

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2012/026

(On appeal from the Commercial Division)

BETWEEN:

[1] SHEIKH MOHAMED ALI M ALHAMRANI
[2] SHEIKH SIRAJ ALI M ALHAMRANI
[3] SHEIKH KHALID ALI M ALHAMRANI
[4] SHEIKH ABDULAZIZ ALI M ALHAMRANI
[5] SHEIKH AHMED ALI M ALHAMRANI
[6] SHEIKH FAHAD ALI M ALHAMRANI

Appellants

and

SHEIKH ABDULLAH ALI ALHAMRANI

Respondent

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances by written submissions:

Mr. Ian Mann for the Appellants

Mr. Jack Husbands for the Respondent

2012: September 10.

Civil appeal – Interlocutory appeal – Order for discovery – Documents passing between party and legal adviser – Whether documents privileged – Case management discretion of trial judge – Basis on which an appellate court will interfere

Saudi Arabian brothers are disputing the ownership of previously jointly owned assets. One of these assets is a BVI company. The respondent brother has, pursuant to a Saudi court order for a Buy/Sell arrangement, bought out the interests of his other six brothers (the appellants in this appeal). During the Buy/Sell process, the six brothers sought and obtained legal advice from a company lawyer. The respondent brother has bought the assets, including the company which employed the lawyer. The six brothers, acting as directors for one of the Group companies, had employed the lawyer as legal adviser to the

company. The lawyer had provided legal advice and prepared documents for the six brothers during the Buy/Sell process against the interest of the other brother, despite twice having previously been deported from Saudi Arabia for working for the six brothers against the one. The purchasing brother obtained documents and emails passing between the lawyer and the six brothers which he found on the computers and email servers of the company. He wishes to produce them in evidence in his suit in the BVI relating to the asset in dispute here. The six brothers object to their production on the basis that the documents and correspondence are confidential and privileged as having been prepared for them by their legal adviser. They argue that as directors of the company they were entitled to authorise a variation of his employment contract to permit him to work personally for individual directors to whom legal professional privilege, even as against the company, would arise. At a case management conference the trial judge ruled that the documents were not confidential and not privileged and he gave directions for the documents to be disclosed prior to the trial which was shortly to occur. The six brothers appealed.

Held: disallowing the appeal, upholding the ruling of the trial judge, and confirming the orders he made for discovery, that:

1. In their capacity as directors the six brothers were under a duty to act *bona fide* in the interests of the company. They cannot maintain that a decision by them to direct an employee of the company to act at the company's expense for them in their individual capacity was a decision taken in the best interests of the company. Directors have no power to authorise an action which prefers one group of shareholders over another. This is necessarily true where the group of shareholders being preferred is made up of the same directors. Accordingly, any decision taken of the sort relied on was taken without authority and is invalid and liable to be set aside.

Boardman and Another v Phipps [1967] 2 AC 46; **Mohan Singh Bhullar and Others v Inderjit Singh Bhullar and Another** [2003] 2 BCLC 241; **In re Smith and Fawcett, Limited** [1942] Ch 304; **Howard Smith Ltd. v Ampol Petroleum Ltd. and Others** [1974] AC 821; **Criterion Properties plc v Stratford UK Properties LLC and Others** [2004] 1 WLR 1846; **Douglas and Others v Hello! Ltd. and Others (No. 3)** [2006] QB 125; **Wilson v Rastall** (1792) 4 Durn & E 753; and **Smith v Jones** [1999] 1 SCR 455 applied.

2. Legal professional privilege attaches to a document that is confidential as between lawyer and client. Without that confidentiality there can be no privilege. First, both the brothers and the lawyer knew that the advice was being provided during the lawyer's employment by the company which was now owned by Sheikh Abdullah; second, both the brothers and the lawyer were aware that Sheikh Abdullah had previously objected to the lawyer providing advice to the brothers in their personal capacity when Sheikh Abdullah was paying for it; third, the documents were stored on the company computer system and the emails communicated on the company email system; fourth, the lawyer and the brothers must have been aware that as a result of the Buy/Sell process Sheikh Abdullah would buy the brothers' interests in

the company and would end up being the sole owner of them, which is precisely what happened. In these circumstances, the judge was right to hold that the communications between the lawyer and the brothers did not have the necessary quality of confidentiality against either the company or Sheikh Abdullah for those communications to be privileged against them.

Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2004] UKHL 48; [2005] 1 AC 610 applied.

3. The cases of joint retainer do not apply. There was no joint retainer or anything analogous to one. Rather, the lawyer was employed under a contract which expressly prohibited him from acting for third parties and in circumstances where both he and the brothers knew that the purchasing brother objected to the lawyer working for them.

The Sagheera [1997] 1 Lloyd's Rep 160; **Harris v Harris** [1931] P 10; **Goddard and Another v Nationwide Building Society** [1987] QB 670; **In re Pickering** (1884) LR 25 Ch D 247; and **Aron Salomon v A. Salomon and Company, Limited** [1897] AC 22 distinguished.

4. The equitable jurisdiction of the court to restrain a party from relying on otherwise confidential and privileged documents which have come into his hands will be exercised taking into account the normal principles of equity. It is fundamental that, 'He who comes into equity must come with clean hands.' In the present case the brothers cannot be said to have clean hands. They obtained advice from the lawyer in relation to their dispute with Sheikh Abdullah when he had twice been forced to leave Saudi Arabia for acting against Sheikh Abdullah. The lawyer has sued the company for employment compensation which will have to be paid by Sheikh Abdullah, in circumstances where he was advising the brothers in their dispute against Sheikh Abdullah. The court is being asked to permit the lawyer to breach his duty of fidelity to his employer.

Calcraft v Guest [1898] 1 QB 759; and **Goddard and Another v Nationwide Building Society** [1987] 1 QB 670 applied.

5. The trial judge was performing a case management function in which he was called on to exercise a discretion whether or not to allow discovery. An appeal against a judgment of a trial judge in the exercise of a judicial discretion will not be allowed unless the court is satisfied that (1) in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or being influenced by irrelevant factors and considerations, or by taking into account or been influenced by irrelevant factors and considerations; and (2) that as a result of the error or the degree of the error in principle, his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In this case the appellants have not passed the requisite threshold. They have not been able to satisfy the Court that the trial judge, in exercising his discretion to admit the documents and to give

the directions he did, erred in principle. He gave all appropriate weight to all the relevant considerations.

Rule 26.3 of the **Civil Procedure Rules 2000** applied; **Dufour and Others v Helenair Corporation Ltd. and Others** (1996) 52 WIR 188 followed.

JUDGMENT

- [1] **MITCHELL JA [AG.]**: This is an interlocutory appeal made with the leave of the trial judge against an order made by Bannister J for disclosure of documents prior to a trial which has been set down for a period of time commencing 20th September 2012. The order granted an application made by the respondent that documents recording certain communications between the appellants and a Mr. Tawfiq Hardan (“Mr. Hardan”) should be disclosed in the trial. In accordance with rule 62.10 of the **Civil Procedure Rules 2000** (“CPR 2000”) it comes before me as a single judge of the Court to determine on the basis of the filed submissions of the parties.

The Background

- [2] The background may be shortly stated. The parties to these proceedings are Saudi Arabian brothers who have unfortunately since about 2000 been engaged in a series of disputes between them about the management and, now, ownership of what were until 2008 the jointly owned assets originating from the estate of their late father. An agreement was entered into under which their interests would be disengaged from one another (“the Disengagement Agreement”). As part of that agreement Sheikh Abdullah Ali Alhamrani (“Sheikh Abdullah”) took responsibility for the management of certain jointly owned assets outside of Saudi Arabia, but gave up responsibility for management of the companies within the Alhamrani Group. In 2004, the Saudi court held the Disengagement Agreement to be void. Sheikh Abdullah continued (he says wrongly) to be excluded by his six brothers (“the Brothers”) from management of the Alhamrani Group of Companies (“the Group”), which comprised interests in a number of companies owned by the Alhamrani family. The Group was not a holding company but consisted of various

directly held companies with different shareholders. Sheikh Abdullah continued to be a so called “partner” in the Group and continued to have a one eighth share in the principal companies in the Group. These proceedings concern the ownership of a BVI company called Chemtrade Limited. Sheikh Abdullah is the claimant in the High Court proceedings, and the appellants are the Brothers.

