

JERSEY / JUDGMENT

Deripaska v Chernukhin and Navigator Equities Limited

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[2021]JCA240 Court of Appeal (Samedi) 28 September 2021 Before : George Bompas, QC., Helen Mountfield, QC., and Jeremy Storey, QC. Between Oleg Vladimirovich Deripaska Appellant And

(1) Vladimir Anatolevich Chernukhin And

(2) Navigator Equities Limited Respondents Advocate D. M. Cadin for the Appellant. Advocate N. M. C. Santos-Costa for the Respondents. JUDGMENT ON APPLICATION FOR PERMISSION TO APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL mountfield JA: 1. On 31 August 2021, the Court of Appeal handed down judgment in an appeal against the decision of the learned Deputy Bailiff MacRae in which he refused an interlocutory application in these long-running proceedings for further disclosure of collateral privileged material, and in which he permitted the replacement of certain affidavits with a view to removing reliance on privileged material. The Court of Appeal's judgment is at Deripaska-v-Chernukhin and Navigator Equities Limited [2021] JCA

206. The Act of Court was dated 3 September 2021. 2. The Deputy Bailiff had held that privilege in certain materials had not been lost unless and until they were deployed in Court, and that if materials had been disclosed which might lead to waiver of privilege, the party which had disclosed them could turn the clock back and withdraw reliance on that material rather than being forced to disclose further collateral materials, provided they had not yet been deployed in Court. The Court of Appeal upheld that decision, and the concomitant decision to allow replacement affidavits to be served to replace those previously relied upon. 3. The subject matter of the underlying proceedings and the basis for the Court of Appeal's decision are set out in its substantive judgment and are not repeated here. 4. The Appellant now seeks the Court of Appeal's permission to appeal to the Judicial Committee of the Privy Council ("the JCPC") against its decision. No such appeal can be made unless permission to do so is granted by this Court, under Article 14(1) of the Court of Appeal (Jersey) Law 1961 ("the Law"), or by the JCPC under Article 14(2) of the Law. The test for whether permission ought to be granted is whether there is an arguable point of law of general public importance which ought to be determined now. 5. Grounds of Appeal were lodged, with the application for permission, on 17 September 2021. The Grounds of Appeal submit that the Court of Appeal erred in concluding that disclosure of privileged material by one party to its opponent in an affidavit intended for use in legal proceedings necessarily waived confidentiality in the content of the affidavit, but did not necessarily waive privilege in that

and collateral material, so as to require the further disclosure of all collateral material, unless and until it was deployed in Court. The Appellant further submits that this is a point of law of general public importance, and that “it would be valuable to the law of privilege as a whole for the Privy Council to consider this appeal at the present time, in order to give clarity to how the principles of loss of confidentiality, ‘true’ waiver, collateral waiver and ‘turning the clock back’ are to be applied in modern litigation”. 6. It is significant to the question of whether this is an application which should be determined now that this is an interlocutory skirmish about a relatively minor issue in relatively major, long-running litigation which is listed for trial in the week commencing 8 November 2021. 7. Permission to appeal as sought under Article 14(1) of the Law is refused. As the Court’s judgment explains, there is a conceptual distinction between what Leggatt J (as he then was) described in *Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB) as amounting to a ‘true’ waiver of privilege, which necessarily results in the right to assert privilege in both that and collateral material being lost, and disclosure of information to another party in circumstances which imply consent to its use, but before it is relied upon at trial. The former case was what Leggatt J described as ‘true waiver’, the latter case may involve a prima facie waiver of privilege, but is not ‘true waiver’ in the sense described by Leggatt J. In the latter case, confidentiality in such material will have been irretrievably lost, but privilege may be reasserted if, and to the extent that, before the material has positively been deployed in the litigation, reliance upon it is withdrawn. The stage of litigation at which this may fairly be done is a question of fact and degree in each case. 8. The judgment of the Court of Appeal on this issue explains why, on proper analysis, the learned Deputy Bailiff had not made an ‘unchallenged finding’ that privilege in the strict sense described by Leggatt J had been lost, albeit he had found that there had been a prima facie waiver; and why it was logically possible for him to have found, as he did, that although privileged material had been disclosed before a trial, the clock could be turned back if the party disclosing it elected to withdraw reliance upon it. When the Deputy Bailiff’s judgment was read as a whole, the decision to allow the clock to be turned back was one open to him on his (proper) construction of the existing and long-standing authorities. The Court of Appeal’s judgment was an application of long-standing principles of Jersey and English law to the case before the Court, rather than a fresh enunciation of legal principle. It also concerned a relatively minor interlocutory issue in the context of the litigation as a whole. 9. For these reasons, the point in issue on the appeal before the Court of Appeal is not, in our judgment, a point of general public importance. Moreover, given that the leading authorities which set out the applicable legal principles as to the law of privilege are (as the Grounds of Appeal note at paragraph 3.1) long-standing, and that they arise in this case on an interlocutory application appealed very shortly before the substantive trial has been listed for hearing, this is not, in the Court of Appeal’s judgment, an application concerning an issue which needs to be determined now.

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10. For these reasons, permission to appeal is refused. Authorities Deripaska-v-Chernukhin and Navigator Equities Limited [2021] JCA 206. Court of Appeal (Jersey) Law 1961. Mohammed v Ministry of Defence [2013] EWHC 4478 (QB).
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