EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

HCVAP 2012/026

(On appeal from the Commercial Division)

BETWEEN:

[1] SHEIKH MOHAMED ALI M ALHAMRANI
[2] SHEIKH SIRAJ ALI M ALHAMRANI
[3] SHEIKH KHALID ALI M ALHAMRANI
[4] SHEIKH ABDULAZIZ ALI M ALHAMRANI
[5] SHEIKH AHMED ALI M ALHAMRANI
[6] SHEIKH FAHAD ALI M ALHAMRANI

Appellants

and

SHEIKH ABDULLAH ALI ALHAMRANI

Respondent

Before:

The Hon. Mde. Janice M. Pereira	Chief Justice
The Hon. Mde. Louise Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. Victor Joffe, QC with him Mr. Lynton Tucker and Ms. Coleen Farrington of Harney Westwood Riegels, for the Appellants
Mr. Simon Hattan, for the Respondent

2012: October 3.

Civil appeal – Order for discovery – Documents passing between client and attorney – Legal professional privilege – Whether documents privileged – Basis on which an appellate court will interfere with the discretion of a judge

The appellants ("the Brothers") and the respondent ("Sheikh Abdullah") are brothers engaged in a dispute concerning the ownership of previously jointly owned assets. In 2008, under a court ordered Buy/Sell Process, Sheikh Abdullah purchased the Brothers' interests in Alhamrani Universal Company ("Universal"), a limited liability company incorporated in Saudi Arabia. During the Buy/Sell process the Brothers, who were on the

board of directors of Universal, had sought and obtained legal advice from an attorney employed by Universal, Mr. Tawfiq Hardan. In the course of advising the Brothers, communications and emails ("the Documents") which related to the Buy/Sell process were brought into existence. Some of the Documents included electronic documents which were left on the Alhamrani Group servers and other computers when Sheikh Abdullah took over the Group in December 2008.

Sheikh Abdullah filed an application for disclosure of the Documents so that they can be relied on by him in the present BVI proceedings. The learned trial judge, Bannister J, found no claim to privilege could properly be maintained with respect to the Documents against Sheikh Abdullah and granted the application sought. The Brothers appealed the learned trial judge's decision. The learned justice of appeal confirmed the orders Bannister J made for discovery, dismissed the appeal and upheld the learned trial judge's ruling on the basis that (1) the advice was provided by Mr. Hardan in the course of his employment by Universal in which Sheikh Abdullah was a partner; (2) the Brothers and Mr. Hardan were aware of the respondent's objections to Mr. Hardan providing legal advice when the respondent as part of the Alhamrani Group was paying for it; (3) the documents were stored on the Alhamrani Group computer system and communicated via its email system and (4) it must plainly have been in the contemplation of the parties that the result of the process would be that Sheikh Abdullah would buy the Brothers' interests. The appellants now appeal to the Full Court against the findings of the learned justice of appeal.

Held: allowing the appeal; revoking the decision of Mitchell JA [Ag.] and setting aside paragraphs 5 and 6 of the Order of Bannister J, that:

1. For a document to have legal professional privilege attached it must be confidential. Mr. Hardan, being an attorney at law, engaged by the Brothers for the purpose of giving legal advice to them would be considered to be in the business of confidential communication. As legal professional privilege attaches to confidential communications generated between an attorney and their client when the communication was made for the dominant purpose of giving or obtaining legal advice, the Documents would be subjected to legal professional privilege. Moreover, only the client can waive privilege. The Brothers being the clients in the present case did not waive privilege. Consequently, privilege cannot now be transferred to Universal and more importantly to Sheikh Abdullah.

2. A breach of Mr. Hardan's contract by him could not have changed his status as a qualified lawyer and the Brothers' status as his clients or changed the status of the advice as confidential and privileged advice as a breach of duties by the legal advisor does not of itself invalidate privilege.

   Harris v Harris [1931] P 10 applied; **Goddard v Nationwide BS** [1987] QB 670 applied.