- [3] In 2008, the Saudi Court proposed a compromise of the dispute between the siblings whereby the Brothers would value all the jointly owned assets and provide Sheikh Abdullah with a price at which he could either sell his share of those assets to the Brothers or buy their shares from them, at his option (“the Buy/Sell Process”). Having received the Brothers’ valuation, Sheikh Abdullah elected to buy the Brothers’ interests. Under the Buy/Sell process Sheikh Abdullah purchased the interests of the Brothers in some (as the Brothers say) or all (as Sheikh Abdullah says) of the Alhamrani Family’s jointly owned interests in the Group and other assets. It is not in dispute that Sheikh Abdullah purchased the Brothers’ interests in Alhamrani Universal Company (“Universal”), a limited liability company incorporated in Saudi Arabia. The precise scope of what was included in the assets sold under the Buy/Sell Process (“the Sale Assets”), and in particular whether the Brothers’ interests in Chemtrade were included, is the subject of the present proceedings in the BVI. Universal is not a party to the proceedings.
- [4] Following Sheikh Abdullah’s decision to buy, the Brothers challenged his right to do so, but on 11th August 2008 the Saudi Court of Appeal gave a judgment (“Judgment 1080”) under which the Brothers were ordered to transfer the Sale Assets to Sheikh Abdullah. On 3rd December 2008, Judgment 1080 was enforced by the Saudi authorities, who took possession, as far as possible, of the Alhamrani Group of companies and handed them over to Sheikh Abdullah. Since that date Sheikh Abdullah has been in control of the Alhamrani Group.
- [5] Mr. Hardan is a Jordanian national and a qualified lawyer who worked in the legal department of the Alhamrani Group of Companies. He was employed at different times by different companies within the Alhamrani Group. Sheikh Abdullah’s claim

is that following Sheikh Abdullah's exclusion from the management of the Alhamrani Group in 2000, Mr. Hardan started to act for the Brothers against Sheikh Abdullah in relation to the various disputes between them. Sheikh Abdullah objected to this on the basis that Mr. Hardan was employed by a company in which Sheikh Abdullah was a partner, so that Mr. Hardan ought not to be advising some of the partners in the company against the others. As a result, Mr. Hardan was twice excluded from Saudi Arabia at the instance of Sheikh Abdullah.

[6] On Mr. Hardan's return to Saudi Arabia, on 18th June 2007, he entered into a contract with Universal, one of the companies in the Alhamrani Group, as a "legal consultant" and was employed to work in the legal department of the Group at the material time, and in particular did so throughout the relevant period. By Article 2 of Mr. Hardan's employment contract he agreed to devote all his time in the service of Universal's interests with due care and diligence and to abstain from working for third parties with or without pay whether during or out of official work hours. Sheikh Abdullah complains that it is against this background that Mr. Hardan continued to provide assistance and legal advice to the Brothers in relation to their dispute with Sheikh Abdullah in general and the Buy/Sell Process in particular. The learned judge's order of 25th July 2012 is in respect of documents dated between 12th February 2008 and 30th September 2008, for all of which period Mr. Hardan was employed by Universal.

[7] Prior to Sheikh Abdullah taking over on 3rd December 2008, Sheikh Abdullah's claim is that Mr. Hardan caused electronic documents to be downloaded from the Group server onto an external hard disk drive. He also tried to remove that drive and his company laptop (together "the Computer Equipment") from the Group headquarters on the day on which Sheikh Abdullah took over. The only available copy of the Computer Equipment is a forensic image created in 2009 which is now in the possession of the Brothers, the original Computer Equipment having been lodged with the Royal Court in Jersey in connection with other proceedings between Sheikh Abdullah and the Brothers which were then in trial there.

