Neutral Citation Number: **[2024] EWHC 2223 (Ch)** Case No: BL-2021-000049

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date of hearing: 15 July 2024, with further submissions filed on 18 July 2024

Before:
DEPUTY MASTER SCHER

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Between:

EAST-WEST UNITED BANK S.A.	**Claimant**
- and -	
(1) MR VLADIMIR GUSINSKI	
(2) GSC SOLICITORS LLP	
(3) MR BARRY SAMUELS	**Defendants**
- and -	
(1) THE FINANCIAL SECRETARY OF THE CAYMAN ISLANDS (as trustee for the creditors and contributories of NEW MEDIA DISTRIBUTION COMPANY SEZC LIMITED, now dissolved)	
(2) NEW MEDIA PROGRAMMING (in liquidation)	
(3) NOVA CENTURY HOLDINGS LIMITED	
(4) PROGRESS STUDIO LLC (in liquidation)	
(5) MOVIE PRODUCTION CENTER LLC (in liquidation)	**Respondents**

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Clare Stanley K.C. and James Walmsley (instructed by **Distinction Law**) for the **Claimant**
Andrew George K.C. (instructed by **Clyde & Co LLP**) for the **Second and Third Defendants**

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JUDGMENT

- -

DEPUTY MASTER SCHER :

Introduction

1. This is my judgment on an application by the Claimant concerning legal professional privilege and the 'iniquity exception'.

2. This judgment is structured as follows:

   i) Background, and the underlying claim

   ii) The Claimant's application

   iii) The position of the Respondents

   iv) The legal test

   v) Discussion

   vi) Conclusion

Background, and the underlying claim

The parties

3. The Claimant is East-West United Bank SA, incorporated in Luxembourg.

4. The First Defendant is Vladimir Gusinski. He does not participate in this application. Indeed, he has been debarred from defending the claim against him, as he failed to comply with an unless order made by Deputy Master Dovar on 7 March 2023.

5. Mr Gusinski is a businessman and a Russian national. His business interests include the "New Media Group". He disagrees with the term ultimate beneficial owner, but admits that he beneficially owns the group's topmost holding company, N M Holding Co Ltd. That company (he says) owns 93% of the shares in New Media Distribution Company SEZC Limited, which in turn owns or controls the various companies in the New Media Group, directly or through further subsidiaries. Mr Gusinski has said in a witness statement (made for the purposes of an arbitration, as to which see below) that he "completely controls" the New Media Group.

6. The Second Defendant is GSC Solicitors LLP (**GSC**)**.** GSC acted for Mr Gusinski and his companies in various matters over several years.

7. The Third Defendant, Mr Samuels, is a solicitor and consultant at GSC. He had day to day conduct of the matter relevant to the present claim and application.

8. As well as the three Defendants, there are five more Respondents to this application:

   i) The First Respondent is the Financial Secretary of the Cayman Islands, as trustee for the creditors and contributories of New Media Distribution Company SEZC Limited, which is now dissolved;

   ii) The Second Respondent is New Media Programming (in liquidation);

   iii) The Third Respondent is Nova Century Holdings Limited;

   iv) The Fourth Respondent is Progress Studio LLC (in liquidation); and

   v) The Fifth Respondent is Movie Production Center LLC (in liquidation)

9. I will refer to the dissolved company New Media Distribution Company SEZC Limited as "**the First Respondent Company**", to distinguish it from the First Respondent proper (the Financial Secretary of the Cayman Islands). I will also use the term "**Respondent Companies**" as a term encompassing the First Respondent Company and the Second to Fifth Respondents.

10. All of the Respondent Companies are or were part of the New Media Group, and subsidiaries (at various levels) of N M Holding Co LLC.

