Neutral Citation Number: [2023] EWHC 74 (Ch)

Case No: BR-2022-000408

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF HO WAN KWOK
AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 20 January 2023

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PARFITT

- -

Between :

LUC A. DESPINS
(AS FOREIGN REPRESENTATIVE OF HO WAN KWOK)

Applicant

- and –

HO WAN KWOK

Respondent

-and-

(1) HARCUS PARKER LIMITED
(2) DAWN STATE LIMITED
(3) ACE DECADE HOLDINGS LIMITED

Interested Parties

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- -

Paul Wright (instructed by **Paul Hastings (Europe) LLP**) for the **Applicant**
Daniel Lewis (instructed by **Wedlake Bell LLP**) for **3rd Interested Party**
The Respondent and the 2nd Interested Party did not appear and were not represented

Harcus Parker Limited appeared but were not represented

Hearing dates: 20 December 2022

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JUDGMENT

Deputy Insolvency and Companies Court Judge Parfitt:

1. This is an application by Luc A. Despins (the "Applicant"), who is the foreign representative of the Respondent, Ho Wan Kwok (the "Respondent"). The application seeks recognition under the Cross-Border Insolvency Regulations 2006 (the "CBIR"), as foreign main proceedings, of the Chapter 11 bankruptcy case concerning the Respondent in the US Bankruptcy Court, District of Connecticut, Bridgepoint Division (the "US Bankruptcy Court").

2. The application also seeks an order that various documents are provided to the Applicant by Harcus Parker Limited ("Harcus Parker"). Harcus Parker are the solicitors acting in litigation before the High Court in England (the "English Proceedings") in which the claimants are the Respondent and two BVI companies, Ace Decade Holdings Limited and Dawn State Limited (respectively, "Ace Decade" and "Dawn State"). The defendant in the English Proceedings is UBS AG (and its London branch). Harcus Parker, Ace Decade and Dawn State have been joined as interested parties to this application, and I have heard counsel for Ace Decade. The solicitor with conduct of the English proceedings at Harcus Parker was present in court and briefly addressed me on certain practical questions about the English Proceedings and the impact on those proceedings of any order I might make.

3. The quantum of the English Proceedings is around $500m. It is at a relatively early stage. UBS brought a preliminary jurisdiction challenge which was dismissed by Mrs Justice Cockerill on 9 February 2022. UBS appealed that order on 18 March 2022. The hearing of the appeal was originally listed for October 2022, but was adjourned. The appeal is presently listed in the Court of Appeal on 8 or 9 February 2023.

4. The Applicant presently has no information concerning the English Proceedings, despite it not being in dispute that the Respondent's interest in those proceedings has vested in the Applicant. The Applicant wants to be provided with documents in order to consider the merits of the claim before determining whether he wants to intervene, and to be able to instruct any legal representatives in advance of the appeal hearing. The English Proceedings may be a very valuable asset which can be realised for the benefit of the Respondent's creditors, although conversely the estate may be exposed to an adverse costs order if the Applicant intervenes. The Applicant has no primary knowledge of the underlying facts. The relevant documents are in the hands of Harcus Parker and the Respondent has not provided the Applicant with the documents at this stage. There is a certain degree of urgency in relation to the present application so that the Applicant will have sufficient time to consider any documents before the hearing of the appeal in February 2023.

5. The application also originally sought an order providing the Applicant with various powers, but this was not pursued before me. The Applicant merely seeks liberty to apply so that a further application can be made in the future if thought necessary.

The background

6. On 15 February 2022 the Respondent petitioned for his own bankruptcy pursuant to chapter 11 of the US Bankruptcy Code.

7. On 19 March 2022 the US Trustee applied to the US Bankruptcy Court for an order appointing a trustee. That application was granted on 15 June 2022 and the US Trustee was directed to appoint a trustee in the Chapter 11 proceedings.

8. On 7 July 2022 the US Trustee applied for an order appointing the Applicant as the Respondent's Chapter 11 trustee.

9. In connection with that application, the Applicant made a declaration of disinterestedness. The Applicant is a partner of Paul Hastings LLP ("Paul Hastings"), an international law firm with offices across the United States, Asia and Europe.