- [8] Documents formerly on computers belonging to the Alhamrani Group are therefore on that forensic image and in the possession of the Brothers. Disclosure has been given by the Brothers of some of the documents on that forensic image. Sheikh Abdullah believes that the forensic image also includes Hardan Documents over which the Brothers claim privilege and which have not been disclosed (“the Hardan Imaged Documents”).
- [9] In addition to the Hardan Imaged Documents now in the possession of the Brothers, many other electronic documents were left on the Alhamrani Group servers and other computers when Sheikh Abdullah took over the Group in December 2008. As a result of searches done by Sheikh Abdullah, numerous documents sent to or from individuals known to be lawyers including documents created by or communications with Mr. Hardan were found. These documents were isolated and copied onto a memory stick and sent to the BVI solicitors for the Brothers to indicate whether the Brothers sought to claim privilege in those documents (“the Isolated Documents”).
- [10] On 8th January 2011, a Saudi judicial body, the Preliminary Committee for Settlement of Labour Disputes (“the Jeddah Committee”) found that Mr. Hardan was employed by the Alhamrani Group of Companies. Mr. Hardan’s contract was with Universal, but in practice his role extended beyond Universal and he performed legal services for other companies in the Group as part of the Group’s legal department and gave advice on personal matters for the siblings in the Alhamrani Family. In particular, during the relevant period, Mr. Hardan advised the Brothers on various matters relating to litigation and disputes with Sheikh Abdullah. In the course of doing so the communications that were the subject of the application before the learned trial judge were brought into existence. The learned judge found that no claim to privilege can properly be maintained in the Hardan Documents against Sheikh Abdullah. He granted an order as sought by Sheikh Abdullah in terms of paragraph 3.3 of his Application.

[11] The appeal is against the judgment and paragraphs 5 and 6 of the Order made on 25th July 2012. The documents which are the subject of paragraph 5 are documents currently under the control of the Brothers, which the learned judge ordered them to disclose. The documents which are the subject of paragraph 6 of the Order are documents which are already under the control of Sheikh Abdullah, which the learned judge has ruled can be deployed and relied on by him.

[12] The learned judge set out his findings in an *ex tempore* judgment given during the course of an interlocutory hearing in which a large number of applications had to be dealt with and which took place less than three months before the matter is due to come to trial. The Brothers appeal those parts of the judgment which provide as follows:

(i) Well, I have to decide whether to order disclosure of all communications between any of the Defendants or their agents and a gentleman called Mr Hardan which were made between the 12th of February, 2008 and the 3rd of September, 2008 a date when ... Mr Hardan ceased to be employed by an entity in the Alhamrani Group of Companies which is now being acquired by Sheikh Abdullah, the Claimant.

(ii) Mr Hardan has or was entitled to possession of documents which were generated during the period of his employment at this company, and it is said by the Defendants that none of the information contained in those documents ... can be disclosed ... to Sheikh Abdullah because it represents legal advice ... given to them by Mr Hardan during the course of his employment by the entity now owned by Sheikh Abdullah ...

Ms Jones for Sheikh Abdullah says that if the Defendants were using Mr Hardan's services, which effectively were meant to be directed for the benefit of the company ... of which he was the employee, they risked any privilege which ... might have attached to the documents had they gone to a completely unconnected lawyer, they risked that privilege being broken because Sheikh Abdullah, the employer of Mr Hardan, would be entitled to everything generated by him in the course of his employment, and the fact that ... some third party had been given legal advice against Sheikh Abdullah's wishes would be irrelevant. The fact is that the company was not holding itself out as providing legal advice to all the partners, although Mr Joffe does say it was generally accepted that that would be done.

(iii) The position ... seems to have been that Mr Hardan was meant to be advising the company, and nobody else, and that in the circumstances it

seems to me that if in breach of the arrangements Sheikh Abdullah thought to obtain, others sought Mr Hardan's advice, they might assert privilege against third parties, but they can't assert privilege against the Company which was paying Mr Hardan's wages.

It does seem to me that in those circumstances a privilege defence can't work in favour of the Defendants, and accordingly, I'm going to make an order in the terms of Paragraph 3.3 of the Application Notice, as it affects Mr Hardan.

(iv) The granting of the order as sought by the Sheikh Abdullah in paragraph 3.3 of the draft order sought by him.

(v) Costs reserved.

The Appeal

[13] The first ground of appeal against the learned judge's findings of fact was that there was no or no sufficient evidence for the judge to find that Mr. Hardan was employed by an entity in the Alhamrani Group of Companies. Mr. Mann submits that this was contrary to the weight of the evidence, particularly the finding of the Jeddah Committee that Mr. Hardan's contract was directed towards employing him in work for the Alhamrani Group.

