Reference numbers: FS/2010/0010 & 11

PENSIONS REGULATOR –contribution notices– procedure – disclosure- whether Applicant obliged to maintain legal professional privilege over documents passed to him by liquidator of sponsoring employer– no because employer dissolved - whether documents concerned not privileged as falling within the iniquity principle– no – disclosure permitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FS/2010 /0010

GARVIN TRUSTEES LIMITED
(as trustee of the Desmond & Sons Limited 1975 Pension and Life Assurance Scheme) **Applicant**

- and -

THE PENSIONS REGULATOR **Respondent**

- and -

(1) MR DENIS DESMOND **Interested**
(2) MR DONAL GORDON **Parties**
(3) MRS ANNICK DESMOND

FS/2010/0011

(1) MR DENIS DESMOND
(2) MR DONAL GORDON **Applicants**
-and-
THE PENSIONS REGULATOR **Respondent**
-and-
GARVIN TRUSTEES LIMITED **Interested Party**
(as trustee of the Desmond & Sons Limited 1975 Pension and Life Assurance Scheme)

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 31 October 2014

Richard Hitchcock QC, Farhaz Khan and Saaman Pourghadiri, Counsel, instructed by Burges Salmon LLP, for the Trustee

Nicolas Stallworthy QC, and Fenner Moeran QC, instructed by Clifford Chance LLP for Mr and Mrs Desmond

Emily Campbell, Counsel, instructed by C & H Jefferson, Solicitors, for Mr Gordon

Raquel Agnello QC and Thomas Robinson, Counsel, instructed by the Pensions Regulator, for the Respondent

DECISION

Introduction

1. This decision relates to two applications relating to the question as to whether certain documents held by one of the Applicants, Mr Donal Gordon, ("Mr Gordon") may not be disclosed in the proceedings relating to these references on the grounds that legal professional privilege attaches to them.

2. The first application is made by Mr Gordon. He seeks directions as to whether he is obliged to maintain privilege over several hundred documents in his control which were retained by him with the permission of the joint liquidators of Desmond & Sons Limited ("the Company"). The Company was the employer in relation to the Desmond & Sons 1975 Pensions and Life Assurance Scheme ("the Scheme").

3. The second application is made by Garvin Trustees Limited, the trustee of the Scheme ("the Trustee). The Trustee seeks a direction that the documents retained by Mr Gordon were never in fact privileged at all on the grounds that it is alleged that they fall within the iniquity exception to privilege. The Trustee's application also seeks the production of documents over which privilege is asserted by Mr and Mrs Desmond.

4. Mr Gordon is broadly neutral on his own application although he has indicated that he would like to rely on some of the documents in relation to his reference. He denies that the principle of iniquity is engaged. Mr and Mrs Desmond maintain that the documents continue to be privileged and oppose disclosure of any of them.

Background to the references

5. These references have already been the subject of litigation on various jurisdictional issues. In [3] to [10] of its judgment on one of these issues, in *The Pensions Regulator and Garvin Trustees Limited v Annick Desmond* (2013) the Court of Appeal in Northern Ireland gave a succinct summary of the background to the references as follows:

> "[3] Article 75 of the [Pensions (Northern Ireland) Order 1995] provided that a deficit in a pension scheme could be claimed by the trustee as a statutory debt from the employer on one of three trigger events. The relevant trigger event in this appeal was a "relevant insolvency event". That included a Members' Voluntary Liquidation with a statutory declaration of insolvency (MVL). When the Article 75 regime was first introduced in 1996, the measure of liabilities used to determine whether there was a deficit in the scheme was the "minimum funding requirement" (MFR). The MFR was highly prescriptive and there was a statutory mechanism to require the deficit to be made up within defined timescales.

[4] In 2002 the regime introduced a different valuation mechanism, the buy-out basis, in certain circumstances. The buy-out basis is a measure of liabilities that looks at how much it would cost to secure all the benefits with an insurance company through buying out the scheme. An insurance company will take a very cautious view in relation to all the various assumptions that need to be made and will charge a premium for taking on the risk associated with the payment of the liabilities. As such liabilities measured on a buy-out basis will be substantially greater than liabilities measured on a MFR basis. The respondent submits that an MVL continued to be a relevant insolvency event until 6 April 2005 and so any debt due to the Trustee in this case should have been determined on an MFR basis.

[5] The company was a well-known clothing manufacturer. It established its final salary occupational pension scheme in 1969. The scheme is funded so that the liabilities are met from assets derived from employer contributions, employee contributions and the return from investments held in the scheme. The company was healthy and solvent but by 2004 its sole customer was Marks and Spencer plc. On 3 February 2004, Marks and Spencer announced that they wished to deal directly with the factories supplying the company and thereby end their 60 year relationship with the company.

