Neutral Citation Number: [2022] EWHC 381 (Comm)

Case No: CL-2018-000716

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: 02/03/2022

BEFORE:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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BETWEEN:

(1) MR NOPPORN SUPPIPAT **(2) SYMPHONY PARTNERS LIMITED** **(3) NEXT GLOBAL INVESTMENTS LIMITED** **(4) DYNAMIC LINK VENTURES LIMITED**	**Claimants/ Respondents**
- and –	
(10) SIAM COMMERCIAL BANK PUBLIC COMPANY LIMITED	**Defendant/ Applicant**
- and –	
WILLKIE FARR & GALLAGHER (UK) LLP	**Respondent**

- -

Jonathan Davies-Jones QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Applicant**
Robert Howe QC and Victoria Windle (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Respondents**

Hearing dates: 17, 18 and 19 January 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

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HH Judge Pelling QC:

Introduction

1. This was to have been the hearing of applications by the 10th Defendant ("SCB") for:

   i) An order prohibiting the respondents from using or deploying in these proceedings certain documents covered by SCB's legal professional privilege and/or containing SCB's confidential information, copies of which the respondents obtained from Wind Energy Holding Company Limited ("WEH") pursuant to subpoenas in Thailand (the "Restraint of Use Application"), together with an order requiring the claimants' legal team in these proceedings to return their copies of the documents.

   ii) An order prohibiting certain members of the claimants' solicitors and counsel team from continuing to act (the "Restraint to Act Application"); and

   iii) An order under CPR PD51U para 21.1(2) requiring the respondents to provide a copy of the legal opinion prepared for them by Mr Lissack QC (the "Lissack Opinion") and related instructions (the "Lissack Instructions"), whose contents the respondents refer to and rely upon in Mr Burrell's fourth witness statement (the "Waiver of Privilege Application")

   Although various permutations had been canvassed in the skeleton arguments as to the order in which these applications would be heard, at the start of the hearing it was agreed that the application referred to in (i) above would be heard first and those referred to in (ii) and (iii) would be considered only following judgment on the first application. However, at the start of Day 2 of the hearing, Mr Davies-Jones QC indicated that his client had decided not to proceed with the applications referred to in (ii) and (iii) – see T2/2/21 to 3/3. It follows that the only application that requires resolving is that referred to in (i) above.

2. The documents referred to in (i) above are in three categories being:

   i) a legal opinion prepared by the Bangkok office of XYZ ("XYZ") for SCB dated 17 July 2017 (Document 1);

   ii) XYZ's invoice (Document 2); and

   iii) a 90-page document containing the text of over 50 emails relating to that opinion (Document 3).

   (Collectively "Documents").

3. Each of the Documents is in evidence and both parties referred at length to the contents of Document 1 and Document 3 in the course of the hearing. It will be necessary to consider at hand down whether this judgment should be published notwithstanding that the hearing has taken place in private as required by the order of Jacobs J dated 3 August

2021. That being so, I have attempted to limit any references to contents of the Documents. It may be that even those references will have to be removed to a confidential schedule if the judgment is to be published. I will hear submissions on that issue at the hand down of this judgment.

Background and Material Facts

4. The first claimant ("NS") controls the other claimants. In 2006, NS founded Renewable Energy Corporation Company Limited ("REC") and in 2009, he founded WEH. Both companies operate exclusively in Thailand. Prior to the events which led to this claim, NS beneficially owned 97.94% of the shares in REC, which were held on his behalf by the second to fourth claimants, and REC held 59.46% of the shares in WEH. The business of each of those companies was the development and construction of large scale wind energy projects.

5. SCB is the third largest commercial bank in Thailand. The King of Thailand personally is one of SCB's shareholders. His holding is said to be about 22% of SCB's issued shares. At certain times, SCB financed certain of WEH's windfarm projects.

6. On 1 December 2014, criminal charges were brought against NS for various alleged offenses including *lèse-majesté* – that is insulting the King, Queen and Heir to the Throne. NS fled from Thailand, obtained political asylum in France and, on 15 December 2014, resigned his positions as co-chief executive officer and a director of WEH. He remained interested however in WEH via his shareholding in REC.

7. At the time of these events, SCB was in the process of negotiating further project finance facilities for WEH and its subsidiaries. Following NS's flight from Thailand, SCB informed WEH that it was unable to fund further projects whilst NS remained a fugitive. In particular negotiations between SCB and WEH (or one of its subsidiaries) concerning what is known in these proceedings as the "Watabak Facility" were suspended.

8. Thereafter NS entered into negotiations for the sale of his shares in REC to companies controlled by the first defendant ("NN"). On or about 19 June 2015, the claimants entered into various share purchase agreements referred to in these proceedings as the "REC SPAs", which the claimants allege they were induced to enter into by false representations by NN, the second and the seventeenth defendants. Under the REC SPAs, the claimants agreed to transfer their shares in REC to companies controlled by NN and not thereafter to seek to rescind the REC SPAs, in return for initial payments totalling US$175m with further sums totalling US$525m becoming payable if a windfarm project known as the Watabak Project (and various other projects) were completed within the times set out in the REC SPAs. The REC shares were transferred by the second to fourth claimants to NN's Companies under the REC SPAs by instruments dated 27 July 2015, and 24 August 2015 respectively. In August 2015, SCB was informed of these disposals.

9. SCB was content to continue its dealings with WEH following these transfers of the REC shares because NS had ceased to have either indirect control of or interest in WEH and its subsidiaries. The suspended negotiations resumed, leading to the grant of the Watabak Facility by SCB to a WEH subsidiary.

10. The acquiring companies under the REC SPAs allegedly defaulted in their payment obligations and the claimants commenced two arbitrations on 26 January and 25 March 2016 under the REC SPAs. In the first of the references, rescission and payment of the sums due was sought. In the other reference only payment of the sums due was sought.

11. On learning of the rescission claim, in March 2016, SCB refused to sign or allow WEH to draw down against the Watabak Facility and refused to discuss financing for future products until this issue had been resolved. The reasoning behind this decision is said to have been that if rescission was granted then NS would regain indirect control and ownership of WEH at a time when the criminal charges against him had not been resolved.

12. This led to further negotiations between SCB and WEH in which it is alleged by SCB that it was informed of the possibility of a sale to a third party of REC's shares in WEH. Such a disposal (assuming that it occurred in circumstances that meant, as a matter of Thai law, it could not be unwound) would remove the risk that NS would regain indirect control and ownership of WEH, even if ultimately the rescission claim succeeded. Given this reasoning, SCB unsurprisingly required sight of an opinion from WEH's Thai lawyers Weerawong Chinnavat & Peangpanor Ltd ("WCP") confirming that the proposed sale (to NN's father, the fourteenth defendant) was irrevocable, in good faith and at a fair price, and that in no event would NS have legal grounds to return as a direct or indirect shareholder of WEH. Each of these points were critical to the elimination of the risk that concerned SCB. Following sight of the opinion and confirmation that the sale had taken place SCB permitted drawdown against the Watabak Facility. SCB did not seek independent advice at this stage.

13. The claimants allege in these proceedings that the purpose or effect of the transfer to NN's father was to deprive REC of its interest in the WEH Shares without adequate or any consideration, for the purpose of ensuring that the claimants could not obtain and/or enforce any right to payment or compensation under the REC SPAs. They allege against SCB that it knowingly acted with NN and NN's companies in furtherance of this conspiracy by "*… causing or facilitating or procuring the transfer of the Relevant WEH Shares to ...*" the fourteenth defendant. Other claims are advanced against the various defendants but what I have summarised is the basis of the claim against SCB. The events alleged against SCB took place in the first six months of 2016.

The Documents

14. In July 2017, negotiations commenced between the Capital Markets Division of SCB and WEH for a new banking facility for the purpose of enabling WEH and its subsidiaries to commence and complete a series of wind farm projects. The cumulative value of this facility is said to have exceeded the local currency equivalent of about US$1 billion and required approval by the Credit Committee of SCB. At the time of these negotiations, an award in the arbitrations was awaited but had not been received. Currently no allegations are pleaded against SCB concerning this transaction or the events that are said to have surrounded it. [**SENTENCE REDACTED**].

15. As might be imagined the commercial and structural issues surrounding these negotiations and the conditions that SCB wished to impose are complex. However most of that detail is irrelevant to the issues that arise on this application and I do not propose

to take up time describing it other than to the extent necessary to understand the context in which the Documents came into existence.

