Neutral Citation Number: [2020] EWFC 84

Case No: BV17D08211

IN THE FAMILY COURT
At the ROYAL COURTS OF JUSTICE
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2020

Before :

SIR JAMES MUNBY

- -

Between :

V	**Applicant**
- and -	
W	**Respondent**

- -
- -

Mr James Finch (instructed by Pinder Reaux) for the applicant
The respondent in person

Hearing dates (by Zoom) : 5 October, 12 November 2020

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Judgment Approved by the court for handing down

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and by placing it on BAILII. The date and time for hand-down will be deemed to be in Open Court at 4pm on 2 December 2020 (at which time the judgment will be published on BAILII)

Sir James Munby :

1. In a suit for divorce in which the wife W (Ms W) was the petitioner and the husband V (Mr V) was the respondent, Ms W applied for financial relief. On 27 March 2018, Roberts J made an order providing for the instruction of a Mr A of a firm I shall refer to as XYZ as SJE to value a company which I shall refer to as S; the order provided that the report (the Report) was to be filed by 4 May 2018 and that Mr V alone was to be responsible for paying the SJE's fees. It was agreed that XYZ's fees would not exceed £62,500 plus VAT, a total of £75,000. Instructions were given to the SJE on 28 March 2018. Despite the terms of the order, the Report was not received by the parties until 5 June 2018. On 7 June 2018, a financial dispute resolution (FDR) hearing took place before Moor J.

2. On 10 December 2018, Roberts J made a 'clean break' order. So far as material for present purposes, it contained the following provisions: an undertaking by Mr V to provide security for the second lump sum payment of £1.1 million (para 15); an undertaking by him to continue to make payments equivalent to the periodical payments to Ms W notwithstanding her remarriage, until payment of the second lump sum (para 18); an order that he pay her lump sums (a) of £1m within 3 months and (b) of £1.1m by 19 June 2023 (para 24); an order that in the event of late payment of the lump sums simple interest should accrue on the remaining balance of the lump sum(s) at the rate applicable for the time being to a High Court judgment debt (para 25); an order that he pay her periodical payments at the rate of £50,000 per annum, ending upon payment of the second lump payment (para 33); and an order that he make payments for benefit of the child of the marriage at the rate of £25,000 per annum, the payments to end upon the cesser of full-time tertiary education to first degree level, including a gap year (para 34). There was also (para 40) the usual liberty to apply "concerning the implementation and timing of the terms of this order only." The decree nisi of divorce was made absolute in January 2019.

3. On 14 April 2019, XYZ issued a claim form in the County Court Money Claims Centre against Mr V seeking payment of its unpaid fee of £75,000 plus interest amounting to £1,579.62. I shall refer to these as the civil proceedings. On 22 April 2019 S, by then insolvent, entered into a USA Chapter Eleven bankruptcy.

4. On 12 June 2019, Mr V filed his defence and counterclaim in the civil proceedings, signed by Leading Counsel. He denied liability, alleging (defence, para 17) that the valuation was one which no reasonably competent valuer could have reached and that Mr A had been negligent. So far as material for present purposes it was further alleged: that because of the late delivery of the Report he and his legal advisers "were prejudiced in their conduct of the FDR and of the financial proceedings" (defence, para 15); that at the FDR Moor J "gave a strong indication that any judge at the final hearing would most likely make findings of fact as to [his] total matrimonial assets, including his interest in S, which were based on the valuations in the report and that this would have a consequential effect on the size of capital and/or other payments which [he] would be required to make to [the wife]" (counterclaim, para 24); and that "In reliance on the Report and/or on the effect which the Report was likely to have on the reasoning of the judge hearing any final hearing" he and his legal representatives entered into negotiations and thereafter reached the settlement embodied in Roberts J's order (counterclaim, para 25). He claimed as damages "the difference between the sums which he has or is obliged to pay … under the order … and the amount which

he would reasonably have had to pay, whether by way of settlement or order of the Family Court, if the value of his interest in S as at 5 June 2018 had been assessed correctly" (counterclaim, para 27.1); he put the difference as being between £1 million and £2.5 million (counterclaim, para 27.6).