[6] The appellants contend that the controlling shareholders in the company, Desmond Desmond[sic], Donal Gordon and the respondent (the targets) were parties to deliberate acts and failures to act that caused the company as the solvent employer of the scheme to cease trading and enter into an MVL as a matter of urgency on 3 June 2004. That decision triggered the calculation of sums due to the scheme from the company under Article 75.

[7] The appellants contend that the targets repeatedly sought and received professional advice with the aim of limiting the company's Article 75 liability and failed to inform the Trustee of events material to the scheme and its future or alternatively acted in such a way as to avoid the Trustee being alerted to the decision to cease trading and enter an MVL. On 15 April 2004 the company directors formed a new company under the name of L & B (No 55) Ltd of which they became directors. In May 2004 the company injected £4 million into the pension scheme which placed it in excess of the amount required for an MFR valuation but some £10.9 million short of a buyout valuation. As a result the Regulator contends that at the present time pension scheme members are only in receipt of 53% of the benefits they should enjoy under the scheme.

[8] The company entered an MVL using an abridged procedure which required the concurrence of 95% of the shareholders on 3 June 2004. Company assets totalling £11,567,177 were transferred to L & B (No 55 Limited when the company was wound up on 4 April 2005 and £15 million or more was distributed among the shareholders.

[9] On 23 February 2010 the Regulator issued a warning notice under the relevant legislation to the targets. Following an oral hearing on 22 and 23 April 2010, the Determinations Panel (the Panel), on behalf of the Regulator issued a contribution notice on 27 April 2010, which was later accepted to be invalid. It was in the sum of £900,000 in relation to Mr Denis Desmond, and

£100,000 in relation to Mr Donal Gordon. The Panel did not impose a contribution notice on the respondent. A Decision Notice determining that a Contribution Notice in the same amounts should be issued on the same targets was issued by the Regulator through the Panel on 17 May 2010.

> [10] The targets and the Trustee both referred the matter to the Upper Tribunal by reference dated 15 June 2010. The targets argued that no contribution notice should have been issued, or that the amounts specified should have been zero. The Trustee contended that the notices should have been for the total shortfall in the scheme or at least a sum significantly greater than £1million, that a finding should have been made that the targets had acted other than in good faith and that a contribution notice should also have been made against the respondent, who was a substantial shareholder voting at the meeting of 3 June 2004. The Regulator became a respondent to these proceedings, and was required to deliver a statement of case in support of the Determination Notice. The Regulator's statement of case was in the same terms as the case made by the Trustee."

Proceedings in the references to date and the current applications

6. Following the determination of the jurisdictional issues, a case management hearing was held on 31 March 2014 following which Judge Bishopp released directions on 14 April 2014 for the future conduct of the references. Judge Bishopp gave permission for Mr Gordon to amend his Reference and for the Respondent (TPR) to serve an amended statement of case and list of documents. Mr and Mrs Desmond (together with Mr Gordon the "Targets") and the Trustee were directed to send Replies in respect of the References. Paragraph 8 of the directions provided as follows:

> "8. The Trustee and each of the Targets shall produce and serve upon the other parties by no later than 5pm on 8 September 2014 a list of the following documents in their possession or control, which documents relate to any of the issues in the References as disclosed in the Statement of Case, the Trustee's reply and/or the Targets' Replies, pursuant to Rules 5(3)(d) and 16 of the Tribunal Rules:
>
> 8.1 those documents on which they rely;
>
> 8.2 those other documents which are not privileged from production and which came into existence in the period from 1 February 2004 to 30 June 2004 inclusive; and
>
> 8.3 those documents which, but for their being privileged from production, would fall within paragraph 8.2 above."

7. Paragraph 12 of the Directions made provision for a further case management hearing and for any application in respect of a claim for

privilege to be made at that hearing and it is in that context that Mr Gordon's and the Trustee's applications were made.

8. In support of his application that the Tribunal determine whether he is obliged to maintain privilege over any of the documents in his control which were passed to him by the joint liquidator of the Company, Mr Gordon has filed a witness statement setting out the circumstances in which he obtained possession of the relevant documents.

9. Mr Gordon states that he and the other Directors of the Company assisted the joint liquidators to progress the liquidation process to a conclusion. In that regard from the documents I have seen it appears that on 4 April 2005 the final general meeting of the Company took place at which the joint liquidators' statement of account for the period of the liquidation was approved and a resolution was passed to the effect that the Company's books, accounts and records be disposed of as the joint liquidators saw fit, subject to any legal requirements governing the period of retention. I understand the relevant period for retention was one year. Following the filing of these resolutions with the Registrar of Companies the Company was removed from the register of companies and thereupon dissolved.

