant Schedule A request as follows:

"*30. Written Communications and other documents sent between: (i) any of the BMC Members or Jack Jao or their respective agents, and (ii) Hughes & Whitaker, Kozusko and any other law firms in relation to the planning of a trust for assets in the United States and the formation of, and transfer of assets to, the New Mighty Trust.*"

16. The Plaintiff advanced the following submissions:

"*160. Thus, the evidence that is before the Court demonstrates as follows:*

160.1. On Susan Wang's evidence (apparently), the legal advice relating to the formation of the First Four Trusts was shared by her with YC Wang so privilege could not have been asserted against him. It is inherently unlikely and improbable, if that evidence is true, that Susan Wang did not also share the legal advice in respect of the New Mighty Trust with YC Wang given its close connection to the First Four Trusts as set out above. Notably, neither the Trustees nor Susan Wang have adduced any evidence that Susan Wang did not share that advice with her father. It is Dr Wong's position that an administrator stands in the shoes of the Deceased for the purposes of privilege and, in any event, the Trustees have already agreed not to take any contrary argument.

160.2. Even if there was any privilege which could be asserted:

160.2.1. someone (presumably Mr Hung as the client) has already made the material available to a third party, namely the Trustees, and there is no evidence before the Court that in doing so Mr Hung expressly limited his waiver such as to preserve any privilege in relation to the New Mighty Trust material (indeed, on any view he appears to have provided the documents to the Trustees for the purposes of their use at least in relation to these proceedings);

160.2.2. when Ms Hung, as representative in these proceedings and, moreover, heir of Hung's Estate, was given an opportunity in correspondence to raise objections to Dr Wong seeing the New Mighty Trust material, she did not do so; and

160.2.3. even now, no one other than the Trustees is advocating the existence of any privilege in the New Mighty Trust material.

161. On that basis, the Trustees have failed to establish their claim to privilege, which is wholly inadequate, and must produce the documents in unredacted form under RSC Order 24, rule 11 (see Supreme Court Practice 1999, para 24/11/6 for orders were privilege has been improperly or inadequately claimed). Absent the New Mighty Trust material, Dr Wong and importantly the Court, are being deprived of an important part of the jigsaw.

162. Inspection of the redacted material addressed is plainly necessary for fairly disposing of the cause under RSC Order 24, rule 13. As observed by Sir Thomas Bingham MR in Taylor v Anderton (Police Complaints Authority Intervening) [1995] 1 WLR 447 at p.462: 'The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test'."

17. Before the hearing, the relevance of the New Mighty Documents was disputed by D1-4, 6-7. At the hearing, the only controversy related to the redactions on the grounds of privilege and whether the relevant documents were subject to D7's power. In the Skeleton Argument of the Trustees and Susan Wang, the following submissions were set out on this issue:

"*123. Documents relating to the formation of a US trust known as the New Mighty Trust ('the New Mighty US Trust') are relevant to two aspects of Winston Wong's application:*

123.1. First, in request 30 of Schedule A Winston Wong refers to 'Written Communications' and other documents sent between (a) any of the BMC Members or Mr Jao or their agents; and (b) Hughes & Whitaker, Kozusko and any other law firms in relation to the planning of a trust for assets in the United States and the formation of and transfer of assets to the New Mighty US Trust.

123.2. Second, certain documents in Schedule C (items 173 - 179) have been redacted on the basis that they relate to the formation of the New Mighty US Trust, as explained in Nairn 1 paragraph 13.8.

124. In summary, the Trustees' and Susan Wang's position is that, other than certain crossover documents which also relate to the formation of the Universal Link and Vantura Trusts (which documents, where relevant, have been produced subject to redactions), the documents relating to the formation of the New Mighty US Trust are not within the possession, custody or power of the Trustees or Susan Wang. Those documents belong to the trustee of the New Mighty US Trust and it does not consent to those documents being made available to the Trustees for the purposes of the Bermudian proceedings."

18. Mr George Harris, based in Washington DC as a partner with the firm Kazusko Harris Vetter Wareh and Duncan LLP, acted from 2004 in relation to the establishment of the Bermuda trusts and New Mighty. In his First Affidavit, he described his instructing clients as firstly the future business management committee members of the Bermuda trusts, who were directors of the four Bermuda trust companies and became trust managers of the New Mighty Trust. Other clients included Mr Hung as owner, shareholder and/or director of various companies including Vanson and Chindwell. He

explained that although he generally maintained separate files for each of the two Bermuda entities he was personally involved in establishing (Universal Link Trust and Vantura Trust) and New Mighty, there were some emails dealing with more than one entity ("cross-over documents"). He would tend to put hard copies of these emails on one of the three files.

19. In late 2012, Mr Harris produced copies of his own files and those of his predecessor (the "Granski files") to the Bermuda Trustees and (as regards New Mighty) to Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). This was in light of Dr Winston Wong having commenced the Hong Kong Proceedings and proceedings in the United States against the New Mighty Trust. No waiver of privilege was made when disclosure was given in relation to these separate entities, one of which (New Mighty) is subject to separate potential disclosure obligations in the District of Columbia. Although all these entities identified themselves as sharing a common interest in defending the various proceedings brought by Dr Wong, the supply of all the deponent's records to Skadden to review was not intended to hand over custody or power over one client's documents to another. Nor was it intended to waive privilege. As regards whether Ms Susan Wang had authority to call for copies of New Mighty Trust documents as one its trust managers, Mr Harris would only consider himself bound by a request supported by a majority of the trust managers.

20. The First Affidavit of Andrew Muscato confirmed that Skadden received Mr Harris' documents on this basis and reviewed New Mighty files only to identify cross-over documents with a view to tagging documents relevant to the Bermuda litigation. The New Mighty Trust was unwilling to allow the disclosure process in the US litigation to be circumvented by consenting to the disclosure of its documents in the Bermuda proceedings.

21. Ms Jennifer Semko, a partner in the Washington DC office of Baker & McKenzie LLP, in her First Affidavit, disputed Mr Harris' assertion that one of several clients who instructed him on a joint basis could not demand copies of documents relating to the joint instruction. Mr Harris in his Second Affidavit stood by his assertion by reference to the State Rules of Professional Conduct. Ms Semko in her own Second Affidavit stated the rule relied upon by Mr Harris dealt with disclosure to third parties, not joint instructions at all. The relevant rules clearly provided that as between clients, no privilege could be claimed in litigation between them.

22. Mrs Talbot Rice QC in her oral reply submitted that Mr Harris had failed to distinguish between pre-formation documents and post-formation documents. The latter category belonged to the New Mighty Trust. The former category belonged to the individuals who gave instructions for the formation of the trust. To whom the documents belonged was, in fact, the critical dispute. Reliance was also placed on *Hamilton and Dixon Group SIPP v Hastings Solicitors* [2014] NICh 27 and the Barristers' Code of Professional Conduct 1981.

23. In 'D1-4, 6-7's responsive submissions', it was argued that in paragraph 19 of the First Harris Affidavit, Mr Harris had deposed that "*the documents I hold belong to the New Mighty US Trust and that trust alone*". It was further submitted:

"*13.1. At paragraph 4 of Harris 2, he stated that he does 'not disagree with the proposition of Ms Semko that in ordinary course if a lawyer acts for Client A with [sic] respect to the formation of a trust, the lawyer continues to hold some professional duties to Client A – including the obligation to return documents related to that engagement to which Client A is entitled – even if the same lawyers acts for Client B as trustee of the Trust. That is not the situation here, however.' (emphasis added)*

13.2. He then went on to explain at paragraph 5 (which is of course to be read in conjunction with paragraph 6, referred to above) that, once the trust was created, he would not have considered himself able to turn over the documents relating to the formation of the New Mighty US Trust to one of his original clients. In short, this is because he no longer holds those documents for the original clients.

14. Although this relates to Mr Hung, Ms Talbot Rice QC also wrongly asserted that 'what Mr Harris doesn't deal with in his second affidavit is Mr Hung's position' [Day 3/192 (lines 14 – 15)). In fact, Mr Harris plainly did. Paragraph 6 of Harris 2 (quoted above) makes reference to five trust managers, one of whom plainly was Mr Hung. Mr Harris then said this (at paragraph 8): 'As a result of the foregoing, I disagree with Ms Semko's suggestion that, under the present circumstances, I may have "an ethical obligation" to turn over files from a joint representation dating back to 2005 that included others besides Ms Wang and Mr Hung to either of them should they ask for those files.' (emphasis added)

15. In the light of Mr Harris's evidence Semko 2 becomes irrelevant. Furthermore, whilst Mr Harris is able to give evidence as to the relevant facts, Ms Semko's evidence, in contradistinction, purports to be expert evidence on issues of US law in circumstances where she is obviously conflicted given that she is a partner at Baker & McKenzie, a firm which acts for Winston Wong. All that Semko 2 does is deal with the question of whether a client is entitled to information from an attorney in cases of joint representation. It simply does not deal with a situation where documents held on a file do not belong to a former client, but are now held on behalf of a new client (which is the case here).
16. For precisely the same reason, both the decision of the Northern Irish Court in Hamilton and Dixon Group SIPP v Hastings Solicitors [2014] NICh 27…and sections 17 and 27 of the Bermudian Barristers' Code of Professional Conduct 1981 [G2/24] are irrelevant. They do not deal with the question of whether a former client on whose behalf files are no longer held is entitled to ask for copies of those files."