3. The legal advice given to the Brothers by Mr. Hardan, a professional attorney, was prima facie confidential and further privileged. That confidentiality and privilege

was not lost merely because some of the Documents were stored electronically and discovered by Sheikh Abdullah.

BBGP Managing General Partner Limited v Babcock & Brown Global Partners [2011] Ch 296 applied.

4. Directors are to act bona fide in the best interests of the company. They are not to engage in dealings where their interests would or possibly may conflict with that of the company. The evidence before the Court did not establish that the Brothers, acting as directors of Universal acted in some way which conflicted with the interests of Universal. The legal advice provided by Mr. Hardan related to the dispute between the Brothers and Sheikh Abdullah. It bore no relation to the business of Universal. As such it was not proven that the Brothers had acted in a manner whereby their interests as directors conflicted with that of the company.

   In re Smith and Fawcett, Limited [1942] Ch 304 applied; Section 120(1) of the BVI **Business Companies Act, 2004** applied.

5. Where a decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, an appellate body is entitled to interfere with that decision. The decision of the learned justice of appeal, having exceeded the generous ambit within which reasonable disagreement is possible, the appellate court is entitled to interfere and allow the appeal.

   Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed.

REASONS FOR DECISION

INTRODUCTION

[1] **BLENMAN JA**: This is an appeal to the Full Court against the order of Mitchell JA [Ag.], sitting as a single judge of this Court dismissing the appellants' appeal and upholding the Order of Bannister J. The Order of Bannister J pertained to disclosure of certain documents and emails, which documents and emails he ruled were not confidential and not privileged and he gave directions for the documents and emails to be disclosed. The appellants objected to their production and appealed his decision. Mitchell JA [Ag.] upheld the ruling of Bannister J.

[2] The appeal was heard on 3rd October 2012. This Court gave an oral decision allowing the appeal, revoking the Order of Mitchell JA [Ag.] and setting aside

paragraphs 5 and 6 of the Order of Bannister J, with written reasons to follow. We now do so.

[3] It is helpful to reproduce the relevant paragraphs of the Order of Bannister J:

> "5. The Defendants [the Brothers] shall by 4 pm on 14 August 2012 provide to the Claimant's lawyers true copies of all communications between any of the Defendants or their agents and Tawfiq Hardan ("Mr Hardan") between 12 February 2008 and 30 September 2008 which are directly relevant to the matters in issue in this action (other than any such communications which are subject to legal advice privilege by reasons that they consist of or relate to legal advice by any lawyers acting on behalf of any of the Defendants other than Mr Hardan)
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> "6. The Claimant shall have liberty to deploy and rely upon any documents directly relevant to the issues in the action which came into his possession as a result of his taking control of the Alhamrani Group Headquarters building and equipment therein in December 2008 which are or include communications with Mr Hardan between 12 February 2008 and 30 September 2008 (other than any such communications which are subject to legal advice privilege by reason that they consist of or relate to legal advice by any lawyers acting on behalf of any of the Defendants other than Mr Hardan)."

Background

[4] The following statement of facts is substantially taken from the judgment of Mitchell JA [Ag.]. The appellants ("the Brothers") and respondent ("Sheikh Abdullah") are brothers engaged in a bitter and longstanding dispute concerning, what were until 2008, the jointly owned assets originating from the estate of their late father. Prior to 2008 both the appellants and respondent, together with their sisters, jointly owned or owned interests in a number of companies collectively known as the Alhamrani Group (although there was no formal holding company). The dispute led to an agreement being entered into whereby their interests would be disengaged from one another ("the Disengagement Agreement"). Pursuant to the Disengagement Agreement the respondent took responsibility for the management of certain jointly owned assets outside of Saudi Arabia and gave up responsibility for management of the companies within the

Alhamrani Group. Although in 2004 the Disengagement Agreement was eventually declared void by the Saudi Court, Sheikh Abdullah continued (he says wrongly) to be excluded by the Brothers from management of the Alhamrani Group companies.