10. According to Mr Gordon's statement, as the liquidation was nearing its conclusion, Mr Gordon spoke to the member of the joint liquidator's staff who was making arrangements for the storage of the Company's records and asked her if he "could retain all records concerning matters I was involved in." Mr Gordon states his request was agreed to and that he was not asked to sign a receipt or letter to acknowledge taking possession of the documents. He states that there were no requirements placed upon him to hold the records in a certain way, to seek consent before records could be copied or passed to another party or to maintain legal privilege over the records. He states that his purpose in requesting agreement to have the records at that time was to respond to enquiries from HMRC. He states that he received the documents on 4 April 2005 in hard copy format and some of the documents were of a type to which legal advice privilege would ordinarily attach. He retains the documents to this day, at his home.

11. The Trustee in its response to Mr Gordon's application contends that the joint liquidators waived privilege over the documents concerned when it permitted Mr Gordon to retain them absent any conditions including as to the privilege. In its own application the Trustee relies on the principle of iniquity to argue that the documents held by Mr Gordon and Mr and Mrs Desmond are not privileged, as discussed in more detail below. TPR supports the Trustee's contention that privilege has been waived but also argues that the dissolution of the Company has the effect that there is no entity to assert the privilege and accordingly Mr Gordon is free to disclose the documents and rely on them. Alternatively, TPR argues that in so far as the privilege survived the dissolution of the Company it vested in the

Crown as *bona vacantia* and, on the facts, the Crown having stated that it had no interest in maintaining privilege, the privilege has been waived.

12. Mr and Mrs Desmond contend that on the facts the privilege has not been waived and that it persists notwithstanding the Company no longer having any interest in the privilege following its dissolution. The fact that the Crown as successor to the Company's rights has declined to become involved in the issue does not in itself amount to a waiver of the privilege. Mr and Mrs Desmond also oppose disclosure on practical grounds ; they have no desire to increase the trial bundle and as a consequence the costs of the substantive hearing. They contend that the suggestion that the iniquity exception applies is wholly misconceived.

Issues to be determined

13. The effect of Judge Bishopp's directions is that if I find that a right to privilege cannot be asserted in relation to the documents held by Mr Gordon or Mr and Mrs Desmond and which fall within paragraph 8.2 of Judge Bishopp's directions then the documents concerned fall to be disclosed. Mr Gordon has undertaken through his counsel that if I determine that a right to privilege cannot be asserted in relation to those documents that he holds then they will be disclosed in their entirety without "cherry picking". In relation to the contentions made by the parties the documents will fall to be disclosed if any of the following arguments succeed:

    (1) That no right of privilege can be asserted because the right was vested in the Company alone and as the Company has been dissolved there is no entity to assert the right (the "Dissolution Argument");

    (2) That the right became vested in the Crown as *bona vacantia* and the Crown has waived the privilege (the "Crown Waiver Argument");

    (3) That the joint liquidators waived the privilege when they passed the documents to Mr Gordon following the completion of the liquidation (the "Joint liquidators Waiver Argument") ; or

    (4) That privilege does not attach to the documents by reason of the operation of the iniquity principle (the "Iniquity Principle Argument").

14. Before turning to consider these arguments, I refer briefly to the legislation which is relevant to the arguments raised.

Relevant Legislation

15. In relation to a pension scheme established in Northern Ireland, which is the case in respect of these References, the right of TPR to issue contribution notices arises pursuant to Article 34 of the Pensions (Northern Ireland) Order 2005 ("the 2005 Order") which, so far as relevant, provides:

> " (3) The Regulator may issue a contribution notice to a person only if:
>
> (a) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within paragraph (5),
>
> ….
>
> (d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to-
>
> (i) the extent to which, in all the circumstances of the case it was reasonable for the person to act, or fail to act, in the way that the person did, and
>
> (ii) such other matters as the Regulator considers relevant, including (where relevant) the matters falling within paragraph (7).
>
> ….
>
> (5) An act or a failure to act falls within this paragraph if :
>
> (a) the Regulator is of the opinion that the main purpose or one of the main purposes of the act or failure was:
>
> (i) to prevent recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under Article 75 of the 1995 Order (deficiencies in scheme assets), or
>
> (ii) otherwise than in good faith, to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or reduce the amount of such a debt which would otherwise become due"

I need not set out Article 75 of the 1995 Order here; the summary of its effect is for the purposes of this decision adequately summarised in [3] of the Court of Appeal in Northern Ireland's judgment referred to in paragraph 5 above. Suffice it to say that the ability to minimise the Article 75 debt by reference to the "MVL loophole", as referred to in [4] of that decision, was removed in April 2005. Consequently, when the Company entered into a Members' Voluntary Liquidation in June 2004 any debt arising under Article 75 would be determined on the MFR basis rather than the buy out basis. Article 34 of the 2005 Order was, however, made

retrospective to 27 April 2004 so that it could potentially apply in relation to the events which occurred in June 2004.