The claim

11. The starting point is a loan. In 2013, the Claimant provided a USD 75 million credit facility to New Century Distribution LLC (later GmbH) **(the Borrower**). The Borrower is part of the New Media Group, being a third-level subsidiary of N M Holding Co LLC. Over time, the Borrower's obligations were guaranteed by other group companies. Relevantly, each of the Respondent Companies guaranteed the Borrower's debt in about 2017. It was a term of the facility agreement that payments receivable by the Borrower under certain key contracts, and payments in of over USD 10,000, must be paid into an account held with the Claimant (rather than into an account held with some other bank). I am told that in Luxembourg, where the Claimant is incorporated, this would assist recovery of debts owed by the Borrower to the Claimant.

12. In January 2018, the Claimant served an acceleration notice, seeking immediate payment of USD 9,596,920.60. The Borrower did not make that payment. The Claimant served demands dated 23 January 2018 on the guarantors, including the five Respondent Companies. They also did not pay.

13. On about 25 January 2018, the Borrower obtained a temporary insolvency moratorium from the Swiss courts. On the face of it, this was in order to restructure its indebtedness and pay its creditors. The Claimant says that this

moratorium was sought for an ulterior and improper purpose, namely to reduce the prospects of enforcement by the Claimant.

14. On 28 February 2018, the Claimant filed a request for an LCIA arbitration (**the Arbitration**). The eventual respondents to the Arbitration were the five Respondent Companies which had guaranteed the debt owed to the Claimant. The Second Defendant, GSC, acted for the Respondent Companies in the Arbitration, and the Third Defendant, Mr Samuels, had day-to-day conduct. GSC and Mr Samuels took instructions from the First Defendant, Mr Gusinski. The arbitration was hard fought for many months until the Respondent Companies withdrew their defences.

15. At around the same time, the First Respondent Company was engaged in separate litigation with a Mr Kagalovsky. Marcus Smith J gave judgment in those proceedings, and on 12 November 2018 ordered Mr Kagalovsky to pay about USD 5.2 million into GSC's client account, for the benefit of the First Respondent Company. Under the terms of Marcus Smith J's order, the money was to be held by GSC until 10 December 2018. After that date, it could be paid out to the First Respondent Company (unless a further order had been made).

16. It is the Claimant's case in the present proceedings that Mr Gusinski, on behalf of the Respondent Companies, deliberately misled the arbitral tribunal about what was to be done with the money in GSC's client account. In particular, the Claimant alleges a series of representations made by the Respondent Companies' counsel to the arbitral tribunal that the c£5.2m in GSC's client account, less a small amount for certain costs, was "*specifically earmarked for repayment*" to the Claimant, and would satisfy more than half of the sum owed by the Respondent Companies to the Claimant. The Claimant says that GSC also undertook to give "*5 business days' notice before any withdrawal of the Judgment Sum from its client account is made which would reduce the sum held to less than USD 4.75 million.*"

17. On 11 December 2018, the arbitral tribunal ordered the Respondent Companies (together with other respondents to the Arbitration) to pay USD 4.75 million to the Claimant forthwith, and a further USD c4.4m by 31 March 2019. The arbitral tribunal noted that "*In making this Award, the Tribunal has sought to avoid the bankruptcy of the Respondents for the sake of a short period of delay. In particular, the Tribunal took account of the statement of the Respondents' Leading Counsel that the majority of the Kagalovsky Judgment sum has been "specifically earmarked for repayment" of the Claimant's loan and that the sum was in the jurisdiction."*

18. GSC did not transfer the USD 4.75 million to the Claimant. On 14 January 2019, Andrew Baker J made an order permitting the Claimant to enforce the award against the First Respondent Company, the Second Respondent, and the Third

Respondent, and entered judgment against each of them. He directed that enforcement could only take place 14 days after service of his order.

19. Meanwhile, Mr Gusinski took steps to wind up the First and Second Respondent Companies. On 21 January 2019, joint provisional liquidators were appointed in the Cayman Islands. On 25 January 2019 the order in respect of the First Respondent Company was recognised in England and Wales, by virtue of a recognition order made by Deputy ICCJ Schaffer. This restricted any further enforcement of the Judgment against that company. The Claimant says that Mr Gusinski's purpose in procuring the insolvency proceedings above was to prevent the Bank from enforcing the award against the First and Second Respondent Companies.