[5] In 2008, the Saudi Court proposed a compromise of the dispute between the siblings whereby the Brothers would value all the jointly owned assets and provide Sheikh Abdullah with a price at which he could either sell his share of those assets to the Brothers or buy their shares from them, at his option ("The Buy/Sell Process"). Having received the Brothers' valuation, Sheikh Abdullah elected to buy the Brothers' interests. Under the Buy/Sell Process, which took place between February 2008 and September 2009, and under circumstances which are disputed and form a material part of the British Virgin Islands proceedings, Sheikh Abdullah purchased the interests of the Brothers in some (as the Brothers say) or all (as Sheikh Abdullah says) of the Alhamrani family's jointly owned interest in the Group and other assets. It is not in dispute that Sheikh Abdullah purchased the Brothers' interests in Alhamrani Universal Company ("Universal"), a limited liability company incorporated in Saudi Arabia. Universal is not a party to these proceedings. The precise scope of what was included in the assets ("the Sale Assets") and in particular whether the Brothers' interests in Chemtrade were included, is the subject of the ongoing proceedings in the BVI.

[6] The Brothers had challenged Sheikh Abdullah's decision to buy. The Saudi Court settled that dispute on 11th August 2008 when they issued judgment in favour of Sheikh Abdullah ordering the Brothers to transfer the Sale Assets to Sheikh Abdullah. The judgment was enforced by the Saudi authorities who took possession, as far as possible, of the Alhamrani Group of companies and handed them over to Sheikh Abdullah, who has been in control of the Alhamrani Group since then.

[7] Mr. Tawfiq Hardan, a qualified attorney, was employed at different times by different companies within the Alhamrani Group. He was twice excluded from

Saudi Arabia at the instance of Sheikh Abdullah for acting on behalf of the Brothers in relation to various disputes between them. It is important to note at this point that Sheikh Abdullah in his skeleton arguments acknowledged that Mr. Hardan did indeed act for the Brothers as their legal adviser. On his return to Saudi Arabia in 2007 he entered into a contract with Universal as a "legal consultant". Article 2 of Mr. Hardan's employment contract provided that his role was to:

> "perform responsibilities of aforementioned position and all other duties within its sphere with necessary sincereness and honesty and abide by instructions and directive issued for him by [Universal] and to devote all his time for the service of [Universal's] interests and establishments benefit with due care and diligence and to abstain from working to Third Party with or without pay whether during or out of the official work hours and shall maintain in confidence all information to which he has access by virtue of his position."

[8] In 2011, the Preliminary Committee for Settlement of Labour Disputes-Jeddah Governate ("the Jeddah Committee") found that Mr. Hardan was employed by the Alhamrani Group of Companies.

[9] During the Buy/Sell Process, Mr. Hardan advised the Brothers on various matters relating to litigation and disputes with Sheikh Abdullah and in the course of his doing so the communications ("the Documents") that were the subject of the application before the learned trial judge, Bannister J, were brought into existence. Mr. Hardan's conduct in so doing was known and approved of by the board of Universal which consisted of the appellants.

[10] Some of the Documents included electronic documents which were left on the Alhamrani Group servers and other computers when Sheikh Abdullah took over the Group in December 2008. As a result of electronic searches done in the course of carrying out Sheikh Abdullah's disclosure exercise in the present proceedings, numerous documents created by or communications with Mr. Hardan were found. Those specific documents were in Sheikh Abdullah's possession when the disclosure exercise started.

