IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 205 OF 2017 (NSJ)

IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED

BETWEEN

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs/Counterclaim Defendants

and

(1) LOPAG TRUST REG.
(2) PRIVATE EQUITY SERVICES (CURACAO) N.V.
(3) FIDUCIANA VERWAL TUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON
(7) RON GREENSPOON
(8) MIA GREENSPOON

Defendants/Counterclaim Plaintiffs (in the case of the First Defendant)

RULING ON PARAGRAPH 2.1 OF THE JANUARY SUMMONS – THE ASSERSONS PRIVILEGE ISSUES

1. This is a note of my ruling on the application made by the First Defendant in paragraph 2.1 of its summons dated 3 January 2019 (the ***January Summons***) for specific discovery from the Plaintiffs of:

> "*All documents containing advice given by Asserson Law to Mr Perry and/or Mrs Perry regarding Mrs Perry's statement of assets in the proceedings in the High Court of England and Wales Claim No 11592 of 2009.*"

2. Asserson Law are referred to as ***Asserson***; the documents covered by paragraph 2.1 of the January Summons are referred to as the ***Asserson Documents*** and the proceedings identified in that paragraph are referred to as the ***SOCA Proceedings***.

3. The First Defendant's attorneys (Campbells) requested that the Plaintiffs disclose the Asserson Documents in their letter to the Plaintiffs' attorneys (Walkers) dated 21 December 2018. Campbells noted that the Plaintiffs had already given discovery of documents which contained advice from Asserson with regard to Mr Perry's and/or the First Plaintiff's statement of assets for the purpose of the SOCA Proceedings and that this amounted to a waiver of privilege in relation to all advice on this issue. Campbells therefore requested disclosure of all advice given to the First Plaintiff concerning her statement of assets.

4. On 3 January 2019 the First Defendant issued and served the Sixth Affidavit of Ms Partos in support of the January Summons. Ms Partos explained that in the SOCA proceedings Mr Perry and the First Plaintiff had been obliged to set out details of the assets they owned including assets that may have been part of Mr Perry's trust structures and asserted that the documents containing such evidence were relevant to the Plaintiffs' claims in these proceedings. Ms Partos also asserted that since some of the Asserson Documents had been listed on discovery and provided for inspection by the Plaintiffs, the Plaintiffs had waived privilege in relation to the documents discovered.

5. In their letter dated 15 January 2019 Walkers rejected the argument that there had been a waiver of privilege.

6. The First Defendant's application was to be renewed and heard at a hearing listed on 22 January 2019. In their skeleton argument for and at that hearing Mr Brownbill QC for the Plaintiffs reiterated the Plaintiffs' position that there had been no waiver of privilege. The Plaintiffs had not intended to waive such privilege and the documents from Asserson provided on discovery had been inadvertently provided. Mr McPherson QC for the First Defendant reiterated the First Defendant's submission that there had been a waiver of privilege but also argued that Asserson had been jointly instructed and retained by all the defendants in the SOCA Proceedings, including Mr Perry, the First Plaintiff and the First Defendant and accordingly there had been a joint retainer such that privilege could not be asserted by one joint client against the other.

7. Since no evidence had been filed regarding the terms and basis on which Asserson had been retained or as to the circumstances in which the Plaintiffs' legal advisers had come to include documents containing advice from Asserson in the Plaintiff's list of documents for the purpose of discovery I ordered the filing of further evidence on these matters and of written submissions dealing with the issues of whether (a) Asserson had been jointly retained so that no privilege could be asserted by the Plaintiffs against the First Defendant with respect to the Asserson Documents (the ***Asserson Retainer Issue***) and (b) assuming that there had not been a joint retainer, whether the Plaintiffs had waived privilege in the Asserson Documents such that they could not refuse to discover and produce copies of them in accordance with paragraph 2.1 of the January Summons (the ***Waiver of Privilege Issue***).

8. Following and in accordance with the orders I made at the 22 January hearing:

(a). the First Defendant has listed the Asserson Documents of which the Plaintiffs have already given discovery and inspection (there are 104 such documents 68 of which are communications which took place on or after the date on which Asserson was retained by the First Defendant, namely 17 March 2010).

