

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2019/0167

BETWEEN:

HU LAN

Claimant/
Respondent

and

[1] **SUNDALE INTERNATIONAL LIMITED**
[2] **BEST LAND INVESTMENTS LIMITED**
[3] **HARNEYS CORPORATE SERVICES LIMITED**

Defendants

[4] **DAVID GOLDEN**

Defendant/Applicant

Appearances:

Mr. Richard Millett, QC with him Ms. Tameka Davis, Ms. Jane Fedotova and Dr. Alicia Johns for the Claimant/Respondent

Mr. John McCarroll, SC, with him Mr. Stuart Rau for the Fourth Defendant/Applicant

2020: December 16,
2021: February 22.

JUDGMENT

[1] **WALLBANK, J. (Ag.)** On 20th October 2020, the Fourth Defendant as Applicant, Mr. Golden, filed an application seeking to set aside an injunction order of this Court entered on 11th August 2020 (the 'Application'). That order discharged an earlier injunction order made on an *ex parte* basis on 25th February 2020, continued on 18th March 2020 and varied on 11th May 2020. The Applicant thus refers to the order dated 11th August 2020 as 'the New Injunction'. The grounds

relied upon by the Applicant are that following the New Injunction, evidence has come to light that two key documents the Claimant, Ms. Hu, relies upon to support her claim were forged by her and her husband Mr. Gao. These two documents are a Declaration of Trust ('DoT') and a share purchase agreement ('SPA') dated 10th January 2013. The Applicant says this evidence is corroborated by transcripts of conversation recordings, photographs and other documents and records. The Applicant contends that the Claimant therefore cannot rely upon the forged documents and her case is bound to fail, but for present purposes, had the evidence of fraud been known to the Court when the New Injunction was being considered, the New Injunction would not have been made. The Claimant, as Respondent, contends that the evidence the Applicant relies upon is not admissible because it is subject to litigation privilege and, further, it had been obtained by wrongful means. This is the Court's judgment on the issue of the admissibility of that evidence. I shall refer to this jurisdiction as the 'BVI' and the Peoples' Republic of China as the 'PRC'.

1. Introduction

- [2] The context by way of the subject matter of the proceedings can be briefly stated. I do this by way of summary of the respective main allegations only, without making any findings of fact.
- [3] The Claimant, Ms. Hu, is the current wife of Mr. Gao. Mr. Gao is now quite elderly and not in the best of health. Ms. Hu and Mr. Gao have young children together. Mr. Gao is the father of Mr. Golden, by a previous marriage. Mr. Golden is himself married with children.
- [4] Mr. Gao has been an enterprising businessman, making a considerable fortune from a variety of businesses. Mr. Gao has an interest in art and culture and has a company called Great National Culture and Arts Products Group Co, also known as 'Guojia'. Guojia employed an artist as art director, one Ms. Han, since around the end of May 2018. Ms. Han was admitted into Ms. Hu's and Mr. Gao's inner circle and appears to have helped them with their private and domestic affairs, including looking after their children – and, so it would appear, as Mr. Golden alleges, with the forgery and falsification of documents. It is Ms. Han who secretly recorded conversations involving Ms. Hu and Mr. Gao which are the subject of this Judgment.

- [5] The value in this dispute concerns a high-end luxury residential villa development near Shanghai, called Sunville, comprising of around 268 villas, in various stages of readiness for sale and occupancy. This is ultimately held through Sundale and Best Land. Earnings for the business are generated through sales of villas (through a company called Jiacheng) and management fees that are charged to residents (through a company called Bange).
- [6] Ms. Hu communicates the following narrative in her Points of Claim filed on 3rd February 2020. For sake of clarity, I set out below what Ms. Hu alleges. These are not findings of fact.
- [7] In or around late 2012, Mr. Gao became very ill with heart disease. He needed to seek treatment in the United States of America. Assuming a good outcome, convalescence would take several years. Ms. Hu had to be with Mr. Gao and care for him.
- [8] So, she thought it advisable to have Mr. Gao's son, in whom she reposed confidence and trust, registered as the owner of the issued share capital of Sundale in case any documents needed to be signed by a registered shareholder. But, says Ms. Hu, Sundale would be held by Mr. David Golden on trust for her as part of this arrangement. She would remain the beneficial owner of the company.
- [9] A suite of documents dated 10th January 2013 was then executed to record this arrangement. These comprised:
- (1) an agreement for the sale and purchase of the share at the nominal amount of US\$1.00 as the sale price and with Ms. Hu as the vendor and Mr. Golden as the purchaser ('the SPA');
 - (2) an instrument of transfer of the share;
 - (3) an irrevocable declaration of trust, with Mr. Golden as trustee or nominee in favour of Ms. Hu as the beneficial owner ('DoT'); and
 - (4) an authorization letter authorizing Ms. Hu to be Mr. Golden's sole representative for all matters relating to Sundale ('Authorization Letter').
- [10] The Claimant refers to these as the 'Trust Documents'. The Fourth Defendant does not accept this characterization. He says there was and is no Trust.

- [11] Initially the issued share capital that was transferred to Mr. Golden consisted of one share. 999 further shares were subsequently issued to Mr. Golden. The precise circumstances of that issuance are in dispute, but for present purposes the only material detail is that Ms. Hu claims that Mr. Golden also holds those shares on trust or as nominee for her.
- [12] Mr. Gao underwent medical treatment and he recovered gradually. By mid-2019 he was able to resume work and travel.
- [13] Ms. Hu and/or Mr. Gao (on behalf of Ms. Hu) instructed Mr. Golden to transfer Sundale back to Ms. Hu. He refused. Instead, he took various steps to consolidate his control and oust Ms. Hu. He:
- (1) Changed the registered agent on 16th October 2019: previously it had been Vistra, who, I am told, treated Ms. Hu as its client of record. Now it is Harneys Corporate Services, who treat Mr. Golden as their client of record, with 'Harneys' the law firm acting for Mr. Golden himself;
 - (2) Caused the companies to revoke a power of attorney in favour of Ms. Hu;
 - (3) Took personal custody of the records and company documentation;
 - (4) Caused Best Land to adopt a resolution removing Ms. Hu as director of the underlying operating company that held the real estate;
 - (5) Vandalized and destroyed the Sunville estate's sales office on 4th November 2019 and removed the steel to be sold for money; and
 - (6) Terminated staff and senior management and created an environment of fear and intimidation such that Ms. Hu, Mr. Gao and their two very young daughters were forced to flee for their safety.
- [14] Ms. Hu says that she attempted to take various corporate administrative steps to reverse some of these steps and to establish herself as sole director of Best Land, but Mr. Golden and Harneys Corporate Services refused to update the company's registers. The reason given was that Mr. Golden is the registered shareholder and director of Sundale and he disputes the authenticity of the DoT.
- [15] Ms. Hu brought these proceedings, seeking relief that would see her regain directorship control over Sundale and Best Land and have her beneficial ownership of all shares in Sundale formally

recognised. She also seeks damages and/or equitable compensation for breach of trust by Mr. Golden.

[16] For his part, Mr. Golden contends that Ms. Hu transferred that first share to him as a gift. If there was any consideration for the transfer, it was purely nominal. Mr. Golden says this transfer was pursuant to a share transfer agreement executed in or around June 2012 and/or an oral agreement entered into around that time. Mr. Golden contends that although he does not know what documents he signed, because he does not read English, he says he did not knowingly execute the DoT relied upon by Ms. Hu, nor the Authorization Letter. Thus, he does not know if he signed a version of a share purchase agreement. Mr. Golden contends that the share had been previously owned beneficially by his father, with the Claimant acting as his nominee, and that his father had repeatedly expressed an intention to make an *inter vivos* gift to him as his only son. Mr. Golden claims that he owns beneficially all the shares that were either transferred or issued to him.

[17] Mr. Golden now accuses Ms. Hu and Mr. Gao of having forged corporate documents, including the DoT and the SPA. In relation to the DoT, Mr. Golden accuses them of having taken a document which bore his signature, and then replaced the first page with paper of a matching weight and type, creating a new first page entitled 'Declaration of Trust'. This, Mr. Golden alleges they did in around November 2019, aided by other persons. This new first page, alleges Mr. Golden, was then artificially aged by Ms. Hu and Mr. Gao, or at their or her behest, by exposing it to the sun for a period of time. Mr. Golden's side sought to inspect the DOT and SPA and they were permitted to inspect it on 28th July 2020. These are central documents upon which Ms. Hu and Mr. Gao seek to rely in these proceedings.

[18] Mr. Golden asserts that the DoT and SPA had been fraudulently created and are thus void.

2. Evidence of the alleged fraud

[19] The evidential basis for Mr. Golden's allegations of fraud comes from Ms. Han. Ms. Han has made a First Affirmation in these proceedings, in which she said that since mid-October 2019 she had been increasingly focused on assisting Mr. Gao and Ms. Hu in the preparation of materials for these proceedings.

