Neutral Citation Number: [2019] EWHC 1754 (Comm)

Case No: CL-2017-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/07/2019

Before :

THE HONOURABLE MRS JUSTICE MOULDER

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Between :

HOTEL PORTFOLIO II UK LIMITED (in liquidation)	**Applicant**
- and –	
(1) SMA INVESTMENT HOLDINGS LIMITED (A company incorporated in the Marshall Islands) **(2) DR GAIL ALISON COCHRANE** **(3) THE VISCOUNT OF JERSEY (As administrator of the desastre of Dr Gail Alison Cochrane)** **(4) THE VISCOUNT OF JERSEY (As administrator of the desastre of Orb Arl)** **(5) NICHOLAS THOMAS** **(6) ROGER TAYLOR**	**Respondents**

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Mr J Pickering & Mr S Hodge (instructed by **The Spring Advisory Group Limited t/as Spring Law**) for the **Applicant**

Hearing dates: 2 May 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment of the Court on the application dated 23 October 2018 brought by Hotel Portfolio II UK Ltd (in liquidation) ("HPII"). HPII is seeking a declaration that it is entitled to disclose a number of documents currently within its possession notwithstanding any legal professional privilege ("LPP") which the Respondents may assert, on the grounds that the "iniquity" exception applies ("the LPP Application").

Evidence

2. In support of the LLP Application, the Court has the first, second and third witness statements of Ms Elizabeth Aird-Brown who is the liquidator of HPII, appointed in March 2018.

3. In opposition to the LLP Application, the Court was provided with letters from Dawna Stickler, Dr Smith and Dr Cochrane setting out their respective positions.

Background

4. The LPP Application is made within the context of proceedings brought by the Serious Fraud Office (the "SFO") arising out of a long-running dispute between Dr Gerald Smith and Mr Andrew Ruhan (the "SFO Proceedings"). These proceedings involve sums of approximately £220 million. A trial concerning some of the issues is due to take place in January 2020 with a time estimate of approximately 10 weeks.

5. The present LPP Application has been brought against only six of the parties involved in the SFO Proceedings.

6. By way of the LPP Application, HPII seeks to disclose 8 documents, each of which comprises a chain of emails together with attachments passing between Stewarts Law and the Orb Claimants. These documents are already in the possession of HPII having been disclosed through proceedings brought by the liquidator of HPII under the Insolvency Act against Mr Campbell.

The LPP Application

7. In a letter of 29 March 2019 Stewarts Law LLP ("Stewarts") stated that:

   i) all of the documents which are the subject of the LPP Application were created in the period 1 November 2013 to 14 January 2014, at which time their only clients were Orb a.r.l.("Orb"), Mr Roger Taylor and Mr Nick Thomas. Thus the clients on whose behalf the documents were produced were those three persons;

   ii) Pursuant to the terms of their engagement, the clients appointed Pro Vinci Ltd ("Pro Vinci") to instruct Stewarts on their behalf. As a result Stewarts corresponded with employees or consultants of Pro Vinci including, Dawna Stickler, Sinead Irving and Gerald Smith;

   iii) Dr Cochrane, the wife of Gerald Smith, gave Stewarts instructions on "significant matters" on behalf of Orb.

8. Stewarts expressed the view in that letter that employees or consultants of Pro Vinci would be able to assert legal advice privilege as agents for their clients and/or litigation privilege given that the dominant purpose of the communications was the litigation against Mr Ruhan. Stewarts further noted that the employees or partners of Stewarts and counsel instructed by Stewarts would have received emails in their capacity as legal advisers of their clients and the same would apply to emails received by their clients' Isle of Man counsel, Lawrence Keenan Advocates Limited.

9. Warren's Law, the solicitors acting for Mr Thomas and Mr Taylor, have confirmed via email dated 17 January 2019 that privilege in the documents sought has been waived by their clients.

10. By letter of 10 April 2019, Addleshaw Goddard LLP, acting on behalf of the Viscount of the Royal Courts of Jersey, who acts as administrator for both Dr Cochrane and Orb, has asserted that the privilege of both Orb and Dr Cochrane has vested in the Viscount as a matter of Jersey law (although it is noted by Stewarts that to the extent that Dr Cochrane was a recipient of the documents, this was not as a client of Stewarts in her personal capacity). By a further letter of 29 April 2019 Addleshaw Goddard LLP informed the Court that, to the extent that she may exert privilege, the Viscount does not object to disclosure of the documents by HPII to and to the extent necessary is willing to waive privilege in the same (but without accepting that the iniquity principle applies).