5. On 20 June 2019, Moor J gave a ruling which is self-explanatory. It is convenient to set it out in full:

> "1 I have received an application from … solicitors for a transcript of the hearing before me on 7 June 2018. [These] solicitors are not acting for either party to the proceedings but wish to have a copy of the transcript as it is said that Mr V has made representations to their client about what was said during the hearing by myself and he intends to rely on this in a claim against their client.
>
> 2 According to my records, the hearing on 7 June 2018 was a Financial Dispute Resolution appointment. This has a very significant consequence. In accordance with paragraph 6.2 of PD9A, to the Family Procedure Rules:-
>
> > "… Non-disclosure of the contents of (FDR appointments) is vital and an essential pre-requisite for fruitful discussion directed to the settlement of the dispute between the parties … As a consequence of *Re D* [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*"
>
> 3 In essence, the "very exceptional circumstances" involves the safeguarding of children or others.
>
> 4 It therefore follows that I cannot agree to a transcript of the hearing being provided to [the] solicitors for use in any other context, including litigation. Equally, however, it is quite wrong and impermissible for Mr V to attempt to rely on something that I am alleged to have said during the hearing in any claim he may have against [the solicitors'] clients.
>
> 5 I will, however, give [the solicitors] liberty to apply if they challenge this conclusion or wish to make any further application arising out of paragraph 6.2."

6. On 12 July 2019, XYZ filed its reply and defence to counterclaim, signed by Counsel, comprehensively disputing Mr V's allegations in his defence and counterclaim. So far as material for present purposes: in relation to what was pleaded in para 24 of the counterclaim, it "denied that [he] is entitled to rely on any such indication in light of the ruling of Mr Justice Moor of 20 June 2019" and asserted that "Any attempt to do so is liable to be struck out" (defence to counterclaim, para 46(b)); in relation to para 25 of the counterclaim, it asserted that "If [he] considered the Report to be negligently defective … he should not have settled in reliance on it" (defence to counterclaim, para 46(a)(i)).

7. On 19 May 2020 (by which time the civil proceedings had been transferred to the Queen's Bench Division), Master Cook made an order, requiring Mr V within 14 days to "issue any application to the … Family Division for permission to rely, for the purposes of these proceedings, on a transcript of the [FDR] (or such other material connected with that hearing which is relevant to [his] defence and counterclaim)" and, within 28 days of receipt of the ruling of the Family Division pursuant to such application to serve on the claimant a draft amended defence and counterclaim.

8. On 27 May 2020 Mr V accordingly made the application which is now before me. It was supported by his witness statement also dated 27 May 2020. I shall refer to this as the disclosure application. It seeks "permission" to disclose certain specified documents, "as part of his defence" to the civil proceedings. The disclosure application was put before Moor J, who declined to deal with it: see *Myerson v Myerson* [2008] EWCA Civ 1376, [2009] 1 FLR 826. I understand that, in the course of ruling that he would not deal with the application, Moor J made certain observations and that by an order made by Holman J on 31 July 2020 Moor J's ruling was 'sealed' with a direction that it should not be before the court at any hearing of Mr V's application. I have seen neither Moor J's ruling nor Holman J's order.

9. On 25 September 2020, Mr V issued an application on Form A, applying, as it was put, to "vary" both the lump sum order and the periodical payments order. I shall refer to this as the variation application. Specifically he seeks: to be released from the undertakings in paragraphs 15 and 18 of the order made by Roberts J on 10 December 2018; that paragraph 24(b) of the order be set aside; that the interest rate in paragraph 25 of the order be varied to UK Sterling LIBOR + 1%; that paragraph 33 of the order be set aside; and that paragraph 34 of the order be varied so that child periodical payments should terminate upon the child of the family attaining 18 years or completing full-time secondary education, whichever is the later.

10. Mr V's application of 27 May 2020 was in due course directed to be heard by me on Monday 5 October 2020 at 2pm. By email on the morning of the hearing, the court office brought Mr V's variation application to my attention.

11. At the hearing, Mr V was represented by Mr James Finch of counsel. Ms W appeared in person. I referred to the variation application, saying it was not clear to me whether it was also listed before me – it turned out that it was not. In order to assist the parties, I indicated that I might be willing to give any directions in relation to the variation application which were agreed. Ms W, rightly, did not want me to deal with it: neither she nor her counsel (she told me she had counsel acting for her in the variation application) were aware it might be before me.

12. In his witness statement in support of the disclosure application, Mr V explained that he requires the documents he seeks to have disclosed in order properly to defend the civil proceedings and, in particular, to enable him to amend his defence and counterclaim. He identified the eight classes of documents which he seeks to disclose into the civil proceedings.

