Neutral Citation Number: [2014] EWHC 1102 (Comm)

Case Nos: See below

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

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

Date: 11 April 2014

Before :

MR JUSTICE EDER

- -

Between :

(1) ROBERT TCHENGUIZ
(2) R20 LTD
Claimants in 2013 Folios 1450 and 1451

(3) RAWLINSON AND HUNTER TRUSTEES SA
(4) VINCOS LTD
(5) EURO INVESTMENTS OVERSEAS INC
Claimants in 2013 Folios 1448 and 1449

(6) VINCENT TCHENGUIZ
(7) AMORA INVESTMENTS LTD
Claimants in 2013 Folio 1449

Claimants

- and -

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

PII/LPP JUDGMENT

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- -

MR JOE SMOUHA QC, Mr ALEX BAILIN QC, MR ANTON DUDNIKOV and Mr JOHN ROBB (instructed by **Shearman & Sterling (London) LLP**) appeared on behalf of the **Claimants** in 2013 Folios 1450 and 1451
MR CHARLES HOLLANDER QC, MS ROSALIND PHELPS and MR JAMES DUFFY (instructed by **Stephenson Harwood LLP**) appeared on behalf of the **Claimants** in 2013 Folios 1448 and 1449
MR JAMES EADIE QC, MR SIMON COLTON, MR JAMES SEGAN and MS PATRICIA BURNS (instructed by **Slaughter and May**) appeared on behalf of the **Defendant**

Hearing dates: 7 & 8 April 2014

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Approved Judgment

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

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MR JUSTICE EDER

Mr Justice Eder:

1. This judgment is concerned with an application by the claimants in 2013 Folios 1448 and 1449 (the "VT claimants") for permission to use certain documents which are said to be subject to public interest immunity ("PII") and legal professional privilege ("LPP"). Although in form an application by the claimants in those proceedings, Mr Smouha QC made plain that he will accept as binding any determination of the Court in respect of that application on behalf of the claimants in 2013 Folios 1450 and 1451. On 24 March 2014, the SFO also issued its own application in relation to PII seeking essentially the return and/or destruction of copies of the document said to be subject to PII.

2. Following argument, I informed the parties of my decision refusing the VT claimants' application and upholding the claim for PII. These are my reasons for that decision.

3. Originally, the application was in respect of some 25 documents disclosed by the defendant (the "SFO"). However, in the event, the SFO indicated shortly before the hearing that it did not intend to oppose the application save in respect of 5 of the documents, 4 of which are said to be subject to LPP and 1 of which to PII. These are:

    i) 'Intelligence Unit Briefing Note' dated 27 October 2009 (SFO-042290) disclosed on 16 January 2014, said to be subject to legal advice privilege.

    ii) The 'Wayil Eisa Report' dated 16 March 2012 (SFO – 038047), disclosed on 23 December 2013, said to be subject to litigation privilege.

    iii) Two emails (forming part of the same 'string') dated 7 and 8 June 2012 (SFO – 032717 and SFO - 19016), disclosed on 23 December 2013 and 16 December 2013 respectively, said to be subject to litigation privilege ('June 2012 emails').

    iv) A power point presentation prepared by Kaupthing and delivered to the Icelandic Special Prosecutor in relation to the proceedings brought by some of the VT Claimants against Kaupthing in the English and Icelandic Courts (SFO- 016237). This is said to be subject to PII.

4. The circumstances in which these documents came to be disclosed are set out in the 11th witness statement of Mr Cotton. It is common ground that all of the documents were disclosed by mistake i.e. inadvertently. The relevant documents said to be subject to LPP are exhibited in a confidential exhibit to that witness statement. As to the single document in respect of which the SFO claims PII, there has been issued a PII certificate which was served on the VT claimants by the Treasury Solicitor on 21 March 2014.