- [20] She there narrated that Ms. Hu and Mr. Gao had embarked from around 3rd November 2019 upon a project to falsify documents that took them at least until about August 2020. They were assisted in this by Ms. Han and Mr. Gao's nephew, Mr. Zhao Lei. Ms. Han explained that she, Mr. Gao and Mr. Zhao Lei went to great lengths to find and acquire paper of a similar type to that which had been used in the documents that they wished to falsify, including, it would appear from Ms. Han's evidence, the DoT. The false text was created on a computer by Ms. Hu, according to things Mr. Gao is reported by Ms. Han to have told her.
- [21] Ms. Han also made a statement containing similar allegations in proceedings in the PRC. She exhibits material which she relies upon as direct evidence of the matters she alleges. Further materials from Ms. Han have been put into evidence by means of a statement by a Ms. Victoria Lord of the Fourth Defendant's Shanghai legal advisers Messrs. Aristodemou Loizides Yiolitis LLC.
- [22] Mr. Gao, Mr. Zhao Lei and Ms. Han went shopping for paper in various stationary outlets as well as on-line. Ms. Han attested that the first shopping trip that she took part in happened in the afternoon of Sunday, 3rd November 2019. Ms. Han exhibited what she said were payment receipts from shops they visited, which show the date and time. There was also a second shopping trip the same afternoon, during which paper was also bought. Ms. Han exhibits receipts from both these trips.
- [23] Then, 'by around 5 November', according to Ms. Han, at least **two** versions of the DoT appear to have been created by Mr. Gao and Ms. Hu. One of the audio transcripts purports to record Ms. Hu telling Ms. Han that the DoT had been created in **2016**. That was some **three years after** Mr. Golden is alleged to have signed it (on 10th January 2013). In respect of the later version, it is not clear when exactly it was created. Ms. Han recounts that Mr. Gao told her 'by around 5 November 2019', that Ms. Hu had found paper 'the other night' and that she had 'then typed up a new front page on the computer and printed the contents on this piece of paper she had found'. We are not told when 'the other night' was, but if it is true, it can only have been before 'around 5 November 2019'. We will return to this. Ms. Han explained that Mr. Gao had said that the first version

contained a 'fatal issue' in that passport numbers did not match. Ms. Han says that the new version was then placed in Guojia's safe.

- [24] Subsequently, but in advance of inspection of documents (including the DoT and SPA) on 28th July 2020, Ms. Hu and Ms. Han exposed the pages in the sun – sun-bathed them, to use their expression - for considerable lengths of time, to make the tone of the new paper match that of the older paper as closely as possible.
- [25] Even after 28th July 2020, the efforts to disguise the forgeries continued, with an eye on legal proceedings in the PRC.
- [26] Ms. Hu and Ms. Han went so far as to weigh pages of paper to test their match. They paid minute attention to ensure features such as staple holes and signatures were in alignment and agonized at great length over other potentially ascertainable differences, such as the use of different ink.
- [27] During their ministrations, Ms. Han recorded Ms. Hu and Mr. Gao propose cover stories to explain anomalies should they be spotted. At least twice (on 22nd April 2020), in the context of, and apparently in the process of, forging documents, Ms. Hu spoke of herself as 'a master of forgery'.
- [28] Ms. Han gave evidence that in addition to the DoT, Mr. Gao and Ms. Hu similarly falsified and/or forged other documents, including the SPA, as well as a loan agreement and a mortgage agreement intended to strip Jiacheng, and therefore Mr. Golden's shareholding in Sundale, of any value.
- [29] Ms. Han supports her narrative by exhibiting photographs of the documents she refers to, including, so the photographs appear to show, the DoT and SPA being 'sun-bathed'. She also exhibits social media communications. Ms. Han exhibits transcripts of voice recordings she secretly made as she was apparently helping and discussing with Ms. Hu and Mr. Gao the fabrication of forgeries and/or falsified documents. Ms. Han claims that she made these recordings because she feared that she might become the target of blackmail attempts by Ms. Hu and/or Mr. Gao and she knew such forgery activities to be wrong.

- [30] Ms. Han also gives evidence that it had been Mr. Gao who had caused a fake high school certificate to be made for Mr. Golden, and moreover, that it had been Mr. Gao who had procured a witness to make a statement falsely saying that that witness had been paid and instructed by Mr. Golden to make that false certificate.
- [31] Ms. Han also gives evidence that Mr. Gao had arranged for a forged construction design to be created, in exchange for an RMB10,000 payment, to deceive this Court that the illegal structure which Mr. Golden had caused to be demolished had in fact been legal.
- [32] Ms. Han further gave evidence that Mr. Gao had written his first Will in December 2019, but backdated it to 19th April 2013 when he was operated on in Cleveland U.S.A. That Will was purportedly witnessed only by Ms. Hu and provided that Mr. Gao wanted to leave all his assets to Ms. Hu, including but not limited to the shares of Jiacheng and another company called Ledao.
- [33] The Claimant, Ms. Hu, contends that the transcripts and documents exhibited by Ms. Han were obtained by an act of impropriety, and possibly criminally under the law of the PRC. The Claimant characterizes herself as the 'victim of a particularly unpleasant sting operation involving a gross invasion of her personal privacy' and a 'sordid intrusion'. She says that Ms. Han 'ensnared' the discussions she recorded by 'inserting herself deep into [Ms. Hu's] private family life'. The Claimant submits that this was the 'clearest possible breach of confidence'.
- [34] The Claimant urges that it 'is quite inconceivable that [Mr. Golden] did not set this up'. She urges that Mr. Golden and his side have remained studiously silent how they came by the recordings. Moreover, the Claimant's Learned Counsel observed that Ms. Han appears from the transcripts to have been a willing assistant in whatever it was Ms. Hu and Mr. Gao were doing and indeed to have encouraged them in it. It is also a feature of the transcripts that Ms. Han would conduct her part in conversations so that what she provided a running commentary of the steps that were being taken and with some details from which it could be ascertained which document or documents were being handled. Such specificity as to what the persons speaking were doing is to be gleaned predominantly from what Ms. Han was saying. This must, as I think it is clear, have been

calculated on the part of Ms. Han, who knew, somehow, what she ought to record, in terms of knowing when to start and stop the recordings.

- [35] Whilst the Claimant does not dispute that the recordings indeed have her and Mr. Gao's voices on them, and Ms. Han's, the Claimant asserts that it 'is never clear exactly what they are actually talking about'. In relation to the DoT, the Claimant suggests references in the various conversations to a 'trust' and trust related documents are insufficient to identify these with the DoT.
- [36] The Claimant observes that her side have not been able to inspect the recording device or devices (noting that Mr. Golden's legal practitioners have referred to such devices in the plural) and moreover, that the recordings and transcripts are not complete. Not only have large parts of the transcripts been redacted by Mr. Golden's legal practitioners and/or lawyers pursuant to a privilege review, but the recordings themselves appear to be of parts of conversations, and they are replete with clicks and gaps which suggest selective recording and/or editing. The Claimant suggests that such editing may have been done by Mr. Golden himself to make the recordings fit his narrative. The recordings, and their translated transcripts, are thus far from a reliable or properly informative record says the Claimant. By the time of the hearing in respect of this Application, discussions were afoot between the parties for an expert to inspect the audio files for authenticity and tampering, if any, as alleged by the Claimant.
- [37] The Claimant has filed evidence in the form of an Eighth Affidavit of Mr. Ribeiro, a Hong Kong Solicitor and Notary Public, based in Hong Kong. Mr. Ribeiro does not claim to be a Legal Practitioner admitted to practice in this jurisdiction. Mr. Ribeiro states that Ms. Hu denies forgery or fraud but he does not explain what it was that Ms. Hu had been recorded as otherwise doing. He states that Ms. Hu 'unequivocally agrees to subject the document [the DoT] to [forensic] examination once the issues are fully pleaded'. This comes across as transparent and cooperative, but it could also be interpreted as Ms. Hu both playing for time and displaying confidence in her own forgery skills (or bluffing about them) that they would evade detection.
- [38] Mr. Ribeiro takes issue with what he says are inaccurate and misleading translations of the transcripts, but he gives just two examples of where his side take issue with the translations, and

those two instances come nowhere close to calling into doubt the general record of forgery, in particular as it may relate to the DoT and the SPA. Mr. Ribeiro asserts that Ms. Hu 'is not prepared to engage in commentary on evidence obtained by way of messaging or audio recording on the basis of in-house transcripts and translations prepared by Harneys, or snapshots of messages taken without context'. This again plays for time.