13. Attached to Mr V's witness statement was an exhibit bundle containing copies of all these eight classes of documents, running in all to 260 pages. Six relate to the FDR. They are: (i) each party's written submissions and asset schedules prepared for the FDR hearing (44 pages); (ii) the transcript of the submissions made by each counsel at

the FDR hearing (60 pages); (iii) the transcript of the "indication" given by Moor J at the FDR hearing (4 pages); (iv) copies of junior counsel for the husband's notes of the FDR hearing (54 pages); (v) copies of junior counsel for the husband's note of the indication given by Moor J at the FDR hearing (5 pages); and (vi) copies of notes by the husband's counsel and solicitors of the without prejudice discussions with the wife's representatives which took place at the FDR (4 pages). A further two relate to events following the FDR: (vii) copies of similar notes of the without prejudice discussions which took place subsequent to the FDR (24 pages); and (viii) copies of the without prejudice correspondence following the FDR hearing which led to the consent order that was signed by Mr V and Ms W and lodged at court for approval on 12 December 2018 (65 pages including attachments). Given the existence of (ii) and (iii) Mr Finch accepted that the application in relation to (iv) and (v) was otiose. They run to 59 pages, so disclosure is now being sought in relation to the remaining 201 pages in the bundle. Of these 201 pages, the FDR materials run to 108 pages; the notes of the without prejudice discussions and the without prejudice correspondence (including attachments) run to 93 pages.

14. Analysis of Mr V's case as set out in his witness statement revealed two seeming difficulties:

i) The "indication" pleaded in paragraph 24 of his counterclaim does not appear anywhere in either transcript. His account in his witness statement of what his case is, and what he wanted to plead by way of amendment, was somewhat opaque, though it is noteworthy that he now asserted (statement, para 11) that "I want to argue that, in effect, the report was put to one side and no reliance was placed on it by either side in the course of the negotiations" – a complete volte-face. Despite his best endeavours to enlighten me as to how Mr V was now putting his case and how he might seek to amend his pleadings, Mr Finch left me far from clear in my own mind as to these important points, though I understood him to be saying that his client was going to abandon both his case as pleaded on the "indication" and his claim as pleaded to the very large damages being sought. I was told there might be added a more modest claim for damages in respect of costs unnecessarily incurred, so it was said, in considering the Report. I was also left unclear as to why, given these proposed amendments, it was said that Mr V needed disclosure of all the 201 pages of documents now being sought. Why he needed to have disclosure of all this material to haul down the flag eluded me – hence the order I made (see below). I do not, in saying this, criticise Mr Finch. He is not instructed in the civil proceedings and, as he told me in answer to a specific question, the proposed amended pleading had not yet been drafted.

ii) In his witness statement Mr V relied upon the fact that, as he put it, the "financial remedy proceedings are … complete and there are no outstanding proceedings in the family division." He added: "There is no prejudice to [Ms W] in permission being given for me to rely on these documents as part of my [defence in the civil proceedings]. Our financial remedy proceedings are concluded and finalised, save for the final instalment of the lump sum, due in 2023. She is not a part of [the civil proceedings] and she was never liable to meet [XYZ's] fees." That may have been so when he prepared his statement; it

had, of course, been falsified by his subsequent issue of the variation application.

15. There was a third difficulty: the variation application (there was no witness statement in support) discloses neither the basis upon which the application is being made nor the facts relied upon in support. When I sought illumination from Mr Finch I was told that essentially it was based upon Mr V's inability to pay, not least in consequence of the insolvency of S. Again, Mr Finch was unable to be more precise, for he is not, he told me, acting in the variation application.

16. Accordingly, I adjourned the matter part-heard and directed Mr V to file a witness statement: (a) exhibiting the amended defence and counterclaim for which he intends to seek permission in the civil proceedings; (b) explaining why it is necessary for the disclosure he seeks to be ordered to achieve the amendment or otherwise for use within the civil proceedings; (c) explaining in summary the grounds for the variation application and the legal basis for it; and (d) explaining why it is said that Ms W will not be prejudiced by the court allowing the disclosure sought notwithstanding he has issued the variation application and what, if any, safeguards can be put in place beyond those set out in his first witness statement. I make clear that the direction in paragraph (c) was included because I needed this information in order properly to decide the disclosure application; it was not a direction given in the variation application and obviously does not in any way fetter the judge dealing with the variation application. Indeed, the order spelt out that I was not giving directions in the variation application.