16. Much of what was being discussed is set out in a memorandum by SCB's Credit Committee dated 13 July 2017. The short point however is that the memorandum recorded that an award in the REC SPAs arbitrations was expected in August 2017, which caused the Credit Committee to ask about the impact of an award requiring the shares in REC to be returned to the claimants and to express concern that the bank had not received its own advice on this issue. It will be recalled that at the time when the Watabak Facility was being negotiated SCB had sought and obtained only the opinion of WEH's own lawyers. [**SENTENCE REDACTED**].

17. **[PARAGRAPH REDACTED]**

The Thai Subpoenas

18. I now turn to the circumstances in which the claimants gained access to the Documents. It should be borne in mind at this stage that SCB maintains that the circumstances in which the Documents came to be obtained "*... remains to be properly explained…*" in the sense that although it is common ground that these documents were obtained following the issue of the equivalent of two subpoenas addressed to WEH by the Thai courts in aid of some proceedings taking place in Thailand, what it is submitted has not been adequately explained is how the claimants came to know of the existence of Document 1 and Document 3 prior to applying for the Subpoenas or knew to request specifically Document 1 and Document 3 when making that application. The explanation offered is that contained in the fourth and fifth statements of Mr Burrell, a partner at Willkie Farr & Gallagher (UK) LLP, the claimants' solicitors.

19. The context for what follows is that the second to fourth claimants have commenced proceedings in Thailand against some of the defendants in these proceedings. One of these is a criminal claim commenced on 23 January 2018 against 13 defendants. SCB is not a defendant in those proceedings. These proceedings are known in this litigation as the "*Cheating Against Creditors Case*" ("CACC"). In the CACC, the second to fourth defendants allege that the defendants committed the offence of "*cheating against creditors*" contrary to section 350 of the Thai Criminal Code by conspiring to transfer the WEH shares from REC, thereby depriving REC of its only asset whilst significant sums were outstanding under the REC SPAs.

20. **[PARAGRAPH REDACTED]**

21. None of this answers SCB's point, which is that it has not been explained how the claimants knew to ask WEH specifically for Document 1. SCB suggest that the claimants' Thai counsel had access to at least Document 1 prior to the First Subpoena application and used knowledge of its existence and contents in order to formulate the request for disclosure of Document 1 so precisely. SCB submit that I should infer that such was the case to the extent that issue is relevant to any question I have to resolve. I return to that issue later to the extent that it is necessary to do so.

The Parties' Respective Cases and the Issues on the Restraint of Use Application

22. In summary, SCB submits that whether a document is privileged or not is to be answered by applying the *lex fori* which in this case is English law and applying English law it is clear that the Documents are and always have been the subject of Legal Advice Privilege ("LAP"), applying Rochester Resources Limited and others v. Lebedev and another [2014] EWHC 2185 (Comm) *per* Blair J at paragraph 23. It further submits that the Documents remain privileged notwithstanding the dissemination of the Documents by SCB to WEH and others or by production of copies by WEH to the claimants in Thailand pursuant to the Thai Subpoenas because to conclude otherwise would circumvent and thereby defeat the public policy on which LAP depends.

23. The respondents submit that the Documents are not now privileged or confidential as between the respondents and SCB because (i) the respondents hold copies of the Documents lawfully pursuant to the Thai Subpoenas; (ii) they or at least Document 1 and Document 3 have been circulated by or on behalf of SCB to other parties including the second, third and thirteenth defendants, WEH and WEH's legal advisors in Thailand and thus have lost their confidentiality; but in any event (iii) because the Documents fall within the iniquity exception and thus were never privileged at all.

24. In those circumstances the issues that arise are those summarised by Mr Howe QC in paragraph 30 of his skeleton argument namely:

    i) Are any of the Documents confidential or privileged as between SCB and respondents, given that the respondents hold the Documents lawfully pursuant to the subpoenas, and (it is common ground) are free under Thai law to deploy them in the Thai proceedings and any other proceedings including these proceedings ("the Subpoena Issue");

    ii) Did Document 1 cease to be confidential or privileged because it has been circulated to third parties including the second, third and thirteenth defendants, WEH and WEH's legal advisors in Thailand ("the Dissemination Issue");

    iii) In any event, do the Documents fall within the Iniquity Exception ("the Iniquity Issue"); and

    iv) Depending on the answers to (i) to (iii), what relief should be granted to SCB ("The Remedies Issue")

    If the answer to the Subpoena Issue is no, then that is the end of the enquiry. If the answer is affirmative then it will be necessary to determine the Dissemination Issue. If the answer on that is affirmative then that is the end of the enquiry. If the answer is negative then it becomes necessary to determine the Iniquity Issue. The Remedies Issue becomes relevant only if the answer to (i) is affirmative and the answers to both (ii) and (iii) are negative. I am bound to say that logically the Iniquity Issue would appear to come first since if it is right it means that the Documents were never privileged, that the Dissemination Issue logically comes next since it precedes the Subpoena Issue chronologically and the Subpoena Issue would not require determination if the respondents are correct in respect of the Dissemination Issue. However, both parties adopted the order referred to above and it is convenient that I follow that order in this judgment.

Discussion

Are the Documents Capable of Being Privileged?

25. There is no real dispute as to whether the Documents were capable of being privileged aside from an argument as to whether some of the emails may not be because they do not contain material capable of being subject to LAP.

26. It is not in dispute and in any event I conclude that whether a document is capable of being privileged is a question to be determined as a matter of English conflicts law by the *lex fori*, which in this case is English law – see Lawrence v. Campbell (1859) 28 L. J. Ch. 780 *per* Sir Richard Kindersley V-C, where he said:

> "A question has been raised as to whether the privilege in the present case is an English or a Scotch privilege; but sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and therefore the letters in question are privileged from production."

This approach has been consistently followed since then – see Re Duncan [1968] P 306 *per* Ormerod J at page 310A-C; Bourns Inc. v Raychem Corp. [1999] 3 All ER 154 *per* Aldous LJ at pages 167G-168B; Rochester Resources Limited v Lebedev (*ibid.*) *per* Blair J at paragraphs 23 and 27 and Re RBS Rights Issue Litigation [2017] 1 WLR 1991 *per* Hildyard J, at paragraph 169, where having reviewed the authorities including those I have referred to, Hildyard J held that:

> "… whether described as a rule, a convention or practice, it is the approach of the English court to apply the lex fori to issues of privilege, and has been so since the mid-19th century."

In reaching the conclusion that the established practice should not be departed from, Hildyard J was influenced by public policy (the ultimate basis for a privilege rule) being "*a paradigm*" matter for resolution applying the *lex fori* and by the practical difficulties of applying some other law, which he described graphically at paragraph 174(6) as being:

> "… that any solution but the application of the lex fori requires determination of the application and content of foreign law, and even the identification of the relevant foreign law may be difficult according to the stage and context in which the issue arises. Those difficulties are compounded where, in multi-jurisdictional cases involving several parties, there is the potential for a variety of different putatively applicable laws, and the prospect of having to determine them at an interlocutory stage, with cross-examination of experts if there is a disagreement."

27. Applying this principle leads to the obvious conclusion that the Documents are privileged subject to the effect of the release of the Documents to the claimants as a result of the Subpoenas and/or as a result of the dissemination of Document 1 and

Document 3 and/or the impact of the iniquity exception save and except for any of the emails whose content would not attract LAP. I do not mention this last point again – it was not the subject of argument at the hearing and will have to be resolved if and to the extent necessary after hand down of this judgment.

The Subpoena issue

28. The next question that arises is whether the Documents should be treated as privileged in this litigation notwithstanding that they have been obtained by the respondents lawfully by operation of an order of a court of competent jurisdiction in Thailand. SCB argues that this should be the proper outcome following Rochester Resources Limited v Lebedev (*ibid.*) *per* Blair J at paragraph 23. The respondents maintain that should not be the outcome relying on paragraph 27.

29. The respondents argue that the Documents are not or have ceased to be privileged because firstly Thai law applies to this question and it is common ground that as a matter of Thai law the recipient of the documents obtained as a result of the Thai Subpoenas can use them for any purpose they choose; but secondly, even if English law applies then the Documents lost any relevant confidentiality they had once they were released pursuant to the Subpoenas and therefore ceased to be privileged as a matter of English law at that point.

30. I turn first to the proper law issue. In my judgment Rochester Resources Limited v Lebedev (*ibid.*) does not support the conclusion for which the respondents contend.