[39] The Fourth Defendant's side remarked that Ms. Hu had refrained from giving evidence herself in response to the application. Ms. Hu decided that she should make good this omission and filed a Third Witness Statement (but not an Affidavit or an Affirmation – in other words, not evidence under oath). She claimed that this was a 'holding' witness statement, and that she had adopted the form of a witness statement 'due to time pressures of the Court time-table'. In this witness statement she said very little about the content of the voice recordings. She acknowledged that Ms. Han had recorded her and Mr. Gao. Ms. Hu claimed that 'in some places' (she does not say how many or where) comments in the transcripts had been incorrectly attributed to her. She baldly asserted that the allegations of forgery and fraud were 'baseless' and 'cannot be remotely supported by the transcripts or recordings so far as we have heard them and are not spelt out by the transcripts or recordings'. She also asserted that 'they do not confirm Mr. Golden's suggestion that I made material alterations to any original documents'. Mindful, doubtless that these assertions begged the question as to how she supports such conclusions, she said that she had not completed her review of the materials and that 'I do not wish to give the court a partial and incomplete explanation which can then be picked apart by Mr. Golden and his lawyers. I need to listen to all audio files and review all transcripts made available to me', which would be a lengthy task.

[40] The Claimant followed this up with a Second Witness Statement of Mr. Ribeiro (again, not evidence under oath). Mr. Ribeiro there stated that Ms. Hu and Mr. Gao had visited and met him in Hong Kong on 4th November 2019. At this meeting, he says, they showed him some documents, including the DoT and the SPA. Mr. Ribeiro says that it was from these documents that the DoT and SPA exhibited to the First Affirmation of Ms. Hu dated 13th November 2019 had been prepared. Mr. Ribeiro recounts that Ms. Hu and Mr. Gao had visited a medical practitioner, a Dr. Chen, **on the morning of 3rd November 2019** and spoken to Dr. Chen about their legal problems

relating to Mr. Golden and Sunville. This is of course hearsay evidence. Mr. Ribeiro narrates that Dr. Chen was a client of his, and that Dr. Chen had recommended that Mr. Gao and Ms. Hu approach him about it, since Dr. Chen reportedly told Mr. Ribeiro that Dr. Chen had been shown documents by Ms. Hu and Mr. Gao which were stated to be governed by Hong Kong law. The implication that Ms. Hu, Mr. Gao and Mr. Ribeiro clearly intend this Court to take from this is that the 'Trust Documents', including the DoT and SPA, already existed in the form ultimately exhibited to the First Affirmation of Ms. Hu before Mr. Gao, Ms. Han and Mr. Zhao Lei went out to buy different types and brands of paper in the afternoon of 3rd November 2019. However, it is impossible to identify from this (largely hearsay) narrative what documents (if any) Mr. Gao and Ms. Hu showed Dr. Chen and what terms such documents contained.

[41] Mr. Ribeiro says that after his meeting with Ms. Hu and Mr. Gao on 4th November 2019, they only arrived back in Shanghai very late in the night of 5th November 2019. He exhibits boarding passes showing Mr. Gao departing Beijing for Hong Kong in the morning of 4th November 2019 and Ms. Hu returning on 5th November 2019.

[42] The intended implication of this narrative is to show that the DoT and SPA exhibited to Ms. Hu's First Affirmation were already in Mr. Ribeiro's possession (on 4th November 2019) in Hong Kong before the alleged forgery took place in Shanghai 'by around 5th November 2019'. This is clear from the heading, in bold, to that section of Mr. Ribeiro's witness statement. This reads: '**The Allegation that the first page of the DoT was changed on 5 November 2019 cannot be true**'.

[43] However, there was in fact no such allegation. The Claimant, through Mr. Ribeiro, sets up and attacks a man of straw. It is apparent from both Mr. Ribeiro's and Ms. Han's narratives that **nobody has said that the text of the first page of the DoT was changed on 5 November 2019 or after Ms. Hu and Mr. Gao returned from Hong Kong**. Mr. Gao is reported by Ms. Han to have said 'by around 5th November 2019' that its 'new' first page had been created by Ms. Hu 'the other night', i.e. on an earlier day. On Mr. Ribeiro's and Ms. Han's narratives, taken together, there was a clear window of opportunity for Ms. Hu to have typed the 'new' first page on a computer and printed it off in the afternoon and evening of 3rd November 2019 – **immediately before** her and Mr. Gao's trip to Hong Kong, or even before 3rd November 2019. Mr. Ribeiro explained that he did not

take and keep an original of the documents during his meeting with Mr. Gao and Ms. Hu on 4th November 2019. It cannot thus be excluded that he was shown and took copies of documents in which the pages were of a slightly different tone or texture, with the ‘aging’ of the source document being attempted after Mr. Gao’s and Ms. Hu’s return from Hong Kong. Thus Mr. Ribeiro’s version of events in respect of those matters of which he had personal and direct knowledge may have been perfectly true. It however fails to exclude the possibility that the ‘new’ – i.e. false – first page of the DoT had been created before Mr. Ribeiro met Mr. Gao and Ms. Hu.

[44] Mr. Ribeiro also suggests that Ms. Han’s story must also be untrue, because Guojia did not have a safe on 5th November 2019. Mr. Ribeiro asserts, again on the basis of hearsay, that Guojia only acquired a safe on 8th November 2019. His information in this regard is stated by him to derive from a document headed ‘witness statement’ of Mr. Zhao Lei (Mr. Gao’s nephew) dated 23rd November 2020, in which Mr. Zhao purports to say that this safe only started being used on 9th November 2019.

[45] This is not necessarily inconsistent with Ms. Han’s narrative. She stated that this occurred ‘around 5th November 2019’. She may simply have been mistaken by a few days.

[46] In this ‘witness statement’ Mr. Zhao Lei purportedly stated that Ms. Han behaved abnormally, such as barking like a dog during conferences and lying on the floor during work. Mr. Zhao purportedly said that she suffers from a major depressive disorder and has a severe suicidal tendency, such that she needs to be accompanied at all times. Ms. Han, he purportedly says, was dismissed in January 2019, but, following tearful entreaties from Ms. Han’s parents, Mr. Gao, being of a ‘kind heart’, re-engaged her.

[47] Mr. Zhao purportedly says further that Ms. Han’s version of events concerning the forgery of the DoT was ‘totally fabricated’. Mr. Zhao purportedly confirms that he, Mr. Gao and Ms. Han did go shopping for paper on 3rd November 2019, but that was because Mr. Gao had just bought a printer for his children to print out homework but that it had a paper jam problem. Mr. Zhao purportedly said it was Ms. Han’s idea for different weights and tones to be bought. This explanation does not, though, address the somewhat curious heavy manning of the paper shopping trips. It begs the

question why a paper buying expedition should be conducted by Mr. Gao, Ms. Han and Mr. Zhao Lei, and then, secondly, by these persons and a driver, on the eve of an important and clearly urgent trip for Mr. Gao and Ms. Hu to consult with Mr. Ribeiro in Hong Kong, if all they were doing was to find some paper that would not jam for Mr. Gao's children's homework.

- [48] Mr. Zhao purportedly accuses Ms. Han of being a 'commercial spy' and that she has 'made many appalling stories through seducing, editing and tampering with recordings'. He does not say how he knows, or why he thinks, that Ms. Han has been 'editing and tampering with recordings'. In other words, Mr. Zhao purportedly suggests that Ms. Han has been splicing together a tissue of lies.
- [49] Mr. Golden filed an Eighth Witness Statement in response to this evidence of Mr. Ribeiro and Mr. Zhao's 'witness statement'. Mr. Golden does not specifically contradict Mr. Ribeiro's account that Mr. Ribeiro had received the DoT and SPA on 4th November 2019. Mr. Golden casts doubt on it by simply saying that '[t]here is significant evidence before the Court of the Claimant's fabrication of documents and deceptive conduct such that it is clear she will stop at nothing to get what she wants and for that reason I cannot take any evidence she files as accurate'.
- [50] Mr. Golden says considerably more concerning Mr. Zhao. Mr. Golden says that he had been informed by someone who he considers to be a reliable source, but whose identity would remain undisclosed due to fear of reprisals from Mr. Gao, that Mr. Gao forced Mr. Zhao to sign his statement, which had been prepared for him and was not of his own making, under threats from Mr. Gao that he would sue Mr. Zhao's mother to deprive her of the house he (Mr. Gao) had given her. Mr. Golden observes that Mr. Zhao had left Shanghai in mid-March 2020, and so was not present at all when Ms. Han made her recordings from April 2020 onwards.
- [51] There is some further evidence concerning conduct of Mr. Gao and Ms. Hu. It comes from a director of Borrelli Walsh Asia Pacific (Beijing) Co., Limited ('Borrelli Walsh'). This is Mr. Vincent Lee, who assists the Court appointed Joint Receivers over the business and assets of Sundale and Best Land, Mr. Meade Malone and Mr. SONG Kuan, of Borrelli Walsh. Mr. Lee states that on 13th August 2020 Mr. Gao and Ms. Hu met him in Shanghai and produced a document which purported

to be a loan agreement between Jiacheng and Ledao at a certain high rate of interest. The document did not carry a paging seal. Mr. Lee says that Ms. Hu and Mr. Gao asked him to use Jiachang's chop to put a paging seal on the document, claiming to have forgotten to put a paging seal on the document when it was signed in 2016. Mr. Gao reportedly suggested that Mr. Lee could disappear for ten minutes while Mr. Gao and Ms. Hu could affix the seal. Mr. Gao reportedly hinted that Mr. Lee would be 'rewarded' and put a brown envelope into Mr. Lee's bag. Mr. Lee says he grabbed his bag and refused the envelope. Mr. Lee says that Ms. Hu requested that Mr. Lee should not mention this event to Mr. SONG Kuan. Mr. Lee says he subsequently investigated the existence of this particular document in the books and records of Jiacheng but could not find any such document (suggesting that it could be a fabrication by Mr. Gao and Ms. Hu).

