COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2015/COM/Com/No. 00073

BETWEEN

Messrs. Raymond Winder, Lai Kar Yan (Derek) and Darach Eoghan Haughey appointed as Receiver-Managers by Citibank, N.A. Bahamas Branch the Onshore Security Agent as agent for the Secured Finance lodged and recorded in the Registry of Records in Volume 11293 at pages 557-711

The Applicants

AND

1. **Baha Mar Ltd. ('In Official Liquidation')**
2. **Baha Mar Land Holdings Ltd. ('In Official Liquidation')**
3. **Baha Mar Enterprises Ltd. ('In Official Liquidation')**
4. **Baha Mar Properties Ltd. ('In Official Liquidation')**
5. **BMP Golf Ltd. ('In Official Liquidation')**
6. **BMP Three Ltd. ('In Official Liquidation')**
7. **Cable Beach Resorts Ltd. ('In Official Liquidation')**
8. **Baha Mar Operating Company Ltd.**
9. **Baha Mar Entertainment Ltd.**

The Respondents

Before Hon. Mr Justice Ian Winder

Appearances: Brian Simms QC with Sophia Rolle-Kapousouzoglou for the Applicants
Hodge Malek QC with Ferron Bethel and Camille Cleare for BML Properties Ltd.
Brian Moree QC with Sean Moree and Vanessa Smith for CCA Bahamas Ltd.
V Moreno Hamilton for the Joint Official Liquidators
Adrian Hunt (watching brief) for Perfect Luck Limited

26 March 2019

WINDER, J

This is an application with respect to the disclosure of documents which had been placed under seal in this action.

[1.] On 22 August 2016 this Court approved the sale of certain secured assets ("Secured Assets") of the Respondents by the Applicants who had been appointed joint receiver managers (the JRMs) by virtue of a Debenture under which the Secured Assets were pledged. The Secured Assets to be realized were described by the JRMs, at paragraphs 22 and 23 of the Third Affidavit of Raymond Winder, filed in support of the approval application, as follows:

> 22. The Secured Assets comprise the largest resort under construction in the Caribbean, with a total investment of over US$3 billion and various other assets. The resort complex covers an area in excess of 300 acres. Additionally, there is in excess of 600 acres of undeveloped land which comprises part of the Secured Assets. The resort is nearly complete and currently features five (5) luxury hotels with four (4) distinguished brands comprising a total of over 3,000 rooms, namely the Baha Mar Casino & Hotel, Grand Hyatt, SLS LUX, a Five Star Luxury Hotel and Melia, which is the only hotel in operation.
>
> 23. The centerpiece of the resort is the Caribbean's largest casino with 100,000 square feet of gaming space. Other notable amenities include a golf course designed by Jack Nicklaus, a 200,000 square foot state of the art convention centre, a SPA centre, over 60,000 square foot of third-party retail options (with restaurants, bars and luxury brand retail shops) and a racquet club with nine (9) tennis courts which will include grass, clay and hard terrains.

[2.] That approval application was heard in private, and upon the application of the JRMs the evidence was received under seal. The Third Affidavit of Raymond Winder ("the Winder Affidavit"), which contained the evidence relied upon by the JRMs, and which the Court took into consideration, was unfiled at the time of the hearing of the application. The Court ordered that all documents in support of the application remain under seal until further order.

[3.] The Winder Affidavit was subsequently filed and received under seal on 24 August 2016. Paragraph 12 of the Winder Affidavit speaks to the need for sealing as follows:

> 12. This Affidavit contains commercially sensitive information relating to the marketing and bidding process that the JRMs believe should be sealed. The JRMs are of the view that release of such sensitive information in a public forum could be prejudicial to the realization of the Secured Assets, as the release of information on the offers, appraisals and proposed sale to the Preferred Bidder might:
>
> (a) have a negative effect on the value of the Secured Assets, in the event that the proposed transaction which the JRMs are presently seeking liberty to enter into does not close and the JRMs are forced to seek another buyer;
>
> (b) result in the Proposed Purchaser seeking to renegotiate a lower purchase price with Asset SPV, if it gains access to the information herein, as the Share SPV (as defined below) has yet to sign a definitive agreement with the Proposed Purchaser; and
>
> (c) cause difficulties with regulators and possibly affect the proposed sale to the Proposed Purchaser particularly in the case of the pre-release of any price-sensitive information as the Proposed Purchaser or its parent/associated entity is a publicly traded company. Consequently, no information regarding the sale should be released, until a definitive agreement has been signed and the Proposed Purchaser has been given the opportunity to make a public announcement.