(b). Ms Partos filed and served her Eighth Affidavit (***Partos 8***) on behalf of the First Defendant in which she dealt with the scope and nature of the retainer of Asserson and the circumstances which in her view gave rise to the waiver of privilege by the Plaintiffs.

(i). As regards the basis on which Asserson had been retained she exhibited various documents which she considered established that the First Defendant, Mr Perry and the First Plaintiff had instructed Asserson under a common retainer for the purpose of defending the SOCA proceedings. On that basis the First Defendant was entitled to see either all further advice which the First Plaintiff had received with regard to the preparation of her statements of assets or such advice given after 17 March 2010 when the First Defendant became a joint client of Asserson (on the basis that the First Defendant was the joint owner of documents produced including advice given by Asserson in furtherance of the joint defence).

(ii). As regards waiver of privilege, Ms Partos provided details of the documents containing advice from Asserson which the Plaintiffs had provided on discovery and which the First Defendant had inspected. She also explained the understanding of the Cayman advocates, English solicitors and English counsel who had reviewed these documents on behalf of the First Defendant. She states that:

> "*At no time during [the process of reviewing the documents] was any belief of concern expressed that documents [containing advice from Asserson] might have been discovered by the Plaintiffs by mistake; while the First Defendant certainly had concerns about [the inadequacy] ..of the Plaintiffs' discovery it had no reason to believe that any mistakes of the type now alleged had been made on the Plaintiff's behalf in conducting the discovery process. Had that been considered a possibility Campbells would have expected Walkers to raise the issue as discovered documents were used in the preparation of witness statements and expert reports. As it is, it was only on 15 January 2019 that Walkers suggested for the first time that there had been any mistake or oversight in connection with the Plaintiff's discovery.*"

(c). Ms Stewart filed and served her Third Affidavit (***CS3***) and the Second Plaintiff filed her Fourteenth Affidavit on behalf of the Plaintiffs. Ms Stewart in CS3 also dealt with the scope and nature of the retainer of Asserson and the waiver of privilege issue:

(i). She explained that she had made inquiries regarding the basis on which Asserson had been instructed and was of the view that there had never been a joint retainer. She referred to and exhibited copies of correspondence between her firm and Asserson, in particular her firm's letter dated 22 January 2019 and Asserson's response dated 29 January 2019. In the letter of 22 January Ms Stewart's firm had stated that:

> "*We consider that you were correct to refuse [the First Defendant's] request [for a copy of the entire client file held by Asserson] because not all of the advice which you provided to our clients and to [Mr Perry] was*

provided for [the First Defendant's] benefit and in so far as advice was provided solely for the benefit of our clients and not for [the First Defendant's] benefit that advice does not belong to [the First Defendant] and indeed is subject to legal advice privilege so that [the First Defendant] is not entitled to obtain those documents without our clients' permission.

We would be grateful if you could confirm that this reflects your understanding of the position and if you have any formal records (such as letters of retainer) to confirm this then please could you provide such records to us as soon as possible.

..[the First Defendant has] asserted that advice given to ..[Mr Perry and the First Plaintiff] in respect of the preparation of [the First Plaintiff's] statement of assets in [the SOCA Proceedings] was produced pursuant to ..a joint retainer so that there is no privilege in relation to such advice as against [the First Defendant]. We consider that [the First Defendant's] position is incorrect and we would be grateful if you would confirm that you agree with our position...

By way of example of such advice we enclose an email from Trevor Asserson dated 6 March 2010 [which does not appear in my copy of the exhibit to CS3] which includes advice in relation to the preparation of [the First Plaintiff's] statements. Please confirm that you agree with us that such documents were not provided for [the First Defendant's] benefit and that you agree with us that [the First Defendant] is not entitled to such documents both because they do not belong to the [First Defendant] and because our clients are entitled to the benefit of legal advice privilege in respect of such documents as against [the First Defendant]."

Asserson provided a brief response in their letter dated 29 January. They simply said that they agreed "*with the analysis set out in [the letter of 22 January].*" They also provided copies of two letters of retainer one addressed to the First Plaintiff

and the other addressed to the Second Plaintiff and Fifth Defendant. Ms Stewart noted that neither referred to there being a joint retainer on behalf of all the defendants to the SOCA Proceedings.