3. Ms. Hu's submissions

[52] In this part, I summarize the Claimants' submissions. I express no views in this part. The Court's opinion is expressed in the **DISCUSSION** section below.

[53] Ms. Hu submits that the transcripts (and the original recordings) and non-transcript documents are inadmissible for two separate and alternative reasons:

- (1) They are privileged, as is common ground; and the Fourth Defendant cannot make out a case for the application of the iniquity exception to privilege, for which he contends and on which he must succeed;
- (2) They were obtained by an act of impropriety (and possibly criminality under PRC law) and are inadmissible under section 125 of the BVI **Evidence Act, 2006**¹ ('**Evidence Act**') unless the court, performing the balancing act under that section, decides to admit them. In this case the scales come down firmly in favour of exclusion she urges.

3.1 The iniquity exception: the law

[54] The Claimant submits that it is common ground that the unredacted transcripts are either privileged or irrelevant. The redactions are of privileged material, and so the balance is either irrelevant

¹ No. 15 of 2006.

material (which is clearly visible) or relevant material which is privileged but to which an established exception to privilege applies. The only such exception is the iniquity, or crime-fraud, exception.

- [55] On a proper analysis, says the Claimant, where it is shown to apply, the iniquity exception works by disallowing the party seeking to claim privilege for a communication from doing so, such that privilege never attaches in the first place: see the English Court of Appeal decision in **Addlesee v Dentons Europe Ilp**.² The privilege in this case is litigation privilege, in communications between a party and a non-party who is not a legal adviser. The facts here are unusual, submits the Claimant, but the principles are clear enough.
- [56] The most authoritative modern guidance on the iniquity exception is that of the English Court of Appeal in **Kuwait Airways Corp v Iraqi Airways Co (No 6)**.³ The court reviewed the authorities back to **Cox v Railton**⁴ and rejected the argument that the fraud exception did not apply where what was in issue was litigation privilege. Longmore LJ said that the fraud exception can apply where there is a claim to litigation privilege as much as where there is a claim to legal advice privilege. However, where the issues, on which the court must be satisfied that there is *prima facie* case of fraud, overlap with the issues at trial, if an interlocutory ruling has the effect of overriding privilege there may be a greater risk of prejudice from disclosure than in most cases, and so a ‘very strong *prima facie* case of fraud’ will need to be shown.⁵ That, says the Claimant, is the current state of the law.
- [57] Thus, urges the Claimant, particular care must be taken where the issues of fraud on which the application for disclosure is made cannot be regarded as discrete issues, and, contends the Claimant ‘the case of fraud must be ‘very strong’’. Where, by contrast, the issue of fraud is not one of the issues in the action, a *prima facie* case of fraud may be enough: see **Kuwait Airways Corp v Iraqi Airways Co (No 6)** at paragraph [42] and also **Dadourian v Simms**,⁶ recognizing the stark consequences of a finding of fraud in the course of the action which would deprive the defendant of

² [2019] 3 WLR 1255, at paragraphs [27]-[31] (Lewison LJ).

³ [2005] 1 WLR 2734.

⁴ (1884) 14 QBD 153.

⁵ *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 at paragraphs 36 to 38 and 42 (Longmore LJ (Ward LJ agreeing)).

⁶ [2008] EWHC 1784 (Ch) at paragraphs 136 and 137 (Patten J).

privilege for his legal advice in the action, and emphasizing the need for care before so holding but nevertheless holding that the test was satisfied.

- [58] The Claimant submits that in **MacPherson v Dennis Wise**⁷ Patten LJ, in refusing a renewed application for leave to appeal, said:⁸

“The balance between preserving the confidentiality of privileged communications and the risk of the Court reaching a wrong conclusion on the facts has been struck firmly in favour of the need to preserve confidentiality.”

- [59] The Claimant submits that a recent English first instance decision provides some illumination of what the standard of proof of ‘very strong prima facie case’ requires. In **Barrowfen Properties v Patel**⁹ it was held¹⁰ that

“...a very strong prima facie case requires me to be satisfied that the threshold is comfortably exceeded and that the case is one that falls at the very end of the continuous spectrum.”

- [60] Accordingly, says the Claimant, since the issue of fraud (forgery) is one of the issues in the action, in order to apply the iniquity exception so as to disqualify privilege from attaching to the audios and transcripts, the burden lies on the Fourth Defendant to establish a very strong prima facie case of fraud, not merely a prima facie case to be answered. The Court will, as the Claimant puts it, ‘need a very high degree of confidence that the iniquity is clearly made out on the present material. That is because of the once and for all nature of the decision.’

3.2 The iniquity exception: application to the facts

- [61] The Claimant urges that there is no case of fraud here that gets the Fourth Defendant anywhere near the high threshold of a very strong *prima facie* case. The Claimant contends that although the Claimant has not yet had a full opportunity to listen and digest all the audios, a difficult and very time-consuming task, she has trenchantly denied the fraud. Quite understandably, urges the

⁷ [2011] EWCA Civ 399.

⁸ (at [33] to [36]).

⁹ [2020] EWHC 2536.

¹⁰ (At paragraph [40] (Mr. Tom Leech, QC, sitting as a judge of the Chancery Division, having cited from *Vinelott J in Derby & Co Ltd v Weldon* (no 7) [1990] 1 WLR 1156 at 1173D-E).

Claimant, she does not wish to put in a partial and incomplete explanation without having undertaken a thorough review. That is all the more important now that a forensic expert is being engaged to examine the originals. The Claimant has explained that she has been getting the audios in 'drips and drabs' from 9th November 2020; there are some 50 hours of audio and over 1000 pages of transcript, and, as the date of the Claimant's skeleton argument on 8th December 2020, she had listened to 27 out of the 58 audio files thus far produced.

[62] The Claimant submits that the allegation of iniquity rests on the passages in the transcripts identified by Ms. Han plus some indistinct and not very revealing photographs. The court is being asked, she says, to take the most apparently incriminating passages identified there not only at face value but as undeniable evidence of the Claimant's fraud. The Claimant submits that the Fourth Defendant, through Harneys, does not accept that there could be any answer to the charge of fraud revealed by the transcripts: they speak for themselves. That is why they have claimed that there is no serious issue to be tried in the case and have threatened (but not brought) an application to strike the claim out as an abuse of process.

[63] In fact, says the Claimant, the transcripts do not speak for themselves, for these reasons:

- (1) There must at least be serious doubt on whether what the Court is looking at is a wholly reliable record of the conversations referred to by Ms. Han. It is plainly not wholly reliable.
- (2) Ms. Han, who is plainly being used as a tool of the Fourth Defendant in this litigation, has not provided any explanation for these matters; and nor has the Fourth Defendant.
- (3) Ms. Han is hardly a credible witness. She has breached her duties of fidelity and confidentiality to her employer and has acted dishonestly towards the Claimant by secretly recording her (and her children) in numerous family and domestic settings in a gross act of intrusion. She can only have done so at the behest of the Fourth Defendant. Since she was doing his bidding for some kind of reward, she would have a powerful motive to edit the conversations, or omit passages which do not suit the Fourth Defendant's case.

