CITATION: Sakab Saudi Holding Company et al. v. Saad Khalid S Al Jabri et al., 2024 ONSC 1601
COURT FILE NO.: CV-21-00655418-00CL
DATE: 20240318

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY~~,~~ and NEW DAWN CONTRACTING COMPANY ~~and SKY PRIME INVESTMENT COMPANY~~, Plaintiffs

AND:

SAAD KHALID S AL JABRI, DREAMS INTERNATIONAL ADVISORY SERVICES LTD., 1147848 B.C. LTD., NEW EAST (US) INC., NEW EAST 804 805 LLC, NEW EAST BACK BAY LLC, NEW EAST DC LLC, JAALIK CONTRACTING LTD., NADYAH SULAIMAN A AL JABBARI, personally and as litigation guardian for SULAIMAN SAAD KHALID AL JABRI, KHALID SAAD KHALID AL JABRI, MOHAMMED SAAD KH AL JABRI, NAIF SAAD KH AL JABRI, HISSAH SAAD KH AL JABRI, SALEH SAAD KHALID AL JABRI, ~~CANADIAN GROWTH INVESTMENTS LIMITED~~, ~~GRYPHON SECURE INC.~~, ~~INFOSEC GLOBAL INC.~~, QFIVE GLOBAL INVESTMENT INC., GOLDEN VALLEY MANAGEMENT LTD, ~~NEW SOUTH EAST PTE LTD.~~, TEN LEAVES MANAGEMENT LTD., ~~2767143 ONTARIO INC.~~, NAGY MOUSTAFA, HSBC TRUSTEE (C.I.) LIMITED, in its capacity as Trustee of the Black Stallion Trust, HSBC PRIVATE BANKING NOMINEE 3 (JERSEY) LIMITED, in its capacity as a Nominee Shareholder of Black Stallion Investments Limited, BLACK STALLION INVESTMENTS LIMITED, NEW EAST FAMILY FOUNDATION, NEW EAST INTERNATIONAL LIMITED, ~~NEW SOUTH EAST ESTABLISHMENT, NCOM INC.~~ and 2701644 ONTARIO INC. Defendants

BEFORE: Cavanagh J.

COUNSEL: *Munaf Mohamed KC, Jonathan G. Bell, and Ian W. Thompson*, for the Plaintiffs

John J. Adair, Jordan Katz, Sean Pierce and Logan St. John-Smith, for the Defendant Saad Aljabri

Andrew Max, for the defendant Mohammed Aljabri

HEARD: September 22, 2023

ENDORSEMENT

Introduction

[1] The plaintiffs move for an order:

a. compelling the defendant Mohammed Aljabri to answer undertakings and other questions from his examinations on August 31 and September 1-2, 2021;

b. requiring the defendant Saad Aljabri to produce trust ledgers from any law firm in respect of funds received from June 2017 to January 23, 2021 and from January 24, 2021 to present for legal purposes and for non-legal purposes; funds sent for non-legal purposes from June 2017 to January 23, 2021 and from January 24, 2021 to present; and funds currently held in trust on his behalf, solely with respect to certain specified information; and

c. requiring the defendant Mohammed Aljabri to produce trust ledgers from any law firm in respect of funds received from June 2017 to January 23, 2021 and from January 24, 2021 to present for legal purposes and for non-legal purposes; funds sent for non-legal purposes from June 2017 to January 23, 2021 and from January 24, 2021 to present; and funds currently held in trust on his behalf, solely with respect to certain specified information.

Analysis

[2] I first address the plaintiffs' motion for an order compelling production of trust ledgers.

Are trust ledgers protected from disclosure by solicitor-client privilege?

[3] The plaintiffs move to compel Dr. Aljabri to produce trust ledgers from any law firm in relation to:

i. Funds received from June 2017 to January 23, 2021 (1) for legal purposes; (2) for non-legal purposes;

ii. Funds received from January 24 2021 to present (1) for legal purposes; (2) for non-legal purposes;

iii. Funds sent for non-legal purposes (1) from June 2017 to January 23, 2021; (2) from January 24, 2021 to present; and

iv. Funds currently held in trust,

on his behalf, directly or indirectly, including by another person to be applied to Dr. Aljabri's benefit, solely with respect to:

(i) the quantum of the funds in the aggregate and/or for each transaction;

(ii) the date received and/or sent; and

(iii) the identity of the source or recipient of funds, including the name of the individual or entity that sent or received the funds, the name of the relevant institutions involved in the transactions, and the account numbers from which the funds came from or were sent to.

[4] The plaintiffs move to compel Mohammed Aljabri ("Mohammed") to produce trust ledgers from any law firm on the same basis.

[5] The plaintiffs submit that the requested records are relevant to compliance with and enforcement of the Aljabri *Mareva* Order and the Mohammed *Mareva* Order and are necessary to enable them to determine the nature, value and location of the assets of Dr. Aljabri and Mohammed. The plaintiffs submit that the transactions shown in the trust ledgers will not bear on communications made for the purpose of giving or receiving legal advice but will reflect the lawyers' trust accounts being used as a conduit for movement of funds in the same way as any other bank account.