16. As a company registered in Northern Ireland the Companies (Northern Ireland) Order 1986 applied to the Company.

17. Article 605 of the 1986 Order deals with the property of a dissolved company. It provides:

> " (1) When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and-
>
> (a) accordingly belong to the Crown, and
>
> (b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown.
>
> (2) Except as provided by Article 606, the foregoing provisions of this Article have effect subject and without prejudice to any order made by the court under Article 602 or 604."

18. Article 602 deals with the power of the court to declare a dissolution void, so the point of the reference to that Article in Article 605(2) is to make it clear that the restoration of a company to the register does not affect the legal position prevailing pending restoration. Article 606 further clarifies the effect on Article 605 of a company's revival after dissolution. So far as relevant it provides:

> "(1) The Crown, in whom any property or right is vested by Article 605, may dispose of, or of an interest in, that property or right notwithstanding that an order may be made under Article 602 or 604.
>
> (2)Where such an order is made –
>
> (a) it does not affect the disposition (but without prejudice to the order so far as it relates to any other property or right previously vested in or held on trust for the company), and
>
> (b) the Crown shall pay to the company an amount equal to –
>
> (i) the amount of any consideration received for the property or right ,or interest therein, or
>
> (ii) the value of any such consideration at the time of the disposition,

or, if no consideration was received an amount equal to the value of the property, right or interest disposed of, as at the date of the disposition.

….."

19. Article 607 gives the Crown the power to disclaim title to any property vested in it under Article 605. I was told that the practice of the Crown in dealing with bona vacantia when it becomes aware of it is either to dispose of it pursuant to Article 605, thus giving rise to a payment to the company of the consideration received or value of the property concerned if the company is revived, or to disclaim it.

20. Companies registered in Northern Ireland are now, in common with companies registered in other parts of the United Kingdom, governed by the Companies Act 2006 ("the 2006 Act")

21. Section 1029(1) of the 2006 Act makes provision for an application to the court to restore a dissolved company to the register. Section 1029(2) provides that amongst those having the right to make an application are any former director, member or liquidator of the company.

22. In general, an application must be made within six years from the date of the dissolution of the company: see Section 1030 (4) of the 2006 Act. Section 1032 (1) of the 2006 Act provides :

" The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

Section 1032(3) of the 2006 Act provides :

"The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly made be) as if the company had not been dissolved or struck off the register."

Legal Principles applicable to legal professional privilege

23. Before turning to consider the arguments, it is helpful to refer to the relevant principles applicable to legal professional privilege.

24. The authorities demonstrate that privilege is simply the right to resist the compulsory disclosure of information: see *B v Auckland District Law Society* [2003] 2 AC 736 at paragraph 67, per Lord Millett. In the House of Lords case of *Three Rivers DC v Bank of England (No 6)* [2004] 3 WLR 1274 Lord Scott of Foscote observed at paragraph 24 of his speech that the concept arises out of a relationship of confidence between lawyer and client so that confidentiality of the document concerned is an essential requirement. He went on to say in paragraph 26:

> "…legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds to or detracts from its features."

This passage highlights another important feature of the right, namely that it is for the person who is entitled to the right to assert it and a third party is not so entitled even if he has possession of the documents concerned.

25. The latter point is illustrated by the case of *Schneider v Leigh* [1954] 2 QB 195 where a doctor was sued for libel in respect of the contents of an expert report written by him for the purposes of litigation between Mr Schneider and a company, who commissioned the report. It was accepted that as far as the company was concerned, it could assert privilege over the report and therefore could not be compelled to produce it. The doctor sought to resist disclosure relying on the dicta of Lindley MR in *Calcraft v Guest* [1898] 1QB 761 who said :

> " I take it that, as a general rule, one may say once privileged always privileged."

Hodson LJ rejected that argument, distinguishing *Calcraft* on the basis the situation being dealt with there involved documents which had attached to them privilege in previous proceedings in which the predecessor in title to the plaintiffs in the action then before the court was involved. He held at page 203:

> "What is being sought here is, in effect, to extend the umbrella of the protection which the privilege gives the company to the defendant, who is on the hypothesis that he is the author of the libel, to be looked at for the purpose of this application as a proposed witness on behalf of the company. In this capacity not only has he no privilege of his own, but he is under no duty to assert the right of the company to resist the production of the documents."