20. GSC then, having given notice of their intention on 25 January 2019, transferred the majority of the USD 4.75m to the joint provisional liquidators of the First Respondent Company. Some money was also transferred to the Borrower, and some to GSC itself as fees. The vast majority of the USD 4.75m is no longer within the jurisdiction, or easily available to the Claimant to satisfy the judgment debt enforcing the arbitral award.

21. In the present proceedings, it is the Claimant's contention that it has an interest in the so-called Earmarked Funds - in particular, by way of an equitable assignment, an equitable charge, and/or a constructive trust. The Claimant further alleges that GSC and Mr Samuels acted in breach of trust and/or fiduciary duties (inter alia) by transferring the money to the joint provisional liquidators of the First Respondent Company.

22. The Claimant also pleads a claim in conspiracy. The Claimant alleges that Mr Gusinski conspired with various parties to "*use both lawful and unlawful means to delay and ultimately avoid payment to the [Claimant] of the Earmarked Funds or the sums due under the Facility*". The alleged conspiracy is set out in some 18 pages of the lengthy Particulars of Claim. I will not summarise all of those paragraphs, but they include allegations such as:

    i) Mr Gusinski combined with others to create "*fictitious and/or inflated claims to be used as the basis for applications to begin insolvency proceedings*";

    ii) Mr Gusinski combined with GSC and Mr Samuels to put forward a false cross-claim in the Arbitration, which was not made in good faith but rather to delay the determination of the Claimant's claim in the Arbitration; and

iii) Mr Samuels and GSC caused or allowed counsel to make representations concerning the "Earmarked Funds" to the arbitral tribunal, even though Mr Samuels and GSC knew that they were false at the time.

23. Mr Gusinski responded to the conspiracy allegations only very briefly in his Defence. He made no admissions about many of the facts alleged by the Claimant. He denied that the inferences relied on by the Claimant could be validly drawn from the facts alleged. He also said that "*All actions taken by the NM Group and/or Mr Gusinski were taken for the purpose of protecting the Group against what they considered to be an illegitimate attack on it by the Bank and preserving its assets and generally, in the interests of the Group and its creditors in view of its financial difficulties.*"

24. GSC and Mr Samuels dealt with the conspiracy allegations far more comprehensively in their Defence. They address some of the allegations head-on. However, their response to many allegations was said to be limited by, or was restricted to, a plea that they were "*unable to plead to the [Claimant's] allegations without the consent of the [Respondents] or the permission of the Court. That is because the [Respondents] are entitled at least arguably to assert privilege in the matters pleaded…*"

The Claimant's application

25. The Claimant's application is at least partly made in order to resolve these issues of privilege, so as to enable GSC and Mr Samuels to plead their cases fully. The Claimant seeks an order that the iniquity exception applies "*to all communications between (a) any one or more of the First Defendant or the [Respondent Companies] and (b) any of the Second or Third Defendants relating in any way to matters concerning the issues raised in this claim. For the avoidance of doubt, the iniquity exception likewise extends to all communications between (i) the Second and/or Third Defendants acting on behalf of the First Defendant and/or one or more of the [Respondent Companies] and (ii) Counsel instructed by the Second and/or Third Defendants on behalf of the First Defendant and/or one or more of the [Respondent Companies], relating in any way to matters concerning the issues raised in this claim.*"

26. The Claimant was represented by Clare Stanley KC, leading James Walmsley.

The position of the Respondents

27. Mr Gusinski has not responded to the application. He was not represented at the hearing.

28. GSC and Mr Samuels, represented by Andrew George KC, have taken a neutral position on the application. They have been cooperative, for example in

agreeing the terms of a draft order should the application succeed. Any privilege would of course belong to the Respondent Companies (their former clients), and so their neutrality is quite appropriate.