[14] He submits that the learned trial judge was wrong to proceed on the basis that Mr. Hardan was supposed to be advising the Company and nobody else. He failed to have sufficient regard to the evidence that Mr. Hardan had been permitted by the Board of Directors to provide confidential legal advice to the Brothers. The judge should have found that Mr. Hardan was employed by the Alhamrani Group of Companies and ought not to have held that Mr. Hardan was meant to be advising Universal and nobody else. The evidence of Sheikh Siraj was that Mr. Hardan was meant also to be advising other companies in the Group and the Alhamrani family members.

[15] He submits that the provision of legal advice to the Brothers was within the permitted ambit of Mr. Hardan's employment arrangements. When Mr. Hardan was engaged in June 2007, at a time when Sheikh Abdullah had no involvement

with the management of the Alhamrani Group of Companies, the evidence of Sheikh Siraj was that the expectation of the Brothers was that he would provide assistance to companies within the Group and assist Alhamrani family members in relation to their personal matters, an arrangement which applied to all staff employed within the Alhamrani Group of Companies. The Board had full authority to agree terms of employment with an employee and to give the employee lawful instructions, and to consent to formal or informal variations without the consent of any individual shareholders before agreeing such matters. Mr. Hardan's terms of engagement were such that they permitted him to provide legal advice to the Brothers and other family members in relation to their personal matters, which were confidential to the family members in question.

- [16] It was accordingly wrong for the learned judge to find that Mr. Hardan was in breach of his contract of employment by providing legal advice to the Brothers, and accordingly no privilege with regard to such advice could be asserted against Sheikh Abdullah. The judge was wrong not to have found that the communications between the Brothers and Mr. Hardan were not (a) confidential and (b) privileged as against Sheikh Abdullah. The communications between the Brothers and Mr. Hardan were confidential and obviously so. They related to personal legal matters, they were made under an expectation of confidentiality, especially against Sheikh Abdullah, and were made or given personally. At the time they were made, neither the maker nor the recipient had any expectation that the communication would be made available to any other person without the consent of the defendant seeking legal advice. As such the communications were plainly subject to legal advice privilege. Counsel submits that no breach of contract on Mr. Hardan's part could have changed his status as a qualified lawyer and legal adviser to the Brothers, or changed the status of the Brothers as his clients for this purpose, or changed the status of the advice as confidential and privileged advice. A breach of duty by a legal adviser does not of itself invalidate privilege: **Harris v Harris**.¹

¹ [1931] P 10.

- [17] Mr. Mann submits that the fact that Universal paid Mr. Hardan's wages, or that Sheikh Abdullah purchased the Brothers' interest in Universal, is irrelevant as the basis of protection in law of confidentiality and legal advice privilege is not proprietary. Confidentiality is protected in equity and sometimes in contract: **Boardman and Another v Phipps**.² Legal advice privilege is a substantive legal right. Legal advice privilege is the privilege of the client: **Wilson v Rastall**.³ No basis has been put forward to suggest that the privilege was transferred to Universal or was waived. Sheikh Abdullah's purchase of the Brothers' interests in Universal which nominally employed Mr. Hardan was not a purchase by him of the Brothers' confidential information or privileged material. The learned judge was wrong not to have found that Sheikh Abdullah had not purchased the Brothers' confidential communications between them and Mr. Hardan for the purpose of obtaining or giving legal advice.
- [18] The Brothers rely on dicta in **Smith v Jones**⁴ to the effect that legal professional privilege is based on important considerations of public policy. It is not merely a rule of evidence but a substantive right arising out of the right to access to legal advice, and is fundamental to the administration of justice. Accordingly, there must be cogent justification for its abrogation.
- [19] A further ground of appeal is that the learned judge was wrong to hold that the Brothers might assert privilege against third parties but not against the company paying Mr. Hardan's wages. The fact of Sheikh Abdullah's purchase of the Brothers' interest in Universal is irrelevant to the question whether he is entitled to access to the Brothers' confidential and privileged communications.
- [20] A further ground of appeal is that the learned judge erred in law in failing to find that even if Mr. Hardan had acted in breach of his employment by providing legal advice to the Brothers, such advice was confidential and privileged and not

² [1967] 2 AC 46, 127-8, cited with approval in *Douglas and Others v Hello! Ltd. and Others* (No. 3) [2006] QB 125, [127].