17. I should make clear that there can be no question of my hearing the variation application, for I have now seen (even if at that hearing I had not yet read it all in detail) both what went on at the FDR and the subsequent without prejudice discussions and correspondence. So, the variation application has to be listed before another judge, probably in the circumstances before Roberts J, though that is a matter for Mostyn J as judge in charge of the money list to decide. I was told at the resumed hearing on 12 November 2020 that it was listed for hearing before Roberts J on 25 November 2020.

18. In accordance with the directions I had given, both Mr V and Ms W have filed further witness statements. Exhibited to Mr V's statement is his proposed draft amended defence and counterclaim, settled, as I understand it, by Leading Counsel. The adjourned hearing resumed before me on 12 November 2020. At the end of the hearing I reserved judgment,

19. As foreshadowed at the previous hearing, in the draft amended defence and counterclaim Mr V's case has undergone drastic surgery. His case in relation to alleged negligence remains essentially unchanged. As to the rest, what is now proposed to be pleaded is that: the Report "was of no value to [him]" so that there was "accordingly a total failure of the basis of the contract" and "any payment of the alleged fee of £75,000 or any part of it … would be wasted expenditure"; this part of the pleading continues that he "relies among other things on the fact that" – and there then follow details of what Moor J is alleged to have said "in his evaluation of the case" at the FDR which it would be wrong to set out in this judgment (amended defence, para 16A); liability to pay the sum of £75,000 or any sum in relation to the Report is denied "because the basis for payment has totally failed" and/or because the

Report "was of no value to [him]" (amended defence, para 19); details of what is alleged to have happened at the FDR are repeated by way of counterclaim (amended counterclaim, para 24); the subsequent negotiations and settlement between the parties "did not include attributing any value to [S] and did not take into account the Report" (amended counterclaim, para 25); "The Report … was not included, relied upon or taken into account in any way in the negotiations and compromise reached and order made, but was essentially ignored" so that "it was accordingly of no value whatsoever to [him]" and/or "there has accordingly been a total failure of the basis for payment of the price for the Report" (amended counterclaim, para 26); He "accordingly counterclaims the price of £75,000 as wasted expenditure (insofar as it is otherwise payable, which is denied)" (amended counterclaim, para 26A). There is a counterclaim for damages (amended counterclaim, para 27), including the cost of lawyers' fees considering the Report which was "unnecessary and irrelevant and a waste of effort on the part of [his] legal representatives" (amended counterclaim, para 27.1) and "costs payable [to] his solicitors … which were unnecessary and wasted in dealing with [XYZ] and with the Report" and "that proportion of his leading and junior counsel's fees which related to considering, dealing with or presenting arguments concerning the Report" (amended counterclaim, para 27.2).

20. This puts me in a position of no little difficulty and delicacy. I am not the judge dealing with the civil proceedings, Mr Finch is not instructed in those proceedings, and counsel who settled the draft amended pleading is not before me. I am bound to say, however, that I have difficulty in understanding, in plain fact I do not understand, the legal basis of the draft amended pleading. Leaving wholly on one side the issues in relation to negligence, the draft amended pleading, as I read it, takes as a separate point, by way of both defence and counterclaim, the facts, so it is said, that "The Report … was not … relied upon or taken into account in any way in the negotiations and compromise reached and order made, but was essentially ignored," that it was "accordingly of no value whatsoever," that to pay for it would be "wasted expenditure" and that there has "accordingly" been "a total failure of the basis for payment of the price."

21. Why should the fact that, after delivery of the Report, the parties chose to "ignore" it (if fact it be) of itself exonerate Mr V from paying for it? Just because the party who has commissioned the work chooses after delivery not to take advantage of the contractor's work, why should he not have to pay for it? After all, and the aphorism goes back to the fourteenth century, the labourer is worthy of his hire. As Chaucer wrote in The Summoner's Tale (lines 1971-1973): "Thou wouldest have our labour all for nothing … the workman is worthy of his hire." Take an example which I put to Mr Finch in the course of argument: If I employ an architect to draw me the plans for a house I am proposing to build, why, after the architect has delivered the plans, should I be able to avoid paying just because I have subsequently decided not to build the house?

22. As a separate point, it is not immediately obvious why, given the form Mr V's case now takes, there is any need to plead what took place at the FDR. The FDR, to repeat, took place on 7 June 2018, while the final order was made by Roberts J some six months later on 10 December 2018. Those facts, taken in conjunction with the volume of material generated by the parties during their without prejudice discussions in the period following the FDR, surely demonstrate clearly enough, without any need to

read the FDR materials, that the FDR itself was inconclusive and generated no agreement. And, again to repeat, the central plea – "The Report … was not included, relied upon or taken into account in any way in the negotiations and compromise reached and order made, but was essentially ignored" – quite plainly relates to the period *after* the FDR. So, why now plead what took place *at* the FDR?