29. None of the five Respondents, to whom any privilege would belong, has resisted the application. None was represented at the hearing. It appears from the evidence, in particular the seventh Witness Statement of Aleksey Stoliarov dated 7 July 2024, that all have been served; that all have had an opportunity to participate; and that none has asserted their right to privilege or defended the application in any way. Further:

i) On 24 October 2023, an order was made permitting the Claimant to serve the application on the Respondents out of the jurisdiction.

ii) The position in respect of the First Respondent Company is slightly complex. At the time the application was made, the company had been dissolved, and the proper respondents to be served were the liquidators as trustees of the creditors and contributories of the First Respondent Company for the first twelve months after dissolution. Since the application was issued, however, the twelve month period expired, and any rights held on trust by the joint liquidators of the First Respondent Company were transferred to the Financial Secretary, who is now the First Respondent. The Financial Secretary has been served, and has said (in a letter of 18 October 2023) that he does not wish to participate in the application. The Financial Secretary in fact suggested that the rights of privilege may now belong to the Crown: accordingly, the Claimant has written to the Bona Vacantia Division of the Government Legal Department, which replied saying (on 2 July 2024) that they do not wish to participate and neither waive nor seek to enforce any rights of privilege.

iii) The Second Respondent is also in liquidation. In January 2024, the liquidators of the Second Respondent questioned the effect of an insolvency moratorium on the service of the application. The Claimant therefore made the appropriate application in the Cayman Islands, and on 8 July 2024 an order was made permitting service of the present application. Whilst this was only a few days before the hearing, the liquidators have had notice of the application for several months, and have not said since such service that they would wish to assert privilege or defend the application.

iv) The Third Respondent is a Gibraltar company, and is not in liquidation. It was served with the application, which was delivered by post in January 2024. However, the envelope was returned in March 2024, marked “return to sender”.

v) The Fourth and Fifth Respondents, both Russian companies in liquidation, were served but have not responded.

30. Accordingly, this application is unopposed by any party.

The legal test

31. The leading case on the so-called "iniquity exception" to legal professional privilege is *Al Sadeq v Dechert LLP and others* [2024] EWCA Civ 28. In that case, Popplewell LJ (with whom Males LJ and Underhill LJ agreed) considered the unfortunate plethora of descriptions of the threshold test in the authorities: for example, a "prima facie", "strong prima facie", or "very strong prima facie" case on the evidence showing that the relevant iniquity has taken place. The test is now, thankfully, much clearer.

32. I derive the following principles from *Al Sadeq v Dechert LLP and others* [2024] EWCA Civ 28, paragraphs [52]-[108] and [154]-[169]:

i) Where legal professional privilege exists, it is inviolate. There is no balancing exercise between the interest in maintaining privilege and the competing interest in disclosure of the communications. It has been described as a fundamental human right.

ii) Privilege does not exist, however, if the document comes into existence in relation to a fraud, crime or other iniquity. This is not limited to criminal or fraudulent purposes, but extends to equivalent underhand conduct which is in breach of a duty of good faith, or contrary to public policy or the interest of justice. This is now called the "iniquity exception".

iii) The iniquity exception is not confined to cases in which the lawyer is party to or aware of the iniquity. The relevant iniquitous purpose is that of the client, or of a third party (if that third party is using the client as a tool for the iniquity).

iv) The principled juridical basis for the iniquity exception is that a necessary ingredient of legal professional privilege is that the communication should be confidential. The exception applies where and because the iniquity deprives the communication of that necessary quality of confidence.

v) The iniquity exception does not apply merely because a solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue, even when this involves a deliberate strategy to mislead the other party and the court, and to commit perjury. Rather, the touchstone is whether the iniquity puts the conduct outside

the normal scope of such professional engagement, or is an abuse of the relationship which falls within the ordinary course of such engagement.

vi) The merits threshold for the existence of an iniquity which prevents legal professional privilege arising, whether legal advice privilege or litigation privilege, is a prima facie case, which means that on an assessment of the material available to the decision maker, whether that be the party or its legal adviser conducting disclosure, or the court, it appears more likely than not on a balance of probabilities that such iniquity exists. In an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not. This is subject to the proviso that there might exist exceptional circumstances which could justify a court taking the view that a balance of harm analysis has a part to play.

vii) Where there is a prima facie case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity. These are two categories, either of which is sufficient. "Part of" will include documents which report on or reveal the iniquitous conduct in question, and documents brought into existence in preparation for the iniquity.