10. Among the statements made in the declaration of disinterestedness was that Paul Hastings had represented UBS AG (London Branch) in an unrelated matter which ended in November 2021, and continues to represent various UBS entities on other unrelated matters, largely involving advice related to capital markets and leveraged finance transactions. The Applicant states that he has never represented any UBS entity, that he is able to be adverse to UBS AG and to be the named plaintiff, as Chapter 11 Trustee, in any lawsuit against UBS AG.

11. On 8 July 2022 the Applicant was appointed as trustee by the US Bankruptcy court.

12. On 15 July 2022 the Respondent filed a motion objecting to the appointment. The reasons include that Paul Hastings had previously represented "multiple parties related to the debtor's largest creditor and zealous adversary, Pacific Alliance Asia Opportunity Fund" and that Paul Hastings had a 'significant relationship' with the Chinese government owing to it having offices there and doing significant business there. On 1 August 2022 the motion was dismissed, apparently on technical rather than substantive grounds. The court's order nevertheless confirmed that no substantive grounds existed.

13. That part of the order was appealed by the Respondent on 9 August 2022, an appeal which remains outstanding. There is no stay pending the resolution of the appeal.

14. On 12 July 2022 the Applicant applied to the US Bankruptcy Court for an order authorising the instruction of Paul Hastings.

15. On 27 July 2022 the Respondent filed a notice of objection. He put forward the same grounds as those on which he had objected to appointment of the Applicant, adding that Paul Hastings had acted for UBS entities on various matters.

16. On 4 August 2022 the US Bankruptcy Court considered the application and dismissed it. No appeal has been brought. During the course of those proceedings, the Applicant gave an assurance in answer to a question raised by the court that Paul Hastings would not "handle" the English Proceedings. This was described before me as a "carve out" and the Applicant accepts that he is bound by it. It appears from the transcript of the proceedings before the US Bankruptcy Court that this carve out may have rested on a misunderstanding of

the role of barristers in English litigation, with the carve out being offered because barristers would be handling the English Proceedings as opposed to a firm such as Paul Hastings. Even so, the Applicant did not seek to resile from the carve out on the present application. If the Applicant wishes to participate in the English Proceedings, he will need to instruct a firm of solicitors other than Paul Hastings.

17. On 27 July 2022 the Applicant made another application to the US Bankruptcy Court seeking various forms of declaratory relief. The Respondent filed evidence in opposition.

18. Meanwhile, the Applicant wrote to Harcus Parker, which as described above is the firm instructed by the three claimants in the English Proceedings, seeking documents to discover more about the nature and merits of those proceedings. Harcus Parker refused without the Respondent's consent in writing.

19. The Applicant then amended the 27 July 2022 application to seek relief requiring such a letter to be sent. The Respondent objected, on a number of grounds. Two were most important for the present application before this court – that there had been no recognition of the Applicant in the UK, and the request might violate privilege as a matter of English law.

20. On 10 August 2022 the US Bankruptcy Court granted the relief sought by the trustee.

21. The Respondent has appealed, and sought to stay the part of the order requiring him to send the letter the Harcus Parker. No other part of the order was the subject of a stay application. The stay application was heard on 30 August 2022

but at the time of the hearing before this court on 20 December 2022 had not yet determined.

22. The Applicant has brought contempt proceedings in the US relating to the Respondent's failure to comply with the terms of the declaratory order, insofar as it relates to transfer of the debtor's shares in Ace Decade to the trustee. The extent of the Respondent's ownership of Ace Decade and Dawn State appears to be in dispute, although the US Bankruptcy Court has made findings about it. In any event, it is not necessary on this application to make any findings about the ownership position.

The present application

23. As described above, the present application is for recognition of the foreign proceedings in the US Bankruptcy Court, and for disclosure.