[6] Dr. Aljabri opposes the motion on the ground that the trust ledgers are accounting records containing administrative information relating to the lawyer and client relationships between law firms and Dr. Aljabri or Mohammed that are presumptively protected from disclosure by solicitor-client privilege. Dr. Aljabri submits that the plaintiffs have failed to rebut the presumption of privilege.

[7] Mohammed supports and adopts the submissions made by Dr. Aljabri with respect to the assertion of solicitor-client privilege.

Are trust ledgers of law firms who represented Dr. Aljabri or Mohammed presumptively privileged?

[8] I first address whether the law firms' trust ledgers are presumptively protected from disclosure by solicitor-client privilege.

[9] The Supreme Court of Canada has held that solicitor-client privilege is a substantive right and a principle of fundamental justice. The obligation of confidentiality that springs from the right to solicitor-client privilege is necessary

for the preservation of a lawyer-client relationship that is based on trust, which is indispensable to the continued existence and effective operation of Canada's legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner. See *Canada (Attorney General) v. Thompson*, 2016 SCC 21, at para. 17.

[10] The plaintiffs submit that the trust ledgers they seek production of are not presumptively privileged. In support of this submission, the plaintiffs cite *Wong v. Luu*, 2015 BCCA 159.

[11] In *Wong*, the respondents were appointed trustees in foreign bankruptcy proceedings of the appellant bankrupt. They sought an order requiring the appellant law firm to disclose certain accounting records, specifically, trust ledgers, relating to the bankrupt. The chambers judge held that the information sought by the trustees was not presumptively privileged.

[12] On appeal, the appellants argued, among other things, that the chambers judge erred in principle by ordering production of records which will permit a party to deduce, through a simple mathematical exercise, the amount of legal fees paid by a client, because this information intrudes upon privileged communications. The trustees argued that the distinction between evidence of facts and evidence of communications continues to have relevance and that evidence of objective facts is not presumptively privileged, but may be privileged if its disclosure would trench upon privilege where it affords insight into the communication between solicitor and client.

[13] The British Columbia Court of Appeal held, at para. 36, that the chambers judge was correct to say there is no presumption that the information in a solicitor's trust ledger is privileged. The Court held that the chambers judge, after considering whether the entries on the trust ledger would contain information ancillary to the provision of legal advice and concluding that it would not, rightly held that disclosure of a redacted trust ledger would not violate the client's right to communicate in confidence with his legal advisor.

[14] The Court held, at para. 39, that there is good reason not to extend the presumed privilege to the lawyer's trust ledger and noted that the entries in a trust account record the possession of and movement of funds which the client may be compelled to disclose. The Court held that insofar as the entries record the payment of funds to parties who do not owe a duty of confidence to the client, the client cannot have expected the fact of payment to remain confidential as between himself and his counsel. The Court held that in that case, no significant insight into the solicitor and client relationship is gained by the ordered disclosure of redacted trust records. The appeal in *Wong* was dismissed. Leave to appeal to the Supreme Court of Canada was denied: 2016 CarswellBC 185.

[15] The plaintiffs also rely on *R. v. Serfaty*, 2004 CarswellOnt 1871. In *Serfaty*, the Crown proposed to introduce into evidence documents seized pursuant to search

warrants from the offices of lawyers who previously represented certain of the accused. The accused objected to the admissibility of the evidence claiming that it is protected from disclosure by solicitor and client privilege. The documents included two directions and authorizations with respect to disbursements from funds held in trust and a trust statement. Molloy J. held that these documents are not privileged.

[16] In so concluding, Molloy J., at para. 50, relied on a decision of the Divisional Court in *Ontario Securities Commission v. Greymac Credit Corp*. (1983), 41 O.R. (2d) 328 which held that documents and information relating to payment of monies into and out of a solicitor's trust account are not privileged because they relate to questions of objective fact, independent of communications between the solicitor and client. Molloy J., at para. 54, held that this decision is a complete answer to the question before her and that transactions through the lawyer's trust account are not protected from disclosure by solicitor and client privilege.

[17] In response, Dr. Aljabri submits that the holding of the British Columbia Court of Appeal in *Wong* that a lawyer's trust ledger is not presumptively privileged is not the law of Ontario and does not accord with principles from later decisions of the Supreme Court of Canada. Dr. Aljabri submits that *Serfaty* is not a governing authority because the reasoning in that case does not accord with subsequent authority from the Supreme Court of Canada.

