In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125 & 126

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

Before: **The Hon. Chief Justice Hargun**

Appearances: **Jonathan Adkin KC, Mark Chudleigh, Laura Williamson and David Thom of Kennedys Chudleigh Limited, Matthew Watson of Cox Hallett Wilkinson Limited, Delroy Duncan KC and Ryan Hawthorne of Trott and Duncan Limited for the Plaintiffs**

Martin Moore KC, John Wasty, Khiyara Krige and Jordan Knight of Appleby (Bermuda) Limited for Jardine Strategic Holdings Limited and Jardine Strategic Limited

Date of Hearing: **5 April 2023**

Date of Judgment: **21 April 2023**

JUDGMENT

Privilege over legal advice claimed on the ground that litigation was reasonably contemplated by the defendant; constituent elements of this ground of privilege; whether communication must have been made for the sole or dominant purpose of conducting the litigation

HARGUN CJ

Introduction

1. This Judgment deals with issues arising out of the earlier Judgment of this Court dated 14 February 2023. The issues are: (i) the scope of the privilege arising from the Court's finding that hostile litigation against Jardine Strategic Holdings Limited (the "**Company**') in the form of section 106 proceedings was indeed in contemplation by the time the Transaction Committee was established on 19 February 2021; (ii) a stay pending appeal; (iii) the Court's inspection of the redacted documents; (iv) the "essence" of the request issue; and (v) the costs of these applications.

(i) The privilege issue

2. At paragraph 169 of the earlier Judgment the Court held that litigation in the form of section 106 proceedings was indeed in contemplation by the time the Transaction Committee was established on 19 February 2021. As a result, in accordance with the decision of Nugee J in *Sharp v Blank* [2015] EWHC 2681 (Ch), any legal advice sought and received on or after 19 February 2021 by the Company and/or the Transaction Committee in defence of or *in connection with the contemplated section 106 proceedings* will fall within the exception to

the general rule and is privileged against the Plaintiffs. The Court is asked to clarify the meaning of the expression "*in connection with the contemplated section 106 proceedings.*"

3. Mr Adkin KC submits that the appropriate wording which encapsulates this point is to provide that the privilege can be claimed for documents which are created from 19 February 2021 for the *dominant purpose* of being in defence of or in connection with the contemplated section 106 proceedings.

4. In response, Mr Moore KC submits that the Judgment is not dealing with litigation privilege but with legal advice privilege. He says that it is clear that the joint interest privilege can be sundered by matters where litigation is not contemplated. He further says that the joint privilege can be lost where the "*interests have diverged*". In any event, he says that the authorities relied upon by Mr Adkin KC do not support the proposition that privilege can only be claimed if the documents were created for the dominant purpose of being in defence of or in connection with the contemplated proceedings.

5. At the hearing in December 2022, in relation to the issue of joint interest privilege, the Company submitted first, the Court should hold that the English rule relating to joint interest privilege does not apply in Bermuda. Second, even if the English rule does apply in Bermuda that the rule has no application in relation to shareholders who are no longer shareholders of the company. Thirdly, the Company submitted, in its written submissions dated 8 December 2022, that: "*in any event, the legal advice obtained by Jardine Strategic in connection with the Amalgamation falls within the* ***established exception to the general English rule*** *as it was obtained in circumstances where Jardine Strategic board (and Independent Transaction Committee)* ***reasonably contemplated hostile litigation against the Defendants****... It follows that Jardine Strategic (and now the Company) can assert privilege vis-à-vis its former shareholders* ***in relation to advice received in connection with or relevant to, such litigation***" (paragraphs 174(b) and 206). This submission is recorded at paragraph 155 of the Judgment and it appeared to the Court that the Company was relying upon litigation privilege. Paragraphs 155 to 169 of the Judgment deal with the issue of privilege in circumstances where hostile litigation is reasonably contemplated.