Recognition

24. The Applicant's recognition application is unopposed. I indicated at the end of the hearing on 20 December 2022 that I was satisfied that this was an appropriate case for recognising the foreign proceeding. I set out below, in brief, my reasons for reaching this conclusion. As it was described by Warren J in *Re Transfield ER Cape Ltd* [2010] EWHC 2851 (Ch) at [1], "the court's function on recognition is something of a 'tick box' exercise". It is nevertheless necessary to ensure that all the boxes are ticked.

25. The application is brought under the CBIR, which incorporate the UNCITRAL Model Law (the "Model Law") at Schedule 1.

26. Article 17(1) of the Model Law provides:

> *"Subject to article 6, a foreign proceeding shall be recognised if–*
>
> *(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;*
>
> *(b) the foreign representative applying for recognition is a person or body within the meaning of subparagraph (j) of article 2;*
>
> *(c) the application meets the requirements of paragraphs 2 and 3 of article 15; and*
>
> *(d) the application has been submitted to the court referred to in article 4."*

I deal with each of these four requirements in turn below.

27. As to Article 17(1)(a), Article 2(i) defines a 'foreign proceeding' as:

> *"a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."*

28. The Applicant has provided me with multiple authorities in which US Chapter 11 proceedings were held to constitute a foreign proceeding for the purposes of the model law including *Rubin v Eurofinance SA* [2011] Ch 133, *Re 19 Entertainment Ltd* [2016] EWHC 1545 (Ch), *Re Videology Ltd* [2018] EWHC

2186 (Ch) and *Re Astora Women's Health LLC* [2022] EWHC 2412 (Ch). I accept that the present proceedings are a foreign proceeding on that basis.

29. As to Article 17(1)(b), Article 2(j) of the Model Law defines 'foreign representative' as:

> *"a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."*

30. I am satisfied that the Applicant fits this description. It is true that there is an appeal against his appointment, but as the Applicant says, this is an appeal against his identity and not his office. Further, there has been no stay pending that appeal. I have been referred to the Southern District of New York bankruptcy case of *In Re Gerova Financial Group Ltd* 282 B.R. 86 (Bankr. S.D.N.Y. 2012), in which the court continued to recognise a Bermudan insolvency despite an appeal then pending: the court took comfort from the fact that, should the commencement order be reversed on appeal, the foreign representative would be under a duty to inform the court promptly (article 18 of the Model Law) and the recognition order could be revisited by the court (article 17(4) of the Model Law). I draw similar comfort in the present case from that likely outcome.

31. As to Article 17(1)(c), the requirements of paragraphs 2 and 3 of article 15 of the Model Law are satisfied:

(a) The Applicant has provided certified copies and given evidence concerning the decisions commencing the foreign proceeding and appointing him as the foreign representative by his first affidavit.

(b) This first affidavit of the Applicant confirms at paragraph 19 that there are no other foreign proceedings, proceedings under British insolvency law or section 426 requests in respect of the Debtor that are known to him.

32. As to Article 17(1)(d), the Chancery Division of the High Court of Justice has jurisdiction to make an order for recognition of foreign insolvency proceedings if the debtor has (i) a place of business, (ii) a place of residence, or (iii) assets, situated in England and Wales, or the court considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested (according to Article 4.2 of the Model Law).

33. In this case, the Respondent has assets situated in England and Wales, namely the English Litigation commenced in the High Court. As such, the present application has been lodged in the competent court pursuant to article 4 of the Model Law.

34. Finally, counsel for the Applicant drew my attention to Article 6 of the Model Law, which provides that:

"[n]othing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it."

35. The only public policy consideration raised relates to the position of the Applicant as a partner in Paul Hastings, and that firm's supposed significant relationship with the People's Republic of China.

36. This argument has already been tested in the US Bankruptcy Court, and failed. While this court is required to consider the issue in a different context, that outcome indicates the likely force of the point. In the present application, there is no specific allegation that the Applicant is acting in the interests of China rather than fulfilling his duties. The concern seems to be based on nothing more than Paul Hastings having offices in China and taking instructions from Chinese companies. Those matters are not enough to mean that it is contrary to public policy to recognise these proceedings.