33. I will expand on two points from the above summary:

i) In subparagraph (ii) of my summary of the principles in *Al Sadeq v Dechert LLP* above, I recorded Popplewell LJ's statement that the iniquity exception is not limited to criminal or fraudulent purposes, but extends to equivalent underhand conduct. One of the cases he cited as authority for that proposition was *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238. Miss Stanley KC took me to that case during oral argument. *Eustice* was a case under section 423 Insolvency Act 1986. In that case, there was evidence that the bank's security had been transferred at an undervalue to members of the transferors' family, at a time when action by the bank was clearly anticipated, in order to prejudice the bank's interest. Schiemann LJ, with whom Aldous LJ and Butler-Sloss LJ agreed, categorised this as "sharp practice", and held that it was sufficient to engage the iniquity exception. See p1252G, although the merits test stated there ("strong prima facie case") has now been eclipsed by *Al Sadeq v Dechert LLP*.

ii) Subparagraph (v) of my summary of the principles above is derived from Popplewell LJ's summary in *Al Sadeq v Dechert LLP* of his own analysis in the case of *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm). In *Ablyazov*, Popplewell J (as he then was) considered the authorities in detail, from [68] to [93]. He concluded at [93]:

> *I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege.* ***In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question.*** *In the "ordinary run" of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege.* ***The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege***. (emphasis added)

Discussion

34. In this section, I will identify the alleged iniquity; consider whether it engages the exception; and then consider whether on the evidence before me it meets the merits threshold.

What is the alleged iniquity?

35. Miss Stanley KC, in her skeleton argument (prepared with Mr Walmsley), says that Mr Gusinski "*took the deliberate decision to avoid the New Media Group repaying [the sums owed to the Claimant] and set about devising and implementing a dishonest scheme which allowed him to achieve that*".

36. Miss Stanley KC was careful to differentiate between the allegations made in the application, and the allegations made in the claim proper. In the claim

proper, the Claimant alleges that GSC and Mr Samuels participated in that dishonest scheme. In the application, however, the Claimant does not rely on that allegation. I will decide the application on the agreed basis that GSC and Mr Samuels were not bound up in the alleged scheme, but I do not make any findings to that effect.

37. I have considered the Fourth Witness Statement of Mr Stoliarov dated 8 August 2023. The statement, over 31 pages, gives a very detailed account of (quoting Miss Stanley KC's words) an alleged strategy to employ "*any means necessary to dodge repayment*", a strategy which was "*dishonest, and at the least sharp practice*".

38. I address in this judgment certain elements of this alleged strategy which I find most likely to engage the exception, and best supported by evidence. Those elements are:

    i) The alleged abuse of the Swiss moratorium;

    ii) The alleged diversion of payments away from the Borrower;

    iii) The alleged misleading of the Arbitral Tribunal and frustration of enforcement;

39. I do not, however, address certain other elements of the alleged strategy, even though they may indeed be sufficiently serious and supported by sufficient evidence. For example, Mr Stoliarov asks the Court to infer that a certain Letter of Guarantee bearing the date of 18 January 2018 is a fabrication. He does so by referring to numerous circumstances and other documents. Miss Stanley KC, however, did not take me to those documents in any detail, or develop submissions about those circumstances, presumably because her case was strong enough already, and because to do so would take up too much of the limited time available at the hearing. I am not therefore going to address that particular element of the more general alleged strategy in this judgment. Similarly, where my judgment is silent on other particulars set out in Mr Stoliarov's 31 page witness statement, or on the numerous pleaded allegations said to form part of the strategy (or indeed conspiracy), it should not be inferred that I find the allegations insufficiently iniquitous or insufficiently evidenced. If I were to closely consider every particular of the alleged strategy, I would have needed to extend the hearing, probably by another full day. Rather, I am focusing on three major allegations because that is sufficient, in my judgment, to find on a *prima facie* basis whether the alleged iniquitous strategy existed. Only by doing so can I deal with the Claimant's application justly and proportionately.