- (4) Indeed, since she gave the recordings to the Fourth Defendant himself before he handed them to Harneys, it is entirely possible that he himself edited them. He would have had the time to do so (these recordings are in many cases many months old) and certainly the motivation. Critically, there is no evidence that the audios that the Fourth Defendant received from Ms. Han (in whatever form that was, which is not known by the Claimant) is identical to what he then handed to Harneys. She has not actually confirmed that fact in her statement. She has not stated that she checked the transcripts against the audios she gave him, and she does not say that she kept a copy herself which would enable her to check. This is not speculation, says the Claimant – the multitude of gaps and non sequiturs in the conversations are too many and too glaring to resist explanation.
- (5) Critically, urges the Claimant, she offered an expert forensic examination of the originals of the 'Trust Documents' through Conyers on 21st August 2020, followed by an expedited timetable to trial. Harneys ignored that suggestion, and ignored a chaser. The Claimant urged that Conyers had made the suggestion because the Court had suggested it at the summary judgment hearing in July 2020. The Claimant contends that at the time Conyers suggested it (which was long before the Fourth Defendant made his discharge application in late October), the Fourth Defendant must have been deep into his audio scheme. The Claimant remarks that instead of going along with the orthodox way of proving a forgery, offered by the Claimant, he chose to pursue his scheme using Ms. Han. That, the Claimant says, is itself highly suspicious because although Mr. Golden would have no control over what an independent expert said about the 'Trust Documents', he would have complete control over the audios and recordings. The inference that these audios have been materially edited is irresistible says the Claimant.
- (6) Accordingly, says the Claimant, the Court cannot simply look at the apparently incriminating 'golden nuggets', as it were, in the transcripts and conclude that they are very strong *prima facie* evidence of fraud. Nor must the Court be swayed into thinking that, just because the Claimant has not yet provided an explanation, there is none to be had. Leaving aside the fact that she has not yet had the time or opportunity to review all the audios (and the need for forensic examination of the originals and devices), it is for the Fourth Defendant to demonstrate a very strong *prima facie* case to answer, not for the Claimant to demonstrate

that there is not. In that connection, says the Claimant's learned Counsel, the Court can also take into account 'the fact that there are passages in the redacted material which provide important context, and which are against the Fourth Defendant's interests and which support the existence of a pre-existing trust of the shares'. However, in order to meet the case against her, the Claimant says she would have to waive her privilege in the redacted material, because it provides important context, and offers support for her case of a long pre-existing trust.

- [64] Accordingly, the Claimant submits that 'the evidence does not meet the high standard of proof required for the iniquity exception'. If the Fourth Defendant wishes to prove that the 'Trust Documents', or any of them, are or is forged, then, she says, all he has to do is to submit them to an expert for forensic examination. For the Fourth Defendant to engage in these shenanigans instead and then ask the Court to trust that the audios are a true and reliable record on the basis of which the Court should proceed to discharge the injunction (and dismiss the action) smacks of something to hide, she urges. Put another way, the Claimant submits, 'does the Court feel confident, on no more evidence, to hold once and for all that the DoT (and possibly other documents, it is not clear which) were forged? The answer must be no'.

3.3 Section 125 of the Evidence Act 2006

- [65] The Claimant submits that in the alternative, the transcripts are all inadmissible wholesale by reason of section 125 of the **Evidence Act**. That section provides:

- "(1) Evidence that was obtained
 - (a) improperly or in contravention of a law, or
 - (b) in consequence of an impropriety,shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained. ...
- (3) For the purposes of subsection (1), the court shall take into account, among other things, the following matters:
 - (a) the probative value of the evidence;
 - (b) the importance of the evidence in the proceeding;
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
 - (d) the gravity of the impropriety or contravention;
 - (e) whether the impropriety or contravention was deliberate or reckless;

- (f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;
- (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.”

[66] The Claimant submits that the first question is whether the evidence of Ms. Han has been obtained improperly or in consequence of an impropriety. The answer to that must be yes. Ms. Han breached her employment duties to the Claimant and to Mr Gao (and to Guojia) and acted in gross breach of trust. The Fourth Defendant either set her up to do it, says the Claimant, or else knowingly took advantage of it. It cannot sensibly be argued, says the Claimant, that either Ms. Han or Mr. Golden have behaved properly or with propriety.

[67] The Claimant submits that that then requires the Court to refuse to admit the evidence unless it is satisfied that the balancing act identified brings the scales down in favour of admission. Again, that is a matter on which the Fourth Defendant must satisfy the Court. As Jack J said in **Tall Trade Ltd v Capital WW Investment Ltd**,¹¹ the court must first assess the ‘probative value’ and ‘importance of the evidence’ under section 125(3)(a) and (b); and then, having done so, it must weigh its conclusion against the other factors listed in section 125(3) and then reach a final value judgment under section 125(1). Here the balancing exercise is not a hard one, says the Claimant, and it comes down against admission.

[68] The Claimant submits that on the one hand:

- (1) The impropriety was on any view serious, and it was one in which Ms. Han, the evidence taker, was a willing participant, if not the instigator. Depending on the device used, it may have been a criminal offence in the PRC.
- (2) It was plainly deliberate.
- (3) The evidence (namely evidence of forgery of the ‘Trust Documents’) could easily be obtained from other sources, namely the forensic examination by an expert offered by the Claimant in all innocence of the audio recording scheme.

[69] On the other hand, the evidence is not of reliably probative value given

¹¹ BVIHCM2020/0025, 2020/0043, 2020/0095 and 2020/0157 (unreported, delivered 2nd November 2020), at [15] (Jack J (Ag.)).

- (1) the manifest defects, gaps and oddities in the transcripts;
- (2) the fact that other probative parts have been redacted on the grounds of privilege and cannot therefore be seen,
- (3) the fact that Ms. Han herself encouraged and participated in the activities said to be forgery, and
- (4) the numerous other matters which cast doubt on the Fourth Defendant's and Ms. Han's conduct in this affair. The Claimant says that it would be important evidence in certain parts if it had the requisite probative value, but it does not.

[70] In the end, says the Claimant, even if the Court considers that the shocking impropriety with which this evidence was entrapped is somehow evenly balanced with what the Fourth Defendant says it shows (which it is not), that is not enough. The balance must come down firmly in favour of admission. Here the scales should, urges the Claimant, on a proper exercise of the discretion, do no such thing.

4. The Fourth Defendant's submissions

[71] In this part, I summarize the Fourth Defendant's submissions. I express no views in this part. The Court's opinion is expressed in the **DISCUSSION** section below.

[72] The Fourth Defendant submits that it is clear from even the briefest reading of the transcripts, that the Claimant has been caught red-handed in a deliberate and calculated fraud and that she has used those documents, fraudulently altered and created, in an attempt to prove a false case in these proceedings and to gain an advantage in interlocutory applications made in these proceedings. Furthermore, she and Mr. Gao have used forged loan documents in the PRC proceedings brought against Jiacheng.

[73] The Fourth Defendant's learned Counsel appended to their skeleton argument a schedule summarizing in tabular form instances where the recording transcripts appear to refer to forgery, falsification or fraud. These are divided into two sections. The first part addresses such instances as evidenced by Ms. Han's First Affirmation in these proceedings. There are 27 such instances referred to in this part, allegedly occurring over a period of 16 days between 8th April 2020 and 13th

August 2020, inclusive. The second part addresses such instances as referred to by Ms. Han in evidence she has given in legal proceedings in the PRC. There are 24 such instances referred to in this part, allegedly occurring over a period of about 13 days between 28th July 2020 and around 20th August 2020, inclusive. The Fourth Defendant refers to this appendix as the 'Iniquity Schedules'.

[74] This case is accordingly one where the fraud or iniquity exception applies and insofar as there are claims that the transcripts or recordings might otherwise attract litigation privilege, such documents and recordings may be used by Mr. Golden as otherwise his rights and the administration of justice would be severely compromised. The Fourth Defendant urges that neither the laws of the BVI nor the PRC permit any confidence in an iniquity.

[75] It is important to observe, says the Fourth Defendant, that in the PRC where the recordings took place no concept of litigation privilege exists. Further the evidence is entitled to be disclosed under Chinese law, further to an opinion of AllBrights law firm exhibited to an Affidavit of one of Mr. Golden's BVI legal practitioner representatives. In addition, citizens are under a positive duty to report fraud to the courts where it arises in litigation. There is no exception for a lawyer to rely on any privilege. The PRC transcripts have already been filed in the PRC proceedings and insofar as confidence attached to them, as they are now part of those proceedings they can no longer be regarded as confidential. Accordingly, privilege can only apply, conceptually, to those transcripts which were exhibited to the BVI affirmation of the witness.

[76] The Claimant has apparently not been prepared to give any explanation of the serious matters that were contained in the evidence. She contented herself instead with general, bland and unconvincing denials.

4.1 Privilege and the iniquity/fraud exception

[77] While the Claimant has yet to identify the nature and scope of the privilege claimed, it is clear that the only privilege which might conceivably apply is litigation privilege.

[78] The fraud exception is well established. Thus, for example, the judgment of Lord Brougham in **Greenough v. Gaskell**:¹²

“The reason on which the rule [of privilege] is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to the administration of justice. Nor do such communications fall within the terms of the rule.”

[79] In **O’Rourke v. Darbishire**¹³ Lord Sumner stated:

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

[80] The policy behind the exemption is clear. That is to say that the courts will not, in an appropriate case, allow a person guilty of iniquitous conduct to hide behind privilege. To do so would be to allow court’s procedures to be used as an engine of fraud. The key question is what type of iniquity falls within the exemption?

