COMMONWEALTH OF THE BAHAMAS

SUPREME COURT COM

2015/Com/No. 00073

Commercial Division

Messrs. Raymond Winder, Lai Kar Yan (Derek) and Darach Eoghan Haughey appointed as Receiver-Managers by Citibank, N.A. Bahamas Branch the Onshore Security Agent as agent for the Secured Finance Parties pursuant to the Debenture dated 31 January 2011 (the Debenture) lodged and recorded in the Registry of Records in Volume 11293 at pages 557-711

The Applicants

AND

1. Baha Mar Ltd. ('In Official Liquidation')
2. Baha Mar Land Holdings Ltd. ('In Official Liquidation')
3. Baha Mar Enterprises Ltd. ('In Official Liquidation')
4. Baha Mar Properties Ltd. ('In Official Liquidation')
5. BMP Golf Ltd. ('In Official Liquidation')
6. BMP Three Ltd. ('In Official Liquidation')
7. Cable Beach Resorts Ltd. ('In Official Liquidation')
8. Baha Mar Operating Company Ltd.
9. Baha Mar Entertainment Ltd.

The Respondents

Before Hon. Mr Justice Ian R. Winder

Appearances: Brian Simms QC with Nik Yeo and Sophia Rolle-Kapousouzoglou for the Applicants
Hodge Malek QC with Ferron Bethel QC for BML Properties Ltd.
Charles Hollander QC with Sean Moree and Vanessa Smith for CCA Bahamas Ltd.

1 October 2020 and 2 October 2020

WINDER J

This is my decision with respect to the several Summonses filed in this matter arising from the disclosure of material which had been the subject of a sealing order.

Background:

1. The background to this matter is by now well recited. It arises from the receivership of the several entities which had been engaged in the development of the "Baha Mar Resort". The first named Respondent, Baha Mar Ltd ("BML") was the principal company in the corporate structure. The Baha Mar Resort was said to be the largest resort under construction in the Caribbean. The resort went into receivership upon the appointment of the Applicants as Joint Receiver Managers (JRMs) pursuant to a Debenture, under which the resort property (described in the Debenture as secured assets ("Secured Assets") had been pledged.

2. On 22 August 2016, this Court approved the sale of the Secured Assets. The approval application was heard in private and the evidence, which was contained in the Third Affidavit of Raymond Winder, was received under seal. The basis for the sealing was that the evidence being presented on the application contained commercially sensitive information relating to the marketing and bidding process. It was argued that the release of such sensitive information in a public forum could be prejudicial to the realization of the Secured Assets until the sale was completed.

3. On 16 April 2018, this Court acceded to the application for the unsealing of all of the evidence save for certain documents which had been identified by the JRMs. Some of these documents, which remained sealed, included opinions ("the Opinions") given by attorneys of BML. The Opinions recorded the attorneys' view of the value of BML's legal claims against its contractors CCA Bahamas Ltd. ("CCA") and CSCEC Bahamas Ltd ("CSCEC"). The Opinions were issued by Kobre & Kim (UK) LLP dated 26 June 2015 and by Glaser Weil LLP dated 3 February 2015 (amended on 5

February 2015). The Opinions were exhibited to the Third Affidavit of Raymond Winder. The terms of the 16 April 2018 Order provided that the documents were to remain under seal until such time as CCA and BML Properties Limited ("BMPL") could make representations, if they wished, concerning whether the documents would continue to remain under seal.

4. On 1 May 2019, after hearing submissions from interested parties, this Court ordered that the Opinions remain under seal until further order of this Court. In the written ruling it was stated as follows:

> …
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> [31.] Looking at the matter objectively, when the matters were placed before me, I could not have considered that the JRM's intended by exhibiting the legal opinions to an affidavit which I received under seal, for use at a private hearing, they intended to have waived LPP generally for all persons.
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> [32.] In any event, I am satisfied that if there was waiver by the JRMs it was only a limited waiver for the purpose of the Application and not a general waiver. ...
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> ...
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> [35.] Finally, there is a question as to whether, assuming a general waiver, such a general waiver would assist the beneficial conduct of the receivership. I accept the state of the law as stated by BMPL, that disclosure of a company's confidential documents that have been obtained by receivers under their compulsory powers is only permissible if it will assist the beneficial conduct of the liquidation, and not merely incidentally so. The English Court of Appeal case of ***Sutton v GE Capital Commercial Finance Ltd. 2004 2 BCLC 662*** provides a good discussion concerning receivers and this issue of waivers of LPP. …
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> [36.] I am satisfied that a general waiver by the JRMs of the LPP of BML does not and could not assist the beneficial conduct of the receivership. Contrary to the submission of CCA, I did not find that it was in the interest of the receivership for the opinions to be waived generally, and descend generally in the public domain. LPP was a fundamental right of BML and the JRMs was under a duty, having regard to the dicta in ***Sutton***, to maintain and protect the LPP of BML. In the event that LPP had to be waived it is limited to what is necessary to protect the interest. Other than indicating that they had