6. Mr Adkin KC correctly points out that the submission that joint interest privilege ceases to apply when the parties' interests are adverse was in fact made by counsel in *Sharp v Blank*

[2015] EWHC 2681 (Ch) at [7]. That submission, as recorded in the earlier Judgment at paragraph 164, was rejected by Nugee J at [10]:

> *"**The decision in Woodhouse does not, I think, give any support to the notion that the determining question of whether the general rule or the exception applies is whether the interests of the company and the interests of its shareholders are wholly aligned or not.** Like all other judgments, statements of principle must be read on the basis of the facts in each case and on the facts of that case there had been actual litigation, and it is quite clear from the way in which Phillimore L.J. approached the judgment that the opinions were written in connection with the actual litigation either after it had been brought or in preparation for it. It is not surprising that in those circumstances he referred to the parties having been sundered by litigation, or that Lush J. referred to the parties' interests as adverse. **The foundation of the exception is still, it seems to me, the existence of actual or threatened litigation, and the taking of advice in connection with the actual or threatened litigation**."*

7. Looking at the authorities relied upon by Counsel, it seems clear that the necessary "*connection*" between the advice sought/received and the contemplated litigation has to be a firm one. Thus, in *Woodhouse v Woodhouse* [1914] TLR 559, Lush J held that the legal opinions obtained by the company would be privileged if they were obtained "*to enable it to carry on the litigation.*"

8. In *W Dennis & Sons Ltd v West Norfolk Farmers Manure and Chemical Co-Op Ltd* [1943] Ch 220, Simonds J held at 222:

> "*The general rule, which applies equally as between a company and shareholders and as between a trustee and his beneficiaries is the stated at pp. 518 and 519 of the Annual Practice, 1943: "a cestui que trust... is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; **but where stated and taken by the trustee not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected**...*"

9. In *Arrow Trading v Edwardian Group (No.2)* [2004] BCC 955, Blackburne J, in considering the issue of the appropriate "*connection*", held at [24]:

"The company, through Mr Collings, opposes the application and does so on two grounds: first relevance and second privilege. I can dispose immediately of the privilege point. It is well established by authority that a shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders: see Re Hydrosan Ltd [1991] BCLC 418 and CAS (Nominees) Ltd & others v. Nottingham Forest Plc & others [2001] 1 All ER 954. ***The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company.*** *"*

10. The authorities cited above were reviewed by Nugee J in *Sharp v Blank* and he defined the expression "*in connection with*" in narrow terms:

"13. It is worth going back to the various phrases which run through the authorities that I have referred to which all consistently refer to the advice which is subject not to the general rule, but to the exception, as being advice in relation to the particular litigation in question. So starting with the earliest case, Woodhouse, Lush J. said that the effect of the contention would be to make it absolutely impossible "for a company in litigation for shareholders to obtain confidential advice" and referred later to "if the opinions were obtained by the company to enable it to carry on the litigation". In Dennis Simonds J. referred to a shareholder not being entitled to seek counsel's opinion taken by the company "in respect of the matter in dispute between them" and, later, on the fact of that case said that the directors "did not seek the report because some action was threatened against them" and, later still, says the report "was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation". Then Blackburne J. in Arrow Trading, referred to "where the advice relates to hostile proceedings between the company and shareholders", and then to advice to the company "in defence of an action actual, threatened or in contemplation". ***Those citations are all, it seems to me, consistent statements to the effect that the foundation of the exception is the fact that not only the interests of the parties have diverged, but***

that litigation, actual, threatened or in contemplation, has caused the company to take advice in defence of, in connection with, or relevant to, that actual, threatened or contemplated litigation.

...

20. Even if it were shown that there were circumstances which made it appropriate to conclude that litigation was in reasonable contemplation on 18th September or 8th October (or any other date in 2008), it does not follow that all legal advice taken from that date by the board was advice in defence of or in connection with that contemplated litigation.

21. In my judgment, for the reasons I have sought to express it is only advice of the latter type, advice which was obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation, which falls within the exception to the general rule, and that is privileged against the shareholders."

11. Mr Adkin KC referred the Court to *In the matter of 58.com, Inc*, Grand Court of the Cayman Islands, FSD 275/2020, where Kawaley J considered that cases such as *Sharp v Blank* merely exemplified the application of the ordinary principles relating to litigation privilege (see paragraphs 16, 80, 81). Applying those principles, Kawaley J ordered at [91] that:

> "*The Company is liable to disclose and produce for inspection (and may not claim privilege against the Dissenters in respect of) documents within its possession custody or power which are relevant to the question of fair value,* ***without prejudice to the Company's right to assert litigation privilege in relation to advice received for the purposes of the present proceedings.***"