[81] The following appears from the judgment of Rix J (as the then was) in **Dubai Aluminium v. Al Alawi and Others**:¹⁴

“In *Ventouris v. Mountain* [1991] 1 W.L.R. 607, 611 Bingham L.J. spoke of the rule of privilege existing “in the absence of iniquity.” It would seem that the concept of iniquity covers “crime or fraud” (*Reg. v. Cox* 14 Q.B.D. 152,165), the “criminal or unlawful” (*Bullivant v. Attorney - General for Victoria*) [1901] A.C. 196,201), and “all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances” (*Crescent Farm (Sidcup) Sports Limited v. Sterling Offices Limited* [1972] Ch. 553,565): see *Barclays Bank v. Eustace* [1995] 1 W.L.R. 1238, 1249nC-D, per Schiemann L.J. In the latter case the Court of Appeal held that the effecting of transactions at an undervalue for the purpose of prejudicing the interests of a creditor (see section 423 of the Insolvency Act 1986) could be regarded as “iniquity” in this context, and that it was sufficient for the loss of privilege that there existed “a strong prima facie case” of such a purpose. On the other hand, Schiemann L.J. also cited Goff L.J. in *Gamlen Chemical Co (U.K.) Ltd v. Rochem Ltd* [1983] R.P.C. unreported...where he said: “the

¹² (1833) 1 M.&K. 98.

¹³ [1920] A.C. 581 at 613.

¹⁴ [1999] 1964 at 1967.

court must in every case be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards, and bear in mind that legal professional privilege is a necessary thing and is not lightly to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends upon its own facts.”

[82] There is clearly a spectrum of what amounts to iniquity. What is clear, however, is that falsifying or fabricating evidence falls squarely within the exception. For example, the case just mentioned, **Dubai Aluminium** (where the evidence over which privilege was claimed was obtained by means of false representation and impersonation and which, in all likelihood, involved the commission of criminal offences); **The David Agmashenebeli**¹⁵ (evidence of trying to get an expert to change his opinion) and **Kuwait Airways Corporation v. Iraqi Airways Company (No. 6)**¹⁶ (perjury).

[83] A simple reading of evidence and of the transcripts or indeed of the Iniquity Schedules shows clearly that the Claimant and Mr. Gao were guilty of extensive fabricating of evidence and their steps are part of a wide-ranging conspiracy to defraud. There can be, despite the somewhat weak protestations of tampering and entrapment (there is evidence of neither and given the scope and detail of the transcripts the suggestions are risible), no doubt that the Claimant has been caught red-handed in her fraud. It follows that she is essentially guilty not only of fabrication of evidence but given how she has used that evidence in these and in other proceedings, of perjury and of perverting the course of justice. She is also, it follows, in contempt of court.

[84] Put bluntly, if the iniquity/fraud exception does not apply in this case it is difficult to imagine a case in which it would apply.

4.2 Interlocutory hearing

[85] The Court when considering the matter at an interlocutory stage must obviously determine it without holding a trial on the issue. The test which is often articulated is that ‘a strong prima facie case’ must be shown before ‘iniquity’ will release communications from the cloak of privilege (see

¹⁵ [2001] CLC 942.

¹⁶ [2005] EWCA Civ. 286.

Dadourian Group International Inc. v. Simms¹⁷ and BBGP Managing partner Limited v. Babcock & Brown Global Partners.¹⁸

[86] The Court of Appeal in England has previously stated that Courts should not qualify what sort of 'prima facie' case is required with such words as 'strong' (see **R v. Gibbons**¹⁹). What is clear is that it is not necessary to prove fraud on balance of probabilities (**Derby v. Weldon (No.7)**).²⁰ Further neither can the mere possibility of a subsequent cross-examination prevent the Court from reaching a decision that there is a *prima facie* case (**Dadourian**).

[87] In truth, says the Fourth Defendant, it matters little in this case whether what is required is a 'prima facie' case or a 'strong prima facie' case. The latter is clearly made out.

5. DISCUSSION

[88] First, I should mention certain aspects on which there is common ground.

[89] This is a case where the forgery and fraud complained of by the Fourth Defendant is not external to the matters that are the subject of these proceedings. Rather, one of the main issues in these proceedings is whether the alleged forgery or fraud took place. Thus, this matter falls within that category of cases where legal professional privilege (here litigation privilege) attaches to materials said to be evidence of that fraud. The Applicant seeks to have that privilege revoked under the so-called 'iniquity exception' if he can persuade the Court that the materials raise 'a strong *prima facie* case' of iniquity.

[90] Neither side submitted that I should not look at the materials adduced by Ms. Han. Indeed, as the Fourth Defendant has made it a primary part of his pleaded case that Ms. Hu fabricated key documents, including the DoT, and that he wishes to rely upon this material as evidence to support that case, I have to consider this material to ascertain whether or not it raises such a case. This

¹⁷ [2008] EWCH 1784 (Ch.) at [143].

¹⁸ [2011] Ch. 296 at [68] and [72].

¹⁹ [2004] EWCA Crim 311.

²⁰ [1990] 1 W.L.R. 1156, 1173.

applies both to application of the fraud or iniquity exception at common law as well as for the application of section 125 of the **Evidence Act**.

[91] What I cannot, and do not do, within the scope of this Application, is to make any findings of fact whether or not allegations of forgery or fraud are made out. For the purposes of this Application, the Court is concerned solely with admissibility. Mr. Ribeiro's evidence, on behalf of Ms. Hu, seeks to cast doubts upon the probative value of Ms. Han's materials. That is relevant to the application of section 125 of the **Evidence Act** and to an eventual summary judgment application. We need to keep clearly in mind that no such summary judgment application is presently before the Court on this occasion. The Court can consider what the material appears to show, but it must not go so far as to make substantive findings of fact deriving therefrom. In short, I cannot and should not say that I am satisfied that the alleged forgery and/or fraud took place.

[92] It is also common ground that litigation privilege on its face applies to the material. The Fourth Defendant raises an argument that some of the materials have already been placed before the courts of the PRC, where privilege does not apply, and thus that such materials are no longer confidential, but no close analysis was conducted before me to separate out what material has and has not already been placed in the public domain. Moreover, confidentiality is a different concept from privilege and should not be conflated with it. I shall approach the matter on the basis that I shall treat all the material obtained by the Fourth Defendant through Ms. Han's clandestine activities as covered by litigation privilege unless an exception applies.

[93] There is some debate whether Ms. Han acted improperly in secretly recording conversations. No argument was led before me that the photographs she took of apparently 'sun-bathing' documents (the DoT and the SPA) or the sharing of WeChat messages, or the secret recording of conversations should be treated as properly obtained in the manner they were. The Claimant suggested that Ms. Han's activities might also be a crime in the PRC. That submission clearly cannot help the Claimant, because there is no evidence before the Court that it was a crime. It is purely speculation. The Fourth Defendant, on the other hand, does not accept that Ms. Han acted improperly, claiming a positive duty upon a citizen of the PRC to report fraud to the courts. The way I would construe this is that if there is such a duty under PRC law, then that could operate to

excuse what would otherwise be an improper act. Absent evidence that PRC law treats it as entirely permissible for one private citizen to record another in secret, it would appear to me to apply standards of propriety that obtain in this jurisdiction. On that basis, absent a lawful exception or excuse, this would be treated as an improper invasion of privacy.

[94] The central issue before me is whether an exception applies to the litigation privilege otherwise attaching to this material.

[95] For reasons I will explain in more detail below, I am persuaded to accept the Fourth Defendant's submissions.

[96] The Claimant's position exhibited two main flaws:

- (1) it ignored that the legal test for application of the so-called 'iniquity exception' requires the Court to be satisfied that the material discloses a **prima facie** case of iniquity or fraud (albeit a strong one); and
- (2) the Claimant failed to address what the content of the material appears to show. The Claimant seeks to downplay this in general terms and to urge that the content is unclear, but without specifically referring to the material.

5.1 The fraud/iniquity exception

[97] Both sides refer to essentially the same authorities. The principles alluded to by the parties are set out above in outline and I will not repeat them in full here.

[98] However, the Claimant urges that I should adopt a more stringent test than is laid down in the authorities.

[99] The Claimant postulates that the Court should ask:

“[D]oes the Court feel confident, on no more evidence, to hold once and for all that the Declaration of Trust (and possibly other documents, it is not clear which) were forged? The answer must be no.”

[100] The Claimant arrives at this formulation by referring to the standard of proof the Fourth Defendant needs to satisfy before litigation privilege can be revoked. The Claimant urges that the standard of proof is a ‘very strong *prima facie* case’. So, indeed, the Claimant uses the words ‘*prima facie*’. But as we shall see, the test she submits that the Court should apply entails going well beyond that.

[101] She refers to a passage in **Barrowfen Properties v Patel**²¹ which I will repeat:²²

“...a very strong *prima facie* case requires me to be satisfied that the threshold is comfortably exceeded and that the case is one that falls at the very end of the continuous spectrum.”

[102] The Claimant however omits to quote the immediately preceding passage, which is instructive in relation to the standard of proof required. The whole passage reads:

“In deciding whether there is a “very strong *prima facie* case” of fraud or some other iniquity, I bear in mind the guidance of Master Clark in *Addlesee* and Vinelott J in *A Derby v Weldon (No 7)*. A *prima facie* case (however strong) does not require Barrowfen to satisfy me that Girish was guilty of fraud or other misconduct on the balance of probabilities. But a very strong *prima facie* case requires me to be satisfied that the threshold is comfortably exceeded and that the case is one that falls at the very end of the continuous spectrum.” (Emphasis added.)