the power to waive the LPP of BML, the evidence of JRMs does not suggest that it was in the interest of the receivership or the conduct of the receivership, that LPP be waived generally with respect to [the Opinions].

[37.] CCA argues that, as the purpose for the sealing direction had fallen away, which was to protect the sales process, then the whole of the Affidavit and all the exhibits, including legal advice, should be unsealed. I do not accept that this is the necessary conclusion and prefer the submission of BMPL that the mere fact the sale process has completed, does not mean, that the exhibits, a legal advice, should go into the public domain. Why should this be any different from any other matter upon which the court receives privileged legal opinions in its supervisory jurisdiction to give directions and sanctions to fiduciaries and insolvency practitioners seeking the assistance of the court. On the contrary, the sale is complete, and there are no outstanding matters which requires the waiver of LPP.

[38.] I find therefore that in all the circumstances, if BML's LPP was waived by the JRMs such waiver was a limited waiver for the purpose of the approval application only and was not a general waiver.

5. It has now transpired that on 25 March 2019, Mr. Norbert Chan handed over the Opinions, along with certain valuation reports, which are derivative of the Opinions ("the Valuations"), to an employee of CCA. This handing over occurred on the day before my hearing of the application to unseal the Opinions. At the time of the delivery of my decision I was not informed of the exchange of the Opinions between Chan and CCA.

6. Norbert Chan is a senior accountant at Deloitte Hong Kong, and at one time the field partner in charge of the sale of the Secured Assets. He is a former director of Perfect Luck Assets Limited ("Asset SPV") and a director of its parent Perfect Luck Investments Limited ("PLIL"). Asset SPV and PLIL were the vehicles in the structure approved by this Court to complete the construction of the resort property and its sale to the ultimate purchaser.

7. According to the evidence of Darach Eoghan Haughey, which is unchallenged, Chan along with other personnel of Delloitte Advisory Hong Kong ("DAHK") were engaged by CEXIM, Asset SPV and PLIL to provide nominee shareholders and directors for Asset SPV and its immediate parent company. Chan and DAHK were engaged to act on behalf of Asset SPV and its immediate parent company in connection with all aspects of the purchase and completion of the Baha Mar Project. Asset SPV and PLIL had access to, and the ability to use, the Opinions in their negotiations. According to Haughey the materials were provided to Asset SPV and PLIL as they were part of the process for determining the consideration under the Sale and Purchase Agreement payable by Asset SPV.

8. Chan is not a party to these proceedings and did not provide an affidavit. There were second hand statements attributed to him in Mr. Haughey's affidavit as to his delivery of the materials to CCA. Other than the fact of his delivery of the document to CCA, I did not accept any of it and find the entire affair relative to his delivery of the materials to CCA unexplained. CCA, which seeks relief in this court also has not sought to provide any details as to how it came to receive these documents from Chan. They simply said, through their attorney Mr Berger, that the account in Haughey's affidavit is accurate.

9. BMPL and CCA are parties to pending litigation in the Supreme Court of New York, ***BML Properties Limited v China Construction America, Inc, et al Cas No. 657550/2017 (the "NY Action").*** In response to requests for disclosure in the NY Action, on 17 July 2019, BMPL's U.S. Attorneys were informed by Squire Paton Boggs, CCA's U.S. attorneys, that they had been provided with the Opinions and the Valuations. They were advised that the Opinions and the Valuations were provided by a representative of the JRMs.