[4.] On 16 April 2018, I acceded to the application for the unsealing of the Winder Affidavit in the following terms:

> IT IS HEREBY ORDERED:
>
> 1. That the Third Affidavit of Raymond Winder sworn to on 22nd August 2016 and filed herein on 24th August 2016 and the exhibits thereto be unsealed as of Monday, 16th April 2018 save for the following exhibits which shall remain sealed until further order:
>   i. Exhibit RW-21; and
>   ii. Exhibit RW-22 (collectively referred to as "the documents to remain under seal")
> 2. That all documents sealed in the Granite Ventures Application to take over the conduct of the CCA litigation remain sealed until further Order.
> 3. That a further hearing be scheduled to determine if the documents remaining under seal should remain sealed.
> 4. That notice of the hearing of the application referenced at paragraph 2 be given to Perfect Luck Assets Limited, BML Properties Ltd., Granite Ventures Ltd., and CCA Bahamas Ltd., as parties interested in the documents to remain under seal.

5. That all documents filed in support of the application which are subject to a confidentiality clause do remain sealed until further Order.

[5.] In compliance with paragraph 3 of the Order, the matter was fixed for hearing and notice of the application given to BML Properties Limited ("BMPL"), CCA Bahamas Ltd. ("CCA"), Perfect Luck Assets Ltd. and Granite Ventures Ltd.

[6.] This ruling concerns my decision whether to remove the seal with respect to exhibits RW-21 and RW-22.

Exhibit RW-22

[7.] Exhibit RW-22 is a draft amended construction contract amendment with the proposed purchaser and CCA Bahamas Ltd and China State Construction and Engineering Co. ("CSCEC"), described as Amendment No. 9 and is referred to in paragraph 195 of the Winder Affidavit. Paragraph 195 of the Winder Affidavit provides as follows:

> 195. While the JRMs have not conducted a marketing and bidding process in relation to the construction contract or the Completion Guarantee, we are entitled under the Debenture to sell any asset by private sale. The Asset SPV has offered the consideration as explained above for the construction contract and the claims which the JRMs wish to accept. Both CCA and CSCEC are willing to consent to the assignments and they have agreed a draft amended construction contract amendment with the Asset SPV, which is now produced and shown to me marked "RW.22".

[8.] CCA says that Exhibit RW-22 (Amendment No. 9) should be released from the sealing order in a redacted form to protect the dissemination to the general public of the commercially sensitive pricing information which is contained therein. At paragraph 17 of the affidavit of Michael Guiffre´ filed on behalf of CCA, CCA says

that it provided an un-redacted copy of RW-22 to BMPL in the New York proceedings between these parties, subject to the terms of an order of the New York Court. RW-22 was redacted to remove all pricing information before being filed in the New York Court. Accordingly, CCA says, BMPL already has a copy of RW-22.

[9.] BMPL says that it "has no objection to the relief sought by CCA, namely that Amendment No. 9 be released from the Sealing Direction in a redacted form."

[10.] In all the circumstances therefore, being satisfied that there is a need to protect the dissemination to the general public of the commercially sensitive pricing information contained in Amendment No. 9, I will order that the document, RW-22, be unsealed in a redacted form after removing the pricing information contained therein.

RW-21

[11.] Exhibit RW-21 concerns the construction claim and arises in the context of paragraphs 185, 188, 193 and 194 of Winder Affidavit. These paragraphs of the Winder Affidavit provides as follows:

> 185. Assets excluded from the bidding process were the construction contract, the Completion Guarantee granted by CSCEC in favour of BML, and any potential claims against CCA and CSCEC in respect of late delivery of the Project. During the negotiations with Melco (Bidder 1), as the Preferred Bidder and subsequently with the Proposed Purchaser it has been stipulated that the Project must be completed. In order to complete the Project for its on-sale to the Preferred Bidder, it is proposed that the Asset SPV will engage CCA to complete the construction.
>
> ...
>
> 188. The JRMs considered that a public sale of the claims under the construction contract and the completion guarantee against CSCEC and CCA would be impractical, considering that transfer of these claims to the Asset SPV is an integral part of the complete package to enable the sale and ultimate completion to occur. The JRMs noted that, realistically, the only persons who could complete the Project

were CCA given the current state of the Project and it was CCA's requirement that the claims under the construction contract and the completion guarantee against CSCEC and CCA be resolved as part of the arrangement for construction remobilization.

...

193. The JRMs noted from the opinions issued by Kobre & Kim (UK) LLP dated 26 June 2015 and the opinions issued by Glaser Weil dated 3 February 2015 (amended on 5 February 2015) that BML was advised by its counsel that its claims against CCA and CSCEC were worth approximately (*blotted out*). They were also advised that with cross claims and the costs of litigation they should expect the discounted present value of the net claim to be approximately (*blotted out*). Now produced and shown to me marked "RW.21" are copies of the opinions received from Kobre & Kim and Glaser Weil.