[11] At first instance, Sheikh Abdullah filed an application asking the court for disclosure of the Documents and to declare that the Documents be relied on by him in the proceedings as they could not be subjected to a claim for legal professional privilege. The learned trial judge, Bannister J, found no claim to privilege could properly be maintained with respect to the Documents against Sheikh Abdullah and granted the application sought. The Brothers appealed those parts of the judgment which provide as follows:

> "(i) Well, I have to decide whether to order disclosure of all communications between any of the Defendants or their agents and a gentleman called Mr Hardan which were made between the 12th February, 2008 and the 3rd of September, 2008 a date when ... Mr Hardan ceased to be employed by an entity in the Alhamrani Group of Companies which is now being acquired by Sheikh Abdullah, the Claimant.
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> "(ii) Mr Hardan has or was entitled to possession of documents which were generated during the period of his employment at this company, and it is said by the Defendants that none of the information contained in those documents ... can be disclosed ... to Sheikh Abdullah because it represents legal advice ... given to them by Mr Hardan during the course of his employment by the entity now owned by Sheikh Abdullah ...
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> Ms Jones for Sheikh Abdullah says that if the Defendants were using Mr Hardan's services, which effectively were meant to be directed for the benefit of the company ... of which he was the employee, they risked any privilege which ... might have attached to the documents had they gone to a completely unconnected lawyer, they risked that privilege being broken because Sheikh Abdullah, the employer of Mr Hardan, would be entitled to everything generated by him in the course of his employment, and the fact that ... some third party had been given legal advice against Sheikh Abdullah's wishes would be irrelevant. The fact is that the company was not holding itself out as providing legal advice to all the partners, although Mr Joffe does say it was generally accepted that that would be done.
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> "(iii) The position ... seems to have been that Mr Hardan was meant to be advising the company, and nobody else, and that in the circumstances it seems to me that if in breach of the arrangements Sheikh Abdullah thought to obtain, others sought Mr Hardan's advice, they might assert privilege against third parties, but they can't assert privilege against the Company which was paying Mr Hardan's wages.
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> It does seem to me that in those circumstances a privilege defence can't work in favour of the Defendants, and accordingly, I'm going to make an

order in the terms of Paragraph 3.3 of the Application Notice, as it affects Mr Hardan."[1]

The Present Appeal

[12] In this appeal, the appellants take issue with the findings contained in paragraphs 27-34 of Mitchell JA's [Ag.] judgment. They object to Mitchell JA's [Ag.] finding that the communications between Mr. Hardan and the Brothers did not have the necessary quality of confidentiality against either Universal or Sheikh Abdullah for those communications to be privileged against them. The learned judge based this finding on the following (1) the advice was provided by Mr. Hardan in the course of his employment by Universal in which Sheikh Abdullah was a partner; (2) the Brothers and Mr. Hardan were aware of Sheikh Abdullah's objections to Mr. Hardan providing advice when Sheikh Abdullah as part of the Alhamrani Group was paying for it; (3) the documents were stored on the Alhamrani Group computer system and communicated via its email system and (4) it must plainly have been in the contemplation of the parties that the result of the process would be that Sheikh Abdullah would buy the Brothers' interests.

[13] Sheikh Abdullah argues that the learned justice of appeal's findings are correct and that this Court should decline to interfere with it. He contends that Mitchell JA [Ag.] took into account the relevant matters in determining the application and that both the decision of Bannister J and Mitchell JA [Ag.] cannot be said to be outside the bounds within which reasonable disagreement is possible. Accordingly, he submits, this Court should not interfere with the decision of the learned justice of appeal.

The Law Pertaining To Legal Professional Privilege

[14] It is the law that communications whether oral or in writing passing between an attorney and his client in general are afforded legal protection by the court, i.e. they are treated as privileged communications. For a document to have legal

[1] See judgment of Mitchell JA [Ag.] dated 10th September 2012, para. 12.

professional privilege attached it must be confidential. That is the first hurdle. If it is not confidential, then there can be no question of legal professional privilege arising or being maintained. Mr. Hardan, being an attorney at law and providing legal advice to the Brothers would be considered to be involved in confidential business with the Brothers, so to speak. The Documents would therefore, prima facie, be confidential. However, confidentiality does not by itself enable privilege to be claimed. The Documents were sent by Mr. Hardan to the Brothers and were not sent for and on behalf of Universal. Rather the Documents were between Mr. Hardan and the Brothers in their personal and private capacity. This was approved and authorised by the Board of Directors of Universal. In the case at bar, since confidential communications between client and legal adviser made for the purpose of obtaining or giving legal advice, the communications were plainly subject to legal advice privilege.