[18] Dr. Aljabri relies on the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, released with the Court's companion decision in *Thompson*. These decisions were released after *Wong* and *Serfaty*. In *Chambre notaires*, the Supreme Court of Canada, at paras. 72 -74, held:

> [72] It is well established that the accounting records of notaries and lawyers are inherently capable of containing information that is protected by professional secrecy. In *Descôteaux*, the Court quoted the following passage from John Henry Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, § 2292): "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure . . ." (pp. 872-73). In *Foster Wheeler*, the Court observed that "[i]t would be inaccurate to reduce the content of the obligation of confidentiality to opinions, advice or counsel given by lawyers to their clients" (para. 38). In *Maranda*, noting the importance of the information that can be extracted from particulars as seemingly neutral as the amount of the fees paid by a client, the Court concluded that "the fact consisting of the amount of the fees must be regarded, in itself, as information that is . . . protected" (para. 33). The Court thus acknowledged that, even where accounting information includes no description of work, it

> may in itself, if disclosed, reveal confidential and privileged information.
>
> [73] Whether a document or the information it contains is privileged depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her notary or lawyer. If lawyers' fees can reveal privileged information, it is difficult to see why this could not also be the case for accounting records. Such records will not always contain privileged information, of course, but the fact remains that they may contain some, so their disclosure could involve a breach of professional secrecy. This is sufficient for the purposes of our analysis.
>
> [74] From this perspective, it is important to note that clients' names may appear in accounting records that contain information about amounts received by and owed to a notary or a lawyer. In some cases, those names may be privileged, since the fact that a person has consulted a notary or a lawyer may reveal other confidential information about the person's personal life or legal problems (*Lavallee*, at para. 28; G. Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege" (1999), 47 Can. Tax J. 799, at pp. 805-6; Lederman, Bryant and Fuerst, at p. 939). Accounting records may also include a description of the mandate the notary or lawyer was given and for which a statement of account was submitted to the client. In other cases, the notary or lawyer may include numerous particulars about the work he or she performed, including the topic of the consultation with the client. Finally, a legal adviser might keep his or her books of account and other accounting records related to the statements of account sent to clients and the amounts owed by clients in such a way as to reveal certain aspects of the litigation strategy that was adopted in a given case.

[19] In *Thompson*, the Supreme Court of Canada, at para. 19, confirmed that the Court has rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege. The Supreme Court of Canada confirmed that while not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as bills of account) must be presumed to be privileged absent proof to the contrary. This rule applies regardless of the context in which solicitor-client privilege is invoked.

[20] Dr. Aljabri also relies on the decision of the Court of Appeal for Ontario in *Kaiser (Re)*, 2012 ONCA 838. In *Kaiser*, a trustee in bankruptcy sought disclosure of the identity of the person paying the bankrupt's legal fees on the theory that the bankrupt was using a third party as a "straw man" to hide assets that belonged to

the bankrupt and, therefore, were subject to the bankruptcy proceedings. The issue on appeal was whether a court may require that a bankrupt or the bankrupt's solicitor disclose the identity of the person paying the bankrupt's legal fees. Blair J.A., writing for the Court, was satisfied on the record before him that the identity of the person paying the bankrupt's legal fees (on a motion to remove a law firm as solicitors of record for the trustee) is protected by solicitor-client privilege and ought not to have been ordered disclosed.

[21] In *Kaiser*, Blair J.A., at para. 21, referred to the decision of LeBel J. in *Maranda v. Richer*, 2003 SCC 67 who held that administrative information relating to the establishment of a solicitor-client relationship – including a lawyer's bill and a client's ability to pay, and the source of the lawyer's fees – is presumptively privileged. The presumption may be rebutted by the party seeking disclosure. Blair J.A. reviewed jurisprudence from the Supreme Court of Canada, including in *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), *Maranda*, and *R. v. Cunningham*, [2010] 1 S.C.R. 331 and, at para. 30, held:

> From these developments in the jurisprudence, I take the law to be that administrative information relating to the solicitor-client relationship -- including the identity of the person paying the lawyer's bills -- is presumptively privileged.

[22] The plaintiffs submit that *Kaiser* is distinguishable because in *Kaiser* the lawyer was being asked to disclose something that they learned only through a file-opening discussion with the client. The plaintiffs say that here, where they seek production of records that exist independently of any solicitor-client communication or provision of legal advice, the same concerns do not hold because the information revealed by the trust ledgers (including the identity of the source of funds for payment of legal fees), even if it overlaps with something that may have been discussed in a solicitor-client communication, is not sourced from such a communication.

[23] I disagree that this is a valid point of distinction. The identity of the person paying the legal fees is presumptively privileged because disclosure of this information would reveal confidential communications between the lawyer and his client. In *Chambre des notaires*, the Supreme Court of Canada, at para. 73, held that whether a document or the information it contains is privileged depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her lawyer. The fact that the same presumptively privileged information given in a confidential communication between a lawyer and client may be found in the lawyer's records does not mean that the information in the records is not privileged.