³ (1792) 4 Durn & E 753.

⁴ [1999] 1 SCR 455 at paras. 48, 50.

available to be used by Sheikh Abdullah. Such breach would not prevent the communications being confidential and privileged.

[21] A further ground of appeal is that the learned judge was wrong to hold that Universal was not holding itself out as providing legal advice to all the partners and to treat that supposed fact as determinative of the issue before him. Counsel submits that the scope of Universal's business was not relevant to the question whether the communications were confidential and privileged and whether privilege can be asserted. The communications did not concern Universal business but were between Mr. Hardan and the Brothers in their personal and private capacity.

[22] A further ground of appeal is that the learned judge was wrong in law in finding that the Brothers risked privilege being broken because Sheikh Abdullah as employer of Mr. Hardan would be entitled to everything generated in the course of Mr. Hardan's employment. Sheikh Abdullah was plainly aware that the communications were privileged. In the course of this litigation his legal team provided copies of the communications to the Brothers' legal team so that they could raise any claims to privilege they saw fit. Mr. Hardan's employment arrangements permitted him to give confidential legal advice to the Brothers. Mr. Mann submits that where an employer permits an employee to provide advice to third parties, including officers or owners of the employer, which the employer knows is (a) confidential and privileged and (b) not to be shared with the employer, the employer cannot subsequently change its mind and demand access to the advice. It will be estopped from doing so by reason of the detriment the Brothers will suffer: **Thomas Hughes v The Directors, & C., of the Metropolitan Railway Company**.⁵

[23] Mr. Mann submits that the position here is analogous to cases of joint retainer. Where persons grant a joint retainer to solicitors, they cannot assert confidence or privilege against each other in respect of documents created with regard to the

⁵ (1876-77) LR 2 App Cas 439, 451-452.

joint retainer. However, each can maintain a claim for privilege in respect of the documents in respect of all other persons not party to the joint retainer, which can only be waived by the parties jointly and not individually: **The Sagheera**.⁶ But, where one of the parties who jointly instruct a lawyer consults the lawyer confidentially on matters in dispute between the persons who have created the joint retainer, he may claim privilege against the other for those communications, even if this creates a conflict for the lawyer: **Harris v Harris**⁷ and **Goddard and Another v Nationwide Building Society**.⁸ The same principle applies in the absence of a joint retainer, where the parties have a joint interest in the subject matter of the communication: **In re Pickering**.⁹ Counsel submits it must apply all the more strongly where there is neither joint retainer nor joint interest in the subject matter of the communication.

- [24] The final ground of appeal is that the learned judge was wrong to fail to distinguish between Universal and Sheikh Abdullah in holding that the consequence of his finding that the Brothers were unable to assert privilege against Universal was that Sheikh Abdullah was entitled to the order which he sought. Universal is not a party to the litigation, and it is as a matter of law a corporation and a separate and independent legal person from its shareholders: **Aron Salomon v A. Salomon and Company, Limited**.¹⁰ A contract entered into by even a 100% shareholder is not the same thing as a contract entered into by the company: **Macaura v Northern Assurance Company, Limited and Others**,¹¹ and the converse is equally true. Mr. Mann submits that even assuming that Universal was able to call for and see confidential and privileged communications passing between Mr. Hardan and the Brothers, that right belongs to Universal and not to Sheikh Abdullah. Universal and Sheikh Abdullah ought not to have been elided for the purpose of the issue, simply because Sheikh Abdullah now owns all the shares in

⁶ [1997] 1 Lloyd's Rep 160, 165-166.

⁷ Supra note 1.

⁸ [1987] QB 670, 678.

⁹ (1884) LR 25 Ch D 247, 249-251.

¹⁰ [1897] AC 22 at 31.

¹¹ [1925] AC 619 at 626-628, 630, 633.

Universal. Sheikh Abdullah has no right to access or use those communications merely by reason that his company has a right to do so.

[25] The Brothers impugn the learned judge's finding that Mr. Hardan was employed by 'an entity in the Alhamrani Group of Companies'. It is not disputed that he was employed by Universal. There is no company or entity known as the Alhamrani Group, which was an abstract concept without legal personality. It is also undisputed that prior to the Buy/Sell Process both the Alhamrani Group and Universal were jointly owned by the Alhamrani siblings and both are now owned by Sheikh Abdullah. The real issue was whether Mr. Hardan was entitled to carry out legal work for some of the partners in the Group in connection with disputes they had with another partner in the Group.