11. Dr Gail Cochrane, the wife of Dr Smith, opposes the LPP Application. Dr Cochrane did not attend the hearing but instead set out her objections in a letter dated 25 April 2019 which was sent to the Court under cover of a letter dated 29 April 2019. Dr Cochrane contends that she has a right of privilege in the documents and that she does not accept that the Viscount can waive her rights in this regard.

12. Dawna Stickler and Berkeley Square Solicitors on behalf of Dr Smith sent in written representations to the Court setting out their opposition to the LLP Application. It is suggested in the letter from Berkeley Square solicitors dated 30 April 2019 that employees or consultants of Pro Vinci would be able to assert legal advice privilege and/or litigation privilege as agent of the clients. However I note that in the letter from Addleshaw Goddard to the court on 29 April 2019, it is asserted that as a matter of Jersey law, Orbs' privilege vested in the Viscount immediately upon the declaration of *en desastre* on 24 November 2016.

13. It is not necessary in order to determine the LPP Application for the court to determine which persons can assert privilege over the documents which are sought. In this regard I note that at the start of the oral hearing I put to counsel for HPII that as a number of the parties to whom it could be submitted that privilege belonged, had in fact waived privileged through correspondence sent to the Court, or at least were not resisting the application, it was unnecessary for the applicant to advance its application on the basis of the iniquity exception. However, counsel stated that he wished to proceed with the LPP Application as set out in the application notice, namely that by reason of the iniquity exception privilege does not arise. Counsel did submit that in the event he did not make out his case, he would seek a declaration that HPII are entitled to disclose the documents because of the waiver but this alternative case was not then addressed in submissions. For disclosure to be permitted on this basis, the Court would have to be satisfied that privilege did indeed rest with the parties who have indicated they are

prepared to waive disclosure. It seems to me that that case was not pursued and not established and as a result I proceed to consider HPII's application as it was framed in the application notice and solely on the basis of the iniquity exception.

14. On that basis the court has taken into account the written submissions made by Berkeley Square Solicitors on behalf of Dr Smith in its letter. Although counsel for HPII did not address these directly in his submissions, it seems to the court that in substance counsel addressed the general issues raised in the letter and that counsel had an opportunity to make submissions on any particular points raised in the letter should he have felt it necessary or advisable to do so.

Factual background

15. The LLP Application in these proceedings arises out of matters which, at their core, relate to ongoing disputes between Dr Smith and Mr Ruhan. The background is both long and complicated but is well known to the parties involved. For the purposes of this application I set out only a brief overview of the history of proceedings to date.

16. In May 2003, HPII owned a portfolio of 37 hotels, 3 of which overlook Hyde Park ("the Hyde Park Hotels"). These three hotels were considered to have significant development potential. At the time, HPII was ultimately owned by a group of companies, the holding company of which was Orb, a company registered in Jersey, whose effective owner and controller is said to have been Dr Smith.

17. The key assets within the Orb group, including the shares in HPII, which in turn owned the Hyde Park Hotels, were transferred by Orb to companies said to be controlled by Mr Ruhan. The consideration for the transfer was some £45 million. However, Dr Smith alleges that in addition to the £45 million there was a side agreement in existence made orally pursuant to which Dr Smith would be entitled, in the event that the Hyde Park Hotels were successfully developed, to receive a share of the profits.

18. Following the transfer in May 2003, it is HPII’s case that HPII remained the owner of the hotel portfolio, including the Hyde Park Hotels, albeit that they were now subject to the beneficial ownership and control of Mr Ruhan.

19. As a director of HPII, Mr Ruhan is alleged to have taken steps to divert the Hyde Park Hotels away from HPII and into a group of companies known as the Cambulo Group which are said to have been nominally owned by an associate of Mr Ruhan named Mr Anthony Stevens. It is HPII's position that in diverting the Hyde Park Hotels to the Cambulo Group, Mr Ruhan was acting in breach of his fiduciary and statutory duties owed to HPII. These alleged breaches are now the subject of separate proceedings brought by HPII and its Liquidator against Mr Ruhan in the Commercial Court, Claim No CL-2018-000226.