194. Therefore, notwithstanding the obstacles in the way of realising value for those claims, the JRMs have imposed a condition in the Asset Transfer Agreement that the claims should be valued and the purchase price payable by Asset SPV should be commensurately increased in order to ensure that the best price reasonably obtainable in the circumstances is achieved.

[12.] CCA wants Exhibit RW-21 to be unsealed. CCA relies heavily on the principle of open justice and says that the principles of Open Justice means, that in exhibiting the documents to the Winder Affidavit, it amounts to a general waiver.

[13.] CCA also says that Exhibit RW-21 should be released from the sealing direction on the ground that there is no longer a valid or proper basis for keeping those documents secret as the sales process has been completed thereby obviating the sole reason why the Court put the *valuations* under seal in August 2016. At paragraph 18 of is submissions, CCA says:

18. The reasons for the Sealing Direction have fallen away as the transaction which was the subject of the application has been completed. The Court sealed the Third Winder Affidavit and the supporting material in order to preserve the integrity of the sales process and ensure that the application for Court approval did not impact the onward sale of the assets to a third party. Clearly, those reasons no longer apply.

[14.] The Applicants have expressed no position at the hearing as to whether the documents ought to be unsealed. They say that they would have sought the unsealing of the entire document but only raised the issue for the Court as a result of the queries raised by counsel for BMPL. The Affidavit of Olivia Moss was filed on their behalf and provided at paragraph 20, 21 and 22 that,

> 20. As the JRMs were in possession of all assets belonging to the Baha Mar Companies with complete access and control, the JRMs were possessed with the capabilities of waiving legal privilege (if any) that may have been attached to documents prepared on behalf of the Baha Mar Companies and specifically BML.
>
> 21. The JRMs are not aware of any joint retainer with BML Properties and do not accept that there was a joint privilege as this fact was never disclosed or raised by Kobre and Kim. The documents which comprise "Exhibit RW-21" were incontestably handed over as comprising part of the assets of BML of which the JRMs had possession and control.
>
> 22. It is therefore indisputable that the JRMs were put into lawful possession of the documents comprising "Exhibit RW-21" and any privilege which may have attached was waived and capable of being waived by the JRMs absolutely.

[15.] The Joint Official Liquidators have likewise taken no position at the hearing and are content to have the Court determine the issue without their input.

[16.] BMPL argues, inter alia, that the Legal Professional Privilege ("LPP") of the first named respondent Baha Mar Ltd. (In Liquidation) ("BML") had not been waived by the JRMs, or alternatively that any waiver was only for the limited purposes of the hearing on 22 August 2016 at which this Court approved the sale of the Secured Assets. They say that:

(1) The JRMs are under a duty only to waive LPP of the company to the extent necessary for the conduct of the receivership.

(2) The Second Affidavit of Olivia Moss refers to the JRMs waiving BML's LPP in the opinions in Exhibit RW-21, but the only act of waiver relied upon is

that the documents were exhibited to the Third Winder Affidavit and deployed at the hearing in private on 22 August 2016.

(3) At the hearing on 22 August 2016, the JRMs very properly drew to the Court's attention all relevant advice relating to the proposed sale of the Secured Assets, including the opinions in Exhibit RW-21. In accordance with the duty at paragraph (1) above, those documents were deployed under seal in a private hearing. It is a familiar procedure for privileged opinions to be produced to the Court without any waiver of LPP, for example in the cases of (a) trustees or executors applying for directions as to the exercise their powers, (b) liquidators, receivers or other office holders applying to the Court for approval of a proposed transaction, and (c) infant settlement approvals.

(4) Alternatively, the JRMs waived LPP in Exhibit RW-21 only for the limited purposes of the hearing on 22 August 2016 and not as regards the world at large: "[i]t does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only"

(5) It is inconceivable that the JRMs could have intended, when deploying Exhibit RW-21, to waive BML's LPP as regards CCA, CCAB, CSCEC and CSCECB: the very adverse parties who are the subject of the advice in Exhibit RW-21. To have purported to do so would have fallen outside the JRMs' powers.

Analysis and Discussion

[17.] It does not escape me that the party asking that the opinions be unsealed is the very party that is the subject matter of those opinions. Mr Moree QC for CCA nonetheless says that this is not an Application by CCA to obtain access to these documents unlike the ordinary case in most of the precedents. To that extent Mr. Moree QC is quite correct as CCA received, as did BMPL, a notice of this hearing which had been fixed by the JRMs. CCA says that they are not applying to have those documents and is simply supporting the Application to lift the seal, since the

reason why it was imposed, is now spent. They argue that it was neither the intention of the JRMs, nor the intention of the Court that the sealing order was to be permanent. Finally, CCA says that what happens to these documents thereafter and who can use them, for whatever purpose, is a completely different matter unrelated to the lifting of the seal itself as a general principle. Notwithstanding Mr. Moree's assurances, I would only say that it would indeed have been unusual that in the ordinary course, BML would voluntarily waive privilege in those legal opinions from its lawyers so that CCA and CSCEC, the subject matter of the opinions, can have access.