[24] *Kaiser* is an Ontario decision. The decisions of the Supreme Court of Canada in *Thompson* and *Chambre des notaires* were released after the decisions in *Wong* and in *Serfaty*. In *Wong*, the British Columbia Court of Appeal relied on a previous decision of that Court in *Donell v. GJB Enterprises Inc*., 2012 BCCA 135 where

the Court held that *Maranda* does not erode or do away with the distinction between facts and communications, although the determination that the information sought is a fact does not bring an end to the analysis. In *Serfaty* the distinction between a fact and a communication was crucial to the decision of Molloy J.

[25] In *Thompson*, at para. 19, the Supreme Court of Canada, citing *Maranda*, confirmed that that Court has rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege. This is a basis to distinguish the decisions in *Wong* and *Serfaty*.

[26] The decisions in *Kaiser*, *Chambre des notaires*, and *Thompson* are authorities that stand for the proposition that a law firm's administrative information and accounting records relating to the solicitor and client relationship, including records showing the identity of persons paying the lawyer's bills, are presumptively privileged.

[27] I conclude that the trust ledgers of law firms which represent Dr. Aljabri and Mohammed and received funds in trust are accounting records that contain administrative information relating to the lawyer and client relationship and, therefore, they are presumptively protected from disclosure by solicitor-client privilege. The plaintiffs bear the onus of proving that disclosure of the requested information is not subject to solicitor-client privilege.

Have the plaintiffs rebutted the presumption?

[28] In *Kaiser*, the Court of Appeal, at para. 30, held:

> The presumption [of privilege] may be rebutted by evidence showing (a) that there is no reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications (Maranda, at para. 34; and Ontario (Assistant Information and Privacy Commissioner), at para. 9); or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client (Cunningham, at paras. 30-31).

[29] In *Kaiser*, at para. 31, Blair J.A. noted that the "confidential information" and the "merits/prejudice" lines of reasoning from *Maranda* and *Cunningham*, respectively, do not necessarily define the same body of information because not all information a client tells his lawyer in confidence will be relevant to the merits of the case for which the lawyer is retained.

[30] The plaintiffs submit that if the trust ledgers are presumptively privileged, they have met their onus of rebutting the presumption by showing that there is no reasonable possibility that disclosure of the aggregate information they seek will lead, directly or indirectly, to the revelation of confidential solicitor-client communications.

[31] The plaintiffs describe the information they seek from the trust ledgers as aggregate information. The plaintiffs do not seek disclosure of individual bills of accounts from law firms. Based on the plaintiffs' Fresh as Amended Notice of Motion, they seek information from the lawyers' trust ledgers of the quantum of funds in the aggregate and/or for each transaction and the date money was received and/or sent, as well as the identity of the source or recipient of funds. The requested information is for each transaction whereby funds were paid into or out of a law firm's trust account.

[32] The plaintiffs argue that the sourcing of funds paid to law firms representing Dr. Aljabri or Mohammed is unconnected to solicitor-client communications made for the purpose of giving and receiving legal advice. However, in *Kaiser*, Blair J.A., having held that the identity of the person paying the lawyer's legal fees is presumptively privileged, held, at para. 38, that disclosure of the source of payment of the lawyer's fees would reveal confidential communications between the lawyer and his client because the information about the source of payment would have been provided in the context of the lawyer's need to know how his fees will be paid in order to decide whether to act and, presumably, whether to continue to act. Blair J.A. held, citing *Maranda* and *Descôteaux*, that this information provided in order to obtain legal advice is given in confidence for that purpose and is, therefore, privileged.

[33] The analysis of the Court of Appeal in *Kaiser* applies to the plaintiffs' request for trust ledgers showing the source of funds provided to law firms representing Dr. Aljabri and Mohammed for payment of their fees. This information is presumptively privileged, and the plaintiffs have not rebutted the presumption.

[34] The plaintiffs submit that the destination of funds in lawyer's trust accounts will either be: (1) to third parties, in which case the law firm is simply acting as a conduit, rather than a provider of legal services; or (2) to pay the law firm's legal fees. In *Maranda*, at para. 30, the Supreme Court of Canada noted that not everything that happens in a solicitor-client relationship falls within the ambit of privileged communications as held in cases where it was found that counsel was acting simply as a conduit for transfers of funds. The plaintiffs submit that where a lawyer is simply acting as a conduit for transfers of funds, information concerning such transfers is not privileged.

[35] In *Maranda,* LeBel J., at para. 32, held that issues relating to the calculation and payment of fees constitute an important element of the solicitor-client relationship for both parties. LeBel J. held that the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. As such, that fact must be regarded, as a general rule, as one of its elements. LeBel J., at para. 33, held that the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege and that recognizing a presumption that such information falls within the privileged category will better ensure that the objectives of the privilege are achieved.

[36] The information in the trust ledgers would disclose the identities of law firms consulted by Dr. Aljabri and Mohammed and provide meaningful information about when they did so, information that is privileged.