24. In the Plaintiff's response to the Trustees' additional submissions, it was argued that:

> "*4.2. Dr Wong maintains his submission that Mr Harris does not deal with what the law would require him to do if an original client asked for copies of the documents. It is not right to describe that submission as 'not accurate' as the Trustees have described it3, and the subparagraphs of paragraph 13 do not show Mr Harris dealing with this question (they simply refer to Mr Harris's evidence that he does not 'consider himself' able to give 'the documents' (as opposed to copies of the documents) to an original client. However the reason why Mr Harris does not consider himself able to give the documents to an original client is his misapprehension that he 'retained custody' of the documents on behalf of the Trust, not the original clients (a point dealt with in the previous sub-paragraph).*
>
> *4.3. Mr Harris does not deal with the separate position of Mr Hung as a client in his capacities as:*
>
> *4.3.1. owner of Vanson Liberia and Chindwell Liberia (which were purportedly settled into two of the Trusts),*
>
> *4.3.2. shareholder, shareholder representative and director of the Creative companies and Sound International in connection with their re-domiciliation from Liberia to BVI; and*
>
> *4.3.3. shareholder, director and officer of Creative II Corp., Creative II Holding and Sound International which were the Grantor companies who contributed their FPC USA shares to the New Mighty US Trust. He only deals with the position of the prospective trust managers (which included Susan and Mr Hung). That is clear from a complete reading of Harris 2 paragraphs 7 and 8. It is therefore not right to characterise Dr Wong's submission that Mr Harris has not dealt with Mr Hung's position as having been 'wrongly asserted'.*"

25. The Plaintiff's counsel are correct to complain that Mr Harris does not explicitly give a legal explanation for why documents relating to the formation of the New Mighty US Trust, or pre-formation documents, ceased to be within the power of those who gave instructions in relation to the formation of the trust. However, I find no reason to reject Mr Harris' explicit evidence that he regards the documents relating to the formation of the New Mighty Trust belong to the Trust, as opposed to (by necessary implication) those persons who gave instructions for the formation of the trust. The District of Columbia professional conduct rules which he cited were, it seems to me, dealing with the ability one of several <u>current</u> joint clients to obtain documents relating to the joint retainer for their own private purposes and, potentially at least, involving disclosure to third parties. Ms Semko's analysis equally appeared to me to be sound as applied to the standard <u>former</u> client/former lawyer paradigm. In her First Affidavit, she expressly deposed that a former client would be entitled to demand the relevant legal advice (paragraph 5).

26. In paragraph 5 of Mr Harris' Second Affidavit, he explains that in the particular circumstances of the present case, he received initial instructions jointly from the five prospective trust managers of the New Mighty Trust. Post-formation, he would still regard those same actual trust managers as not competent to individually demand access to documents in their personal capacity. In her Second Affidavit, Ms Semko insists that a former client who jointly instructed a lawyer would be entitled to obtain documents unilaterally for their individual benefit. That also appears to me to accord with common sense and principle. But the critical question in the present case is whether one of several former clients who jointly instructed a lawyer can unilaterally compel the lawyer to produce documents relating to the former client for the specific purpose of the document being disclosed to a third party in litigation.

27. Paragraphs 17 and 27 of the Bermudian Barristers' Code of Professional Conduct shed no light on the pertinent issues in question so far as I could discern. *Hamilton and Dixon Group SIPP v Hastings Solicitors* [2014] NICh 27 does not support the proposition, contended for by the Plaintiff, that one of several joint instructing clients can unilaterally obtain copies of documents from a trustee. The single trustee in that case was a current client. Moreover Deeny J observed:

> "*12. The Law Society of England expressed the opinion that the various documents, akin to those sought here, 'can only be disclosed to third parties with the consent of both or all of the clients and the original papers can only be given to one client with the authority of the other(s). Each client is entitled to a copy of the relevant documents at their own expense.' It seems to me that this is a correct and succinct statement of the position. It accords with the view I have formed. See also Underhill & Hayton, Law of Trusts and Trustees, 18th edn, 82.6.*"

28. This view of the professional position for solicitors in England and Wales is essentially in line with the view of his professional obligations articulated by Mr Harris with respect to the District of Columbia professional position. As between themselves, each of several joint instructing clients has a right to obtain copies of documents relevant to the retainer. The position is different if disclosure to a third party is involved.

29. A Bermudian court is ill-equipped to decide the legal merits of questions of District of Columbia professional conduct law based on the evidence not of experts, but of partisan lawyers. Although it seems possible that the governing legal principles are broadly the same in the two jurisdictions concerned, what the true legal position is remains somewhat unclear. In my judgment, the Plaintiff assumed the burden of establishing that the documents are within the power of Susan Wang and the Estate of Mr Hung, both (a) in their personal capacity and (b) for the purposes of disclosing the documents containing legal advice to third parties in litigation against them. I find that the Plaintiff has not discharged that evidential burden.

30. If I was required to decide this question on its merits, I would incline to the view that the documents are <u>not</u> for present purposes within the power of the Estate of Mr Hung

and/or Ms Wang. It would potentially run a coach and horses through confidentiality rights attached to trusts if every person involved in establishing a trust were to be deemed to have documents relating to the formation of the trust under their power for all purposes, including disclosure in litigation which does not even directly involve the entity to which the documents relate. The pre-formation documents might well be within the power of the individuals who gave instructions on a joint basis for some purposes (for instance for deployment in litigation between those individuals or in litigation to which the relevant entity was a party). This does not mean that they are within each individual's power for all purposes including disclosure in litigation relating to other trusts.

31. It remains to consider the alternative question of whether Ms Susan Wang, the 7th Defendant, is obliged to disclose the New Mighty documents because they are within her power as a director of a Cayman Islands company, New Mighty PTC, a point raised in the Plaintiff's Summary Reply Points at paragraph 2.2.1.3. I reject the Plaintiff's submission and accept the counter-argument of D1-4, 6-7. In the Skeleton Argument on behalf of the Trustee and Susan Wang, it was submitted that:

> "*146…the fact that Susan Wang, who is a defendant in these proceedings, is a trust manager of the New Mighty US Trust, does not mean that the New Mighty US Trust Files are in her power.*
>
> *147. As Dunn J explained in B v B [1978] Fam 181(at193-194):*
>
> > *'Whether or not documents of a company are in the power of a director who is a party to the litigation is a question of fact in each case. 'Power' in this context means 'the enforceable right to inspect or obtain possession or control of the document.' If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant, documents in the possession of the company."*"

<u>Was privilege lost because the New Mighty Trust documents were shared with YC Wang by Susan Wang</u>

32. It remains to consider the distinct issue of whether privilege was lost because Susan Wang must be presumed to have shared any advice received in relation to New Mighty with her father so that no privilege can be claimed as against the Plaintiff as Administrator of his Estate. The Plaintiff's case on this issue in its broader factual context was described in 6th Poulton Affidavit, sworn in reply, as follows:

> "56…*Respectfully, in my view the New Mighty Documents are plainly relevant to the issues in dispute, not only for the foregoing reasons but also as a result of the following facts:*

(a) A claim has been brought by the executors of Wang Yueh Lan (Y.C. Wang's widow) before the U.S. District Court for the District of Columbia against three entities connected with the New Mighty structure. According to the Second Amended Complaint (the "DC Complaint") [ARP-6/187-221] and Defence and Answers (the "DC Defence") [ARP- 6/222-242] filed in those proceedings:

(i) Mr Hung formed two Liberian bearer companies in 1976, Creative Holding Corp. and Creative Corp. to invest in FPC USA (Complaint, paras 39-40; Defence, paras 39-40). He also formed a Liberian company called Sound International Investment Corp. in 1991 to invest in Inteplast Group, a company directed by Susan Wang and her then-husband, John Young (DC Complaint, paras 42-45; DC Defence, paras 42-45).

(ii) In 2005, Hung caused the three Liberian companies to be re-domiciled in the British Virgin Islands, prior to their transfer into the New Mighty U.S. Trust (DC Complaint, para. 46; DC Defence, para. 46). The New Mighty U.S. Trust was then declared on 3rd May 2005 (para. 47).

(iii) Shortly after the New Mighty U.S. Trust was set up, the re-domiciled BVI companies were transferred into it, and Y.C. Wang allegedly 'knew and approved of' the transfers (DC Complaint, para. 51; admitted in DC Defence, para. 51).

(b) The New Mighty US Trust was therefore declared a matter of days before the Vantura and Universal Link Trusts were declared in Bermuda. Both trusts purported to receive as their trust property bearer shares in Liberian companies, which had either been 're-domiciled' in the BVI (in the case of New Mighty) or transferred to BVI companies (in the case of Vantura and Universal Link) prior to their alleged settlement on trust. The strong inference is that the creation of these three trusts was conceived of as a single plan.

(c) In addition, at a meeting on 10th January 2009, Mr Hung and Mr Jao gave the Plaintiff a collection of trust materials, a list of which is disclosed by the Trustees at #1672 of their list. This included documents relating to the New Mighty structure, just as it did for the Bermuda Trusts. According to the Plaintiff's evidence, there was no suggestion that the New Mighty structure was treated any differently from the Bermuda Trusts.