[18.] It is not seriously disputed that the two legal opinions in Exhibit RW-21 was the subject of LPP. They were prepared by Kobre and Kim and Glaser Weil, then attorneys of BML in relation to the assessment of the legal claims of BML by and against CCA and CSCEC. It is of public record that attorneys from Kobre and Kim, specifically Mr. James Corbett QC, appeared with local counsel here in The Bahamas on behalf the BML companies in earlier proceedings. RW-21 are legal opinions from the lawyers of BML as to the quantum of its legal claim against its contractors taking into account the strength of the cross claims of the contractor. The documents, when they came into existence, were therefore plainly protected by LPP. They were not mere valuations as contended by CCA.

[19.] CCA says that this was an extremely high profile matter, which attracted the highest level of public interest and that given the public importance of the transaction, transparency was an essential element of the process. Further, that in order to attract the confidence of the public, that something was not going on behind closed doors, which the Court was privy to, in order to deliver this property to a specific party. According CCA at paragraphs 15 and 17 of its submissions:

> 15. It cannot be reasonably disputed that, apart from the claim by [BMPL] to have a legal professional privilege in the Valuations, those document should now be released from the Sealing Direction. This is because of the venerable and long standing principles of open justice. The English court reaffirmed those principles in the celebrated case of Scott v Scott

[1913] AC 417. The subject was addressed in that case by Viscount Haldane LC at page 437 in these terms:

> "*While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done [...] It may often be necessary, in order to attain its primary object, that the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting on his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning not on convenience, but on necessity.*"

...

17. Departure from the open justice principle can only be justified in the event that it is necessary to serve the ends of justice. Lord Diplock in AG v Leveller Magazine [1979] AC 440 approved Scott v Scott at page 450 and stated:

> "*Since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.*"

[20.] Mr. Malek QC, for BMPL, says that the public's need for scrutiny is satisfied as a result of "all the Winder Affidavits becoming public, apart from the legally privileged document, which is what one expect to remain there and confidential." BMPL also

says that the Court has given a detailed a judgement explaining in 51 paragraphs what the sales process is and why it was approved and there has been no challenge to that judgment. Finally, Mr Malek QC says that there is no public interest to override the LPP and the principle that once privileged always privileged should prevail. Even death, he says, does not displace your privilege and in this case the privilege is that of the company which continues, because it has never been waived.

[21.] It is accepted that the transaction involving the Baha Mar sale garnered much public attention and scrutiny. As such, notwithstanding the sealing of the details of the transaction, I issued a written ruling concerning the approval process. In that ruling, at paragraphs 2 and 3, this court commented on the requirement of open justice as follows:

> **2** Whilst it is important that I provide these written reasons I am constrained by my Order which also sealed the affidavit and supporting material. The reason for the sealing was to preserve the integrity of the sales process which remains a commercially live issue. The process of approval by the Court ought not to impact the onward sale of the assets to the Proposed Purchaser or a subsequent purchaser should the proposed sale not be concluded. This is not unusual. The Irish Supreme Court ***In the Matter of Bula Ltd. In Receivership [2003] IR 430 at page 456***, when considering the issue of confidentiality in the context of an application for approval of a sale stated:
>
> > "Counsel for the receivers submitted that in any application under Section 316, a competent receiver must come before the court in the knowledge that the Court might not approve the sale. Thus it was essential that while the receiver placed before the court materials sufficient for directions, he must not disclose material that could prejudice a subsequent sale if the court did not approve the sale.... Counsel submitted careful judgment was necessary by the receiver to determine if there was sufficient material for the court to exercise its function. However, on the other hand, the receiver should not disclose commercially sensitive information in case a subsequent sale was necessary. The test for the court was whether it had sufficient information on which to make a decision. The court could either require further information or refuse (because of lack of sufficient information or otherwise) to direct the sale. I am satisfied that this is the correct analysis of the nature of the application and the functions of the

receiver and the court and I apply them to this case. If the court required further material it could have requested it, it could have requested commercially sensitive material in a sealed envelope, or it could have refused to order the sale."

3 Whilst the matters are of importance to the general public, having regard to the overall impact to the people of The Bahamas and the Government involvement, it is nonetheless a commercial transaction of a largely private nature. The court is sensitive to the importance of "open justice" and that proceedings in court should be open to the public, but this is not the only consideration and it must be balanced against other equally compelling considerations.