26. It is of course clear that privilege can be waived. The waiver can be express or implied from an examination of all of the surrounding circumstances. The authorities demonstrate that if the person entitled to assert the privilege provides the documents concerned to a third party on terms that they be kept confidential then the third party will be obliged to maintain privilege. This principle was expressed by Staughton LJ in the Court of Appeal's judgment in *Gotha City v Sotheby's and Another* [1998] 1 WLR 114 at page 118F in the following terms:

> "Now of course legal professional privilege can come to an end. It can end by waiver, although some say that a more correct description is a loss of

confidentiality. To my mind it does not matter, for present purposes which is the correct rationale for the ending of the privilege."

He went on to say at page 121H:

> "At the end of the day it seems to me that the issue is: were the documents and the information disclosed to Sotheby's in confidence."

27. This approach was followed by Mann J in *USP Strategies Plc v London General Holdings Limited* [2004] EWHC 373 where he made the following observation on *Gotha City* at paragraph 21 of his judgment:

> "…the subsistence or otherwise of privilege, where advice is communicated to a third party, turns on the extent to which there is a waiver of privilege on that occasion. *Gotha City* demonstrates that it is not inevitable that there is a waiver in those circumstances. In that case it was held that the receipt of the advice by Sotheby's was attended by a degree of confidentiality which meant that, while there was waiver as between the owner and Sotheby's, there was no waiver vis –a –vis the outside world."

28. The authors of the 18th edition of *Phipson on Evidence* discuss these cases and conclude, correctly in my view, that :

> "Where the document is disclosed to one or more parties with no express or implied requirement that the third party should treat the document as confidential, it is hard to see why there should be any legal bar on the third party disclosing the document or making it available when served with a witness summons. If the third party is himself free to disclose the document to someone else without restriction, a stranger should be entitled to obtain the document on a witness summons."

29. The requirement that it is only the person entitled to the privilege who can assert it appears to be modified in the case of solicitors who are asked to disclose material which it is alleged is privileged. It appears that it is the duty of a solicitor to maintain the privilege on behalf of a client or former client. This principle was expressed by Blackburne J in *Nationwide Building Society v Various Solicitors* [1999] PNLR 52 as follows:

> "… I take the view that whether or not the client has any recognisable interest in continuing to assert privilege in the confidential communications, the privilege is absolute in nature and the lawyer's mouth is "shut for ever". I further agree with Mr Davidson that it follows from this that it is the lawyer's duty to claim the privilege on behalf of the client, or former client, whose privilege it is, at any rate where it is at least arguable that the privilege exists."

This case therefore appears to apply the "once privileged always privileged" principle to privileged documents held by solicitors and they are duty bound to maintain confidentiality in respect of them even in the absences of any instructions from a client or former client to maintain the privilege.

30. I now turn to deal with each of the four issues identified in paragraph 13 above.

The Dissolution Argument

31. Miss Agnello advances this argument on behalf of TPR. It can be summarised as follows:

    (1) The Company has ceased to exist and unless it is restored it cannot assert any of its previous rights. Creditors are no longer able to claim debts from a dissolved company and equally the dissolved company is unable to assert any rights.

    (2) Just as proceedings commenced against a dissolved company are a nullity unless and until the company is restored, because the company does not exist, so any attempt to assert privilege on behalf of the Company would also be a nullity.

    (3) Since privilege is a right to resist disclosure it must be claimed or asserted for disclosure to be resisted and as, established in *Schneider v Leigh,* it is only the person who is entitled to the privilege who can restrain disclosure, since the Company no longer exists there is nobody who can assert the privilege.

    (4) The statutory provisions relating to restoration do not alter this analysis. The effect of dissolution is absolute and the actions of the Crown during a dissolution are not invalidated by any subsequent restoration.

32. Mr Stallworthy's answer to these arguments can be summarised as follows:

    (1) The privilege persists despite the Company no longer having any interest in it due to its dissolution. He relies on *Nationwide Building Society* for this proposition.

    (2) Just as privilege persists after a person's death it persists after the dissolution of a company. It becomes vested in the Crown as *bona vacantia.* He relies on the principle "once privileged always privileged."

    (3) Mr Gordon has a fiduciary duty to maintain the privilege and cannot waive it. This duty derives from his fiduciary duties as a director and his contract of employment which expressly prohibited him from disclosing either

during or after his employment any confidential information he may have received from the Company.