(a) *Finally, the Declaration of Trust for the New Mighty U.S. Trust [ARP-6/243-257] was signed by 'Company Manager' Donald D. Kozusko, a partner in the same firm as George Harris, who was at that time corresponding with Susan Wang on the formation of the Vantura and Universal Link Trusts. In relation to those Trusts, <u>the Trustees stated in their letter of 14 April 2020 [E1/51] that 'the evidence shows that Susan Wang informed YC and YT Wang of the</u>*

advice that was obtained from Mr Harris in relation to the formation of the Vantura and Universal Link Trusts' and agreed not to seek to assert privilege in that advice against Dr Wong. On the basis of the Trustees' position as set out in that letter and given that Mr Harris was discussing all three trusts with Susan Wang at the same time (as is obvious from the heavily redacted emails about the Bermuda Trusts which have been produced), it would be extremely surprising if Ms Wang discussed only two of those structures with her father. There is thus no reason to treat the advice in respect of the New Mighty Trust differently for the purposes of privilege, and Dr Wong will invite the Court to infer that, on the Trustees' position, privilege could not have been asserted against YC Wang (and cannot now be asserted against the administrator of his estate)." [emphasis added]

33. The assertion that Ms Wang likely did share advice received in relation to the New Mighty Trust with Mr YT Wang was not controversial[1]. The only real controversy was a legal one: did the Plaintiff as administrator stand in the shoes of the deceased as regards privilege? In the Skeleton Argument of the Trustees and Susan Wang, the following cogent arguments were advanced:

"*162. In Shlosberg v Avonwick Holdings Ltd [2017] Ch 210, the question for the Court of Appeal was whether a bankrupt's right to waive privilege in documents created prior to the bankruptcy was exercisable by his trustee in bankruptcy. The Court of Appeal held that it was not. Sir Terence Etherton MR, with whom the rest of the Court agreed, concluded (at paragraphs 63 and 64) that privilege is not property of a bankrupt which automatically vests in the trustee in bankruptcy. He held that the right to privilege was a fundamental right of which a person could only be deprived by express statutory provision or as a necessary implication of such provision. He further held that there was no such provision in the insolvency legislation and, therefore, that the right to waive privilege remained with the bankrupt and could not be exercised by his trustee in bankruptcy.*

163. By parity of reasoning, even if confidentiality in the New Mighty Privileged Material was lost as against YC Wang, such that privilege could not be asserted against him, it simply does not follow that confidentiality has also been lost as against his personal representative such that privilege cannot be asserted against him. Privilege is not a property right which 'vests' in a personal representative. Even less so is the loss of the ability to assert privilege against a deceased. To find otherwise would potentially have very serious consequences for the sanctity of privilege in Bermuda and would lead to unnecessary disputes (particularly at the interlocutory stage in litigation) about whether privilege could be asserted against a deceased's personal representative in circumstances where privilege could not be asserted against the deceased because confidentiality may have been lost against him.

[1] Transcript Day 3 page 31 lines 9-16

164. Even if the Court were to find that confidence was lost as against YT Wang, and that, at least in theory, privilege could not be asserted against his personal representative, that is not the end of the matter because the Court would then have to consider whether there was any express or implied limit on the manner in which the material shared could be used by YC Wang and, by extension, his personal representative.

165. This issue arose before the English Court of Appeal in Berezovsky v Hine [2011] EWCA Civ 1089. In that case Mr Berezovsky, the claimant, had for some time been engaged in litigation against Mr Abramovich. At an early stage of that litigation Mr Berezovsky's solicitors had sent a copy of certain draft witness statements to a Mr Patarkatsishvili. Mr Patarkatsishvili subsequently died, and Mr Berezovsky and the administrators of Mr Patarkatsishvili's estate ended up in litigation. Certain issues in that litigation were directed to be tried at the same time as the trial of Mr Berezovsky's action against Mr Abramovich. The question in issue was whether the administrators could deploy the draft statements, which remained in their hands, at that trial: see paragraph 22 of Lord Neuberger MR's judgment, with which the other two members of the Court agreed.

166. Lord Neuberger summarised the applicable principles at paragraphs 24 to 31 of his Judgment. He referred to the judgment of the Privy Council case of B v Auckland District Law Society [2003] 2 AC 736 at paragraph 68, in which Lord Millett held that '[i]t does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only ...' and that it 'must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause the privilege to be lost.' Lord Neuberger went on to state (at paragraph 29) that 'where privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving, the documents in question, and what they must or ought reasonably [to} have understood.' He also held that the administrators were, for the purpose of the issue he had to decide, in precisely the same position as Mr Patarkatsishvili would be if he were still alive.

167. Lord Neuberger found (at paragraph 34) that the draft statements had been sent to Mr Patarkatsishvili for a particular purpose on the basis that their use for any other purpose was prohibited, unless it was a purpose to which Mr Berezovsky assented or (arguably) to which he objected but which could not damage him in any way, or which could damage him but which would not involve the contents of the draft statements being revealed to anyone other than Mr Berezovsky and Mr Patarkatsishvili's successors and their advisors. He reached this conclusion on a number of grounds. In particular, he noted (at paragraph 30) that the waiver effected by sending the drafts cannot have been intended or understood to mean that Mr Patarkatsishvili could make whatever use of the documents that he wanted and, to take an extreme example, it could not conceivably have been envisaged that Mr Patarkatsishvili could show the

drafts to Mr Abramovich. He further noted (at paragraph 42) that it was inconceivable that either Mr Berezovsky or Mr Patarkatsishvili could possibly have envisaged that the draft statements could be deployed by Mr Patarkatsishvili in proceedings in which Mr Abramovich was a party, yet that was what might well happen if the administrators' argument were to succeed. Lord Neuberger MR therefore concluded that the administrators were not entitled to deploy the draft statements at the trial of their action with Mr Berezovsky. This was a conclusion which he held (at paragraphs 44 and 45) would be the same whether the matter was analysed as one of waiver of privilege or the ambit of any common interest privilege shared in the drafts.

168. It is submitted that there are parallels between the position which pertained in Berezovsky v Hine and the position relating to any New Mighty Privileged Material which was shared with YC Wang. The purpose for which that material was shared would obviously have been to ensure that the new trust was set up in a way which was consistent with YC Wang's wishes. YC Wang cannot possibly have thought that he was receiving that material in a way which permitted him to deploy it in any manner he chose, including in order to be used to challenge the validity of the transfers of assets into the Vantura and Universal Link Trusts. It is similarly inconceivable that anyone can possibly have envisaged that a personal representative of YC Wang could deploy the New Mighty Privileged Material in proceedings in Bermuda challenging the validity of the transfer of assets into the Universal Link and Vantura Trusts."

34. Mrs TalbotRice QC in her opening oral arguments relied principally on the practical point that the legal position contended for was inconsistent with the stance adopted in relation to the corresponding privilege issue in relation to two of the Bermuda trusts to whom the privilege actually belonged. The privilege being asserted in relation to the New Mighty documents belonged to the New Mighty Trust. In the Plaintiff's Skeleton Argument, it was pointed out that:

> "*155. By Conyers' 14 April 2020 letter, the Trustees further stated that:*
>
> > *'Following the Privilege Review, the evidence shows that Susan Wang informed YC and YT Wang of the advice that was obtained from Mr Harris in relation to the formation of the Vantura and Universal Link Trusts…our clients are content not to seek to assert the privilege in the Kozusko Vantura and Universal Link Documents against Winston Wong (as the personal representative of YC Wang's estate in Bermuda). [E1/1/51]*"

35. I consider it to be self-evident that D1-4, 6-7 were asserting the privilege belong to the New Mighty Trust because the owner of the privilege had supplied them documents on the express basis that the relevant privilege was not to be waived. In my judgment there is an obvious public interest in promoting discovery in cross-border civil litigation through the courts of the *lex fori* adopting a strong starting assumption that privilege claimed by entities in other jurisdictions will be respected rather than ignored. Otherwise, professional service providers in other jurisdictions will potentially be

encouraged to resist requests for voluntary disclosure and to compel the foreign litigant to seek a disclosure order from the relevant foreign court on terms that ensure appropriate protection for privileged documents intended to be used in the *lex fori*. This would be inconsistent with the Overriding Objective in that it would increase costs and cause delay in all civil and commercial litigation where important documents belonging partially to parties before and partially to parties not before this Court are held by lawyers or other professionals located abroad. The appropriate way of compelling foreign parties to produce relevant evidence located abroad is to apply to this Court for a letter of request to the foreign court requesting an order that the evidence be produced abroad. Such policy concerns are primarily relevant to the exercise of the ultimate discretion if privilege cannot strictly be claimed.

36. As regards the potential privilege claim in relation to the Bermuda trusts, it is within the exclusive power of those entities to waive the privilege they might otherwise claim. It also seems to me to be self-evident, that the advice given in relation to the formation of the Bermuda trusts is far more relevant to claims against such entities than the advice given in relation to the formation of the New Mighty Trust, which is not a Defendant herein. I was unable to discern any credible suggestion that the advice given in relation to the US trust was likely to have been strikingly different in such a way as might advance the Plaintiff's claim. On the contrary, the most likely position appears to be that the advice was broadly the same. Again, this is merely relevant to the exercise of the ultimate discretion if privilege cannot strictly be claimed.

37. Mrs TalbotRice QC dealt with the legal validity of this limb of the New Mighty privilege claim in her opening oral submissions as follows:

> "*The New Mighty Trust privilege is not the trustees in this case privilege to assert, so there really is no privilege point to make. No, what the trustees are therefore driven to is to try and draw on an authority out of the bankruptcy courts in England called Schlossberg which essentially says that privilege isn't a property and therefore when somebody is made bankrupt it doesn't automatically vest in a trustee in bankruptcy, but that's because it is still the bankrupt's right and he is still there to either maintain it or waive it as he chooses. That cannot be the position where someone is dead because the dead person isn't there to choose to maintain or waive the privilege in question. That right falls to his personal representative. So that really doesn't help them in any way. The only other point made on this arises out of the case of Berezovsky v Hine which is that if privileged material about New Mighty Trust was shared with YC, it was shared on the basis that to ensure that the New Trust was being set up in accordance with his wishes. If that new trust was not set up in accordance with his wishes, YC Wang, had he still been alive would have relied on the New Mighty Trust material to help him in this regard to say that it hadn't been. That's Dr Wong's case. In the same way it is available to - -it doesn't prevent Dr Wong from having regard to the New Mighty Trust material in order to make his case. YC would have absolutely deployed this material if he was running a case that the trust had not been set up consistently with his wishes then so can YC.*"[2]

[2] Transcript Day 1, page 120 lines 15-25- page 121 lines 1-20.