[22.] I agree with the submission of BMPL that the public interest in this matter has been amply supplied by the written reasons provided and the unsealing of the entirety of the affidavits laid before the Court (save for this exhibit). This is even more apparent when considered in light of the fact that the sale did not, strictly speaking, require Court approval. The Debenture under which the Secured Assets were pledged provided the power in the JRMs to sell the Secured Assets independent of the Courts permission. The blessing of the Court was sought due to possible issues and concerns of the JRMs which may have raised the specter of self-dealing and their desire, as officers of the court, for sanction as a result of the sheer magnitude of the transaction.

[23.] CCA's concern, that transparency required the public to be satisfied as to whether an adequate price was secured for the construction contract, is severely weakened when we look at the terms of the sale relative to the construction contract. The process approved by the Court at the 22 August 2016 hearing, pegged the sale to an independent valuation. Paragraphs 28 and 29 of the ruling arising from that 22 August hearing, provided:

28 In addition to the Project and the construction contract, the JRMs have also agreed, at the request of the SPV, for the sale of the Baha Mar Claim against CSCEC. The Baha Mar Claim was not part of the bidding process. According to the JRMs,

"Given (i) the legal uncertainty as to whether the Guarantee claim against CSCEC would survive the assignment of the construction contract and the sale of the Project and (ii) the fact that the SPV has insisted on buying not only the Project but also the construction contract, it is improbable that the JRMs could recover a larger sum by selling the Guarantee claim against CSCEC and the claims against CCA separately. By obtaining a sale price for the completed Project from the SPV the JRMs have effectively procured an offer which is far in excess of what the Project would otherwise have commanded."

"A separate sale of the Guarantee claim and the construction claims against CCA could never in the face of CCA's counterclaim recover anywhere near those figures."

29 According to the JRMs the terms of the proposed sale of the Baha Mar Claim has tied the consideration to be paid by the SPV to a further valuation to be conducted by an independent valuer appointed by the JRMs. Any additional consideration will be at the upper end of that valuation if it does in fact exceed a minimum purchase price for these claims.

The final sales price for the construction contract therefore, was not specifically set by the material provided to the Court in the Winder Affidavit, or Exhibit RW-21 but was ultimately to be later determined by an independent valuer.

[24.] It also cannot be disputed that LPP is a fundamental human right which has historically trumped the very important principles of open justice. In the Privy Council case of ***B and others v. Auckland District Law Society [2003] UKPC 38***, a complaint was made to the respondent law society arising out of the failure of certain partnerships formed for clients, for the purpose of investment in bloodstock, by the second appellant firm of which the first appellants were past and present partners. The law society sought disclosure of a number of documents which were in the firm's possession and subject to legal professional privilege. The firm agreed to the disclosure of such documents to counsel appointed by the law society, subject to their use being restricted and privilege not being waived. Subsequently, new counsel was appointed by the law society, who was not informed of the arrangement relating to the privileged documents, which were

disclosed in part to the law society. The firm commenced proceedings in the High Court seeking an order for the return of the documents already delivered. The law society resisted the claim and counterclaimed for a declaration that the firm was obliged to comply with the requisitions for those and other documents. The court found that the documents were covered by legal professional privilege and need not have been produced but refused to order their return.

[25.] In upholding the decision of the High Court, the Board found that:

> Legal professional privilege was a fundamental condition on which the administration of justice as a whole rested; it existed in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors and therefore could not be subject to any balancing exercise in individual cases. If a lawyer was to be able to give his client an absolute and unqualified assurance that what the client told him in confidence would not be disclosed, in any circumstances, without the client's consent, the assurance had to follow and not precede the undertaking of any exercise of striking a balance between competing public interests in the administration of justice and in the maintenance of the integrity of the legal profession. Legal professional privilege could only be overridden by express statutory provision or by necessary implication, when the balance was struck by Parliament when enacting the legislation.

[26.] In ***Regina (Morgan Grenfell & Co Ltd.) v Special Commissioner of Income Tax and Another 2003 1 AC 563***, Lord Hoffmann stated at paragraph 7,

> **7** Two of the principles relevant to construction are not in dispute. First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487. It has been held by the European

Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (*Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: *A M & S Europe Ltd v Commission of the European Communities (Case 155/79)* [1983] QB 878.

8 Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. The speeches of Lord Steyn and myself in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 contain some discussion of this principle and its constitutional justification in the context of human rights. But the wider principle itself is hardly new. It can be traced back at least to *Stradling v Morgan* (1560) 1 Pl 199.