Does the alleged strategy engage the exception?

40. In my judgment, the alleged conduct falls within the category of wrongdoing which would engage the iniquity exception, so long as the evidence meets the merits threshold.

41. The alleged wrongdoing is sufficiently iniquitous. It is alleged that Mr Gusinski and his companies avoided repaying an undefended debt by misleading the Swiss courts and the Arbitral Tribunal, and by transferring funds within the group of companies. This has clear similarities with the case of *Eustace* which I referred to in paragraph [33(i)] above, where the bank's security had been transferred at an undervalue to members of the transferors' family in order to prejudice the bank's interest. Similarly here, it is alleged that Mr Gusinski intentionally misled the Swiss Court and the Arbitral Tribunal and transferred assets around the New Media Group in a strategy which intentionally prejudiced the Claimant's ability to recover sums indisputably owed. As well as following *Eustice*, in my judgment the allegations in this case fall squarely within the more broadly worded category of "*underhand conduct [equivalent to fraud] which is in breach of a duty of good faith, or contrary to public policy or the interest of justice*."

42. Further, GSC and Mr Samuels deny knowing that statements made to the Arbitral Tribunal were false. I am asked by the parties to decide this application on the basis that GSC and Mr Samuels were not bound up in the alleged scheme. If their denial is made out at trial, it would mean that they (as well as the Arbitral Tribunal) were misled by Mr Gusinski about his intentions for the Earmarked Funds. That would be an abuse of the normal solicitor/client relationship, and an indicator (indeed, a "hallmark") of the kind of iniquity which negates legal professional privilege (see paragraph [33(ii)] above).

Does the alleged strategy meet the merits threshold?

43. When deciding whether or not there is a prima facie case, my assessment is limited to the material available to me. See paragraph [32(vi)] above. Importantly, in the present case, no evidence has been filed by the Respondent Companies or Mr Gusinski to contradict the evidence relied on by the Claimant, and GSC and Mr Samuels are neutral. In my judgment, it would be wrong to speculate on what evidence might be available to contradict the allegations if the Respondents had chosen to respond. Nevertheless, the right to legal professional privilege is extremely important, and so I have considered the evidence with care (rather than waving the application through because it is unopposed). I have taken particular care when deciding whether I can correctly draw the inferences sought by the Claimant from uncontradicted evidence.

44. With all this in mind, I must now decide whether it appears, on the basis of the evidence before me, more likely than not that the iniquity exists.

45. First, the alleged abuse of the Swiss moratorium. This allegation concerns a sequence of events in January 2018. The Claimant served on the Borrower and the Respondent Companies an acceleration notice dated 15 January 2018, and a demand notice dated 23 January 2018 (the latter of which sought payment from (inter alia) the Respondent Companies). On 25 January 2018, the Borrower applied to the Swiss court for a provisional moratorium.

46. On the face of the order of Cantonal Judge C Frey dated 29 January 2018, in the Canton of Zug Cantonal Court, the Borrower had relied on evidence showing that "*by the end of March of 2018 payments of over USD 3 million are expected*", and that "*the reason for the debt restructuring request is the maturity of a bank loan as the result of the late payment caused by the applicant's liquidity shortage… and the petitioner, in the context of a moratorium with East-West United Bank S.A., wishes to agree on a new bilateral payment plan*".

47. The Claimant alleges that important aspects of the Borrower's evidence were false. Mr Stoliarov states that he does not recall any approach by anyone representing the Borrower for a "*bilateral payment plan*" during the course of the moratorium, or any other offers. (There was a without prejudice discussion with Mr Gusinski on 27 November 2018, but that seems irrelevant to Mr Gusinski's intentions in January 2018.) Moreover, the "*over USD 3 million*" payments referred to in Judge Frey's order was not received by the end of March 2018. The Claimant relies on all this as evidence that the Swiss Moratorium was obtained by misleading the Swiss Court on an important point (the intention to restructure the debt).