20. Following the transfer of the Hyde Park Hotels from HPII to the Cambulo Group, the hotels were developed into luxury apartments and then sold, as a result of which the Cambulo Group made significant profits. It is HPII's case that as the effective owner and controller of the Cambulo Group, it was Mr Ruhan who in fact made significant gains and that this was done at the expense of HPII and its creditors. It is alleged that Mr Ruhan invested the profits in numerous ways, one of which involved a trust being established in the Isle of Man known as the Arena Settlement Trust. The purported

beneficiaries of the Arena Settlement Trust are said to included two associates of Mr Ruhan, namely Mr Cooper and Mr McNally. It is HPII's case, however, that Mr Cooper and Mr McNally were in fact trustees/nominees for Mr Ruhan, which is to say that Mr Ruhan is alleged to be the ultimate beneficial owner of the assets held within the Arena Settlement Trust.

21. Meanwhile, in April 2006, Dr Smith pleaded guilty to counts of theft and false accounting and in September 2006 was sentenced to 8 years' imprisonment. In November 2007, the Serious Fraud Office obtained a confiscation order against Dr Smith in the sum of £40.9 million. Following his release from prison in 2010, Dr Smith sought to obtain the assets within the Arena Settlement Trust and initiated proceedings in the Commercial Court against Mr Ruhan. The claimants were Orb (the company said to be controlled by Dr Smith), together with Mr Thomas and Mr Taylor (two associates of Dr Smith) (collectively known as, "the Orb Claimants"). In broad terms, the Orb Claimants alleged that they were entitled to a share of the profits made by Mr Ruhan from the development of the Hyde Park Hotels pursuant to the oral agreement, and that Mr Ruhan was the ultimate beneficial owner of the Arena Settlement Trust. From 2013, the Orb Claimants engaged the services of Stewarts to provide legal advice and drafting.

22. It is HPII's case that Dr Smith orchestrated the theft of assets from Mr Ruhan by way of the Arena Settlement Trust by allegedly coercing Mr Cooper and Mr McNally, through threats of exposing them to allegations of complicity in tax evasion and serious professional wrongdoing, to transfer the assets within the Arena Settlement Trust to Dr Smith's nominees. This is said to have been effected by a series of agreements termed the Isle of Man Settlement (the "IOM Settlement"). HPII allege that Mr Cooper and Mr McNally hold the proceeds from the Hyde Park Hotels on trust for Mr Ruhan and that by transferring them via the IOM Settlement to Dr Smith and others that they were in breach of their purported fiduciary duties.

23. Subsequently, Mr Ruhan entered into negotiations with Dr Smith which concluded in a series of agreements in 2016 in Geneva, termed the "Geneva Settlement". The Orb Commercial Court claim was discontinued and Mr Ruhan and Dr Smith effectively split the assets between them. It is alleged that Mr Ruhan directed the transfer of his assets to various nominees including Mr A Stevens, Phoenix and Minardi, while Dr Smith is said to have directed that his assets were to be transferred to nominees on his behalf including Dr Gail Cochrane and a company termed LCL.

24. As a result of these instances, HPII is now involved in two separate pieces of litigation:

    i) the Ruhan Proceedings in which HPII and its liquidator are the Claimants and seek relief against Mr Ruhan and Mr Stevens. If successful, it is said that these proceedings will result in HPII obtaining both personal and proprietary claims against Mr Ruhan and Mr Stevens in relation to the profits made by Mr Ruhan which are said to have been made at the expense of HPII and its creditors.

    ii) the present Serious Fraud Office Proceedings in which HPII seeks to challenge both the IOM Settlement and the Geneva Settlement.

25. HPII's case is that if successful in the Ruhan Proceedings it will seek to trace the proceeds of the sale. Alternatively, if unable to trace the proceeds, HPII will seek to

enforce personal claims against those assets of which Mr Ruhan is found to be the ultimate beneficial owner.

Applicable legal principles

26. The relevant documents under consideration in this application are prima facie covered by legal professional privilege ("LPP"). However, LPP is subject to a number of narrow exceptions, one of which is the "iniquity" exception, otherwise known as the "crime-fraud" exception.

27. With respect to when the iniquity exception takes effect, *Disclosure (Matthews & Malek) (5th Ed)* states at paragraph 11.72(c) that LPP will not apply "where the legal advice was sought or given to assist in a fraud or illegality".

28. In *Banque Keyser Ullman S.A. v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep. 336, Parker LJ at 337 set out the following guidance, from which it can be seen that it is not necessary for the solicitor to have been complicit or aware of the iniquitous conduct for the exception to apply:

> "Legal professional privilege does not exist in respect of documents which are in themselves part of a criminal or fraudulent proceeding or, if it be different, communications made in order to get advice for the purpose of carrying out fraud, and that this is so whether or not the solicitor was or was not ignorant of the fact that he was being used for that purpose."