38. In the Plaintiff's written brief reply submissions specific reliance was placed on the last four lines of the following passage in *Berezovsky-v-Hine* [2011] EWCA Civ 1089 where Sir Terence Etherton (MR) stated:

> "*21. Although the case was argued as involving an issue of disclosure, the Judge rightly said that no question of disclosure arises. First, even privileged documents have to be disclosed: so long as they remain privileged, however, they are immune from inspection, and may not be used in proceedings. Further and in any event, no question of inspection arises in the present case, as copies of the documents in question remain with the Family Defendants, because they (or more accurately the administrators of Mr Patarkatsishvili's estate) stand in the shoes of Mr Patarkatsishvili, and copies of the draft statements remain with Ghersons, to whom they were sent, and who received them as attachments to the second email, as his solicitors.*" [emphasis added]

39. The non-discretionary issues to be resolved may be summarised as follows:

(a) whether D1-4, 6-7 possess the standing to assert the New Mighty Trust's privilege rights;

(b) whether the Plaintiff as Administrator of YC Wang's Estate stands in the shoes of Mr YC Wang in relation to any waiver of privilege he could rely upon;

(c) whether, even if the Plaintiff does stand in YC Wang's shoes, the circumstances of the waiver which originally occurred still prevent the inspection of the redacted portions of the documents over which privilege is claimed on behalf of New Mighty Trust.

40. Without reference to express authority, I find that D1-4, 6-7 must have standing to assert the New Mighty Trust's privilege claim. They received cross-over documents on the express basis that privilege in the New Mighty Trust formation legal advice was intended to be preserved. D1-4, D6-7 must be entitled to enforce the confidentiality obligations which they have assumed to the New Mighty Trust. I reject their primary submission that the rule that a bankrupt's rights of privilege are not transmitted as a matter of law to his estate applies in the probate context. I find that the Plaintiff is right to insist that he stands in the shoes of the late Mr YC Wang. That is supported by the passage in in *Berezovsky-v-Hine* [2011] EWCA Civ 1089 upon which the Plaintiff's counsel relied. However, as the Master of the Rolls also went on to state when summarising what he considered to be uncontroversial principles:

> "*31. Finally, the Family Defendants are in precisely the same position as Mr Patarkatsishvili would be if he was still alive and adopting the*

> *position in the Chancery actions which the Family Defendants are adopting.*"

41. In other words, if privilege was waived for all purposes when the formation advice was shared with Mr YC Wang, it cannot be asserted against the Plaintiff in the present proceedings on behalf of the New Mighty Trust. If the privilege was waived on a conditional basis, it is necessary to analyse what conditions were expressly or impliedly imposed on the use of the privileged material when it was shared with Mr YC Wang. This issue is far a more nuanced one.

42. Was the advice shared with YC Wang on terms that permitted its deployment in proceedings not only to impugn the New Mighty Trust but also to impugn the validity of the Bermuda trusts, two of which were simultaneously established? D1-4, 6-7's counsel rightly submitted that *Berezovsky-v-Hine* considered an analogous question to the pivotal question on this aspect of the present case. In that case the issue was described as follows:

> "*32. Accordingly, the issue is as follows. Given the terms of the emails, the purpose for which the draft statements were sent to Mr Patarkatsishvili's solicitors, and all the surrounding circumstances, what are the limits on the use which were expressly or impliedly imposed, or which ought reasonably have been understood to have been imposed, on Mr Patarkatsishvili so far as the use of the draft statements was concerned, and, in particular can the draft statements be deployed by the Family Defendants in connection with the pursuit of their case in the overlap issues*."

43. There the clear analogy with the present case ends. The documents in question were litigation documents supplied from one ally to another which were subsequently sought to be used in litigation between the two former allies. Deployment was not permitted in *Berezovsky* on the following grounds:

> "*The possibility of Mr Patarkatsishvili deploying the draft statements against Mr Berezovsky was not in the parties' minds at the time: they were staunch allies, and appear to have been for many years. While that is a point which in one sense cuts both ways, it does highlight the fact that there would have been possible uses to which Mr Patarkatsishvili might wish to put the draft statements to which neither party would have put his mind. On the facts of this case, I think that that supports the notion that Mr Berezovsky would have intended a very limited waiver, and that Mr Patarkatsishvili would have appreciated that.*"

44. In the present case it is not possible to infer that a very limited waiver would have been intended in sharing advice given by the parties forming the New Mighty Trust with the person whose indirectly held wealth was being placed in the various trusts. After all,

they claim to have been giving effect to his wishes in setting up the trusts. It is not possible to decisively find at this stage that Mr YC Wang would not have wanted the trusts to be challenged, because the central issue in this action is whether he actually wanted the trusts to be formed. Mrs Talbot Rice vividly put it, if the facts were as the Plaintiff contends they were, "*YC would have absolutely deployed this material if he was running a case that the trust had not been set up consistently with his wishes*". In other words, it is wholly unrealistic to contend those giving instructions for the formation of the US trust shared the related legal advice with the man who was instructing them to establish the trust on terms which deprived him of the ability to deploy that advice in circumstances where he wished to contend that his true wishes had not been carried out.

45. On the basis of the limited evidence available and being guided by common sense, I find that the legal advice in relation to the establishment of the New Mighty Trust was not shared with Mr YC Wang on terms that restricted him or his Estate from using the relevant advice in collateral litigation seeking to establish that his wishes in relation to similar but separate trusts were not carried out. I reach this conclusion with some diffidence, bearing in mind that:

    (a) the party to whom the privilege belongs is not before the Court;

    (b) the precise circumstances in which the advice was shared roughly 15 years ago are far from crystal clear;

    (c) the most natural forum for determining the waiver of privilege issue is the District of Columbia where the New Mighty Trust is being sued by a party with common interests to the Plaintiff.

Findings: should the Plaintiff be permitted to inspect unredacted copies of the New Mighty documents?

46. It remains to consider whether or not in the exercise of my discretion I should compel D1-4, 6-7 to permit inspection of unredacted copies of the relevant documents.

47. The legal principles governing the discretion to permit inspection can be stated shortly. Order 24 rule 11 is the inspection compelling rule the Plaintiff relies upon. Th exercise of that jurisdiction is governed by Order 24 rule 13 which provides as follows:

> "***24/13 Production to be ordered only if necessary, etc***.
> (1) *No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs*…"

48. Paragraph 24/13/2 of the *1999 White Book* commenting on the English equivalent of the Bermudian rule:

> "*Under this rule, in contrast to r.8, it is for the party 24/13/2 applying for the order for production to satisfy the court that the order for production and inspection is necessary either for disposing fairly of the cause or matter, or for saving costs (Dolling-Bakerv. Merrett[1991) 2 All E.R. 890, CA) . It is not enough for the applicant to show that the documents are relevant; he must also show that their production and inspection is necessary for one or more of the purposes mentioned in the rule (ibid.). See too Wallace Smith Trust Co. Ltd (in liquidation) v. Delloitte Haskin & Sells (A Firm) [1997) 1 W.L.R. 257; [1996] 4 All E.R. 403, CA, for an exposition of the matters to be considered in ordering production.*"

49. Lord Bingham MR in *Taylor v Anderton* [1995] 1 WLR 447 at 462 as follows:

> "*The crucial consideration is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. These words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test.*"

50. In D1-4,6-7's Skeleton Argument, it was submitted:

> "*19…The short point is that those documents are not within the Trustees' possession, custody or power and Winston Wong should not be allowed opportunistically to obtain an advantage from the practical and cost efficient way in which Skadden happened to deal with the relevant files. It would operate as a disincentive for litigants in the use of databases to introduce efficiencies in the management of large numbers of documents in litigation.*
>
> *20. Furthermore, and in any event, the Court has a discretion not to order the Trustees or Susan Wang (or indeed Mr Hung's estate) to give discovery or inspection of the New Mighty US Trust documents in circumstances where there is extant litigation in the United States regarding that trust and also in circumstances where there is evidence before this Court that ordering the Trustees, Susan Wang (or indeed Mr Hung's estate) to give such discovery or inspection would put Mr Harris and Skadden in a difficult position.*"

51. For the avoidance of doubt I do not consider that putting "*Mr Harris and Skadden in a difficult position*" is a relevant consideration. The most important considerations weighing against permitting inspection of the otherwise privileged material which I have narrowly concluded New Mighty Trust has waived (some 15 years ago) are as follows:

    (a) the documents in question were only fortuitously disclosed by a law firm handling US litigation voluntarily assisting D1-4, 6-7 to discharge their discovery obligations herein because an overlap between documents relating to multiple connected clients. The pertinent documents (or parts of documents) were not originally in the Bermuda Defendants custody, power or control. But for the idiosyncratic but understandable way in which the records had been maintained, they would not have been disclosed at all in the present proceedings;

    (b) the pertinent documents or parts of documents were expressly disclosed on the basis that the privilege in documents which will in due course be disclosed in the US litigation would be protected by the recipients of the voluntary discovery;

    (c) there would be some, arguably minimal, prejudice to New Mighty Trust because the Plaintiff would receive (if inspection was ordered), subject to the implied undertaking, advance notice of material which would ordinarily be obtainable at a later date in the US proceedings;

    (d) New Mighty Trust would be more materially prejudiced by being deprived of the opportunity to have its claim to privilege adjudicated under District of Columbia law within the proceedings to which the documents primarily relate. Compelling inspection in these circumstances might have a 'chilling effect' on future attempts by Bermudian litigants to obtain voluntary disclosure from overseas lawyers where the documents include privileged material;

    (e) the privilege belongs to a party not before the Court and the decision that privilege in the relevant advice was actually waived many years ago was a borderline one;

    (f) the relevance of the documents to the present action appears to be limited and inspection has not been shown to be "necessary" in the requisite legal sense. The New Mighty documents may shed light on a "*piece of the jigsaw*", but not an essential or even an important piece.