31. Rochester Resources Limited v Lebedev (*ibid.*) was concerned with "*without prejudice*" privilege and with an argument as to whether a draft pleading sent by one party to the other in the course of negotiations was admissible or not. The claimants maintained that it was not privileged, applying New York law and the defendant maintained that it was privileged, applying English law, which was the *lex fori*. In paragraph 23 of his judgment Blair J held that:

> "However, when the question arises in English proceedings, the rule is that the question whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. This is how the principle is stated in Dicey, Morris & Collins, The Conflict of Laws, 15th ed., para 7-022. The proposition is based on the decision of the Court of Appeal in Bourns Inc v Raychem Corp [1999] 3 All ER 154 at 167h-168b, Aldous LJ." [Emphasis supplied]

The words I have emphasised are those relied on by SCB. Given that the issues in that case were as I have summarised them, it was not necessary for Blair J to go any further than that. It was not suggested the New York courts had declared that the documents were not privileged or even treated them as not privileged in proceedings before it. However, Blair J added at paragraph 27:

> "I do not think that if the draft Complaint is privileged under English law it ceases to be privileged on the ground that it would

> not be privileged from production in the New York proceedings. This is because, as stated above, the question whether or not a document is privileged is to be determined by English law, for reasons which are partly practical (see Bourns Inc v Raychem Corp, ibid). The position might be different if the New York courts had themselves decided that the draft Complaint was not privileged from production, and it had entered into the public domain, because in those circumstances confidentiality would have been lost. However, that is not the case here." [Emphasis supplied]

The respondents rely on the part of the paragraph that I have underlined. In my view this part of the judgment does not assist because Blair J did not purport to decide whether the position was different but merely expressed the view (obiter) that it might be.

32. Given that Blair J identified Bourns Inc v Raychem Corp (ibid.) in paragraph 23 of his judgment as authority for the conclusions that he reached, it is necessary to refer to that authority. The part of Aldous LJ's judgment to which Blair J referred is to the following effect:

> "Privilege is … justified on the ground of public interest. It involves a right to keep confidential the document and the information in it. The fact that under foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant. The crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use. If it is, then privilege in this country can be claimed and that claim, if properly made, will be enforced.
>
> In the present case the documents and the information in them remain confidential in the sense that I have used that word. It follows that the documents remain privileged under English law, whether or not the right to privilege from production in a foreign country is deemed not to exist or to have been waived." [Emphasis supplied]

I am satisfied that the part of paragraph 23 of Blair J's judgment on which SCB relies is supported by the formulation of the principle as set out by Aldous LJ and should be followed. Thus both cases are authority for the proposition that the effect of a loss of privilege in a foreign jurisdiction on the admissibility or disclosability of documents in litigation in this jurisdiction is a question to be resolved applying English law. Further, Bourns Inc v Raychem Corp (ibid.) is authority for the proposition that as a matter of English law whether privilege has been lost is to be tested by asking whether the document and its information remain confidential in the sense that it is not properly available for use-meaning in context use in English proceedings.

33. In my judgment there is no material distinction to be drawn for present purposes between an assertion that the effect of foreign law is that no privilege attached or has

been lost and that being the effect of an order of a court applying that law as its *lex fori* – see British American Tobacco (Investments) Ltd v United States [2004] EWCA Civ 1064 *per* Mummery LJ at paragraph 38. For that reason I do not accept that the position is different simply because (in this case) the Thai Courts have apparently decided the Documents are not privileged. It is true to say that Blair J's formulation suggests that entry of the material into the public domain is required before the necessary confidence can be lost. If that is so then whether that is the result of a document not being privileged as a matter of foreign law or as a result of an order of a court applying that law is beside the point. It is common ground that the Documents have not entered the public domain. If that was the true test then the outcome would be obvious. However, in my judgment the issue is not (or not limited to) whether the document has entered the public domain, because as Aldous LJ said in Bourns Inc v Raychem Corp (ibid.), the "… *crucial consideration is whether the document and its information remain confidential in the sense that it is not properly available for use*." If Blair J's use of the phrase "*public domain"* is understood as short hand for Aldous LJ's formulation, as it should be given his citation of Bourns Inc v Raychem Corp (ibid.), then no difficulty arises. On any view however Blair J was not suggesting that privilege would be lost in respect of a document which is subject to LAP applying English law simply because a foreign court applying its own law had decided otherwise. In my judgment the key issue as a matter of English law is simply whether the Documents "… *remain confidential in the sense that [they are] not properly available for use …*". This is a question of mixed law and fact.

34. This leads the respondents to submit that if the continued existence of confidence is the question that has to be decided then that issue is one that must be decided applying (in this case) Thai law. SCB maintains that the issue is to be resolved applying English law for essentially all the reasons set out in the authorities referred to earlier deciding that English law applies to the question whether a particular document is privileged or not.

35. The respondents contend that it does not make much difference whether English law or Thai law is applied to this issue because as Mr Howe put it in the course of his oral submissions " … *the position as regards these documents is clear as a matter of fact, that they have been provided lawfully in Thailand to the claimants, and therefore confidentiality in them has ceased to exist. And that is so because, it is common ground, there is no restriction under the Thai law on them using them*". In my judgment this is largely circular since the argument assumes Thai law provides the answer but in any event Mr Howe maintained as his primary submission that:

> "…the applicable law to determine whether there is an obligation of confidence is the law most closely related to the facts in question, which is to say, in this case, unquestionably Thai law."

Accordingly it is necessary that I resolve that issue.

36. Mr Howe starts by submitting that but for, the impact of LAP, it is plain that the issue concerning whether a document that had been obtained in a foreign country was confidential would be decided by reference to the law of the country with which the document had its closest connection. He submits that since privilege depends on confidence, it follows that where a confidence issue arises in the context of a claim for LAP it should be resolved applying the same conflict principles as would apply to a

breach of confidence claim. In my judgment this approach is unhelpful and likely to result in error because it is the assertion of LAP that is all important to the resolution of the issue. The question is not whether the document is confidential in some general sense but whether it is confidential in the sense that it is not properly available for use in litigation in England – see Aldous LJ's formulation in Bourns Inc v Raychem Corp (ibid.) cited earlier. I return to that point below.

37. Mr Howe submits that a confidence claim is characterised as a matter of English conflicts law as restitutionary in nature, following the decision of the Court of Appeal in Douglas v. Hello! Limited [2006] QB 125 and thus the proper law for determining issues concerning confidence is ascertained by applying the principles relating to such claims to be found in Regulation (EC) No 864/2007 Of The European Parliament And Of The Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"). I do not accept the premise of this submission – namely that a confidence claim should be characterised in this manner. It is controversial whether a confidence claim should be characterised in this way applying Rome II. Douglas v. Hello! Limited (ibid.) was not decided by reference to Rome II. However for reasons that I explain below it is not necessary that I come to a final conclusion on that issue and I express no conclusions about it.

38. Mr Howe maintains that because as a matter of English law a confidence claim is regarded as restitutionary in nature it is not necessary to look further than Article 10(1) in order to resolve the question of what law should be applied to the issue. Article 10(1) provides:

> "If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

Mr Howe maintains that this leads to the conclusion that the applicable law is Thai law because that is where it is said that the confidential nature of the communications arose and because the relationship between SCB and the claimants is one arising from a tort committed in Thailand to which the law of Thailand applies. He adds that if that is not right then Article 10(3) applies and that leads to the conclusion that Thai law applies because that is the law of the place where what is to be characterised as the unjust enrichment took place. Finally he submits that if all that is wrong, then Article 10(4) applies and it is clear from all the circumstances that the obligation is more closely connected with Thailand than anywhere else. In support of that contention, Mr Howe relies on all the relevant documents having been created in Thailand, all the relevant communications being in Thailand, that the advice and communications concerned issues of Thai law relating to actions taken or to be taken in Thailand concerning the transfer of shares in a Thai company and on the documents having been obtained as a result of the issue by a Thai court of a Subpoena executed in Thailand.

39. Alternatively Mr Howe submits that if the restitutionary analysis is to be rejected then the obligation is one arising out of a tort or delict and thus the issue is to be decided by reference to Article 4 of Rome II, and requires the issue to be resolved by reference to

the law of the country in which the damage occurred. Mr Howe submitted that damage occurred when the Documents were disclosed to the claimants and that occurred in Thailand. He submits that because the Documents were disclosed by operation of a subpoena issued by the Thai courts, no question of confidence could arise and "*... that's the end of the matter ...*".

40. I accept that it is arguably now more appropriate to decide the proper law of a breach of confidence claim by applying Article 4 rather than Article 10 of Rome II. However in my judgment in all other respects these submissions are to be rejected for the following reasons.