[15] It must be remembered that the privilege is that of the client.[2] It exists for the benefit of the client. Accordingly, only the client may waive privilege. The Brothers being the clients in the present case did not waive privilege. Consequently, privilege cannot now be transferred to Universal and more importantly to Sheikh Abdullah.

[16] The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in **Anderson v Bank of British Columbia**[3] the importance of the rule was recognised:

> "the object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, ... to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman who he consults with a view to the prosecution of his claim, or the substantiating of his defence...that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless

[2] Minet v Morgan (1873) 8 Ch App 361 adopted in Waugh v British Railway Board [1980] AC 521.
[3] (1876) 2 Ch D 644 (CA) at p. 649.

with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation."

[17] Further, as Lord Lyndhurst observed in **Regina v Derby's Magistrate Court ex parte B**:[4]

> "the principle upon which the rule is established in that communications between a party and his professional advisers ... should be unfettered and they should not be restrained by the apprehension of such communications being afterwards divulged and made use of to his prejudice. The necessary confidence will be destroyed if it be known that the communications can be revealed at any time."

[18] It is indeed important for information to be made known to the court so that justice can prevail. However as explained by Baroness Hale in **Three Rivers District Council and others v. Governor and Company of the Bank of England**:[5]

> "Legal advice privilege restricts the power of a court to compel the production of what would otherwise be relevant evidence. It may thus impede the proper administration of justice in the individual case. This makes the communications covered different from most other types of confidential communication, where the need to encourage candour may be just as great. But the privilege is too well established in the common law for its existence to be doubted now. And there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client."

[19] With respect to candour, we find the enunciation of Sir James Knight Bruce VC in the case of **Pearse v Pearse**[6] quite instructive:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely – may be pursued too

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[4] (1996) AC 487.

[5] [2004] UKHL 48.

[6] (1846) 1 De G & Sm 12, 28–29 (cited with approval by Lord Carswell in *Three Rivers* District Council and others v. Governor and Company of the Bank of England, [2004] UKHL 48, para.112)

keenly – may cost too much. **And surely the meanness and the mischief of prying into a man's confidential communications with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.**" (My emphasis).

[20] The Brothers not having waived their privilege to the Documents it follows that the Documents would be afforded the necessary legal professional privilege. There was no sufficient reason proffered by Sheikh Abdullah which would remove the privilege attached to the Documents. Even though the advice was provided by Mr. Hardan in the course of his employment with Universal, the Board of Universal approved of this.

[21] Moreover, there was no evidence which suggested that Mr. Hardan breached his contract with Universal. Even if he did, any breach on his part could not have (a) changed his status as qualified lawyer and legal advisor to the Brothers, or (b) changed the status of the Brothers as his clients for this purpose, or (c) changed the status of the advice as confidential and privileged advice. As held in **Harris v Harris**[7] and **Goddard v Nationwide BS**,[8] a breach of duties by the legal advisor does not of itself invalidate privilege.

[22] The Brothers submit that there is no logical or legal reason put forward by Sheikh Abdullah why the Brothers should lose their protection in equity and substantive legal rights in respect of the Documents (which belong to them and them only) simply because their legal advisor happened to be employed by a company at the time the communications came into existence. They further submit that the existence of an employment relationship between Universal and Mr. Hardan should not alter the confidential nature and privileged status of the communications. These submissions this Court wholly accepts.

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[7] [1931] P 10, pp. 12-13.
[8] [1987] QB 670, p. 678.

[23] The learned justice of appeal also determined that since Sheikh Abdullah objected to Mr. Hardan providing advice to the Brothers, this meant that the Documents lacked the necessary confidentiality for them to be privileged. We must disagree since Sheikh Abdullah's objections do not affect the quality of confidentiality attached to the Documents.