52. The Plaintiff has advanced a persuasive case as to why documents in connection with the formation of the New Mighty Trust would be desirable or helpful and/or is relevant (see e.g. the Plaintiff's Skeleton Argument, paragraphs 139-150), and I have accepted that privilege should be regarded as having been waived (as against the Plaintiff himself). I find, however, that he has not demonstrated that access to the redacted legal advice is "*necessary…for disposing fairly of the cause or matter*". Since I have found

that the New Mighty documents were not within the possession or custody or within the power of any of the Defendants, it is entirely fortuitous that the documents have been disclosed at all. Had Mr Harris not created cross-over documents and had his firm not voluntarily assisted D1-4, 6-7, none of the New Mighty documents would have been liable to be disclosed in the present action at all. Perhaps it would not have been difficult for the relevant Bermuda Defendants to obtain the documents from the District of Columbia Court, but how that Court would have approached the issue of whether the disputed privilege had been waived for the purposes of these Bermuda proceedings cannot be realistically assessed.

53. In these circumstances, it is difficult to see what tangible litigious disadvantage the Plaintiff would suffer which could properly be considered to be unfair if he is denied the right to inspect presently redacted portions of documents which have through happenstance been disclosed in this action and could well not have been disclosed at all. It is understandable that he is "curious" about the legal advice and self-evident that the information would confer a more complete background view of the entire story. The bare assertion of a litigation advantage (see e.g. Plaintiff's Summary Reply Points, paragraph 2.2.3) in my judgment is not enough in the particular and somewhat unusual context of the present application. In more normal circumstances, the finding that privilege had been waived in relation to relevant documents would more easily support permitting inspection to take place.

54. In the exercise of my discretion, I find that the Plaintiff is not entitled to inspect unredacted copies of the New Mighty documents.

Findings: whether privilege attaches to the Ocean View Litigation Documents

<u>The Plaintiff's substantive claim against Ocean View</u>

55. The Plaintiff, Dr Winston Wong, sues as the son and heir of the late Mr YC Wang. The claim against Ocean View is summarised in paragraph 4.1 of the Amended Statement of Claim ("ASOC") as follows:

> "*(a) in the case of the Sixth Defendant, the assets transferred to it were transferred after Mr YC Wang's death without the authority of his duly appointed personal representative*".

56. Ocean View is a company incorporated in Bermuda which became trustee of a Bermudian non-charitable purpose trust in or about 2013, after Mr YC Wang's death in 2008. The Plaintiff also seeks to invalidate on (partially) different legal grounds the *inter vivos* transfer of assets said to belong to the Estate of Mr YC Wang and wrongfully transferred to the 1st to 4th Defendants, which are each incorporated in Bermuda and are also each trustees of Bermudian non-charitable purpose trusts created in 2001 (1st and 2nd Defendants) and 2004 (3rd and 4th Defendants).

57. Although the Plaintiff initially contended that all assets settled on trust properly belonged to the Estate of Mr YC Wang, his draft Re-Amended Statement of Claim avers that 50% of the relevant assets belonged to the Estate of Mr YT Wang.

58. The Defendants' Amended Defence and Counterclaim summarises the defence to the main freestanding Ocean View claim as follows:

> "*101. It is denied that the Trustees hold any assets on resulting or constructive trust for YC Wang's heirs or for his estate as alleged in sub-paragraph 4.1. As to the grounds relied on by Winston Wong:*
>
> > *101.1. In the case of the assets transferred into the Ocean View Trust, following YC Wang's death such assets were held by Mr Hung for such purposes as were directed by his surviving brother, YT Wang. YT Wang assented to the transfer of such assets into the Ocean View Trust, both orally himself and in writing by his duly appointed attorney William Wong. It was not necessary to obtain the authority or consent of YC Wang's personal representative to such transfer.*"

59. D1-4, 6-7's counsel also invited the Court to have regard to the reasons for which the Defendants aver the first four trusts were established, namely to fulfil the vision of YC Wang and YT Wang (the "Founders"):

> "…101.5… *the transfer of assets into the First Four Trusts achieved what the Founders wanted to achieve, which was to protect and preserve the operations of FPG into the future and to give back wealth to society, including through the continued support of the Charitable Enterprises they had established.*"

Overview of the Plaintiff's case on why privilege cannot be claimed

60. The Plaintiff submitted in his Skeleton argument as follows:

> "*165. As appears more fully below, the basis for asserting that the Ocean View Litigation Documents are free from any privilege are that there is a strong prima facie case that the advice in the Ocean View Litigation Documents was given in relation to the formation of a trust whose dominant purpose was to defeat Dr Wong's claims on behalf of his late father's estate in respect of Chindwell International Investment Corp ("**Chindwell BVI**") and Vanson International Investment Co. Limited ("**Vanson BVI**"). In this regard, Dr Wong relies on the line of authority associated in modern times with the English Court of Appeal decision, Barclays Bank v Eustice [1995] 1 W.L.R. 1238.*"

61. In their Skeleton Argument, D1-4,6-7 submitted:

> "*82.1. The case on which Winston Wong appears to rely in support of his contention that the crime/fraud exception to legal professional privilege may be engaged (Barclays Bank v Eustice [1995] 1 WLR 1238, referred to at paragraph 32(f) of Poulton 5) is not authority for the proposition that there is no privilege in advice in relation to structuring a prospective transaction if imminent litigation had prompted the transaction.*
>
> *82.2. In any event, there is no proper basis on which the crime/fraud exception to legal professional privilege can possibly be said to be engaged on the facts of this case, not least because no evidence has been put forward to suggest that there was any fraudulent or dishonest conduct of the type which might engage the exception so as to deprive the then-existing Trustees (namely, Grand View PTC, Transglobe PTC, Universal Link PTC and Vantura PTC) of their privilege in the Skadden and Lee & Li Advice.*"

62. That the transaction in relation to which advice had been sought had been "prompted by imminent litigation" was not seriously disputed. My preliminary view accordingly was that the critical question was not whether or not the formation of the trust was motivated to a material extent by a desire to defeat the Plaintiff's claims on behalf of his late father's Estate. Rather, the critical question appeared to me to be whether or not seeking advice about settlement of the relevant assets upon trust, with knowledge of the Plaintiff's claims, engaged the "fraud exception" (or "iniquity exception") to legal privilege.

<u>The Plaintiff's Hong Kong Action and the impugned transfers to the Ocean View Trust</u>

63. Mr Hagen QC in oral argument described the conduct complained of as follows[3]:

> "*…But what's happened is that by putting the assets into a Bermudian trust for charitable and non- charitable purposes, their case has first of all moved from a simple action against the nominee in BVI to this far more complex animal that we are now dealing with and secondly, and this is an important observation, Mr Hung is being sued in Hong Kong, so he was the legal owner of the assets. The legal owner of the assets is being sued in Hong Kong and Winston Wong was trying to establish qua administrator in Hong Kong and in personam jurisdiction over Mr Hung. By transferring the legal title to those shares to a Bermudian trustee, which was not subject to the jurisdiction of the Hong Kong court, which sat behind the Bermudian firewall, that Hong Kong action, so far as those shares were concerned, became a dead letter. And he had to recast his claims which are now much more difficult, although we say they are very good claims, to get the assets back.*"

[3] Transcript Day 2 page 68 line 9-page 69 line 1.

64. It is common ground that in 2009, the year after his father's death, the Plaintiff met with, *inter alia*, Mr Hung and a Mr Yao and learnt of the existence of the Bermuda trusts and the assets not yet in trust which were ultimately transferred to Ocean View (Chindwell BVI and Vanson BVI). On December 17, 2011, the Plaintiff commenced proceedings in Hong Kong against, *inter alia*, various parties including Mr Hung who were directors of the 1st to 4th Defendants ("First Hong Kong Writ"). The action sought to recover assets belonging to Mr YC Wang's Estate. Paragraph 39 made reference to assets which had not been settled on trust. This action was seemingly not pursued and not even served, but on its face was valid for 12 months. The Plaintiff contends that publicity about the filing must have come to the attention of the managers of the Bermuda trusts and controllers of Chindwell BVI and Vanson BVI, specific entities which were not known to the Plaintiff at this stage.