41. First, they were premised on the basis that the issue is to be determined without regard to the context in which the issue arises namely, a claim of LAP. That is the critical artificiality about this argument. The law is replete with statements to the effect that LAP in England is founded on public policy. Many of the relevant authorities were cited in the course of the argument and a number have been cited above. It is not necessary that I cite them all. It is necessary only to note the statement of Aldous LJ in Bourns Inc v Raychem Corp (ibid.) at 167 that " … *Privilege is ... justified on the ground of public interest* …", that of Hildyard J in Re RBS Rights Issue Litigation (ibid.) at paragraph 160 that " … *the English law of privilege ultimately reflects a public policy decision as to how justice is best served between the parties and a balance between the conflict between a private right and the public interest in the determination of factual matters on the basis of full disclosure is best struck*" and that of Mummery LJ at paragraph 38 of his judgment in British American Tobacco (Investments) Ltd v United States [2004] EWCA Civ 1064 noted by Hildyard J in Re RBS Rights Issue Litigation (ibid.) at paragraph 162 that " … *as for the ruling in the US courts and the Australian courts that privilege has been waived, that depends on the domestic law of those countries as interpreted and applied by their courts*." In summarising his conclusions in Re RBS Rights Issue Litigation (ibid.) at paragraph 160, Hildyard J summarised the effect of these various authorities in these terms: "… *the lex fori has been adopted because ... it is an aspect of English public policy ...: the balance to be struck between disclosure and privilege in the course of a trial is always a difficult one, and ultimately is a public policy decision*." I respectfully agree.

42. English domestic conflicts law establishes that the *lex fori* – that is English law - is the system of law by which issues concerning the existence and loss of privilege are to be determined. It would be entirely artificial for that principle to apply but for the issue of the continued existence of confidence on which the existence of privilege depends to be tested by reference to another system of law. Such an approach would or is likely to defeat the *rationale* for adopting the *lex fori* as the law for determining the existence and loss of privilege and trigger the or most of the problems identified in the authorities referred to above as the consequence of not adopting that approach. In those circumstances, I question whether it is necessary to consider Rome II at all. In each case where a privilege issue arises it should be necessary to refer only to the *lex fori* to resolve those issues.

43. However, if and to the extent that is wrong, it is clear that public policy justifies departing from the general principles set out in Rome II where such an issue is genuinely engaged. That is apparent from the qualification contained in recital (32) that:

> "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions."

and from Article 26, which provides:

> "Article 26
>
> Public policy of the forum
>
> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."

The statements of principle within Rome II in Recital (32) and Article 26 permit the Courts of England and Wales to adopt such an approach to issues of confidence where such issues arise in the context of whether privilege exists or has been lost.

44. Mr Howe is mistaken when he submits that applying English law to decide whether the documents for which privilege is claimed retain sufficient confidence for privilege to be asserted or maintained involves disapplying a foreign system of law that would otherwise apply and "… *the subversion of a carefully calibrated system of choice of laws"* – see T2/39/1. The question is not whether the Documents are confidential as a matter of Thai law but whether applying English law as the *lex fori* "*…the document and its information remain confidential in the sense that it is not properly available for use*." It is only by detaching the issue of confidence from the context in which the issue arises and from the sense in which the word "confidence" is used in that context that the subversion submission becomes arguable. That detachment is unprincipled and wrong. Once that is accepted then there is no disapplication or subversion of a choice of law that would otherwise apply either because it is not necessary to consider Rome II at all or if it is, because of the effect of recital (32) and Article 26 of Rome II.

45. Although Mr Howe submitted that an order in the terms sought would be inconsistent with comity because it would involve the English Court requiring the claimants to deliver up documents which the Thai court ordered should be available to them, I consider this too to be mistaken. No issue of comity arises if the *lex fori* is applied to the confidence issue. In issuing the Subpoenas, the Thai courts did not and could not direct that the documents delivered up as a result would be admissible or disclosable in English litigation before an English Court any more than a Thai court would consider the order of an English court would have that effect in Thailand. Merely because, as a matter of Thai law, the documentation can be used in proceedings other than the proceedings in Thailand in which the Thai Subpoenas were issued does not lead to the conclusion that the material can or should be permitted to be used in litigation in the courts of England and Wales. All comity issues are avoided by each court applying its own *lex fori* to privilege issues. I address the point concerning delivery up below. However, in summary any remedy granted by an English court in these circumstances will not be inconsistent with comity because a court will be careful to structure the remedies granted so as to confine their effect to the English proceedings and to exclude any extra territorial effect.

46. For those reasons, I consider that all issues concerning LAP including whether a document and its contents remains confidential in the sense that they are not properly available for use in litigation before the courts of England and Wales are to be resolved by reference to English law.

47. Returning now to what Mr Howe accepted[1] was the critical question namely whether in the events that have happened the Documents and the information they contain remain confidential in the sense that they are not properly available for use in this litigation, and applying English law to that issue, it is common ground that a document will enter the public domain and thereby lose any confidentiality it possessed when it is made generally available to the public – see AG v Guardian Newspapers (No 2) [1990] 1 AC 109, at 177. It is not suggested by the respondents that this has occurred in the circumstances of this case. I reject the suggestion made by Mr Howe that I should proceed on the basis that this would happen when the material was deployed in the Thai courts. I do so for the obvious reason that I must decide this application on the facts as they are now. It is unknown whether and if so when and to what extent the Documents will ever be deployed in a Thai court and it would be fundamentally mistaken to assume (as this submission requires me to assume) that any use of such documents in a Thai court would constitute the entry of the Documents into the public domain.

48. It was submitted by Mr Howe that once the documents had been produced by WEH pursuant to an order of the Thai court and disclosed to the claimants lawfully according to Thai law, it followed that the Documents had lost the characteristics of confidentiality necessary for an assertion of privilege and thus the Documents became both disclosable and admissible in these proceedings. On the conclusions I have reached so far, this issue must be resolved applying English law.

49. Mr Howe advanced this proposition by reference to what he submitted was a statement of general principle by Lord Brandon in South Carolina Co v Assurantie NV [1987] 1 AC 24 that:

> "… Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. … the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used."

In my judgment neither that statement nor that authority justify the submission that is made by reference to them. That case was not concerned with privilege in any sense. It was concerned with an application by one of the parties for an injunction to restrain the other party from proceeding with an application to a US Federal Court for pre-trial discovery by deposition.

50. When considering statements of general principle it is necessary that they be read in context. Because no issue concerning privilege arose in South Carolina Co v Assurantie NV (ibid.), it was not necessary for the House of Lords to consider the impact of

[1] T2/608-12

privilege on the general principle identified. However even so, Lord Brandon was careful to qualify what he said by including the phrase "*in general*". He did so because the submissions that were made to the House had been qualified. Leading counsel for the appellants (Mr Robert Alexander QC and Mr Jonathan Sumption QC as he then was) formulated the question to be decided as being:

> "in what circumstances (if any) may the English courts restrain a party to an English action from availing himself of the process of a foreign court for the purpose of obtaining evidence relevant to the English action?"

– see page 26E. Their submitted answer was summarised at 26H-27A as being:

> "… Further, a party may use the facilities of the courts of a friendly foreign state if that state is willing for them so to do. <u>The defendants concede that there are limits to this principle. Thus, it is inapplicable where it would be unconscionable for a party to obtain discovery, for example, of documents which in this country are subject to professional privilege</u>." [Emphasis supplied]

In my judgment Lord Brandon's statement of general principle (particularly given its express qualification) must be read as not extending to the exceptional situation identified in the submissions or at best as leaving that point to be resolved on a future occasion. Lord Brandon could not have intended to express any conclusions that went beyond the submissions that had been made.

51. This then leads to Mr Howe's alternative submission, that whereas here one party to litigation has lawfully obtained a copy of a document that is the subject of LAP, that privilege itself does not prevent the other party from adducing that secondary evidence of the privileged document – see <u>Calcraft v Guest</u> [1898] 1 QB 759 at 764 - and it will only be possible to prevent a party in the position of the claimants from using the copies of the document so obtained by relying on the court's equitable jurisdiction to restrain a breach of confidence. I agree with this analysis. As Lawrence Collins J (as he then was) held in <u>ISTIL Group Inc v. Zahoor and another</u> [2003] EWHC 165 (Ch); [2003] 2 All ER 252 at [74]:

> "The position on the authorities is this. First, it is clear that the jurisdiction to restrain the use of privileged documents is based on the equitable jurisdiction to restrain breach of confidence. The citation of the cases on the duty of confidentiality of employees makes it plain that what the Court of Appeal was doing in Lord Ashburton v Pape was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged, and were and remained confidential. Second, after a privileged document has been seen by the opposing party, the court may intervene by way of injunction in exercise of the equitable jurisdiction if the circumstances warrant such intervention on equitable grounds. Third, if the party in whose hands the document has come (or his solicitor) either (a)

> has procured inspection of the document by fraud or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene by the grant of an injunction in exercise of the equitable jurisdiction. Fourth, in such cases the court should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, eg on the ground of delay."