(ii). Ms Stewart also explained that the documents containing advice from Asserson which had been included in the Plaintiffs' list of documents and provided for inspection had been included inadvertently and that there had been no intention by the Plaintiffs to waive privilege. She also explained the circumstances in which the mistake had been made. The process of reviewing documents had been carried out by a team of lawyers and paralegals of varying degrees of seniority and involved reviewing thousands of documents under very significant time pressure by reason of the tight timetable imposed by the Court. It had been impossible in the time available for every document to be reviewed by Ms Stewart or a senior lawyer in her team. She had instructed her team to show her documents about which there was a difficulty so that she could form a view on whether the document was to be discovered. However none of the documents containing advice from Asserson had been shown to her and she therefore assumed that a junior lawyer had included the documents without appreciating that they were privileged. The error had not been picked up because of the scale of the exercise and time pressures. Furthermore, she explained that in her view the fact that a mistake must have been made ought to have been obvious to the First Defendant's legal team. She further says that since Campbells had written to Walkers on 21 December 2018 stating that the documents had before the alleged waiver been privileged they had accepted and conceded that the First Defendant was not entitled to them by virtue of a joint retainer.

(d). Mr McPherson QC and Campbells on behalf of the First Defendant and Mr Brownbill QC and Walkers on behalf of the Plaintiffs filed their written submissions. All parties confirmed that they agreed to me dealing with the application on the papers and without the need for a further hearing.

9. The First Defendant's submissions on the Asserson Retainer Issue can briefly be summarised as follows:

(a) The evidence relating to the basis and terms on which Asserson was instructed by Mr Perry (from the outset), the First Plaintiff (from 24 June 2008), the Second Plaintiff and Fifth Defendant (from about 25 June 2008) and the First Defendant (from 17 March 2010) establishes that there was a joint retainer (as regards the First Defendant from 17 March 2010). Accordingly no party to the joint retainer was entitled to assert privilege against another with respect to documents produced in connection with the joint retainer.

(b). Various items of contemporaneous correspondence and documents showed that Asserson's working practices and the manner in which Asserson carried out its instructions were consistent with a joint retainer and not a separate retainer. This correspondence and documentation included:

(i). An email from Mr Asserson to Mr Greenspoon, the Fifth Defendant and Hadie Cohen dated 22 November 2009 suggesting that in the early stages of their engagement and before the First Defendant became a client Asserson had it in mind that it would represent the defendants to the SOCA Proceedings jointly rather than separately (and that if there was to be a separate instruction the defendants wishing to instruct solicitors should instruct a separate firm). The email related to urgent steps to be taken in relation to each defendant to the SOCA Proceedings and stated that in Mr Asserson's view it "*would be most advantageous were [Asserson] to represent each [defendant]. If however some of the [defendants] prefer separate representation then the best scenario would be to ensure that they are represented by a single law firm and preferably one which is prepared to authorise all non-controversial acts of [Asserson] on their behalf. This would ensure a united and costs friendly front albeit that an independent solicitor ensures that there is no conflict between the needs of our clients and the other [defendants].*"

(ii). Written instructions to counsel in April 2010 who were instructed on behalf of a number and probably all of the defendants to the SOCA Proceedings, including the

First Defendant. These instructions discussed in a single document the separate position of and issues affecting the different defendants. It appears that these instructions and information concerning (and probably the advice given by counsel on) these issues were shared among and made available to each of the defendants.

(iii). A witness statement of Mr Asserson filed in the SOCA Proceedings (***Mr Asserson's Witness Statement***) in which he averred that it was a feature of the "*litigation that there were a number of individual parties being sued who had almost identical interests ... Each of the Defendants was content to instruct [Asserson] to accept day to day instructions from Mr Perry in relation to all aspects of the case and each expressed to me that they recognised that they had a common interest in the result.*' He went on to confirm that Mr Perry and the First Defendant had agreed to be jointly liable for the "*payment of all the common costs*" incurred by Asserson. Therefore the First Defendant was liable with Mr Perry for (and paid) the costs incurred by all defendants in obtaining advice from Asserson.

