The Court of Appeal for Bermuda

CIVIL APPEAL No. 1 of 2021

B E T W E E N:

WANG, VEN-JIAO (Tony Wang)
(as joint administrator of the Bermudian estate of YT Wang)
Appellant / 8th Defendant

and

WONG, WEN-YOUNG (Winston Wong)
Plaintiff

GRAND VIEW PRIVATE TRUST COMPANY LIMITED
1st Respondent / 1st Defendant

TRANSGLOBE PRIVATE TRUST COMPANY LIMITED
2nd Respondent / 2nd Defendant

VANTURA PRIVATE TRUST COMPANY LIMITED
3rd Respondent / 3rd Defendant

UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED
4th Respondent / 4th Defendant

THE ESTATE OF HUNG WEN-HSIUNG, DECEASED
5th Defendant

OCEAN VIEW PRIVATE TRUST COMPANY LIMITED
5th Respondent / 6th Defendant

WANG, RUEY-HWA (Susan Wang)
7th Defendant

WANG, HSUEH-MIN (Jennifer Wang)
(as joint administrator of the Bermudian estate of YT Wang)
9th Defendant

Before: **Clarke, President**
Smellie, JA
Subair Williams, JA

Appearances: Mr. Richard Wilson QC of Counsel and Mrs. Fozeia Rana-Fahy, MJM Limited for the Appellant

Mr. Jonathan Adkin QC of Counsel and Mr. Scott Pearman, Conyers Dill & Pearman Limited for the Respondents

Date of Hearing: **3 March 2021**

Date of Judgment: **12 April 2021**

JUDGMENT

Shared Interest Privilege - Joint Interest Privilege – Whether the Donor of a Power of Attorney had Joint Interest Privilege with Private Trust Companies who retained a law firm to prepare the Power of Attorney – Whether there was a joint interest in the subject matter of the privileged materials and communications – Relevant Legal Principles

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INTRODUCTION

1 These judgments are the product of the collaborative work of three.

2 The coil of ongoing litigation in these proceedings ensues from a dynastic conflict over several billions of dollars' worth of assets held in five Bermuda purpose trusts which were funded from the wealth accumulated by Wang, Yun Ching ("Mr. YC Wang") who died on 15 October 2008 and his brother Wang, Yung Tsai ("Mr. YT Wang") who died on 27 November 2014. These are the two Taiwanese-born brothers ("the Founders") who founded Formosa Plastics Group ("FPG") which is eminently classified as one of the largest and most prosperous business establishments in Taiwan.

3 Mr. YC Wang had three wives[1]. His first wife was Wang, Yueh Lan who died on 1 July 2012 without having had any children. Mr. YC Wang's second wife, Yang Chiao Wang is the mother of Wong, Wen-Young (also known as Winston Wong) ("Winston"), the eldest son of Mr. YC Wang. The other siblings of this marriage are Wang, Kuei Yung ("Margaret"); Wong, Xue Ling ("Charlene"); Wang, Xue Hong ("Cher") and Wong, Wen-Hsiang ("Walter"). Wang, Ruey-Hwa ("Susan") is the eldest daughter of Mr. YC Wang and his third wife, Pao-Chu Lee. The second eldest daughter of this marriage is Wang, Ruey-Yu ("Sandy"), followed by Wang, Ruey Huei ("Diana") and Wang, Ruey-Jorn ("Lora").

4 Mr.YT Wang had two wives[2]. Mr.YT Wang's first wife, who died on 5 May 2019, was Pi-Ruang Wang. The children of this marriage are William W.Y. Wong ("William"); Wilfred W.T. Wang ("Wilfred"); Sara H.C. Wang ("Sara"); Wang, Hsueh-Min ("Jennifer") and Hsiueh-Kuang Wang ("Hsiueh-Kuang"). Mr.YT Wang's

[1] There is a dispute between the parties as to whether Yang Chiao Wang and Pao-Chu Lee were married to YC Wang, which has no bearing on this appeal.
[2] There is a dispute between the parties as to whether Yu-Mei Chou was married to YT Wang, which has no bearing on this appeal.

second wife is Yu-Mei Chou ("Madam Chou"). Their children are Ven-Jiao, Wang ("Tony"); Tammy W.Y. Wang and Janis H.J. Wang.

5 In this appeal the Court is ultimately concerned with whether a donor of a power of attorney had joint interest privilege in attorney-client communications and related documents preparatory to the drafting and execution of the power of attorney instrument itself. It is common ground between the parties that the communication and the correlating documents qualified for protection under the rule of legal professional privilege.

6 Mr. YT Wang was the putative donor of the relevant power of attorney, said to have been executed on 31 October 2012 ("the POA"), whereby at the age of 91 years he gave his eldest son, William, broad and unfettered powers to handle and dispose of all of his assets. The POA was drafted by Yao Lin, also known Ms. Angela Lin ("Ms. Lin") of the law firm Lee and Li Attorneys-at-Law located in Tapei, Taiwan ("Lee and Li").

7 Some two and a half months after the execution of the POA, the 5th Respondent was incorporated as a private trust company on 15 January 2013 and by Deed of Trust dated 8 March 2013, the Ocean View Trust was established and the 5th Respondent was declared its trustee. Thereafter, as the Respondents aver, FPG shares indirectly owned by Mr. YT Wang were transferred into the Ocean View Trust by reliance upon the POA, in circumstances which are examined further below.

8 William is one of three other family members who serves as a member of the Board of Trustees for the 1st – 5th Respondents in these proceedings, which are each private trust companies. The other three family members of the Boards of the Respondents are Wilfred, Susan and Sandy. Together they represent the children of Mr. YC Wang and his third wife (to the exclusion of any of the children of Mr. YC Wang's second wife) and the children of Mr. YT Wang and his first wife (to the exclusion of any of the children of Mr. YT Wang's second wife).

9 The Respondents are the trustees of five Bermuda purpose trusts settled by the Founders, namely the Wang Family Trust; China Trust; Vantura Trust; Universal Link Trust and Ocean View Trust ("the five Bermuda purpose trusts"). Moreover, it was the first four Respondents who retained and instructed Lee and Li for the purpose of creating and executing the POA. (I shall in due course outline the evidence of the purposes for the making of the POA.) Collectively, the Respondents reject Tony's assertion that Mr. YT Wang, the donor of the POA, had joint interest privilege in the communications and documents prepared by Lee and Li in respect of the POA.

10 In the underlying pending Supreme Court action (Case No.44 of 2018) before the learned Assistant Justice, Mr. Ian Kawaley ("the main action"), Mr. YC Wang's eldest son, Winston, is the Plaintiff. Winston challenges the validity of the Bermuda purpose trusts and the transfer of the Founders' assets into those Bermuda purpose trusts. The Appellant, Tony, is the youngest son of Mr. YT Wang. Tony is the 8th Defendant in the main action and is supporting Winston's case challenging the legitimacy of the Bermuda purpose trusts.

11 By summons dated 3 December 2020, Tony applied before Kawaley AJ in a hearing held on 17-18 and 21 December 2020[3] for production and inspection of all documents held by Lee and Li relating to the creation and execution of what was termed "the purported Power of Attorney". I shall refer to these documents as "the POA documents".

12 In his written ruling delivered on 30 December 2020 (intermittently referred to as "the Ruling") Kawaley AJ refused Tony's application for disclosure and inspection of the POA documents. Aggrieved by the Ruling, Tony filed a Notice of Appeal dated 14 January 2021 appealing to this Court for an order setting aside Kawaley AJ's decision and an order requiring the Respondents to produce the POA documents for Tony's

[3] Three other interlocutory applications were heard before Kawaley AJ with which this Court is not presently concerned.

access and inspection. The Respondents in turn filed a formal Notice on 25 January 2021 for the Ruling to be affirmed on grounds other than those relied on in the Ruling itself.

13 Having considered the written and oral arguments from Counsel for Tony and the Respondents, I now give my reasons for finding that this appeal should be allowed.

THE BACKGROUND

14 The assets of the impugned five purpose trusts are FPG shares held in various holding companies previously owned by an agent of the Founders, Wen-Hsiung Hung ("Mr. Hung"), who was at all times acting pursuant to the direction of the Founders in respect of those shares and is said effectively to have held them on trust for such purposes as the Founders might direct. On the averments of Winston and Tony under the main action, the Bermuda trusts were always intended by the Founders to be family beneficiary trusts, holding its assets for equal division and enjoyment between each of the Founders' children. The case against Winston and Tony, which is primarily being prosecuted by the Respondents, is that the Founders' expressed wishes and intentions were for their FPG shares to be placed into Bermuda purpose trusts for the exclusive benefit of specified charitable and non-charitable purposes.

15 The administration of the financial aspects of those Bermuda purpose trusts were partly handled by senior employees of the FPG Finance Department under the supervision and direction of a Business Management Committee ("the BMC") for each Trust. Mr. Hung, Sandy, Susan, William and Wilfred were all members of the BMC.

16 After the passing of Mr. YC Wang and the onset of Mr. YT Wang's terminal illnesses, steps were taken by the Respondents to obtain the POA in October 2012. The fifth trust, which is the Ocean View Trust, was subsequently established in March 2013 and thereafter the remaining holding companies endowed with FPG shares were placed into the fifth trust.

17 There is a tireless battle on the evidence between the opposing parties as to what the true wishes of the Founders were in respect of their fortune in FPG shares. Of course, these are all issues for adjudication at the trial of the main action. However, a broad outline of the pleaded cases and the competing background evidence is relevant for contextual purposes.

FPG Shares held in Holding Companies

18 A majority tranche of shares in FPG were held by holding companies incorporated in the British Virgin Islands ("the BVI") and in Liberia. These holding companies received dividends from those shareholdings only to reinvest in the purchase of further FPG shares. The control of those shares was entrusted to Mr. Hung as a close family friend of the Founders. Mr. Hung was bestowed nominee ownership of those holding companies on behalf of the Founders. It is common ground between the parties that Mr. Hung was expected to use the FPG shares at the direction of the Founders.

FPG Shares in the Holding Companies placed into the First Four Trusts

19 Between 2001 and 2005 and during the lifetime of the Founders, the Wang Family Trust; China Trust; Vantura Trust and Universal Link Trust ("the first four Bermuda purpose trusts" or "the first four trusts") were established by the Harrington Trust Limited and Codan Trust Company Limited as Bermuda purpose trusts for charitable and non-charitable purposes. The FPG shares held by most of the holding companies in the BVI and Liberia were placed into the first four trusts during that period. Broadly speaking, the averred purpose of the transfer of these shares into the first four trusts was to hold FPG shares for the continuous growth and prosperity of FPG in addition to supporting and furthering charitable foundations which had been established by the Founders.

The Senior Employees of the FPG Finance Department

20 By 1995 Mr. Hung had been the right-hand man of the Founders for some 40 years. Subordinate to Mr. Hung in the FPG Finance Department was Jao, Chien Fang, otherwise known as Jack Jao ("Mr. Jao"). In 2005 Mr. Jao was the Assistant Vice

President of Financial Affairs at FPG and a supervisor to Roger Hsiu, Hsiung Yang ("Mr. Yang") who was the Administrator in the FPG Finance Department. Mr. Jao's responsibilities included the administration of the financial affairs of the first four Bermuda purpose trusts. In this remit, he was assisted by Mr. Yang.

21 Mr. Jao's evidence is that on 31 January 2011 he retired from FPG and was replaced by Mr. Yang as the Senior Administrator for the financial affairs of the five Bermuda purpose trusts and another offshore trust named the New Mighty Trust. Mr. Yang's evidence is that from 1 February 2011 through to 31 December 2013 Mr. Jao operated as a part-time Consultant in the Finance Department.

Retirement of the Founders and Succession at FPG

22 In June 2006 the Founders retired from FPG leaving the FPG Executive Committee to assume operational control. At all material times, William was and continues to be a member of the FPG Executive Committee as chairman of Formosa Chemical and Fibre Corporation ("FCFC"), an FPG company engaged in the manufacturing of fibre products derived from wood for use in fabrics and clothing. It was during this period that Tony was also being appointed to senior corporate posts in the FPG companies. In 2006 Tony was the Senior Vice President of Nan Ya Technology Company ("NTC") and the Assistant Vice President of Nan Ya Plastics Corporation ("NNYPC"). Tony points to these appointments as examples of his father's succession plan for him to play a significant role in the control and management of FPG.

The Founders' Children Informed about the First Four Bermuda Purpose Trusts and Winston Commences Litigation Proceedings in the USA

23 On Mr. Jao's evidence, Mr. Hung met with Winston on 10 January 2009 and advised him about the first four Bermuda purpose trusts. The case for the Respondents is that Winston was expressly told that these Bermuda purpose trusts were not beneficiary trusts.

24 Tony's evidence is that in 2009 William called a family gathering of all of Mr. YT Wang's children at Chang Gung Golf Course where he explicitly described the Bermuda purpose trusts as beneficiary trusts. [See Tony's witness statement of 9 September 2020 paras 86-87]. Later that same year of 2009, Winston commenced proceedings in the United States in relation to his challenge to the Bermuda purpose trusts.

25 On 13 January 2011 Mr. Jao accompanied by Mr. Yang attended Mr. YT Wang's and Madam Chou's Mingshui Residence to discuss the first four Bermuda purpose trusts. In Mr. Jao's first witness statement he states [137]:

"*I have been asked about a meeting I attended at the Ming Shui Apartments on 13 January 2011 ("the 13 January 2011 Meeting").*

I recall that Mr. Hung had been asked to set up a meeting with YT's Second Family to provide them with information concerning the Offshore Trusts and to inform them of the intention to expand the PTC Boards. I cannot recall who had asked Mr. Hung to arrange this meeting, or whether Mr. Hung had informed me who had asked him. I do recall, however, that Susan and William had confirmed to Mr. Hung that it would be appropriate for such a meeting to take place. I was asked by Mr. Hung to make arrangements for the meeting. Mr. Hung told me that it was important, in terms of family unity, that each side of the family should be aware of the Offshore Trusts and the manner in which they were structured. I no longer recall in any detail how the arrangements were made for the meeting.

The meeting took place less than three weeks before I was due to retire formally from my full-time position in the FPG Finance Department. I therefore suggested that my colleague Roger Yang ("Mr. Yang"), who had joined the General Administration Office of FPG during 2010, should attend the meeting. It was envisaged that after my retirement, Mr. Yang would be taking on much of my role in the administration of the Bermuda Trusts. As far as I recall, I had informed Mr. Yang, before the meeting that the intention was to explain the Offshore Trusts to YT's Second Family and inform

them of the intention to expand the PTC Boards. My intention was that, in view of the impending "hand over", he should attend in the role of observer."

26 On the subject of the 13 January 2011 meeting, Tony accepts in his evidence that his understanding of the meeting may have been derived from his mother's account of the meeting and that he had no specific recollection of having met Mr. Jao on that occasion. It is suggested in Tony's witness statement [102] that the 13 January meeting further confirmed his understanding that the Bermuda trusts were all intended for the benefit for each of his siblings and half siblings:

"In accordance with my father's signed instruction to Mr. Jao dated 31 December 2010, Mr. Jao arranged a visit to the Mingshui Residence on 13 January 2011 to explain the overseas trusts to my family. I cannot specifically recall meeting Mr. Jao on that occasion and it is possible that my knowledge of it derives from what I was told by my mother and sisters shortly after that meeting. In any event, however, I was aware that Mr. Jao provided a briefing document to us which I believe was a copy of a document headed "Introduction to Purpose Trust dated January 13, 2011 [i.e. the same date as his visit]…" (the "2011 Briefing Document")

I clearly recall understanding (which may have derived from what I was told by my sisters and mother) that Mr. Jao had said that each of the Founders' children were beneficiaries of the first four Bermuda Trusts and the New Mighty Trust, and that was one of the reasons why we had been given a briefing on the above trusts. I therefore had no reason to doubt that I was a beneficiary.

The information which I received following Mr. Jao's visit on 13 January 2011 was the only occasion during my father's lifetime on which I was ever provided with any information about the Founders' overseas trusts (before then I had merely been told of their existence without even knowing their names and being told that the assets held by them would be left to all the children)."

Tony's Evidence of Mr. YT Wang's Testamentary Intentions and Declarations

27 On Tony's case, in 2010 Mr. YT Wang told his second wife Madam Chou (Tony's mother) of his wishes in relation to the Bermuda purpose trusts, foreshadowing the written declarations produced on Tony's case.

28 I pause here to note that by 2010 the first four Bermuda purpose trusts had been established in addition to the Global Resource Trust ("the GRT") which had been declared by Global Resource Private Trust Company on 10 May 2001, three days after the settling of a trust called the Wang Family Trust. (The entirety of the assets of the GRT were subsequently transferred to Grand View Private Trust Company Limited for placement into the Wang Family Trust pursuant to an irrevocable deed of 26 September 2005)[4].