[24] In addition, the learned justice of appeal took into consideration matters which this Court does not consider to be relevant to the confidentiality and resulting legal professional privilege which would be attached to the Documents. One such matter being that the Documents were stored on the Alhamrani Group computer system and communicated via its email system. The Brothers relied on Norris J's statement in **BBGP Managing General Partner Limited v Babcock & Brown Global Partners**[9] where he said:

> "The starting point is the nature of the matter communicated not the manner of communication. Legal professional privilege is a substantive right founded on an important public policy namely that a client should be able to communicate freely with his legal advisor without fear that what passes between them will be used against him. Documents generated in the course of a solicitor/client relationship are presumed confidential. The confidentiality that prima facie attaches to legal advice is the correct starting point ... I accordingly find and hold that communications ... remain confidential and capable of being the subject of a claim to legal professional privilege notwithstanding that digital copies are to be found on the B & B Group database."

[25] Sheikh Abdullah contends that to ask whether in the circumstances the presumed confidence in the relevant communications has been lost by their transmission and storage on a particular system is to start the enquiry at the wrong end. They urge the Court that **BBGP Managing General Partner Limited** was wrongly decided and ought not to be followed.

[26] However, the principle enunciated in **BBGP Managing** finds favour with us. There was no authority relied on by Sheikh Abdullah to say otherwise. We accept that notwithstanding the Documents were stored on Alhamrani Group computer system

[9] [2011] Ch 296, paras. 48-50.

and communicated via its email system, the Documents do not lose their confidentiality and their resulting privilege.

[27] The appellants contend that the learned justice of appeal's finding that any decision relied on by the Brothers was taken without authority, either actual or apparent, is invalid and liable to be set aside was wholly wrong. The learned justice of appeal held this on the basis that the Brothers actions involved breaches of: (a) the self-dealing rule; (b) the requirement to act bona fide in the interest of the company of which they were directors; and (c) the principle that a director has no power to authorise an action which prefers one group of shareholders over another. Mitchell JA [Ag.] cited the case of **Boardman v Phipps**[10] and **Bhullar v Bhullar**[11] in support of that finding.

The Law Relating To That Particular Finding

[28] The Brothers as directors of Universal were in a fiduciary position with Universal and ought to have reflected this relationship in all they did. Further, section 120(1) of the BVI **Business Companies Act, 2004** states: "Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company." Directors are in a fiduciary position with the company and are prohibited from doing any acts deemed prejudicial to the company. As fiduciaries, directors must at all times act bona fide in the best interests of the company. This principle is enunciated in the case **In re Smith and Fawcett, Limited**,[12] where it was held that, "[Directors], must exercise their discretion bona fide in what they consider – not what a court may consider – **is in the interests of the company**, and not for any collateral purpose." (My emphasis).

[10] [1967] 2 AC 46.
[11] [2003] 2 BCLC 241.
[12] [1942] Ch 304 p. 306.

[29] Moreover a director is prohibited from 'self-dealing'. As they are in a fiduciary position they are bound by duty succinctly stated by Lord Cranworth LC in **Aberdeen Railway Co. v Blaikie Brothers**:

> "This, therefore, brings us to the general question, whether a Director of a ... Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner ... And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."[13]

[30] The above principle lays down the rule that directors are not to engage in dealings where their interest would or possibly may conflict with that of the company.

[31] The company in this instance is Universal and the directors are the Brothers. Sheikh Abdullah contended that the Brothers would be in breach of the prohibition on 'self dealing' if they were to authorise Mr. Hardan to provide advice to them in their personal capacity in their dispute with him. The learned justice of appeal agreed with their submission. This contention, however, cannot be supported. Firstly, for the principle against self dealing to arise the director must have acted in a way which conflicts with the interest of the company and not that of a third party. There was no evidence before this Court that showed that the Brothers, acting as directors of Universal, acted in some way which conflicted with the interests of Universal.