52. This leads Mr Howe to submit that to succeed on this application, SCB must show both that the Documents were privileged from disclosure by SCB to the claimants and that the claimants owe SCB a duty of confidence which prohibits them from relying on the copies of the Documents notwithstanding they have obtained the copies lawfully. I am satisfied as to the first of these requirements for the reasons given earlier but in summary because Document 1 was privileged by its very nature as were the emails that referred to it or attached copies of it or referred to its contents and the Invoice by reason of its narrative contents. It follows that for the purposes of the English law of confidence, the Documents have the necessary quality of confidence about them.

53. The real issue is whether the Documents were received in circumstances importing an obligation of confidence. Mr Howe submits that they were not and no duty of confidence can arise because the claimants:

    i) Received and hold those documents lawfully, pursuant to an order of the Thai court which has not been challenged in Thailand; and

    ii) Did not obtain those documents inadvertently, or through a trick but on the contrary obtained them lawfully as a result of a court order in Thailand without any constraint being placed on the use to which the documents so obtained could be put.

    Mr Howe emphasises that the answer does not lie in the absolute nature of LAP because as he put it in his oral submissions, " … *it may be absolute when it exists, but that begs the question as to whether it exists or not; and it doesn't exist if confidence in the document is lost as between the relevant parties*". It is important to bear in mind the breadth of this submission. The Subpoenas were not addressed to or applied for against SCB. SCB is not a party to the proceedings in Thailand in which the Subpoenas were applied for. No prior notice was given by the claimants to SCB of their intention to apply for disclosure against WEH of the Documents. It is submitted that notwithstanding these factors the result of the claimants obtaining the copies of the Documents in Thailand is that thereby any confidence that SCB might otherwise have been able to assert against them has been lost. In consequence, it is submitted, the Documents are properly available for use in the sense that Aldous LJ meant in Bourns Inc v Raychem Corp (ibid.) because (unlike that case) the Documents have been produced pursuant to an order of the Thai court and under Thai procedural law the claimants are free to deploy the documents in foreign proceedings including these proceedings.

54. Whilst it is true to say that most of the reported cases are concerned with privileged documents that have been obtained in error (as for example where privileged material has been disclosed in error in the course of a disclosure exercise) or by illegitimate means, I do not consider that those are the only categories of case in which equity would interfere. Lord Goff expressly stated that a duty of confidence may arise whenever a person comes into possession of obviously confidential information, or information known to be confidential, even if it was received innocently and outside the context of any relationship with the person concerned – see Attorney General v Guardian Newspapers (No.2) [1990] A.C. 109 at 281. Whilst this will include obviously confidential information obtained accidentally, there is no reason why if a party to litigation in England (A) obtained obviously privileged material belonging to another party to the litigation (B) by taking legal proceedings against a third party (C) in a foreign state, that B's entitlement to assert privilege or rely on the confidentiality of the material as against A for that purpose should be lost, at any rate where C received the documents in confidence from B and where no prior notice of the application against C was given to B. I agree with Mr Davies-Jones that to adopt any other course would be to permit the evasion or at any rate the avoidance of what in English law is a paramount public policy.

55. One of the characteristics of this case that distinguishes it from most if not all the others in this area is that SCB is not a party to the Thai proceedings and was not given prior notice either here or in Thailand of the application. The Subpoenas were addressed to WEH and WEH was able to disclose the material only because it had received it from SCB in the circumstances I describe when considering the Dissemination Issue. As I explain there, the material that WEH disclosed was sent to it on terms that made it clear that it was delivered in confidence. Mr Davies-Jones submits that equity will come to the assistance of a party to litigation in England where another party has gone abroad to obtain materials that he knows could not be obtained here. Mr Davies-Jones places particular reliance on the fact that no prior notice was given to SCB of an intention to apply for the Subpoenas and that had such notice been given then an application would have been made for an injunction at that stage that would have either precluded the claimants from applying for the material at all in Thailand or would have prevented its use in these proceedings.

56. I return to the language used by Aldous LJ in Bourns Inc v Raychem Corp (ibid.) and to the question whether the Documents remain confidential in the sense that they are not properly available for use in this litigation. I conclude that the necessary confidence has not been lost simply by reason of the Subpoenas having been applied for and copies of the Documents being thereby obtained in Thailand. Whether confidence has been lost is a contextual and factual question. In my judgment where the issue concerns the loss of privilege which is protected in England as a matter of public policy, a court should be very slow to conclude that the necessary level of confidence has been lost in circumstances such as this namely where an application has been made for disclosure to a foreign court in aid of other proceedings in that court against parties other than the party whose privilege is supposedly thereby lost and without prior notice to that party of the application. To obtain copies of documents by these means and without prior notice to SCB cannot mean that the documents thereby become properly available for use in litigation in this jurisdiction against SCB at any rate without more.

57. It was submitted by Mr Howe that since the claimants had come into possession of the documents lawfully under the laws of Thailand by operation of an Order by a Court in Thailand, they could not be ordered to deliver them up to SCB by an English court and, therefore, confidence and privilege was lost at the time when the documents first came into the possession of the claimants. I have referred to this issue in passing already. I do not agree that the touchstone, or even a touchstone, test is whether the documents could be ordered to be delivered up. There will be cases where that is the appropriate remedy in a breach of confidence case but as I have emphasised it is mistaken to approach this case as if it was a breach of confidence case divorced from the privilege issues that provide the necessary context. In my judgment the court is fully entitled to control its own procedures by controlling the use to which privileged material can be put in litigation before it including by granting injunctions that limit or prohibit its use. Obtaining documents that are obviously privileged by lawful means in a foreign state does not lead to the conclusion that as a result they have become available for use in litigation in England, particularly where the documents were obtained from a third party not the party entitled to assert the privilege.

Unconscionability

58. There was a significant debate concerning whether the claimants had behaved unconscionably in applying in the Thai proceedings for documents in aid of these proceedings that were by their very nature privileged. This was met in large part by the suggestion on behalf of the claimants that they were fully entitled as a matter of Thai law to apply for disclosure of those documents. This led Mr Howe to submit that:

> "There is nothing wrong in using the properly available legal systems or foreign proceedings in which you are involved to obtain documents, whether or not those documents might or might not also benefit other proceedings."

I agree with that proposition as far as it goes. Where I part company with Mr Howe is when he submits that:

> "Provided the lawyers and clients obey the relevant restrictions that are imposed on the documents when they are produced, then there is no problem, and never has been, in deploying information or evidence obtained in one set of proceedings in another …"

It simply does not follow that because documents have been obtained lawfully in one jurisdiction they thereby become available for use in litigation in another. This last question depends on the *lex fori* and in English law is dependent on whether privilege can be asserted or has been lost by the party against whom it is sought to deploy the material, which in turn depends upon the issues I have considered above. As it seems to me issues concerning unconscionability don't arise – though where unconscionability is established that may strengthen the position of the party seeking to restrain use of the material. In a case such as this there is a distinction to be drawn between a case where A is suing B in England and applies to a foreign court against B for an order for disclosure of privileged materials and one such as this, where the application is made by A against C for disclosure of copies of B's privileged documents

without notice to B. In the second of these two scenarios, it is difficult to see how it could be said that B's right to assert privilege or confidence in the material could be lost as against A without more. It is possible of course that confidence could be lost when copies of the material were supplied by B to C (the Dissemination Issue resolve below). However, absent that, it is difficult to see why B should be deprived of its right to assert confidence and therefore privilege against A.

59. I would add this however: I am not satisfied that the claimants have fully or frankly explained how they knew of the existence of the material in a way that enabled them to identify the material in the application for the Subpoenas. Plainly the lawyers in Thailand must have known of the existence of the material sufficiently to be able to identify it in the applications. The only explanation offered is formulaic: it is that at the time the applications were made the Thai lawyers did not have the subpoena documents in their possession "*… in their capacity as lawyers or agents of the Claimants (or any of them), and nor did they review their contents in that capacity*." It is obvious as a matter of inevitable inference that the Thai lawyers did have the material and had reviewed that material in some capacity other than that of counsel to the claimants prior to applying for the subpoenas. It is entirely unexplained how that could properly be without the consent of SCB (which is not alleged), without there having been a breach of confidence at some stage by someone. It is entirely unsatisfactory that this issue should be explained in this way. If necessary, I would have held that this in combination with the lack of notice to SCB of the application was sufficient unconscionability for present purposes. However it is not necessary for me to descend any further into this material on the conclusions that I have reached. English law applies for the purpose of deciding whether the Documents were and remain privileged for the purpose of disclosure and use in English litigation and for the reasons set out above, I conclude that (subject to Dissemination and Iniquity Issues) the material is and remains privileged as a matter of English law.

