IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA Civil Application No: 10 of 2016

CAUSE NO: FSD 30 of 2013 (AJJ)

Between:

PRIMEO FUND (IN OFFICIAL LIQUIDATION)

Plaintiff / Proposed Appellant

And:

(1) BANK OF BERMUDA (CAYMAN) LIMITED

(2) HSBC SECURITIES SERVICES (LUXEMBOURG) SA

Defendants / Proposed Respondents

BEFORE:

THE RT. HON. SIR JOHN GOLDRING, PRESIDENT
THE HON. SIR GEORGE NEWMAN, JUSTICE OF APPEAL
THE HON. (CECILE) DENNIS MORRISON, JUSTICE OF APPEAL

Appearances: Mr. Tom Smith QC, instructed by Mr. Peter Hayden and Mr. Jonathon Milne of Mourant Ozannes for the Appellant. Mr. Richard Gillis QC and Mr. Toby Brown, instructed by Mr. Andrew Pullinger of Campbells for the Respondents.

Hearing: 30 August 2016

Judgment delivered: 16 November 2016

Sir John Goldring, President:

JUDGMENT

Introduction

1. Bank of Bermuda (Cayman) Limited ("BoB") and HSBC Securities (Luxembourg) SA ("HSSL"), are both members of the HSBC group of companies. By an order of 31 May 2016 the Honourable Mr Justice Jones QC refused the Appellant's application for an order that the Respondents provide discovery and inspection of three witness statements which had been served by another, but legally separate, HSBC entity, namely HSBC Institutional Trust Services (Ireland) ("HTIE") in similar proceedings in Ireland. The learned judge concluded the statements had been subject to litigation privilege in the hands of HTIE. They had been provided to the Respondents on a "common interest" privilege basis. They remained privileged.
2. At the outset of the hearing the court granted leave to appeal. The issue it has to resolve is whether the judge was right to conclude the statements were privileged in the hands of HTIE. If they were, there is no dispute that they were provided on a common interest privilege basis to the Respondents.

A summary of the relevant factual background

3. Primeo is a Cayman Islands incorporated company. It operated as a "feeder fund" to Bernard L. Madoff Securities Limited ("BLMIS"). BLMIS was a fraudulent investment operation. Primeo, having invested large sums of money, suffered significant losses when it collapsed. BoB was Primeo's Administrator. HSSL was its Custodian. In the present proceedings Primeo claims they were in breach of duty in the way they discharged those roles. The trial began on 7 November 2016.
4. As I have said, both Respondents are members of the HSBC group of companies. Other HSBC group companies acted as administrator and/or custodian to other BLMIS feeder funds. HTIE acted in both roles to an Irish fund, Thema International Fund Plc ("Thema"). Thema brought claims in Ireland against, among others, HTIE. The claims against HTIE were broadly similar to those in the present proceedings. The Thema proceedings came to trial in

the Irish High Court in April 2013. They settled on the 17th day. The case had been opened. Some witnesses had given evidence. They did not include any HTIE factual witness.

5. For present purposes it is sufficient to say that the Plaintiff asserts that HSBC Securities Services Division performed centrally certain functions relating to the provision of administration and custodian services. A number of HSBC witnesses due to give evidence in the present proceedings provided witness statements for the Thema proceedings. Christine Coe, Nigel Fielding and Brian Pettit, all former or current HSBC Group employees have given lengthy statements in the present proceedings. They also made witness statements in the Thema proceedings. It is those statements that the Appellant seeks. It is common ground they contain evidence relevant to the present proceedings.

The applicable law

6. It is agreed that the relevant English and Cayman Islands law is the same.
7. There is no dispute as to what is the correct approach to events in Ireland. As it is put in Rule Chapter 7, "Rule 19" of the 15th Edition of Dicey, Morris and Collins' *The Conflict of Laws*:

> "All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*)."

8. Paragraph 7-022 states that:

> "In the context of English proceedings, whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to be waived is irrelevant."

9. Cayman Islands law therefore determines whether the witness statements are privileged or not. However, as Mr Smith QC on behalf of the Appellant submitted, and Mr Gillis QC on behalf of the Respondents agreed, evidence regarding the circumstances in which a document was produced in the context of foreign litigation may be relevant in determining whether the document is capable of attracting such privilege. It is, for example, relevant to know whether as a matter of fact confidentiality in the witness statements was lost in Ireland. However, it is

solely a matter of Cayman Islands' law whether in the present proceedings they are or are not privileged.

Litigation privilege

The general approach

10. As Mr Smith QC submitted in his skeleton argument, the classic statement of the scope and object of litigation privilege was set out by Sir George Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649:

> "The object and meaning of the rule is this: that, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary…that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless, with his consent (for it is his privilege…), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

11. The privilege extends to communications with a lawyer or a lawyer's client and a third party or to any document brought into existence for the dominant purpose of litigation.