[37] Disclosure of information in trust ledgers of amounts that were not used for payment of legal fees would necessarily result in disclosure of amounts used and held for payment of legal fees because even if the amounts used and held to pay legal fees were to be redacted, disclosure of the amounts used for legal purposes, information that is privileged, could be readily calculated.

[38] The plaintiffs submit that even if this calculation could be made, a balance needs to be struck between preventing disclosure of relevant information about payments of money out of trust for non-legal purposes (that may involve transfers of fraudulently misappropriated money) and protection of information from trust ledgers of amounts held in or paid from trust accounts for legal purposes such as payment of legal fees. I disagree. If disclosure of information from trust ledgers of payments for non-legal purposes would lead to disclosure of confidential information concerning amounts held and payments made for legal purposes, production of the trust ledgers, even if redacted, would disclose information that is privileged: *Maranda*, at paras. 32-33.

[39] The plaintiffs have failed to establish that there is no reasonable possibility that disclosure of information in the law firms' trust ledgers will lead, directly or indirectly, to the revelation of confidential solicitor-client communications.

[40] The plaintiffs have also failed to establish that the requested information is not linked to the merits of the case and that disclosure of the trust ledgers would not prejudice Dr. Aljabri and Mohammed.

[41] I conclude that the trust ledgers are presumptively protected from disclosure by solicitor-client privileged and that the plaintiffs have failed to rebut the presumption.

Does the "crime/fraud" exception apply?

[42] The plaintiffs submit that even if privilege otherwise attaches to the requested information, privilege does not attach to communications that have the purpose of furthering unlawful conduct.

[43] In support of this submission, the plaintiffs cite *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31. In *Pritchard*, at para.16, the Supreme Court of Canada cited *Solosky v. The Queen*, 1979 CanLII 9 where, at p. 835, the Court held that an exception to solicitor-client privilege is "where a client seeks guidance from a lawyer in order to facilitate the commission of a crime or fraud". In *Descôteaux*, at p. 873, the Supreme Court of Canada held that the relationship must be a professional one at the exact moment of the communication and that "[c]ommunications made in order to facilitate the commission of a crime or fraud

will not be confidential either, regardless of whether or not the lawyer is acting in good faith".

[44] The plaintiffs submit that the assertion of privilege over the trust ledgers is being used to conceal information that would show movement of funds that were fraudulently misappropriated from the plaintiffs. The plaintiffs submit that where the movement of such funds is in furtherance of a fraud perpetrated on them, the "crime/fraud" exception to solicitor-client privilege applies. The plaintiffs rely on the findings by Gilmore J. and Koehnen J. that the plaintiffs have shown a strong *prima facie* case that Dr. Aljabri fraudulently misappropriated money from them.

[45] The plaintiffs submit that the movement of those funds furthered unlawful conduct in two different way.

[46] First, the plaintiffs contend that the distribution and concealment of stolen assets by Dr. Aljabri and Mohammed is ongoing. The plaintiffs rely on the finding by Gilmore J. in her ruling on the jurisdiction motion, at para. 64, that Dr. Aljabri is "adept at moving money around the world" and that there is evidence to suggest that he continues to do so "in furtherance of the conspiracy". The plaintiffs contend that Mohammed has been complicit in the movement of those funds.

[47] Second, the plaintiffs contend that since the issuance of the Aljabri *Mareva* Order and the Mohammed *Mareva* Order, any movement of assets by Dr. Aljabri or Mohammed is in defiance of these orders.

[48] The plaintiffs do not allege any wrongdoing by the law firms whose trust accounts have been involved in flows of Dr. Aljabri's and Mohammed's funds. The exception applies regardless of whether or not the lawyer is acting in good faith and contemplates situations where the lawyer is "an unwitting dupe". See *Solosky*, at p. 835.

[49] In *Industrial Alliance Securities Inc. v. Kunicyn*, 2020 ONSC 3393, the Divisional Court, at paras. 26-29, set out the test for application of what the Court called the "future crimes and fraud" exception to solicitor-client privilege:

> [26] In *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, at pp. 882-83 S.C.R., the Supreme Court explained that confidential communications lose their confidential character to the extent that those communications were made to obtain legal advice for the purpose of committing a crime or if the communication itself is the material element of the crime. Such communications are injurious to the administration of justice and do not fall into the "ordinary scope of professional employment".
>
> [27] This is what has become known as the "future crimes/ fraud exception". As described by the Supreme Court in *Canada (Privacy Commissioner) v. Blood Tribe (Department of Health)*, 2008 SCC

> 44 (CanLII), [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 10, the exception is "extremely limited [in] nature", which serves to emphasize rather than dilute the general rule that solicitor-client privilege is to remain "[a]s close to absolute as possible to ensure public confidence and retain relevance".
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> [28] The parties agree that to establish the exception the party relying on the exception has the onus of demonstrating:
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> > (a) That the challenged communications relate to proposed future conduct;
> >
> > (b) The client must be seeking to advance conduct which they know or should know is unlawful; and
> >
> > (c) The wrongful act being contemplated must be clearly wrong (see, e.g., *McDermott v. McDermott*, [2013] B.C.J. No. 587, 2013 BCSC 534, at para. 75; *1784049 Ontario Ltd. v. Toronto (City)* (2010), 2010 ONSC 1204 (CanLII), 101 O.R. (3d) 505, [2010] O.J. No. 764, at para. 34).
>
> [29] In establishing these elements, the moving party is held to a *prima facie* case standard.