29 Tony contends that his father, Mr. YT Wang, was clear in expressing his wishes for his children to receive equal shares of the assets held in the Bermuda purpose trusts. Tony's case is that his father openly communicated these wishes by declarations made in 2010 and 2011. [See Tony's witness statement of 9 September 2020 paras 94-95]:

"*…In the course of those instructions, my father made clear his wish, not only that his children be treated equally, but also that they should each inherit a share of his 50% interest (held through offshore companies) in FPG.*"

30 As part of Tony's evidence he produced a 15 April 2010 written declaration which he asserts to have been dictated by his father, Mr. YT Wang, to Madam Chou's cousin (Ms. Ming-Chu Chiu) in the following terms. In Tony's witness statement of 9 September 2020 he says [96]:

"*Regarding the 5 overseas trust funds, they should, according to their present value, be equally divided into 2 parts, [one part] to be owned by YC Wang's family and [one*

[4] See Grand View Private Trust Company Limited v Winston Wong et al [2020] Bda LR 29

part] to be owned by my family. The part that I, WY Wang, own should be co-administered by representatives assigned by children of my two families respectively."

31 Tony also claims in his witness statement that his father made a will on the same date, 15 April 2010 [99]:

"The terms of the wills were very simple and the only relevant provision stated as follows:

> *"All of my estates should be divided into four shares. The first wife and the second wife, Chou, Yu-Mei, will each receive one share, and the other two shares are equally distributed among the eight children.""*

32 Tony further points to a request for approval dated 9 August 2010 ("the August 2010 RFA") where Mr. YT Wang stated his wish for Tony to succeed him as a director of the Chang Gung Memorial Hospital ("CGMH"). The CGMH is one of various charitable institutions established by the Founders by an endowment of FPG shares. It was first opened in 1976 and is now described as one of the largest hospitals in Taiwan. While it is also a major shareholder of FPG, its annual dividends from those shareholdings represent about 30% of its annual revenue according to CGMH financial statements for 2017/2018.

33 Following the August 2010 RFA, on 23 December 2010 Mr. YT Wang is said by Tony to have made a further declaration that representatives assigned by the children of his two families co-administer as members of the Board of Directors in the event that any of his family members were to become directors.

34 Nearly one year after the 23 December 2010 declaration, a further written statement of 27 October 2011 was signed by Mr. YT Wang, according to Tony's evidence. On this occasion, Mr. YT Wang is said to have declared while being video recorded, that:

"Regarding the Chang Gung Medical Foundation that was set up domestically, I am currently a director of the Board of Directors. For the sake of fair and unbiased treatment to the children of my first and second families, respectively, after my passing, the vacancy of director of the Board of Directors of the Chang Gung Medical Foundation shall be succeeded by my third son, Wang, Ven-Jiao, and co-administered."

35 Tony states in his evidence that also on 27 October 2011 Mr. YT Wang made a further declaration that Tony's succession to the directorship had been verbally conveyed to Mr. YT Wang's second family. To that extent, Tony produced in his evidence a document where his father purportedly declared:

"The matter of my third son Wang, Ven-Jiao's succession to the directorship of the Board of Directors of the Chang Gung Medical Foundation has been verbally conveyed to my second family by Section Chief, Ho, Shui-Wen, and hereby declared in writing. Please act according to this declaration."

36 Tony's evidence is that Mr. YT Wang always intended for his children to equally benefit from the assets held in the Bermuda purpose trusts. Summarizing this point, he said [Tony's witness statement of 9 September 2020 paras 102]:

"Based on the matters described above, it is inconceivable that my father would have intended to disinherit his children from the vast bulk of his wealth and to limit the control and management of FPG, through the Bermuda Trusts, to only William and Wilfred on behalf of his First Family, to the exclusion of our family. The Bermuda Trusts, which prevent my father's children from benefitting from his overseas assets, demonstrably contradict his wishes and intentions."

William's Evidence of Mr. YT Wang's Intentions and Oral Mandate

37 William directly challenges in his evidence the authenticity and credibility of the declarations and the "*self-written will*" averred by Tony to have been made by or on behalf of Mr. YT Wang. Williams states [141-144]:

"*I have seen for the first time in these proceedings three separate documents (all dated 15 April 2010), each purporting to be a "self-written will" of my father (two of which are handwritten, one of which is typewritten)…I have seen the video…in which my father appears to be reading a document and is purportedly signing a typed document and copying a second document. I have also been shown a typewritten document (also dated 15 April 2010), purporting to be a "declaration"…*
There is also the handwritten document dated 23 December 2010, described as a "self-written will", a further "declaration" of the same date and a video…As I understand it from others, there are no videos or audio recordings of my father signing, reading out or writing the declarations, and it is unclear what he is copying in the video.

There are also three documents dated 27 October 2011, two handwritten…and one typewritten… The handwritten documents are apparently written by another person and possibly signed in a shaky hand by my father. The typewritten document entitled "declaration" is also possibly signed by my father.

In my view, all of these documents appear to lack credibility. I will leave it to others to otherwise further address the possible meaning of these documents, but it is inconceivable that my father would have prepared a document intended to be a will or another testamentary document without involving Mr. Hung, me or Wilfred. My father trusted Mr. Hung to manage all of his personal financial affairs, including his tax returns and his charitable giving. He also trusted Mr. Hung to hold and manage Chindwell BVI and Vanson BVI and, through his role on the BMC, to manage the First Four Trust[s]".

38 On William's evidence, in early October 2010 Mr. YT Wang gave him an oral mandate, in the presence of Wilfred, Sara and Mr. Hung, to manage his affairs ("the October 2010 oral mandate"). He states [145]:

"My father also entrusted me with his affairs. In early October 2010 he had specifically given me before witnesses an oral mandate to handle his affairs. This mandate was communicated when my father summoned me, my brother Wilfred and Mr. Hung to a meeting in his study in the First Family's home. My sister Sarah was there and arranged tea for us. At that time my father was 89 years old and was in declining health."

39 William also produced a note[5] of the October 2010 oral mandate which he avers was made by Mr. Hung nearly two years later in July 2012 in accordance with his own recollection:

"***REPORT***

The Finance Department *26 July 2012*

In the afternoon on a certain day in early October 2010, as instructed by the President [YT Wang], I, being an officer of the Company, was requested to attend a meeting held on the 1st floor of YT Wang's apartment on Yanshou Street. CEO William Wen-Yuan Wong, Chairman Wilfred Weng-Tsao Wang and Miss Sarah Hsueh-Ching [Wang] were all present at that time. The President [YT Wang] declared before us that, "from now on, any matter such as the withdrawal of funds from my accounts or investment in shares, etc. (except for any household expenses of the two families which have been previously reviewed and verified) must be discussed between the two brothers William Wen-Yuan [Wang] and Wilfred Weng-Tsao [Wang], and be verified and approved by William Wen-Yuan [Wang]." In

[5] A copy of this trial exhibit [D4/37/1] was made available to this Court shortly after the 3 March 2021 hearing of this appeal

order that there is a written record that may be relied upon in the future, this document has been [drawn up].

To
Chairman Wilfred Weng-Tsao Wang [signed:] Wilfred Weng-Tsao Wang 27 July
CEO [William Wen-Yuan] Wong [signed:] William Wen-Yuan Wong 27 July

Forward to
The President [YT Wang] for verification and instructions [signed] YT Wang
[illegible]

Submitted by officer [signed]: Hung Wen-Hsiung"

40 In his second witness statement dated 13 November 2020, Mr. Jao spoke about Mr. Hung's 26 July 2012 report on Mr. YT Wang's oral mandate for William to handle his, Mr. YT Wang's, financial affairs [102-104]:

"*102. I have been informed that Tony has questioned whether certain of the documents which have been put forward in this Action are genuine. I understand that one of the documents being challenged is a report prepared by Mr Hung on 26 July 2012 (see Exhibit 3342). I have been shown a copy of that report (which was signed by William, Wilfred and YT). In it, Mr Hung summarised a discussion which had taken place in October 2010, during which YT had given William authority to act on his behalf.*

103. I was not involved in the discussion which took place in October 2010 or in the preparation of Mr Hung's report. However, I do recall Mr Hung showing me a copy of the report. My recollection is that he showed it to me shortly after it had been signed by William, Wilfred and YT.

104. At that time, Mr Hung explained to me why he had decided, at that particular time, to record a conversation which had taken place more than a year earlier. I recall that Mr Hung's explanation was that by 2012 he was concerned about YT's declining

health and advancing age and also about his own health. He said that, for these reasons, he had decided that it was important to record in writing what had been agreed. I have no reason to doubt that the document and the signatures on it are entirely genuine."

Mr. YT Wang's Deteriorating Health

41 On Tony's pleaded case, Mr. YT Wang had lost all mental capacity by February 2012 and remained mentally incompetent thereafter. Tony's challenge to the validity of the POA is largely premised on his assertion that Mr. YT Wang was mentally unfit and incapable of having lawfully conferred those powers on William. In Tony's Amended Defence and Counterclaim he states [86.3.2]:

"*86.3.2. Mr YT Wang, however, lacked the requisite mental capacity to execute the Power of Attorney in circumstances where he had advanced Alzheimer's by October 2012 (at the latest), of sufficient severity to have deprived him of that capacity*".

42 Tony provided a detailed narrative in his witness statement on the events which he says evidenced the deterioration of his father's health from December 2011 onwards leading up to the starting point of his father's mental incapacity in February 2012. These averments compete with the Respondents' case on which it is contended that Mr. YT Wang was in good mental health throughout most of 2012.

43 It is alleged by Tony that following Mr. YT Wang's hospitalization in December 2011 William arranged for their father to occupy the Yanshou Residence (the homestead of William's mother, Pi-Ruang Wang). Tony suggests that William imposed this arrangement on his father in order to increase his control and influence over him, notwithstanding that Mr. YT Wang wished to return to the *Mingshui Residence* (the homestead of Tony's mother, Madam Chou).

44 Tony avers that it would have been impossible for Mr. YT Wang to have engaged in an intelligible conversation from February 2012 onwards. To that end, he provides

various explicit and detailed examples to support his account of Mr. YT Wang's mental health during this period.

45 On 18 September 2012 Mr. YT Wang was hospitalized at CGMH where he remained until his dying day.

Mr. Hung's Proclamation to Transfer the FPG Shares in Chindwell BVI and Vanson BVI into a Bermuda Purpose Trust

46 Mr. Jao states in his first witness statement [150] that in 2008 when Mr. YC Wang died, Chindwell BVI and Vanson BVI were the only remaining holding companies whose shares had not yet been transferred into the Bermuda purpose trusts. Mr. Jao's evidence is that following the death of Mr. YC Wang in 2008, Mr. Hung did not regard Chindwell BVI and Vanson BVI as forming part of Mr. YC Wang's estate or as belonging to Mr. YT Wang himself. Notwithstanding, Mr. Hung regarded himself to be bound by any further directions from Mr. YT Wang as to his holding of the FPG shares in these BVI companies.

47 Mr. Jao said that Mr. Hung was managing Chindwell BVI and Vanson BVI as a trustee of the shares of those remaining BVI companies while at the same time managing the first four Bermuda Purpose Trusts via the BMC. Mr. Jao and Mr. Yang continued to report directly to the BMC in relation to the Bermuda purpose trusts. In providing examples of this working relationship with the BMC members, Mr. Jao said in his first witness statement [151]: "*…The BMC members were provided with quarterly reports for the companies held in the Bermuda Trusts and the Share Purchase Reports to review. They would also consider and authorise other strategic or charitable matters.*"

48 On William's evidence, it was during the summer months of 2012 that Mr. Hung, informed the members of the BMC of the first four trusts that he wished to retire as a trustee of the FPG shares held by Chindwell BVI and Vanson BVI and that the time had come to transfer these shares into a Bermuda purpose trust. By this time, Mr. Hung's health had fallen into a state of deterioration. It is also William's evidence that

Mr. Hung stated that the share placement would accord with Mr. YT Wang's wishes and that Mr. YT Wang had, in any event, already approved this. This led to discussions between Mr. Hung and the rest of the BMC members as to whether the shares would be placed in one of the existing Bermuda purpose trusts or a new Bermuda purpose trust.

49 The Respondents' case that Mr. Hung had secured Mr. YT Wang's approval in respect of the transfer of Chindwell BVI and Vanson BVI is further supported by Mr. Jao's evidence. In his first witness statement [154] Mr. Jao said:

"As I have mentioned above, I retired from my full-time work at FPG in January 2011. From that time, I did not see Mr Hung as often. It was my understanding, from conversations I had with Mr Hung shortly following my retirement, that YT's health was not good and nor was Mr Hung's. He had cancer. He mentioned that YT had confirmed that Mr Hung could move the last of the assets into a Bermuda Trust so that Mr Hung could finally retire as well. Because of his health issues, Mr Hung was very conscious of his own mortality and he mentioned to me on more than one occasion, around this time, that Chindwell BVI and Vanson BVI should be transferred into a purpose trust structure sooner rather than later."

50 Mr. Jao added that Mr. Hung informed him that Mr. YT Wang had confirmed his approval of the transfer of Chindwell BVI and Vanson BVI at least one year prior to August 2012 and that in 2012 Mr. Hung was anxious to retire not only on account of his grave illness but because of the anxiety he felt as a result of the litigation which had been commenced by Winston. In Mr. Jao's first witness statement [155-158] he explained:

"155. I do not know why this was not formalised in 2011 but, in any case, both Mr Hung and I were spending time in 2011 helping with matters connected with Winston's litigation in the US and we were also helping Roger Yang to take over the day to day management role with respect to the Bermuda Trusts. Then in December 2011, matters become very difficult when Winston commenced a law suit in Hong Kong against

thirteen defendants, including Mr Hung and me. I was aware that the claims being made by Winston involved allegations of dishonesty, which were very upsetting and completely unjustified.

156. I recall that Mr Hung was particularly upset about the allegations that Winston was making in the Hong Kong proceedings. By that time, he was quite unwell and the stress caused by the litigation seemed only to worsen his condition. I was very concerned for Mr Hung. I refer below to a letter I wrote to Susan in August 2012 in which I expressed these sentiments and how the situation was affecting Mr Hung.

157. Shortly before I wrote that letter, Mr Hung told me he had indicated to the BMC Members that he wished to be relieved of some of his responsibilities within FPG, including in relation to the trusts and certain charitable foundations within FPG, including the Pro-Diligence Foundation. Around this time, Mr Hung suggested that the shares in Chindwell BVI and Vanson BVI should now be transferred to a Bermuda purpose trust. This did not surprise me. My understanding from Mr Hung, as I have noted in paragraphs 154 and 155 above, was that it was intended that these two companies would be placed into trust and Mr Hung had told me at least a year before that YT had agreed that he was free to pass these to a Bermuda trust. I do not know whether Mr Hung consulted YT again about this intention in 2012. However, since Mr Hung never acted without being certain that he was following the wishes of the Founders, I am sure that he had received whatever direction he felt he needed or was acting within the scope of a discretion which had already been given by YT.

158. My understanding was, and remains, that, the particular urgency with Mr Hung's decision to stand down was, to a large extent, prompted by the considerable additional anxiety that the Hong Kong proceedings had caused him."

Decision and Purpose for obtaining a Power of Attorney and Instructions to Angela Lin of Lee and Li for an Instrument of Power of Attorney to be drafted

51 Mr. Jao stated in his evidence that Mr. Hung had been handling Mr. YT Wang's personal financial affairs since the passing of Mr. YC Wang in 2008. William contends in his witness statement [166] that the purpose for obtaining the POA was to confirm his father's earlier oral mandate. In William's witness statement [169-174] he explained that the purpose of the POA was also to provide the assurances required by Mr. Hung for the subsequent establishment of the Ocean View Trust and the transfer of Chindwell BVI and Vanson BVI into the Ocean View Trust.

52 Against this backdrop, Mr. Yang, who had now taken over from Mr. Jao as Senior Administrator in the FPG Finance Department, instructed attorneys Lee and Li to prepare the POA. Mr. Jao, in his first witness statement [163] offers some insight on how it was that Mr. Yang came to instruct Lee and Li:

"163. I recall being told by Mr Hung that the possibility of obtaining a Power of Attorney had been discussed between William and Wilfred. I was not involved in those discussions, nor was I informed of any details. I recall that Mr Hung requested that I ask Mr Yang to prepare the document. My recollection is that, because Mr Yang was still relatively new to the FPG Finance Department, I recommended that he discuss the matter with the lawyers and provided him with the contact details for Lee and Li."