12. In *Waugh v British Railways Board* [1980] AC 521, the House of Lords had to consider whether privilege was rightly claimed in respect of a report prepared for the defendant on the cause of a railway accident. Lord Wilberforce at page 531C and following said:

> "…[The privilege] is sometimes ascribed to the exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the

nature of his case until the trial…A more powerful argument…is that everything should be done in order to encourage anyone who knows the facts to state them fully and candidly…This he may not do unless he knows his communication is privileged.

But the preparation of a case for litigation is not the only interest which calls for candour. In accident cases the…safety of the public may well depend on the candour and completeness of reports…

It is clear that the due administration of justice strongly requires disclosure and production of this report…If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle, I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem excessive and unnecessary in the interest of encouraging truthful revelation. At the lowest, such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available."

13. In the course of his speech, Lord Edmund-Davies said (at page 543B):

> "…in my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression. For, as it was put in *Grant v Downs*… 'the privilege…detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise."

14. In *Three Rivers DC v Bank of England (No 6)* [2005] 1AC 610 at paragraph 52 Lord Rodger of Earlsferry said that:

> "Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to defeat the other…In such a system, each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by is preparations."

15. Finally, in *Ventouris v Mountain* [1991] 1 WLR 607 at page 611H, in comments which reflected those of Lord Edmund-Davies (paragraph 13 above), Bingham LJ said that:

> "Our system of civil procedure is founded on the rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other party's inspection all documents in their possession, custody and power relating to the issues in the action. This is not of course a necessary rule but is firmly established here. It is not however an absolute rule, as exceptions such as legal professional privilege and public interest immunity demonstrate. Nonetheless, disclosure being generally regarded as beneficial, any exception has to be justified as serving the public interest which gives rise to the exception."

16. There is then no real dispute about the essential rationale for litigation privilege. It lies in the public interest in parties and their lawyers having the freedom properly to prepare their case. As Mr Gillis submitted, and as all the authorities underline, it is a very important public interest at the heart of the proper administration of justice. However, since, as Mr Smith put it, an assertion of privilege represents an inroad on the general principle that justice is better served by the disclosure rather than the suppression of relevant documents and evidence, the courts have emphasised that the scope of privilege should not be viewed expansively.

17. This case well illustrates why the scope of the privilege should not be viewed expansively. The previous statements deal with the same, or very similar issues, which the judge has to resolve in the present proceedings. The judge (as is agreed) would not even know the witnesses had made previous statements. He would be deprived of the fullest possible account of events. He would not know if the witnesses have been consistent in their accounts. He

might in the result be deprived of a possible touchstone regarding the veracity of the witnesses' accounts. The context of the judge's ignorance would be a multi-million dollar claim by innocent investors.

18. In short it seems to me plain that on the facts of the present case justice would be better served by disclosure of the witness statements. However, if the law prevents such disclosure, the judge will have to resolve the issues without them.

Documents served on the other side in the litigation

19. The witness statements were served under Rule 22(1) of Order 63A of the Irish Rules of the Superior Courts 1968. By that rule a party is obliged to serve a statement of a witness if he intends to rely on his oral evidence in court. The explicit purpose under the Rule is to communicate the witness's evidence. The judge below accepted on the basis of the evidence he heard, that service in Ireland in such circumstances would not mean that the statements would lose their privileged nature: indeed, that they would not do so unless the witness in question was called. In other words, on the basis of the judge's finding, the server of the statements in Ireland would believe that the contents of the statements would remain confidential to the parties pending their deployment. Although Mr Smith does not accept the judge's finding, he does accept, as I understand it, that, if correct, such a finding would form part of the factual background when deciding whether the statements attracted litigation privilege in the Cayman Islands.

The Appellant's primary submissions

20. Mr Smith advanced his case on two primary bases. First, he submitted that litigation privilege has no application at all when signed witness statements, prepared for service were voluntarily served pursuant to Rule 22(1). Second, and alternatively, he argued that service of the statements amounted to a waiver of any privilege in respect of them. In either case, the statements became compellable in the hands of the server at the suit of someone not a party to the litigation in which they were served.

Whether litigation privilege has any application at all when signed statements have been served

21. In *Visx Inc v Nidex Co. and others* [1999] FSR 91, depositions were taken by both sides in proceedings in the United States. Before they could be filed (in the US Patent Office), the proceedings settled. In addition, the parties to the litigation gave certain answers to interrogatories in the United States. In the course of proceedings in England for patent infringement, the defendants sought discovery of the depositions and answers to the interrogatories. The Plaintiff resisted on the ground of privilege. The Court of Appeal dismissed the Plaintiff's appeal against the judge's finding that the depositions and answers to interrogatories were not privileged.

