

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2018-404-0957
[2019] NZHC 2321**

UNDER the Companies Act 1993, Part 16
(Liquidations)

IN THE MATTER of an application pursuant to s 261 and s 266
by applicants for order to produce AND a
cross-application for directions declaratory
orders against the Applicant Liquidators

BETWEEN SIMON DALTON and MATTHEW KEMP
as liquidators of CHARMING GROUP (NZ)
LIMITED (In Liquidation)
Applicants

AND BOON GUNN HONG
Respondent

Hearing: On the papers

Counsel: A Ho for the Applicants
Respondent in person

Judgment: 13 September 2019

RESERVED JUDGMENT (NO. 3) OF ASSOCIATE JUDGE SMITH

*This judgment was delivered by me on 13 September 2019 at 4.00 pm,
pursuant to r 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Solicitors / Counsel:
Martelli McKegg, Auckland
B G Hong, Auckland

[1] The background of the matter is fully set out in my judgment of 30 August 2018,¹ and I will not repeat that background in this judgment. In that judgment, I directed that Mr Hong was to produce for my inspection certain documents sought by the applicant liquidators under s 266 of the Companies Act 1993, for which privilege had been claimed. Those documents were produced by Mr Hong.

[2] I considered the documents provided by Mr Hong, and in my reserved judgment (No. 2) dated 26 June 2019² I ruled that he need not produce to the liquidators certain of them. In respect of certain other documents, I sought further submissions from Mr Hong.

[3] Mr Hong has now filed a memorandum setting out his further submissions. The further submissions were filed with the approval of Ms Cheng, one of the directors of Charming Group.

[4] My rulings on each of the documents on which I sought further submissions are set out below.

Documents 3, 4, and 5 forming part of Mr Hong's computer file described as "annC&ricLI_claimed legal privilege\annC&ricLI_re Gerry Rea"

[5] There were three documents remaining for consideration on this file, being the documents numbered 3, 4, and 5 (referred to at paragraphs [15] and [16] of my judgment of 26 June 2019).

[6] Mr Hong does not now oppose the production of documents 3 and 4 (email dated 9 November 2017 from Mr Hong to Ms Cheng providing certain advice relating to the business accounts or affairs of Charming Group). Documents 3 and 4 are to be produced to the liquidators within 15 working days.

[7] Document 5 was another email exchange between Ms Cheng and Mr Hong on 9 November 2017. Mr Hong and Ms Cheng oppose the production of this document, on the basis that it contains private and confidential advice between Mr Hong and

¹ *Dalton v Hong* [2018] NZHC 2266.

² *Dalton v Hong* [2019] NZHC 1473.

Ms Cheng, not relating to the business or affairs of Charming Group. Mr Hong also notes that his email comprising part of document 5 refers to the name of another of his clients.

[8] Having reviewed document 5 in light of Mr Hong's further submissions, I am satisfied that the document appears to comprise personal and confidential communications between Ms Cheng and Mr Hong for the purpose of giving and receiving personal legal advice for Ms Cheng. There is one exception to that, being the last sentence of Mr Hong's email to Ms Cheng timed at 11.19 am on 9 November 2017, commencing "Can U also ...". That part of the email clearly relates to the business or affairs of Charming Group, and cannot be subject to any privilege owned by Ms Cheng. I direct that Mr Hong is to produce to the liquidators within 15 working days a redacted copy of his email sent to Ms Cheng at 11.19 am on 9 November 2017, with all of the email redacted except for the last sentence (commencing "Can U also ...").

Document 6 in Mr Hong's computer file described as "annC&ricLI_claimed legal privilege\annC&ricLI_re Gerry Rea\"

[9] I note that in my judgment of 26 June 2019 I did invite Mr Hong to make a further submission on document 6 in this file. The reference to document 6 in paragraph [24](ii) of my judgment of 26 June 2019 was in error. As stated in paragraph [24](i) of that judgment, Mr Hong is not required to produce document 6.

Documents 1-10, 13-19, and part of document 20 in Mr Hong's computer file described as "annC&ricLI_claimed legal privilege\annC&ricLI_funding & costs issues\"

[10] In my judgment of 26 June 2019, I invited Mr Hong to make submissions on documents 1 to 10 and 13 to 19 forming part of this file. I also sought submissions on two emails from Mr Hong to Ms Cheng dated 5 September 2017 that formed part of document 20 in this file. Mr Hong has made further submissions addressing those documents.

[11] In my judgment of 26 June 2019 I noted that documents 1 to 10 and 13 to 19 all appeared to be concerned with the affairs of Charming Group, and to comprise (i)

legal advice sought and given by Mr Hong, and (ii) communications relating to the funding of the landlord litigation. I expressed the preliminary view that the owner of any privilege in respect of these documents was either Charming Group, or Charming Group jointly with the directors.

[12] In respect of documents 1 to 10, Mr Hong submitted that the correspondence in question occurred when he had been retained by the directors personally, and the existence of Charming Group was not known to him. He submitted that the correspondence covered the directors' personal circumstances, and arrangements that Mr Hong understood he was making with them personally. Mr Hong submitted that documents 1 to 10 are all dated in 2011, and it was only clear that Charming Group would be the plaintiff in the landlord litigation in July 2012. It was not until then that a decision was made to issue the landlord litigation in the name of Charming Group.