5. It is, as I understand, common ground at least so far as the documents which are subject to claims of LPP, that the position is governed by CPR 31.20 which provides:

> "*Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.*"

6. It is also common ground, at least in relation to documents which are subject to claims of LPP, that the relevant guidelines are those set out in paragraph 16 of the judgment of Clarke LJ in *Al-Fayed v Metropolitan Police Commissioner* [2002] EWCA Civ 780 (the "*Al-Fayed* principles"):

> "*(i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not."*
>
> *(ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.*
>
> *(iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.*
>
> *(iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.*
>
> *(v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.*
>
> *(vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.*
>
> *(vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:*
>
> > *(a) the solicitor appreciates that a mistake has been made before making some use of the documents; or*
> >
> > *(b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;*
>
> *and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.*
>
> *(viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for*

inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

(ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

(x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

LPP

7. It is convenient to consider first the four documents in respect of which the SFO claim LPP.

8. The first is a document authored by someone called Katie Badger and dated 27 October 2009. The VT claimants' evidence about this document is, in summary, as follows:

   i) It was read shortly after it was disclosed by a legally qualified employee of one of the VT Claimants by 20 January 2014 at the latest.

   ii) That person did not consider that the document was a privileged document which had been disclosed by mistake because:

      a) It relates to the history of the investigation into Kaupthing and sets out various potential offences under consideration. In this regard it is similar to a number of other SFO documents which have also been disclosed (presumably not by mistake).

      b) The author did not know who Katie Badger was.

      c) The document was already redacted by the SFO and the reviewer considered that the document had therefore already been considered in detail prior to disclosure.

   iii) No-one at Stephenson Harwood read it before they were alerted to the mistake.

9. In the light of such evidence, it is common ground that this is not a case where the receiving party in fact realised that a mistake had been made: *Al-Fayed* principle (vii)(a). It is also common ground that the principal issue for the Court is, therefore, whether the mistake should have been realised in the sense that it would have been obvious to a reasonable solicitor in the position of the reviewer that the document was not intended to be disclosed: *Al-Fayed* principle (vii)(b).

10. As to that issue, Mr Hollander QC on behalf of the VT claimants submitted that the mistake was certainly not an obvious one. In that context, Mr Hollander advanced a

number of general submissions as to the nature of the disclosure process in these proceedings. In particular, he submitted that it was necessary and important to take into account that this was obviously large scale litigation in which very many documents have been disclosed; that a mistake in the context of such a disclosure process is less likely to be obvious than it would be in a small case where fewer documents are disclosed, particularly in circumstances where the disclosure has been made at a relatively late stage and the VT claimants' legal team are under pressure to read documents quickly; that in this case, perhaps more so than in most others, the Court has been provided with detailed evidence as to the intricacies of the SFO's review process and the very extensive resources applied to the process; that the strong impression sought to be created by the evidence is that a great deal of care and resources have been applied by the SFO to the disclosure process including considering documents carefully prior to disclosure almost on a line-by-line basis for all of the various issues (such as statutory bar, third party information as well as privilege and confidentiality/irrelevance); that the form of the disclosure was electronic with documents being provided on CDs with accompanying Excel spreadsheets (i.e. the lists themselves); and that with one exception, there was nothing in the manner of the disclosure to alert the VT claimants to the mistake.

11. For all these reasons, Mr Hollander submitted that the VT claimants were entitled to and did rely on the SFO's legal team to conduct their review properly and that they were therefore entitled to take at face value the SFO's evidence as to the enormous degree of care and money being spent on this disclosure exercise. In effect, Mr Hollander relied on the foregoing in support of his argument that it could not be said that there had been any "obvious mistake" with regard to any of the documents provided by the SFO in the course of the disclosure process.

12. More specifically with regard to this particular document, Mr Hollander relied upon a number of particular matters in support of his submission that there was no "obvious mistake". In particular:

    i) The document is headed 'Intelligence Unit Briefing Note' and the title makes no reference to legal advice.

    ii) The document begins by setting out in detail certain alleged facts in relation to a number of transactions which took place prior to the Bank's collapse and then sets out a number of potential offences which may have been committed. In this regard the document is very similar to a number of other documents disclosed by the SFO (some of which were dated at around the same time) which set out the facts and the potential offences available by reference to those facts.