53 Mr. Yang in his witness statement confirmed that Mr. Jao asked for him to arrange for the drafting of a power of attorney in broad terms conferring maximised scope of authorization to William. Mr. Yang stated that he secured a draft from Lee and Li for circulation to Mr. Jao, William and Wilfred under the cover of a memo he [Mr. Yang] scripted. Mr Yang says [40-42]:

"*40. In early October 2012, shortly after the New Bermuda Purpose Trust had first been mentioned to me, Mr Jao asked me to arrange for a power of attorney to be drawn up. The power of attorney was to be executed by YT Wang in favour of his eldest son*

William Wong Wen-Yuan ("William"). Mr Jao asked me to ensure that the document was drafted in broad terms.

41. I arranged for a draft power of attorney to be drawn up by Lee and Li, a law firm in Taipei. Once that draft had been provided to me, I prepared a memo which was to be sent to Mr Jao, William and another son of YT Wang, Wilfred Wang Weng-Tsao ("Wilfred"), together with the draft of the power of attorney. I have been shown that memo, which was dated 24 October 2012 (See Exhibit 3..). The memo stated:

> *"The attached was drafted with the help of legal counsel, being a proposed Power of Attorney to be granted to [William] by [YT Wang], with maximised scope of authorization. If [William] approves, a formal version will be accordingly produced. Please advise whether this is appropriate."*

42. The memo and draft power of attorney were provided, in the first instance, to Mr Jao (on 24 October 2012). Later that day (24 October 2012), the memo and draft power of attorney were circulated to William and Wilfred for their approval. William approved the draft and signed the memo on 29 October 2012. Wilfred did likewise on 30 October 2012."

54 In his second witness statement of 12 November 2020, Mr. Yang corrected himself in respect of his first statement as to the date on which he produced the memo which described the events of 31 October 2012. Mr. Yang said [65-66]:

"65. I also explained, in paragraph 41 of my First Statement, that the Power of Attorney… was prepared by a law firm in Taipei, Lee and Li. As I stated, I then provided William, Wilfred and Mr Jao with a draft of the Power of Attorney on 24 October 2012 under cover of the memo I had prepared on that date… At paragraphs 43 to 58 of my First Statement, I described the events that took place on 31 October 2012 when YT Wang signed the Power of Attorney. As I stated in paragraph 48, there were several witnesses present including two Taiwanese lawyers and medical staff. I

can state, first hand, that this document is exactly what it appears to be and is entirely genuine.

66. My Note of 31 October 2012…was referred to in paragraph 47 of my First Statement, in which I described the events which took place on that date. In that paragraph, I stated that I prepared the document later that day (31 October 2012). I have now had an opportunity to inspect the metadata of the original electronic file. In fact, it is apparent from the metadata that I prepared the document some days later (on 6 November 2012)."

55 Also within the evidence put forth by the Respondents, William arranged for Mr. YT Wang's medical advisors to consult with an attorney as to the suitability of Mr. YT Wang's signing of a power of attorney. William also commissioned the presence of attorneys to witness Mr. YT Wang's signature of the POA and visited his father at the Linkou branch of CGMH late October 2012 to discuss the POA before it was to be signed. In outlining these events, William said [166-168]:

"*166. A Senior Administrator in the Finance Department of FPG, Roger Yang ("Mr Yang"), liaised with lawyers to prepare a written power of attorney (in Chinese) which was intended to confirm my father's earlier oral mandate.*

167. I arranged for my father's medical advisers to meet a lawyer to determine whether it was appropriate for my father to sign the power of attorney. I arranged for lawyers to be present when my father would sign the document. He was unwell by this time and had been receiving treatment for medical issues including cancer and Alzheimer's disease. He was also about to have chemotherapy and my primary concern at this time was to ensure that he was well cared for. Since my father had already authorized me to have control of his financial affairs, I felt that my father would be comfortable to provide to me a more durable power of attorney, especially given that the purpose was to give comfort to Mr Hung who was himself ill with cancer at this time. Based on my own communications with my father, his condition was variable but I personally

believed that, at the right time, he would be able to understand the meaning of the power of attorney granted to me and his act in executing it.

168. Having been informed that his doctor also thought he would be well enough to understand and sign the power of attorney, I went to visit my father around the end of October to raise it with him. He was sleepy but seemed calm and comfortable. I told him that he would be asked to sign a document which confirmed that I was responsible for his affairs. Knowing my father, I believe he understood what I meant and was willing to do it. My father then executed the power of attorney on 31 October 2012…"

Execution of the Instrument of Power of Attorney

56 Mr. Yang's evidence is that Mr. Jao suggested for him to contact Yeh, Ta-Hui ("Attorney Yeh") to witness the affixing of Mr. YT Wang's signature to the POA. However, Attorney Yeh, being an attorney who had previously provided legal services to the Wang family, suggested that the more appropriate attorney would be his former colleague, Attorney Chang Li-Yu ("Attorney Chang"). This was agreed by Mr. Yang. On 30 October 2012 it was arranged that both Attorney Yeh and Attorney Chang would meet Mr. Yang in the FPG building early the following morning before travelling together to attend Mr. YT Wang's hospital bed with the draft POA in hand.

57 Describing the 31 October 2012 visit to the hospital for Mr. YT Wang's signature Mr. Yang in his first witness statement said [46-58]:

"*46. At some point before 8.00 am on 31 October 2012, I met Attorney Yeh and Attorney Chang at the FPG building. I was introduced to Attorney Chang and the three of us had a brief conversation. I also showed the proposed power of attorney to Attorney Yeh and Attorney Chang. They had no comments or concerns regarding the document. We then travelled to the Hospital together.*

47. I have also been shown the note that I prepared later that day, entitled "Summary of Execution of [YT Wang]'s POA" ("my Note of 31 October 2012")… The times

referred to in this note are approximate and my recollection is that Attorney Yeh, Attorney Chang and I arrived at the Hospital before 9.00 am.

48. I was not aware who else would be attending the meeting with YT Wang or indeed whether anybody else would be attending. In fact, it transpired that a number of medical staff were already in the room, together with YT Wang's bodyguard. As I recorded in my Note of 31 October 2012, in addition to myself, Attorney Yeh and Attorney Chang, the following individuals were there:

(a) Yang, Li-Chu, the Vice President of the Department of Nursing at the Hospital;
(b) Dr Wang, Chun-Chieh, from the Division of Cardiology at the Hospital ("Dr Wang");
(c) Chen, Li-Chen, the Nursing Supervisor at the Hospital;
(d) Teng, Yu-Shan, a Registered Nurse at the Hospital;
(e) Chang, Erh-Wen, YT Wang's bodyguard; and
(f) Chiang, Yung-Ji, a male nurse at the Hospital.

No members of YT Wang's families were present.

49. This was the first (and only) time that I met YT Wang. I therefore have a very clear recollection of the occasion. It was also my understanding that neither Attorney Yeh nor Attorney Chang had met YT Wang previously.

50. When we entered the room, the nurses were talking with YT Wang. My recollection is that, after an exchange of pleasantries, both Attorney Chang and Attorney Yeh spoke with Dr Wang concerning YT Wang's health. I do not recall the details of what was discussed but I recall that Dr Wang assured them that YT Wang was of a clear mind and had sufficient capacity.

51. Attorney Chang and Attorney Yeh then both spoke with YT Wang. Again, I do not recall specific details of the conversation but I do recall that Attorney Yeh and

Attorney Chang introduced themselves to YT Wang. Attorney Chang then explained the purpose of our visit.

52. At around that moment, I handed the power of attorney to YT Wang. Attorney Chang explained the contents of the document and also read out particular parts of it. She then asked YT Wang whether he understood the nature of the document and whether he wished to authorise William to handle his assets and his affairs by signing the power of attorney. YT Wang said "yes" and nodded.

53. My recollection is that YT Wang appeared to understand Attorney Chang's explanation and questions. He did not object to anything that was said. My impression was that both Attorney Yeh and Attorney Chang were satisfied that YT Wang had understood. In fact, I recorded this in my Note of 31 October 2012 (at paragraph 1).

54. I recall that, once Attorney Yeh and Attorney Chang had indicated that they were content to proceed, YT Wang was shown where on the page he would need to sign. He then signed the power of attorney ("the Power of Attorney") ... and added his fingerprint. Having satisfied herself that YT Wang had validly executed the Power of Attorney, Attorney Chang added her signature.

55. As I recorded in my Note of 31 October 2012, once the Power of Attorney had been executed, YT Wang began talking and joking with the nursing staff who were in attendance. In addition, I recall that one of the nursing staff asked YT Wang if he wanted to play mahjong.

56. In light of the events that took place that morning and the interaction between YT Wang, the medical staff and the two attorneys, I had no reason to doubt YT Wang's ability to understand the consequences of signing the Power of Attorney.

57. Attorney Yeh, Attorney Chang and I then left YT Wang's room. As I have stated above, the timings referred to in my Note of 31 October 2012 are approximate. On

further reflection, my recollection is that the gathering in YT Wang's room in fact lasted for around 15 minutes.

58. The three of us then returned to the FPG building together. Attorney Chang asked for a copy of the Power of Attorney for her records. I later provided her with a copy."

58 Attorney Chang also provided a witness statement dated 15 September 2020 detailing the events of 31 October 2012. She said [5-22]:

"*5. During the early evening of 30 October 2012, I received a call from Attorney Yeh, Ta-Hui ("Attorney Yeh"). Attorney Yeh is also a lawyer in Taipei and we were previously colleagues, in the same law firm. Attorney Yeh informed me that arrangements had been made for the late Wang, Yung-Tsai ("YT") to sign a Power of Attorney ("the PoA") the following day (i.e., 31 October 2012) in favour of his son, William Wen Yuan Wong ("William"). He asked whether I would be willing to witness YT signing the document. I confirmed that I would be pleased to do so.*

6. I had not previously had any connection, personal or professional, with any of the members of the Wang family, the Formosa Plastics Group ("FPG") or the Private Trust Companies.

7. Some time between 7.00 and 8.00 am on 31 October 2012, Attorney Yeh and I met with Roger Hsiu Hsiung Yang ("Mr Yang") in the FPG Building. Mr Yang was a Senior Administrator of the Financial Department of FPG at that time. I had not met Mr Yang previously.

8. We had a brief conversation in the FPG building, at which time I was shown the PoA. I had not previously seen it. I did not have any concerns and confirmed again that I would be pleased to witness YT signing it.

9. Mr Yang, Attorney Yeh and I then went to the Linkou site of the Chang Gung Memorial Hospital together.

10. The three of us entered YT's room, which I remember being extremely spacious. There were around 6 to 7 people already there, including YT, a doctor (Dr. Wang, Chun-Chieh ("Dr. Wang")) and several nurses. The nurses were talkative, and were chatting to YT.

11. I asked Dr. Wang about YT's state of mind. In response to my enquiry, Dr. Wang confirmed that YT was compos mentis and in a good mental state. I recall that Attorney Yeh also joined the conversation with Dr. Wang. It was apparent that the two of them were familiar with one another.

12. I introduced myself to YT. I had not met him previously. Given that Attorney Yeh also introduced himself at the time, it is my understanding that it was also the first time the two of them had met.

13. I explained the purpose of our visit. I then read out the tenns of the PoA and explained the content to YT in simple language. At the same time, Mr Yang handed YT the PoA that I had been shown earlier that morning.

14. I then asked YT whether he understood the content and whether he wished to provide the authorisation to William by signing the PoA. YT nodded and said "yes" in Taiwanese. My recollection is that when I read and explained the content of the PoA to YT, he listened attentively. He raised no objection to anything I told him.

15. YT then signed and fingerprinted the PoA.

16. I recall that YT was quite lively and even made jokes with the nurse who was standing next to him after he signed and fingerprinted the PoA.

17. Based on YT's interaction with myself and the nurses, it was certainly my impression that YT was capable of understanding the PoA and did understand the document.

18. It was also my impression that everyone in the room understood why Attorney Yeh and I were there and the purpose of our visit.

19. I recall that after I had signed and sealed the PoA, Mr Yang took possession of the document.

20. Attorney Yeh, Mr Yang and I stayed in YT's room for around a quarter of an hour. We returned to Taipei together. I then headed the Civil Tribunal of the Taiwan High Court for a hearing.

21. Mr Yang informed me that he was intending to have the PoA signed by William. Since there was only one original PoA, I asked Mr Yang to provide a copy of the Po A for my files after William had signed it.

22. Or1 November 6, 2012, I received a copy of the fully executed PoA."

59 Mr. Yang stated that he attended William's office at FPG after having returned from the hospital on 31 October 2012. In his first witness statement, he said [59]:

"Once I had returned to the FPG building, I made arrangements to attend William's office. I recall that I handed William the signed Power of Attorney and provided him with a report of the events that had taken place in YT Wang's room at the Hospital. I informed him that YT Wang had been content to sign it and had done so. I also informed William that YT Wang had been joking with the nurses and that the lawyers who had been present, Attorney Yeh and Attorney Chang, were satisfied that YT Wang was of sound mind and understood the document. William then signed the Power of Attorney."

60 (The report to which Mr. Yang refers above is the same report which he speaks of in his second witness statement where he corrected his original statement that the report was made on 31 October 2012. Mr. Yang stated in his second witness statement that the report detailing the 31 October 2012 hospital visit was in fact made on 6 November 2012.)

Formation of Ocean View Trust and Transfer of the FPG Shares in Chindwell BVI and Vanson BVI into Ocean View Trust

61 In William's witness statement [169-174] he refers to a letter he wrote as the donee of the POA (on behalf Mr. YT Wang) to Mr. Hung confirming Mr. YT Wang's approval of the establishment of the Ocean View Trust and the transfer of Chindwell BVI and Vanson BVI into the Ocean View Trust:

"*169. I believe the power of attorney authorised me to provide whatever assurances Mr Hung required.*

170. I believe that in November and December 2012 Mr Yang liaised with the lawyers to have the documents prepared to establish a new private trust company and transfer the shares of Chindwell BVI and Vanson BVI into a new Bermuda purpose trust.

171. At Mr Hung's request, I provided a formal letter confirming on behalf of my father that he was in agreement with the decision to establish a new purpose trust structure to hold the shares of Chindwell BVI and Vanson BVI…

172. The letter stated (in English translation):

"Since [Vanson BVI] and [Chindwell BVI] have been incorporated under the laws of [the BVI], you have served as the trustee, and you have held all shares issued by the company until now.

I understand that currently there is a proposal to establish a new and more official trust structure in accordance with the laws of Bermuda to hold the shares in the two aforementioned companies. I also understand that this decision was made by consensus reached from discussions by future members of the [BMC] of the new trust company, the purpose of which is to ensure that the existing companies can achieve sustainable operations and perpetual development. I am in full agreement with this decision.

I am also aware that [Winston] has asserted certain lawsuits, including against your transfers of shares in other companies held as the trustee. In relation to this, even though you believe it is not necessary under the circumstances, out of an abundance of caution, I should still formally approve of the aforementioned transaction. Therefore, I hereby confirm to you that I am in full agreement and support of the decision to proceed with and to complete in the future the aforementioned stock transfer.

I would like to again express my appreciation toward you for your faithful loyalty toward my elder brother [YC Wang] and myself over the years.

Yung-Tsai Wang
Signed by authorised signatory William Wen-Yuan Wong"…

173. The mechanics of establishing the trust were left to others.

174. During the early part of 2013, I believe all of the necessary steps were completed for the formation of the proposed new trust, which became known as "the Ocean View Trust", although I do not have any independent recollection of the legal documentation."

62 Consistent with the legal advice received from the attorneys who had previously assisted with the establishment of the first four Bermuda purpose trusts, Mr. Hung took

steps to place the FPG shares held by Chindwell BVI and Vanson BVI into a new purpose trust, namely Ocean View Trust. That is William's evidence [165]. (On the affidavit evidence of Mr. Scott Pearman of Conyers Dill & Pearman, it is stated that the law firm Skadden Arps. was associated with the formation of the Ocean View Trust.)

ANALYSIS AND FINDINGS

63 There is no dispute in this case that the POA documents qualify for protection under the rule of legal professional privilege. It is also common ground between the parties that the issue of legal professional privilege is procedural and thus governed by the *lex fori* which in this case is Bermuda law.

64 Equally, no contention arises on the point that Tony seeks access to these documents in his capacity as a representative of Mr. YT Wang's estate in respect of his Bermuda assets. With the consent of the parties, on 9 March 2020 Kawaley AJ ordered the joinder of Tony and Jennifer to the main action as joint administrators of the Bermudian estate of Mr. YT Wang. Kawaley AJ made a further and subsequent order, also with the consent of the parties, empowering Tony alone (to the exclusion of Jennifer or any other Defendant), to participate as the administrator of Mr. YT Wang's estate in the main action. Specifically, Tony was given leave to:

"i. recover documents to which the administrators of the Estate are entitled (if any);

ii. bind the Estate in respect of the position it takes in making and responding to interlocutory applications (including in respect of disclosure);

iii. take all strategic decisions in relation to the litigation on behalf of the Estate;

iv. waive any privilege which an administrator of the Estate is entitled to waive; and

v. progress any claim on behalf of the Estate against any party and/or defend any claim brought on behalf of YC [sic] [YT] Wang's estate in the Main Proceedings by the exercise of all other rights of the administrators of the Estate whose exercise Tony Wang considers necessary."