12. At [81], Kawaley J held that deciding the earliest point when litigation privilege might be claimed does not mean that litigation privilege will automatically cover all advice the company receives; the relevant advice must actually have been given in connection with the dispute. However, Kawaley J records the submission of counsel for the company that in evaluating the evidence "*the court must take a realistic, indeed commercial, view of the facts*" referring to the judgment of Sir Geoffrey Vos, C in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791. The words quoted from

the judgment of Sir Geoffrey Vos, C come from a section of the judgment dealing with "*Was the judge right to determine that none of the Documents was brought into existence for the dominant purpose of resisting contemplated criminal proceedings…*" The relevant context appears from [103]-[104] of the judgment of Sir Geoffrey Vos:

> "***103*** *It was common ground that the test to be adopted in relation to documents prepared for reasons which only included (but were not limited to) the conduct of litigation is that identified by the House of Lords in Waugh v British Railways Board [1980] AC 521...In a judgment with which the other members of the House agreed in terms or in substance, he [Lord Wilberforce] identified the test to be adopted, (at p 533), in these terms:*
>
> > ***"It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply."***
>
> ***104*** *That test has been applied in the subsequent decisions in this area of the law. Thus in In re Highgrade Traders Ltd [1984] BCLC 151, it was made clear* ***that the exercise of determining dominant purpose*** *in each case is a determination of fact, and that* ***the court must take a realistic, indeed commercial, view of the facts.***"

13. In an earlier passage at [64], Sir Geoffrey Vos referred to the requirements for litigation privilege:

> "***64*** *The requirements for litigation privilege were as stated by Lord Carswell in Three Rivers (No 6) at paragraph 102 as follows:*
>
> > *"communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b)* ***the communications must have been made for the sole or dominant purpose of***

***conducting that litigation**; (c) the litigation must be adversarial, not investigative or inquisitorial."*

14. In light of the above review of the authorities, the Court is satisfied that the line of cases culminating in *Sharp v Blank* merely exemplifies the application of the ordinary rule relating to litigation privilege. The Court is satisfied that the legal advice sought or received must be in connection with the contemplated proceedings and for the dominant purpose of conducting such proceedings. This accords with the requirements of litigation privilege as stated by Lord Carswell in *Three Rivers (No 6)*. Accordingly, paragraph 6 of the order proposed by the Plaintiffs reflects the Judgment of the Court.

The date by which litigation was reasonably contemplated

15. At [167] of the Judgment, the Court held that:

"The Court holds that, as at the time when the Company and Jardine Matheson decided to implement the necessary steps to accomplish the amalgamation, section 106 proceedings against the Company were in contemplation of the Company... ***The Court accepts Mr Moore KC's submission that the present litigation was in contemplation of the Company by the time the Transaction Committee was established on 19 February 2021.***"

16. At [200] of the Judgment, the Court again refers to the date when the hostile litigation was in contemplation of the Company and stated:

"(ii) hostile litigation against the Company in the form of section 106 proceedings was indeed in contemplation by the time the Transaction Committee was established on 19 February 2021 and, ***as a result, any legal advice sought and received, on or after 19 February 2021, by the Company and/or the Transaction Committee in defence of or in connection with the contemplated section 106 proceedings will fall within the exception to the general rule and that is privileged against the shareholders***".

17. Mr Moore KC contends that the Judgment does not identify a hard cut-off date, whether 19 February 2021 or otherwise, before which the company may not assert privilege against the Plaintiffs. The Court is unable to accept that submission. In the Court's view, the cut-

off date of 19 February 2021 has been determined such that the Company may not assert privilege against the Plaintiffs prior to that date.

Privilege log

18. Given that there is potential for disagreement over the issue of whether the legal advice sought and obtained was for the dominant purpose of conducting this litigation, it is desirable that the Company serves a privilege log or list identifying the documents for which privilege is claimed. Accordingly, the Court is prepared to make an order in terms of paragraph 7 and 8 of the draft order submitted by the Plaintiffs save that the time limit for compliance be 28 days from the date of the Order (as opposed to the 14 days provided for in the draft order). The Court also orders that the Plaintiffs provide to the Company a privilege log or list identifying the documents for which privilege is claimed by the Plaintiffs within 28 days of the date of the Order.

19. In the circumstances, the Court approves the terms of paragraphs 2 to 8 of the draft order proposed by the Plaintiffs.