    iii) The only material factor distinguishing this document from the others is that Ms Badger is legally qualified, but this does not appear from the face of the document. In relation to this last point, the SFO relies on Ms Badger's 'LinkedIn' profile in support of its argument that the mistake was obvious, since it shows that she is a lawyer. This point is wholly without merit: first, no-one in the VT claimants' legal team in fact accessed that web page, nor is it reasonable to argue that the reasonable solicitor should have done so; secondly, even if they had done so, that page simply shows that Ms Badger used to be a lawyer at the CPS until 2004 and is now a 'case manager' at the

SFO. It would not, on any view, follow that all briefing-type documents written by Ms Badger would be subject to legal advice privilege.

iv) The document is redacted for relevance in two places and therefore gives every impression of having been carefully considered before being disclosed, especially in the context of the other points about the disclosure in these proceedings made above (paragraphs 10 and 11).

13. In addition, Mr Hollander submitted that there were other documents which had been disclosed in the disclosure process which were similar to this particular document but in respect of which LPP had not been claimed. This, he submitted, bolstered the argument that there had been no "obvious mistake" with regard to this particular document.

14. Although advanced most attractively, I do not accept these submissions. I recognise the force of the argument that in general terms at least the VT claimants were entitled to rely on the SFO's legal team to conduct the disclosure process review properly. However, given the scale and complexity of the SFO's disclosure review as referred to in the 11th witness statement of Mr Cotton, it would be wrong, in my view, for anyone to assume that such review would be infallible. On the contrary, it seems to me almost inevitable that some mistakes would or at least might occur and that the SFO was not intending that there should be any waiver of the SFO's rights in documents which might be inadvertently disclosed. That conclusion is, in my view, reinforced by a series of letters commencing with a letter from the SFO's solicitors dated 14 March 2013 and further letters dated 16 December, 19 December, 23 December 2013 and 16 January 2014.

15. Further, there are specific matters in the body of this particular document which would, in my view, indicate that there had been an obvious mistake in relation to the disclosure of this particular document, although I do not propose in this public judgment to identify such matters. For the avoidance of doubt, I do not accept the submission that this particular document was in any relevant sense "similar" to other documents which had been disclosed and in respect of which no LPP had been claimed.

16. The second document is dated 16 March 2012 and headed "*Response by Wayil Eisa to SFO Requests for Information re KAU01*". As to this document, the VT claimants' primary case is that the claim for litigation privilege is not made out. Specifically, Mr Hollander submitted that the "dominant purpose" test was not made out in respect of this document. In particular, he submitted that there was nothing in the body of the document nor in the evidence of Mr Cotton relating to its provenance to justify a conclusion that the document was produced for the dominant purpose of the judicial review litigation. I do not accept that submission. It is fair to say that Mr Cotton in his witness statement does not in terms say that the document was produced for the dominant purpose of the judicial review. However, reading fairly paragraph 63 of Mr Cotton's 11th witness statement, it seems to me that that is the necessary effect of his evidence. Further it seems to me that contrary to Mr Hollander's submission, it is plain from the nature of the contents of the document that that was indeed its dominant purpose.

17. In the alternative, Mr Hollander submitted that the VT claimants should, in any event, be entitled to use the document pursuant to CPR 31.20. In particular, he relied on the same general points referred to above which he said militate against a conclusion that there had been any "obvious mistake". As to that point, I am prepared to accept (and indeed, I think, it was common ground) that when the document was reviewed by the legally-qualified employee from the VT claimants' in-house team, that individual did not in fact realise that privilege was intended to be claimed over the document. Be that as it may, it seems to me that with regard to this document it would have been obvious to a reasonable solicitor in his position that a mistake had been made. In reaching that conclusion I bear in mind the general points with regard to the disclosure process generally undertaken by the SFO which I have already referred to above as well as the contents of the body of the document.

18. The last two documents consist of two emails forming part of the same string, although I bear in mind that they were apparently not disclosed at the same time.