The Dissemination Issue

60. The second way in which the respondents maintain that the Documents have lost confidentiality and therefore are not or have ceased to be privileged is because they were circulated by or on behalf of SCB to various third parties including the second, third and thirteenth defendants. This depends on whether the recipient of the information knew or ought reasonably to have known that the information was confidential and being supplied confidentially. If privileged material is supplied by A to B for a specific purpose with all other rights being impliedly reserved then it remains privileged save as against B for the specific purpose it was supplied by A to B – see Bourns Inc v. Raychem Corp (ibid) *per* Aldous LJ at 170D-J

61. The respondents submit that Document 1 was sent by SCB to the second defendant (Ms Collins), the third defendant (Mr Reansuwan) and the thirteenth defendant (Mr Weerawong, senior partner of WCP, WEH's Thai legal advisors). Of these, the respondents accept that Ms Collins was asked not to share Document 1. In fact the email under cover of which Document 1 was sent to her came from the third defendant under cover of an email dated 31 July 2017, which said "*I can share across but just to you please*" and "*We don't suppose to have this as it is for the Bank*". It is to my mind clear from this email that the sender (the third defendant) was aware that the document being sent (Document 1) was confidential to SCB and Ms Collins knew by no later than the

date when she received the email that the document as confidential to SCB and was not to be circulated.

62. The respondents rely specifically on SCB sending Document 1 to the third defendant and the third defendant sharing it with WEH's legal advisor (the thirteenth defendant) as well as others within WEH's organisation. The difficulty about that submission is twofold – first, as I have said it is clear from the third defendant's 31 July email to the second defendant that he knew the material was confidential and that such was the case is apparent on its face.

63. Secondly and as, if not more, importantly, the confidential nature of the material was apparent on the face of the emails passing between the Bank and XYZ on the one hand and the third defendant on the other. Thus, by an email of 14 July 2017 XYZ sought some information from the third defendant in connection with the preparation of Document 1. It was headed "*Strictly Confidential*". Whilst the third defendant's acknowledgement on 14 July 2017 (12.22) didn't contain a similar statement, the first substantive reply (at 2.30 pm) was headed by the third defendant "*Strictly Private and Confidential*" as was the second one (at 2.34pm) under cover of which the outstanding information was sought. When Document 1 was sent to SCB, the lawyer at XYZ headed the email to which it was attached "*Strictly Confidential: WEH Legal Opinion*". It was then sent by an official within SCB to various individuals including the third defendant. Although the forwarding email was not marked in the same way, what was attached included the mail from XYZ that was prominently marked "*Strictly Confidential: WEH Legal Opinion*" as I have said. The third defendant plainly knew what he was receiving was confidential for the reasons outlined earlier.

64. The respondents submit that this was not a case where information was shared in circumstances where there was a clear obligation of confidence because there was no requirement that WEH or its managers comment on either the instructions given to XYZ nor to receive a copy of Document 1 and that what the respondents characterise as a " *… wide sharing of information beyond any identified client …*" led " *… the Emails and Opinions to lose their confidential character, and therefore their privileged character …*"

65. Whilst I accept that privilege can be lost where there is a loss of confidentiality, I am not able to accept these submissions for the following reasons.

66. First, confidentiality can be implied where it would be expected to be assumed by those involved – see Gotha City v. Sotheby's and another [1998] 1 WLR 114 *per* Staughton LJ at B-D. In my view that implication in this case is plain from the nature of Document 1. It is significantly bolstered by the express references to confidentiality in the covering emails referred to above. In my judgment it is plain that Document 1 was communicated and received in circumstances that made it clear either expressly or by implication that the material was intended to be confidential as between WEH and SCB.

67. In any event, as I have said already, the authorities establish that where documents that are the subject of legal professional privilege, are disclosed to a third party (here WEH and its directors and officials) by the person entitled to assert legal professional privilege (here SCB and its officials) for a limited and specific purpose (here obtaining information for the purpose of enabling Document 1 to be prepared and then for the

purpose of informing WEH as to the basis on which SCB was proceeding), legal professional privilege is only waived for that limited and specific purpose and as between the person entitled to assert LAP on the one hand and the recipient on the other. Where that happens the person entitled to assert LAP is fully entitled to maintain privilege against others – see the authorities considered by Staughton LJ at Gotha City v. Sotheby's and another (ibid.) at 120C-121G. Here Document 1 was disseminated to a limited number of individuals for limited purposes in circumstances where it was obvious that the material was confidential and where the recipients plainly ought reasonably to have understood that to be so from the context, the nature of the information shared and the email subject headings to which I have referred.

The Iniquity Issue

68. The principle is not in dispute - where the lawyer is consulted in furtherance of an iniquitous purpose, no privilege can arise in documents coming into existence in furtherance of or to facilitate fraud or crime – see Kuwait Airways Corporation v Iraqi Airways Company (No.6) [2005] 1 WLR 2734 *per* Longmore LJ at paragraph 21 and 36. The exception applies to any conduct consisting of " … *fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice …"*- see JSC BTA Bank v Ablyazov [2014] EWHC 2788 *per* Popplewell J as he then was at paragraph 68. The onus rests on the party alleging iniquity to establish a strong prima facie case that the iniquity exception applies, where the issue of fraud is one of the issues in the claim – see Barclays Bank Plc v. Eustace [1995] 1 WLR 1238 at 1250.

69. The respondents' case on the applicability of the iniquity exception stems from what had troubled SCB all along - namely that the disposal by NS might be unwound by reason of the claim for rescission made in the first of the two arbitral references commenced following the failure of the purchasers to pay what was due with the ultimate result that NS would end up directly or indirectly owning at least a majority interest in WEH.

70. **[PARAGRAPH REDACTED]**

71. **[PARAGRAPH REDACTED]**

72. **[PARAGRAPH REDACTED]**

73. **[PARAGRAPH REDACTED]**

74. **[PARAGRAPH REDACTED]**

75. **[PARAGRAPH REDACTED]**

76. **[PARAGRAPH REDACTED]**

77. **[PARAGRAPH REDACTED]**

78. **[PARAGRAPH REDACTED]**

79. As I indicated earlier, it is for the respondents to demonstrate a strong prima facie case that Document 1 was sought in furtherance of fraud, crime or some other breach of a duty of good faith or other conduct that is contrary to public policy or the interests of justice. In my judgment the respondents have not come close to satisfying that test in this case. This was from first to last a properly conducted major lending exercise by a bank the senior management of which had a particular concern about which they sought legal advice. I do not accept the advice they received was in furtherance of a scheme to defeat the interests of creditors, I do not accept that the advice was explicitly or implicitly sought on that basis, nor do I accept that it could be read in the way contended for or that in fact it was acted on in the way contended for. The requirements imposed by the bank are inconsistent with that.

Conclusions

80. I am satisfied that the Documents were privileged as a matter of English law at all material times. The Documents were not unprivileged by reason of Document 1 being sought in order to further iniquity. Privilege was not lost when Document 1 was circulated for the reasons that I identified earlier and it was not lost for the purposes of these proceedings when the claimants obtained copies of the Documents by applying for copies by application in Thailand in proceedings to which SCB was not a party and of which it had no notice. I will hear the parties further as to the terms of the orders that ought to follow assuming suitable undertakings are not forthcoming.