[27.] In ***Glinton v Ingraham 5 ITELR 264***, ***Hall CJ*** stated at paragraph 8,

8 I confess that I see no plinth of legal professional privilege so conspicuously erected by art 23 as the plaintiffs submit. However, having regard to the judgment of the House of Lords in *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21, 4 ITLR 809, [2002] STC 786, handed down in May of this year, anticipated a year earlier by Meerabux J in the Supreme Court of Bermuda in *Re an Application by Braswell* (2001) 4 ITLR 226 and a half century ago in New Zealand in *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191, I am prepared to hold that, whether teased out of the interstices of art 23 or coaxed out of the penumbra of that provision read in the context of the fundamental rights chapter of the Constitution, legal professional privilege is a fundamental human right.

[28.] The next issue for consideration is whether there was a general waiver by the JRMs in exhibiting the documents to the Winder Affidavit. A general waiver means that privilege in the documents is lost against the whole world, so that there is no longer any privilege at all. In the context of this case I am prepared to find that answer to this has to be given in the negative. Submitting the two opinions before the Court, as an exhibit to an Affidavit, which was being received under seal, in

relation to a hearing in private, could not, in my view, constitute a waiver of privilege as against the whole world. I find this to be so for the following main reasons:

a) The document was received under seal by the court and have not been disclosed to anyone other than to the court. The JRMs have not supplied the opinions to anyone other than in the context of that application. They have not entered the public domain and remain under seal. It remains under seal and as such the question of waiver ought not properly to arise in this context.
b) The JRMs are officers of the court, in compliance with the duty to be full and frank in their disclosure to the court in the directions hearing, they were required to put all of the facts before the court including those which may be the subject of LPP. Disclosure by court officers to the court in these types of hearings should not amount to a general waiver.

[29.] Examples of what occurs in similar types of applications abound. BMPL, identified the most notable examples in their submissions, namely:

a) trustees or executors applying for opinions advice and directions as to the exercise their powers under section 77 of the Trustee Act;
b) liquidators, receivers or other office holders applying to the Court for approval of a proposed transaction; and
c) infant settlement approvals.

In each of the above situations, the legal opinions are routinely provided to the Court and kept private and under seal. Those legal opinions remain confidential and not for the public record. In considering the particular application for decision, the Court has all the legal arguments and knows what the applicant's legal advisors have opined. In my view, the production of the legal advice, in these types of applications could not amount to a waiver as it would otherwise stifle this avenue for these types of parties to obtain the courts directions and advice and ultimately discourage settlements.

[30.] Should the production of legal opinions in these private hearings amount to a general waiver it could also ultimately curtail the exercise of the duty of full and frank disclosure. The extent of such disclosure would likely fall short of including

the legal opinion if it was now understood that such opinions would no longer be protected by LPP. This would be unfortunate as the consideration of these opinions is necessary for the Court to fully appreciate and properly assess whether or not to approve the relevant transaction, settlement or direction.

[31.] Looking at the matter objectively, when the matters were placed before me, I could not have considered that the JRM's intended by exhibiting the legal opinions to an affidavit which I received under seal, for use at a private hearing, they intended to have waived LPP generally for all persons.

[32.] In any event, I am satisfied that if there was waiver by the JRMs it was only a limited waiver for the purpose of the Application and not a general waiver. In ***B and others v. Auckland District Law Society*** the Board identified the following well established principles:

(a) unless waived by the client, legal professional privilege continues even after the occasion for it has passed;
(b) the privilege is the same whether the documents were sought for the purposes of civil or criminal proceedings and whether by the prosecution or the defence;
(c) the refusal of a claimant to waive his privilege for any reason or none cannot be investigated by the court; and
(d) save where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute.

In delivering the advice of the Board, ***Lord Millet*** noted at paragraph 68:

> [68] The society's argument, put colloquially, is that privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back. Their Lordships observe that this arises from the nature of privilege; it has nothing to do with waiver. It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corpn v Dennis Rye Ltd (No 2)* [1988] 3 All ER 816 and *Bourns Inc v Raychem Corpn* [1999] 3 All ER 154. The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should

be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.

[33.] In the case of ***Re Moritz [1960] Ch 251***, the executor of a will took out an originating summons, to which all the residuary beneficiaries under the will were defendants, asking the court for directions whether they should take certain proceedings against two of the beneficiaries. The proposed defendants were supplied with copies of the affidavits filed on the originating summons but not with copies of the exhibits thereto. On an application by those defendants for an order on the executors' solicitors to supply them with copies of certain of the exhibits, the Court found that where the trustee found himself compelled to ask for directions whether or not proceedings should be taken against a beneficiary, while it was proper and indeed necessary to join the parties against whom the proposed relief was sought, it was not the practice of the Chancery Division that those parties should be those parties should not be present in Chambers when the matter is debated, and they should not be furnished with the evidence upon which the court is asked to act.