48. Secondly, I have seen bank statements evidencing that the Borrower received substantial payments in 2018 and early 2019, although none was paid to the Claimant. Indeed, it appears from the evidence I have seen that incoming payments were diverted to accounts with banks other than the Claimant, in breach of the facility agreement, and that the Borrower paid money to (or for the benefit of) other companies in the New Media Group. All of this evidence implies that Mr Gusinski, through the Borrower, was using the Moratorium to retain control of the Borrower and to divert payments which could have been used to satisfy the debt owed to the Claimant.

49. Thirdly, the Bank complains that false representations were made to the Arbitral Tribunal and the Bank to the effect that the Earmarked Fund would be available to the Bank. There is abundant evidence, including written correspondence and a transcript of submissions made to the Arbitral Tribunal, that support this allegation.

50. The Tribunal's partial final award issued on 11 December 2018 (**the First Award**) included the following passages:

> *68. Having considered the evidence, and heard Mr Gusinski's testimony and the Parties' submissions,* ***the Tribunal has, in addition, received the information provided to it by the Respondents that the sum of US$4.75m is no longer the subject of a stay from the Courts in that case and is now 'available'****. The Tribunal notes the submission made by the Respondents above namely:*
>
> > *'In the event that the stay application by the Defendant in the Kagalovsky proceedings is dismissed,* ***the Third Respondent would make a payment to the Claimant of US$4.75 million within seven days of being notified of that dismissal****, such sum to be taken into account in respect of the liability to pay the First Instalment of the award East-West Bank United SA v Gusinski and others proposed by the Respondents provided that an award is made in the terms proposed (RS, 4(d)).'*
>
> *69.* ***The Tribunal can see no reason not to order the Respondents to make immediate payment of that sum to the Claimant and will so order****. As for the balance the Tribunal has decided to specify in the Award that payment in full of the remainder of the claim should be made on or before 31 March 2019.*
>
> *…*
>
> *73. In making this Award,* ***the Tribunal has sought to avoid the bankruptcy of the Respondents for the sake of a short period of delay. In particular, the Tribunal took account of the statement of the Respondents' Leading Counsel that the majority of the Kagalovsky Judgment sum has been 'specifically earmarked for repayment' of the Claimant's loan and that the sum was in the jurisdiction****."*
>
> (emphasis added)

51. Shortly after the First Award, on 18 January 2019 the First Respondent Company petitioned for its own winding up. On 21 January 2019, joint provisional liquidators were appointed. The proximity in timing between the assurances being given about the availability of USD 4.75m to repay the Claimant, and the appointment of provisional liquidators (who took control of that money) implies (according to the Claimant) that the assurances of the availability of funds were false.

52. On a careful assessment of the material before me, it appears more likely than not on the balance of probabilities that the Borrower, controlled by Mr Gusinski,

misled the Swiss court about its intentions when applying for the moratorium; that the Respondent Companies, controlled by Mr Gusinski, misled the Arbitral Tribunal; and that the Borrower, controlled by Mr Gusinski, diverted funds which could have been seized by the Bank to other companies within the New Media Group.

53. There is, therefore, a prima facie case of the iniquity relied on by the Claimant as giving rise to the iniquity exception, namely a decision by Mr Gusinski to avoid the New Media Group repaying the sums owed to the Claimant, and a sufficiently dishonest or underhand scheme which allowed him to achieve that. In my judgment, there is sufficient evidence here to satisfy the merits threshold for that iniquity.

Conclusion

54. In conclusion, no legal professional privilege applies to documents and communications brought into existence as part of or in furtherance of the alleged decision by Mr Gusinski to avoid the New Media Group repaying the sums owed to the Claimant, and the alleged scheme which has so far allowed him to achieve that. This includes, for the avoidance of doubt, the matters raised in the present claim.