Case No: **CL-2018-000716**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **2 March 2022**

Before :

HHJ Pelling QC

- -

Between :

Nopporn Suppipat & Ors	**Claimant**
- and -	
Nop Narongdej & Ors	**Defendant**

- -
- -

Robert Howe QC and Victoria Windle (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimant**
Jonathan Davies-Jones (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: **2nd March 2022**

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RULING

HHJ Pelling QC **Wednesday, 2 March 2022**

(**11:23** am)

Ruling by **HHJ PELLING QC**

1. This is an application for permission to appeal. The test is whether or not there is a realistic prospect of the Court of Appeal coming to a different conclusion. The application for permission to appeal is advanced exclusively by reference to the issue identified in paragraph 24.1 of the judgment and not by reference to any of the others.
2. It is submitted that upon analysis, it is at least arguable that the conclusions I reached were wrong in law in an area which is novel. Mr Davies-Jones submits that this is wrong root and branch. It is wrong, first, because it is not novel in any real sense and because upon proper analysis, the conclusions I reached involved applying established principle to particular facts.
3. I accept the submissions made by Mr Davies-Jones. I do not regard the proposed appeal as being realistically arguable. It is to be remembered that the conclusions that I reached in relation to this application were driven very significantly by the facts that surrounded them and, in particular, the absence of an explanation as to how the existence of the opinion became known in the first place. Secondly, the fact that the application for the subpoena was made without prior notice to the applicant. Third, the application in Thailand was not made against the applicant at all but was made by reference to a third party to whom the documents had been transmitted by the applicant in confidence, a point that I reached a conclusion on and which is not challenged in the proposed appeal. In summary, aside from misplaced reliance on the crime and fraud exception, the claimants' case depended principally on the assertion that documents that were privileged in the hands of the applicant, which had been passed to a third party in confidence and had been obtained in copy by the claimant from that third party in proceedings to which the applicant was not a party in Thailand following an application without notice to the applicant had nevertheless ceased to be confidential which is unarguable, particularly when no explanation is offered as to how the claimants came to know of the existence or contents of the documents and bearing in mind the public policy

considerations that lie at the heard of legal advice privilege. In those circumstances, permission to appeal is refused.

Case No: **CL-2018-000716**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **2 March 2022**

Before :

HHJ Pelling QC

- -

Between :

Nopporn Suppipat & Ors	**Claimant**
- and -	
Nop Narongdej & Ors	**Defendant**

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Robert Howe QC and Victoria Windle (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimant**
Jonathan Davies-Jones (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: **2nd March 2022**

- -

RULING

HHJ Pelling QC **Wednesday, 2 March 2022**
(**10:45** am)

Ruling by **HHJ PELLING QC**

1. The issue I now have to determine concerns what percentage reductions there should be from the sums otherwise recoverable by the successful applicant in respect of the restraint to act application and the waiver of privilege application.
2. Mr Davies-Jones submits that there should be an aggregate reduction of 8%, being 5% in relation to the restraint to act application and 3% in relation to the waiver of privilege application. The basis on which he arrives at that analysis is by analysing the evidence which can be said to be exclusively attributable to each of the two applications and the amount of written submission likewise exclusively attributable to each of the relevant applications. The mathematical basis of this submission has not been challenged. The respondent submits however that there should be a global reduction of 30%. This is advanced on a very broad-brush basis, being 5%, which is said to be attributable to the waiver of privilege application and 25% in respect of the restraint to Act application.
3. Since Mr Davies-Jones did not seriously dispute the suggestion of a 5% reduction in relation to that part of the application it seems to me that that element at least is broadly common ground.
4. Where the parties part company is in the sum attributable to the restraint to act application. The submission which is made by the respondents is that there should be a 25% reduction, because that will reflect properly that, first of all, the applicants should not recover their costs of that element of the application and, secondly, the respondents should recover their costs of that part of the application. This implies that 12.5% of the costs of each side is attributable to the restraint from acting application.
5. It will not be every case where there is a percentage reduction in which it will be appropriate to calculate the percentage reduction by reference to both eliminating the successful party's costs of the unsuccessful application and at the same time making a further reduction to ensure that the

unsuccessful party recovers its costs in relation to the part on which the successful party was unsuccessful. However, there will be a limited subset of cases where that is the appropriate approach. I am entirely satisfied in the circumstances of this case that the restraint to act application is one of those falling within the subset. It is an application that would not have succeeded for the reasons explained earlier but was only abandoned at the beginning of the second day of the hearing when all the costs of resisting it had been incurred.

6. I accept Mr Davies-Jones' submission however that there is no justification for the starting point of 12.5%, which is the basis of the respondents' submission. Looked at in the round and applying a sense test, in my judgment to attribute 12.5% of the costs of each party to this issue would be very substantially in excess of what is reasonably proportionate in regard to that issue, having regard to the fact that however bitterly fought the issue was and however much it generated heat rather than light in relation to the application, the amount of legal material generated in the application itself, both by way of submission and evidence, was limited. In the absence of any rival mathematical detail, I accept Mr Davies-Jones' submission that the proper starting point is that both parties will have spent about 5% of their total costs on the restraint from acting issue.

7. In those circumstances I conclude that the appropriate course is to reduce the costs which are otherwise recoverable by the applicant by 10% in respect of the restraint to act applicant and a further 5% in relation to the waiver of privilege application, resulting in an overall reduction in costs recovery at 15%.

Case No: **CL-2018-000716**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **2 March 2022**

Before :

HHJ Pelling QC

- -

Between :

Nopporn Suppipat & Ors	**Claimant**
- and -	
Nop Narongdej & Ors	**Defendant**

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Robert Howe QC and Victoria Windle (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimant**
Jonathan Davies-Jones (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: **2nd March 2022**

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RULING

HHJ Pelling QC **Wednesday, 2 March 2022**

(**11:09** am)

Ruling by **HHJ PELLING QC**

1. The issue I now have to determine is the amount of a payment on account of costs. The global headline sum claimed by the successful applicant is £719,000, to which the reduction I arrived at earlier has to be applied, reducing the total sum claimed to £611,000.
2. It is submitted by Mr Davies-Jones QC, on behalf of the successful party, that the appropriate order to make, applying the principles which apply in this area, is to order a payment on account of about £318,000, which starts with the £611,000 figure that I mentioned a moment ago, applies to it a 35% discount, which is what can be expected on a detailed assessment, which reduces the sum recoverable to £397,000-odd and leads to the submission that there should be an interim payment on account of £315,000.
3. The point made on behalf of the respondents, not unnaturally in the circumstances, is to draw attention to the fact that on a detailed assessment the sum which the costs judge will arrive at as recoverable is a sum which must be calculated not merely by reference to what is reasonable but also by reference to what is proportionate, both in relation to the work done and to the amount claimed in respect of it.
4. That leads Mr Howe QC to submit that very substantial reductions ought to be made. He refers to the well-known decision of Mr Justice Leggatt in Kazakhstan and the principle identified in that case as to what constitutes proportionate cost, that is to say the lowest amount that needs to be spent in order to obtain competent representation in relation to the application concerned. In some ways this is an answer to the points which are made by Mr Davies-Jones, in particular in relation to the fact that this is hard fought litigation with $1 billion at stake. What has to be focused on in the circumstances of this application is the application itself rather than the litigation generally.
5. Nonetheless, the application was one which was of the utmost importance for the bank. It involved meeting very serious allegations against it and there is no doubt at all that if looked at in terms of

guideline rates this is a case which would fall within the London 1 or slightly more than the London 1 level, having regard to the issues that had to be determined.

6. As always in these circumstances the approach has to be a relatively broad-brush. I accept the point made by Mr Howe that in some respects the hours that have been incurred in relation to communicating with clients in particular, but also opponents and attendance on others, is higher than might be expected and that has to be taken into account in arriving at an interim payment because one has to ensure that no more than a reasonable and proportionate sum is recovered.
7. In my judgment, the notion that only £150,000-odd would be recoverable following a detailed assessment underestimates the costs which are likely to be recovered by the successful applicant in the circumstances of this case, having regard to the work that plainly had to be done. Whilst I have found the case at the end, with the assistance of leading counsel on both sides, relatively straightforward, by the same token getting to the point where there could be a two-day hearing which could be resolved in that way involved very significant amounts of work, which cannot entirely be divorced from the litigation generally in this sense, that there is to be a trial in October of this year listed, I think, for 16-19 weeks. There will be an enormous amount of work to be done on this application in the middle of very intensive activity driven by the approaching trial. That is bound to have involved solicitors having to apply themselves in order to deal with the application whilst at the same time managing the litigation generally. That is likely to have generated reasonable and proportionate costs which would be higher than perhaps would otherwise be anticipated.
8. Whilst I consider £150,000 to be markedly too low as an estimate of what is likely to be recovered on the detailed assessment, I consider nonetheless that some degree of caution needs to be exercised in relation to issues, for example in relation to the very large numbers of hours which were expended communicating with others and with work done on documents and I direct that there should be an interim payment on account of £300,000.

