Neutral Citation Number: [2025] EWHC 341 (Ch)

Case No: CR-2019-004187
CR-2019-008077

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST (ChD)

The Rolls Building
Fetter Lane, London
EC4A 1NL

Date of hearing: 29 January 2025

Before:

MR JUSTICE ADAM JOHNSON

- -

Between:

KRISHNA HOLDCO LIMITED

Petitioner

- and -

(1) GOWRIE HOLDINGS LIMITED
(2) SAMIT GOVINDJI HATHI
(3) GOVINDJI THAKERSHI HATHI
(4) ALPA HATHI
(5) PORTSIDE NORTH LIMITED
(6) LAXMICO GROUP FINANCE LIMITED
(7) SYRI LIMITED
(8) LAXMI BNS HOLDINGS LIMITED

Respondents

- -

MR IAIN QUIRK KC, MR EDWARD BATROUNEY and MR ROBERT WINSPEAR (instructed by **McCarthy Denning**) for the **Petitioner**
MR MARK ANDERSON KC and MR SAMIR AMIN (instructed by **ORJ Law**) for the **First to Seventh Respondents**
MR CHRISTOPHER HARRISON (instructed by **JKW Law**) for the **Eighth Respondent**

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Approved Judgment

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MR JUSTICE ADAM JOHNSON:

1. I need to resolve an application about disclosure in these ongoing unfair prejudice proceedings, in which the quantum trial is due to be heard shortly. There has already been a trial on liability and a judgment in favour of the petitioner, Krishna, requiring its co-shareholder, GHL, to buy Krishna's shares in their jointly owned company, LBNS (see [2023] EWHC 1538 (Ch)). There is an agreed valuation date, which is 25 June 2019. There has been ongoing disclosure in the action.

2. I am concerned with an issue which it seems first emerged in the summer of last year, 2024. Among the documents produced by GHL in June 2024 was a signed board minute of LBNS bearing the date 13 March 2019. By agreement of the parties, I have been shown the board minute. At one point, there was a question about whether it was privileged but it has now been accepted that, even if it was, privilege has been waived. There is though still a question to be resolved about whether the minute should be admitted as evidence in the forthcoming trial, as to which the Court has a discretion, notwithstanding the waiver of privilege: see PD 57AD at paragraph 19.

3. There is a separate and more substantive issue though. This arises because the board minute refers to a valuation report prepared by PwC of two of LBNS's trading subsidiaries, referred to as GLL and LL. The board minute references a sale of those subsidiaries to GHL and, on the face of it, records resolutions authorising their sale on the basis of an offer by GHL, "*based upon full value (and supported by independent valuations from PricewaterhouseCoopers) which is not discounted to reflect the desperate situation the Company and the Targets have been placed in.*"

4. The "*Company*" referred to in that quotation is LBNS; the "*Targets*" are GLL and LL; and the reference to "*the desperate situation the Company and the Targets have been placed in*" is a reference to the risk that LBNS's banking facilities might imminently be withdrawn by its bankers, HSBC. The background to that, as I understand it, had its origin in the broader dispute which by early 2019 had developed between GHL on the one hand and Krishna on the other. According to the board minute, the problem had arisen because of Krishna refusing to provide certain "*Know Your Client*" information to HSBC, with the effect that HSBC was threatening to terminate LBNS's banking facilities. The minute reflects the idea that one possible solution to this ongoing problem was for GHL to buy LBNS's two operating subsidiaries, presumably on the basis that that would then insulate them from the effects of any withdrawal of LBNS's banking facilities by HSBC and enable them to continue to trade.

5. The "*full value*" referenced in the board minute is some £47 million. As I say, this figure was apparently supported by independent valuations undertaken by PwC. Krishna is now pressing for the disclosure of those valuations which they say are obviously relevant to the valuation question the Court has to address given their proximity to the agreed valuation date of 25 June 2019. GHL resist disclosure on the basis that the work undertaken by PwC was privileged.

6. Pausing there and to expand a little, PwC's work is in fact reflected in two versions of a report. I understand there is a draft dated 13 March 2019 and a further final version dated 4 April 2019. GHL takes the position that both versions are subject to litigation privilege and the second, moreover, is subject to without prejudice privilege because it was prepared for and deployed in a mediation that took place in April 2019.