10. According to CCA, in the NY Action, BMPL has criticized the disclosure of the Opinions to CCA on the bases that: (i) BMPL was a joint holder, along with BML (and the JRMs as BML's successor), of legal privilege in the Opinions, (ii) dissemination of the Opinions to CCA had been barred by this Court's Order of 1 May 2019, and,

(iii) BMPL was entitled to prevent CCA from using the Valuations because they ostensibly are derivative of The Opinions. CCA opposed all of those contentions in the NY Action. The New York court has not ruled on these issues.

11. In a hearing in the NY Action on 26 February 2020, concerning the propriety of the Chan disclosure, Judge Scarpulla, who was managing the trial proceedings (but has since been elevated to the appellate court), was understandably alarmed by representations that the JRMs had provided the Opinions and the Valuations to CCA, in the face of my 1 May 2019 ruling, indicating that the Opinions had not been disclosed to anyone. Concerned that The Bahamian Court had been misled, at the 26 March 2019 hearing, the learned judge sought to ensure that the disclosure be brought to the attention of this Court. I readily admit that I too was initially troubled by the revelations in the NY Action concerning the disclosure.

12. At the 26 March 2019 hearing, it appears that the court proceeded on a misapprehension of the evidence. At paragraph 28(a) of the ruling it was stated that the Opinions (which were in Exhibit RW-21 and subject to the Sealing Orders) had not been disclosed to anyone other than this Court. That was not a proper representation of the evidence before me. This misapprehension, it appears, likely occurred as a result of a statement made in the skeleton arguments (not evidence) of BMPL. BMPL stated at paragraph 12 of their skeleton arguments that the Construction Opinions, *as far as is known to BMPL*, have not been provided to any other party. One would have expected the JRMs to have cleared up this issue at the earliest opportunity, if it were not true. Haughey has apologized to the Court, on behalf of the JRMs, for his attorneys not addressing this misstatement in the record.

13. Before this Court CCA, through its Bahamian counsel, acknowledged that Squire Patton Boggs was misinformed when it was assumed that the Opinions and Valuations had been provided to CCA by a representative of the JRM's. The unchallenged evidence was that The Opinions and the Valuations were provided by Chan, unbeknownst to the JRMs.

14. The JRM's issued a Summons on 31 July 2020 seeking the following:
    (a) To update the Court in respect of the disclosure to CCA Bahamas Limited of [the Opinions] comprised in Exhibit 21 to the Third Affidavit of Raymond Winder by Mr Norbert Chan.
    (b) And for a declaration of the Court that the JRMs were entitled to conclude that the disclosure of those documents and the Reports (as defined in Paragraph 8 of the Affidavit of Darach Haughey sworn herein on 30 July 2020) by the JRMs to Norbert Chan was in the interests and for the purpose of the Receivership.
    (c) And for such other directions or relief as the Court considers just.

15. CCA issued a Summons on 14 August 2020 seeking declarations that:
    (a) Receipt by CCA of [the Opinions], comprised in Exhibit RW-21 to the Third Affidavit of Raymond Winder filed 24 August, 2016, and the Reports (as defined in paragraph 8 of the Affidavit of Darach Haughey, sworn on 30 July, 2020) is not in breach of the Order filed herein on 4 July, 2019, and did not otherwise constitute misconduct.
    (b) Privilege in [the Opinions and the Valuations] disclosed to CCA has been waived, as to CCA, by the Applicants (for themselves and on behalf of Baha Mar Limited ("BML")), the Asset Special Purpose Vehicle formed to hold the Baha Mar assets until the completion of construction on the Baha Mar Project and the sale of BML's assets, its immediate parent company, Perfect Luck Investments Limited; and,
    (c) Any other directions or relief as the Court considers just.

16. BMPL issued a Summons on 14 August 2020 seeking declarations that:
    (a) When Mr Norbert Chan provided [the Opinions and the Valuations] to an employee of [CCA] on 25 March 2019, he did so as an agent of the Joint Receiver-Managers, Messrs Raymond Winder, Lai Kar Yan (Derek) and Darach Eoghan Haughey (the "JRMs");
    (b) Mr Chan's provision of [the Opinions and the Valuations] to CCA was not in the interests and for the purpose of the receivership and did not waive the legal professional privilege of BML in [the Opinions and the Valuations], and BML's privilege in [the Opinions and the Valuations] is subsisting.
    (c) Alternatively, on the hypothesis (which is not accepted) that the JRMs provided [the Opinions and the Valuations] to Mr Norbert Chan qua director of [PLIL], and not as part of the JRMs' team or as the JRMs' agent, they did so on the basis of a limited not a general waiver of privilege in [the Opinions and the Valuations], and Mr Chan qua director of [PLIL] was not entitled to waive the legal professional privilege of BML in [the Opinions and the Valuations] by providing them to CCA on

> 25 March 2019, and BML's privilege in [the Opinions and the Valuations] is subsisting.