[32] Sheikh Abdullah argued that the Brothers, by directing Mr. Hardan, an employee of Universal, to advise them personally in their dispute with Sheikh Abdullah were plainly putting their own interests in conflict with those of Universal and that they could not have believed that they were acting bona fide in Universal's interest. The learned justice of appeal accepted their argument and concluded that the Brothers, as directors, could not maintain that a decision by them to direct an employee of Universal to act at Universal's expense for them in their individual capacity was a decision taken in the bests interests of the company. However,

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[13] (1854) 1 Macq 461, p. 471.

this Court is unable to accept the whole chain of reasoning by which the learned justice of appeal arrived at his conclusion. The Brother's advice related to the dispute with Sheikh Abdullah. It did not relate to anything pertaining to the business of Universal and had no ill bearing on the company. Simply stating that the Brothers were putting their own interests in conflict with those of Universal and not providing evidence of this, cannot be accepted. There was no evidence presented by Sheikh Abdullah to prove his contention that there was any possible conflict of interest between the Brothers and Universal or that any of the Brothers had failed to act bona fide in the best interests of Universal. There was no evidence to show, for example, that Mr. Hardan offered advice to the Brothers at the expense of the discharge of his employment duties to Universal.

[33] Sheikh Abdullah asserts that the Brothers provided no evidence to suggest that Mr. Hardan carried out his work on the Brothers' behalf outside his normal office hours. However, it is relevant to note that the Board of Directors of Universal knew, authorised and approved Mr. Hardan's work for the Brothers, evidence of which was not disputed by Sheikh Abdullah. Mr. Hardan's employment contract provided that he would abide by instructions and directives issued for him by Universal.

[34] The evidence before this Court was that the Board of Universal did in fact give directives and instructions to Mr. Hardan to provide legal advice to Alhamrani family members of which the Brothers, were of course, included. This piece of evidence was confirmed by Sheikh Abdullah. Sheikh Abdullah failed to provide any evidence to show that the Brothers' interests conflicted with those of Universal and that the Brothers by receiving legal advice from Mr. Hardan in relation to the dispute between themselves and Sheikh Abdullah (and which did not relate to or have any ill bearing on Universal) failed to act bona fide in the best interests of Universal.

[35] A director's duty is not merely to serve the company's interests. He must avoid placing himself in a position where he prefers his own interests, or the interests of

a third party, instead of or to the detriment of the company's interests. The learned justice of appeal concluded that the Brothers as directors did not act bona fide in the best interests of Universal. We can find nothing in the evidence to support this as it was not shown that the Brothers acted to the detriment of the company's interests.

[36] Most importantly, Sheikh Abdullah and Universal are two separate distinct legal persons. They can sue and be sued in their own name. There is nothing that would prevent Sheikh Abdullah from suing Universal and Universal from suing Sheikh Abdullah. Section 27 of the BVI **Business Companies Act, 2004** establishes that 'A company is a legal entity in its own right separate from its members and continues in existence until it is dissolved'.

[37] It is a well-established principle that a company is a separate and distinct entity from its shareholders. This is so even if the company has only one shareholder as established by the landmark case of **Salomon v A. Salomon & Co. Ltd.**[14]

[38] Sheikh Abdullah, being a legal person separate and distinct from Universal would be considered a third party in relation to the confidentiality and privilege of the Documents. Even assuming that Universal was entitled to call for and see the Documents (which Documents are of a privileged nature against Universal) the right or entitlement to do so lies with Universal only and not Sheikh Abdullah because (1) he is separate and distinct from Universal even if he is the only shareholder and (2) when he purchased Universal he did not purchase confidential and privileged information.

[39] In passing, it bears stating that Mr. Hardan sued the Alhamrani Group for employment compensation in other proceedings. The appellants contend the learned justice of appeal's finding that it is effectively Sheikh Abdullah who is the ultimate owner of all the companies in the Group and that the cost of paying any compensation to Mr. Hardan will fall on him, despite the fact that compensation

[14] [1897] AC 22 at p. 31.

relates to a period during which Mr. Hardan was advising the Brothers in their dispute against Sheikh Abdullah. We do not agree with this finding. The learned justice of appeal took into consideration matters which were not strictly relevant to the issue of confidentiality and further legal professional privilege. The fact remains that Sheikh Abdullah is separate and distinct from Universal or any of the companies within the Alhamrani Group. A company hires its own employees in its own right and capacity and it pays them from its own money. There was no evidence presented which established that Sheikh Abdullah would personally be responsible for compensating Mr. Hardan.

