

BRITISH VIRGIN ISLANDS COURT OF APPEAL

***Sheikh Mohamed Ali M Alhamrani Et Al -v-
Sheikh Abdullah Ali Alhamrani HCVAP
2012/26***

DISCOVERY - BVI APPEALS - DOCUMENTS
PASSING BETWEEN PARTY AND LEGAL ADVISERS
- WHETHER DOCUMENTS ARE PRIVILEGED -
CASE MANAGEMENT DISCRETION OF THE TRIAL
JUDGE - BASIS ON WHICH AN APPELLATE COURT
WILL INTERFERE

Seven brothers owned a BVI Company. A dispute arose between the six Appellants and the other brother which was settled by the single brother buying all shares in the Company. In the buy/sell process the Appellants received advice from a Lawyer engaged by the Company. The Respondent found these documents on the Company's computer equipment now owned by him. He wished to rely on such documents in the subsequent dispute as to ownership of the Company. The Appellants argued the terms of engagement with the Lawyer adapted over time to be his advice to them as shareholders and not the Company, and that such variation to the terms were authorised by them as directors. The trial Judge disagreed and found no privilege or confidentiality and ordered at the Case Management hearing that disclosure be made.

On a decision of the single Justice of Appeal delivered on 10 September 2012, the Court of Appeal dismissed an appeal from the Commercial Judge's decision. Justice Mitchell ruled that the Directors were under a duty to act *bona fide* and in the interests of the Company, and that was not the case where they took steps to have the Company hire a lawyer to advise one group of Shareholders alone. This was necessarily so when there was complete overlap of identity between the Shareholders and Directors. Further, that privilege can only attach to a confidential document and that there was no confidentiality because the lawyer knew the advice was being provided to a Company now owned by the Respondent, and that the Lawyer also knew the Respondent objected to the advice being provided to the Appellants when he was paying for that process.

The Court also held that the trial Judge was performing a case management function in which he was called on to exercise discretion in whether or not to allow discovery. Following the decision in *Dufour and Others -v- Helenair Corporation Ltd and Others* (1996) 52 WIR 188, the Court held that an appeal against a Judgment of a trial Judge in the exercise of a judicial discretion will not be allowed unless the Court is satisfied that: (1) in exercising his or her judicial discretion the Judge erred in principle by either failing to take into account or by taking into account or being influenced by irrelevant factors and considerations; and (2) that as a result of the error or the degree of the error in principle, his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly wrong.

The Appeal was determined days before the start of a six week trial on the underlying issue between the parties. The Appellants have asked for a review of the decision by the full court and that is to be determined on an expedited basis. It is not yet clear when that hearing will occur.

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