(c). Asserson had made clear in their letter dated 29 October 2018 to Byrne & Partners (the First Defendant's London solicitors) that they had generally acted under a joint retainer and held files which "*mostly contain documents which belonged jointly to a group of clients [who were now in dispute with one another]*." The letter makes it clear that Asserson accept that they were generally acting pursuant to a "*common retainer*" but that they needed to take great care to identify and not disclose documents which were prepared during a period when a particular defendant was not a joint client or in relation to a matter outside the common retainer. Asserson listed five such matters which "*arose during the course of the litigation which eventually became the subject of separate representation for various clients*." None of the items listed appear to relate (nor were identified by Asserson as relating) to the preparation of the First Plaintiff's statement of assets.

(d). The statement made by Asserson in their letter to Ms Stewart's firm (Bridge Law Solicitors Limited) dated 28 January 2019 should not be taken as being inconsistent with or undermining the significance of the account given in their letter dated 29 October 2018 to Byrne & Partners. As the quotation set out above makes clear, the letter from Ms Stewart's

firm had focussed on advice produced "*solely for the benefit*" of the First and Second Plaintiffs ("*We consider that you were correct to refuse [the First Defendant's] request [for a copy of the entire client file held by Asserson] because not all of the advice which you provided to our clients and to [Mr Perry] was provided for [the First Defendant's] benefit and in so far as advice was provided solely for the benefit of our clients and not for [the First Defendant's] benefit that advice does not belong to [the First Defendant] and indeed is subject to legal advice privilege so that [the First Defendant] is not entitled to obtain those documents without our clients' permission.*")

10. The Plaintiffs' submissions on the Asserson Retainer Issue can briefly be summarised as follows:

(a). Asserson's response in their letter to Ms Stewart's firm dated 28 January 2019 is inconsistent with Asserson believing that it acted under a joint retainer and Asserson had repeatedly rejected the First Defendant's requests to see a copy of their entire client file because they considered that the First Defendant was not entitled to receive all the documents in it. Asserson were in the best position to know the basis on which they had been instructed and their views should be given considerable weight.

(b). Asserson had consistently taken the view that there were separate and not joint retainers, which was supported by an email from Mr Asserson to the Second Plaintiff in August 2016 in which he had responded to a request from her to receive copies of all correspondence that he had or would have with other "clients" for whom Asserson was acting in relation to the SOCA Proceedings. Mr Asserson had responded as follows:

> "*Correspondence with this firm and its clients is confidential to those clients unless it is also copied to others when sent, When, as I understand is the case here relationships between my respective clients are not entirely amicable the need to preserve confidence is greater than might normally be the case between a group of clients on the same case.*"

(c). None of the Asserson engagement letters state or indicate that there was a joint instruction and should be taken as evidencing separate instructions.

(d). The First Defendant has only recently claimed that there was a joint instruction and must have until recently believed that there was no such retainer.

11. The First Defendant's submissions on the Waiver of Privilege Issue can briefly be summarised as follows:

(a). Discovery of documents falling within the category of Asserson Documents has been given by the Plaintiffs and inspection has been provided.

(b). Giving discovery and inspection of a document waives privilege in it subject to the Court's jurisdiction to relieve a party from the consequences of an inadvertent mistake (in reliance on *Al Fayed v Commissioner of Police* [2002] EWCA Civ 780 at [16(iv)]).

(c). Once privilege is waived in a document the waiver extends to all documents relating to the same transaction (in reliance on *Thanki* at [5-129]).

(d). The Court has an equitable jurisdiction to prevent the use of documents made available for inspection by mistake where justice requires and the principles applicable to the exercise of this jurisdiction are summarised in *Atlantisrealm* [2017] EWCA 1029 at [31-37] (referring to dicta in *Al Fayed* (above) and *Rawlinson and Hunter Trustees SA v Director of the SFO (No 2)* [2014] EWCA Civ 1129):

(i). In the absence of fraud all will depend on the circumstances.

(ii). The Court may grant an injunction if the documents have been made available as a result of an obvious mistake.

(iii). A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and (I) the solicitor appreciated that a mistake had been made before making use of the documents **or** (II) 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.

(iv). Where a solicitor gives detailed consideration to the question of 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. Since the Court is exercising an equitable jurisdiction there are no rigid rules.