19. In this context, the main focus was, again, whether it would be obvious to a reasonable solicitor in his position that a mistake had been made. In that context, Mr Hollander submitted that there had been no "obvious mistake" for reasons which were, in summary, as follows:

    i) The June 2012 emails have been disclosed and read by one of the VT Claimants' in-house lawyers.

    ii) On the face of it, and taken in isolation, the June 2012 emails might appear to be privileged (since they refer to the seeking of instructions by Treasury Solicitor from the SFO in relation to the application made in the judicial review proceedings about the Brinkworth statement). However, when set in their proper context, and in particular given (i) the fact that the 'hot topic' of GT's possible input into the Brinkworth Statement had already been extensively versed in correspondence (ii) the fact the SFO had sought to bring the correspondence to an end by saying, effectively, 'wait for disclosure', and (iii) the disclosure of a considerable number of other documents dealing with this topic, those lawyers who reviewed the documents thought that they had been deliberately disclosed. That conclusion is one which a reasonable solicitor would have reached given the circumstances.

    iii) The SFO's evidence does not explain why the application was belatedly conceded in relation to the other documents, although the concession is said to be made 'without waiving privilege in any documents'. Presumably the SFO has taken the view that the other documents were not disclosed pursuant to an obvious mistake, or at least that they are not likely to succeed in arguing that they were. There is no justification for treating the June 2012 emails any differently.

20. I do not accept those submissions for the reasons set out by Mr Eadie QC in his skeleton argument. In particular, these emails are headed "*Re: R (Robert Tchenguiz and R20 Ltd) v SFO – URGENT INSTRUCTIONS SOUGHT*". The emails are between the SFO and the Treasury Solicitor. The subject line of the emails, and the contents of those emails, make clear that the Treasury Solicitor is seeking instructions about an application being made in the context of the judicial review proceedings. As

the VT claimants' own evidence describes it, it relates to the SFO considering responses to the application by Herbert Smith on behalf of the Tchenguiz Discretionary Trust for use of the Paul Brinkworth witness statement exhibits in the Guernsey Court.

21. In my view it is plain from the face of these documents that they were created for the dominant purpose of an application being made in the context of the judicial review proceedings and thus attract litigation privilege: and that this would have been obvious to a reasonable solicitor in the position of the VT claimants' solicitors.

Public Interest Immunity

22. In relation to the VT claimants' application to use the document in respect of which the SFO claimed public interest immunity, there was an important dispute as to whether the applicable principles were the same as those set out above in relation to LPP i.e. the *Al-Fayed* principles. In that context, although the *Al-Fayed* principles as quoted above from paragraph 16 of the judgment of Clarke LJ in the *Al-Fayed* case were derived from cases concerned with LPP and not PII (as Clarke LJ expressly acknowledges in paragraph 15 of his judgment), Mr Hollander submitted that it is plain from paragraph 17 of the judgment that the Court of Appeal decided that the same principles applied in the two different situations; and that, as a matter of precedent, that conclusion was binding upon me. Paragraph 17 of the judgment of Clarke LJ in *Al-Fayed* reads as follows:

> "*Those principles seem to us also to apply to cases where the documents were not initially the subject of LPP privilege but in respect of which the disclosing party was entitled to claim PII. Once it is accepted that the party concerned is not bound to refuse to permit inspection of a relevant document we can see no reason why (in the absence of particular circumstances in a particular case) different principles should apply to the two situations.*"

23. This was hotly disputed by Mr Eadie QC on behalf of the SFO. That submission had two main strands. First, Mr Eadie submitted that the statement in paragraph 17 was not on its face the subject of detailed or indeed any submissions; that, in such circumstances, such statement is not binding authority for the proposition set out: see e.g. *In re Hetherington, decd* [1990] Ch 1 at 10 per Sir Nicolas Browne-Wilkinson VC; and that this position is not altered by the later decision of the Court of Appeal in *R v G* [2004] 1 WLR 2932 in which *Al-Fayed* was taken, without further argument, to be authority for the proposition contained in paragraph 17 of Clarke LJ's judgment. For the avoidance of doubt, I should mention that in any event the SFO reserved the right to argue on appeal that the decision in *Al-Fayed* was *per incuriam*.