[50] In *Industrial Alliance*, the Divisional Court, at para. 40, held that the case law would appear to be divided on the question of whether the exception should be extended to include civil wrongs. The Divisional Court, at para. 49, held that there is no evidence that meets the *prima facie* standard that the communications were made in furtherance of a criminal or civil wrong.

[51] Dr. Aljabri and Mohammed rely on *Wintercorn v. Global Learning Group Inc*., 2022 ONSC 4576; motion for leave to appeal dismissed, 2023 ONSC 199, as authority for the principle that the “crime/fraud” exception does not apply to civil wrongs, including civil fraud.

[52] In *Wintercorn*, the plaintiffs in a class action moved for production of documents by defendants who were legal counsel for other defendants. In the action, the plaintiffs sued certain defendants, clients of the law firms, for fraud, conspiracy, unjust enrichment, fraudulent and negligent misrepresentation, among other claims. The law firms objected to production of the documents on the ground that the documents were protected from disclosure by solicitor-client privilege. The plaintiffs submitted that the “fraud exception” applied such that no solicitor-client privilege can attach to the documents in the client files.

[53] Gluestein J. held, citing *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, that the “fraud exception” applies only when the client engaged in fraud with or on the lawyer through impugned communications that were “criminal in themselves or intended to further criminal

purposes" and does not apply to civil wrongs. Gluestein J. referred to the decision of Binnie J. in *Blood Tribe* who relied on his earlier reasons in *R. v. Campbell*, 1999 CanLII 676 (SCC) in which, at para. 55, he described the fraud exception as "an exception to the principle of confidentiality of solicitor-client communications where those communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime". Gluestein J. referred to *Campbell*, at para. 57, where Binnie J. stated that the exception "can only apply where a client is knowingly pursuing a criminal purpose" [emphasis by Binnie J.].

[54] Gluestein J. held, at paras. 65-66:

> Consequently, it is the "criminal" object of the client that results in the fraud exception. The exception applies only if the client conspires with the lawyer or deceives the lawyer to advance the "future crime". Privilege is not destroyed merely because the act is later deemed improper or illegal. Solicitor-client privilege continues to protect good-faith consultations with lawyers where a client is not sure of the implications of a transaction or activity: *Campbell*, at para. 56.
>
> The restriction of the fraud exception to the "rare" and "extremely limited" circumstances of "communications criminal in themselves or intended to further criminal purposes" is consistent with the sanctity of solicitor-client privilege. To permit a party to access solicitor-client communications because a client is alleged to have deceived a lawyer with respect to a civil fraud or other unlawful civil conduct would significantly weaken the privilege. The "future crimes" requirement is an important limitation on the fraud exception which restricts its application to situations when a party can satisfy the Court, on the evidence, of a *prima facie* case that the *mens rea* requirement for communications intended to further criminal purposes can be met.

[55] Gluestein J. went on to cited Ontario decisions which, he held, followed the approach from *Blood Tribe* and *Campbell*. In *Carroll v. The Toronto-Dominion Bank*, 2022 ONSC 2395 Pattillo J. held that "[t]he exception can only apply where the client knowingly is pursuing a criminal purpose". In *Whitty v. Wells*, 2016 ONSC 7716, Myers J. held that "privilege is lost only for conversations that are 'criminal in themselves or intended to further criminal purposes'". I observe that the decisions in *Carroll* and *Whitty* involved alleged torts of maladministration of a trust, and misfeasance in public office and defamation, respectively, and did not involve the assertion of solicitor-client privilege in the context of a claim founded in civil fraud.

[56] Gluestein J. also addressed a submission made by the plaintiffs in that case who relied on the decision of the Divisional Court in *Industrial Alliance*. Gluestein J. concluded, citing *Industrial Alliance*, at para. 41, that the Divisional Court did not

reach a conclusion as to the scope of the fraud exception, but upheld the decision of the motion judge who, he wrote, held that the fraud exception should be limited to criminal conduct.

[57] The plaintiffs submit that *Wintercorn* was wrongly decided because Gluestein J. failed to follow governing appellate authority. The plaintiffs submit that I am bound by the appellate authority that Gluestein J. failed to follow and that *Wintercorn* should not be followed.