33. My starting position is that the Company itself cannot assert any right to privilege as it no longer exists. Miss Agnello took me to a passage from the speech of Lord Hoffman in *Wight and others v Eckhardt* [2004] 1 AC 147 where he neatly described the effect of a company's dissolution on its assets and liabilities at paragraph 27 as follows:

> " The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against the creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in a *pari passu* distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue.

Applying this reasoning to the position here, as Miss Agnello submits, just as any proceedings brought against the Company would be a nullity, so would any attempt to assert privilege by the Company be a nullity. As Lord Hoffman envisaged, if the Company is to assert any rights it has to be restored to the register to do so, a process that cannot now be undertaken due to the expiry of the time limit provided for in Section 1030(4) of the 2006 Act.

34. The restoration of a company to the register would not invalidate any acts of the Crown dealing with the company's assets as *bona vacantia.* That is apparent from the wording of Article 605 of the 1986 Order which specifically provides that any disposition of the property concerned is not affected. By analogy any failure to maintain privilege over any relevant documents during the period of dissolution could not be questioned. By operation of Section 1032 of the 2006 Act the company would be put in the same position as nearly as may be as if it had not been dissolved. Therefore in the present case, if the Company had been restored it could assert the privilege provided it had not previously been waived, but without prejudice to any intervening acts or omissions.

35. Consequently, it follows that if the position is, as is established by *Schneider v Leigh,* that only the person entitled to assert the privilege can

resist disclosure then upon the Company's dissolution Mr Gordon would not be obliged to maintain the privilege unless some other basis can be established for its maintenance.

36. In that context, it is necessary to consider the position of the Crown. I accept that the wording of Article 605 is sufficiently wide to include as *bona vacantia* vested in the Crown a right to assert legal professional privilege which still persisted at the time of the dissolution of the Company. The question therefore arises as to whether Mr Gordon is entitled to resist disclosure on the basis that the privilege has vested in the Crown and has not been waived.

37. The Crown Solicitor (CSNI) was therefore asked by Mr Gordon's solicitors if it wished to be represented in these proceedings. He responded in the negative on 7 October 2014 and stated the policy with regard to the handling of *bona vacantia* as follows:

> "The policy is either to disclaim bona vacantia under the statutory provisions in that regard or else to realise the value of any bona vacantia. The function of the CSNI does not extend beyond that specific remit…..
>
> The CSNI would accordingly have no interest in the issue of the maintenance of any residual documentary privilege such as might exist after the Liquidator's involvement in the matter, and in any waiver thereof, and any ancillary issues, such as are referred to in the documentation. This office thus cannot discern any potential benefit to the Crown in becoming involved in any way in the matter."

38. This response brings into clear relief the role of the Crown in relation to *bona vacantia.* Although it becomes both legal and beneficial owner of the property and rights concerned it is more akin to a custodian to whom assets are given for safekeeping. Like all custodians, it will not seek to act on its own initiative, save as it is permitted to do so by the legislation and it knows it is free to dispose of property without repercussions if it decides to exercise that power. In relation to a right that is not capable of being turned to account, such as the right to privilege, it is clear that its policy is to do nothing, so the Crown will neither assert nor waive the right. That is entirely consistent with the statutory scheme; the Crown has no power to act on behalf of the company concerned because the company does not exist and no right of its own to assert privilege. If any person has an interest in the right being asserted then the appropriate course is for an application to be made to restore the company to the register and then the person who is entitled to assert it can do so.

39. It is therefore clear that the Crown is not a successor in title to the Company in the same way that that the executors of a deceased person's estate are successors in title to the deceased and can, as the authorities show, assert any privilege which the deceased was entitled to maintain. As far as the Crown is concerned, the winding up of the Company has

concluded and it is not in effect to be prolonged by the Crown becoming involved in any ongoing matters relating to the Company's previous rights. That is entirely a matter for those with the power to revive the Company and restore its rights.

40. It follows that with the Crown having no interest in asserting the privilege that Mr Gordon is under no obligation to maintain the privilege simply because the right has been vested in the Crown. The Crown has correctly concluded that it should not assert the privilege and in those circumstances absent any other restriction Mr Gordon has no obligation to maintain the privilege. As *Schneider v Leigh* shows the maxim "once privileged always privileged" is not absolute.

41. In my view *Nationwide Building Society* does not assist Mr Stallworthy in this regard. That case was dealing with the positive duty of solicitors to maintain privilege in the absence of its client or former client seeking to do so. The case did not deal with the position of a solicitor holding privileged material of a dissolved company. Moreover, in this case the documents concerned are not held by a firm of solicitors against whom disclosure is sought.