22. As to the depositions, the Court held they were not privileged. As Aldous LJ put it (page 12):

> "The depositions for which privilege is claimed do not fall within the rule as explained in *Anderson*. They are not communications made by a party to his lawyer and they are not part of the confidential preparations by a party of his case. Further, they are not the type of document that it is necessary in the public interest to exclude from the normal rule that justice is best served by disclosure. That public interest must, I believe, be a basic consideration before any decision on privilege is made…"

23. As to the interrogatories, Aldous LJ said:

> "…a document containing answers to interrogatories which is served upon another party is not a privileged document and therefore waiver (of privilege) never occurs. Why is it not privileged? Because it is not a document falling within the class of documents for which legal professional privilege can ever be claimed. The answers may be confidential and restriction may be placed upon disclosure, but the document is no more privileged than is a pleading. The document is not of the type covered by legal professional privilege in that it is not a document within the rules set out in *Anderson* nor one which the public interest requires to be privileged."

24. Lord Justice Roch agreed.

25. Mr Smith submitted that the rationale for the court's decision in respect of depositions and answers to interrogatories, applies equally to witness statements once they have been served. They cease to be documents which the public interest requires to be privileged. They were privileged before service. On service their character changed. The crucial change came with their communication to the defendants. It is not a question of waiving the privilege which previously applied. He submitted Mr Gillis was not correct in saying there was a difference between service (as with the witness statements) and deployment (as with the depositions and the interrogatories). Neither has any bearing on whether privilege exists, although, as Aldous LJ observed regarding interrogatories, there might be some restriction on their use.
26. I agree with Mr Gillis that depositions taken in the presence of the parties were never privileged and immediately deployed. I agree too that answers to interrogatories were never privileged once deployed in the litigation. However, it seems to me difficult to draw a principled distinction as far as privilege is concerned between a witness statement voluntarily served without reservation in the litigation and an affidavit or an answer to an interrogatory. I agree with Mr Smith that on service the character of a witness statement changes. It does seem to me, as Mr Smith submitted, *Visx* provides some guidance as to the general approach to the application of litigation privilege.
27. Mr Smith placed great reliance on the decision of the full Federal Court of Australia in *Australian Competition and Consumer Commission* ("ACCC") *v Cadbury Schweppes Pty Ltd* (2009) 254 ALR 198
28. I need to go into some detail.
29. In previous proceedings, ACCC brought proceedings for price fixing against a company called Visy. In those proceedings, ACCC had served on Visy (and other parties) a large number of finalised proofs of evidence of witnesses upon whom it intended to rely. The judge's order in that case stated, among other things, that the same implied undertaking as to confidentiality applied to the statements as applied to any document disclosed during discovery. The case was later decided on the basis of agreed facts. None of the witnesses gave evidence.

30. In the subsequent *Cadbury* proceedings, Cadbury made allegations against Amcor, some of which concerned the same subject matter as that in the *ACCC* proceedings. Amcor cross-claimed against Visy. The judge released Visy from the implied confidentiality undertaking in respect of the statements and ordered that they be filed and served. The ACCC intervened to claim legal professional privilege in respect of the statements. The court upheld the decision of the judge below denying such privilege. As the court said (paragraph 2):

> "The matters argued before [it] raise[ed] important issues concerning the principles of legal professional privilege and the operation of those principles in relation to the final version of a witness statement or proof of evidence intended at the time of its creation to be filed in court and served upon an opponent to existing litigation and then in fact so filed and served pursuant to an order of the court."

31. In its judgment the Federal Court defined the "issues on appeal" in the following way (paragraphs 28 and 29):

> "[28] (1) whether or not the finalised proofs of evidence prepared, filed and served by the ACCC…were subject to litigation privilege; and
>
> (2) whether or not the filing and service of the finalised proofs of evidence constituted a waiver (implied or otherwise) of legal professional privilege in the finalised proofs of evidence, and, if so, to what extent?"
>
> [29] If no legal professional privilege arises in answer to the first issue, it is strictly speaking, unnecessary to address the second issue, although for reasons we explain, we do…so below."

32. At paragraphs 37 and 38 the court said:

> "[37] In our view, whatever is the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one's opponent. To say (as does the ACCC) that finalised proofs of evidence were created and served for the existing litigation can be accepted. However, in our view, it is impossible for litigation privilege to apply to the finalised proofs of evidence, when the finalised proofs of evidence were created for the purpose of serving them on the

ACCC's opponent *and* [my emphasis] when they were in fact served on that opponent.

[38] The rationale for litigation privilege is different from that of advice privilege, and rests on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party or parties of the material acquired in preparation of the case."

