

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

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

**CIV-2018-404-0957  
[2019] NZHC 1473**

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: 26 June 2019

---

**RESERVED JUDGMENT (NO. 2) OF ASSOCIATE JUDGE SMITH**

---

*This judgment was delivered by me on 26 June 2019 at 4.00pm,  
pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

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

[1] The applicants are the liquidators of Charming Group (NZ) Ltd (In Liquidation) — "Charming Group". The applicants, who I will refer to as "the liquidators", applied under s 266 of the Companies Act 1993 (the Act) for an order that Mr Hong, an Auckland solicitor who had acted for Charming Group and its directors, produce documents relating to the business, accounts and affairs of Charming Group.

[2] In my judgment delivered on 30 August 2018,<sup>1</sup> I ordered Mr Hong to review all documents on his computer(s) in the period 1 January 2010 to 13 December 2017 prepared for Charming Group or any of its directors, or passing between himself and Charming Group or any of its directors. I directed that any documents relating to Charming Group or its business, accounts or affairs that were documents of Charming Group (ie owned by or held for Charming Group) were to be delivered to the liquidators, and (in respect of remaining documents relating to the business, accounts or affairs of Charming Group) directed Mr Hong to ascertain whether any claims to privilege or confidentiality were asserted, whether by a director or directors of Charming Group,<sup>2</sup> or by any other party.

[3] I required Mr Hong to file and serve a memorandum listing all documents within the stipulated date range relating to Charming Group or its business, accounts or affairs for which a claim to confidentiality or privilege was made, identifying in each case the names of the parties and the dates of the documents, and stating the basis on which the document was said to be the subject of privilege or an entitlement to confidentiality that was not owned by Charming Group. Mr Hong was directed to file those documents in Court in a sealed envelope marked for my attention, and to advise the Court whether any person who had asserted a claim to privilege or confidentiality wished to be heard in support of that claim, or wished to make submissions on it.

[4] Mr Hong filed two memoranda, dated 20 November 2018 and 17 December 2018. Following his review of the documents on his computer, he advised that a total of 10 computer files of documents would be disclosed to the liquidators. He then attached a schedule listing a total of 41 documents in respect of which there were said

---

<sup>1</sup> *Dalton and Kemp v Hong* [2018] NZHC 2266.

<sup>2</sup> The active directors of Charming Group during the date range covered by the order appear to have been Ms Annette Cheng and Ms Ricki Li.

to be claims to privilege or confidentiality by parties other than Charming Group. Of the 41 documents, 10 (documents numbered 9 to 18 in the computer file described as "annC&ricLI\_claimed legal privilege\annC&ricLI\_re Gerry Rea\") fell outside the date range covered by the order. I direct that Mr Hong is not required to produce those documents to the liquidators for inspection. Mr Hong made general submissions in support of the claims to privilege or confidentiality, to which I refer below.

[5] Mr Hong has produced the 41 documents referred to in paragraph [4] above, in a sealed envelope, as directed.

[6] By memorandum dated 18 December 2018, the liquidators requested me to review all documents disclosed by Mr Hong other than documents 9 to 18 referred to above, and give to judgment on the liquidators' application under s 266 of the Act insofar as it relates to the reviewed documents.

[7] I did not consider it necessary or appropriate to call for further submissions from Mr Hong before inspecting the documents produced by Mr Hong in the sealed envelope, and I have now inspected them. I now give judgment (to the extent I am able to do so without further submissions) on the liquidators' application for production of the documents in the sealed envelope, and (where necessary) give further directions.

#### **The documents in respect of which privilege or confidentiality is claimed**

[8] The first eight documents were on a computer file identified by Mr Hong as "annC&ricLI\_claimed legal privilege\annC&ricLI\_re Gerry Rea\".

[9] In respect of this group of documents, Mr Hong said that he had included correspondence touching the issues in the proceeding arising out of the claims made by the liquidators, including issues such as the liquidators' motives and the identity of any financial backer. Mr Hong asserted that these documents were private and confidential correspondence, not being the property of or owned by Charming Group, and are legally privileged as against the liquidators.

[10] Mr Hong submitted that it is the interests of the director, Ms Cheng, that must be protected. While it appears that neither Ms Cheng nor Ms Li has actively asserted any claim to privilege or confidentiality, Mr Hong advised that Ms Cheng has been suffering serious medical difficulties, and any stress on her could adversely affect her recuperation. It appears that she has not waived any privilege she may own.

[11] The second group of documents identified by Mr Hong consisted of 23 documents gathered in a computer file styled "annC&ricLI\_claimed legal privilege \annC&ricLI\_funding & costs issues\".

[12] Mr Hong submitted that the documents in this folder are private, confidential correspondence on the funding of the litigation, including documents relating to the financial circumstances of Ms Cheng and Ms Li and their "disgruntlement over funding by one with the other". The documents were also said to include Mr Hong's arrangements with the directors. Mr Hong submitted that the documents are not the property of, or owned by, Charming Group, and are legally privileged documents providing advice on funding and costs questions.

### **Analysis**

[13] I now consider each of the 31 documents in respect of which a decision is required.

*The 8 documents within the date range in the "annC&ricLI\_claimed legal privilege\annC&ricLI\_funding & costs issues" file*

[14] Documents numbers 1 and 2 in this file are email exchanges between Ms Cheng and Mr Hong dated respectively 21 April 2017 and 20 June 2017. Neither appears to relate to the business, accounts or affairs of Charming Group. These two documents need not be produced.