42. It also follows from the foregoing analysis that there is nothing in Mr Gordon's previous employment contract or his former status as a Director of the Company which requires him now to maintain the privilege. I accept that Mr Gordon's obligations under his employment contract and his fiduciary duties as a former director would have required him to maintain confidentiality and therefore, on the basis of *Gotha City,* maintain privilege up to the point the Company was dissolved, absent any prior waiver of privilege. However, once the Company is dissolved it cannot enforce that contract. It is clear from the Crown Solicitor's letter that the Crown has no interest in enforcing the contract and the Company cannot now be restored to the register and seek to enforce its rights. There is therefore no proper basis on which Mr Gordon should be required to maintain the privilege on these grounds.

43. I therefore conclude that Mr Gordon is no longer obliged to maintain the Company's privilege over the documents that he holds, as a result of the dissolution of the Company. That is sufficient to dispose of Mr Gordon's application and accordingly it is not necessary to deal with the other arguments raised or the Trustee's application. I will, however, for completeness deal with them very briefly.

The Crown Waiver Argument

44. Miss Agnello advances this argument on behalf of TPR. It presupposes that, contrary to my findings above, the privilege is maintained in circumstances where the Crown is not seeking to assert privilege and the Company has not been restored to the register.

45. In my view there is no evidence that the Crown has waived privilege. As its letter indicates and as I have found above, the Crown has remained entirely neutral. Contrary to Miss Agnello's submissions, its confirmation that it has no interest in maintaining it cannot be regarded as a waiver. As I have indicated, the approach of the Crown is to preserve the status quo pending any application to restore the Company to the register, subject to its statutory rights to dispose of *bona vacantia.* In my view the Crown's letter shows no intention to waive the right.

The Joint Liquidators Waiver Argument

46. Miss Agnello advances this argument on behalf of TPR. She relies on the fact that the documents were provided to Mr Gordon by the Joint Liquidators with no restriction on their being shared with others, or held in a certain way, such as being marked confidential. Miss Agnello submits that any restrictions in Mr Gordon's Service Agreement were disapplied by the authorisation given by the Joint Liquidators to hold the documents and use them without restrictions.

47. I reject those submissions. As Mr Stallworthy put it, the documents containing legal advice came to Mr Gordon's knowledge during the course of his employment and were plainly confidential; under the terms of his Service Agreement he was bound to preserve that confidentiality even after the termination of his employment. In my view it would require very clear words to indicate that Mr Gordon had been released from his duty of confidentiality in relation to the privileged material and in the absence of such words Mr Gordon should have regarded himself as still bound by confidentiality obligations. Indeed his behaviour since he obtained the documents in taking care to preserve the confidentiality of the privileged material indicates that he did regard himself as so bound. As Staughton LJ put it at page 112 B to C of *Gotha City* :

> " This is the sort of situation where, in the ordinary way, one would expect confidentiality to be assumed by all present rather than expressly agreed upon."

48. I therefore conclude that until the Company was dissolved Mr Gordon remained under a duty of confidentiality in relation to the privileged material and could not have been compelled to disclose them if privilege were asserted by the Company.

The Iniquity Principle Argument

49. Mr Hitchcock advances this argument on behalf of the Trustee. He relies on the established principle that there is no privilege in legal advice sought for the purpose of effecting an iniquity. For this principle to apply, the evidence has to show a strong *prima facie* case of iniquity, namely conduct

amounting to fraud in its wider sense: see *BBGP v Babcock* [2011] Ch 296.

50. In the Court of Appeal case of *Barclays Bank v Eustice* [1995] 1 WLR 1238 the principle was held to cover transactions alleged to be made at an undervalue pursuant to s.423 Insolvency Act 1986, the relevant parts of which read:

> "(2) Where a person has entered a transaction at an undervalue, the court may , if satisfied under the next subsection, make an order as it thinks fit for:
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of the persons who are victims of the transaction.
>
> (2) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose-
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make ,a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

51. Similarly, in *C v C* [2006] EWHC 336 the principle was held to apply to a transaction within s. 37 Matrimonial Causes Act 1973, which catches transactions made by a spouse with the intention of defeating the other spouse's claim for financial relief. Mumby J held there was a "parity" between that provision and s 423 Insolvency Act 1986.

52. Mr Hitchcock submits that there is a similar parity with Article 34 of the 2005 Order. He submits that the underlying theme of conduct which engages the iniquity principle is, as described by Norris J at paragraph 62 of *BBGP v Babcock*, that:

> "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."