[26] Mr. Husbands, on behalf of Sheikh Abdullah, submits that when the learned judge found that Mr. Hardan was meant to be advising the company and nobody else, he was addressing the issue whether it was permissible for Mr. Hardan to advise individual partners, i.e., the Brothers, in their dispute with Sheikh Abdullah. Mr. Hardan's contract specifically prohibited him from carrying out work for third parties. In this context, working for third parties must include providing advice to individual partners in their personal and private capacity in respect of a dispute between Sheikh Abdullah and the other partners in circumstances where Sheikh Abdullah was contributing to the cost of his employment. All this must be viewed in the context of Mr. Hardan having recently returned to Saudi Arabia following his exclusion from Saudi Arabia for the very thing which the Brothers now contend the contract permitted him to do, i.e., to act for them against Sheikh Abdullah.

Findings

[27] On the issues of fact challenged by the appellants, I accept the submissions of Mr. Husbands that the Brothers would be in breach of the prohibition on 'self-dealing' if they were to authorise the company's lawyer, Mr. Hardan, to provide advice to them in their personal capacity in their dispute with Sheikh Abdullah. He

relies on **Boardman v Phipps**,¹² and **Mohan Singh Bhullar and Others v Inderjit Singh Bhullar and Another**.¹³ Further, in their capacity as directors the Brothers were under a duty to exercise those powers only *bona fide* in the interests of Universal: **In re Smith and Fawcett, Limited**.¹⁴ They could not maintain that a decision by them to direct an employee of Universal to act at Universal's expense for them in their individual capacity was a decision taken in the best interests of the company. Directors have no power to authorise an action which prefers one group of shareholders over another: **Howard Smith Ltd. v Ampol Petroleum Ltd. and Others**.¹⁵ This must necessarily be true where the group of shareholders being preferred is made up of the very directors taking the decision, as is the position in this case. Accordingly, any decision taken of the sort relied on by the Brothers was taken without authority, either actual or apparent, and is invalid and liable to be set aside: **Criterion Properties plc v Stratford UK Properties LLC and Others**.¹⁶

[28] It is a fundamental requirement of a claim to legal advice privilege that the communication was confidential as between lawyer and client. Without that quality of confidentiality, there can be no privilege: **Three Rivers District Council v Governor and Company of the Bank of England (No 6)**.¹⁷ As regards the learned judge's finding that the communications between the Brothers and Mr. Hardan were not confidential, it is apparent that the judge had reasons for his finding that no such confidentiality can be said to exist as against either Universal or Sheikh Abdullah. First, the advice was provided by Mr. Hardan in the course of his employment by Universal, a company in the Alhamrani Group and in which company Sheikh Abdullah was a partner. Second, both the Brothers and Mr. Hardan were aware that Sheikh Abdullah had previously objected strenuously to Mr. Hardan providing advice to the Brothers in their personal capacity when Sheikh Abdullah as part of the Alhamrani Group was paying for it. Third, the

¹² Supra note 2.

¹³ [2003] 2 BCLC 241.

¹⁴ [1942] Ch 304.

¹⁵ [1974] AC 821.

¹⁶ [2004] 1 WLR 1846 at paras. 30-31.

¹⁷ [2004] UKHL 48; [2005] 1 AC 610, per Lord Scott of Foscote at para. 24.

documents were stored on the Alhamrani Group computer system and communicated via the Group email system. Fourth, to the extent that the advice related to the Buy/Sell Process, it must plainly have been in the contemplation of Mr. Hardan and the Brothers that the result of the process would be that Sheikh Abdullah would buy the Brothers' interests and the companies in it, and would therefore end up being the sole owner of them, which is precisely what happened. In such circumstances, the learned trial judge was right to hold that the communications between Mr. Hardan and the Brothers did not have the necessary quality of confidentiality against either Universal or Sheikh Abdullah for those communications to be privileged against them.