Case No: **CL-2018-000716**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **2 March 2022**

Before :

HHJ Pelling QC

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Between :

Nopporn Suppipat & Ors	**Claimant**
- and -	
Nop Narongdej & Ors	**Defendant**

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Robert Howe QC and Victoria Windle (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimant**
Jonathan Davies-Jones (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: **2nd March 2022**

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RULING

HHJ Pelling QC **Wednesday, 2 March 2022**

(**10:19** am)

Ruling by **HHJ PELLING QC**

1. The issue I now have to determine concerns whether or not the successful applicant should recover some or all of its costs to be assessed on the indemnity as opposed to the standard basis.
2. There were, as I indicated in paragraph 1 of my substantive judgment, three applications before the court being respectively the restraint of use application, which was in the end the only application I had to determine, a restraint to act application, which was an attempt by the applicants to obtain an order prohibiting various members of the claimants' solicitors and counsel team from continuing to act, and the third application, described as the waiver of privilege application, which was an application contained in a separate application notice for disclosure of an opinion prepared by Mr Lissack QC, which apparently supported the position adopted by the respondents in the way they conducted themselves in relation to the material the subject of the restraint of use application.
3. The first issue which arose earlier this morning was whether or not there should be a separate costs order in relation to the waiver of privilege application. The submission made by the respondents is that there should be a single order with suitable percentage reductions. That reflects the reality of the situation, which is that the whole of the costs were incurred in dealing with the three applications together and I accepted that proposition as the appropriate way to proceed. There is an issue as to what deductions or reductions ought to be applied to reflect the parties' respective success on the restraint to act and waiver of privilege applications, but that will be dealt with later today.
4. The applicant's submissions start by referring to the very well-known principles that identify the circumstances in which an indemnity costs order will be made. The starting point is, as always, the Excelsior principle, that is to say whether it can be shown that the paying party has conducted itself in a way which comes outside the norm to be expected, in this context, in hard-fought commercial litigation. That needs to be weighed with the conduct of the receiving party since conduct before and during the application is always material to the exercise of the discretion as to costs.

5. Particular reliance was placed upon various factors identified in Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), [2006] 5 Costs Law Reports 714, a decision of Mr Justice Tomlinson, as he then was, as justifying, in the circumstances of this case, the making of such an order. The factors which were relied upon by the applicant are all contained in paragraph 8 of the summary contained in Mr Justice Tomlinson's judgment and, in particular, the applicant relied upon the following as justifying the conclusion that an indemnity costs order should be made:

   (a) that the claimant had advanced and aggressively pursued serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time; and

   (b) the claimants had advanced and aggressively pursued such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintained the allegations without apology to the bitter end, and where the claimant pursued a claim which was irreconcilable with the contemporaneous documentation. All this led to the submission set out in paragraph 11 and following of the written submissions of Mr Davies-Jones QC where he makes a series of points which lead to the conclusion, so he submits, that an indemnity costs order should be made.

6. Those points include an allegation or an assertion that the respondents were seeking to do something they were plainly not entitled to do, namely deploy against SCB in proceedings in England, privileged material belonging to SCB in circumstances where SCB had not consented or waived its privilege. As to that, whilst I agree that is a summary from the applicant's perspective of the issue which had to be determined, it is not, in my judgment, a reason for making an indemnity costs order. The issue was fully argued out over a number of days and whilst I came to a conclusion in the end that the applicant was correct in the submissions it made, it would be wrong to conclude that the point was hopeless without hearing and determining the points the subject of the arguments that followed. Not every case that turns out to be relatively straight forward at the end appears that way at the start and this was one of those cases.

7. It is said that the privileged material did not come into the respondents' hands by accident but was deliberately sought abroad and without any notice being given. I accept that analysis and, with it, the analysis that there has never been a satisfactory explanation as to how it was that those on the claimants' side knew of the existence or contents of the documents that were sought, which were the subject of this application, nor how that information could have come to them without a breach of confidence occurring by someone prior to the application being made in Thailand. It was submitted this was conduct that was unreasonable to a high degree and I accept that that is one of the factors that I ought to take into account in coming to a conclusion on this issue.
8. The third point that is made is that there was effectively an unreasonable deployment of the privileged materials notwithstanding complaints by the applicants concerning the use of the material. The difficulty about that is that once the material came into the hands of the claimants, it was certainly disclosable unless an injunction was obtained. Therefore, this point is a circular one. It was submitted that to proceed to disclose the document in this way was both contentious and high-risk and ought to lead to the conclusion that it was unreasonable to a high degree and therefore conduct which comes within the scope of indemnity costs. So far as that is concerned, it was plainly potentially contentious, as is obvious from the fact that advice was sought from Mr Lissack QC before any steps were taken. However, aside from the point made by Mr Howe, that it is the responsibility of solicitors, acting fearlessly in the interests of their client, to advance points that are both contentious and high-risk, the real point is that the claimants had no choice but to disclose the documents once they came into their hands.
9. More significant in relation to all of this is the point which is made at paragraph 15 of his skeleton submissions by Mr Davies-Jones concerning the deployment of the points which were, in the end, either not of themselves arguable or were not relied upon. It is not necessary I summarise them in detail - the main focus was on a series of points that were raised in support of the contention that the documents were not privileged because they came within what was referred to in this case as the

crime or fraud exception. The particular complaint is not that the points were bad points (although it is submitted that they were) but that they were maintained until Mr Howe's skeleton weas served when the points were abandoned. The taking of points which are abandoned on the basis that they are unsustainable is potentially an issue justifying the grant of indemnity costs, but it must be borne in mind that the costs of and occasioned by issues that have been abandoned will themselves be costs which will be recoverable on the standard basis. Furthermore this is a question of fact and degree. On the facts of this case directing that all the costs incurred by the applicant be assessed on the indemnity basis by reference to the making of points in aid of one submissions that were abandoned would be obviously disproportionate

10. More significant than all of these, as it seemed to me, was the reliance placed on the crime and fraud exception to the end. It was a point that I was forced to deal with at some length in the judgment and which I concluded the claimants had not come near establishing. Mr Howe's skeleton submissions indicate that there is to be no application for permission to appeal against that conclusion. The point which is made by Mr Davies-Jones is that where a financial institution, such as SCB, is faced with allegations of this sort, it is bound to take those allegations seriously and bound to resist them root and branch. I can understand that but the difficulty about those points is that to treat them as ones triggering indemnity costs would be to overcompensate the applicant because one is focusing on particular allegations for the purposes of coming to a conclusion as to whether an all-or-nothing indemnity costs order should be made.

11. I now turn to the respondent's submissions as to why an indemnity assessment ought not to be ordered. One of the points which is made most strenuously on behalf of the respondents is that part and parcel of the original application was the application by the applicant for the restraint to act order. It was submitted by Mr Howe QC, on behalf of the respondents, that this was an application which was bound to be resisted root and branch, it was an application which should not have been made, whether in September or at the hearing in January given the proximity of the trial and the

nature of the documents for which privilege was claimed. In summary, the application ought not to have been made because of the wholly disproportionate effect it would have had on the trial and also because the documents were ones where the court could protect the legitimate interest of the applicant by the orders sought seeking to restrain use of the documents. The merit of this point is illustrated by the abandonment of this part of the application. I accept this last point as correct. The restraint from acting application which was unnecessary in the circumstances of this case having regard to the wide-ranging relief sought on the restraint of use application, which would preclude any real problems developing at the trial by reason of access having been obtained to the privileged material, particularly since the privileged material does not relate to any specific allegation made as against the applicants. Indeed, the point which was being made was that the respondents were intending to amend pleadings so as to raise fresh allegations on the basis of the privileged entirely. I do not regard the proximity to trial as the most important consideration since if a restraint from acting had been an otherwise reasonable and proportionate order to make, the proximity of the trial would not have justified not making it – particularly given that it is the claimants that were seeking to rely on privileged material.

12. In those circumstances, it is plain that the respondents would have to incur very significant costs in terms of resisting the restraint to act application and just as complaints can be made by the applicant concerning the respondent running allegations which it then abandoned just before the commencement of the hearing, so the same sort of complaints can be made against the applicant in relation to the restraint to act application. The real point, I think, is that this is, for better or worse, brutally hard-fought commercial litigation and this was a particular application, also very firmly and hard-fought between the parties, in which allegations were made by each and then abandoned as the application came to hearing and commenced. As it seems to me, there is good reason for treating the mutual making and then abandonment of unsustainable claims as conduct effectively cancelling each other out. I have come to the conclusion that, notwithstanding the one point which might have

influenced me to a degree, namely the allegations of impropriety advanced against the bank, on balance and looked at in the round, the appropriate order to make in the circumstances of this case is that the applicant recover its costs on the standard basis. There is simply no justification for directing an indemnity assessment of the whole of the applicant's costs by reference to the claimant's allegation that the crime and fraud exception applied, even though that application failed, given that it was in no respect the part of the application that generated most cost.