(e). There was insufficient evidence of a qualifying mistake in the present case. In order to decide whether the documents have been discovered by mistake the Court must review how the disclosure process has been conducted and the explanation provided as to how the documents came to be discovered. The present case was very different from the facts in *Atlantisrealm*. Here there was no evidence from which the Court could conclude that the Plaintiffs intended the discovery process to prevent the Asserson Documents from being discovered or being made available for inspection and Ms Stewart's account in CS3 as to how the Asserson Documents came to be included in the list of documents was no more than speculation. It was unlikely that an individual would inadvertently list more than one hundred different documents which he/she ought to have realised were privileged or that multiple individuals would make the same mistake.

(f). Even if there was such a mistake it was not obvious. None of the First Defendant's legal team involved in the document review process raised any concerns that the Asserson Documents had been wrongly produced. Nor was there anything in the nature of these documents to identify them as sensitive and therefore alert those reviewing them that disclosure was unexpected or unusual. Furthermore it took Walkers twenty five days to assert that there had been a mistake. The fact that the disclosing party's solicitor had immediately asserted privilege had been a significant factor in *Atlantisrealm.*

(g). The Court should not in any event exercise its discretion to grant relief to the Plaintiffs. Since the Asserson Documents were discovered and provided for inspection witness

statements and expert reports had been exchanged and it would be unfair for only some and not all of the Asserson Documents to be provided.

12. The Plaintiffs' submissions on the Waiver of Privilege Issue can briefly be summarised as follows:

(a). The evidence of Ms Stewart clearly established that there had been a mistake in this case and that it was understandable why the mistake was made.

(b). The First Defendant's legal team should have realised that the Asserson Documents had been included in the Plaintiffs' discovery inadvertently and Campbells' letter of 21 December demonstrated that they appreciated that the Asserson Documents contained legal advice which was *prima facie* privileged and they and the First Defendant should have drawn the material to the attention of the Plaintiffs in order the ascertain the true position. They failed to take the responsible course and should now be required to destroy all copies of the Asserson Documents and not be permitted to refer to such material at trial.

13. My conclusions are as follows:

(a). dealing first with the Asserson Retainer Issue:

(i). I seems to me, based on the evidence filed in this application, that Asserson were instructed under a joint retainer which included advice on the statements of assets to be prepared by various defendants in the SOCA Proceedings.

(ii). The defendants regarded themselves as having a common interest so that there was no need to keep information and the statements confidential as, and not to distribute it freely, between them. This conclusion is confirmed by Mr Asserson's Witness Statement. This meant that there was no perceived need to keep information and documents separate and confidential to each defendant. Each defendant delegated decision making with regard to the preparation of the statements to one person, Mr Perry. All information and documents would need to be shared with and seen by him and he would be acting for and need to make

decisions for each of the defendants involved. There was no suggestion that the pooling of information and documents for the purpose of allowing day to day decision making by Mr Perry did not permit the defendants for whom Mr Perry was acting to see the documents given to him.

(iii). The sharing of such information and statements was needed for the effective management of the process of preparing and obtaining advice on the statements. This was because a number of the defendants held title to assets and coordination in the preparation of the statements was, as a practical matter, needed and, in practice, undertaken.

(iv). Information relating to the preparation of the First Plaintiff's statement of assets was in fact shared with counsel acting for all the defendants without any suggestion that it could not be shared with all clients or was to be dealt with separately. The instructions dated 9 April 2010 deal with seven issues one of which is the statement of assets to be prepared by the First Plaintiff. There is no suggestion that this issue or aspect is to be kept separate from the other defendants and clients. The instructions dated 22 June 2010 also discuss sensitive information concerning the manner in which Mr Perry's statement of assets had been prepared.

(v). Asserson appear to accept that they were generally acting under a joint retainer although they made it clear that all instructions were not provided under the joint retainer and therefore they were unable to deliver up to Campbells the full file which they hold in relation to the SOCA Proceedings. This is explained in in their long, detailed and carefully constructed letter to Byrne & Partners dated 29 October 2018. They identified two particular circumstances in which a (joint) client would not be entitled to receive copies of document held by Asserson - first, documents generated in the period before the (joint) client instructed Asserson or after they ceased to be a client; and second, documents relating to certain separate engagements which they list and describe briefly. None of these separate engagements appear to include the preparation of the statements of assets nor does

Assertion say that the advice on the preparation of the statements was the subject of a separate engagement.