29. It is established law that documents which are relevant to the dispute are subject to inspection and disclosure, and that LPP acts as an exception to this rule where a confidential relationship exists in the ordinary course of a professional engagement between a client and a lawyer. If, however, the communications between lawyer and client are, whether or not the lawyer knows this, in fact conducted with the intention of pursuing a fraudulent purpose, then those communications are outside the ordinary course of a professional engagement, or, put in the alternative, qualify as an abuse of it, such that LPP does not apply.

30. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 Popplewell J gave the following guidance at [76]:

> "Where is the line to be drawn between 'the ordinary run of cases' in which privilege attaches to communications with a solicitor by a client with a view to advancing a knowingly false case, and the conduct in Kuwait Airways (No.6)? The answer lies, in my view, in a focus on three aspects of legal professional privilege and the iniquity exception. The first is that legal professional privilege attaches to communications between solicitor and client which are confidential. The quality of confidence is a prerequisite to the privilege, because it is the protection of such confidence which forms the bedrock of the rationale for the privilege as essential to the administration of justice. Secondly,

> communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality. It is this which prevents legal professional privilege attaching to communications for such purpose. Thirdly, the reason that communications in furtherance of iniquity lack the necessary quality of confidentiality is that communications can only attract the confidence if they are made in the ordinary course of professional engagement of a solicitor. It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service falling within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The 'ordinary run of cases' involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case." [emphasis added]

31. And then at [93]:

> "I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the 'ordinary run' of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege." [emphasis added]

32. With respect to what is meant by iniquitous conduct, *Matthews & Malek* in *Disclosure* state at paragraph 11.80 that:

> "For the purposes of the rule, fraud includes "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances", but not mere inducement to breach of contract. Nor does it include entering into an improper contingency fee agreement, or interference with goods. On the other hand it includes deliberate misrepresentation for the purposes of obtaining a mortgage loan, and fraud on creditors within s.423 of the Insolvency Act 1986 and this is so even if all parties wrongly believe the actions concerned to fall outside the scope of the section."

33. In *Crescent Farm (Sidcup) Sports Ltd v Sterline Offices Ltd* [1972] Ch 553, Goff J. (as he then was) said at 566:

> "I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit."

34. It is not necessary to prove that there has in fact been iniquitous conduct on the part of the solicitor's client. However, a mere allegation of iniquitous conduct will not suffice: *Disclosure (Matthews & Malek)* at paragraph 11.79:

> "There must be a definite charge of fraud or illegality, supported by prima facie evidence, and not a mere allegation. There must also be a prima facie case that the document came into existence as part of the fraud. Indeed, it may be that there needs to be a "strong prima facie case". In Australia the evidence to show fraud must be admissible evidence. The court will be astute to prevent such allegations being made in order to enable discovery "fishing" applications to be mounted and "very slow" to deprive a defendant of legal privilege on an interlocutory application. It is not however necessary that the word "fraud" be used, if the facts alleged enable the court to recognise it." [emphasis added]

35. In *O'Rourke v Darbishire* [1920] AC 581 Viscount Finlay at 604 said:

> "…[N]o privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.
>
> "This is clear law, and, if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The

> statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. [emphasis added]"

36. Lord Sumner at 613:

> "No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. "

> "…it is equally clear in principle that no mere allegation of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege, properly formulated." [emphasis added]

37. Lord Parmoor at 622:

> "...[T]he proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim if professional privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege, a claim founded in the interest of the proper administration of justice, could be defeated by the skill of a pleader and the use of technical language whenever it was desired to obtain an inspection of documents, otherwise privileged, in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand, in order to obtain the production of documents, it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents, which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case. "

> "…Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a prima

> facie case of definite fraud, either by allegation, affidavit, or in some other way, will depend on the special facts in each case: Reg. v. Cox. But something more is required than mere pleading, or than mere surmise and conjecture." [emphasis added]

38. Lord Wrenbury at 632:

> "Lord Halsbury's words are that before professional "confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." If I may venture to express this in my own words I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud. " [emphasis added]

39. Their Lordships' dicta in *O'Rourke* were applied in *London Borough of Brent v Kane* [2014] EWHC 4564 (Ch) at [43] and Munby J in *C v C* [2008] 1 FLR 115 at [61].