[13] Mr Hong referred in his submissions to the offer of \$50,000 made for the purchase of the restaurant business. He said that Charming Group and its directors could not advance the matter because the landlord had re-entered and taken possession of the premises. He submitted that the litigation strategy was then one for Ms Cheng, the majority shareholder, to consider.

[14] First, I do not think it matters when the existence of Charming Group came to Mr Hong's attention. If it was not owned by Charming Group, any relevant privilege would be owned by Ms Cheng and/or Ms Li — it would not be owned by Mr Hong. Ms Cheng and Ms Li would have been aware of the existence of Charming Group at the relevant time, and if anyone knew who the tenant of the premises was it must have been them.

[15] Documents 1 to 10 all appear to be concerned with issues associated with the funding of the landlord litigation. The funding of the landlord litigation, commenced as it was by Charming Group, was a matter relating to the business accounts or affairs of Charming Group. Charming Group would be the plaintiff in the litigation that was in contemplation, and even if Ms Cheng and/or Ms Li had a personal interest in the contents of the documents, they would have been so interested not only in their personal capacities but also in their capacities as directors of Charming Group. In

those circumstances I consider Charming Group was at least a joint owner of any privilege in these documents.

[16] For those reasons, I direct that Mr Hong is to produce to the liquidators documents 1 to 10 on this file, within 15 working days.

[17] Turning to documents 13 to 19 on this file, Mr Hong opposed production of documents 13 and 14 on the same grounds as he raised in respect of documents 1 to 10. He submitted that documents 15 to 19 should not be produced, as they involved correspondence relating to costs and Ms Cheng's personal position. He submitted that the advice here was given to Ms Cheng personally, and had nothing to do with Charming Group. The correspondence in documents 15 to 19 was also written after Mr Hong was no longer engaged in the landlord litigation, prior to the appeal hearing in the High Court.

[18] In my view, documents 13 and 14 are in the same category as documents 1 to 10. Charming Group clearly had an interest in the contemplated landlord litigation, and the advice given to Ms Cheng in the email correspondence comprising documents 13 and 14 would have been received by Ms Cheng in her capacity as a director of Charming Group. Advice given to Charming Group could only have been given to it through its directors. For those reasons, any privilege in documents 13 and 14 would be at least jointly owned by Charming Group. I direct that Mr Hong is to produce documents 13 and 14 to the liquidators within 15 working days.

[19] Documents 15 and 16 comprise email communications between Ms Cheng and Mr Hong, in which legal advice is sought and given directly on matters of concern to Charming Group.

[20] First, I do not think the fact that Mr Hong might have withdrawn as solicitor for Charming Group in the landlord litigation can assist any argument that the communications in documents 15 to 19 are subject to legal professional privilege owned by some party other than Charming Group. Ms Cheng could only have been acting in her capacity as a director of Charming Group in this correspondence, and Charming Group must have been at least a joint owner of any privilege. I accordingly

direct that documents 15 and 16 are to be produced to the liquidators within 15 working days.

[21] Documents 17 to 19 again appear to relate directly to the business or affairs of Charming Group, and again I think the advice sought by Ms Cheng in this correspondence must have been sought in her capacity as a director of Charming Group. The result is that Charming Group must have been at least a joint owner of any legal privilege in the communications, and the liquidators are entitled to production. I direct in respect of documents 17 to 19 that the documents are to be produced to the liquidators within 15 working days, subject to one redaction: the last line of Mr Hong's email to Ms Cheng timed at 1.44 pm on 19 June 2017 appears to have no connection with Charming Group. That line may be redacted from the copies of the documents supplied to the liquidators.

[22] The remaining documents for consideration are two emails forming part of document 20 on this file. The first email was from Mr Hong to Ms Cheng and Ms Li timed at 8.13 am on 5 September 2017. This email referred to the statutory demand recently served on Charming Group, and the advice in it appears to be advice intended for Ms Cheng and Ms Li in their capacities as directors of Charming Group. Again, any privilege in this email would be at least jointly owned by Charming Group, and the liquidators are entitled to it. The second email from Mr Hong forming part of document 20 was timed at 11.28 am on 5 September 2017, and it appears to be a response to an email from Ms Cheng which was concerned with her personal position. In my view, this email comprised personal advice given to Ms Cheng, and Mr Hong is not required to produce it to the liquidators.

[23] In summary on document 20, I find that any privilege in the email from Mr Hong to Ms Cheng and Ms Li timed at 8.13 am on 5 September 2017 would be owned, at least jointly, by Charming Group. That email is to be produced to the liquidators within 15 working days. I accept that the other emails comprised in document 20 appear to be concerned with advice given to Ms Cheng in her personal capacity. They need not be produced.

Documents 21 and 22 in Mr Hong's computer file described as "annC&ricLI_claimed legal privilege\annC&ricLI_funding & costs issues\"

[24] I note that in his further memorandum dated 26 July 2019 Mr Hong indicated that he no longer opposes disclosure of the correspondence in documents 21 and 22 in this file. In my judgment of 26 June 2019 I directed that those documents need not be produced. It is a matter for Mr Hong whether he wishes to produce those documents voluntarily to the liquidators.

Costs

[25] Counsel and Mr Hong may file memoranda on costs if they cannot agree. Any memorandum from the liquidators is to be filed and served within 25 working days. Any memorandum in response by Mr Hong is to be filed and served within 10 working days after the liquidators' memorandum has been served on him. On receipt of the memoranda, I will deal with costs on the papers.

Associate Judge Smith