65. While the First Hong Kong Writ was still valid, the Plaintiff submitted that it is clear that Mr Hung on or about November 1, 2012 instructed attorneys to set up a trust hold Chindwell BVI and Vanson BVI. This finds support in a lawyer's letter (Kazusko Harris Duncan) of that date confirming such instructions in general terms[4]. The connection is made explicit by a January 7, 2013 letter signed by William Wong (on behalf of YT Wang) addressed to Mr Hung stating:

> "*Since the incorporation of Vanson International Investment Co., Ltd ("Vanson (BVI)") and Chindwell International Investment Corp. ("Chindwell (BVI)") in the British Virgin Islands, you have been appointed the trustee and holding the shares in the above two companies until now.*
>
> *I understand it has been proposed that a new and more formal trust structure is to be set up in accordance with the Bermudian laws to hold the shares of the abovementioned companies. I also understand that this decision is made by the members of the Business Management Committee for this new trust company on consensus, and the purpose of this is to ensure that these companies can continue to operate and develop.*
>
> *I know that Winston Wong has brought several lawsuits, including litigation against your transfer of the shares in other companies as the trustee. Hence, you view that under these circumstances, for precaution, even if it is not necessary, I should formally consent to the above transaction. I hereby confirm that I fully agree with and support the proposal and the decision to complete the abovementioned transfer of shares in the future.*
>
> *I thank you again for your loyalty to my brother, Mr YC Wang and me throughout the years.*"

66. Meanwhile, on or about December 13, 2012 the Plaintiff had jointly commenced proceedings (with the then Executor his father's Estate) against various parties including Mr Hung and the 7th Defendant in Hong Kong (the "Hong Kong Proceedings"). The main purpose of the action was to recover assets belonging to Mr YC Wang's Estate. The Statement of Claim averred that Mr Hung held various assets

[4] Bundle A2, page 102.

on trust for Mr YC Wang and had wrongfully established the Bermuda trusts (paragraphs 29-31). The Hong Kong Proceedings, *inter alia*, sought to recover the assets subsequently transferred to the Ocean View Trust. It appears that no injunctive relief was sought although the Statement of Claim averred as follows:

> "*167. Further, unless restrained by this Honourable Court, the Defendants intends* [sic] *to dissipate assets in their hands which belong to the Estate.*"

67. The Ocean View Purpose Trust was initially created by a Declaration dated January 13, 2013 by Appleby Services (Bermuda) Limited as the Original Trustee. Mr Hagen QC emphasised the haste with which the process had proceeded. Appleby had issued a retainer letter on December 20, 2012 and Ocean View was incorporated on January 15, 2013. On January 8, 2013 in an email, US attorney George Harris alluded to "*the desire to create and fund this structure as quickly as possible*". A draft declaration of trust to be executed by Ocean View was circulated on March 1, 2013 and seemingly executed on March 8, 2013. The main assets were transferred to the Ocean View Trust on March 11, 2013.

68. While the ultimate Ocean View trust was being set up, the Plaintiff was contemplating commencing proceedings against the previously established four Bermuda purposes trusts. ASW Law sent a letter before action to 1st to 4th Defendants and Mr Hung on February 6, 2013. So, perhaps coincidentally, Mr Hagen QC conceded, the impugned transfer was taking place at the same time that Conyers Dill & Pearman were responding to the ASW Law letter before action. The letter before action enclosed a draft writ and stated on page 1:

> "*Our client's position is that the assets held by the Bermuda Trusts were never properly transferred to the Bermuda Trusts and as such each of the Bermuda Trusts' trustees held these assets on trust for Mr YC Wang until his death, and now hold these assets on trust for the Heirs.*"

69. As Mr Howard QC rightly submitted, and implicitly conceded, whether the Ocean View assets ought to be treated as forming part of the Estates (as the Plaintiff contends) is a question which must now be considered through the lens of the question of whether the assets have been validly settled on trust:

> "*Of course the effect of putting the assets into trust did do one thing, but of course again there's nothing improper in that. If the assets had not been put into Ocean View, these two companies, and YT had died then no doubt there would have been arguments, which would have been subject to Taiwanese law, as to whether the assets of those two companies then fell back into either YT's estate or YC and the YT's estate, would be available to Winston and the others. Now the fact that by putting them into trust, if it is validly done, that*

means that Winston can't raise that argument, is neither here nor there. That's just the result of the two fathers, YC and the YT, wanting to put these assets into trust and not wanting Winston and the other children to have them for their personal use."[5]

70. However, the Plaintiff did not submit that had he been able to proceed with the Hong Kong Proceedings, the Hong Kong Defendants would not have been able to argue that they held the relevant assets on trust for the specific purposes articulated by the Founders and that they did not intend the assets to form part of their Estates. It was not contended that the Plaintiff had been deprived of a "slam-dunk" claim. Instead, Mr Hagen QC complained of the inherent impropriety of extinguishing a claim:

"*One of the things my learned friend has said in relation to the facts is that actually Mr Wong's claim wasn't prejudiced by rehousing the asset in a trust, and I think I have dealt with that, because if you extinguish a claim in jurisdiction A and force the claimant to come and find you in jurisdiction B in a different corporate guise, where does that end? And when he sees you in jurisdiction B can you transfer the asset to jurisdiction C under a new trust, and then it goes to jurisdiction D? I mean, obviously the claimant is being prejudiced on those facts.*"

71. The effect of this transaction was in practical terms said to be to extinguish the Plaintiff's Hong Kong cause of action, requiring the Plaintiff to sue to set aside the transfer of assets to a Bermudian trust. The circumstances in which the assets were transferred were said to clearly demonstrate that the main purpose of the transfer was to defeat the Plaintiff's claim. This argument appeared to me to be irresistible, even though it was not easy to understand how the substantive claim advanced in Bermuda was more difficult to make out than that in Hong Kong. It appeared to me that want of authority asserted by the Plaintiff to attack the Ocean View settlement was more connected to what the true intentions of Mr YC Wang were during his lifetime rather than the state of mind of, *inter alia*, Mr Hung in 2013. Mr Howard QC put another spin on the relevant facts. Mr Hung was essentially a loyal servant of the Founders who (as an elderly man in 2013) wanted to complete the Founders wishes before he died (as he did in 2015). It being hotly contested in the present action what the Founders true wishes actually were, the evidential position at the end of the hearing appeared to me to be as follows:

(a) it seemed easy to conclude that the impugned transfers to Ocean View were to a material extent motivated by a desire to defeat the claims to those assets asserted by the Plaintiff in the Hong Kong Proceedings;

[5] Transcript Day 3, page 53 line 19-page 54 line 9.

(b) it seemed impossible to fairly or properly conclude at this stage that Mr Hung and/or others involved in effecting the transfers knew or must be deemed to have known either (i) that the Plaintiff's claims were valid and/or (ii) that the transfers would in substantive terms materially impair the merits of the relevant claims;

(c) it seemed, however, possible to conclude that the transferors knew or must be deemed to have known that the Plaintiff's claims were, as Mr Hagen QC put it, "bona fide" claims with some prospect of success.

The correct legal test for determining when a transaction is so improper that no privilege will attach to related advice

72. There was in my judgment no real controversy about the content of the relevant principles as opposed to how they should be applied to the present case. Mr Hagen QC contended for a somewhat more fluid application of the relevant principles while Mr Howard QC contended for a more restrictive test. To the extent that each side sought to buttress their position on the application of the principles with a conforming legal test, there was a skilfully argued dispute on the governing principles. Ultimately this dispute seemed to me to be somewhat artificial in the context of the present application. '*Thanki on the Law of Privilege*' at paragraph 4.4.3, to which Mr Howard QC referred, pithily described the broad character of the 'fraud exception' rule in terms with which it was impossible to disagree:

> "*It is important to bear in mind that the principle is an exceptional one.*"

73. In the Plaintiff's Skeleton Argument, the following governing principles were contended for:

> "*186. It is well established that no privilege attaches to communications between a client and a lawyer when the object of those communications is to place assets beyond the scope of a bona fide claim.*
>
> *187. In Barclays Bank v Eustice [1995] 1 W.L.R. 1238 defendant farmers borrowed monies from a bank subject to charges over freehold and leasehold land already in the defendants' ownership. The Revenue later distrained goods on the farm to cover amounts outstanding in tax. A week later the farmers, without informing the bank, assigned the leasehold land to their sons, for a consideration of £1 and granted them a tenancy of the freehold for an annual rent to be paid in arrears and further agreed to sell them certain agricultural assets, which were the subject of distraint by the Revenue, with provision for deferred payment. The bank called in its loans and appointed receivers under*

its charges over the freehold land. The bank sought an order for disclosure of all documents containing or evidencing communications between the defendant farmers and their legal advisers relating to the transactions. The English Court of Appeal ordered disclosure on grounds of the fraud exception, sometimes described as the principle that there is no privilege in iniquity.

188. The Court of Appeal framed the question before it as follows at p. 1248:

> *'The question which falls to be resolved is whether legal professional privilege attaches to documents containing or evidencing communications between the transferor and his legal advisers relating to transactions entered into by the transferor at an undervalue for the purpose of prejudicing the interest of persons making a claim against him. If it does then the documents need not be produced for inspection.'*

189. The court proceeded further to find at p. 1248 that:

> *'The present appeal is concerned essentially with the question whether the effecting of transactions at an undervalue for the purpose of prejudicing the interests of a creditor can be regarded as "iniquity" in this context. ... The case law refers to "crime or fraud" ... "criminal or unlawful" ... and "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances" ...The case law indicates that "fraud" is in this context used in a relatively wide sense'.*

190. There has been some debate about whether 'iniquity' puts the test too low, but there is no doubt that so far as the result was concerned in Barclays Bank v Eustice it was the right one, namely that there is no privilege in the communications when their object is the structuring of a transaction to prejudice a claim: see Kerman v Akhmedova [2018] 4 W.L.R. 52. <u>That is 'fraud' for these purposes</u>: see Williams v Quebrada Railway, Land & Copper Co [1895] 2 Ch 751." [Emphasis added]

74. The Plaintiff's counsel accordingly acknowledged that that there was a single "fraud exception" to a privilege claim, but merely contended that it was sufficiently flexible to embrace "iniquity" as well as "fraud" in any strict legal sense. In responding orally to his opponents' written and oral submissions on the applicable test and their reliance on *Barclays Bank v Eustice* [1995] 1 W.L.R. 1238, Mr Howard QC most significantly submitted as follows:

> "*When looking at the various cases which I 'm going to show you, a constant refrain of Mr Hagen was that these cases were before Barclays Bank v Eustice. The point is once you see Barclays Bank v Eustice in context of all the other cases and remember the word 'iniquity' came from something Lord Bingham had said in Ventouris v Mountain, had come from elsewhere, what*

you actually see is the Court of Appeal in Barclays Bank v Eustice was not intended to make any dramatic inroads into this area of law; alternatively if it was that is where the commenters generally say it is an unreliable authority. So there are two ways you can look at it, that essentially it is not really saying anything else and it is just you get this different use of language but they are all describing the same concept, which is something where what you can see is people who are involved in the commission of crime or dishonesty or something akin to that, or you say: no, no, this was a massive extension…"[6]

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. This legal conclusion may be illustrated by extracts from a few of the many cases to which counsel referred.