Submissions for HPII

40. It was submitted by counsel for HPII in his written submissions that:

    i) The documents sought to be disclosed are highly relevant to an issue in the trial – the IOM Settlement;

    ii) The documents clearly fall within the iniquity exception.

41. In particular, whilst accepting that the mere allegation of iniquitous conduct will not be sufficient, it was submitted that here there is prima facie evidence of fraud involving theft by Dr Smith (and his associates) of Mr Ruhan's assets, by Dr Smith effectively blackmailing Messrs Cooper and McNally and bribing them. The theft was carried out by drawing up the documents which effected the transfer of assets from Cooper and McNally to Smith.

42. In oral submissions counsel referred to having to demonstrate two things: Stage 1 and Stage 2. Stage 1 consisted of an allegation that Dr Smith had blackmailed and bribed Mr Cooper and Mr McNally into transferring assets which it is said that they hold beneficially for Mr Ruhan and in doing so had coerced them via illegal means to breach their fiduciary duties as trustees. Stage 2 was concerned with demonstrating that Stewarts had been used as a vehicle to help bring about the breach by providing advice and assistance with drafting the IOM Settlement.

Submissions for Dr Smith

43. It was submitted (in the letter of 30 April 2019 from Berkeley Square solicitors) for Dr Smith that:

    i) the evidence fails to establish "sufficient probability" of the truth of the allegations;

    ii) the allegations are inadequately aligned to any cause of action.

44. In particular it was submitted that no sham is pleaded in relation to the IOM Settlement and thus the application for the documents cannot be said to be relevant.

45. Further it was submitted that, applying *Ablyazov* at [93] (cited above), there is no suggestion that there was anything inappropriate about the conduct of Stewarts such that the communications amounted to an abuse of the relationship between solicitor and client sufficient to negate the necessary professional confidence. The concerns raised by HPII about the ownership of property are precisely the subject that is raised in the emails and about which advice is being given by Stewarts.

46. It was submitted that there was no deception indicative of a lack of confidentiality in circumstances where the solicitors were being consulted about giving advice about the very challenges to the claimant's case on which HPII rely. The application requires the court at a preliminary stage to make findings about egregious iniquity on behalf of the claimants both within the Orb litigation and within the relationship with their lawyers sufficient to negate privilege in circumstances where the relevance of the material is at best uncertain.

Discussion

47. Applying the principles referred to above the court has to consider that:

    i) It is not enough to allege fraud -the statement must be made in clear and definite terms;

    ii) There must be prima facie evidence that has some foundation in fact.

It is not enough to allege fraud the statement must be made in clear and definite terms

48. It was not entirely clear from the submissions made by counsel for HPII as to the "iniquity" which was being relied on in order to found the argument that the communications with the solicitors were conducted with the intention of pursuing a "fraudulent" (iniquitous) purpose. In his skeleton argument (paragraph 28) counsel stated that the documents are "highly relevant" to the issue of the validity of the IOM Settlement and counsel cross-referred to the list of issues at 15.4 and 15.6 which refers to whether the IOM Settlement was void or voidable and whether it was valid and enforceable. However, in oral submissions, counsel seem to rely on a broader case that Dr Smith was "behind misconduct" in that he blackmailed and bribed Messrs Cooper and McNally into transferring assets which they were holding beneficially for Mr Ruhan. He also submitted that he was seeking to demonstrate that there was prima facie evidence that the IOM Settlement by which the assets were transferred was done "in fraudulent breach of trust", relying on the alleged breach of a fiduciary relationship between Mr Ruhan on the one hand and Mr Cooper and Mr McNally on the other.

There must be prima facie evidence that has some foundation in fact

49. Bearing in mind the lack of clarity as to the precise iniquity which was being relied on, the court then needs to consider whether the applicant has shown prima facie evidence of such iniquity or "sufficient probability of its truth to disallow the privilege of professional communication".

Evidence

50. Counsel for HPII relied on:

i) The change in position by Mr Ruhan in the Orb Commercial Court claim as to whether he was the beneficial owner of the assets within the Arena Settlement Trust;

ii) The evidence that the Orb Claimants stated in proceedings in the Isle of Man that Mr Ruhan was the beneficial owner of the assets;

iii) The judgment of Cooke J;

iv) The evidence of correspondence that Cooper and McNally were employed by Mr Ruhan to "shield and hide" his assets;

v) The evidence of blackmail and bribery by Dr Smith of Messrs Cooper and McNally;

vi) The terms of the IOM Settlement.