[103] What Master Clark said was quoted at paragraph 36:

“The test [of a ‘strong *prima facie* case’] sets a lower threshold than balance of probabilities; and, of course, lower than the summary judgment test of showing that the defendant has no real prospect of success – no significance therefore can be attached to the fact (even if it could be inferred from the claimants not having made a summary judgment application) that the claimants’ case would not justify summary judgment.” (Emphasis added.)

[104] The guidance from **A Derby v Weldon (No 7)** was quoted at paragraph 37:

“There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength of the case that the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances but it is, I think, too restrictive to say that the plaintiff’s case must always be founded on an admission or supported by affidavit evidence or that the

²¹ [2020] EWHC 2536.

²² (At paragraph [40] (Mr. Tom Leech, QC, sitting as a judge of the Chancery Division, having cited from Vinelott J in *Derby & Co Ltd v Weldon (no 7)* [1990] 1 WLR 1156 at 1173D-E.)

court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the court has no more than affidavit evidence.” (Emphasis added.)

- [105] The requirement for a ‘very strong *prima facie* case’ (or simply ‘strong *prima facie* case’) is to be contrasted with the ‘*prima facie*’ case required to be shown where the issue of fraud is not one of the issues in the action. This is neatly expressed by Longmore LJ in the English Court of Appeal case of **Kuwait Airways Corporation v. Iraqi Airways Company (No. 6)**²³ at paragraph 42:

“I would therefore summarise the position thus:-

- (1) the fraud exception can apply where there is a claim to litigation privilege as much as where there is a claim to legal advice privilege;
- (2) nevertheless it can only be used in cases in which the issue of fraud is one of the issues in the action where there is a strong (I would myself use the words “very strong”) *prima facie* case of fraud as there was in Dubai Aluminium v Al-Alawi and there was not in Chandler v Church;
- (3) where the issue of fraud is not one of the issues in the action, a *prima facie* case of fraud may be enough as in Hallinan.”

- [106] The rationale for requiring a strong or very strong *prima facie* case to be shown was explained by Patten J in **Dadourian v Simms**²⁴ at paragraph 137:

There are obvious dangers in allowing a party to litigation who claims that the version of events being put forward by the other side is dishonest and untrue, to invite the Court to anticipate its judgment on that issue in advance of the trial and to require production of otherwise privileged material on the basis of an interlocutory finding about the strength of the opposing party's case. But in Dubai Aluminium Ltd v Al Alawi [1999] 1 WLR 1964 Rix J accepted that it might be appropriate to make such an order where there was a strong *prima facie* case of criminal or fraudulent conduct by a party in the preparation of its case. The correctness of this decision has been confirmed by the subsequent decision of the Court of Appeal in Kuwait Airways Corporation v Iraqi Airways Company (No 6) [2005] EWCA Civ 286 which has extended the principle to a case where the criminal purpose of the client and solicitor involved the commission of perjury.

- [107] The Claimant's formulation of the test is expressed in terms of ‘feel[ing] confident to hold once and for all that the Declaration of Trust (and possibly other documents, it is not clear which) were forged’ overstates the test. This is quite apart from requiring an unsatisfactory appeal to the

²³ [2005] EWCA Civ. 286.

²⁴ [2008] EWHC 1784 (Ch) at paragraphs 136 and 137(Patten J).

subjective and amorphous notion of ‘feelings’. To find that even a very strong *prima facie* case has been raised does not require the Court to ‘hold once and for all’ that the fraud or iniquity has been carried out. Such a ‘once and for all’ holding would require the Court to be satisfied that the balance of probabilities tips in favour of such a conclusive finding in the light of all material circumstances. All material circumstances are typically also not before the Court on an interlocutory application. The authorities expounded above are emphatic that that is too high a standard and is not the test. The authorities are clear that it is a *prima facie* case which must be found, even if that might be one that could eventually be disproved or fail at trial. Although the Claimant described the test as being whether there is ‘a very strong *prima facie* case’, in her application of the principles she skips over the ‘*prima facie*’ nature of the case. She speaks in terms of ‘the case of fraud must be ‘very strong’.

5.2 A very strong *prima facie* case

- [108] In the present case I am satisfied that the Fourth Defendant comfortably exceeds a threshold of a *prima facie* case that Ms. Hu and Mr. Gao forged or otherwise falsified documents, including the DoT and the SPA. The Fourth Defendant has shown that the material raises a very strong *prima facie* case of forgery and fraud, which are pernicious forms of dishonesty.
- [109] Upon a strict analysis of the English authorities referred to above, the purist view is that the *prima facie* case simply has to be ‘strong’, not necessarily ‘very strong’. The word ‘very’ does not add much to ‘strong’. It simply underlines that the Court must be slow to revoke legal professional privilege other than in very exceptional circumstances. No additional gloss or explanation is needed than the requirement that an application must show that he comfortably exceeds the threshold of a *prima facie* case.
- [110] The materials in issue here, on their face, can hardly be consistent with anything other than forgery and fraud, and that on a substantial scale and over an extensive period of time. The Claimant does not proffer an alternative explanation. Indeed, her learned Counsel refrained from addressing the contents of the materials other than with the most sweeping generalizations. This silence on

the part of her Counsel is remarkable. The Claimant's denial, however 'trenchant' it is said to be, is bare.

- [111] The materials, again on their face, considered sensibly, refer with considerable clarity to forgery and/or falsification of the DoT and the SPA, amongst other identifiable documents. The materials show great efforts to forge documents, and the DoT in particular, to a high standard of perfection. What is more, much of the apparent efforts were ostensibly geared towards disguising the forgery. The materials do not show mere 'golden nuggets' from which inferences of forgery or fraud could be drawn, but rather they show a whole fraudulent scheme, with real-time commentary, running for months. That is not to say that there might be some alternative explanation, but the Claimant does not proffer one, at least yet.
- [112] The importance to the Claimant's case of the DoT in particular is primordial. If it is that she seeks to rely upon a mendacious forged document that she created, as the materials appear to show, then this would be a premeditated fraud upon the Court, including perjury, as well as fraud against the Fourth Defendant. Thus, these circumstances are very exceptional. The apparent forgery and fraud raised by these materials are egregious in the extreme.
- [113] Ms. Hu and Mr. Gao may complain that their trust, confidence and privacy have been betrayed by Ms. Han, but this amounts to a most unattractive argument that their privacy should be treated as so inviolable that it can be used as a cloak behind which they can concoct and execute frauds upon the Court and others. The iniquity exception itself is proof that such an argument is incorrect. If this were a case where the material disclosed by Ms. Han as a result of her improper conduct revealed conduct by Ms. Hu and/or Mr. Gao which could be open to differing interpretations, some of which might fall short of iniquity, or if the content of itself did not show iniquity but required much context to be added from external evidentiary sources or oral evidence, then disapproval of the impropriety of Ms. Han could restrain the Court from treating the material as excepted from litigation privilege. But that is not the case here. Ms. Han's impropriety is serious, but the apparent forgery and fraud ostensibly perpetrated by Ms. Hu and Mr. Gao is even more serious, because, unlike Ms. Han's evidence, it threatens the very administration of justice itself, and, if not exposed, could be immensely prejudicial in financial terms to the Fourth Defendant.

[114] That said, the cases referred to above in relation to the application of the iniquity exception do not treat the conduct of the person unearthing the evidence of iniquity as a consideration, or at least not a weighty consideration, in determining whether legal professional privilege should be revoked. The focus of the inquiry is directed towards whether the evidence in question raises a strong or very strong *prima facie* case of iniquity. I have here dealt with Ms. Han's conduct for good measure, in case a point should be taken that I erroneously omitted to take it into account in the context of the iniquity exception.

[115] The Claimant seeks to invoke the fact that significant parts of the recording transcripts have been redacted. Her learned Counsel goes so far as to say that the redacted parts contain materials which contradict the alleged case of forgery and fraud, but he can, of course, not be heard to say that. Obviously, I cannot see what the redacted parts say, which are not available to me. Ignoring that overreaching submission, the Claimant submits that the existence of the redacted parts indicates that the unredacted parts reveal only a part of the overall picture.

[116] The Claimant also submits that breaks in the recordings, clicks, and recordings of partial conversations compel a conclusion that the recordings are not an authentic record but have been edited and tampered with. They urge that, even before the recordings have been inspected by an expert. This is not a conclusion the Court can reach now as there may well be an innocent explanation for breaks, clicks and partially recorded conversations.

[117] These are matters which might affect the assessment of the probative value of the materials at trial. As those materials stand, however, they appear to show:

- (1) a clear case of forgery and fraud by Ms. Hu and Mr. Gao;
- (2) with a view to deceiving this Court in these proceedings; and
- (3) with very considerable probability in relation to the DoT and the SPA.