[58] In support of this submission, the plaintiffs note that in *Campbell*, Binnie J., when he addressed the "future crimes and fraud" exception, quoted with approval a passage from *Solosky v. The Queen*, [1980] 1 S.C.R. 821 in which Dickson J. (as he then was) explained the exception as applying if a client seeks guidance from a lawyer "in order to facilitate the commission of a crime or a fraud…". The plaintiffs submit that this passage should be read as including a civil fraud because, if it is not, the words "or a fraud" would be unnecessary and redundant. The plaintiffs note that Binnie J., at para. 55, refers with approval to an academic article in which, when explaining the exception, the authors describe the client's knowledge of "a crime or a tort". The plaintiffs refer to *Campbell*, at para. 59, where Binnie J. cited *O'Rourke v. Darbyshire*, [1920] A.C. 581 (H.L.), a civil case, where the exception included civil fraud. The plaintiffs submit that the statements made by Binnie J. in *Blood Tribe*, that followed his decision in *Campbell*, must be understood as including a civil fraud within the exception.

[59] The plaintiffs submit that Gluestein J. also failed to follow governing appellate authority because he failed to follow the decision of the Divisional Court in *Industrial Alliance*. The plaintiffs note that in *Industrial Alliance*, at para. 49, the Divisional Court wrote that "[f]or deceit to constitute a wrong, either criminal or civilly, the dishonest conduct must cause injury". The plaintiffs submit that the Divisional Court in *Industrial Alliance* should be read as accepting that the exception applies to deceit, a civil wrong. I disagree that the Divisional Court in *Industrial Alliance* so decided. The Divisional Court held, at para. 40, that the case law appears to be divided on the question of whether the exception should be extended to include civil wrongs and decided the appeal on the basis that there was no *prima facie* evidence to support the allegation that the wrongful conduct, a lie to the regulator, caused harm. The Divisional Court held, at para. 49, that the motion judge's conclusion that she was not prepared to invoke the narrow exception to a very important privilege was correct.

[60] The plaintiffs also rely on *Kaiser* where, at para. 38, Blair J.A. wrote that the privilege is lost if the party seeking disclosure can demonstrate that "the communication was itself criminal or fraudulent or made in furtherance of a crime or fraud". In *Kaiser*, Blair J.A. confirmed that the trustee did not seek to invoke the crime/fraud exception to force disclosure of the identity of the person who funded the client's legal costs. Blair J.A. was not called upon to analyze the exception or to decide the scope of the exception. For this reason, I do not regard the statement made by Blair J.A. to be a statement of governing law made by an appellate court.

[61] The plaintiffs submit that *Wintercorn* is distinguishable on three grounds.

[62] First, they submit that the holding of Gluestein J. that the exception does not apply to civil fraud is *obiter dicta* because this question was not before the court. I disagree. In *Wintercorn*, at para. 62, Gluestein J. noted that the plaintiffs had alleged civil fraud and they relied on the fraud exception. The question decided by Gluestein J. was before the court. This is not a valid point of distinction.

[63] Second, they submit that *Wintercorn* is distinguishable because the allegation of civil fraud was made in a pleading, which is not the case here. The fact that the allegation was made in a pleading does not change the issue decided by Gluestein J., that the exception does not apply to a civil wrong, including a civil fraud. This is not a valid point of distinction.

[64] Third, the plaintiffs submit that *Wintercorn* does not deal with communications in furtherance of breach of a court order which has a public dimension and may attract a quasi-criminal sanction through a finding of contempt of court. In *Warde v. Slatter Holdings Ltd*., 2016 BCCA 63, the British Columbia Court of Appeal, at para. 72, expressed doubt that the violation of the court order in that case (if established) is sufficient "wrongful conduct" for the exception to apply. In *Wintercorn*, Gluestein J. held that the exception only applies if the client conspires with the lawyer or deceives the lawyer to advance the "future crime". The plaintiffs have not shown that this is a valid point of distinction.

[65] I conclude that *Wintercorn* is authority for the principle that the "fraud exception" to solicitor-client privilege, as Gluestein J. described it, does not apply to civil wrongs, including civil fraud.

[66] In *R. Sullivan*, 2022 SCC 19, the Supreme Court of Canada held, at para. 75, that the principle of judicial comity as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed and that trial courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

a. The rationale of an earlier decision has been undermined by subsequent appellate decisions;

b. The earlier decision was reached *per incuriam* (through carelessness or by inadvertence); or

c. The earlier decision was not fully considered, e.g., taken in exigent circumstances.

[67] The decision in *Wintercorn* has not been undermined by subsequent appellate decisions. The appellate cases upon which the plaintiffs rely were decided before *Wintercorn*. The motion judge considered the appellate authorities in *Industrial Alliance*, *Blood Tribe* and *Campbell*, as well as other authorities. The decision in

Wintercorn was not reached *per incuriam*. The plaintiffs have not shown that decision in *Wintercorn* was not fully considered or taken in exigent circumstances.

[68] I conclude that under the principles of horizontal *stare decisis* as set out in *Sullivan*, I am bound by the decision in *Wintercorn*. I conclude that the exception to solicitor-client privilege does not apply on this motion because the plaintiffs' claim is based in civil fraud against Dr. Aljabri and Mohammed and, as held in *Wintercorn*, the exception does not apply to civil fraud.