(ii) Stay pending appeal

20. The Defendants have indicated that they will be seeking a stay of the Court's Order on the privilege issue pending the determination of any appeal which they may bring against it. The Plaintiffs do not object to such a stay being granted, however, they submit that any such stay should be subject to the conditions that: (i) the Defendants prosecute any appeal expeditiously; and (ii) whilst any stay should suspend the Defendants' obligation to produce documents over which they have maintained a claim for privilege but over which, in light of the Judgment, such a claim can no longer be maintained, the Defendants should nonetheless be required to produce a list of those documents. The Plaintiffs also say that the outcome of any appeal shall not delay the fixing of the Discovery Completion Date.

21. Having considered the respective submissions, the Court orders that, in the event of an appeal in relation to the privilege issue, there be a stay in terms of paragraph 9 of the draft

order submitted by the Plaintiffs and that the Defendants be required to comply with those sub-paragraphs: (a) the requirement that they prosecute any such appeal expeditiously; and (b) the outcome of any appeal shall not delay the fixing of the Discovery Completion Date. However, the Court does not order that, pending determination of the appeal, the Defendants (or the Plaintiffs) be required to prepare a privilege log and/or a further list of documents and that such privilege log and/or such further list be delivered to the Plaintiffs (or the Defendants).

(iii) Redactions

22. A large number of redacted documents have now been unredacted and have been provided to the Company. By letter dated 28 March 2023, Kennedys Chudleigh forwarded to the Court 14 documents for the Court to review to ensure that the redactions on the grounds of fee arrangements and privilege were appropriate. The Court confirms that it has reviewed the documents and the redactions are indeed appropriate. The only remaining issue in relation to redacted documents is the incidence of costs, which will be considered below.

(iv) Essence of the request

23. In the end, the only disagreement between the parties in relation to this issue is whether the directions given by the Court in paragraph 190 of the earlier Judgment should appear in the recital or in the main body of the order. The Court directs that the directions set out in paragraph 190 of the earlier Judgment should appear in the recital.

(v) The costs applications

24. The applications for costs principally relate to the applications considered by the Court on 9 November 2022 and 12-16 December 2023.

25. At the November 2022 hearing the Court principally considered the Plaintiffs' application under RSC Order 38, rule 2 for an order that Mr Parr attend the discovery application hearing in December 2022 for cross-examination on the matters arising out of his affidavit evidence relevant to the discovery application. The Court also considered the Company's application under RSC Order 24, requiring the Plaintiffs to produce for inspection the documents identified in Mr Chudleigh's third affidavit as being allegedly "*inconsistent and incompatible*" with Mr Parr's evidence. The latter application effectively became moot because Mr Chudleigh advised the Court that the documents on which the Plaintiffs intended to rely at the December discovery application would be fully identified in a further affidavit which Mr Chudleigh proposed he file prior to the December hearing.

26. The December 2022 hearing principally related to the Plaintiffs' application seeking an order that the Defendants give discovery on the footing that the documents over which they have possession, custody or power ("**PCP**") include the documents held by the 10 Principal Group Companies. The Court also heard: (i) the Plaintiffs' application for an order that the Defendants are not entitled to withhold certain relevant documents from the Plaintiffs on the grounds of privilege since a shareholder of the company is entitled to see privileged documents of the company obtained in the course of the company's administration of its affairs, including legal advice; (ii) the Plaintiffs' application seeking an order "*that the Defendant shall, in accordance with paragraph 7.1 of the Order herein dated 12 November 2021, upload to the Data Room all documents within their possession, custody or power which are requested by the Valuation Experts in these proceedings*" (the "*essence*" of the request issue); (iii) the Defendants' application contending that, pursuant to paragraph 1 of Appendix 2 of the Directions Order, the Plaintiffs were required to give discovery of documents existing and within the Plaintiffs' PCP between 12 April 2018 and 12 April 2021, which are relevant to the question of the fair value of the Plaintiffs' shares in the Company (**Appendix 2 Category 1 Application**); and (iv) the Defendants' application for an order that in relation to paragraphs 2 and 3 of Appendix 2 of the Directions Order, certain Plaintiffs give discovery of documents identified in unredacted form on the basis that there is doubt as to the appropriateness of the redactions (**Appendix 2 Category 2-3 Application**).

27. In considering the applications for costs, the starting point is RSC Order 62, rule 3(3):

"If the Court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, the Court shall order the cost to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

28. This Court's general approach in relation to the issue of costs is set out in the judgment of Chief Justice Kawaley in *Binns v Burrows* [2012] Bda LR 3 at [6]:

"6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:

i. determine which party has in common sense or "real life" terms succeeded;
ii. award the successful party its/his costs; and
iii. consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event."