[15] Documents 3 and 4 comprise an email dated 9 November 2017 from Mr Hong to Ms Cheng providing certain advice relating to the business, accounts or affairs of Charming Group. My preliminary view is that the owner of any privilege in respect of these documents was either Charming Group, or Charming Group jointly with the

directors. However, I did not receive full submissions on this issue from Mr Hong, and in my view he should be afforded an opportunity to file a supplementary written submission directed to those documents if he is so instructed. Any such supplementary submission is to be filed and served within 10 working days, and is to clarify (in respect of each document) who is said to be the owner of the relevant privilege, and (to the extent that Charming Group might be the owner or a joint owner of the privilege) why it is said that the documents should not be produced to the liquidators.

[16] Document 5 consists of an email exchange between Mr Hong and Ms Cheng on 9 November 2017. It appears to be in the same category as documents 3 and 4, and I make the same directions in respect of it as that made in respect of those two documents.

[17] Document 6 appears to be the same as document 5, with the addition of an email from Ms Cheng to Mr Hong dated 9 November 2017. I am not satisfied that this additional email relates to the business, accounts or affairs of Charming Group as opposed to more general matters. Document 6 need not be produced.

[18] Documents numbers 7 and 8 (respectively, an email exchange between Mr Hong and Ms Cheng on 9 November 2017, and an email from Mr Hong to Ms Cheng dated 20 December 2017) appear to comprise a request for personal legal advice by Ms Cheng, and the giving of that advice. In my view they are documents in respect of which she is entitled to claim privilege under s 54 of the Evidence Act 2006.<sup>3</sup> Mr Hong is not required to produce them.

---

<sup>3</sup> Section 54(1) of the Evidence Act 2006 provides:

**54 Privilege for communications with legal advisers**

(1) A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—

- (a) intended to be confidential; and
- (b) made in the course of and for the purpose of—
  - (i) the person requesting or obtaining professional legal services from the legal adviser; or
  - (ii) the legal adviser giving such services to the person.

...

*The 23 documents within the date range in the "annC&ricLI\_claimed legal privilege annC&ricLI\_funding & costs issues\" file*

[19] Mr Hong identified each of these documents in the sealed envelope by numbering them 1-23. For convenience, I will use those numbers.

[20] First, I note that there is nothing to suggest that documents 11 and 12 relate to the business, accounts or affairs of Charming Group, or that they might assist the liquidators in the discharge of their functions. Documents 11 and 12 need not be produced.

[21] Documents 21, 22, and 23 all appear to be communications in which Ms Cheng sought advice from Mr Hong relating to her personal position. In my view these are subject to legal professional privilege owned by Ms Cheng. They need not be produced.

[22] Turning to the remaining documents, documents 1 to 10 and 13-19 on this file all appear to be concerned with the affairs of Charming Group, and comprise (i) legal advice sought and given by Mr Hong, and (ii) communications relating to the funding of the landlord litigation. As with documents 3 to 5 in the first computer file, my preliminary view is that the owner of any privilege in respect of these documents was either Charming Group, or Charming Group jointly with the directors. However, I did not receive full submissions on this issue from Mr Hong, and in my view he should be afforded an opportunity to file a supplementary written submission directed to those documents if he is so instructed. Any such supplementary submission is to be filed and served within 10 working days, and is to clarify (in respect of each document) who is said to be the owner of the relevant privilege, and (to the extent that Charming Group might be the owner or a joint owner of the privilege) why it is said that the documents should not be produced to the liquidators.

[23] Document 20 consists of a number of emails passing between Mr Hong and Ms Cheng. The two emails from Ms Cheng in this document (both dated 5 September 2017, one timed at 10.25am and the other at 3.19pm) appear to comprise requests or instructions relating to her personal legal position. Those two emails appear to be subject to legal professional privilege owned by Ms Cheng, and they need not be

produced. The other emails comprising document 20 are two emails both dated 5 September 2017 from Mr Hong to Ms Cheng. The first provided certain advice to Ms Cheng under a heading referring to the statutory demand. The second provided further legal advice. Mr Hong may make a supplementary submission in respect of these two emails, in accordance with the direction at paragraph [22] of this judgment.

## **Result**

[24] I make the following orders:

- (i) Mr Hong is not required to produce the documents numbered 1, 2, 6, 7, 8 and 9-18 (forming part of the computer file described as "annC&ricLI\_re Gerry REA\") in the sealed envelope produced by him.
- (ii) In respect of the documents numbered 4, 5 and 6 forming part of that computer file, Mr Hong may file a supplementary written submission within 10 working days, clarifying (in respect of each document) who is said to be the owner of the relevant privilege and (to the extent that Charming Group might be the owner or a joint owner of the privilege) why it is said that the documents should not be produced to the liquidators.
- (iii) Mr Hong is not required to produce the documents numbered 11, 12, 21, 22 and 23 (forming part of the computer file described as annC&ricLI\_claimed legal privilege\annC&ricLI\_funding & costs issues\") in the sealed envelope produced by him. Nor is Mr Hong required to produce the two emails from Ms Cheng dated 5 September 2017 forming part of the document numbered 20 from that computer file.
- (iv) In respect of the documents numbered 1-10 and 13-19 forming part of the computer file referred to in (iii) above, and in respect of the two emails from Mr Hong to Ms Cheng dated 5 September 2017 that form part of document 20 in that computer file, Mr Hong may file a

supplementary written submission within 10 working days clarifying (in respect of each document or email) who is said to be the owner of the relevant privilege and (to the extent that Charming Group might be the owner or a joint owner of the privilege) why it is said that the documents or emails should not be produced to the liquidators.

- (v) Costs are reserved.

**Associate Judge Smith**