76. In *Barclays Bank v Eustice* [1995] 1 W.L.R. 1238, the substantive application was to set aside a transaction at an undervalue contrary to section 423 of the Insolvency act 1986 (UK). The defendant's land was charged to secure a loan he obtained from the bank. Shortly after the Inland Revenue had distrained against certain of the defendant's assets, he assigned property in which both the bank and the tax authorities were interested to his sons without notice. The bank claimed that privilege did not attach to the advice in relation to the impugned transfers. Schiemann LJ stated (at page –page 1249D)

"*In the resolution of this question there are two conflicting desiderata in the background. (1) Discovery of every relevant document is desirable to help the court decide what happened and why. The right answer is more likely to be arrived at by the court if it is in possession of all relevant material. (2) It is desirable that persons should be able to go to their legal advisers knowing that they can talk frankly and receive professional advice knowing that what each party has said to the other will not be revealed to third parties. This second desideratum has recently been expressed thus by Bingham L.J. in Ventouris v. Mountain [1991] 1 W.L.R. 607, 611 and I gratefully adopt his words:*

'The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial

[6] Transcript Day 3, page 63 lines 9-25-page 64 lines 1-2.

decision. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege. . Without the consent of the client, and in the absence of iniquity or dispute between client and solicitor, no inquiry may be made into or disclosure made of any instructions which the client gave the solicitor or any advice the solicitor gave the client, whether in writing or orally.'

It will be noted that in the last sentence cited Bingham L.J. referred to the 'absence of iniquity.' In so doing he was recognising the effect of a line of cases which have established that advice sought or given for the purpose of effecting iniquity is not privileged. The present appeal is concerned C essentially with the question whether the effecting of transactions at an undervalue for the purpose of prejudicing the interests of a creditor can be regarded as 'iniquity' in this context. 'Iniquity' is I believe, without having done any research on the point, Bingham L.J.'s word. The case law refers to 'crime or fraud' (Reg. v. Cox and Railton (1884) 14 Q.B.D. 153, 165), "criminal or unlawful" (Bullivant v. Attorney-General for Q Victoria [1901] A.C. 196, 201), and 'all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances' (Crescent Farm (Sidcup) Sports Ltd. v. Sterling Offices Ltd. [1972] Ch. 553, 565). The case law indicates that 'fraud' is in this context used in a relatively wide sense." [emphasis added]

77. The rule is not, of course, limited to circumstances where the iniquity or fraud complained of and the substantive cause of action in the litigation are aligned. In *Dubai Bank-v-Galadari*, The Times 22 April 1991, Morritt J (as he then was) ruled as follows:

> "*In Derby v Weldon (No 7) [1990] 1 WLR 1156 the point before me was raised. Counsel for the defendants had submitted that the principle did not apply because the communications in question related to transactions not in contemplation at the time of the initial alleged fraud. Vinelott J held that that did not matter because steps taken to conceal the initial fraud were 'in furtherance of' that fraud. He added at page 1174E:*

> *'. . . moreover, those steps even if taken in isolation from the initial fraud were in my judgment themselves so dishonest as to negate the claim for legal professional privilege.'*
>
> *In my judgment the plaintiffs are right. The rationale for the principle, the decisions of the House of Lords and Vinelott J, all point to the conclusion that communications in furtherance of a crime or fraud are not protected from disclosure, if they are relevant to an issue in the action whether or not the plaintiffs claim is founded on that crime or fraud*."[7] [Emphasis added]

78. Cases cited in argument also shed light on the important practical question of how a Court invited to apply the exception (by finding that otherwise privileged communications are not protected) should approach the relevant evidence. Again, I could discern no real controversy as to what the governing principles. In *O'Rourke-v-Derbyshire* [1920] AC 581, Lord Sumner opined (at page 614):

> "*The right of one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the person claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this be establishing a prima facie case of fraud in fact. Evidence, admission, inference from circumstances which are common ground, or 'what not', as Lord Halsbury says, may serve for this purpose….The stage of the action is only an interlocutory one, and the materials must be weighed, such as they are, without the apparatus of a formal trial. On such materials the Court must judge whether or not the claim of privilege is displaced or not.*"

79. In the same case Lord Wrenby (at page 633) opined that the material relied upon by the applicant must be such as "*would lead a reasonable person to see, at any rate, a strong probability that there was fraud, may be taken by the Court to be sufficient.*"

80. In the present case the controversy was not whether the Plaintiff could establish to the requisite standard that the misconduct he complained of had occurred. The critical question was whether or not impugned conduct was sufficiently egregious to qualify as "iniquity" or "fraud" in the requisite legal sense. To the extent that this oversimplifies the factual analysis, and there was a material dispute about what the dominant motivation for the creation of the Ocean view Trust was, I assume in the Plaintiff's favour that the dominant purpose of settling the shares in Chindwell BVI and Vanson

[7] [1991] Lexis Citation 3228 at page 8 of the transcript.

BVI on trust was to defeat any claim the Plaintiff might advance in that regard in the Hong Kong Proceedings.

Application of the legal test to the facts of the present case

81. I approach the task of applying the governing legal principles to the facts of the present case by adopting the approach commended to the Court by Mr Hagen QC in oral argument:

> "*Just to remind your Lordship what I said in respect of Eustice, this is not about semantic games. This is about looking at the fact pattern and asking the question, does the policy of the law recognise a privilege in these circumstances?*"[8]

82. In my judgment, the following facts were clearly established by the evidence before the Court:

(a) Mr Hung and the other Defendants to the Hong Kong Proceedings who were involved in transferring the assets to Ocean View effected the transaction when they did with a view to defeating any claim that might be asserted in respect of those assets in the Hong Kong Proceedings;

(b) the Plaintiff had not asserted any specific claim in respect of the relevant assets in the Hong Kong Proceedings nor obtained a freezing injunction so that the transaction entailed the breach of an order of the Hong Kong Court;

(c) a direct consequence of the impugned transaction was to defeat or extinguish any claim the Plaintiff could have advanced in the Hong Kong Proceedings solely for a declaration that Mr Hung held the assets not yet settled on trust in Bermuda;

(d) the main consequential effect of the impugned transaction was to require the Plaintiff to pursue any claim in respect of Chindwell BVI and Vanson BVI in Bermuda on the same legal basis and in the same proceeding the Plaintiff had at the material time already elected to bring against the other Bermuda trusts by early 2013 in any event. Because:

    (i) Ocean View was incorporated on January 13, 2013;

[8] Transcript Day 2 page 33 lines 12-16.

(ii) ASW Law sent a letter before action threatening Bermuda proceedings on February 6, 2013;

(iii) The Ocean View Purpose Trust Declaration was executed on March 8, 2013;

(iv) the impugned asset transfers took place on March 11, 2013, despite the fact that the prime movers had notice of the fact that a claim similar to that asserted against the 1st to 4th Defendants would likely be asserted against Ocean View;

(v) the Plaintiff's 2013 Writ was issued on April 8, 2013.

83. I reject Mr Howard QC's submission that it provides a complete answer to the Plaintiff's present complaints to say that no harm was caused because the true motivation behind the Ocean View transfers was to further the Founders' wishes. The iniquity complained of is transferring assets with a view to defeating a potentially valid claim in Hong Kong. As *Eustice* illustrates, it is not an answer to an application to set aside a transfer which prejudices creditors for the transferor to say, in effect, that he considered his motives were pure. However, Mr Howard QC also submitted more pertinently that on a proper analysis, Mr Hung "*hasn't done something which is designed to frustrate or prevent a good claim if it exists. That claim hasn't been altered one jot.*"[9]

84. It was impossible to identify any tangible way in which the Plaintiff's substantive claim had been expunged or even impaired, apart from the inherent prejudice of being deprived of the ability to sensibly continue with the Hong Kong Proceedings, which did not at the material time even explicitly advance claims about specific assets the identity of which the Plaintiff was at that time not fully aware. It was not as if the Plaintiff could initially pursue a claim in Hong Kong, but was deprived by the impugned transaction of the ability to bring any claim at all because of the availability of a limitation defence in Bermuda not available to the Defendants in Hong Kong. Mr Howard QC pivotally submitted that:

> "*What is important about this is to see - - to set the Barclays Bank v Eustice case properly in its context and you will note that despite the diligent research by Mr Hagen -- he is very diligent at researching authorities from all over The Commonwealth -- he hasn't managed to find a single case which supports the type of proposition he is putting forward here. So it is very important your Lordship should see what we look at the authorities that what is being put forward is a very substantial extension of the fraud exception.*"

85. Mr Hagen QC, when pressed to clarify what Bermudian legal policy the transaction offended, nimbly referred to the provisions of the Conveyancing Act 1983, sections 36A-36G. It was not suggested that these present sections were engaged by the present

[9] Transcript Day 3 page 60 lines 20-22.

facts and no substantive claim based on these sections is advanced in this action. Section 36C provides that transactions at an undervalue (which includes transfers for no consideration) are liable to be set aside if the transferor has the requisite intention, which is defined in section 36A as follows:

> "*'requisite intention' means an intention of a transferor to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him*…"

86. Clearly, there is no proper basis on which I could make a summary determination that the policy of these statutory provisions had been contravened. These provisions seek to prohibit transfers which are designed to put assets beyond the reach of creditors. What happened here was that the assets were placed in a trust vehicle which mirrored the trust vehicles in which the bulk of the assets pursued by the Plaintiff were already held and located the new trust in the same domicile as the other four Bermuda trusts. There is no suggestion that any concealment occurred. The complaint was that the trust creation transaction interfered with the Plaintiff's ability to advance a foreign action in circumstances where no breach of a foreign freezing injunction occurred and no claim to the relevant assets was explicitly asserted before the Hong Kong Court. As Mr Hagen QC submitted in reply when I pressed him to identify which specific legal rights had been interfered with:

> "*The identifiable legal right is the cause of action my Lord. It is exactly as is put here in the ratio of this case. It is the claim, so Dr Wong had property in the form of a cause of action in Hong Kong and that property was extinguished. His cause of action in Hong Kong was extinguished because the defendant effectively removed himself from the picture by sending the asset to another jurisdiction, or rather reconstituting the defendant as a corporation in another jurisdiction, and holding the asset on different terms*…"

87. The idea that the Hong Kong cause of action had been "extinguished" by the change in ownership of the shares was not supported by the evidence, and was not even the way the point was initially put. In the 5th Poulton Affidavit, reference was made to enquiries as to whether:

> "*the nature of the advice was to explain the legal effect of something that had already been done and had subsequently become the subject of existing or imminent litigation (which might be covered by litigation privilege) or was advice in relation to structuring a prospective transaction which had yet to be carried out. If the latter, there would be no privilege if imminent litigation had prompted the transaction given the principles in Barclays Bank v. Eustice [1995] 1 WLR 1238…*[10]

[10] Paragraph 32(f).