[34.] According to ***Wynn-Parry J***, at page 255,

> My attention was also drawn to the case of *In re Hinchliffe* [1895] 1 Ch 117 in which the Court of Appeal laid down as a general rule that, if a document is made an exhibit to an affidavit, any person who has the right to take copies of the affidavit has a similar right in the case of the exhibits also. With that proposition one could not, of course, properly quarrel, but that does not deal in the least with the practice in Chambers in this Division. As I understand it, the practice in this Division is that where a trustee finds it is compelled to ask for the directions of the court as to whether or not certain proceedings should be taken, while it is proper and indeed necessary to join the parties against whom the proposed relief is sought, those parties should not be present in Chambers when the matter is debated; and they should not be furnished with the evidence upon which the court is asked to act. The court in these circumstances is appealed to by the trustee to say "Aye," or "No," in view of the circumstances put before it, should the action proceed, and, if so, how far? Very frequently, the leave to proceed is limited, for instance, up to discovery, but it would seem to me to be a quite unjustified inroad upon what I conceive to be a very useful

practice if I were to allow this application and to allow the two defendants not merely to be present at the beginning of the proceedings when the originating summons is heard, but to remain there throughout those proceedings and to have all the evidence on which the trustees are asking the court for its directions. I know of no precedent for it, and, in my view, it is completely against the established practice.

In ***Re Moritz*** the exhibits were not expected to have been available to the public at large but merely, as it would seem in this case, for the limited purpose of the application.

[35.] Finally, there is a question as to whether, assuming a general waiver, such a general waiver would assist the beneficial conduct of the receivership. I accept the state of the law as stated by BMPL, that disclosure of a company's confidential documents that have been obtained by receivers under their compulsory powers is only permissible if it will assist the beneficial conduct of the liquidation, and not merely incidentally so. The English Court of Appeal case of ***Sutton v GE Capital Commercial Finance Ltd. 2004 2 BCLC 662*** provides a good discussion concerning receivers and this issue of waivers of LPP. In ***Sutton***, PS was the principal backer, but not a director, of APL. The sole director was RS, PS's father. APL entered into a debt factoring agreement with GE. GE subsequently appointed administrative receivers of APL.GE brought proceedings (the guarantee action) against PS to enforce guarantees given by PS and others for the liabilities of APL. APL brought proceedings (the APL action) (acting or purporting to act by RS) against GE for the return of documents provided to GE by the APL receivers. The documents which were the subject of the APL action had been sent to the APL receivers by solicitors who had formerly acted for APL. PS made an application in the guarantee action for an order restraining GE or the APL receivers from using those documents and, in particular, from adducing them as evidence in the guarantee action on the ground that they were and always had been subject to legal professional privilege for the benefit of APL and/or PS. An application in substantially the same terms and on the same grounds was made in the APL proceedings. The judge refused both applications. PS and APL appealed against

the judge's decisions. The principal issue on the appeal in the APL action was whether privilege, or confidence, in the documents had been waived when they were sent by the APL receivers to GE's solicitors. In allowing the appeal, the English Court of Appeal held, inter alia that, even if the documents had been obtained by the receivers under statutory powers for the purpose of enabling them to make their own investigations, their disclosure to GE's solicitors was not a proper exercise of their powers since they had sent them without giving any consideration to their contents or to the question whether disclosure was in the interests of APL. At paragraphs 38-43 of the decision, ***Chadwick LJ*** stated:

> **[38]** In our view it is not open to serious doubt that, if the true purpose of the APL receivers in requesting documents from BT was to assist GE in its litigation against the guarantors (notwithstanding the assertion made in the letter of 25 February 2003), the APL receivers were exceeding their powers. If that were the true purpose of the request, it cannot be said that, in requiring delivery up of the BT documents, the APL receivers were engaged in the task of taking possession of, collecting and getting in those documents as part of the mortgaged property; or of carrying on the business of APL. If that were the true purpose of the request, the APL receivers were not seeking to serve any interest of APL or its creditors generally; they were seeking only to serve the interests of GE. Nor can reliance be placed on the power 'to exercise any powers or rights incidental to the ownership of the Mortgaged Property', or the power 'to do all such other things as the Receiver may consider to be incidental to the lawful exercise of his powers and duties'. Those powers are conferred on the receiver to enable him to perform his functions of getting in, protecting, and realising the mortgaged property for the benefit of APL and its creditors; not for the purpose of assisting GE in litigation against a third party.
>
> **[39]** We return, therefore, to the question whether, if the documents were obtained under the statutory powers conferred by ss 234–236 of the Insolvency Act 1986 for the purpose of enabling the APL receivers to make their own investigations (as the letter of 25 February 2003 asserted), it could have been a proper exercise of those powers for the APL receivers to send those documents to GE's solicitors without giving any consideration to their contents or to the question whether disclosing the documents to GE served the interests of APL. In our view that question, also, must be answered in the negative.