65 These Court-ordered powers given to Tony were made subject to only one exception which is of no consequence to this appeal. I have thus proceeded on the basis that any entitlement that Mr. YT Wang has to a joint legal interest is by extension available to Tony as the administrator of his estate in the main action.

66 Tony's grounds of appeal are mounted on the premise that Mr. YT Wang had a joint legal interest in the POA documents. Tony does not rely on any claim to a joint retainer agreement.

67 The Respondents, however, assert that even if Tony could establish his right to joint legal interest, he ought not to be granted any right of production/inspection under RSC Order 24 on the basis that his pleaded case is incompatible with his application for discovery of the POA documents.

68 It is therefore appropriate to consider Tony's grounds of appeal separately from the additional grounds relied on in the Respondents' Notice.

Tony's Grounds of Appeal:

69 On 8 January 2021 Kawaley AJ granted leave for Tony to appeal on the grounds set out in his Notice of Appeal dated 14 January 2021. Those grounds of appeal are pleaded as follows:

"Ground 1

The Learned Judge's overall conclusion that Mr YT Wang had no joint interest in communications relating to the preparation and execution of a power of attorney for and/or on behalf of Mr. YT Wang himself (such that privilege may now be asserted

against Tony as administrator of YT Wang's estate) constituted an error of law and/or was plainly wrong and/or was not one that could properly be reached by him. The Learned Judge was bound to conclude that Mr. YT Wang had an interest in the creation and execution of his own power of attorney such as to require communications relating to it to be disclosed to him.

Ground 2

The Learned Judge further erred (at § 28-29) in treating the dictum of Burnett J in R (Ford) v Financial Services [2011] EWHC 2583 (Admin) at §40 as the applicable test and/or a decisive factor in determining the existence of joint privilege. In particular, the conclusion that advice must be "given to an individual as a client" in order for joint privilege to attach in all cases is plainly wrong and contradicted by subsequent authority (including at appellate level) and, indeed, by the Learned Judge's correct conclusion (at §27) that the test is a flexible one.

Ground 3

Further, and in any event, the Learned Judge (at §31-32) misunderstood and/or misapplied the principles set out in R (Ford) v Financial Services (above) insofar as he failed to appreciate or conclude that Lee and Li and those instructing them were necessarily communicating (inter alia in seeking legal advice) on behalf of Mr YT Wang given that the instructions concerned the production of a document by which he was to delegate the authority for dealing with his personal assets and exercising powers conferred on him personally.

Ground 4

The Learned Judge's conclusion (at §35 §36-37) that Mr. YT Wang did not have a joint interest in his own power of attorney because: (i) he did not personally benefit from the transactions subsequently effected by/through it and/or (ii) that Lee & Li's work product was not for the benefit of Mr YT Wang or his personal interests, constituted an error of law and/or was plainly wrong and/or was not one that could properly be reached by him.

Ground 5

The Learned Judge erred in law and in fact by treating the assertions contained in the affidavit [of] *Angela Lin as to her alleged subjective belief as to the identity of Lee and Li's clients as conclusive (at §33-35) in circumstances where:*

a. *The Learned Judge had correctly concluded (at §30) that Ms Lin's affidavit failed to explain how privilege could be asserted (at least) in respect of a larger part of the relevant documentation over which privilege was asserted; and*

b. *Ms Lin's affidavit did not even acknowledge Mr YT Wang's personal interest in the subject-matter of the communications and therefore did not attempt to engage with that issue, let alone explain how privilege could be asserted in such circumstances;*

c. *Ms Lin's affidavit was deficient in various other material respects and inconsistent with other evidence submitted on behalf of the PTCs.*

Ground 6

Having concluded that Ms Lin's affidavit failed to explain how privilege could arise in respect of drafts of the Power of Attorney and instructions relating to it (at §30), the Learned Judge was bound to conclude (at the very least) that inspection of those documents should be provided and order[ed] *accordingly.*

70 By way of relief, Tony seeks an order setting aside the decision of Kawaley AJ and in substitution of that decision he invites this Court to make an order requiring the inspection/production of documents held by Lee and Li relating to the preparation and/or execution of the POA.

The Evidence filed in the Discovery Application

71 In support of Tony's summons application before Kawaley AJ for inspection and discovery, Mr. Timothy Molton, an associate of MJM Limited, swore an affidavit of

3 December 2020. Therein, he referred to his 30 November 2020 letter to the Respondents' attorneys expressly asserting Tony's entitlement to [17] "*a full copy of Lee & Li's file relating to the creation and execution of the Power of Attorney including all correspondence, instructions and advice in relation to those matters*."

72 Mr. Molton further deposed [19-20]:

"*19. If it is the PTCs' position that the Power of Attorney purportedly executed by Mr. YT Wang was prepared by Lee and Li without any instruction being sought from, or any advice being given to, Mr. YT Wang, that would have obvious implications in the context of the disputes surrounding the Power of Attorney. In the circumstances, the inadequacy of the PTCs' explanation of how privilege can be asserted against Mr. YT Wang (and his representatives) is all the more striking.*

20. For the reasons set out above:

a. there is no doubt that the Power of Attorney (and, it is to be inferred other documents relating to the Power of Attorney) held by Lee and Li are within the possession, custody or power of the PTCs;

b. the documents relating to the creation and execution of the Power of Attorney are directly relevant to important issues in dispute (which form the subject matter of the parties' pleaded cases);

c. I do not believe that a proper basis for asserting privilege against Tony (as representative of Mr. YT Wang) has been made out; and

d. *I do not believe that there can be any suggestion that the production of Lee and Li's files solely in relation to the Power of Attorney would be in any way difficult or onerous (let alone disproportionate)*."

73 Ms. Lin and Yi-Wen Chen ("Attorney Chen") were the attorneys who drafted and advised on the POA. Ms. Lin in her witness statement [9] describes Lee and Li as "*the largest and most prominent law firm in Taiwan with expertise across a wide range of legal disciplines, including litigation*." Ms. Lin, was (and continues to be) a partner and attorney in the Litigation and Dispute Resolution Department. In 2012 she had approximately 19 years of practising experience at the Taiwan bar. Attorney Chen, a senior associate of the firm at the time and former member of the judiciary in Taiwan, assisted Ms. Lin in the preparation of the POA.

74 Ms. Lin in her affidavit states her firm's position on the terms of her instructions and the clients to whom they were advising [14-19]:

"*14. Our instructions in relation to the Power of Attorney were received in or around early October 2012 and formed part of ongoing advice being rendered by my firm to the First to Fourth Trustees, Lee and Li having been instructed by them in connection with litigation which had been commenced and/or which might be commenced by Winston Wong ("Winston"). I believe that the Trustees have also previously explained to this Court (in response to Winston's application several months ago for disclosure of documents created around 2012 and 2013 regarding the formation of the Ocean View Trust) that Lee and Li's clients were the First to Fourth Trustees. I am informed by Conyers, Dill & Pearman ("CDP") that Tony's legal team attended the hearing of Winston's application and therefore ought to have been aware that privilege was asserted by the First to Fourth Trustees in respect of other advice rendered by my firm during this time frame.*

15. I do not understand the basis for the assertion in paragraph 10 of Mr. Molton's 11th Affidavit that the Power of Attorney was "purportedly prepared for or on behalf of YT Wang". My firm was not advising YT Wang nor anyone acting on behalf of YT Wang in connection with the preparation of the Power of Attorney. To the extent that the word "purportedly" is intended by Mr. Molton to question whether my firm in fact worked on preparing the Power of Attorney at that time, Mr. Molton is wrong. The

work on the preparation of the Power of Attorney was genuinely undertaken by my firm in October 2012 at the instruction of the First to Fourth Trustees.

16. In Taiwan, a law firm owes a duty of confidentiality to its clients. It would constitute a breach of our ethical duties to provide copies of communications with a client to a third party, without the client's advance permission. In any case, at no time did YT Wang ask for the legal advice rendered by my firm to be shared with him.

17. Early drafts and internal email exchanges or other internal notes prepared or exchanged within Lee and Li are not shown to clients. I have not provided to my clients (nor to their litigation team in these proceedings) copies of such materials in connection with the preparation of the Power of Attorney, other than the document referred to in paragraph 18 below.

18. Proof of the work being undertaken in October 2012 can be demonstrated by the fact that I provided a draft version of the Power of Attorney in hard copy to Mr. Roger Hsiu Hsiung Yang ("Mr. Yang") on 23 October 2012 by hand. (At that time the offices of Lee and Li were in the FPG building in Taipei.) A copy of the version is still available in soft copy at Lee and Li. The Trustees have agreed to provide the electronic file of the 23 October draft to Tony's lawyers in the event that both he and the other parties to this Action agree not to assert that doing so would constitute any wider or collateral waiver of privilege. Lee and Li did not keep a contemporaneous hard copy of the 23 October draft in view of the fact that we had a soft copy that could be printed any time.

19. ...Document 1948 in the Trustees' discovery...is a copy of the stamped executed copy of the Power of Attorney which was received by my firm from Mr. Yang on 6 November 2012 (along with a copy of Mr. Yang's note of 31 October 2012...) It is the usual practice of my firm to date stamp all documents delivered by hand or post to the firm and that was certainly the practice in 2012. Moreover, I understand from CDP

that a copy of Document 1948 was provided to the then parties to this Action on 28 June 2019 and to Tony shortly after he joined the proceedings in March 2020."

75 In an affidavit sworn by Mr. Scott Pearman on 14 December 2020 for the Respondents [6(1)(c)], it was confirmed that the 1st - 4th Respondents would not consent to waiving privilege in respect of the documents relating to the creation and execution of the POA, save only for the draft power of attorney dated 23 October 2012.

76 The POA which, on the Respondents' case, was signed and executed on 31 October 2012 provides as follows:

"*I. I hereby authorize Mr. William Wen-Yuan Wong to handle and dispose of, with full authority, all of my assets, and to handle all matters relating to my assets, including but not limited to:*

1. all acts such as the management of, use of, benefit from, disposition of, gift of, settlement of, investment of and the establishment of trusts, etc., in relation to rights over personal property, real property, creditors' rights, securities and all other property, the sale and encumbrance of real property, the leasing of real property for a period of over two years, etc. The aforementioned acts include factual acts and juridical acts, which can be gratuitous acts or non-gratuitous acts. If such acts are required to be done in writing, this Power of Attorney provides my written authorisation of the right to conduct such acts.

2. acting on my behalf to conduct all acts such as making or receiving any expression of intent, producing documents, signing or affixing seal(s) to any document, appointing or authorising another person, handling any transfer or other registration, engraving and using seal(s), applying and using relevant supporting documents, etc., which can be acts of self-dealing or dual agency.

3. for matters relating to my assets, engaging in all procedures such as filing a criminal complaint against [somebody], informing against [somebody], reporting [to the authorities], mediation, arbitration, civil, criminal, and administrative litigation, etc., which include initiating lawsuits or other proceedings solely or jointly with others, or defending proceedings brought by others, with full authority to handle all acts relating to such proceedings, as well as with special authority of agency to waive a right, concede a liability, withdraw an action, settle an action, bring a counterclaim, appeal, or a motion for retrial petition, and appoint a substitute agent ad litem, engage in acts relating to enforcement, or collect objects under dispute.

4. Mr. William Wen-Yuan Wong may handle all property-related matters for me according to his personal judgement [sic]*, regardless of whether or not the outcome of [such acts] is objectively beneficial to me, and whether or not Mr. William Wen-Yuan Wong personally or [any] person associated with him will benefit as a result.*

II. The property that I authorise Mr. William Wen-Yuan Wong to handle includes all assets that I own, shall own, and may obtain for any reason in the future.

III. I fully understand the contents of this Power of Attorney and sign this Power of Attorney based on my free will.

IV. This Power of Attorney shall continue to be valid except when I amend or terminate it in writing, and shall not be affected by changes in my health, finances or other circumstances.

31 October 2012

Authorized by: Yung-Tsai Wang [signature: Yung-Tsai Wang & fingerprint]
Uniform identification number: E102470845
Address: No. 8, Ln. 230, Guangfu N. Rd., Taipei City
Authorized person: William Wen-Yuan Wong [signature: Wen-Yuan Wong]"

77 As pointed out in the written submissions filed on behalf of Tony [20], Tony challenges the authenticity of the POA and expressly disputes that it: (i) was signed by Mr YT Wang; and (ii) was signed and created on 31 October 2012.

The Relevant Legal Principles

78 This Court was referred to a line of English authorities as to the meaning and scope of joint interest privilege. Both parties relied on various passages in *Thanki on The Law of Privilege* (Third Edition) ("*Thanki*") at §6.07-6.09:

"**6.07**

Joint privilege can also arise where, even though party A and party B have not jointly retained a lawyer (and only one of them is party to the relevant lawyer-client relationship), they have a joint interest in the subject matter of the communication. The defining characteristic of this aspect of joint privilege is that the joint interest must [foot note 22: omitted] *exist at the time that the communication comes into existence*.[6] *So joint privilege will only arise in respect of a document created during the period when the joint interest subsists; in other words, the documents must have come into being for the furtherance of the joint purpose or interest. This can be contrasted with the position in relation to common interest privilege, where, as considered further below, the better view is that the relevant date is that on which the document was disclosed by the primary party to the incidental party.*

6.08

If a joint interest exists then the same principles as those set out above in relation to joint retainers will generally apply. Accordingly, neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted; hence, each party to the relationship can obtain disclosure of

Foot note 23: "*See Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep 640, 646, 648. Moore-Bick J stated (at 648) that the interested party 'must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained'. Moore-Bick J clearly meant the time at which the documents were obtained by the interested party. See also R (Ford) v Financial Services Authority [2011] EWHC 2583 (Admin)…para 16 and Kousouros v O' Halloran [2014] EWHC 2294 (Ch)…paras 53-55).*"

the other's (otherwise privileged) documents so far as they concern the joint purpose or interest [footnote 24: omitted]*. However, both parties are entitled to maintain privilege as against the rest of the world.*[7] *As with a joint retainer, the privilege is not lost simply because the parties subsequently fall out. Given the extent to which the existence of a joint interest might fetter the actual client's rights in relation to privileged advice, a joint interest ought not to be lightly inferred. Nor have the courts worked through all the consequences of the existence of a joint interest. The concept is less well developed or defined in the case law than joint retainer. It is questionable, for example, whether a client is necessarily precluded from waiving privilege in advice he has obtained simply because someone else (of necessity a stranger to the relevant lawyer-client relationship) can assert a joint interest in the advice. For instance, while companies and shareholders might have a joint interest in the advice. For instance, while companies and shareholders might have a joint interest in legal advice, it is doubtful whether the courts would say privilege in legal advice obtained by the company could not be waived by the company unless all its shareholders consented. Would a large multinational corporation be required to obtain the consent of all of its shareholders before waiving privilege in advice the company had obtained? This seems highly unlikely.*

6.09

Examples of joint interests *Whilst not a rigidly defined concept*[8]*, examples of situations where such a joint interest has been held to arise are between*[9]*:*

Foot note 25: "*Jenkyns v Bushby (1866) LR 2 Eq 547; Farrow Mortgage Services Pty Ltd v Webb (1996) 39 NSWLR 601, 608, Court of Appeal of New South Wales.*"

Footnote 26: "*In Love v Fawcett [2011] EWHC 1686 (Ch), Morgan J stated (at para 18) that in order to establish whether there was a joint interest it was necessary 'to identify when a communication between [the solicitor] and [party A] is confidential to those two and when it is not confidential so that (in the latter case) [the solicitor] is entitled to pass the information in question onto [party B] and indeed [party B] is entitled to have access to the matter communicated'. Insofar as it was being suggested that a joint interest arises wherever there is the requisite relationship of confidentiality, it is suggested that such an approach is too broad.)*"

Footnote 27: "*Other circumstances in which such a joint interest has arisen are between: (a) lord and freehold tenants of a manor as to customary rights over commons in the manor: Warwick v Queen's College, Oxford (1867) LR 3 Eq 683; cf Owen v Wynn (1878) 9 Ch D 29 (CA); (b) a lessor and lessee in relation to the production of the lease: Doe v Thomas (1829) 9 B & C 288; (c) a reversioner and tenant for*

- *a trustee (properly so-called) [10]and beneficiary;[11]*
- *a parent company and its wholly-owned subsidiary;* [Footnote 30: omitted]
- *a company and its shareholders;* [Footnote 31: omitted]
- *a limited liability partnership and its members;* [Footnote 32: omitted]
- *a company and its director;* [Footnote 33: omitted] *and*
- *partners* [Footnote 34: omitted]

…"

79 Underscoring the importance of a joint interest at the very point during which the communication or document in question is made, *Thanki* [6.16] contrasts between a joint interest and a competing interest:

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life as to common title: Doe v Date (1842) 3 QB 609; (d) a husband and wife who are not genuinely in dispute, but are acting in collusion: Ford v De Pontes (1859) 5 Jur (NS) 993; (e) the client and those claiming under him in cases of testamentary disposition: Russel v Jackson (1851) 9 Hare 387; (f) beneficiaries under a will in ensuring that it is properly administered: Kousouros v O'Halloran [2014] EWHC 2294 (Ch), [2015] WTLR 1023, para 52. It has also been suggested that a ratepayer is in an analogous position to a beneficiary and therefore may have a joint interest with the corporation: Mayor and Corporation of Bristol v Cox (1884) 26 Ch D 678; cf St Albans City and District Council v International Computers Ltd [1996] 4 ALL ER 481, 489 (CA). See, generally, E Bray, The Principles and Practice of Discovery (1885), 379-83."