(vi). Asserson's letter to Bridge Law dated 28 January 2019 does appear to support the Plaintiffs' submissions. Bridge Law did clearly state in their letter dated 22 January to Asserson, as appears from the quotation set out above, that they disagreed with the First Defendant's claim that the advice given to Mr Perry and the First Plaintiff in respect of the preparation of the statements of assets was produced pursuant to a joint retainer so that no privilege could be asserted against the First Defendant. And Asserson said that they agreed with Bridge Law's analysis as set out in the 22 January letter. Bridge Law's letter did contain two requests for confirmation from Asserson, the first being a request for a confirmation that the First Defendant was not entitled to see Asserson's entire file. But it appears that Asserson was responding to, and did not differentiate between, the two requests. But I do not regard Asserson's brief response on 22 January 2019 as being intended to qualify or undermine the detailed treatment of their position set out a few months previously in the letter dated 29 October 2018. That earlier letter was, it is true, designed to explain that Asserson (understandably) did not wish to expose themselves to a claim by any of their former clients by taking their own view and providing documents to one former client without the consent of all clients or an order of the court (the English court or at least a court of competent jurisdiction who made an order on notice to all the defendants and which was binding on them and Asserson). So it was adopting a neutral view as between the parties. But it did explain Asserson's position in some detail and seems to me to be consistent with the analysis I have adopted.

(vii). The extract from the email from Mr Asserson to the Second Plaintiff in August 2006 relied on by the Plaintiffs (quoted in Mr Brownbill's skeleton and set out above) was not representative of Mr Asserson's position in that email. He went on to say, immediately after this extract [my underlining]:

"*If they permit me to send it to you I will have no objection to sending the correspondence to you. I will ask them. But this requires someone to work out what emails were sent to which people and when and then to show them to those people to get permission to copy the correspondence to you. That is time consuming.*

I am confident that all material advice and information would have been copied to the general group and therefore the exercise you request me to undertake is unlikely to be of any material consequence in the end. Hence my reluctance to give it priority when I have a number of other very pressing things on my desk. ...

I note that you write the word "clients" in inverted commas. Is it intended that I should understand anything by that. If so, I would be grateful if you could explain what."

So Mr Asserson was of the view that *all material advice* had been and was being shared and therefore was available to and not confidential as between the *general group*, that is all the defendants. He was also questioning the Second Plaintiff's use of inverted commas and the suggestion that a special designation or treatment was needed for the general client group for whom his firm acted.

(viii). It is correct that separate engagement letters were signed with Asserson by the Second Plaintiff (and the Fifth Defendant) and the First Defendant and that the engagement letters made no mention of there being a joint instruction (or of Asserson being permitted to disclose information and documents with other joint clients). But the engagement letters were clearly standard form documents which did not address the issue of whether the engagement was joint or separate (albeit that they should have done) and therefore in my view did not preclude a joint engagement being agreed.

(ix). Bridge Law in their letter to Asserson dated 22 January 2019 had referred to and relied on a benefit analysis. The argument was that even though Asserson was acting for a number of clients in relation to the same matter advice was produced for particular clients according to whether the subject matter of the particular advice was for their benefit. Advice for the benefit of one client was to be kept separate from the other clients. I can see that this is a possible approach but for the reasons I have given it is not applicable in the present case or the correct construction of the arrangements between Asserson and the defendants to the SOCA Proceedings.

(b). Dealing secondly with the Waiver of Privilege Issue:

(i). In view of my decision on the Asserson Retainer Issue there is no need for me to deal with the Waiver of Privilege Issue but I shall, nonetheless, briefly explain my conclusions on it as it was argued. In my view, on balance, the Plaintiffs are not entitled to an injunction prohibiting the use by the First Defendant of the documents discovered.

(ii). There was no dispute as to the applicable law and approach to be adopted by the Court. The correct approach was set out in *Atlantisrealm*. The Court has a discretion and may permit or prohibit the receiving party to make use of the documents discovered. Since the Court is exercising an equitable jurisdiction there are no rigid rules.