[29] While the Hardan Imaged Documents are in the possession of the Brothers, the Isolated Documents are under the control of Sheikh Abdullah because they were left by the Brothers and/or Mr. Hardan on the Alhamrani Group System at the time that Sheikh Abdullah took control of the Group in December 2008. To the extent that the Brothers are entitled to claim privilege over the Isolated Documents they fall within the principle set out in **Calcraft v Guest**.¹⁸ There it was held that copies of documents obtained by one party when the other was entitled to claim privilege could be adduced by the first party as secondary evidence. Under this principle, Sheikh Abdullah is *prima facie* entitled to use in evidence the Isolated Documents left on the system at the Alhamrani Group.

[30] The **Calcraft** principle is subject to the equitable jurisdiction of the court to restrain a party from relying on otherwise confidential and privileged documents which have come into his hands. See for example, **Goddard and Another v Nationwide Building Society**.¹⁹ That jurisdiction will be exercised taking account of the normal principles of equity.

¹⁸ [1898] 1 QB 759 (CA).

¹⁹ [1987] QB 670.

- [31] It is a fundamental principle that, 'He who comes into equity must come with clean hands'.²⁰ Where a party has itself been guilty of unfair or inequitable conduct, it will be denied equitable relief. See, e.g., **Shell U.K. Ltd. v Lostock Garage Ltd.**²¹ In the present context, the Brothers cannot be said to have clean hands. They proceeded to obtain advice from Mr. Hardan in relation to their dispute with Sheikh Abdullah himself, a partner in the Alhamrani Group, and where Mr. Hardan had twice been forced to leave Saudi Arabia for acting against Sheikh Abdullah in such circumstances. This is not analagous to a case of joint retainer as submitted by Mr. Mann. First, there was no joint retainer or anything analogous to one. Second, Mr. Hardan was employed by Universal under a contract which specifically prohibited him from acting for third parties. And, third, both he and the Brothers knew that Sheikh Abdullah objected to Mr. Hardan acting for them.
- [32] Mr. Hardan has sued the Alhamrani Group for employment compensation. It is effectively Sheikh Abdullah who is the ultimate owner of all the companies in the Group. The cost of paying any compensation to Mr. Hardan will fall on him, despite the fact that that compensation relates to a period during which Mr. Hardan was advising the Brothers in their dispute against Sheikh Abdullah. Thus, Sheikh Abdullah alone will be bearing the cost of Mr. Hardan's end of employment by the Alhamrani Group under the management of the Brothers at the same time that the Brothers are asserting that Sheikh Abdullah is not entitled to the documents which Mr. Hardan generated during that employment. The Court is being asked effectively to permit Mr. Hardan to breach his duty of fidelity to his employer.
- [33] Given the above circumstances, the balance weighs heavily against the Court intervening to prevent reliance by Sheikh Abdullah on the documents ordered by the trial judge to be disclosed, and in favour of him being given leave to do so. In the circumstances, the learned trial judge was right to hold that Sheikh Abdullah is entitled to rely on the documents.

²⁰ John McGhee QC: Snell's Equity (32nd edn.) at 5-015.

²¹ [1976] 1 WLR 1187 at 1202C.

A trial judge's case management discretion

[34] The learned trial judge on this occasion was performing a case management function in which he was called on to exercise a discretion whether or not to allow discovery. The principles on which an appellate body will overturn a case management order of a judge are not in doubt. CPR 26.3 gives the trial judge a wide discretion to manage a case before him, including making orders for discovery. In **Dufour and Others v Helenair Corporation Ltd. and Others**,²² Sir Vincent Floissac CJ explained that an appeal will not be allowed against a judgment given by a trial judge in the exercise of a judicial discretion unless the court is satisfied, (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified: **Charles Osenton & Co. v Johnston**.²³

[35] The appellants in this appeal have not passed the requisite threshold. They have not satisfied me that the learned trial judge in exercising his discretion to admit the

²² (1996) 52 WIR 188.

²³ [1941] 2 All ER 245 at 250.

documents and to give the directions he did erred in principle. He gave all appropriate weight to all the relevant considerations. There is thus no reason to interfere with his order. I would uphold his ruling and confirm the order that he made. Sheikh Abdullah is entitled to his costs on the appeal pursuant to CPR 65.13 when the costs of the application in the court below come to be determined.

Don Mitchell
Justice of Appeal [Ag.]