[10] Footnote 28: *"In Saltri III Limited v MD Mezzanine SA SICA [2012] EWHC 1270 (Comm), an issue arose as to whether a security trustee under an inter-creditor agreement could assert privilege against the lenders. Hamblen J held (at para 94) that the role of the security trustee in that case was not a role that was sufficiently analogous to that of a trustee for the 'trustee rule' to apply, which 'must depend on the nature of the role undertaken rather than any label which may be attached to it. To put the matter another way, in performing that role there was not a sufficient joint interest in any legal advice obtained for joint interest privilege to apply.'"*

[11] Footnote 29: "… *As Salmon LJ put it in Re Londonderry's Settlement [1965] Ch 918, 938 (CA): 'The position is quite different where the beneficiary seeks disclosure of documents from the trustees in the air, as in this case, from the position where the beneficiary seeks discovery of documents in an action in which allegations are being made against the bona fides of the trustees. If the documents in question are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents. In some instances, however, the fact that they are trust documents may nullify the privilege that would otherwise exist, as for example if the document consists of counsel's opinion taken before the issue of the writ, clearly the beneficiary is entitled to see any opinion taken on behalf of the trust.'*…"

"***6.16***

Insufficient joint interests or a divergence of joint interests *As stated above, in order for a joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of the can claim privilege as against the other in respect of any documents that are caught by the joint privilege,*[12] *as the original joint interest is not destroyed by a subsequent disagreement between the parties.*[13] *However, any documentation that comes into existence after a dispute arises between the parties, and thus at a time when the joint interest no longer subsists (and therefore outside the joint interest), will not be caught by the joint privilege.* [Footnote 50 omitted] *Therefore, a party will be able to assert privilege as against the other in relation to any such documentation, even if the latter has borne the expense of the communication. For example, privilege can be asserted for documents coming into existence in relation to hostile or adverse litigation between shareholders and the company,* [Footnote 51 omitted] *or communications concerning the directors in a personal capacity.* [Footnote 52 omitted] *Likewise, privilege can be asserted as against the beneficiary for communications between a trustee and his solicitor in relation to a dispute with the beneficiary, or communications with the trustee not acting in that capacity.* [Footnote 53 omitted] *Similarly, advice obtained by a partner in dispute with his fellow partners in relation to his individual interests will be privileged as against the other partners*."

80 A word of caution. Joint legal interest ought not to be conflated with the doctrine of "common interest privilege" which arises when one party voluntarily shares privileged material with another who has a common interest in the subject matter of the privileged material or communication or litigation to which it relates. The issue of common interest privilege surfaced before the English Court of Appeal in *Buttes Gas and Oil*

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[12] Footnote 48: "*CIA Barca de Panama SA v George Wimpey & Co Ltd [1980] 1 Lloyd's Rep 598, 615 (CA); Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep* 640, 646."

Footnote 49: "*This passage in the first edition of this work was approved by Norris J in BBGP Managing General Partner Limited v Babcock & Brown Global Partners [2010] EWHC 2176 (Ch), [2011] Ch 296, para 52. If the joint interest were* [sic] *destroyed by subsequent disagreement between the parties, the joint interest doctrine would be largely useless.*"

Co v Hammer (No 3) [1981] QB 223 (CA). Lord Denning MR's description of this form of privilege is quoted in *Thanki* [6.18]:

"***6.18***

There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him- who have the self-same interest as he- and who have consulted lawyers on the self-same points as he- but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of the litigation. All make copies. All await the outcome with the same anticipation- because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to be a libel or an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant. In all such cases I think the courts should- for the purposes of discovery- treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.[14]

81 The United Kingdom Supreme Court in *James-Bowen and others v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021 approached the question of joint interest privilege, having proceeded on the basis that a joint retainer did not arise. In that case

Footnote 61: "*[1981] QB 223, 243. Lord Denning was the only member of the Court to use the phrase 'common interest privilege'*."

(which appears regrettably not to have been cited to Kawaley AJ) the underlying facts involved a controversial arrest of 'BA' by the claimant police officers which culminated in a disciplinary complaint against those officers. In the original action BA sued the Commissioner of Police ("the Police Commissioner") for vicarious liability in respect of the arrest effected by the officers. In preparation of a defence against the claim brought by BA, the Metropolitan Police Directorate of Legal Services ("the DLS") on behalf of the Police Commissioner sought to call the arresting officers as witnesses in the suit.

82 The officers met with the DLS on two occasions prior to the impending trial date. The officers alleged in the subsequent action brought by them against the Police Commissioner that the DLS lawyers had assured them that they were acting for them and in their interests and that the claim of vicarious liability would be vigorously defended. Subsequently, the officers decided that they would refuse to give evidence if they were not permitted by the trial judge to give their oral evidence behind a shield of protective measures. This prompted the Police Commissioner to seek an order for protective measures. However, the application was denied. At the second meeting between the officers and the DLS legal representatives, the officers attended accompanied by a separate solicitor who was advising them on the narrow issue of special measures. On that occasion the officers asserted that the DLS attorney informed them that the DLS was no longer representing their interests and that they were exclusively concerned with the interests of the Police Commissioner. During that same meeting the DLS attorney shared that the case against the Police Commissioner would be lost, despite having been told by the officers that they were reluctant to give evidence without special measures being put into place.

83 In the end the police officers refused to give oral evidence and on the third day of the trial a decision was taken by the Police Commissioner to settle the claim on the basis of agreed damages and an acceptance of liability. The admission of liability included an apology by the Police Commissioner for the "gratuitous violence" caused by the officers.

84 The officers, who had been exonerated in the disciplinary proceedings against them for the arrest of BA and acquitted of causing actual bodily harm, brought a claim for breach of duty against the Police Commissioner in relation to her settlement of the vicarious liability claim. At first instance, Jay J granted the Police Commissioner's strike-out application. However, on appeal to the English Court of Appeal, Moore-Bick LJ held that it was arguable that the Commissioner of Police owed a duty of care to safeguard the officers' interests.

85 The Police Commissioner appealed from the Court of Appeal to the Supreme Court. Concerned with the officers' claim to joint interest privilege, Lord Lloyd-Jones JSC said [39-46]:

"39 It is also necessary to say something about the issue of legal professional privilege. At first instance, it was submitted on behalf of the commissioner that legal professional privilege was a further policy consideration for not imposing a duty of care in these circumstances. It was submitted that if such a duty of care existed an employer would in effect be compelled to waive privilege in circumstances where he would otherwise be entitled to assert privilege, because the correctness or reasonableness of his conduct of the underlying litigation could not be properly examined without relevant legal advice being properly exposed to judicial scrutiny. The response on behalf of the officers was that the relationship between the parties gave rise to a joint or common interest with the result that the commissioner would, in any event, be unable to rely on legal professional privilege against the officers to the extent that common interest privilege applied.

40 In his judgment Jay J [2015] EWHC 1219 (QB) expressly stated that he did not rely on legal professional privilege in coming to the conclusion that there was no arguable duty of care. The Court of Appeal did not address this point in its judgments.

41 The judgments below have established that the legal advisers who defended the claim brought by BA were instructed on behalf of the commissioner only and that

neither those lawyers nor the commissioner undertook responsibility to the officers for the conduct of the litigation. The officers attended conferences with counsel in the capacity of witnesses not clients. The officers do not seek to appeal those conclusions. Accordingly, there can be no question of legal professional privilege belonging jointly to the commissioner and the officers. However, the officers rely on common interest privilege and seek to employ it as a sword in asserting an entitlement to disclosure of material in the possession of the commissioner which is privileged against disclosure to others. Whether the officers have such an entitlement will depend on whether such a claim is consistent with the underlying relationship of the commissioner and the officers: see Phipson on Evidence, 19th ed (2018), para 24-11. In my view it is not.

42 If one sets to one side the decided cases which turn on contractual access rights, the cases show that something more than a shared interest in the outcome of litigation is required before common interest privilege can be used as a sword in the manner proposed here. For example, in Dennis and Sons Ltd v West Norfolk Farmers' Manure and Chemical Co-operative Co [1943] Ch 220 Simonds J held that shareholders were entitled to disclosure of an accountants' report concerning the rights and duties of the board commissioned by the directors, notwithstanding that by the time the report was received the shareholders had commenced proceedings against the company in relation to the conduct of the company's affairs. The report had been commissioned by the directors on behalf of all the shareholders and not for the purpose of defending themselves against hostile litigation. The judge observed, at p 222, that the general rule applied equally as between a company and its shareholders and as between a trustee and his beneficiaries. A claim to privilege between the company and its shareholders would have been inconsistent with the nature of the relationship.

43 Similarly, in Cia Barca de Panama SA v George Wimpey & Co Ltd [1980] 1 Lloyd's Rep 598, Barca and Wimpey each held half the shares in a joint venture company, DLW, which had claims against Aramco. Wimpey settled the claims without authority from Barca. In the resulting proceedings brought by Barca against Wimpey the Court of Appeal held that Barca was entitled to disclosure of privileged documents of

Wimpey generated in the original litigation as the Aramco claims had been made by Wimpey on behalf of itself and Barca: per Stephenson LJ at p 614.

44 In Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep 640, 647—648, Moore-Bick J provided the following example:

> "*Although in many cases a relationship between two parties which supports common interest privilege will be one which also gives each of them a right to obtain disclosure of confidential documents relating to the matter in which they are both interested, one can readily think of situations in which that would not be so. Take the example given by Donaldson LJ in Buttes v Hammer (No 3) of tenants in a block of flats. One tenant, acting entirely for his own benefit, obtains legal advice concerning a dispute with the landlord over a provision in the lease which affects other tenants in a similar way. If he chooses to give a copy of the document containing that advice in confidence to another tenant who is willing to co-operate with him in pursuing a claim their common interest would be sufficient for the document to remain privileged in the latter's hands. I do not, however, see any basis upon which the second tenant could have insisted on seeing the advice if the first tenant did not wish to show it to him, even though they had a common interest in the subject matter. Both as a matter of principle and authority . . . it is not enough that the person seeking disclosure of confidential documents can show that he has an interest in the subject matter which would be sufficient to give rise to common interest privilege if the documents had been disclosed to him; he must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained.*"

45 In the present case the commissioner and the officers are likely to have had a shared interest in successfully defending the claim brought by BA against the commissioner, at least initially. It may well be that, had privileged documents been disclosed in confidence by the commissioner to the officers at that stage, that shared interest would

have enabled the officers to defeat an application for disclosure by a third party on grounds of common interest privilege. However, before the officers could compel disclosure of privileged material in the hands of the commissioner, considerably more would be required. Although the relationship between the commissioner and the officers is closely analogous to that of employer and employees, there is nothing in the present situation which resembles the relationship between a company and its shareholders, or between a trustee and his beneficiaries, or between parties to a joint venture agreement. Here the relationship between the commissioner and the officers does not require or justify such an entitlement of access to legally privileged material.

46 Considered against this background, there is force in the commissioner's submission as to the practical consequences in this regard of the recognition of the duty of care for which the officers contend. Although employees would normally have no entitlement to disclosure of privileged material in the possession of their employer relating to the defence of the original proceedings, the effective defence of proceedings by the employees against the employer brought on the basis that the earlier proceedings were conducted in breach of duty may well require waiver of privilege in order to demonstrate the contrary. This has the potential to undermine the effective conduct of the defence of the original claim against the employer in that the possibility of such a claim in negligence and the likelihood of having to waive privilege may well inhibit frank discussion between the employer and his legal advisers. This is, therefore, a further consideration which weighs against the recognition of the duty of care for which the officers contend."

86 While Lord Lloyd-Jones JSC employed the term "*common interest privilege*" when examining the nature of the relationship between the parties, the Supreme Court was, in effect, only concerned with the issue of joint interest privilege. This is evident on the facts of that case which did not entail any volunteering or sharing of privileged information with the police officers, as would be required for a "*common interest privilege*" case. So, where Lord Lloyd-Jones JSC says that "*the cases show that something more than a shared interest in the outcome of litigation is required before*

common interest privilege can be used as a sword in the manner proposed here" the UK Supreme Court was in fact referring to the requirements of joint interest privilege. The Police Commissioner's appeal was allowed and the Supreme Court found that the relationship between the officers and the Police Commissioner was not, on the particular facts of the case, sufficiently analogous or comparable to the nature of other relationships which gave rise to a duty to disclose.

87 Of course, the fact that there is a relationship of trustee and beneficiary does not automatically mean that all communications between the trustee and solicitors are the subject of joint privilege. For example, if a trustee takes advice about his powers of disposition under the trust, the beneficiary may have a joint privilege in respect of that communication with the solicitor. However, if the beneficiary sues the trustee and the trustee takes advice as to whether he is liable, the beneficiary would not enjoy a right of access to those communications under the joint interest privilege rule.

88 Mr. Wilson QC keenly pointed to the judgment of Morgan J in *Gary Love v Robert Fawcett and Northam Worldwide* [2011] EWHC 1686 (Ch) where the English High Court was concerned, *inter alia*, with an application for joint interest privilege. In that case the defendants, Mr. Fawcett and Northam Worldwide Limited (collectively "Northam"), instructed a solicitor Mr. Ivan Barry from June 2007 onwards. Morgan J considered it to be common ground between the parties that the same Mr. Barry had been instructed by the claimant, Mr. Love, up until 21 May 2007.

89 Mr. Love claimed that he had a joint retainer with Northam. He also advanced an alternative case that he had rights of access to privileged documents and communications with Mr. Barry as one of the agents of Northam Worldwide Limited. On this alternative case, Mr. Love claimed that he was entitled to joint interest privilege.

90 Citing and relying on passages from *Thanki*, Morgan J held [18-20]:

"*18. The next question is whether Mr Love and Northam had a joint interest for present purposes. What are the relevant purposes behind this question? The relevant purpose, in my judgment, is to identify when a communication between Mr Barry and Northam is confidential to those two and when it is not confidential so that (in the latter case) Mr Barry is entitled to pass the information in question onto Mr Love and indeed Mr Love is entitled to have access to the matter communicated. If one puts the question in that way and focuses upon the purpose for which Mr Barry was instructed and the way in which Mr Love was or was not interested in that purpose, I make the following findings. Mr Love did have a joint interest with Northam in communications between Northam and Mr Barry for the purpose of the letting to Gordon Ramsay Holdings and for the purpose of the prospective sale of the reversion on the lease. Conversely, Mr Love did not have a joint interest, but rather a competing interest, in relation to communications between Northam and Mr Barry for the purpose of considering the financial relationship between Northam and Mr Love.*

19. I should explain my reasons for those two contrasting conclusions. As to the joint interest, which I do find did exist for a certain purpose I put forward the following reasons. First, although the precise entitlement of Mr Love as against Northam is very much in dispute, I consider at this interlocutory stage that Mr Love has a strong prima facie case of entitlement to a share in the fruits of the development, so that his case for an entitlement to a share in the fruits of the development gives him an interest in the fruits of the development for present purposes. Secondly, the proposed letting and the proposed sale of the reversion were for the purpose of realising the fruits of the development. Thirdly, Mr Love was involved day to day in dealing with those matters and instructing the solicitors on behalf of Northam. Fourthly, the burden of the solicitor's charges were expected to fall on Mr Love. Fifthly, although the precise line drawn by the authorities between cases of joint interest and other cases is not made wholly clear, I find that the facts of this case place this case on the side of the line where I should recognise the existence of a joint interest of Mr Love and Northam in relation to instructing the solicitor in respect of the letting and the sale of the development.