7. When it comes to litigation privilege, it is well settled that the critical question is whether the relevant document was created for the sole or dominant purpose of conducting litigation: see for example *Three Rivers District Council v Bank of England No.6* [2005] 1 AC 610 at [102], per Lord Carswell. That is one important issue which needs to be addressed on this application. Another issue, which has featured prominently in oral submissions this morning, has been the matter of whose privilege it is to assert. The main point developed by Mr Quirk KC for Krishna has been that any privilege is LBNS's privilege, not GHL's privilege, and LBNS has not properly or adequately made any claim, and so the documents should be disclosed.

8. Taking first then the question of purpose, Krishna relies on GHL's own explanation of the purpose of the PwC work in its solicitors' letter of 27 August 2024, which was that it emerged from GHL and LBNS seeking advice about a sale of GL and GLL to GHL. Krishna says that the exploration of a sale cannot properly be described as conducting litigation, whether or not the motivation for the sale was anticipated litigation. They resist the claim for without prejudice privilege, or mediation privilege if that is a different thing, essentially on the same grounds, i.e. they say the fact that a version of the PwC report may have been deployed in a later mediation does not convert the document into a privileged document if it was not privileged to begin with.

9. I have come to the view that I must reject these arguments. In my opinion, the two versions of the PwC report were produced for privileged purposes. I think the approach taken by Krishna is too narrow. In determining the question of purpose, it seems to me that one must obviously look beyond the form of the transaction proposed and ask why it was intended to happen and, relatedly therefore, why PwC's valuation work was carried out. Thus in my opinion motivation *is* relevant to the question of purpose. I think that approach is consistent with recent authority on the question of determining purpose: see, for example, *Director of the Serious Fraud Office v Eurasian Resources Corporation* [2019] 1 WLR 791 at 104 where Sir Geoffrey Vos, then Chancellor of the High Court, endorsed the view expressed in *Re Highgrade Traders* [1984] BCLC 151 that, "*the exercise of determining dominant purpose in each case is a determination of fact*," and that, "*the court must take a realistic and, indeed, commercial view of the facts*."

10. Here the relevant background is set out in two letters from GHL's solicitors dated 27 August 2024 and 8 January 2025. They explain GHL's claim to privilege. I note three preliminary points before considering them. The first is that the claim is made in light of GHL's solicitors and both leading and junior counsel having considered the PwC report and surrounding materials and having concluded that they are privileged. The second point is that Krishna and, indeed, the Court have obviously seen only a partial picture, whereas GHL's solicitors and counsel, as explained in their letter of 8 January, have "*fully, objectively and independently appraised the context in which communications occurred and documents came into existence.*" The third point is that in the letter of 27 August 2024, GHL's solicitors said they would reflect the matters in the letter in the form of an affidavit if necessary. Krishna's solicitors did not press for that at the time, but it remains open for the court to require it.

11. The relevant context is that by January 2019 the parties were engaged in litigation. A claim referred to as the "*Trust Proceedings*" had already been commenced and Krishna's solicitors had intimated claims of wrongdoing by GHL. There had been a without prejudice meeting in January 2019. A further set of proceedings called the

"*Keycircle Proceedings*" was served in early February 2019. Against this background, the potential sale of GLL and LL was considered as a possible response to the threat that LBNS's banking facilities might be withdrawn. The 13 March board minute and the initial draft of PwC's valuation report were both prepared as part of that response strategy. The board minute was, in fact, only ever a draft and although it was signed in anticipation that it might be needed, it was never in fact used because the issue over the HSBC banking facility dissolved and so the sale became unnecessary. There was a later mediation which took place on 15 April 2019 and a final version of the PwC report was deployed in that mediation but subject to an express agreement that it was being provided on a without prejudice basis.