24. The second main strand of Mr Eadie's argument in this context was that importantly, paragraph 17 of *Al-Fayed* is premised on the assumption that a party "*... is not bound to refuse to permit inspection*" of a document covered by PII and that such premise was unsound because it is inconsistent with at least three previous authoritative decisions of the House of Lords:

i) In *R v Lewes Justices, ex parte Home Secretary* [1973] AC 388, the House of Lords held that PII was **not** to be equated with a privilege and that there was instead a **duty** on the relevant public authority to assert PII: see 400D-G per Lord Reid, 406F-G per Lord Pearson, 407A-B per Lord Simon and 412B-C per Lord Salmon. As Lord Simon put it, once the public interest in withholding disclosure has been held to outweigh the public interest in disclosure, "*... the evidence cannot in any circumstances be admitted. It is not a privilege which may be waived by the Crown ...*" (407B).

ii) In *Air Canada and Ors v Secretary of State for Trade* [1983] 2 AC 394 at 436, the House of Lords again held that PII is "*... not a privilege which may be waived by the Crown or by any party*" (436 per Lord Fraser).

iii) In *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] AC 274, the House of Lords again emphasised that PII is not a privilege and cannot therefore be waived: see 290G, 295F-296C, 296E-G and 298B-E per Lord Woolf, with whom Lords Templeman, Bridge, Slynn and Lloyd agreed.

See also *Makanjuola v Commissioner of Police for the Metropolis* [1992] 3 All ER 617 at 623.

25. On this basis, Mr Eadie submitted that if these decisions had been cited to the Court of Appeal in the *Al-Fayed* case, the Court's decision on the PII point could not have been the same. In particular, Mr Eadie submitted that these cases establish that PII means that a party is indeed precisely "*... bound to refuse to permit inspection of a relevant document*".

26. In response, Mr Hollander submitted in effect that both strands of Mr Eadie's argument were without merit. In particular, as to the first, he submitted that it was plain that the point had been argued before the Court of Appeal; alternatively, and in any event, he submitted that even if the Court had simply proceeded on an assumption that the party concerned is not bound to refuse to permit inspection of a relevant document governed by PII, nevertheless such assumption formed the basis of the decision of the Court of Appeal and therefore, as a matter of precedent, was binding on me for that reason.

27. As to the second main strand, Mr Hollander referred me to the decision of the House of Lords in *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 274. Relying upon that authority, Mr Hollander submitted that the statement in paragraph 17 in *Al-Fayed* that the party concerned is not bound to refuse to permit inspection of a relevant document was plainly correct.

28. In the event, I do not consider that it is necessary for me to decide either whether what is stated in paragraph 17 in *Al-Fayed* is binding on me nor whether such statement is correct in law. I am prepared to proceed on the basis that it is binding on me; alternatively that it does represent a correct statement of the law.

29. Nevertheless, it seems to me important to bear in mind that paragraph (x) of the *Al-Fayed* principles expressly recognises that the Court is exercising an equitable jurisdiction and that there are no rigid rules. That seems to me equally true of the position under CPR 31.20. I have not seen this particular document. However, even

assuming that this is not a case of "obvious mistake" the fact that the document in question is one in respect of which a public interest certificate has been issued is, in my view, a very potent and relevant matter to consider. At one stage, I had understood Mr Hollander's argument to be that absent "obvious mistake" the Court would, in effect, be bound to grant permission to the VT claimants to use these particular documents. However, in my view, that would plainly be incorrect – and, in truth, I do not think that Mr Hollander went that far. In any event, in my view, any such submission would be inconsistent with the *Al-Fayed* principles, and, as I understand, Mr Hollander was bound to concede that this was so.

30. It may well be that absent "obvious mistake" and in certain circumstances a court may well engage in an exercise in considering whether the public interest immunity was properly claimed or should be over-ridden having regard to the private interests of the parties. Be that as it may, that was not an exercise which I was invited to carry out in this case. In such circumstances, it seems to me that I must and should take the public interest immunity certificate at face value and even without deciding whether or not this was a case of "obvious mistake" should give effect to it. As it seems to me, that conclusion accords with general principle and the particular circumstances of the present case.

31. For all these reasons, I refuse to exercise the discretion under CPR 31.20 in favour of the VT claimants and am prepared to grant the relief sought by the SFO in its application.