33. Having referred to the older authorities, the court went on to say (at paragraph 43 and following):

"[43] With the introduction of case management principles, some of the adversarial elements of the common law pretrial processes have been removed or tempered. However, a party generally still has the option of what evidence to put before the court, and what witnesses to call in support of his or her case…

[44] Prior to the introduction of the practice of serving proofs of evidence prior to trial, disclosure of evidence to be adduced did not normally occur until the trial. If so disclosed at trial, no question of litigation privilege arose. At trial, the actual statement made under oath or tendered in written form was not privileged. There would be no issue of "waiver" of that particular evidence so given…Disclosure of evidence has now been accelerated by the provision of proofs of evidence, but no different consequence or application of principle should apply just because of this acceleration of the process of communicating to the adversary (and the court) the evidence to be adduced."

34. The court underlined the factual basis upon which it was working:

"[45] It is important in this appeal to have regard to the factual position and how the question comes to be determined. The documents the subject of this appeal are finalised proofs of evidence in the possession of Visy- not proofs of evidence…in the possession of ACCC or those filed in the court. As such, our attention is on the creation of the finalised proofs of evidence and their service upon Visy. It is generally

accepted that one would ask what was the intended use or uses of the finalised proofs of evidence which accounted for them being brought into existence…the purpose for creating the finalised proofs of evidence is different from the purpose for preparing drafts…

[46] We should mention that the question of whether one focuses on the time of the creation of the finalised proofs of evidence or their subsequent communication to Visy does not appear to matter in this case, as there was no suggestion that the purpose for which they came to exist changed…"

35. At paragraph 47 the court observed that the implied limitation of use of the statements in the hands of Visy was irrelevant. At paragraph 51, the court noted there was no compulsion on a party to serve witness statements. At paragraph 52 and following, the court stated that:

"[52]…the purpose of the finalised proofs of evidence was to tell…Visy what the ACCC in any event wanted to disclose to Visy (and the court) and it fulfilled that purpose by giving advance notice of the evidence to be led...

[53]…The finalised proofs of evidence were created and served for the dominant purpose of use in existing litigation, but were obviously not to remain confidential as far as Visy was concerned. They were intended to be provided to Visy.

[54] The above application of principle disposes of the appeal. The ACCC relies on litigation privilege. The finalised proofs of evidence were prepared for provision and provided to Visy…The disclosure was not made on a relevantly confidential basis, although made expressly with the protection of the "implied undertaking."

[55] As the subject matter of this appeal is the finalised proofs of evidence in the possession of Visy, and not copies of them, say in the hands of the ACCC, no issue of waiver applies. If, for instance, the finalised proofs of evidence in the possession of Visy were no longer available, and copies in the hands of the ACCC were sought, a question of waiver may arise in these circumstances having regard to the service of the finalised proofs of evidence. This is not the current position."

36. Having expressly decided the case on the basis I have indicated, the court went on to make some further observations.

37. At paragraph 63 it said that:

> "…Once a document in question (here the finalised proof of evidence) is intended to be given to an opposing party, it is not a document in which privilege subsists. As a matter of principle, this is sufficient to conclude that no privilege attaches to the finalised proof of evidence.

38. At paragraph 64, the court said it found no distinction between affidavits and finalised proofs of evidence for the purposes of the appeal.

39. At paragraph 75 there was reference to previous Australian authority in which the decision of Hobhouse J (as he then was) in *Prudential Assurance v Fountain Page* [1991] 1 WLR 756 had been considered. I shall return to this topic.

40. At paragraph 102, the court went to say that:

> "...The filing and serving of the finalised proofs of evidence was a deliberate act…made with the purpose of informing Visy of the proposed evidence to be led by the ACCC in existing litigation. It would have been inconsistent upon so filing and serving the finalised proofs of evidence on Visy for the ACCC to have claimed litigation privilege. No unfairness to the ACCC arises. The ACCC was content for the information contained in the finalised proofs of evidence to be made known to Visy and, presumably, to be led in open court…"

41. Mr Smith submitted that the court's primary analysis in *ACCC* was similar to that of the English Court of Appeal in *Visx.* It was dispositive of the appeal. It did not matter that in *ACCC* the court was considering the statements in the hands of the recipients. If the statements were not privileged once sent, they were not privileged irrespective of whose hands they were in. It did not matter that they had not been deployed in the case. He did not however go so far as to submit that the statements when in the hands of the solicitors before

being sent were not privileged (as was said in paragraph 55 of the judgment). The case was not, he submitted, decided on that basis. It was not something the court had to decide.

Waiver

42. Mr Smith submitted that the above was the correct analysis. However, an alternative submission, leading to the same result, was that any privilege in the witness statements was waived when the statements were served on Thema.