51. Counsel relied on the fact that in the first instance in the Orb Commercial Court claim Mr Ruhan had opposed the notion that he was the ultimate beneficial owner of the proceeds held by Mr Cooper and Mr McNally but that upon finding out that the proceeds had been transferred under the IOM Settlement, Mr Ruhan filed an amended defence and counterclaim admitting that he was the ultimate beneficial owner of the Arena Settlement and asserting that Messrs Cooper and McNally had constituted themselves fiduciaries and alleging breach of trust and/or fiduciary duty.

52. Counsel also relied on the evidence that in the *Norwich Pharmacal* applications in the Isle of Man, Dr Cochrane stated in her evidence to the court that the Orb Claimants were of the view that Mr Ruhan was the beneficial owner of the assets and that Mr Ruhan was concealing ownership of his business portfolio through Cooper and McNally.

53. Counsel took the court to the judgment of Cooke J [bundle 5/1194] dealing with Mr Ruhan's application to amend and (amongst other things) paragraph 51 of the judgment:

> "The claimant's case has always been that Mr Cooper and Mr McNally held the relevant assets in the arena settlement as nominees for Mr Ruhan. By being parties to transactions which form part of the Isle of Man settlement, they participated in the transfer of assets which they therefore considered to be those of Mr Ruhan to parties other than him on the basis of his alleged wrongdoings…" [emphasis added]

54. It was submitted [transcript p58] that this was an important passage which "sheds light" on Cooke J's "thoughts" that they were party to transactions which form part of the Isle of Man settlement and they participated in the transfer of the assets which they considered to be those of Mr Ruhan to parties other than him.

55. Counsel also relied on the "key passage" at paragraph 119 of the judgment where Cooke J said:

> "Moreover there are clearly issues of fact which arise in relation to the exact circumstances in which the assets inside and outside the arena settlement claim to be transferred under the terms of the MSD and the other two disclosed documents. At the very time that assets were being transferred to SMA, Dr Cochrane and all were seeking orders in the Isle of Man which are predicated on the assets belonging to Mr Ruhan rather than to Mr McNally and Mr Cooper."

56. Counsel relied on a letter sent from Pro Vinci Ltd in 2013, who at the time were acting as agent and manager for the Orb Claimants, to Mr Cooper and Mr McNally (para 35 of the witness statement of Ms Elizabeth Aird-Brown) which alleged that the two were employed by Mr Ruhan "to shield and hide his assets" and which stated that Pro Vinci had undertaken investigations which had uncovered evidence of (amongst other things) tax fraud, tax evasion and money laundering.

57. The letter included the following passage:

> "Our investigations have uncovered evidence of long term tax fraud, tax evasion, misrepresentation, false accounting, forgery and money laundering. In particular, it appears that Mr Cooper and you [Mr McNally] caused to be created and have run on Mr Ruhan's behalf, a number of sham discretionary trusts…";

58. Ms Aird-Brown suggested in her witness statement that this letter can be used as the basis from which "to infer" that the Pro Vinci and the Orb Claimants believed that Mr Cooper and Mr McNally were trustees holding assets beneficially owned by Mr Ruhan (para 36 of the witness statement).

59. In a further letter of 21 May 2013 from Pro Vinci to Mr Cooper and Mr McNally, Pro Vinci stated:

> "In view of the action of Mr Cooper and Mr McNally described in the [letter], which we believe could be the subject of disciplinary action against them under the Code of Conduct of the Solicitors Regulation Authority and the Solicitors Act 1974…we are writing to you to share our findings and to give you the opportunity of providing an explanation before we decide on an approach to the Solicitors Regulatory Authority or other regulator".

60. Ms Elizabeth Aird-Brown stated (paragraph 40 of her witness statement) that "it is to be inferred" that this formed the basis of the Orb Claimants' "strategy to exert extreme personal and professional pressure" to coerce Mr Cooper and Mr McNally into joining in "a dishonest conspiracy to transfer the Stolen Assets".