(iii). Accordingly there are three main questions:

(A). Did Bridge Law and those responsible for the Plaintiffs' discovery process make a mistake (were the documents which contained advice from Asserson included in the list by mistake)?

(B). If so, was this an obvious mistake either subjectively (did the First Defendant's legal team appreciate that a mistake had been made before

making use of the documents) or objectively (would it be obvious to a reasonable solicitor in the position of the First Defendant's legal team that a mistake has been made)?

(C). If so, are there are other circumstances which would make it unjust or inequitable to grant relief to the Plaintiffs?

(iv). In my view Ms Stewart's evidence (in CS3) makes it clear that there was a mistake in the present case.

(v). Ms Partos' evidence (in Partos 8) makes it clear that the First Defendant's legal team did not subjectively appreciate or conclude that a mistake had been made.

(vi). Would it have been obvious to a reasonable solicitor in the circumstances that a mistake had been made? I note the comments made Moore-Bick LJ in *Rawlinson & Hunter* (above) that:

> "*…once it is accepted that the person who inspected the documents did not realise that it had been disclosed by mistake, despite being a qualified lawyer, it is a strong thing for a judge to hold that the mistake was obvious. Those reviewing the documents were engaged on an enormous task in the course of which they had been required to consider many thousands of documents some of which were, or at any rate may arguably have been, privileged…the essence of [the judge's] thinking seems to have been that it was obvious that the document had been disclosed by mistake because it was obvious that it was privileged. That seems to me to confuse two things: whether the document was privileged and whether even if privileged it had obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in litigation. No doubt in some cases the sensitive nature of the document will be enough to make it obvious that it has been disclosed by mistake but often that will not be the case…*"

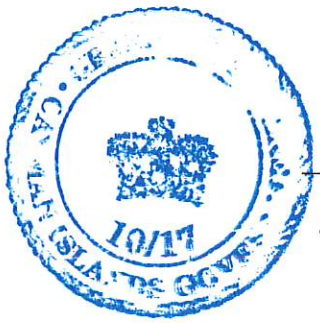
So (as Clarke LJ noted in *Al-Fayed*) the fact that a solicitor has given detailed consideration to the question of whether the documents have been made available by mistake and has honestly concluded that they were not is a relevant and in many cases an important pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made. But is not conclusive. Furthermore the mere fact that it is obvious that the documents are privileged is insufficient.

I also note the important comments made by Jackson LJ at the end of his judgment in *Atlantisrealm* (at [55]) regarding the duties of the lawyers on both sides involved in the discovery process.

(vii). This is not a case like *Atlantisrealm* where a single email that was immediately recognised as being of significance and capable of being helpful in negotiations between the parties was inadvertently disclosed. This case involved the discovery of over one hundred documents. This can weigh on both sides of the argument. It can be said (as the First Defendant submits) that the volume of documents discovered would cause a reasonable solicitor to conclude that the disclosing party must have deliberately decided to include such a large volume of material because a mistake on such a large scale is inherently unlikely. The counter-argument is that the disclosure of such a large volume of privileged documents is sufficiently unusual strongly to suggest that (at least to put a reasonable solicitor on inquiry as to whether) a mistake has been made and that in this case the First Defendant's legal team clearly appreciated that the discovery of documents containing advice from Asserson had potentially serious implications for the Plaintiffs and that discovery had not been complete because they sought to rely on that discovery as a basis for obtaining further documents on the grounds that there had been a waiver of all related documents. On balance it seems to me that in this case it cannot be said that the mistake was obvious. I take into account the important but not conclusive pointer that the uncontested evidence of Ms Partos is that it did not occur to the First Defendant's experienced legal team that included Cayman

advocates, English solicitors and English counsel that there might have been a mistake. There is no suggestion that they were not conducting a thorough and careful review. The Plaintiffs, in their brief submissions, have not claimed that the documents were sufficiently sensitive or unusual to alert the First Defendant's legal team to the risk and likelihood of a mistake.

14. Accordingly, for the reasons I have given, the application made by the First Defendant in paragraph 2.1 of the January Summons is granted.



Justice Segal
Justice of the Grand Court, Cayman Islands
11 March 2019