43. As it is put in paragraph 26-27 of the eighteenth edition of Phipson on Evidence:

> "Waiver or privilege properly named involves the voluntary production of documents where there would otherwise be a right to object to compulsory production. The principal circumstance in which this arises is in litigation, where a party voluntarily produces or seeks to rely on privileged documents."

44. Paragraph 26-4 states that:

> "The conduct of the party taking the voluntary decision to put material before the court gives rise to a waiver of privilege."

45. Mr Smith and Mr Gillis agreed that a waiver could be limited, although each put it rather differently. Mr Smith submitted there would only be a limited waiver where the document was provided for a limited purpose, and where the rights in relation to privilege generally are expressly reserved. That did not happen when HTIE served the witness statements. Mr Gillis submitted that on service by HTIE of the witness statements, privilege was only waived in respect of the parties to the litigation. It was not waived generally to the world at large.

46. In *B v Auckland District Law Society* [2003] 736, the Privy Council held that (as it is put in the headnote) legal professional privilege was a fundamental condition of the administration of justice which could not be overridden at common law by, or balanced against, any competing public interest right to compel production. In that case documents had been disclosed with the express caveat that that their use was to be limited and privilege not

waived. In the course of the Privy Council's judgment delivered by Lord Millett, he said (at paragraph 68 and following):

> "68. The [Respondent'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 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 Denis Rye Ltd (No 2)* [1988] 1 WLR 1113…The question is not whether privilege has been waived, but whether it has been lost. It would [on the facts] 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.
>
> 69. The [Respondent] argued that, once documents were produced…they ceased to be privileged. Their Lordships consider this is playing with words. It confuses the nature of the documents with the rights to which the arrangements…gave rise. The documents are privileged because they were created for the purpose of giving or receiving legal advice…If they are produced voluntarily, the right to withhold production no longer attaches to them. In that sense the privilege may be said to be lost. But they are the same documents, and it is not inappropriate to describe them as privileged. Their inherent characteristics are the same. The policy which protected them from unauthorised disclosure is the same. The cat is still a cat. It can be put back into the bag."

47. In *Berezovsky v Hine and Others* [2011] EWCA Civ 1089, the Court of Appeal (at paragraph 29) summarised the position regarding partial waiver in the following way:

> "…where privilege is waived, the question whether waiver was limited and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving the documents in question, and what they must or ought reasonably have understood…"

48. Other authorities to similar effect were drawn to our attention. Mr Smith's short point was that when, as he submitted happened in the present case, the document was voluntarily served in proceedings and without reservation, there is no basis for concluding the waiver was limited rather than general.

49. Mr Gillis and the judge below placed considerable emphasis on the decision of Hobhouse J (as he then was) in *Prudential Assurance Company Limited v Fountain Page Limited and Another* [1991] AC 756, to which I briefly referred at paragraph 38 above.

50. The short facts were that the plaintiff had served various documents, including witness statements, on the defendants in proceedings in England. The action had settled. One of the defendants was then sued in Texas. The issue arose as to whether it was able to use the witness statements and an expert's report served on it by the plaintiff in the English proceedings for the purpose of the Texan proceedings.

51. The background to Hobhouse J's decision was a change in 1986 to the Rules of the Supreme Court ("RSC"). Order 38, Rule 2A(4) provided:

> "…where a party serving a statement under paragraph (2) does not call the witness to whose evidence it relates no other party may put the statement in evidence at trial."

52. Order 38, rule 2A(8) provided:

> "Nothing in this rule shall deprive any party of his right to treat any communication as privileged or make admissible evidence otherwise inadmissible."

53. After Hobhouse J's decision, Order 38, rule 2A was amended (on 16 November 1992). Rule 2A(8) was not changed. Added was paragraph (11) which provided:

"Where a party serves a witness statement under this rule, no other person may make use of that statement for any purpose other than the purpose of the proceedings in which it was served-

(a) unless and to the extent that the party serving it gives his consent in writing or the Court gives leave; or

(b) unless and to the extent it has been put in evidence…"

54. That is the provision which currently applies in the Cayman Islands.

55. At page 760C Hobhouse J said that:

"The summonses…raised an important question whether there is any restriction upon the subsequent use of…documents [including witness statements] analogous to the restrictions that exist in relation to documents that are obtained on discovery."

56. At page 767F, Hobhouse J said that:

"It is clear that where documents are produced in the course of legal proceedings, or information provided, the further use of that material must be governed by the legal principles or rules of court which relate to the use of such material and not by any private law rights."

57. Hobhouse J dealt with the distinction in the authorities between what was produced voluntarily and under compulsion. At page 769E he said:

"From these authorities it is clear that there is no blanket restriction on the use of documents and information acquired in the course of litigation. Prima facie there is no restriction. The compulsion exception is confined to documents and information which a party is compelled, without any choice, to disclose. Where a party has a right to cho[o]se the extent to which he will adduce evidence…then there is no compulsion even though a consequence of such choice is that he will have to disclose material to other parties…witness statements…served pursuant to the provisions of Order 38 or directions given thereunder are not served under compulsion and are not protected by the duties or undertakings which the court implies where there is compulsion.