17. The Summonses of the JRMs, BMPL and CCA were supported by the affidavits of Darach Haughey (31 July 2020), Miko Pinder (14 August 2020) and Mitchell Berger (27 August 2020) respectively.

18. It is important not to lose sight of the nature of these proceedings and the terms of the Order which was made by this Court on 1 May 2019.

19. This action was commenced by the JRMs seeking the Court's sanction and blessings with respect to the momentous decisions made by them, and to be made, in respect of a significant undertaking by them as receiver managers. The JRMs were not appointed by the Court but pursuant to the terms of a Debenture dated 31 January 2011. Notwithstanding that appointment the JRM's became officers of this Court and have effectively surrendered much of their discretion to the Court.

20. I accept the submission of the JRMs, at paragraphs 28-30 of their skeleton argument, as a good summary of the purpose of the Order sealing The Opinions:

> 28. [The Raymond Winder Affidavit] sworn in support of the directions for sale, requested the Court to seal [the Raymond Winder Affidavit] and accompanying exhibits including Exhibit RW-21 because they contained *"commercially sensitive information relating to the marketing and bidding process"*: [the Raymond Winder Affidavit], para. 12. [The Raymond Winder Affidavit] continued: *"The JRMs are of the view that release of such sensitive information in a public forum could be prejudicial to the realisation of the Secured Assets"* and that CEXIM had indicated that its support was in part *"based upon the Affidavit being sealed so that it will have no adverse effect on Shareholder SPV's ability to reach a good deal on the sale of the Asset SPV."*: [The Raymond Winder Affidavit], para. 14. "Shareholder SPV" was Perfect Luck Investments Limited ('PLIL'). PLIL advanced the funds to its subsidiary, Perfect Luck Assets Ltd, ('Asset SPV'), in connection with the acquisition of the Baha Mar Project from BML and its affiliates, acting by the JRMs, as described in [the Raymond Winder Affidavit].

29. This Court acknowledged the sentiments expressed and justification for sealing [the Raymond Winder Affidavit] in para. 10 of its Order dated 26th September 2016 (the 'Sealing Order') when it acceded to the request to seal. The ruling stated (at [2]) that the reason for sealing *was "to preserve the integrity of the sales process which remains a commercially live issue."* The judgment also went on to observe at [3] that: "*Whilst the matters are of importance to the general public, having regard to the overall impact to the people of the Bahamas and the Government involvement*" it was *"nonetheless a commercial transaction of a largely private nature".*

30. It is clear, therefore, that the purpose of the Sealing Order was to protect and preserve the integrity of the sales process, which was commercially sensitive at that time, from the general public. The purpose was not to prohibit the JRMs from using and deploying information that had come into their possession, as JRMs and as agents of the Baha Mar Companies, but which had been necessary to exhibit to [the Raymond Winder Affidavit] for the purposes of obtaining the sanction and the directions of this Court to the JRMs' strategy. This strategy had been developed and worked on over many months in order to obtain the best price reasonably obtainable for the Baha Mar Project and other assets charged to CEXIM. Importantly, also, the purpose of the Sealing Order was not to protect a claim by BMLPL to joint privilege to the Construction Opinions comprised in Exhibit RW-21. At the time of the Sealing Order BMLPL had not notified or even indicated to the JRMs that it had any claim to joint privilege with BML in the Construction Opinions. BMLPL first made its claim of joint privilege over the Construction Opinions in Sheridan 1 filed on 28th January 2019 in response to the JRMs' Summons dated 18th April 2018. Further, BMLPL's first suggestion of a claim to joint privilege over the Reports was contained in Glaser Weil's letter of 16th August 2019.