20. Why is there not a joint interest in relation to communications as to the financial dealings of Mr Love and Northam? Quite simply the financial relationship between Mr Love and Northam involves competing interests and not the same or a joint interest. Northam's communications with Mr Barry in relation to how Northam should deal with Mr Love are to be expected to be confidential to Northam and Mr Barry. They are not to be automatically revealed by Mr Barry to Mr Love nor does Mr Love have an entitlement to be informed of those communications."

91 What may be taken as the relevant high points of Morgan J's reasoning in *Love v Fawcett & Northam* is threefold: (i) In the assessment of a claim to joint interest privilege, the Court will focus on the purpose for which the attorneys in question were instructed and the way in which the parties concerned were or were not interested in that purpose; (ii) the sufficiency of the claimant's interest in the purpose of the instructions may be determined by the presence of a strong *prima facie* case of entitlement to a share in the fruits developed by the furtherance of that purpose; and (iii) joint interest privilege is founded and dependent on joint interests, not competing interests.

92 Burnett J (as he then was) in *R (Ford) v Financial Services Authority* [2011] EWHC 2583 (Admin) had the benefit of appearances from Mr. Hodge Malek QC (editor of Phipson on Evidence) for the claimant Mr. Stewart Ford and from Mr. Bankim Thanki QC (editor of *Thanki*) for the defendant, the Financial Services Authority ("the FSA"). Mr. Mark Owen was joined as an interested party and appeared in person. Mr. Ford and Mr. Owen were directors of Keydata Investment Services ("Keydata"). It was an accepted fact that Keydata instructed Irwin Mitchell in December 2007 to advise in connection with an investigation launched against it by the FSA. However, Mr. Ford and Mr. Owen asserted that Irwin Mitchell were not only advising Keydata but were also advising them individually as to their personal vulnerability to FSA's investigation. The directors contended that the legal advice obtained was both corporate and personal.

93 As envisaged, the FSA confirmed the start of an investigation into the executives and Keydata went into administration. During the course of the FSA's investigation, they liaised directly with the administrators of Keydata, Price Waterhouse Cooper LLP ("PwC"), to obtain company documents which included emails and attachments. Burnett J noted in his judgment that it was common ground between the parties that the administrators were entitled to waive the company's privilege and did so effectively.

94 Notwithstanding, it later turned out that the directors considered that they had joint interest privilege with Keydata in respect of written advice and a conference note from Ms. Sara Wallace of Irwin Mitchell which was included amongst the emails and attachments which had been transmitted to the FSA by PwC. However, the FSA had not verified with either Mr. Ford or Mr. Owen whether they would be asserting privilege over any of the documents seized. Instead, the FSA made use of Ms. Wallace's advice and conference note in their investigation reports forming the basis of the directors' claim that the FSA had acted unlawfully by availing themselves of privileged material.

95 Finding in favour of Mr. Ford and Mr. Owen's claim to joint interest privilege Justice Burnett held [63]:

"63. My conclusion is that each of the criteria I have identified in paragraph [40] was satisfied as regards the email containing advice dated 7 February 2008 and the email dated 18 April 2008 containing a note of the conference with counsel the previous afternoon. I am satisfied that the claimant has established by evidence that he enjoyed joint legal advice privilege with Keydata in those two communications. It is accepted that PwC's waiver of privilege on behalf of the company did not impact upon the claimant's privilege. It follows that the FSA may not rely upon the content of those communications in the regulatory proceedings against Keydata or the executives."

96 Burnett J in the *Ford* case commented in his judgment that while he was referred to Australian and American authority, neither Mr. Malek QC nor Mr. Thanki QC had

cited any English authority which established a criteria against which joint interest privilege (as opposed to joint retainer) should be considered. He thus proposed a formulation of facts to be shown in cases where joint interest privilege is claimed [40]:

"*40. In searching for the true factual position at the time that the contentious communication was made it is necessary to distinguish between advice being given to an individual as client from advice which is being given to another, but in which the first individual is interested because it impacts upon his personal position. It is the former that supports a claim for joint privilege, not the latter. It is also necessary to recognise that if joint privilege exists it affects the rights of all those who share that joint privilege and also the professional obligations of the lawyers. For this reason statements of subjective belief by an individual claiming joint privilege without more are likely to be of little value. Joint privilege should not arise casually or accidentally. For joint privilege to arise it is necessary for the facts to demonstrate that all those sharing the privilege and the lawyers concerned knew, or from the objective evidence ought to have known, that they enjoyed legal professional privilege with the others. Evidence of an understanding by the lawyer of potential conflicts of interest may provide some evidential support for joint privilege, but it is not a necessary ingredient. It is not unknown for conflicts of interest to arise but those advising to be slow to appreciate their significance. In my judgment, apart from those cases in which there is no legal distinction between those claiming joint privilege (see paragraph [19] above) an individual claiming joint privilege with others in a communication with a lawyer, when there is no joint retainer, will need to establish the following facts by evidence:*

i) That he communicated with the lawyer for the purpose of seeking advice in an individual capacity;

ii) That he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative of a corporate body;

iii) *That those with whom the joint privilege was claimed knew or ought to have appreciated the legal position;*

iv) *That the lawyer knew or ought to have appreciated that he was communicating with the individual in that individual capacity.*

v) *That the communication with the lawyer was confidential.*"

97 Assistant Justice Kawaley found the reasoning in *Ford* particularly convincing [26-27]:

"26. As far as the law is concerned, in oral argument Mr Weale contended that the crucial question was whether or not there was a joint interest in the "subject-matter" of the relevant legal retainer. Mr Adkin QC countered that the critical analysis was the "relationship" between the third party (YTW) and the instructing clients (the Trustees); recognised examples were the relationship between a trustee and a beneficiary and a company and its wholly-owned subsidiary. However, he sensibly accepted that the categories of qualifying relationship were not closed. He submitted that "a joint interest should not be lightly inferred": Bankim Thanki QC (ed.), 'The Law of Privilege', Third Edition paragraph 6.08. Mr Adkin QC acknowledged that the legal position was not crystal clear, while Mr Weale insisted that in the present context the position was very simple indeed.

27. In my judgment the relevant legal test is clearly a somewhat flexible one, making a binary choice between these two factors, subject-matter and relationship, inappropriate. Whether a joint interest in the subject-matter of a legal retainer exists requires an analysis of both the subject-matter of the retainer and the relationship between the parties. In the present case, the Power of Attorney on its face purports to confer broad authority on William Wong to deal with all of YTW's personal assets. This creates a strong initial inference that any advice obtained in relation to the drafting of the Power of Attorney would be highly relevant (in a general sense) to the interests of the person who was intended to execute the document. My instinctive

feeling from the outset was that D8's counsel was right to submit that the Trustees' position was absurd."

98 Kawaley AJ continued [30-31]:

"*30. Mr Weale submitted that it was obvious that YTW could have obtained access to the Lee and Li advice had he asked for it, and suggested I could properly ignore Ms Lin's evidence because she had not addressed the important consideration of what the purpose of the retainer was. This seemed a powerful argument. Because if the critical question is what relationship existed between YTW and the Trustees, and whether there was a joint 'commercial' interest in instructing Lee and Li, there would be a yawning chasm in the First Lin Affidavit. What the purpose of obtaining the advice over which privilege is asserted (and I appreciate that privilege was asserted over drafts and instructions, not merely advice) was* [and] *is wholly (or largely) unexplained.*

31. If, on the other hand, the critical framing is that articulated by Burnett J (as he then was) in R (Ford)-v-Financial Services Authority), then the purpose of the retainer is not, standing by itself, the key criterion. Rather, it is important to analyse what was the relationship between the parties in relation to the relevant retainer. What is most important is whether the person asserting a joint interest in the privilege claimed by those who formally instructed lawyers was a de facto client.

32. Accepting that the authorities are far from clear as to precisely what the legal test for joint interest privilege is, in the context of the factual matrix of the present case, I find that it is insufficient to support a claim to joint interest privilege on the part of D8 as the administrator of YTW's Estate merely to demonstrate the undeniable fact that any advice given to the Trustees in relation to the Power of Attorney "impacts on his personal position". I find that the analysis of Burnett J in R (Ford)-v-Financial Services Authority is most persuasive."

99 I agree with the learned Assistant Justice Kawaley that "*the assessment of whether joint interest privilege exists requires an analysis of both the subject-matter of the retainer and the relationship between the parties*". However, relying on *R (Ford)-v-Financial Services Authority)*, Kawaley AJ found that the purpose of the retainer is not the key criterion in and of itself. Effectively, the learned judge found, as a matter of principle, that the purpose of the retainer is subordinate, in terms of importance, to the legal relationship between the parties asserting joint interest privilege and the parties directly privy to the retainer agreement.

100 In the present case, the purpose of the retainer was to obtain the POA which is the subject-matter of the retainer. The POA was a means of carrying out Mr. YT Wang's oral mandate and a means of authorizing Mr. Hung's transfer of the FPG shares held in Chindwell BVI and Vanson BVI into the Ocean View Trust. On the Respondents' case the creation of the POA and the transfer of the FPG shares was all done for the purpose of materializing and furthering the express wishes of Mr. YT Wang. This is consistent with the nature of the relationship between Mr. YT Wang as donor of the POA and William as the donee. After all, the POA created a relationship of agency whereby William (a member of both the BMC and the Board of Trustees for the Respondents) was given authorization to act on behalf of Mr. YT Wang by handling and disposing of all of Mr. YT Wang's assets.

101 By definition, a power of attorney is designed to construct a relationship of agency. In Bowstead & Reynolds on Agency (Twenty-First Edition, 2018) ("Bowstead & Reynolds on Agency") [2-039] the authors cite the definition provided by Jowitt, Dictionary of English Law (3rd edn, 2010) "…*a formal instrument in writing by which one person empowers another to represent him, or act in his stead for certain purposes*". The foot note to this passage refers to the following commentary in Bowstead & Reynolds on Agency [3-011]:

"*It is implicit in a conferral of authority that the principal intends the agent to exercise the relevant powers in the interests of the principal. An agent who deliberately or*

recklessly exercises powers against the interests of the principal must know that he acts without his principal's consent, and therefore acts without authority. A clear statement of the principle can be found in Lysaght & Co Ltd v Falk [footnote 64 omitted]:

> *"Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of the principal. That is a condition precedent to the right of exercising it, and, if that condition is not fulfilled, then there is no authority, and any act purporting to have been done under it, unless in dealing with innocent parties, is void."*"

102 When Burnett J found that joint interest privilege will not be established merely by demonstrating that the advice given impacts on the asserting party's personal position, he explained that it will *"also* [be] *necessary to recognise that if joint privilege exists it affects the rights of all those who share that joint privilege and also the professional obligations of the lawyers."* In my judgment, the learned Assistant Justice, in finding that it was insufficient to establish that the advice given impacted on the asserting party's personal position, needed also to consider whether the same advice (comprising the POA together with its earlier draft(s) and associated material) affected the rights and interests of both the asserting party (i.e. Mr. YT Wang via Tony) and those party to the retainer (i.e. the PTC Respondents) in addition to the professional obligations of the lawyers (i.e. Lee and Li).

103 Kawaley AJ applied Burnett J's criteria which (whether or not intended) could be said to apply more readily to the question of a joint retainer, rather than joint interest privilege. The relevant portions of the Ruling in this regard are [35-37]:

"*35. However one characterises the relationship between YTW and the 1st to 4th Defendants in October 2012, I find that D8 has failed to establish, as the law requires him to do, that YTW in his personal capacity had a joint interest in the Lee and Li retainer. There is no evidence that he was involved in instructing Lee and Li or paying*

their fees. There is no evidence that Lee and Li purported to render advice for the benefit of him or his personal interests. There is positive and credible evidence that Lee and Li did not consider they were acting for YTW.

36. It is essentially common ground that YTW did not personally financially benefit from the transactions effected by the Power of Attorney Lee and Li were retained to draft. The instructing clients on any view were seeking to 'deprive' YTW of his personal assets (or assets over which he had some degree of control). Any countervailing personal interests vested in YTW favouring his retention of the assets covered by the Power of Attorney were not joint interests, shared with the Trustees, but adverse ones.

37. In these circumstances, rather like the banker obtaining security over one spouse's joint interest in family assets to secure the client spouse's business debts, Lee & Li would arguably have been obliged to invite YTW to obtain independent advice in relation to the transaction, had he sought personal advice from them. Viewed in this contextual way, the joint interest claim lacks any meaningful coherence."

104 It was contemplated by Burnett J in *R (Ford) v Financial Services* that an instructed attorney will not always perceive the full scope of potential conflicts which arise between parties to a joint retainer. Similarly, I would observe that it will also sometimes be the case that an attorney, for one reason or another, is either unaware or unappreciative of the full extent to which there is a joint interest in the instructions they receive and the advice and documents they prepare. The perspective of the attorney in these regards, may therefore be irrelevant, depending on the circumstances.

105 Mr. Wilson QC raised during his oral submissions the importance of distinguishing between the meaning of "interest" and "benefit". I would caution against distinguishing between these terms so categorically. For example, the term "benefit" would apply to divesting Mr. YT Wang of his assets so long as that is in fact what he wanted. Under those circumstances, it may be said that the disposal of his assets was

for his benefit. (See Bowstead & Reynolds on Agency (Twenty-First Edition, 2018) [3-010] where "benefit" and "interest" are used interchangeably.) In any event, the critical question is whether the facts and circumstances give rise to a joint interest with the retainer party.

Analysis and Findings on Tony's Appeal:

106 It is well established law that the burden of proof to establish a disclosure exemption on grounds of legal professional privilege is on the party claiming privilege. In this case, there is no dispute that the POA documents qualify as privileged material and that the Respondents are generally entitled to assert privilege. The contentious assertion of privilege with which we are presently concerned is the Appellant's claim to joint interest privilege. Although the cases referred to above do not relate to the burden of proof for claims to joint privilege, it seems to me that where there is a dispute as to whether the Appellant enjoys joint privilege, it is for him to prove this assertion.

107 In assessing the facts as to whether a case of joint interest privilege is made out, regard should be had to both the Appellant's evidence and pleaded case and that of the Respondents. That is to say, the Court should consider all of the evidence before it. (See Phipson on Evidence (Nineteenth Edition, 2018) [23-44]).

108 As I will necessarily examine the facts on the Appellant's case when I come to consider the merits of the Respondents' Notice, I shall first deliberate the claim of joint interest privilege on the facts put forth by the Respondents. This must begin with the evidence of the purpose for the instructions to Lee and Li and the POA which was prepared. (Notably, I am sympathetic to the disadvantageous position in which Assistant Justice Kawaley found himself, evidenced by his remark that the purpose of obtaining the advice from Lee and Li was wholly or largely unexplained before him.)

109 On the Respondents' case the purpose of the Lee and Li's instructions, advice and preparation of the POA was two-fold (i) to give effect to the October 2010 oral mandate given by Mr. YT Wang and (ii) during a period of hostile litigation

commenced by Winston, to provide Mr. Hung (as a member of the BMC and the Board of Trustees for the 1st- 4th Respondents, and as an agent or trustee for Mr. YT Wang in his ownership of Vanson BVI and Chindwell BVI) with tangible evidence that Mr. YT Wang was in agreement with his impending transfer of Vanson BVI and Chindwell BVI into one of the existing Bermuda purpose trusts or a new trust.

110 Mr. Adkin QC submitted that as the starting point, the Court must first consider the legal relationship between the parties. In the written submissions for the Respondent, it is suggested [38]:

"38. The principle of joint interest privilege has developed incrementally and by analogy with established categories. It is not a test based on indefinable considerations of 'joint interest' and 'subject matter'. Accordingly Tony must show:

1.1 *First, that there existed a legal relationship between YT Wang and the First to Fourth Trustees; and*

1.2 *Second, that relationship is either (i) one where joint interest privilege has been held to exist or (ii) resembles one of those legal relationships."*

111 I would accept that the case law contains a series of examples of pre-existing legal relationships which have been held to give rise to joint interest privilege. I would also accept, as Mr. Adkin QC contended during his oral arguments, that each of these recognized relationships involve a person or entity who has a fiduciary or quasi-fiduciary duty to act on behalf of and/or in the interest of the other party to the relationship. However, this list of relevant relationships is not closed.

112 It seems to me that it is the joint interest which the parties have in the subject-matter of the relevant material and instructions which will either reflect, give rise to, or evidence a relationship which creates a right to disclosure of legally privileged material by the party other than the one who retains the lawyers; so long as the joint interest subsists at the time when the communications and privileged materials are made. As Moore-Bick J said in Commercial Union what is to be established is that

there is "*a right to obtain access ... by reason of a common interest in their subject matter*". Further, whilst the application of concepts of "joint interest" and "subject matter" may be difficult to apply, these are the concepts that have featured in legal texts and decided cases.