It follows that if…the plaintiffs are to succeed…[they] must make out some basis of restriction which does not depend upon the principle of compulsion. To do this they invoke the privilege in the documents which existed prior to their service…and rely upon the provisions of Order 38 [(8)] which they say either confirm that the privilege has only been waived to a limited extent, or conditionally, or, alternatively, that Order 38 does not debar them from continuing to assert privilege…[They] say therefore that the court should recognise those continuing rights of privilege and allow them either to enforce rights of confidentiality or ask the court to rule that the fourth defendants and the…solicitors are under a duty to the court which restricts the use that may be made of those documents.

….if the…plaintiffs are to succeed…it must be by the demonstration of a duty owed to the court, analogous to that owed under the implied undertaking, which derives from the circumstances of the case and, in particular, as a matter of implication from the relevant rules of court…Prima facie, the use of documents and information in litigation is inconsistent with any such restriction or reservation of any private law right. However, such restrictions are capable of existing and where they do, they derive from rules of procedure or principles of law recognised by the courts as being incidents of such procedure.

There is no conceptual difficulty about the reservation of rights of confidentiality or privilege notwithstanding that a document or piece of information has been communicated to another…"

58. At page 772A Hobhouse J said:

"…once the [disclosed] document has passed into the possession of another the privilege lacks subject matter. But where one is dealing with a privilege which can be treated as analogous to the privilege that attaches to without prejudice communications, then it can be seen that the fact that relevant material has been disclosed to another party is not the moment at which the right ceases to exist but is the moment at which it comes into existence. If the analogy is apt, the communication

> of a witness statement…to another party, although it may be the moment at which waiver of the privilege against disclosure occurs, may be the moment when a right to restrict the use that can be made of the document arises.
>
> The question therefore is whether there is such an analogy and what is the correct inference to be drawn from…the provisions of Order 38."

59. Hobhouse J first considered the position as far as a disclosed report was concerned. He then went on to analyse the provisions of Order 38. He referred to sub-rule 8. He said (at page 773A):

> "Sub-rule 8 is widely drafted and its wording remarkably pertinent to the present argument. But the intent of rule 2A is further emphasised by sub-rule (4) which…provides that where the party serving a statement "does not call the witness to whose evidence it relates, no other party may put the statement in evidence at trial." Here again, the contrast is obvious: there is a restriction on the use to which any other party may make of the witness statement that has been served.
>
> I consider that the inferences to be drawn from reading these two parts of Order 38 both separately, and, more strikingly, together, are that…in respect of witness statements there is to be a restriction which, subject to sub-rule 4, preserves privilege in the document…
>
> Under rule 2A the inference to be drawn is…clear. I infer that the receiving party is not to be allowed to put the statement in evidence save at trial and then only if the serving party elects to call the relevant witness at that trial; and apart from this, the receiving party and his solicitor may not use the material nor allow it to be used for any purpose other than the proper conduct of that action…the solicitor and his client may not supply the material to any other person…"

60. Hobhouse rejected as "an absurdity" the suggestion that the witness statements could be used without restriction at any other time. He went on to say, in words unsurprisingly emphasised by Mr Gillis (at page 774 A):

> "In my judgment when a statement is served pursuant to a direction…under Ord. 38 r.2A and the witness…is never called by that party to give evidence…that statement remains a privileged document in the same way as without prejudice communication remains privileged. The party serving the statement may not be compelled to disclose the statement to any other person and is entitled to prevent any other person using that evidence without his consent and, in particular, using it as evidence against the person who originally served the statement…
>
> The policy reflected in the rule is simply procedural. Its purpose stated in sub-rule (2) to be "disposing fairly and expeditiously of [the case]…and saving costs."…A secondary purpose must…be to encourage and facilitate the making of admissions and settlements…The policy of the law which protects without prejudice communications should apply to protect the confidentiality of statements that are exchanged but not used under rule 2A….A statement may contain possibly defamatory statements; if an unused statement is not to be treated as privileged from disclosure to third parties or being used in evidence, obvious difficulties can arise. Accordingly there are good reasons of policy arising from the rule that reinforce the analogy with the treatment of documents obtained on discovery and communications without prejudice. Likewise there are good policy reasons for imposing similar restrictions. There is therefore no basis for declining to give effect to the inference to be drawn from the rule itself.