12. GHL's position is that the issue over potential withdrawal of HSBC's banking facilities forms part of this overall background. So does the potential response to that threat, namely the prospective sale of GLL and LL to GHL. It was all part of the ongoing and developing set of hostilities which had begun to separate the parties. The PwC valuation work was thus undertaken for the sole or dominant purpose of responding in a practical way to one of the key issues forming part of those ongoing hostilities. To put it another way, the prospective sale did not arise in a vacuum or even from the course of routine commercial negotiations but instead as a response to a strategic threat arising as part of the wider dispute which already by March 2019 had prompted two ongoing pieces of litigation and was soon to give rise to more. Had the hostilities not developed in that way, then the idea of a sale and thus of a valuation would not have arisen. That tells one all one needs to know about the sole or dominant purpose of the valuation. The later mediation was part of that same continuum and the final version of the report deployed in that mediation was thus prepared for the sole or dominant purpose of trying to bring the ongoing hostilities to an end and was disclosed only in the context of discussions which were plainly intended to be and in fact were without prejudice.

13. That summarises GHL's submissions and I agree with them. Again, I consider them consistent with authority. Once more, in the *Eurasian Resources* case, Sir Geoffrey Vos at [118] explained that the reason the claim to privilege succeeded in the *Highgrade* case was because the need to identify the cause of the fire was just a subset of the defence of the contemplated legal proceedings. I think the same logic can be applied here. The possibility of a sale of GLL and LL cannot sensibly be looked at in isolation but only as a subset of a broader defence strategy designed to counter steps being taken by Krishna on a number of fronts.

14. I also agree with Mr Anderson KC that, in fact, the exercise for the Court on this sort of application is a relatively narrow one. The Court in such cases is faced with a familiar problem. It is asked to form a view about privilege but without sight of the relevant documents. The exercise of disclosure is essentially one for the parties, although subject to the Court's supervision. The Court to some extent has to trust the parties' representatives who are professional persons subject to their own regulatory controls and whose duties include assisting the Court. Their obligations include carrying out the exercise of reviewing documents diligently and in good faith for the benefit of all. That is what has happened here and I do not think it right to go behind the assessments made by both solicitors and counsel after their careful review.

15. Birss J, as he then was, put the matter well in *Property Alliance Group Limited v Royal Bank of Scotland* EWHC 1515 (Ch) at [17]. Referring to the earlier decision of Beatson J in the *West London Pipeline* case ([2008] 2 CLC 258, Birss J said:

> "*The key points are as follows. The burden is on the party claiming privilege. The court must be careful to consider how the claim is made out. Affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect. An assertion of privilege in an affidavit is not determinative but it is difficult to go behind an affidavit at the interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain something has gone wrong*."

16. I think it correct to take the same approach here and, doing so, I agree with Mr Anderson KC's submission that there is no proper basis for being reasonably certain that something has gone wrong. For the reasons already given, I do not think it has. Of course, I do not have an Affidavit in this case but, as noted, GHL's solicitors have said they are willing to provide one and I think for the sake of good order they should do so, affirming the factual statements made in their letters of August and January.

17. I next turn to the question of whose privilege it is to assert. Mr Quirk KC has denied that any privilege can be that of GHL. He relies, for instance, on the fact that the PwC reports are apparently addressed to LBNS and that LBNS paid for them. He says there is no evidence directly supporting the view that anyone other than LBNS has any relevant interest.

18. Mr Anderson KC's submissions again invited me to look at the substance rather than the form. He submitted that the privilege is really that of GHL and/or of Samit Hathi. Samit is a leading figure in the Hathi family, who are the owners of GHL. Mr Anderson KC relied on the statement in the letter from GHL's solicitors of 27 August 2024 to the effect that: "*PWC was instructed by LBNS but at the joint direction of both Samit Hathi and LBNS*." In his skeleton argument he put the matter as follows: "*Here, the report was in substance obtained by Samit, and the privilege belongs to GHL*."

19. On this issue I have again come to the view that I prefer the submissions made by Mr Anderson KC. I take on board Mr Quirk's point about the lack of direct documentary evidence but that is only part of the picture and, again, I think one needs to step back and, to use the language of Sir Geoffrey Vos, take "*a realistic and, indeed, commercial view of the facts.*" I would summarise my reasoning briefly as follows:

    i) The authorities on determining the purpose of a document emphasise that an important question is the intention of the person who instigates its creation: see, for example, *Guinness Peat Limited v Fitzroy Robinson* [1987] 1 WLR 1027 at page 1037A.

    ii) It is thus the position of the instigator which needs to be protected. Why? The rationale was explained by Lord Rodger in *Three Rivers (No. 6)* as follows at paragraph [52] (emphasis added):