Is Mohammed required to answer other questions from his asset examination?

[69] In their Fresh as Amended Notice of Motion, the plaintiffs move for:

a. An order compelling Mohammed to answer undertakings given during his examinations on August 31 and September 1-2, 2021;

b. An order, if necessary, compelling Mohammed to answer the partial undertakings given on these examinations;

c. An order compelling Mohammed to answer questions he refused to answer on the basis that they relate to allegations that are the subject of contempt proceedings brought by the plaintiffs;

d. An order compelling Mohammed to answer questions he refused on other bases (as set out in Appendix "2" of the plaintiffs' factum).

[70] With respect to undertakings, there was no dispute at the hearing of the motion that undertakings must be answered. The issue on this motion was the time for answers to be provided. If any undertakings remain unanswered, I may be spoken to at the next case conference.

[71] With respect to other questions, the plaintiffs organize their requests for answers to other questions asked of Mohammed into a number of categories. Some of these questions were objected to on the basis that there was an outstanding contempt motion and answers could not be compelled in the face of that motion. The contempt motion has been decided, so this is not a proper basis to object to production of documents. Other questions were objected to on the ground that the request was overly broad. Mohammed agreed to produce these documents, subject to redactions to protect privilege.

[72] The issue that remains in dispute is whether bank documents can be redacted to protect from disclosure information over which Dr. Aljabri and Mohammed assert solicitor-client privilege.

[73] The plaintiffs submit that bank statements which may contain information that is otherwise privileged must be disclosed without redaction. They cite *Maranda*, at para. 34, where LeBel J. held that when the Crown believes that disclosure of information subject to an application for a search warrant would not violate the

confidentiality of the relationship between the lawyer and client, it will be up to the Crown to make that allegation adequately in its application for a warrant for search and seizure. Lebel J. went on to write that, in addition, "certain information will be available from other sources, such as the client's bank where it retains the cheques or documents showing payment of the bills of account". I do not read this statement as holding that information in a client's bank records which is privileged loses the protection of privilege because it is included in bank records.

[74] Dr. Aljabri and Mohammed submit that where information such as the identities of law firms who they may have consulted, the amounts of legal fees paid to lawyers, and the identities of persons paying legal fees is subject to solicitor-client privilege, bank records, including bank statements, disclosing privileged information may properly be redacted to preserve the privilege.

[75] In support of this submission, Dr. Aljabri and Mohammed cite the decision of the British Columbia Court of Appeal in *Warde*. In *Warde*, the appellant company claimed that certain banking transactions were subject to solicitor-client privilege. The chambers judge accepted that solicitor-client privilege would ordinarily attach to cheques and related documents written for the purpose of obtaining legal advice, a finding that was not challenged on appeal. The chambers judge had held that any privilege that would otherwise apply was displaced because the cheques were written in violation of a court order and because by asserting that it was entitled to dispose of the funds in question for litigation purposes, the company waived any privilege that might otherwise have attached. On appeal, the British Columbia Court of Appeal held that the order had not been breached and there was no waiver of privilege. The Court set aside the finding that the privilege that attached to the cheques was displaced. The question before me was not decided in *Warde*, although the British Columbia Court of Appeal did not question the chambers judge's conclusion that solicitor-client privilege would ordinarily attach to cheques and related documents written for the purpose of obtaining legal advice. This conclusion supports the position taken by Dr. Aljabri and Mohammed.

[76] As I have noted in this endorsement, in *Chambre des notaires*, the Supreme Court of Canada held, at para. 73, that where a party claims privilege over information, whether a document or the information it contains is privileged depends on its content and on what it might reveal about the relationship and communications between a client and his or her lawyer. Whether the information or document is privileged does not depend on the type of document. By using a cheque or electronic bank payment to make payments to law firm, a client does not waive privilege over information that may be shown in banking records or statements. Information that is properly subject to solicitor-client privilege is not lost simply because the client makes payments to his lawyer using ordinary mechanisms facilitated by banks or other financial institutions. Any privileged information in bank records, including bank statements, remains privileged and protected from disclosure.

[77] Dr. Aljabri and Mohammed are not required to disclose, without redaction, otherwise privileged information in bank statements they produce.

Disposition

[78] For these reasons:

a. The plaintiffs' motion for an order compelling Dr. Aljabri and Mohammed to produce trust ledgers from law firms in dismissed.

b. The plaintiffs' motion to compel Mohammed to answer questions from his examinations on August 31 and September 1-2, 2021 is allowed in that (i) Mohammed is required to answer undertakings (if not already answered); (ii) Mohammed is required to answer questions that he refused to answer on the ground of relevance, subject to redactions to protect privilege.

[79] If the parties are unable to resolve costs, I may be spoken to.

Cavanagh J.

Date: March 18, 2024