61. Hobhouse J went on to say (at page 774G):

> "I consider that the rights of the London plaintiffs arise by inference from the terms of rule 2A *and* [my emphasis] from the confidential and privileged character of the statement prior to the time at which it was served. I consider that there is therefore a rule of law that, unless the…plaintiffs have relinquished their rights to restrict the use of the document by some further waiver or consent…the defendants and the London

solicitors were under the duty which I have formulated above. Their supplying the statements to [others]…was a breach of that duty.

It may be thought desirable to express the duty as an implied undertaking to the court. But whether it is so expressed or not, it is…a duty owed to the court and which can be enforced by the court at the instance of the English plaintiffs. Breach of the duty amounts to contempt of court which may be trivial or serious depending on the circumstances. The court has the power wholly or partially to release the recipient from the duty, or, undertaking, and to permit use to be made of the documents nevertheless. Circumstances under which that relaxation would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice to the serving party. (This is, of course, always subject to any overriding principle of public policy).

….As…I ruled [the witness statements]…were subject to a restriction which had been broken and which should at the least on an interim basis be restrained."

62. Finally (at page 775C), Hobhouse J referred to the judgment of Hoffmann J (as he then was) in *Black and Decker Inc v Flymo Ltd* [1991] 1 WLR 753. In that case, a witness statement had been served on the opposing party in accordance with Order 38 Rule 2A, sub-rule (8). Hoffmann J said (at page 755C) that:

> "Once a statement has been disclosed pursuant to the rule, there can no longer be any question of privilege…Once the document has passed into the hands of the other party the question no longer is one of privilege but of admissibility."

63. Hobhouse J said in *Prudential Assurance, Black and Decker* was:

> "…concerned with the question whether a witness statement served under Ord. 38 r. 2A could be referred to on an interlocutory application for further discovery prior to the trial of the action…No question of the use of the statement in other later

proceedings was involved. [Hoffmann J] referred to the fact that privilege from disclosure ceases to be relevant once the document has been disclosed…His decision is not contrary to that which I have reached in the present matter or what I have said in these reasons."

64. Mr Smith submitted that privilege is an absolute right: see *R v Derby Magistrates Court ex parte B* [1996] AC 487. As to Hobhouse J's analysis, he submitted, that it turned on the terms and effect of Order 38 rule 2A. Hobhouse J was attempting to fill the lacuna caused by an absence of any provision restricting the subsequent use of served witness statements. That position subsequently changed. There was no such provision in Ireland. At best, there is some uncertainty about the nature of the obligation regarding the subsequent use of the served statements Hobhouse J was identifying. At times he referred to privilege. At times he referred to a duty. He contemplated the possibility of the court permitting the recipient of the statement using it in other proceedings. That would be inconsistent with any privilege in the statement remaining. If there is no privilege in the statement when in the hands of the recipient, that inevitably means privilege in the statement has gone. A statement cannot have a different status depending upon in whose hands it is. Given these areas of uncertainty, it is understandable why the Federal Court in *ACCC* (at paragraph 75), accepted that Hobhouse J's decision related to an implied undertaking rather than privilege remaining in the served witness statement. Citing previous Australian authority, the Federal Court had stated:

> "…his Honour [sic] referred to the matter as arising under the duty that was owed to the court, breach of which amounted to contempt, and which duty could be released by the court. It would be strange if the court could act in such a way as to waive legal professional privilege. Rather, it seems to me, his Honour was referring to the [implied undertaking] to which I have referred."

65. Mr Gillis' submission can be shortly summarised. While Hobhouse J was considering the wording of r2A(8), that merely required him to analyse what the existing legal position was. That is what he did. What he said about privilege reflected his view of the law of privilege as

it applied to served witness statements. It was not simply the wording of r2A(8) which enabled Hobhouse J to conclude that privilege in the statement was maintained. When read as a whole, the judgement was saying no more than this. A witness statement is privileged. On its service, that privilege is waived as far as the recipient is concerned. A duty of confidentiality then arises. It restricts the use to which the recipient can make of the statement. It is to that duty he refers in the later part of his judgment. Privilege in the statement has not however been entirely waived. The waiver is partial. As against a third party, it remains. That is why in the hands of the server, the statement is not compellable. Moreover, Hobhouse J regarded the possible use of the statement by the recipient in third party litigation as severely constrained. He suggested, the consent of the serving party would normally be needed; that it would be hard to visualise subsequent use if it might prejudice the serving party.

66. Our attention was drawn to the decision of Mance J (as he was) in *Visa Maritime Inc v Sesa Goa* [1997 CLC 1600 at 16001. He said:

> "…witness statements…do not introduce absolute certainty about the evidence other parties will adduce. A party serving such a statement…has not thereby put his cards irrevocably on the table or committed himself thereby to using them…It is open to a party not to adduce either the whole or specific parts of a statement...Where…a party states positively that he does not intend to adduce particular parts of a statement…there is no reason why the court should not act on the statement [ie the assurance].

