Claim No: CFI-048-2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

SKAT

(The Danish Customs and Tax Administration)

Claimant

and

(1) ELYSIUM GLOBAL (DUBAI) LIMITED

(2) ELYSIUM PROPERTIES LIMITED

Defendants

ORDER WITH REASONS OF JUSTICE SIR JEREMY COOKE

UPON reviewing the Defendants' submissions dated 13 January 2019 and 27 January 2019

AND UPON reading the Claimant's submissions dated 22 January 2019 and 24 January 2019

AND UPON reading the SLR's Response dated 24 January 2019

IT IS HEREBY ORDERED THAT:

1. The Supervision Legal Representative (SLR) shall release to the Claimant, forthwith, all the documents over which privilege is claimed which are referred to in the Defendants' submission dated 13 January 2019, insofar as they are otherwise caught by the search orders made by the Court.

2. The Defendants shall pay to the Claimant the costs of its responses of 21 and 27 January 2019 and the costs of the SLR of its response of 24 January 2019 to the Defendants' submissions of 13 January 2019 on the standard basis, such costs be the subject of assessment if not agreed, but payable only in accordance with a further order of the Court.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date of issue: 29 January 2019

At: 9 am

SCHEDULE OF REASONS

1. The Defendants have, despite paragraph 4(a)(i) and 4(b)(i) of the Court's Order of 26 December 2018 and paragraph 12 of the reasons attached to that Order, failed to make any application to the Court or file any supporting evidence, whether within the 14 days prescribed by that order or at all. The Defendants have had more than enough time to make the application required by earlier orders and that order. The concessions made in later submissions illustrate the need for proper evidence in relation to disputed claims for privilege.

2. Instead the Defendants sent submissions dated 13 January relating to claims for privilege which had been made in a letter of 18 September to the SLR and rejected by him in a letter of 22 September.

3. The SLR sought the guidance of the Court in a number of respects, by means of his Second Report to the Court dated 23 December 2018, including guidance as to the ambit of the order preventing release to the Claimant of documents which were the subject of orders by the Crown Court in Kingston and Southwark. Such guidance was given in the Order of 26 December 2018. In the light of that guidance, the SLR has maintained his earlier decisions as to the documents which he considered did not attract privilege.

4. In such circumstances the failure of the Defendants to make any application to the Court in accordance with the terms of previous orders and the order of 26 December, with evidence in relation to the character of the documents should be fatal to any continuing claim to privilege.

5. However, because privilege is such a sensitive area, the Court does not lightly order disclosure of documents over which there is dispute as to privilege and has examined the materials put before it in order to ensure that no prejudice can fall on the Defendants from any failure to make such an application with supporting evidence.

6. From the terms of the submissions made by the Defendant and the responses of the Claimants dated 21 and 27 January 2019 and the SLR dated 24 January 2019, some matters are clear:

a. Neither of the 2 documents referred to as "the Disputed Retained Documents" can attract a claim for privilege. It is accepted by the Defendant now that the first does not attract such a claim and the second is advice from accountants not lawyers and therefore cannot be the subject of legal advice privilege, as claimed by the Defendant. Moreover, the latter merely notifies/confirms the contents of the documents being forwarded, which are not privileged. The Defendant now accepts that the letter is not privileged.

b. So far as the "Disputed Black Box Documents" are concerned (references are to the Box and Document numbers in the Defendants' submissions of 13 January 2019):

i. Nine of those documents are said to be "correspondence with CPS disclosing information re compliance with the Crown Court order". (Documents in Boxes 58, 66 and 68). They are not said to be documents which disclosed information pursuant to such an order (and no evidence has been produced as to their contents nor as to the orders relied - none are referred to in the relevant correspondence). They therefore fall outside the ambit of privilege in accordance with the clarification provided in paragraph 4(c) of the 2 December Order.

ii. 2 documents are said to be draft agreements covered by legal professional privilege. (Box 26 Document 1 and Box 64 Document 1) but no evidence has been presented that these are drafts prepared by lawyers or were the subject of legal advice. It is not stated whether the privilege claimed is Litigation privilege not legal advice privilege, though it is to be assumed that it is the latter. Nor is it said that the drafts were not sent to the party on the opposite side of the transaction. In the absence of such evidence, the claim to privilege is not made out.

iii. Box 60, Document 1 is said to be "advice sought re handwritten notes on Articles of Association" and Box 26, Document 1 is said to be "notes relating to court dispute". Both are said to be covered by legal professional privilege but, again, the nature/character of the privilege is not identified and no evidence has been adduced as to the provenance of the documents, the authors, senders or recipients and the claim to privilege is therefore not made out.

iv. Box 17 Document 1 is said to attract litigation privilege but the SLR rejected the claim, pointing out that ARIG LLP are not lawyers and that the document was not crated for use in the conduct of litigation. In the absence of any supporting evidence to contradict that finding, the claim for privilege is not made out.

v. In the light of the above and the SLR's view that the Court would not be assisted further by inspecting the documents themselves, the Court declines to do so.

7. The Defendants have caused the Claimant and the SLR to incur costs without observing the Court's orders as to the procedure for determining challenges to the SLR's decisions on privilege. They should therefore pay the costs of the Claimant's response to their submissions.

8. Furthermore, in future the Court will not countenance any failure by the Defendants to observe the procedure laid down by filing proper applications with evidence where that is the requirement and will not accept continuing ping-pong submissions outwith the terms of any order. The terms of orders made by the Court must be complied with.

9. Despite the Claimant's submission that If the Court is satisfied that the Defendants' descriptions are materially inaccurate, the Defendants' lawyers should be ordered to explain: (i) who prepared and approved the submissions; and (ii) how the descriptions in the submissions came to be inaccurate, and the SLR's submissions and Defendants' concessions which show that there is substance to the suggestion that there was material inaccuracy in the descriptions offered, the Court considers that making such an order would result in more costs and no real productive benefit.