113 The subject-matter of the instructions is readily discernible by reference to the POA itself which is exclusively concerned with the handling and disposal of Mr. YT Wang's financial affairs. The learned judge was correct in sensing not only that Mr. YT Wang had an interest in the subject-matter of the instructions but also that his interest subsisted at the point during which the instructions were given and the POA was drafted and executed.

114 The error made by the learned judge occurred when he treated Mr. YT Wang's interest in the subject-matter as a competing interest on the basis that the transfer of the power under the POA deprived him of control over his financial assets. This analysis ignores the fact that on the Respondents' case, the POA was obtained not only in consultation with Mr. YT Wang (when William attended the hospital to discuss the POA with Mr. YT Wang in late October 2012) but also that the POA was made in furtherance of Mr. YT Wang's expressed wishes (as confirmed by the oral mandate and the evidence on Mr. Hung). Further, on the facts put forth by the Respondents, there was a joint objective between Mr. Hung and Mr. YT Wang in respect of the transfer of the shares in Vanson BVI and Chindwell BVI into a Bermuda purpose trust (see *Cia Barca de Panama SA v George Wimpey & Co Ltd [1980] 1 Lloyd's Rep 598* on joint ventures in the commercial context). The POA was intended to further this common purpose between Mr. Hung and Mr. YT Wang. They and the four PTCs can be regarded as akin to joint venturers in the fulfilment of the wishes of the Founders, or, at any rate, of the remaining Founder and when bearing in mind the fiduciary nature of the relationship of agency created by the POA. Another way of expressing the concept, in the words of Moore-Bick J in *Commercial Union Assurance Co plc v Mander*, is that Mr. Hung, Mr. YT Wang and the four PTCs (and for that matter William) had a "community of interest" in the execution of the POA and the furtherance of its purpose.

115 Here the learned judge focused on the absence of a formal legal relationship between Mr. YT Wang and the Respondent private trust companies without attaching importance to the crucial fact that the purpose for instructing Lee and Li was to carry out Mr. YT Wang's wishes. It was equally important that the subject-matter of those instructions was the creation of a relationship of agency between Mr. YT Wang and William. In considering this factual reality, it cannot be ignored that William acted as a connector between Mr. YT Wang and the Respondent private trust companies in that William (a member of the Board of the Respondent trustees) used the POA as his authority subsequently to write to Mr. Hung on behalf of Mr. YT Wang confirming Mr. YT Wang's approval of the creation of a new Bermuda purpose trust and the transfer of Chindwell BVI and Vanson BVI into that new trust.

116 Lee and Li deposed that they were instructed by the Respondents only. This was true insofar as they were describing their retainer agreement. Otherwise, Lee and Li's contention that they were not assisting Mr. YT Wang constitutes a shortfall in analysis of Mr. YT Wang's entitlement under the joint interest privilege doctrine. What Lee and Li were doing was creating a POA for the benefit of Mr YT Wang. Indeed, at the moment when it was created, Mr. YT Wang alone benefited from it. Any benefit to Ocean View would depend on (a) the execution of the POA and (b) William acting pursuant to it. On the averments of the Respondents' case, Mr. YT Wang had a clear joint interest in the instructions given to Lee and Li.

117 These are my reasons for finding that Tony, as the estate representative of Mr. YT Wang, has joint interest privilege in the instructions and POA documents prepared by Lee and Li. However, this does not bring an immediate end to the matter as I must now go on to consider the grounds relied on in the Respondents' Notice.

Analysis and Findings on the Respondents' Notice

118 The Respondents rely on the following additional grounds for our consideration:

"1. *Where a party asserts joint interest privilege, that party is confined to the facts and matters in its pleaded case in the main action for the purposes of establishing that joint interest. The Learned Judge, at paragraph 38(a) of the Ruling, did not apply this principle because it was not necessary for the disposal of the application. Had he done so, he would have found that the Appellant's case in the underlying proceedings is inconsistent with a finding that Mr. YT Wang had the asserted joint interest with the Trustees and, accordingly, the Appellant cannot establish that joint interest privilege.*

2. Further, if the Learned Judge was wrong to hold that Mr YT Wang (and the Appellant) did not have joint interest privilege in the Requested Documents (which he was not), he would have had a discretion under Order 24, Rules 11 and 13 of the Rules of the Supreme Court as to whether to order production of the Requested Documents. Had the Learned Judge exercised his discretion, he would have come to the conclusion that such an order was not necessary for disposing fairly of the cause or matter and would therefore have refused to order production of the Requested Documents."

119 I shall start with Tony's pleaded case on his Amended Defence and Counterclaim. The following extract of those pleadings provide an overview of Tony's case in respect of the POA and the subsequent transfers of Chindwell BVI and Vanson BVI into the Ocean View Trust [86.3 – 86.3.6]:

"86.3. It is averred that no effective authority was obtained from Mr YT Wang. In particular:

86.3.1. By a letter dated 7 January 2013, William Wong purported to provide written authority on behalf of Mr YT Wang pursuant to a power of attorney purportedly executed by Mr YT Wang on 31 October 2012 (the "Power of Attorney").

86.3.2. Mr YT Wang, however, lacked the requisite mental capacity to execute the Power of Attorney in circumstances where he had advanced Alzheimer's by October 2012 (at the latest), of sufficient severity to have deprived him of that capacity. Pursuant to Article 75 of the Taiwan Civil Code, an adult person lacks mental capacity where he is in a condition of unconsciousness or mental disorder, which means that he is unable to judge, recognise or anticipate his own actions or their effects.

Further:

86.3.2.1. While the Power of Attorney purports to bear Mr YT Wang's handwritten signature, that signature differs materially from Mr YT Wang's signature on other documents known to have been signed by him. In the premises, the aforesaid signature on the Power of Attorney was made by someone other than Mr YT Wang.

86.3.2.2. Further: (i) the First to Fourth and Sixth Defendants have failed, despite having been requested to do so, to disclose to Tony a complete record of the metadata for the Power of Attorney showing how, when and by whom the Power of Attorney was created; and (ii) the contemporaneous hospital records relating to Mr YT Wang are inconsistent with the signing ceremony alleged by the First to Fourth and Sixth Defendants. In the premises, it is not admitted and the First to Fourth and Sixth Defendants are required to prove that Mr YT Wang placed his fingerprint on the Power of Attorney.

86.3.2.3. Further, if, which is denied, the purported handwritten signature on the Power of Attorney is that of Mr YT Wang, or if, which is not admitted, the Power of Attorney bears Mr YT Wang's fingerprint, it is denied that either represented Mr YT Wang's free and informed consent to the powers purportedly thereby conferred on William Wong in circumstances where: (i) those caring for

YT Wang were instructed regularly to give him meaningless documents they referred to as "official documents" to sign; (ii) no explanation was given to Mr YT Wang of the meaning and significance of the Power of Attorney before he was asked to sign "official documents" on 31 October 2012; (iii) Lee & Li – the firm of lawyers who prepared the Power of Attorney – are said by the First to Fourth and Sixth Defendants not to have sought any instructions from or given any advice to Mr YT Wang.

86.3.3. Mr YT Wang did not otherwise authorise, or consent to, the transfer either directly or by way of another person acting on his behalf.

86.3.4. In particular, it is to be inferred that Mr YT Wang did not grant William Wong an "oral mandate" in 2010:

86.3.4.1. While the purported memo prepared by Hung on 26 July 2012 concerning the alleged 2010 meeting between Hung, Mr YT Wang, William Wong, Wilfred Wang and Sarah Wang at which the alleged "oral mandate" was granted (the "July 2012 Memo") purports to bear Mr YT Wang's signature: (i) that signature differs materially from Mr YT Wang's signature on other documents known to have been signed by him; (ii) Mr YT Wang's mental health at that time was such that it would have been difficult if not impossible for him to have understood its contents, at least in the absence of a clear explanation and no such explanation appears to have been given; and (iii) the First to Fourth and Sixth Defendants have failed to produce any electronic copy of the July 2012 Memo despite having been requested to do so. In all the circumstances, the signature on the July 2012 Memo was made by someone other than Mr YT Wang and Mr YT Wang did not sign the July 2012 Memo and, at all events, Mr YT Wang did not give his free and informed approval to the contents of the July 2012 Memo.

86.3.4.2. Alternatively, if, which is denied, Mr YT Wang did sign the July 2012 Memo, his signature does not show his confirmation or approval of the matters set out in that document (namely, the alleged grant of the alleged "oral mandate") in circumstances where those caring for YT Wang were instructed regularly to give him meaningless documents they referred to as "official documents" to sign and there is no evidence that the July 2012 Memo was explained to Mr YT Wang before he signed it.

86.3.5. Even if, which is denied, an "oral mandate" was granted, that mandate did not confer power or authority upon William Wong to authorise the transfers of Chindwell BVI and Vanson BVI to the Sixth Defendant on Mr YT Wang's behalf or at all for the reasons pleaded at paragraph 111B below.

86.3.6. Further, Mr YT Wang did not provide oral authorisation for or consent to the transfers of Chindwell BVI and Vanson BVI to the Sixth Defendant on an unidentified date in 2011."

120 What is said against Tony's claim for discovery of the POA documents is that if this Court were to proceed on the facts pleaded by Tony, he would not be entitled to access the POA documents on a claim to joint interest privilege. It is argued in the Respondents' written submissions [59]:

"*For Tony to succeed he must establish that YT Wang had a joint interest in the Requested Documents at the time they were created. However, Tony cannot advance a case on his summons seeking the Requested Documents inconsistent with his pleaded case, and his pleaded case makes plain that YT Wang had no joint interest in the Requested Documents*."

121 I do not consider the Respondents' objections to be well-founded for the following principal reasons:

(i) Firstly, the Respondents claim that they are entitled to privilege in the relevant documents. But, on their case, that privilege is, as I have concluded, a joint privilege with Mr. YT Wang. It does not seem to me that, in those circumstances, the Respondents can claim the privilege they assert without recognising that it is a joint one. In particular, they cannot do so because (a) they cannot be heard to say that, in drafting the POA, they were acting otherwise than in the best interests of, and for the benefit of, Mr. YT Wang; (b) they do not say that; (c) the contentions to the contrary are contained, for the most part, in Tony's pleadings, which they vigorously dispute.

(ii) Secondly, I am not persuaded that, if there was some iniquitous purpose Mr. YT Wang would not have a joint interest in the creation of his own POA. When a beneficiary sues his trustee and the trustee takes advice it is obvious that, in respect of that advice, the interests of the beneficiary and the trustee are not joint. The fact that those instructing the drafters of the POA may have intended that it should be used contrary to the interests of Mr. YT Wang (something that could only occur after its creation and execution) does not deprive Mr. YT Wang of his interest (together with that of the Respondents) in his own power.

(iii) Thirdly, the theme of Tony's pleaded case is that the Respondents were exploiting Mr. YT Wang's mental condition when they instructed Lee and Li to prepare the POA. If Tony successfully establishes that the POA was made in furtherance of an iniquitous purpose, the fraudulent/inequity principle would apply. It is thus implausible that a proven fraud or inequity would disentitle Mr. YT Wang via Tony to access to the POA documents.

122 Legal professional privilege cannot be properly relied on when it is wielded in circumstances where the communication or material in question was created in furtherance of a crime or fraud. *Thanki* speaks to this rule [6.17]:

"***Joint privilege and the crime/fraud exception*** *As addressed above, [footnote 54 omitted] there is no privilege in documents or communications which are themselves*

part of a crime or a fraud, or which seek or give legal advice about how to facilitate the commission of a crime or a fraud. How does the exception apply if only one party to the joint privilege acts with iniquity? The answer is likely to turn on the facts. In Group Seven Limited v Allied Investments Corporation Limited, [footnote 55 omitted] Norris J held that the crime/fraud exception was engaged even though one of the parties to the joint retainer had acted innocently. Disclosure was ordered against the innocent client because it had 'engaged in furtherance of the fraud (albeit innocently)', [footnote 56 omitted] by jointly retaining the solicitors with the aim of unfreezing funds that were connected with the fraud…"

123 Norris J delivering the English High Court decision in *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch. 296 summarized the "the iniquity principle" in saying "…*advice sought or given for the purpose of effecting iniquity is not privileged* " [61-62]:

"*61. Having summarised the position arising on the first two lines of argument, I can turn to the third line of argument. This is that the partners in Global cannot claim that any material seen by General is subject to claims to legal professional privilege by them (so that General is not free to use and to disseminate such material as it wishes) because of "the iniquity principle". This principle may be shortly stated: advice sought or given for the purpose of effecting iniquity is not privileged (see Barclays Bank v Eustice [1995] 1 WLR 1238 at 1249 per Schiemann LJ). The principle is founded upon public policy: "we are here engaged ... in deciding whether public policy requires that the documents in question are left uninspected" (ibid at p. 1250H). The rationale was said by Parker LJ in Banque Kayser v Skandia [1986] 1 Ll. Rep 336 at 338 to be: "...first, that a fraudulent party who communicates with his solicitor for the purposes of the furtherance of fraud or crime is both communicating with his solicitor otherwise than in the ordinary course of professional communications, and secondly that in any event it would be monstrous for the Court to afford protection from production in respect of communications which are made for the purpose of fraud or crime" The difference in language flags up the first of the points argued.*

62. Mister Moger QC argued that the principle was not engaged at all because whatever wrongdoing occurred it lacked sufficient seriousness to constitute "iniquity". Although the case law refers to crime or fraud or dishonesty (such as fraudulent breach of trust, fraudulent conspiracy, trickery or sham contrivances) it is plain that the term "fraud" is used in a relatively wide sense: Eustice (op.cit) at 1249D. So a scheme to effect transactions at an under value was sufficient (Eustice); as was deliberate misrepresentation for the purpose of securing a mortgage advance (Nationwide Building Society v Various Solicitors [1999] PNLR 52 at 72; or making a disposition with the intention of defeating a spouse's claim for financial relief (C v C [2008] 1 FLR 115); or the establishment by employees, in breach of a duty of fidelity to their employer, of a rival business (Gamlen v Rochem [1983] RPC 1 and Walsh Automation v Bridgeman [2002] EWHC 1344 (QB)). The enumeration of examples is useful only insofar as it enables some underlying theme or connectedness to be identified. In each of these cases the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy. (I borrow language from Gamlen (supra) and from Williams v Quebrada Railway [1895] 2 Ch 751)."

124 We are not in a position to determine whether or not Tony has a strong *prima facie* case of iniquity. That would require further consideration and submissions. That being said, if the case advanced by Tony is accepted, it would amount to a fraudulent or iniquitous purpose on the part of the Respondents and Tony would be entitled to discovery of the POA documents under the exception arising from the iniquity principle.

125 The Respondents point out that this has not been established. Be that as it may, they cannot decline to recognise a joint interest privilege, which, on their own case, exists

on account of averments in the pleadings which they dispute but which, if made good, would entitle Tony to disclosure in any event.

126 The Respondents further argued that even if Tony is successful in asserting joint interest privilege, this Court ought to find that the judge should nevertheless have refused him access in the reasonable exercise of his discretion under RSC Order 24. Rule 12 broadly empowers the Supreme Court to order the production of a document subject to Rule 13 which requires the Court to be of the opinion that an order for production is necessary either for disposing of the matter fairly or for saving costs:

24/12 Order for production to Court

12. At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.

24/13 Production to be ordered only if necessary, etc.

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

127 Mr. Adkin QC for the Respondents relied on the decision in *Dolling-Baker v Merrett and Another* [1990] 1 W.L.R. 70 where the English Court of Appeal overturned a judge's refusal to grant injunctive relief restraining disclosure of documents. In that case the plaintiff brought a claim for moneys due under a policy of reinsurance. The first defendant was one of the insurers and the second defendants were the placing brokers. The material subject to the disclosure dispute related to documents in an

arbitration on a similar issue to which the same insurers and brokers were party. I am not assisted by any reference to the outcome of this case as the decision of the Court of Appeal was reached through a fact-sensitive pathway. However, I accept that this case supports the unchallenged principle that an order for disclosure ought not to be made unless it is necessary to do so for the fair disposal of the issues.

128 I shall therefore move on to consider the issue of fair disposal of the matter (the matter being the main action). The validity of the POA is crucially relevant to Tony's case. As the 8th Defendant in the main action and in support of the Plaintiff Winston's case, Tony's pleaded case is that Mr. YT Wang did not have the mental capacity nor the requisite independent legal advice to effectively approve of the transfers of Chindwell BVI and Vanson BVI into the Ocean View Trust. The Respondents, however, rely on the existence of the POA in their Re-Amended Defence [133.3]:

"*…YT Wang's formal written approval for the formation of such a trust and the transfer by Mr Hung of the shares in Chindwell BVI and Vanson BVI into it was recorded in a letter dated 7 January 2013 which was signed on his behalf by William Wong pursuant to a Power of Attorney executed by YT Wang on 31 October 2012…*"

129 The Respondents' Re-Amended Defence [133.4]:

"*It is denied that YT Wang lacked the requisite mental capacity to execute the Power of Attorney. Further, the question of whether YT Wang had the requisite mental capacity to execute the Power of Attorney is a matter governed by Taiwan law. As a matter of Taiwan law, YT Wang is assumed to have had the requisite mental capacity unless it is proved that he lacked such capacity*."