[40] The learned justice of appeal held that directors have no power to authorise an action which prefers one group of shareholders over another. He relied on **Howard Smith Ltd. v Ampol Petroleum Ltd. and Others**[15] in support of his proposition. This certainly rings true, however, that case can be differentiated from the present as there was no evidence presented to show that the Brothers who gave authorisation to Mr. Hardan to provide them with legal advice were exercising their powers to prefer one group of shareholders in their capacity as directors over Sheikh Abdullah in his capacity as shareholder in the same company.

[41] Furthermore, there was no evidence to show that Sheikh Abdullah was adversely affected in his capacity as shareholder in relation to the legal advice provided which legal advice had to do with the Brothers' personal affairs, rather than the business or affairs of Universal, or the rights of Sheikh Abdullah in his capacity as shareholder of Universal.

Estoppel

[42] The appellants raised the issue of estoppel alleging that they will suffer undoubted detriment if Universal decides to go back on its conduct in permitting legal advice to be taken without demanding that it be shared with them (which conduct has plainly let to the appellants not taking steps to protect the privilege by seeking

[15] [1974] AC 821.

advice from external lawyers). As such, Universal plainly estopped from demanding access to the advice.

[43] The case of **Thomas Hughes v Metropolitan Railway**[16] is instructive on this point where the Lord Chancellor Lord Cairns said:

> "...it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results...afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising...will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

[44] Since the Board of Universal had already authorised the giving of legal advice by Mr. Hardan to the Brothers in relation to their dispute with Sheikh Abdullah, estoppel would operate to prevent Universal and further Sheikh Abdullah having access to the Documents as it would be inequitable having regard to the dealings between Mr. Hardan and the Brothers.

Challenge To The Learned Justice Of Appeal Finding Of Facts

[45] Where a party asserts that a judge exercised his judicial discretion, the Court of Appeal will not interfere unless certain provisions are met. In **DuFour v Helenair Corporation Ltd**[17] Sir Vincent Floissac CJ articulated the basis on which an appellate court would interfere with the exercise of a judicial discretion by a trial judge. He said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded

[16] (1877) 2 App Cas 439.
[17] (1996) 52 WIR 188.

the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[46] We adopt Gordon JA's words in the case **Edy Gay Addari v Enzo Addari**:[18]

> "The first condition was explained by Viscount Simon LC in ***Charles Osenton & Co v Johnson*** [1941] 2 ALL ER 245 page 250. There, the Lord Chancellor said:
>
> > "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."
> >
> > "The second condition was explained by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 ALL ER 343 in language which was approved and adopted by the House of Lords in **G v G** [1985] 2 ALL ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said ([1948] 1 ALL ER at page 345):
> >
> > > "...We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, that an appellate body is entitled to interfere."

[47] That being said, we have no doubt that the decision of both Bannister J and Mitchell JA [Ag.] exceeds the generous ambit within which reasonable disagreement is possible and is in fact plainly wrong. Consequently, an appellate body is entitled to interfere as no sufficient weight has been given to the relevant

[18] Territory of the British Virgin Islands High Court Civil Appeal No. 2 of 2005 (delivered 27th June 2005), para. 10.

considerations such as those urged before us by the Brothers. A reversal of the order of Mitchell JA [Ag.] is therefore justified.

Conclusion

[48] The appeal is allowed. It is ordered that the decision of Mitchell JA [Ag.] delivered on 10th September 2012 is revoked and paragraphs 5 and 6 of the Order of Bannister J dated 25th July 2012 are hereby set aside.

[49] We gratefully acknowledge the assistance of learned counsel.

Louise Blenman
Justice of Appeal

Janice M. Pereira
Chief Justice

Mario Michel
Justice of Appeal