37. There is a further minor issue, which is the automatic stay of proceedings under Article 20 of the Model Law. I am satisfied that it is appropriate to carve out the English Proceedings from any automatic stay, and to allow them to continue.

38. Since the Respondent's place of habitual residence is the United States, the US proceedings are to be recognised as main proceedings.

Disclosure

39. The focus of this hearing was whether Harcus Parker should be ordered to disclose their file relating to the English Proceedings to the Applicant. The basis on which this relief is sought is Articles 21(1)(d) and (g) of the Model Law, and sections 311, 312 and 366 of the Insolvency Act 1986 ("IA86").

40. The Articles of the Model Law provide:

> *"21(1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—…*
>
> > *"(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;…*
> >
> > *"(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986."*

41. The reference to "any additional relief" in Article 21(1)(g) includes an order pursuant to sections 311 and 366 IA86. Section 311 IA86 provides that a trustee in bankruptcy shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or control (including any which would be privileged from disclosure in any proceedings). Section 312 IA86 requires the bankrupt to surrender control of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession. Section 366 IA86 provides a power, inter alia, to require a person who appears to be able to give information concerning a bankrupt's dealings, affairs or property to produce any documents in his possession or under his control relating to the bankrupt's dealings, affairs or property.

42. In the context of the recognition of a foreign proceeding under CBIR, the court has a discretion whether to exercise the powers under these provisions. The discretion is to be exercised where it is "necessary" to protect the assets of the debtor or the interests of creditors. This question was dealt with only briefly in argument since the answer is clear. Subject to questions of privilege and conflict of interest discussed below, I would be satisfied that it is appropriate to exercise my discretion to require Harcus Parker to provide the documents sought by the Applicant. There is no dispute that the Respondent's interest in the English Proceedings has vested in the Applicant, and the English Proceedings may represent a very substantial asset of the Respondent. Alternatively, participation by the Applicant in the English Proceedings without full knowledge of the underlying documents risks the interests of creditors, since it will expose the Respondent's estate to a risk of adverse costs. On that basis, it is necessary to require Harcus Parker to provide the documents sought to the Applicant.

43. Ace Decade's primary concern relates to privilege. It says that almost all of the documents sought are subject to Ace Decade's privilege: where that privilege is Ace Decade's sole privilege, no disclosure should be ordered, and where that privilege is joint privilege with the Respondent, Ace Decade should be entitled to assert privilege against the Applicant since, it is said, he is not the holder of the Respondent's privilege.

44. The Applicant accepts that there should be no disclosure of material which is subject to Ace Decade's sole privilege. It is not presently clear whether there is any such material, but if there were to be, it would be beyond the scope of the disclosure which ought to be ordered. The order can be drafted so as to exclude

this category of material. I was informed by the solicitor at Harcus Parker that there are certain matters on its file which do not relate to the English Proceedings, such as separate proceedings in New York. Such documents can be excluded from any order on the present application by way of drafting.

45. As to joint privilege, the Respondent, Ace Decade and Dawn State have instructed Harcus Parker to act for them on a joint retainer. Where a law firm represents a number of clients pursuant to a joint retainer, each of the clients has a joint interest in relation to any privileged communications or advice irrespective of to whom it is addressed. In *The Sagheera* [1997] 1 Lloyd's Rep 160 at 165-166, Rix LJ said as follows:

> *"Parties who grant a joint retainer to solicitors of course retain no confidence against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone."*

46. This principle was applied by Tom Leech QC (then sitting as a Deputy Judge) in *Barrowfen Properties v Patel* [2020] EWHC 2536 (Ch) at paragraphs 29-30:

> *"29. Where a firm of solicitors is retained under a joint retainer, neither client may assert LPP as against the other in relation to any documents passing between themselves and the solicitor: see The Sagheera [1997] 1 Lloyd's Rep 160 at 165-166. In BBGP Managing General Partner Ltd v Babcock & Brown Global Partners [2011] Ch 296 Norris J also stated as follows (at [51]):*