21. The Order was simply a sealing order prohibiting public access to the Court's file in respect of this singular exhibit in the third Raymond Winder Affidavit: Exhibit RW-21. A good discussion of the nature of a sealing order, is seen in the Ontario Superior Court decision in ***Maria Konstan et al v. Samuel Berkovits et al 2016 ONSC 7958.*** In that case Berkovits had come into possession of documents related to sealed matrimonial proceedings. ***Myers J*** stated, at paragraphs [8] and [9] of his ruling:

> [8] It is important to distinguish between a sealing order and a publication ban or other injunctive relief. A sealing order simply prevents the public from obtaining access to documents contained in a court file to which they would otherwise have access upon paying the prescribed fee. The order was not made on notice to the press. It does not prohibit dissemination of information about the lawsuit. It does not impose confidentiality obligations on any person. A sealing order is just what it says – a sealing of the court file.
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> [9] If sealed documents were obtained from the court's files, a breach of the sealing order occurred. If the documents were obtained surreptitiously from the parties or their lawyers' offices, criminal misconduct may have occurred. But there are also innocent explanations for how Mr. Berkovits came into possession of the documents. For example, they may have been disclosed by Mr. or Mrs. Gerstel either to Mr. Berkovits or to someone else who gave them to Mr. Berkovits. The sealing order is not necessarily relevant at all to whether Mr. Berkovits is entitled to possess or to use the documents that he says he has.

22. I fully accept that the legal position, as stated by ***Myers J*** above, reflects the general position in The Bahamas with respect to the sealing order made by me in this case on 22 August 2016 and allowed to continue on 1 May 2019. A sealing order is just what it says – a sealing of the court's file and is not necessarily relevant at all to whether CCA is entitled to possess or to use the Opinions that they have apparently now obtained. The evidence seems clear that the material was not obtained from accessing the Court's file at all but from Chan who had access to the Opinions through his directorship (past or present) with Asset SPV and PLIL.

23. Both CCA and BMPL have issued Summonses seeking relief in this action. Both seek to have this Court grant declaratory relief in their favour. I am not satisfied that any of the declarations sought by them are appropriate to be made in the circumstances of this case where the receivership is, but for this issue, effectively at an end. These Summonses require the making of substantive findings in their favor where neither of them have issued any originating process in this jurisdiction. They have merely

issued interlocutory applications seeking what amounts to final declarations, in an action which neither of them are parties. Whilst they certainly each have a right to be heard, as they were invited to make representation at the March 2019 hearing, it does not, in my view, create a right to make applications for substantive relief.

24. In any event, the grant of declaratory relief is discretionary and I am cognizant that outstanding issues, such as the determination of whether BMPL has joint ownership of BML's LPP, remain live and awaiting determination in the NY Action. The New York Court, having assumed jurisdiction, I ought not to complicate matters by making findings in this receivership action, especially where such findings do not have any impact on this action. The New York Court is quite capable of making its own findings in its litigation. In this receivership action there is no *lis* between the contending parties to the NY action, i.e. BMPL and CCA. More importantly, neither BMPL nor CCA have any interest in the receivership.

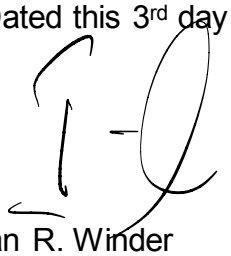
25. BMPL accepted, in its presentation before me, that the JRMs did not know that Chan made the disclosure and further, that Chan was not authorized by the JRMs. It was also accepted that Counsel who appeared before me on 25 March 2019 for both the JRMs and CCA were unaware that the disclosure had been made by Chan. It would follow therefore that Chan could not have been acting, at the time, on any authority of the JRMs, but rather on a frolic of his own or upon some other authority outside of the JRMs.

26. What does trouble me, however, is the actions of CCA. CCA received the documents on 25 March 2019 from Chan and its U.S. lawyers received the documents on 4 April 2019. Whilst their Bahamian lawyers who appeared before me at the hearing on 26 March 2019 were unaware that the information had been disclosed it is unacceptable that CCA said nothing to the court about its already having acquired the Opinions which were the subject of the application. That information was not provided to me, either at the hearing on 26 March 2019 or prior to my delivery of the ruling on 1 May 2019. Had I not found that CCA lacked proper standing, this conduct would have

been an additional matter which would have impeded any decision to exercise my discretion to grant declaratory relief in its favor.

27. In the circumstances, I am grateful for the update provided by the JRMs. For the reasons stated, I will not make any of the declarations sought by any party. I also make no order for costs in the circumstances.

Dated this 3rd day of November 2020



Ian R. Winder
Justice