[118] There is a *prima facie* case of forgery and fraud here and it is very strong. The questions the Claimant raises in an effort to cast doubt upon the reliability of the material are no more than that at this point – questions. There is no cogent competing explanation put forward by her. Evidence led by her in an effort to contradict peripheral aspects, such as dates referred to by Ms. Han and her

alleged unreliability, do not address the heart of the allegations, which appear to speak from the materials themselves. I have also seen that Mr. Ribeiro's evidence which sets out to show that the DoT could not have been forged on 5th November 2019 is misconceived.

- [119] I am satisfied that it is appropriate to treat the unredacted materials in issue in this Application as not covered by litigation privilege, as they fall within the iniquity exception.

5.3 Section 125 of the Evidence Act 2006.

- [120] Section 125 of the **Evidence Act** provides a statutory code. Its scheme, by subsection (1), is to render inadmissible evidence obtained through improper conduct or in contravention of a law, unless, on balance, the 'desirability' of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which it was obtained. Subsection (3) sets out an inexhaustive list of matters the Court should take into account in conducting this balancing exercise. The Claimant submits that the balance must come down firmly in favour of admission, but without reference to authority or statute or any particular reason. I do not see any such weighting built into section 125. It is a non-existent gloss that would unnecessarily complicate and fetter the balancing exercise. It is another example of the Claimant overstating the legal position in an attempt to stretch beyond his reach the threshold the Fourth Defendant has to cross.

- [121] In the present case it is uncontroversial that the material was made available by Ms. Han at least in consequence of an impropriety. There is no evidence that Ms. Han committed any crime.

- [122] The question in issue is whether or not the balance of 'desirability' tips in favour of admission.

- [123] The Claimant seeks to impute impropriety to Mr. Golden, who, unlike Ms. Han, is a party to this matter. Despite the Claimant's urging and the inferences she seeks to tease out from the circumstances, there simply is no evidence that Ms. Han was lying in saying that she began recording conversations with a view to protecting herself from possible recriminations or blackmail from Ms. Hu and/or Mr. Gao. Whilst inferences can be drawn that it is possible and perhaps even

likely that Mr. Golden was behind Ms. Han's recording plan, or part of it, there is no direct evidence of this and it would risk doing an injustice for me to make any findings in this regard.

[124] The first matter to be considered is the probative value of the evidence obtained through Ms. Han's impropriety. The Claimant says that it is not 'reliably probative', citing circumstantial reasons which (as I have mentioned in the part addressing the iniquity exception) raise questions about the reliability of the materials. The Claimant skirts round the content that the materials appear to show. As I have mentioned in the earlier part, the Claimant only engaged with the content in a most general way, to portray it as unclear. This is a gaping omission in the Claimant's case on the Application. The content of the material, viewed sensibly, amounts to a very serious *prima facie* case, at least, of forgery and fraud. The Claimant has proffered no sensible answer to that central and substantive point. It is no answer, as the Claimant has suggested in oral submissions, that what the material might prove would only be proven by the person creating the record, i.e. Ms. Han herself. The burden would be on the Claimant to show that the materials do not in fact show and say what the Fourth Defendant alleges, because, as they stand, they largely speak for themselves irrespective of who created them. Certainly, there may be questions about the materials going to their probative value that reasonably require answers, but there is no requirement under section 125 of the **Evidence Act** that the evidence must be definitive. So, I am satisfied that the materials appear to have considerable probative value.

[125] The second matter concerns the importance of the evidence in the proceeding. The materials appear to be direct evidence of forgery and fraud collected in their commission. The existence or otherwise of the forgery and fraud are core issues in the proceedings. This evidence is clearly important. The Claimant urges that it is not necessary because the allegations of forgery can, and more conventionally should, be investigated by independent forensic experts. That submission however overlooks that the Claimant herself appears to have been recorded vaunting her own skills as a master of forgery, as well as being extremely pleased with the precision of her own forgery efforts. This is a transparent attempt by the Claimant to secure for herself an unfair litigation advantage. It is natural that she would prefer the matter to be tested by a forensic expert – she would stand a fighting chance of the forgery remaining undetected or for an 'inconclusive' result to be pronounced. It is likely to be much harder for Ms. Hu and Mr. Gao to extricate

themselves from the cold hard light apparently shone upon their works, *in flagrante delicto*, by this direct evidence. The evidence is important because it is direct, in relation to core issues, and is on its face damning.

[126] The third matter concerns the nature of the subject-matter of the proceeding. The Fourth Defendant alleges that the Claimant has fraudulently created documents to deprive him of the beneficial interest in a multi-million dollar real estate development. The Fourth Defendant would suffer huge financial prejudice as a result. The Claimant denies this and asserts that the Fourth Defendant holds the legal ownership on trust for her, such that it is she would suffer the huge financial prejudice if her rights are not vindicated.

[127] The third matter needs to be weighed in the balance with the fourth matter, which is the gravity of Ms. Han's impropriety. The Claimant says that on any view it was serious, and it was one in which Ms. Han, the evidence taker, was a willing participant, if not the instigator. That is right, but, as I have explained in the previous part, the apparent fraud, if made out at trial, is even more serious, both in terms of an apparent direct attempt to commit a fraud upon the Court, thereby undermining the administration of justice, and a fraud upon other persons to their potentially very great financial detriment. In contrast, there is no evidence that Ms. Han has caused Ms. Hu and Mr. Gao any or any significant financial prejudice by betraying their privacy. There is no evidence that Ms. Han deprived them of anything more than the intangible principle of their privacy, in circumstances where they appear to have abused such privacy to further a grossly fraudulent scheme.

[128] The fifth consideration is whether the impropriety was deliberate or reckless. Ms. Han's impropriety was clearly deliberate. In my view the gravity of the apparent fraud perpetrated by Ms. Hu and Mr. Gao, should it be made out at trial, outweighs this factor.

[129] The sixth matter concerns whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention. I am not aware of any significant factors under this head. The Claimant does not say that any proceedings against Ms. Han, or otherwise to exclude the material from consideration, are being taken or planned. Ms. Han has disclosed similar evidence for use in proceedings in the PRC. It might be said that refusing

admission of the material would be the only way of punishing the impropriety of the manner in which it was obtained, but that would be punishing the Fourth Defendant for something there is no direct evidence that he has done. Moreover, the reality of the circumstances of this case is that refusal to admit the material in order to signal disapproval of the means by which it was obtained would be an instance of intolerantly clamping down upon a lesser form of wrongdoing whilst liberally permitting a far more egregious form of conduct (for which there is a very strong *prima facie* case, although it remains to be proven) to remain unchecked, save in so far as a forensic examiner should have the ability to spot the forgeries and be able to show on a balance of probabilities that the forgery took place. That would send out a perverse signal that fraudsters are to have a fair chance of evading detection, such that the more competent, and hence more malicious, a fraudster is, the more chance he will be accorded of prevailing with his fraud. That cannot be right and is not the law.

[130] The seventh and last listed matter concerns the difficulty, if any, of obtaining the evidence without impropriety. As I have mentioned above, forensic examination of the allegedly forged documents may well not detect the fraud that Ms. Hu is recorded to have meticulously carried out. Such an examination would pit the skills of the forensic examiner against the skills of the forger. A true result does not necessarily follow. Instead, Ms. Han's material, on its face, is reasonably clear evidence suggesting the alleged forgery and fraud. There would be a significant risk of a grave injustice or of a serious miscarriage of justice if it were to be excluded.

[131] I do not understand section 125 of the **Evidence Act** to lay down any requirement that it would be 'impossible' to prove the fraud in any other way. The factors listed in subsection (3) are not expressed in terms of absolute requirements. The list of factors is also open ended. 'Difficulty' does not equate to 'impossibility'. 'Desirability' is ultimately a value judgment which, upon the scheme of the section, requires various factors to be balanced, with the ultimate goal of serving the interests of justice. Such a value judgment is not a mathematical or computational binary exercise in which a result emerges after strictly defined boxes are ticked.

[132] I have had regard to the manner in which this Court applied section 125 of the **Evidence Act** in **Tall Trade Ltd v Capital WW Investment Ltd**.²⁵ In each case the balance of 'desirability' turns upon its own facts, thus I form no views whether the Court's balancing exercise was conducted appropriately in that case. To the extent that that authority could be taken as reading section 125 of the **Evidence Act** as permitting the admission of material obtained by improper means only as a last resort, I disagree with such a view.

[133] I am therefore persuaded that the desirability of admitting the material considerably outweighs the desirability of excluding it by reason of the improper manner in which it was obtained.

6. DISPOSITION

[134] The Fourth Defendant will therefore be permitted to rely upon that material. He will also have his costs of the admissibility issue.

[135] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar

²⁵ BVIHCM2020/0025, 2020/0043, 2020/0095 and 2020/0157 (unreported, delivered 2nd November 2020), at [15] (Jack J (Ag.)).