> *"I consider that the authorities establish that where a solicitor accepts a joint retainer from parties with potentially conflicting interests one client cannot insist as against the other that legal professional privilege attaches to any of what passes between the solicitor and that client during the currency and in the course of the retainer:…"*

30. The default position should be, therefore, that Barrowfen ought to be entitled to disclosure and production of all privileged documents created by S&B in the course of any joint retainer from Barrowfen and Girish and S&B are not entitled to withhold or redact those documents on grounds of privilege…"

47. Accordingly, it was rightly submitted by the Applicant that a joint client has an unequivocal right to inspect any document subject to that joint privilege. This means that the documents relating to the English Proceedings held by Harcus Parker are within the Respondent's possession or control as a joint client even though there are other parties entitled to assert privilege over them. The documents therefore fall within the scope of sections 311 and 366 IA86.

48. Ace Decade submitted that the Applicant, as the Chapter 11 Trustee of the Respondent, did not enjoy the same rights as the Respondent in relation to this material. The Applicant did not dispute this proposition, which was based on the cases of *Shlosberg v Avonwick Holdings* [2017] Ch 210 and *Leeds v Lemos* [2018] Ch 81.

49. In *Shlosberg*, the Master of the Rolls said as follows (at [63]):

> *"I consider it clear that, on the proper interpretation of the relevant provisions of the 1986 Act, privilege is not property of a bankrupt which automatically vests in the trustee in bankruptcy. Following the Morgan*

> *Grenfell case [2003] 1 AC 563 and the Simms case [2000] 2 AC 115, the bankrupt can only be deprived of privilege if the 1986 Act expressly so provides or it is a necessary implication of the express language of its provisions. The only provisions relied on by the Trustees in the present case on this aspect are the definitions of "property" in section 436(1) and the treatment of a "power over or in respect of property" in section 283(4), in conjunction with the general provisions of section 283 and 306 for the automatic vesting in the trustee of the bankrupt's property comprised in his estate. All those provisions are in general terms. They do not expressly treat privilege as property of the bankrupt which automatically transfers from the bankrupt to the trustee. Nor is that a necessary implication of the provisions."*

50. Later in the judgment, addressing an argument that section 311 IA86 permitted a trustee in bankruptcy to deploy material obtained under that section in such a way as to waive privilege, the Master of the Rolls said at [69]-[71]:

> *69. The submission has a practical attraction. Indeed, Mr Marshall accepted that the trustee can use privileged documentation and the information contained in it for the statutory purpose of getting in and realising the bankrupt's estate. He submitted, and the judge concluded, however, that the trustee can only use such documentation and information in a way that would not amount to a waiver of privilege. I agree.*
>
> *70. The applicable principles are, once again, those stated in the Derby Magistrates case, the Simms case and the Morgan Grenfell case, keeping in focus the status of privilege as a fundamental right. The express terms*

of section 311(1) describe the duty of the trustee to take possession of the documents mentioned there. It says nothing about their use by the trustee. It is necessarily implicit in section 311(1) , however, that the trustee is to take possession of the documents for the overriding function of getting in, realising and distributing the bankrupt's estate. It follows that the trustee must, at the least, be entitled to look at the documents to obtain information relevant to those matters. That is, of itself, a valuable advantage in the fulfilment of the trustee's statutory function.

71. It is not, however, necessarily implicit that the trustee can waive the bankrupt's legal professional privilege in taking steps against third parties for the benefit of the bankrupt's estate, desirable as that might be from the point of view of the creditors. Echoing the words of Lord Hobhouse in the Morgan Grenfell case quoted above at para 49, the fact that it would have been sensible or reasonable for Parliament to have included such a power does not mean that it is necessarily implicit having regard to the express language of the statute."