29. Kawaley CJ cited the Privy Council decision in *Seepersad v Persad & Anor (Trinidad and Tobago)* [2004] UKPC 19 (per Lord Carswell) in support of the proposition that, in cases where a party has failed on some of the issues, it may be appropriate for the court to order a reduction in the award of costs:

"The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata (No 2) WLR [1992] 1 WLR 1207."

30. The above approach, as seen in the judgment of Lord Carswell in *Seepersad*, was also endorsed by the Court of Appeal in *Credit Suisse Life (Bermuda) Limited v Bidzina*

Ivanishvili and others [2021] CA (Bda) 10 Civ, Ruling dated 28 June 2021, where Clarke P held:

> "… *The clear winner on the appeal was the Respondents. In our view they are entitled to have their costs of both the appeal and the leave to appeal applications paid by the Appellant but reduced by 5% to reflect the Appellant's success in relation to the short and narrow point of law on waiver of privilege (Ground 5) upon which it succeeded.*"

31. The Court is entirely satisfied that the application for cross-examination in November 2022 and the discovery application in December 2022 are not the run-of-the-mill case management applications. In principle, the costs in relation to these two applications are to be awarded in accordance with the general principle that costs should follow the event as reflected in RSC 62, rule 3(3).

32. In relation to the cross-examination application made by the Plaintiffs at the November 2022 hearing, there can be no serious argument contrary to the clear position that the Company was the successful party. The Plaintiffs failed in their application for an order that Mr Parr attend the December 2022 discovery application for cross-examination. Accordingly, the Court orders that the Plaintiffs shall pay the Defendants' costs in relation to the cross-examination application and the cross-examination hearing in November 2022. The Court does not order that this award of costs should be reduced by the fact that the Defendants were unsuccessful in relation to their application under order RSC Order 24, rule 10. That application effectively became moot as a result of Mr Chudleigh's proposal that the documents would be identified in a further affidavit to be filed. Further and in any event this application occupied relatively insignificant time at the hearing.

33. In relation to the discovery application in December 2022, the main issue was PCP. As Mr Moore KC points out, PCP was by far the most substantial matter at the hearing. It was also by far the most substantial matter in preparation terms. Most of the evidence filed related to the PCP issue. Most of the hearing bundle (running to 22,262 pages), again, related to the PCP issue.

34. Again, there can be no doubt that the Company was the successful party in relation to this application and that the Plaintiffs were the unsuccessful party. Accordingly, the Plaintiffs should pay the Defendants' costs of the Plaintiffs' discovery application in any event. However, the award of costs should be reduced by the fact that: (i) the Defendants were unsuccessful in their contention that the English rule in relation to joint interest privilege as it applies between shareholders and the company should not be imported into Bermuda law; (ii) the Defendants were unsuccessful in their contention that the English rule in relation to joint interest privilege has no application to past shareholders; (iii) the Plaintiffs obtained a measure of success in relation to the "essence" of request issue; and (iv) the Plaintiffs were successful in relation to the Appendix 2 Category 1 Application. The Court has taken into account the further issues raised in the Plaintiffs' Skeleton Argument (for the hearing on 5 April 2023) (paragraphs 29 to 39) and the Defendants' Skeleton Argument dated 31 March 2023 (paragraph 39 to 66). In all the circumstances, the Court orders that the Plaintiffs should pay the Defendants' costs of the Plaintiffs' discovery application and of the hearing in December 2022, but that the award of costs be reduced by 20% to reflect the factors and circumstances outlined above.

35. The Court makes no further orders in relation to the issue of costs arising out of or related to the applications dealt with by the Court in its Judgments dated 24 November 2022 and 14 February 2023. The Court also orders that the costs in relation to the Defendants' time summons be costs in the cause for the reasons advanced by Mr Adkin KC at the hearing (transcript page 195).

36. The Court certifies, for the purposes of taxation, that the attendance at the hearing of the applications for the Defendants in November and December 2022 by Mr Martin Moore KC and Mr John Wasty of Appleby (Bermuda) Limited was proper in the circumstances of the case.

37. The Court also orders that any application for leave to appeal the Judgment dated 14 February 2023 be made no later than 14 days from the date of the Order signed by the Court. Counsel are invited to submit an agreed order which reflects the terms of this Judgment.

38. The Court will hear the parties in relation to the issue of costs, if required.

DATED this 21st day of April 2023

NARINDER K HARGUN
CHIEF JUSTICE