

## Article

### Piercing the Veil of Privilege: The Iniquity Exception

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**Conyers represented the successful respondent trustees in the recent Court of Appeal decision in *Wang, Ven Jiao v Grand View PTC & Ors* [2021] Civil Appeal No.4, in which the Court refused an application for leave to appeal against Kawaley AJ's refusal to permit the applicant to rely on otherwise privileged hearsay evidence.**

The applicant sought to rely on evidence of his wife's witness statement setting out her conversation with a witness for the respondent trustees regarding the pressure that he felt during the taking of his witness proof. The applicant also sought permission to ask interrogatories concerning the witness proofing process. The wife's statement contained evidence of statements made to her during the course of a telephone conversation with the witness in January 2021. The witness's evidence was said to be of relevance to the disputed mental state of one of the key figures in the proceedings when he signed a power of attorney.

As the witness's account of what happened during the proofing process was privileged, the applicant claimed that what had happened established a prima facie case of iniquitous conduct in the proofing process thereby enabling the applicant to pierce the veil of privilege. Kawaley AJ found that the evidence did not establish a prima facie case of iniquitous conduct. The applicant appealed on the basis that the Judge erred in concluding there was no iniquitous conduct, that he applied the incorrect test, was wrong to preclude the further investigation into the procedure for taking evidence and was wrong to preclude the applicant from relying on the wife's witness statement.

The Court of Appeal felt that it was first necessary to address the legal principles marking the distinction between witness training and (impermissible) witness coaching. It cited with approval the decision of the Singapore High Court in *Compania Navegacion Palomar SA v Ferdinand de la Sal* [2017] SGHC 14 in which it was said that guidance and familiarisation by reference to documents becomes coaching when it seeks to supplement the witness's true recollection with another version of events. The Court of Appeal resisted an absolute application of the reasoning in *R v Momodou* [2005] 2 All ER 571 to civil proceedings and indicated that each case turns on its own particular facts. In relation to the latter, the Court of Appeal cited *Day v Perisher Blue* [2005] NSWCA 110 a decision of the New South Wales Court of Appeal, in which the Court concluded that the subject law firm's real intention behind the collective conferencing with Perisher Blue's witnesses was to influence the witnesses into speaking with one accord. Applying these principles, the Court of Appeal rejected the contention that the mere presence of another witness during the witness proofing process automatically constituted iniquitous conduct.

To establish a prima facie case of iniquity the Court of Appeal confirmed that what was required was an assessment of the totality of the evidence that was before the Court. Citing the decision in *Z v Z* [2017] 4 WLR 84, it was emphasised that there required to be a balancing exercise between, on the one hand, the public interest in legal advice being privileged and, on the other hand, the public interest in not permitting privilege being used to shield fraudulent or other seriously wrongful misconduct. The Court of Appeal confirmed that the circumstances in which the "fraud exception" will apply must themselves be exceptional. The evidence required to establish a prima facie case must therefore be properly assessed so that privilege is not overborne by flimsy allegations of iniquity; the evidence of iniquity, assessed in its totality, must be sufficiently cogent for a claim to privilege to be defeated. The Court of Appeal found that Kawaley AJ had applied the correct test in this respect and found that his evaluation of the evidence before him had been such that there was no cause for interference with his discretion.

Bermuda has no statutory or professional rules governing the proofing and preparation of witnesses. The Bermuda Court of Appeal has confirmed that the English common law rules apply in Bermuda and that the legal professional privilege applying to the witness proofing and preparation process is not lightly to be abrogated.

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