51. At [76], the Master of the Rolls continued:

"76. Further, it is relevant on this aspect of the appeal, and works against Avonwick's submission on section 311(1) , that the subsection is not limited to documents which belong to the bankrupt. It extends to documents belonging to others but which are in the bankrupt's possession or under his control. It has not been suggested that the words in parenthesis in section 311(1) do not apply to such third party documents. There can be no argument, however, that section 311(1) necessarily implies that the trustee

could deploy those documents in a way which would waive the privilege of those third parties."

52. In summary, therefore, section 311 IA86 gives a trustee in bankruptcy a power to see and consider documents over which the bankrupt or a third party would be entitled to assert privilege, but the trustee does not himself obtain that privilege or the right to use the material in such a way that privilege would be waived. As HHJ Hodge QC put it in *Leeds v Lemos* at [233], merely because privilege is held by a bankrupt, the trustee does not "automatically step into his shoes".

53. Accordingly, I accept that the Applicant does not enjoy the same rights in relation to the privileged material as the Respondent. It follows that the Applicant is not in the same position as a client with a joint retainer.

54. Both sides referred me to the decision of Stanley Burnton QC (then sitting as a Deputy Judge) in *Re Ouvaroff (a bankrupt)* [1997] BPIR 712. In this case, it was held that section 366 IA86 did not override a third party's right to assert legal professional privilege as a ground for refusing to deliver up documents although, on the facts, such privilege had been waived by the third party's lawyers who provided the documents to the trustee. This was not a case of a joint retainer, so it has limited application to the present case. The relevant passage is at page 720, with emphasis added:

"In the absence of authority, I should have no hesitation in holding that s. 366 does not override privilege so as to entitle a trustee to an order for the disclosure of information or documents of <u>someone other than the bankrupt</u> which is the subject of legal professional privilege. It follows that the

section does not justify a demand by a trustee of the legally privileged and confidential documents of someone other than the bankrupt."

55. Dawn State and Ace Decade's right to assert privilege is one they share with the Respondent as joint clients of Harcus Parker. Since Dawn State and Ace Decade cannot assert privilege against the Respondent so as to prevent the Respondent having possession or control of the privileged information, they cannot use privilege to resist an application under s. 311 IA86 by the Respondent's trustee in bankruptcy seeking sight of that material. This is the effect of the analysis of s. 311(1) IA86 at paragraph [76] of the Master of the Rolls' judgment in *Shlosberg*, set out above in the context of a joint retainer.

56. Privilege is thus not a bar to the grant of the relief being sought by the Applicant. The position would be different if the Applicant intended to deal with the documents inconsistently with the other parties' privilege, but the Applicant has now made it clear (in his first affidavit in support of this application) that he does not want to waive privilege in the documents he is seeking. He simply wishes to review them to decide what to do in relation to the English Proceedings. If in due course the Applicant wishes to waive privilege in relation to any such documents, the Applicant has undertaken to return to this court before doing so. During the course of submissions, the Applicant offered a further undertaking that the Applicant would not seek liberty to depart from the undertaking from the US Bankruptcy Court (as opposed to this court). In those circumstances, it seems to me that Ace Decade's concerns in relation to privilege are unfounded.

57. The Applicant's present position has not always been as clear as this. In particular, in a hearing before the US Bankruptcy Court on 4 August 2022 the Applicant said, in relation to a concern that he might waive the Respondent's privilege:

> *"…that's not an issue meaning, I didn't intend to do that anyways. But I thought it's always my privilege to waive. But my point is let's not get into those issues. The important thing is to get access to the files and understand the case, to get a full briefing."*

58. It should now be clear to the Applicant that, as a matter of English law, the Respondent's privilege is *not* his to waive. The undertaking offered to the court on the present application reflects that revised understanding. In those circumstances, I am satisfied that the undertaking to return to this court should the Applicant wish to waive such privilege is a sufficient protection against a unilateral waiver of the Respondent's privilege.

59. Ace Decade also has a concern regarding the Applicant's position as a partner of Paul Hastings, and the alleged conflict in respect of UBS. This is a matter which has already been dealt with by the US Bankruptcy Court, and is to be managed in this jurisdiction by way of the carve out described above.