[40] The circumstances in which an administrative receiver may properly disclose privileged communications, obtained under statutory powers, to the creditor by whom he has been appointed were considered by Harman J in *Re a company (No 005374 of 1993)* [1993] BCC 734. He said ([1993] BCC 734 at 735):

> '... the duty of confidence imposed upon those who obtain information by the use of sec. 236 of the 1986 Act can, if the court is satisfied that either it is for the purposes of the office which the office-holders who seek to disclose the information hold, or is otherwise justified by the balance of considerations of how justice is properly to be attained, be waived by the court. That I base upon the decision of Millett J in *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708, and in particular para. 1 and 2 of the headnote.'

[41] The same point was addressed, a few months later, by Lord Cameron, sitting in the Outer House of the Court of Session, in *First Tokyo Index Trust Ltd v Gould* (30 September 1993, unreported). In that case the applicants (petitioners) were the joint liquidators of the company, First Tokyo Index Trust Ltd. They had obtained documents from the respondents under the statutory powers. They sought the permission of the court to disclose those documents – and the transcripts of private examination – to the debenture holder, Swiss Bank Corp. Permission was refused. Lord Cameron drew attention to the special nature of the powers conferred by ss 234–236 of the 1986 Act. He said:

> '... [those] powers ... are given to the Court in order to enable the liquidator to better discharge his functions as such and not to enable a prospective litigant to improve the prospects of litigious success by giving him rights which other litigants lack. To grant leave in order to enable the Bank to have disclosed to them even those documents limited to the extent suggested by counsel for the petitioners, would do just that and would not be for the purpose of the liquidation.'

[42] It can be seen, therefore, that, if disclosure of the BT documents to GE's solicitors for the purpose of assisting GE in its litigation against Mr Paul Sutton and others was not a proper exercise of the APL receivers' powers under the debenture, the position is not changed by the fact that the BT documents were obtained by a request made (or purportedly made) under ss 234–236 of the Insolvency Act 1986. The overriding question is whether disclosure of the BT documents to GE's solicitors was made in the performance by the APL receivers of their functions as administrative receivers of APL. It has not been suggested, by or on behalf of the APL receivers, that they gave any consideration to that question; in particular, it

has not been suggested that the APL receivers gave any consideration to the contents of the BT documents or to whether disclosure of those documents to GE would enable them the better to discharge their functions as administrative receivers of APL. The facts point strongly to the conclusion that they did not do so. Rather, they simply did as they were asked by GE's solicitor, Mr Boon, without giving any thought to the interests of APL.

[43] We hold, therefore, that APL's right to confidence – and to the legal professional privilege which would protect confidential communications from disclosure in litigation – was not lost when the BT documents were sent by the APL receivers to GE's solicitors. In the circumstances which we have described the disclosure of those documents to GE's solicitors was outside the powers of the APL receivers; and an unauthorised disclosure cannot have had the effect of waiving APL's rights to confidence and privilege.

[36.] I am satisfied that a general waiver by the JRMs of the LPP of BML does not and could not assist the beneficial conduct of the receivership. Contrary to the submission of CCA, I did not find that it was in the interest of the receivership for the opinions to be waived generally, and descend generally in the public domain. LPP was a fundamental right of BML and the JRMs was under a duty, having regard to the dicta in ***Sutton***, to maintain and protect the LPP of BML. In the event that LPP had to be waived it is limited to what is necessary to protect the interest. Other than indicating that they had the power to waive the LPP of BML, the evidence of JRMs does not suggest that it was in the interest of the receivership or the conduct of the receivership, that LPP be waived generally with respect to Exhibit RW-21.

[37.] CCA argues that, as the purpose for the sealing direction had fallen away, which was to protect the sales process, then the whole of the Affidavit and all the exhibits, including legal advice, should be unsealed. I do not accept that this is the necessary conclusion and prefer the submission of BMPL that the mere fact the sale process has completed, does not mean, that the exhibits, a legal advice, should go into the public domain. Why should this be any different from any other matter upon which the court receives privileged legal opinions in its supervisory

jurisdiction to give directions and sanctions to fiduciaries and insolvency practitioners seeking the assistance of the court. On the contrary, the sale is complete, and there are no outstanding matters which requires the waiver of LPP.

[38.] I find therefore that in all the circumstances, if BML's LPP was waived by the JRMs such waiver was a limited waiver for the purpose of the approval application only and was not a general waiver.

Conclusion

[39.] In all the circumstances therefore I make the following orders:

a) Exhibit RW-21 do remain under seal until further order of this Court;
b) Exhibit RW-22, be unsealed in a redacted form to remove any pricing information contained therein;
c) There be no order as to costs.

Dated this 1st day of May AD 2019

Ian Winder

Justice