53. Mr Hitchcock submits that the evidence shows that the Targets first sought advice on how to take advantage of the MVL loophole and then advice on the risk that their actions could fall foul of the proposed provisions of Article 34 There was therefore a strong nexus between the advice being sought and the conduct proposed to be proscribed by the proposed

legislation. He submits that this evidence, combined with the Determination Panel's findings that an MVL was capable of engaging Article 34 and one of the main purposes of the MVL was to avoid the buyout liability to the Scheme which had the effect (as the Panel found) of ensuring that the Targets maximised their shareholder value, provides the necessary strong *prima facie* case to engage the iniquity principle and deny privilege attaching to the relevant legal advice.

54. I accept that there is parity between Article 34 and the other statutory provisions mentioned above; in particular acts or deliberate omissions designed to avoid Article 75 liabilities, certainly if done or omitted otherwise than in good faith offend the public policy, reflected in TPR's statutory objectives, of protecting the benefits of members under occupational pension schemes.

55. There are, however a number of other factors, as identified by Mr Stallworthy, that lead me to conclude that the factors identified by Mr Hitchcock are not so strong that professional privilege should be denied in respect of the advice given before and at the time of the MVL. These matters are as follows:

    (1) Much of the advice appears to have been given before the provisions of what became Article 34 had even been presented to Parliament. The fact that there were to be and at the time of the announcement it had not been decided, as became apparent after the MVL was implemented, that they would be retrospective. Consequently, at the time the advice was given the focus of the Company was on entering into an MVL before the loophole was closed, as it was expected to be when the new pensions legislation received Parliament's approval;

    (2) Therefore, at the time the MVL was implemented there were parallels with the situation in *Re T & N and others* [2004] EWHC 1680 (Ch). In that case administrators of a company sought directions as to whether various companies in the T&N group should withdraw from the T&N pension scheme for the sole purpose of ensuring their debts under s 75 Pensions Act 2005 would be calculated on the MFR basis, an application which was made and heard without notice to the trustees. David Richards J was satisfied that the administrators would be acting in good faith, notwithstanding that the contribution notice provisions were before Parliament at that stage;

    (3) The Determinations Panel made no finding that any of the Targets had acted otherwise than in good faith and dismissed the case against Mrs Desmond;

(4) Mr and Mrs Desmond in their Reply identify other factors they considered at the time of the MVL was being considered as well as the pensions issue, namely the imminent loss of Marks and Spencer, the Company's only customer , and the fiduciary duties of the Directors to consider the interests of the company's shareholders and other creditors;

(5) Even if this Tribunal after hearing the references were to hold that any of the Targets acted otherwise than in good faith it would be still required to consider whether it was reasonable to impose a contribution notice having regard to all the circumstances, which will include the state of the legislative process at the time the MVL was entered into; and

(6) The Targets have pleaded in their Reply that as a matter of statutory interpretation, the acts alleged did not fall within the scope of Article 34, an interpretation which TPR appeared to accept before, as it was entitled to do, changing its view and reopening its investigation.

Consequently, I conclude that the iniquity principle on the facts of this case does not apply so as to deny privilege being maintained in respect of the relevant documents.

Conclusion

56. As mentioned in paragraph 12 above, Mr and Mrs Desmond also oppose disclosure on practical grounds because of the potential increase in the size of the trial bundle. I have some sympathy with this. The Tribunal's rules on disclosure in financial services cases deliberately do not mirror those of the Civil Procedure Rules. They broadly proceed on the basis that in the absence of a specific application for disclosure, only documents on which the party concerned wishes to rely should be produced, subject also to the duty of TPR to disclose documents that might undermine its case. There are good reasons for this. The Tribunal is generally a no costs jurisdiction and it aims to ensure informality in its proceedings where possible. Also, it is to be expected that TPR will run much the same case in the Tribunal as it did before the Determinations Panel. During its investigations TPR will have made extensive use of its powers to obtain relevant documents from the Targets and third parties, so there should, subject to any new evidence coming to light or a change in circumstances, be no need to seek further extensive disclosure during the Tribunal proceedings. The case is a regulatory one which is primarily for TPR to make and the Trustee's role is much more limited.

57. The initiative for a CPR type disclosure has, it appears, come from the Trustee and it was given effect to by Judge Bishopp's directions. I can see no grounds at this stage for altering those directions. Therefore, as I indicated in paragraph 13 above, the effect of this decision is that the documents held by Mr Gordon are not privileged from production and must be included on the list directed to be prepared by Judge Bishopp in paragraph 8.2 of his directions. It follows that the same position applies in relation to any documents held by Mr and Mrs Desmond in respect of which privilege has been asserted by them but in respect of which privilege cannot now be asserted as a result of the dissolution of the Company.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 17 NOVEMBER 2014