60. Ace Decade described this as an unusual situation, with the Applicant having implicitly accepted the existence of a conflict of interest by offering the carve out. Ace Decade noted that the solicitors acting for the Applicant on the present application are Paul Hastings, in breach of the spirit if not the letter of the carve out (as Ace Decade put it). The Applicant's position is that the carve out was offered as a way to avoid having to deal with the issue, and there was no

acceptance that Paul Hastings was conflicted. As to the alleged breach of the spirit of the carve out, the Applicant submitted that Paul Hastings is on the record for this application alone, and not the English Proceedings. The application was not an application by Paul Hastings for sight of the documents, but an application by the Applicant as the Respondent's Chapter 11 Trustee. I was told that nobody at Paul Hastings apart from the Applicant will see the material which is to be provided by Harcus Parker.

61. I am satisfied that the carve out represents a sufficient protection for the Respondent, Ace Decade and Dawn State, and that the English court should adopt the same approach as the US Bankruptcy Court to the question of the Applicant's status as a partner in Paul Hastings. For those reasons I do not consider that the Applicant's position as a partner in Paul Hastings should prevent the Applicant from obtaining sight of the documents in relation to the English Proceedings.

62. Drawing all the factors together, I am persuaded that it is appropriate to exercise my discretion to require Harcus Parker to disclose its file relating to the English Proceedings to the Applicant. The Applicant's interest in seeing the documents, the benefits to the Respondent's estate, and the interests of his creditors all outweigh the risk that disclosure will harm the course of the English Proceedings. There are sufficient protections to ensure that the privilege of the claimants in the English Proceedings will be maintained.

Application to restrict the supply of documents from court records to a non-party

63. At the start of the hearing of the application in December 2022 I considered, and dismissed, an oral application by Ace Decade for the court to sit in private.

The concern giving rise to that application was that the proceedings might involve examining privileged material and thereby exposing it in open court. It did not seem to me that this concern was made out, and accordingly I proceeded to hear the application in open court.

64. However, it has subsequently transpired that among the exhibits to one of the witness statements filed on behalf of the Applicant were certain documents which ought not to have been filed as they were provided to the Applicant on confidential terms which restricted their use. Ace Decade sent me an email dated 12 January 2023 from the Respondent's US lawyers objecting to the deployment of this material. This has prompted an application by the Applicant dated 16 January 2023 seeking an order under CPR Rule 5.4C(d) that a non-party may not obtain a copy of the original exhibit, and permitting the Applicant to file a fresh version of the exhibit with the material removed. The evidence in support of the application also corrects two minor factual errors in the underlying witness statement which had been noted in the Respondent's US lawyers' email. The Applicant asked for this application to be determined without a hearing.

65. Ace Decade's skeleton and oral submissions in court complained in broad terms about the Applicant having exhibited this information, albeit at that stage the complaint was not put by reference to any breach of a specific restriction on the use of the material. Neither side referred in detail to the information itself, and there is no reference to it in this judgment. It is material of a private and confidential nature which was unnecessary for the determination of the primary application. It is not in the interests of justice for any further dispute to arise about the propriety of its inclusion in the exhibit, nor is there any public interest

in a non-party having access to this material. Given its irrelevance to the matters in issue, it does not seem to me to derogate from the principle of open justice to prevent access to the original exhibit and to permit a replacement to be lodged without the offending material.

66. In the circumstances, I will grant the relief sought, which will be incorporated into the final form of order following this judgment.

67. By a further email from Ace Decade's counsel on 18 January 2023 in response to the Applicant's 16 January 2023 application, Ace Decade seek to persuade me, when exercising my discretion whether to order disclosure of the documents relating to the English Proceedings, to take into account the Applicant's apparent failure to abide by the confidentiality obligations in relation to this material. Following receipt of this email, I have taken the apparent failure into account in relation to the outcome of the main application. I regard the balance still lies in favour of ordering disclosure. The protections offered by the Applicant and the value to the estate of obtaining sight of the documents outweighs the risk of improper use of the material.

68. I invite the parties to agree a form of order following this judgment.