> *"Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations."*

iii) Who then here were the parties to the contest, whose interests were to be protected? Again, I think one must look at this as a matter of substance, otherwise one risks the policy being disregarded and the critical protection it affords overridden. Approaching things in this way, I think it entirely fair to say that Samit and GHL were the parties whose interests fell to be protected. They were the ones in the fight with Krishna, not LBNS. LBNS was what the fight was about, but the protagonists were the shareholders and those controlling the shareholders.

iv) Mr Quirk KC in his submissions made the point that the observations in the authorities about promoting substance over form were typically made in the context of disputes over the *purpose* of a document rather than the question of who is entitled to assert any privilege. I think that is correct, but I cannot see any reason in principle why the basic approach should be any different, even if the precise form of the question is not the same. The reason for adopting an approach based on substance and not form is to give proper effect to the important policy I have described and, in my judgment, the policy objective is the same even if the issue for decision is about who is the holder of the privilege rather than about whether it attaches at all. If the policy is the same, then the approach should also be the same.

20. For all those reasons, in my judgment, the application in relation to the PwC reports fails.

21. That then leaves the question of 13 March 2024 board minute. Should it be admitted as part of the trial record? The parties are agreed I have a discretion. Mr Anderson KC has submitted that I should exercise the discretion by refusing to admit the minute. He relies broadly on two interrelated points. One is that the minute on its face, although it refers to a figure of £47 million, has no or very limited probative value without access to the underlying PwC work. The other point relied on is GHL's delay in seeking to raise the matter of the minute, which in fact emerged as an issue between the parties only recently, although GHL has had access to the minute for many months. Mr Anderson KC says this reinforces the point that the minute has no real significance and it would be too troublesome to admit it at this late stage.

22. I note all those points but I consider that I should permit the minute to form part of the trial record. I have referred already to the language of the offer it recites: namely, an offer to acquire LBNS's two operating subsidiaries for £47 million. That is described in terms as an offer based on "*full value*". The fact is that, on the face of it, the minute records that GHL was willing to make an offer to buy the two subsidiaries for that figure. The issue of fair value will be in play in the quantum trial. At a minimum, it

seems to me the fact that a party was apparently willing to pay £47 million for the two operating subsidiaries will operate as a useful cross-check or reference point for the Court during the quantum trial, in deciding any question of value.

23. Moreover, the offer was made without any discount, as the minute expressly says, and so, although we do not have any underlying workings from PwC, we are told something about the basis on which the number was arrived at. Further, the number was, according to the minute, only "*supported*" by the valuations from PwC, which to my mind leaves open the scope for factual enquiry about whether Samit Hathi - who will be giving evidence - was independently satisfied that £47m represented fair value and was in fact prepared to pay that sum and, if so, on what basis. So, in my view, there is potential value in having the document available, notwithstanding the shortcomings and delays I have referred to, and I will give permission accordingly.

LATER

24. I am going to order the costs of the application be costs in the case as between GHL and Krishna.

25. Although it is true that the successful party would normally expect to recover its costs of a contested application, that is not invariably the case and if there is good reason, then the Court may choose in its discretion to depart from that general approach.

26. Here I think neither party has been wholly successful and, certainly, I think it would be inaccurate to describe GHL as the successful party without qualification. It successfully resisted the application made by Krishna for disclosure of the PwC report or reports but there was also a separate contested issue about Krishna's ability at trial to rely on the 13 March 2019 board minute and, having heard submissions from the parties, I resolved that question in Krishna's favour so, in one sense, honours are even.

27. It also seems to me appropriate to reserve costs in light of the fact that the quantum trial is on the near horizon. I have been concerned today essentially with resolving a set of procedural questions which will inform the content and course of that trial. In the circumstances, it seems to me appropriate to treat the costs of today as a whole as costs in the case. Everything will then come out in the wash, hopefully in relatively short order following the quantum trial. For all those reasons, I will make the costs of today costs in the case as between GHL and Krishna.

28. The position of LBNS it seems to me may be different in the sense that it is a neutral party. I think in the circumstances the appropriate order is for LBNS's costs of today to be reserved and they can be resolved in due course as part of the general wrap-up at the end of the proceedings, together with any other outstanding costs questions.

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(This Judgment has been approved by the Judge.)

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