61. Counsel submitted that Dr Smith allegedly used blackmail and bribery to coerce Mr Cooper and Mr McNally into transferring the assets under the IOM Settlement, which

it is alleged are beneficially owned by Mr Ruhan. In this regard, HPII relied upon the witness statement of Mr Alan Campbell (referred to at paragraph 15 of the third witness statement of Ms Aird-Brown). Counsel for HPII told the court that Mr Campbell was originally an associate of Mr Ruhan until he became aggrieved with Mr Ruhan after not being provided with what he felt he was entitled to and thereafter began assisting Dr Smith. In the context of discussing the background to the settlement negotiations, the following paragraphs of Mr Campbell's witness statement were relied upon in support of the allegations of blackmail and bribery:

> "Dr Smith kept me informed of the settlement negotiations. As far as I am aware those initial discussions all took place between Dr Smith, Ms Stickler, Mr Cooper and Mr McNally, but without any lawyers present. Dr Smith told me the key discussion points were Mr Cooper's will, the Diamond settlement and the impact of the English litigation on Messrs Cooper and McNally personally.
>
> Dr Smith told me that at a crucial point in a meeting Mr Cooper was sitting back with his hands behind his back not paying very much attention. Dr Smith said he leaned forward and threw a file containing Mr Cooper's will on the table and said words to the effect, "that will put you in jail Simon". Dr Smith said that Cooper appeared shocked on reading the contents of the file. For completeness I should state that Ms Stickler has recently intimated to Mr Chan through solicitors that although she was present at those meetings, she has no recollection of Cooper's will being mentioned.
>
> At that time I did not give much thought to this, and it did not occur to me that using legally obtained documents might not be legitimate negotiation by Dr Smith. I did not share this with Mr Chan until very recently.
>
> Dr Smith did share with me an email from his friend Mark Keegan to him dated 8 November 2013 (page # of AC2) referring to a conversation the previous evening with Colin Emson. I believe that Mr Emson knows Messrs Cooper and McNally well, and Mr Keegan knows Dr Smith well. The email stated "Colin rang at about 10.15pm last night at McNally's request. He asked me to telephone you and suggest that the payment should be split £9m escrow, £1, risk. The reason he gave was that McNally thought he was giving into blackmail and there might be no end. McNally said he trusted Colin and asked Colin if he trusted me and if I trusted Gerald: blah, blah, blah. It's not blinking, it's crying" and went on to say "Colin spoke as if that was the case and asked me to believe that the £10m was McNally's. I was asleep when he rang and could not summon hollow laughter." At this time, I thought that the reference in this email to "blackmail" was simply a reference to tough negotiation by Dr Smith." [Emphasis added]

62. Ms Aird-Brown states that the passages "confirm how the Orb Claimants and Dr Smith in particular exerted significant and entirely improper (and could be unlawful) pressure on Mr Cooper and Mr McNally to coerce them to enter into the IOM settlement".

63. Counsel also relied on the payment of £10 million to Dr Cochrane by Messrs Cooper and McNally (paragraph 72 of the witness statement) and the terms of the settlement deed itself which he submitted (as stated in the witness statement at paragraph 90) proceeded on the basis that Messrs Cooper and McNally were the ultimate beneficial owners of the arena settlement.

64. It was submitted that there is prima facie evidence that the IOM Settlement took place without the apparent knowledge of Mr Ruhan and that the assets beneficially owned by Mr Ruhan were apparently transferred, as a result of the threats for reporting for tax evasion and regulatory breaches, to Dr Cochrane.

Discussion

65. As the authorities referred to above make clear, it is not enough to allege fraud or similar wrongdoing; something more is required than mere pleading, or than mere surmise and conjecture. The court exercises its discretion taking into account not only the terms of the allegations but also the surrounding circumstances to see whether the charge has sufficient probability of its truth to make it right to disallow the privilege of professional communications. The court will be "very slow" to deprive a defendant of legal privilege on an interlocutory application.

66. In my view HPII has not discharged the burden on it:

    i) Mr Ruhan's change of position in the pleadings in the Orb Commercial Court Claim is not evidence but an assertion that Mr Ruhan is in fact the beneficial owner of the relevant assets. *A fortiori* it is not evidence that Mr Cooper and Mr McNally were acting as fiduciaries for Mr Ruhan and acted in breach of fiduciary duty in respect of the IOM Settlement.

    ii) I do not read the passages in the judgment of Cooke J (who refers to Mr Cooper and Mr McNally as nominees) as amounting to a finding that Mr Cooper and Mr McNally were participating in the transfer of assets which they considered to belong to Ruhan. At most, as counsel acknowledged (page 61 of the transcript), the judge was pointing out the contradictory stances taken by the Orb Claimants. Although the documents underlying the application before Cooke J may be evidence that assets were being transferred at a time when the Orb Claimants had taken the position in proceedings in the Isle of Man that Mr Ruhan was the beneficial owner of the assets belong to Mr Ruhan rather than Messrs McNally and Mr Cooper, the judgment does not provide additional evidence of the iniquity alleged either acting in breach of fiduciary duty or a broader fraud.