If …the creation of the Ocean View Trust was intended to inhibit the impact of anticipated litigation seeking recovery for the estates of YC Wang and YT of its purported assets, the law would recognise no privilege in the communications.[11]" [emphasis added]

88. In the 6th Poulton Affidavit, it was further deposed that:

"*52…<u>There is a strong prima facie case that the motivation for the transfer of Chindwell BVI and Vanson BVI to the Ocean View Trust was to inhibit anticipated claims to those companies by Dr Wong.</u> In this regard I exhibit a number of other documents which add further detail to the factual chronology leading up to the creation of the Ocean View Trust in the same clip of documents at [ARP-6/103-154]. My understanding is that, in the first Hong Kong action issued in December 2011 and the second Hong Kong action issued in December 2012, the statement of claim in respect of each had attached a number of schedules to it, including the table attached to Dr Wong's Amended Statement of Claim in this action, which mentioned Chindwell BVI and Vanson BVI.*" [emphasis added]

89. So the most that was asserted in Affidavits sworn by a lawyer was that "*imminent litigation had prompted the transaction*" and that the motivation for the transaction had been "*to inhibit anticipated claims*". It seems improbable that if the impact of the transaction had so dramatic effect as to extinguish the Hong Kong action that this would have been overlooked. How the claims had been inhibited was not particularised in any way. The notion that a Hong Kong claim had been extinguished by the transaction was simply advanced by way oral argument in reply. In the Plaintiff's Skeleton Argument, after reviewing the evidence supportive of the degree of haste with which the transaction was completed, the following conclusory submission was made:

"*177. Taking all of that together, it is self-evident that the history of the formation of the Ocean View Trust is inextricably bound up with the history of this litigation and the wider litigation brought by Dr Wong. Indeed, there is a strong prima facie inferential case that it was motivated by it.*"

90. Mr Midwinter QC, appearing for Mr Hung's Estate which was not directly impacted by this limb of the application, made the following submissions which provided helpful additional context for viewing the Ocean View transaction:

"*Mr Hagen advanced the application as though it was all very light. It is only iniquity, he is not alleging dishonesty, nothing to do with the real issues in the case, your Lordship needn't worry about it, making this sort of finding won't cause any real harm and I would wish to make it clear to your Lordship that*

[11] Paragraph 36 (c).

that is not so. The allegation that Mr Hung acted iniquitously is very firmly denied and my submission would be that it would be entirely wrong on any basis for the court to make any such finding as a result of this hearing. Mr Hung's evidence in the Beddoe proceedings, which there is no basis to doubt, is that his understanding was that he was required to deal with these assets as directed by YT Wang and on the documents YT Wang expressly directed the transfer and so Mr Hung couldn't not transfer them. He was doing what he was obliged to do. In any event, even if that were not right, it would be entirely unsurprising that a terminally ill man in his 80s holding assets on trust did not want to continue to hold them in circumstances where he was being threatened with litigation in relation to them. There is nothing dishonest or iniquitous on him passing them onto someone else in those circumstances."

91. In my judgment all that the Plaintiff was able to establish amounted essentially to this. Mr Hung had engaged in what might described as "reverse forum shopping", selecting Bermuda as the forum the Plaintiff would have to use to recover the assets settled on trust. Assuming in the Plaintiff's favour that those creating the new trust were aware that the Hong Kong Proceedings asserted claims against the assets in question, they took evasive action before the Hong Kong Writ had even been served. Coincidentally, while the impugned transaction was being consummated, the Plaintiff was in the process of commencing litigation in Bermuda in any event. There is no suggestion that the Plaintiff would have benefitted legally from being able to pursue the claims as regards Chindwell BVI and Vanson BVI alone in Hong Kong, while separately pursuing the Bermuda proceedings in respect of the initially settled Bermuda assets. This further diminishes the suggestion that in real world terms any significant prejudicial interference with the Hong Kong Proceedings actually occurred.

92. I accept that as a matter of law, the fraud exception is sufficiently broad to be engaged in relation to serious misconduct which has occurred in connection with proceedings abroad. But, for such misconduct to outweigh the countervailing public policy dictates in favour of legal professional privilege, it must to my mind generally involve a tangible contravention of legal or policy interests. For example:

    (a) a contravention of either a local or foreign statute or a local or foreign court order; or

    (b) contempt or similar disrespect for the processes the foreign court; or

    (c) direct interference with vested private law rights.

93. No such 'misconduct' has been established to have occurred here. In *Barclays Bank v Eustice* [1995] 1 W.L.R. 1238, the iniquity that justified lifting the cloak of privilege entailed a *prima facie* breach of a local statute and an interference with the bank's existing contractual security rights. In *Z-v-Z* [2017] 1 WLR 84, a husband placed substantial assets in trust after the wife issued a divorce petition and subsequently

breached various court orders. The transfer was liable to be set aside under two separate statutory avoidance provisions. Haddon-Cave LJ held:

> "***20*** *In the light of these findings, it is clear in my view, that the fraud or "iniquity" exception applies in this case. H's conduct has been seriously iniquitous. He has displayed a cavalier attitude to these proceedings and a naked determination to hinder or prevent the enforcement of W's claim. There was ample evidence of this prior to my first ruling on 16 December (see above). The picture was subsequently compounded by S's subsequent revelations of the recent steps which H has taken to hide the modern art collection and P Ltd's portfolio in a second European country. In my judgment, H's conduct is such that it is plain that legal professional privilege should not attach to his communications with S regarding the modern art collection and P Ltd's portfolio of financial assets.*"

94. Both *Eustice* and *Z-v-Z* cited with approval the dictum of Goff LJ in *Gamlem Chemicals Co (UK) Ltd v Rochem Ltd* (unreported) 7 December 1979 (at page 13) to the effect that "*the Court must, of course, in every case be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards*". In my judgment "dishonesty" in the strict sense may not necessarily need to be proved where the legal privilege is claimed in connection with a transaction which is clearly designed to undermine the efficacy of legal proceedings and/or orders made by a court. The 'misconduct' established by the Plaintiff in the present case, carefully analysed, falls far short of the high degree of impropriety required for displacing legal professional privilege. It is difficult to identify any substantial way in which the Plaintiff has been prejudiced by the impugned transaction. It amounts at worst to aggressive litigation and risk management.

95. I find there is an insufficient evidential basis to justify a finding that the privilege asserted in relation to the Ocean View Litigation documents should be refused on "fraud" or "iniquity" grounds.

Findings: alternative Kong Wah Holdings Direction

96. The Plaintiff's Skeleton sought the following relief if the application fraud exception application was refused:

> "*201. If, contrary to his position, the court would find it helpful for there to be a more fully particularised list of the Ocean View Litigation Documents before deciding the matter, then it has jurisdiction to grant one in the light of the decision in Kong Wah Holdings v HSBC [2007] 4 HKLRD 620, where the Hong Kong court ordered the list described in para 42(1) of that judgment (the drafting of which order substantially mirrors that sought by Dr Wong in this application). In Kong Wah there was a specific finding in para 70 that a list of this nature would not undermine or destroy the respondent's privilege (contrary*

to the view of Ms Nairn in paragraph 17.4 of her affidavit). Kong Wah was followed in England in Tchenguiz-Imerman v Imerman [2014] 1 F.L.R. 232."

97. My provisional view expressed at the hearing was that no useful purpose would be served by such a direction if the claim to privilege was upheld. Mr Hagen QC, in my view sensibly, did not seriously pursue this point in oral argument. For the avoidance of doubt I decline to make such a direction.

Summary

98. In summary, my findings are as follows:

(a) the New Mighty documents are not within the power of Ms Susan Wang or the Estate of Mr Hung;

(b) privilege in the legal advice given by the lawyers who formed the New Mighty Trust was waived when the advice was shared with Mr YC Wang;

(c) the Plaintiff has, however, failed to establish that inspecting the documents which were fortuitously disclosed in the present action, and would ordinarily have been disclosed in separate US proceedings, is necessary in the requisite legal sense;

(d) Privilege attaching to legal advice given in relation to the formation of the Ocean View Trust has not been lost because the establishment of that trust has not been shown, at the interlocutory stage, to have been iniquitous in the requisite legal sense.

99. I will hear counsel as to costs and the proposed terms of the Order to be drawn up in respect of this Ruling and other matters arising on the Plaintiff's Specific Disclosure Summons.

Dated this 5th day of August 2020

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IAN R.C. KAWALEY
ASSISTANT JUSTICE