What the textbooks say

67. Basing their view upon *Prudential Assurance*, the textbooks tend to support Mr Gillis' submissions. In the twelfth edition of Hollander's Documentary Evidence, it is said (at paragraph 23-21) that:

> "The position under RSC was rather different in the case of witness statements [from affidavits]. Not only were the draft witness statements privileged, as were signed, unserved witness statements, but when the witness statements were served, there was an undertaking not to use [them]…for a collateral purpose. Service of the witness statements waived privilege in the statements themselves in the litigation, but the confidence in the statements remained and it was probably possible to claim privilege for the statements in subsequent litigation against a different party against whom the statements remained confidential. Of course, once the statement has been used in open court or the witness has given evidence, the position is entirely different…
> …There is no reason to think this has changed since the CPR…"

68. The eighteenth edition of Phipson on Evidence is to similar effect: see 26-17, which, among other things, states that:

> "…by contrast [to affidavits] witness statements once served probably could be the subject of a claim for privilege in a subsequent action against a different party, *although the point was never determined* [my emphasis].
> There is no reason to think this has changed…"

69. The second edition of Bankim Thanki's The Law of Privilege states (at 5.41) that:

> " Prior to service, the witness statement and affidavit remain privileged. Once served, confidentiality in them is lost vis a vis the other parties to the litigation and privilege can no longer be maintained against those parties *in that action* [original emphasis]. If however, the witness never gives the evidence contained in the statement in open court, then there is pre-CPR authority [*Prudential Assurance*] to support the argument that it remains privileged for other purposes."

My conclusion

70. As Phipson states, the point at issue in the present case has never been determined. Not without hesitation, and for the reasons which I shall set out, I have concluded that Mr Smith's first argument is right.

71. First, the witness statements were prepared with the intention of their being used in the Irish litigation. HTIE chose to serve them and did so without reservation. The statements were relevant to the Irish proceedings. They are similarly relevant to the present proceedings. As such they are prima facie discoverable as a matter of law. No question arises of the statements being used for a collateral purpose in breach of any undertaking of confidentiality. No question arises of the application or not of any implied undertaking.
72. Second, as I have set out above, the absence of the witness statements has the real potential of prejudicing a just outcome.
73. Third, whether privilege applies in this Cayman Islands litigation is a matter to be determined by Cayman Islands, hence, English law.
74. Fourth, for many years there has been an ever-greater emphasis on transparency and openness in civil litigation. Civil litigation is not to be regarded as a 'game.' Unnecessarily restricting the disclosure of documents would run counter to such progress and not be in the public interest.
75. Fifth, while I agree with Mr Gillis (and the learned judge) that Hobhouse J's decision in *Prudential Assurance* tends to support his submission that privilege on the basis of partial waiver applies to the witness statements, as Mr Smith submitted, the decision is not without difficulty. At the time of the decision, service of witness statements in advance of trial was a comparatively new concept. The rules did not deal with their collateral use in the hands of a recipient. That was the essential issue with which Hobhouse J had to deal. As Mr Smith submitted (and the Federal Court in *ACCC* suggested (see paragraph 64 above)), Hobhouse J at times referred to privilege, at times to a duty. In the context of the second, he contemplated the possibility of a statement being used in other proceedings. That could not be the case if the statement were privileged.
76. In short, it does not seem to me that *Prudential* is determinative of the issue, as the learned judge concluded.
77. Sixth, it is my view that the essential reasoning of the Federal Court in *ACCC* was correct. There is no good reason for litigation privilege to apply to finalised witness statements

created for that purpose and unconditionally served. It does not seem to me the important public interest in the proper preparation and conduct of litigation requires that to be the case. To order disclosure of such statements to a third party on the basis they are relevant in the third party proceedings would not, in my judgment, prevent candour in the preparation of a case, or prejudice such preparation, or damage the public interest lying behind legal professional privilege. As this case illustrates, a proper balance between the public interest in maintaining litigation privilege and the public interest in disclosure comes out, as it seems to me, overwhelmingly, in favour of disclosure.

78. It is not necessary to go as far as did the Federal Court when it stated that privilege did not apply to statements before they were served. That was not something necessary for their decision.

79. Seventh, the fact that *ACCC* concerned statements in the hands of the recipient and not the server does not seem to me to affect the position. If statements once served are not privileged, it does not matter in whose hands they are.

80. Eighth, I do not think that the judgment of Mance J in *Visa Maritime Inc* affects the analysis as far as privilege is concerned.

81. In the result, I would allow this appeal and order that the statements be disclosed. It is in the circumstances not necessary to consider the other submissions which were made to us.

The Honourable Justice Sir George Newman:

I agree.

The Honourable Justice Morrison:

I too agree.