    iii) The letter from Pro Vinci asserts that Mr Cooper and Mr McNally were employed by Mr Ruhan to shield and hide his assets. HPII suggests that the letter can be used to draw an inference not that Mr Ruhan was the beneficial owner, but instead that the Orb Claimants believed that this were the case. It is far from

clear that it is anything other than one strand of the evidence of the alleged iniquity.

iv) I note that the observations of Ms Aird-Brown on the suggested inferences to be drawn are not evidence but merely her opinion. Further and more significantly, Mr Campbell's witness statement is untested from a person who is accepted to have a grievance with Mr Ruhan and his evidence is based on hearsay about a meeting at which he was not present.

v) As to the terms of the settlement it is unclear that the payment is prima facie evidence of misconduct: Dr Smith describes this as a without prejudice good faith payment in exchange for his stay in the disclosure proceedings. Whilst this is disputed this is a matter which will be only resolved at trial. The issue of beneficial ownership again is only one strand of the elements which will need to be established at trial.

67. Taking the evidence before me at its highest, all that can be said is that there is prima facie evidence that the IOM Settlement took place without the apparent knowledge of Mr Ruhan and that the assets beneficially owned by Mr Ruhan were apparently transferred, as a result of the threats for reporting for tax evasion and regulatory breaches, to Dr Cochrane. To the extent that HPII seek to establish that "Dr Smith was behind misconduct" (page 49 of the transcript) this does not appear to be enough unless it resulted in assets being transferred in breach of trust. Broad allegations of "deceiving all involved" or an "underlying fraudulent scheme" (page 51 of the transcript) is not sufficiently linked to the alleged iniquity that the assets were transferred in fraudulent breach of trust (page 50 of the transcript) or the (in)validity of the IOM Settlement.

68. For all these reasons I find that HPII has not shown prima facie evidence that Mr Cooper and Mr McNally were trustees and acted in breach of fiduciary duty or of a wider conspiracy to defraud Mr Ruhan.

69. Stage 2 only arises if HPII has established that there is prima facie evidence of the alleged iniquity. In the light of my findings I do not need to consider stage 2 and whether the relationship was such as to take it out of the context of the normal relationship.

70. However, if I am wrong on that, I will consider the issue of whether the iniquity put the advice outside the normal scope of professional engagement.

71. Counsel submitted that the "normal relationship" did not arise because the conduct of the Orb Claimants, through Dr Smith, in obtaining the transfer of assets from McNally and Cooper was misconduct, fraud and theft and that Stewarts was being used as a vehicle for that.

72. I accept on the authorities that it is not necessary to show that Stewarts were complicit. However, it seems to me that the test is not whether Stewarts facilitated the iniquity in the sense of drafting the documents which enabled the transfer of assets to take place. The question is whether their advice or conduct was such as to put it outside the normal scope of professional engagement (*Ablyazov* at [93] cited above).

73. I note in particular the following extracts in the emails:

[*The remainder of this paragraph has been redacted on the basis of privilege and is reproduced in the confidential schedule attached which may not be published (other than to the parties and their legal advisors) without permission of the court.*]

74. Rather than amounting to evidence that Stewarts were complicit in facilitating the alleged iniquity or deceived into being an instrument to perpetrate the iniquity, in my view the emails demonstrate that Stewarts/ Isle of Man counsel were giving legal advice as to the risks inherent in what was proposed.

75. It seems to me therefore that the emails cannot be said to show that Stewarts were acting outside the normal scope of professional engagement. Stewarts were performing their proper professional role of giving advice on the risks of the transaction. They were providing the services which were inherent in the proper fulfilment of their engagement.

Conclusion

76. Legal professional privilege attaches to communications which are confidential. The protection of confidence is essential to the administration of justice. It is a question of fact and degree whether the alleged iniquity amounts to an abuse of the ordinary professional engagement in the circumstances in question. In my view, the evidence of the alleged wrongdoing does not establish a prima facie case of a breach of a fiduciary duty or the broader misconduct alleged and the advice which Stewarts gave to the Orb Claimants did not involve the abuse of the ordinary professional engagement. In all the circumstances, I am not satisfied that the Court should disallow the privilege of the professional communications of the documents in question on the basis of the "iniquity" exception.

77. Accordingly, for these reasons, HPII's application is dismissed.