130 The Respondents' Re-Amended Defence [133.5B]:

"*As to sub-paragraph 86.3.3, it is averred that … The transfer of the shares in Chindwell BVI and Vanson BVI to the Ocean View Trust was authorised, as well as by the Power of Attorney, by the Oral Mandate YT Wang gave to William Wong and/or by an authorisation and direction YT Wang gave to Mr Hung*."

131 The background and circumstances surrounding the POA are clearly relevant to and impactful on the pleaded cases for both the Appellant and the Respondents in the main action. I am thus without difficulty in finding that, in any reasonable exercise of judicial discretion, the POA documents ought to be disclosed by the Respondents as such documents are materials (i) which Tony had an entitlement to access by joint interest privilege; (ii) which are relevant to and impactful on his pleaded case and (iii) which are under the practical control of the Respondents.

CONCLUSION

132 For all of these reasons, I find that Tony's appeal should be allowed.

133 The Respondents' Notice for the judgment to be confirmed on reasons other than those relied on by Kawaley AJA should be dismissed.

134 I would invite the Appellant's counsel to draw up an order to give effect to this ruling. Subject to any submissions that may be made within 21 days in writing, the Appellant should have his costs here and below.

CLARKE, P

135 In considering whether a claim to joint interest privilege arises we find ourselves in a somewhat poorly charted sea. It is necessary, in this context, to distinguish between a number of different concepts, namely (a) joint retainer, which is not here alleged; (b) joint interest privilege; (c) common interest privilege; and (d) interest in a general sense, which does not fall within (b) or (c).

136 There is an important distinction between joint interest privilege and common interest privilege. In the case of joint interest privilege, the person who is jointly privileged has the right to see the relevant material. In the case of common interest, he does not have a right to see the material but, if he is shown it, privilege can be claimed in respect of it against third parties. Thus, in the example given by Donaldson LJ in *Buttes v Hammer (No 3),* one tenant of a block of flats may obtain advice concerning a dispute with the landlord over a provision in the lease which affects other tenants in a similar way. If he chooses to give a copy of the document containing that advice to another tenant, who is willing to cooperate with him in pursuing a claim, their common interest would be sufficient for the document to remain privileged in the latter's hands. But the second tenant could not insist on seeing the advice if the first tenant did not wish to show it to him, even though they had a common interest in the subject matter.

137 In the present case, the solicitors, disclosure of whose material is sought, were retained by the four PTCs to draft a POA for YT Wang ("YTW") to execute, and the question is whether YTW had a joint interest in the product of their work. For the purposes of exegesis, I propose to call the party who retains the solicitors as A; and the party who claims a joint interest privilege as B; and that of which disclosure is sought as "the material". Here the material sought is documentation relating to the creation and execution of the POA.

138 In the classic cases in which joint privilege has been held to exist the nature of the relationship between A and B is such that the courts have held that it gives rise to a

right in favour of B to have access to the material; and a duty on the part of A to make it available. As is said in *Thanki*, A and B must "*have a joint interest in the subject matter of the communication",* existing at the time the communication comes into existence, and "*the interested party must be able to establish* ***a right to obtain access to them by reason of a common interest in their subject matter*** *which existed at the time the advice was sought or the documents were obtained*" per Moore-Bick J in *Commercial Union Assurance.* That formulation begs the question as to when a common interest in the subject matter gives rise to a right to obtain access to it. The mere fact that the subject matter is of interest to B in some general sense is not sufficient.

139 There are a number of cases in which a right to obtain access has been held to exist by reason of the nature of the existing relationship between A and B. The classic examples are where A and B are partners. The list includes (a) partners; (b) joint venturers or those who are party to something like a joint venture, e.g. because they have an entitlement to a share in the fruits of a development, or at least a claim to that effect; (c) beneficiaries and trustees; (d) shareholders and companies in relation to the property of the company; (e) parents and subsidiaries; (f) insured/reinsured and insurer/reinsurer (g) beneficiaries under a will and executors; (h) principal and agent.

140 In each of these cases the relationship is such that B is properly held to be entitled as against A to access to the privileged material. Sometimes the relationship is in the nature of a shared enterprise (partners and joint venturers). Sometimes the relationship is one of ownership, as in the case of shareholders. Sometimes the relationship is one of contractual obligation. Sometimes the relationship is one where A holds assets for, and owes duties to B, as in the case of a trustee.

141 Even in cases of the type referred to in the previous paragraph the question whether joint privilege may in fact be asserted will depend on the circumstances. If the subject matter comes into existence after a dispute has arisen between the parties, it may well not be caught by joint privilege.

142 The relationship between A and B in the present case is somewhat difficult to define. In essence YTW was akin to a prospective donor of assets to a Trust to be established by the directors of the PTCs. I say "akin" because the actual transfer of the relevant assets to the Trust was to be, and was, effected by Mr Hung and what YTW gave, through William (if one assumes that the POA was validly executed), was confirmation of his approval thereto. I do not think that it matters for present purposes that the directors of the existing PTCs decided that the transfer should be to a new PTC.

143 A relationship of prospective donor and donee might not be thought *per se* to give rise to any obligation on the part of the donee to give access to privileged material. But it is necessary to look at the totality of the circumstances and the nature of the transaction in question. The PTCs, on their case, were seeking to secure the provision of an effective POA, which, once executed, would give to William the widest possible power over all the assets of YTW and enable him to fulfil YTW's wishes as to the transfer by Mr Hung of the relevant shares by confirming his approval of that transfer. That power related exclusively to YTW's affairs and would, if exercised, create a fiduciary relationship of agency between YTW and his son. The PTCs were not to be parties to the POA, or the relationship created thereby, although the new PTC – Ocean View Trust - would benefit from its existence if the POA was executed and William were to approve the transfer to it, as he did. As between YTW and the PTCs only YTW had any legal interest in the POA, which was to be his instrument relating to his property.

144 The PTCs, in instructing Lee and Li to draft the POA cannot, as it seems to me, be regarded as acting solely in their own interests. They were also acting, or must be treated as acting, in the interests of YTW and for his benefit, by enabling him to create, through the product of their work, a fiduciary relationship of agency with his son. In such circumstances it does not seem to me that a claim to privilege is consistent with the nature of the relationship between the PTCs, as procurers of the POA for YTW

and YTW as intended grantor of the power that Lee and Li were drafting; and that the nature of that relationship justifies YTW in having access to the privileged material in question. Further, neither the PTCs nor their solicitors, when claiming privilege, could be heard to say (and they do not say) that there was some conflicting interest because the power that they were drafting for YTW was to be used, or might be used, to secure a disposal which was contrary to, or not in accordance with, his wishes.

145 In those circumstances I think it right to hold that YTW and the PTCs had a joint interest in the material, even if there was no joint retainer. The fact that the solicitors were acting on behalf of the PTCs in drafting a POA does not mean that there can be no joint privilege – when B claims joint privilege he does so where it is A who retains the solicitors. If both A and B retain the solicitors, there is a joint retainer.

146 In reaching this conclusion I adopt the view of Kawaley AJ that one should consider both the relationship between the parties and the subject matter of the material. The relevant relationship, for present purposes, was that of procurer of the POA (by the PTCs giving instructions to Lee & Li) and the intended holder of it. That relationship was apt, of itself, to give rise to a joint interest. The subject matter was the preparation, production and execution of the POA. The interest of YTW in the subject matter was not just some general interest, but an interest of YTW in the POA as a personal authority of his, which, if executed and acted on, could affect the totality of his property, and to which no one except him and his son would be party.

147 The classes of relationship and interest in subject matter in which a duty to afford access may arise are not closed. This, in my view, should be treated as one of those cases.

148 I do not regard these considerations as affected by the fact that YTW is said not to have benefited from the POA, which led to the approval of the transfer of assets that he controlled. I say that for two reasons.

149 First, the question, as it seems to me, is whether the parties had a joint interest in the documents relating to the creation and execution of what was to be his own POA at the time that they came into existence. The fact that after the POA was executed it was acted upon by William in the way it was does not affect the existence of that joint interest when the instrument was created.

150 Second, I would not regard it as right to say that YTW would not benefit from having a draft POA which would enable him, if he wished, to appoint someone to deal with his affairs who could, thereby, approve on his behalf a transfer which he is said to have wanted. Nor do I think it matters that he did not directly instruct Lee & Li or pay them (as could be the case in many cases where A & B have a joint interest), or that they might have been obliged to advise him to obtain separate advice. Any such obligation, if it arose, would not be inconsistent with the existence of a joint interest. Further, in circumstances where no such advice was given it does not seem to me that the solicitors can be heard to say that they were not acting in the joint interests of YTW and their clients.

151 I have not ignored the fact that in *R v Ford* Burnett, J held that it was necessary "*to distinguish between advice being given to an individual as a client from advice which is being given to another, but in which the first individual is interested because it impacts on his personal position. It is the former that supports a claim for joint privilege, not the latter.*" The circumstances in the present case are markedly different from those in *Ford*. In the present case YTW was not interested merely because the material impacted on his personal position in the manner in which advice to a company might (tangentially) impact on its directors. He was directly interested in the creation (and validity) of an instrument to be executed by him, to which no one but he and his fiduciary were to be parties, giving him power to confer very wide powers potentially affecting all his property. His personal property rights and interest formed the very subject matter of the material. His interest was far more substantive than any interest of the PTCs, who were not to be parties to the POA, and whose only "interest" was

that Ocean View should become the beneficiary of a transfer of assets approved by the holder of the power once YT Wang had executed it.

152 In *Ford* it was not clear whether the advice was directed towards the personal interests of the director, as opposed to those interests being merely incidental to that advice. In such a case it may be necessary to identify whether the director was a notional client. But the factors set out at [40] of Ford are not, in my view, an appropriate guide in all cases. If they were it would be difficult to distinguish joint retainer from joint interest and difficult to see how, for instance, the beneficiary could have a joint interest with the trustee. But in the present case there was, in my view, a clear joint interest arising by the very nature of the exercise (creation of a POA) on which the PTCs and their solicitors were engaged. I would also regard it as difficult to regard YTW as someone other than a notional or de facto client.

153 I turn then to consider whether no claim to joint interest privilege can in fact be relied on on account of the claims made by Tony in the main action. These include the contentions that:

(a) YTW lacked the mental capacity to execute the POA, its meaning and significance were not explained to him, and, in the circumstances, he did not agree to its terms;

(b) YTW never signed the POA and it is not admitted that he placed his fingerprint on it;

(c) YTW did not give his free and informed consent to conferring the powers contained in the POA on William or otherwise authorise or consent to the transfer of the relevant assets to Ocean View;

(d) there was no oral mandate in favour of William in 2010 and, even if there was, it did not confer power on William to authorise the transfer of Chindwell BVI and Vanson BVI to Ocean Trust;

(e) no oral authority was provided by YTW to William for these transfers in 2011;

(f) no explanation was given to YTW of the POA; nor did he receive legal advice about the effect of the proposed transfers;

(g) no explanation was given to YTW of the proposed transfers, and Mr Hung did not have YTW's authority to make them, such that there was no valid transfer

(h) the terms of the Ocean View Trust and the other trusts did not reflect YT Wang's intentions and instructions;

(f) the POA should be declared void.

All that is said to show that, on Tony's case, the PTCs and their directors and Lee & Li were not acting on YTW's behalf, or in his interests, and YTW had no joint interest in the requested documents.

154 It is the case of the PTCs that everything was above board and regular; and that they were seeking to put into effect what were understood to be YTW's wishes and to give effect to a previous oral mandate. Unsurprisingly, they do not say that they had some conflicting objective vis-à-vis YTW when seeking the creation of the POA for him to execute. Any such objective would amount to an intention not to act, or to procure William not to act, in keeping with YTW's intentions. That would have been a fraudulent or at least iniquitous use of YTW's POA. On their case the documents fall to be disclosed (subject to the exercise of our discretion).

155 But it is the case of Tony and Winston that what was done was to use the POA as part of a scheme to effect a transfer to Ocean View even thought it was not in accordance with YTW's wishes (insofar as he was able to have any true wishes) and that the POA was void. Such a scheme would be grossly improper to put it no higher. What then is

the Court to do if, on the case of the party resisting production the case is one of joint interest privilege but, on the case of the party seeking production the procurement of the POA was not in accordance with YTW's wishes or his interests but part and parcel of an improper scheme.

156 The PTCs submit that this case is like that of *Commercial Union Assurance Co Plc v Mander* [1996] 2 Lloyds' Rep 64, in which the applicant reinsurer was, unsuccessfully, seeking to rely on a contract of reinsurance with a "*follow the settlements*" clause in order to establish a joint interest with the reinsured in privileged documents relating to the claim against the insured, when it had already avoided the contract which was said to give rise to the joint interest. Similarly, here Tony is seeking a declaration that the POA is void.

157 I do not regard that case as determinative. The reason why the application failed in that case was that the joint interest relied on was contingent upon the existence and validity of the reinsurance contract, because it was the "follow settlements" clause in that contract that had created a community of interest between the insurer and reinsurer as to the original claim. The difficulty for the reinsurer was that it was simultaneously seeking to avoid the relevant contract and to rely on its provisions in order to establish a joint interest.

158 Moore-Bick J, as he then was, held that that could not be done. As he said:

"*The plaintiffs do not need to rely on the contract to establish that; privilege arises by operation of the general rules of law. The defendant, on the other hand, relies on the contract to establish an interest in the subject matter of the documents which would entitle him to have access to them notwithstanding that they are prima facie privileged. However, by avoiding the contract the defendant seeks to place the parties in the same position as if it had never been made. Mr Howard recognised that a party who maintains that he has avoided the contract cannot at the same time exercise rights under it since these two positions are mutually inconsistent. Equally, it seems to me, he cannot rely on*

a relationship created by the contract in order to exercise rights to obtain access to documents which he could only enjoy if he were in contractual relations with the plaintiffs."

159 By contrast, in the present case the joint interest, if it exists, is derived from the relationship between the parties, and the subject matter of the material at the time that it was created. Those were what they were; and they have not changed. Reliance is not placed on a contractual relationship between YTW and the PTCs that has been avoided.

160 The PTCs contend that Tony cannot at one and same time say that he has a joint interest with the PTCs in respect of the relevant material on the basis that the PTCs were acting in the joint interests of YTW and themselves when his case is that the PTCs were not acting on YTW's behalf or for his benefit.

161 I take a different view for three reasons.

162 First, it seems to me that the Court should approach the matter on the basis upon which the PTCs, who are claiming privilege and resisting any claim to joint interest, put their case. On that basis there is, as I would hold, a joint interest in the material as between them and YTW. If on the PTCs case any privilege that they claim is a joint one, they should not be allowed to claim their privilege without recognising that it is joint, or do so by reference to averments which they vigorously dispute.

163 Second, it does not seem to me that, if the PTCs had some iniquitous purpose, that would mean that there was no joint interest in the creation of the POA. YTW's interest in its creation arises because it is his power, affecting his property. The fact that there might have been iniquity of the type averred does not mean that he did not have an interest, properly so called, in the creation and execution of the power at the time when that took place, as did the PTCs. Indeed, the existence of iniquity might be said to give him an even greater interest in the preparation and execution of the power. I accept

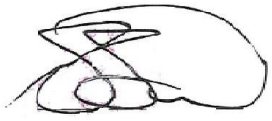
that the logic of the PTCs case is that if a joint venturer instructed a firm in relation to the affairs of the joint venture and was later said to have been acting in bad faith he could successfully resist any claim to joint privilege, which cannot, as it seems to me, be right. The position is different to a case where the trustee consults a lawyer as to whether he has a defence to the beneficiary's claim against him.

164 Third, it is relevant to consider the iniquity exception to privilege. The Court can determine the application of that exception on an interlocutory basis if provided with a strong prima facie case of iniquity. That is not, I think, a matter which can presently be regarded as established, and would need further submissions and consideration. But the matters averred appear to me to fall plainly within the iniquity exception. In those circumstances it does not seem to me open to the PTCs, whilst asserting privilege on a basis which involves no iniquity, and which engages joint privilege, to resist disclosure on the ground that what is said against them, and which they vigorously refute, is that there was iniquity, when, if that was established, there would be an exception to any privilege anyway.

165 For these reasons I agree with the conclusions of Subair Williams, JA.

CLARKE P

SMELLIE JA



SUBAIR WILLIAMS JA