23. These are not idle questions, and I cannot simply ignore them. For if there is no or only a rather questionable basis for this part of Mr V's case – and it is to this part of his case that the disclosure he seeks goes – then surely I have to take it into account in deciding what order I ought to make. Whatever the applicable test for disclosure may be (a question I address below), surely in addressing the question of whether it is satisfied I have to take into account to what extent the disclosure sought is actually needed by Mr V to support some legally sustainable defence or counterclaim in the civil proceedings.

24. Moreover, as it turns out, this is no academic question for, as I now know, the draft pleading was sent to XYZ's solicitors on 22 October 2020. And in their reply dated 5 November 2020, as I read it, they took the point:

> "The Counterclaim was based entirely on your client's claim that our client's Report was not competently prepared and that the content of the Report impacted upon the approach of the Court and the settlement which he then reached with his wife.
>
> … your client has now reversed his position in respect of the Report …
>
> It appears from your client's revised case that the Court did not use the Report. In that instance it is unclear what link your client hopes to draw between the quality of the Report and your client's loss. Payment to our client and the obligation upon your client to pay for the Report is not dependent on whether or not the Court reads the Report; that is a decision for the Judge. It may well be that a Report is not ultimately given any weight by a Court, for example, but that does not excuse that party the obligation to pay for it.
>
> In any event as you will have advised your client, an argument based on total failure of consideration is a very high bar to meet, and one which your amended Defence clearly does not make out.
>
> We need further explanation from your client as to the nature of your client's revised case, which is not obvious. Otherwise the Defence is simply not sufficiently particularised and we believe there is a risk that there will need to be further amendments.
>
> Were your client to propose to apply for permission to amend on the basis of the current amended draft, our client reserves its right to apply for strike out/summary Judgment of the amended version."

The final paragraph is to be noted. What is threatened is an attack on or founded on the pleading, *qua* pleading, not, as I read the letter, founded on an alleged absence of any factual basis for what is pleaded. And, as Mr Finch correctly observed, on any

such attack as XYZ seems to have in mind, the court approaches the matter on the basis of the *facts* alleged and, moreover, taking them at their highest.

25. I turn to consider the FDR.

26. It is important to remember that the FDR is entirely a creature of statute, being part of the statutory process for dealing with proceedings – financial remedy proceedings brought under the Matrimonial Causes Act 1973 – which are themselves entirely a creature of statute. So far as concerns the FDR, the relevant provisions are in FPR 9.15(4), 9.17 and PD9A, para 6. For present purposes, two aspects of the FDR process are significant. The first is that the FDR is compulsory and both parties must personally attend: the parties cannot themselves contract out of it, though they can pre-empt the FDR by embarking upon a 'private' FDR: see *President's Circular: Financial Remedies Court Pilot Phase 2*, 27 July 2018, paras 7-11. The other is the obligation on the parties to hold nothing back at the FDR and, indeed, to put forward their best offers. Moreover, it is fundamental that the FDR is a confidential process, differing from other types of family hearings in two significant respects: first, journalists are not permitted to attend the FDR: FPR 27.11(1)(a); secondly, the judge hearing the FDR must have no further involvement with the case: FPR 9.17(2).

27. This explains the language of PD9A, para 6.2, which is at the heart of this case:

> "In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in *Re D*."

Re D, to repeat, is concerned with child protection and is therefore irrelevant here.

28. Given the way in which, in the light of Article 6, domestic law treats applications for committal (see *Hammerton v Hammerton* [2007] EWCA Civ 248, [2007] 2 FLR 1133), I would expect the words "an offence committed at the appointment" to include a contempt committed in the face of the court. Otherwise one would have the absurdity that, in a case where one party had assaulted the other in front of the judge at the FDR, the matter could be tried only as a criminal assault in the Magistrates' Court or Crown Court and not as a contempt in the face of the court by the family court: cf, *Chelmsford County Court v Ramet* [2014] EWHC 56 (Fam), [2014] 2 FLR 1084.

29. Mr Finch has to accept that, on the face of it, he cannot bring himself within either exception. But, he submits, the words "will not be admissible in evidence" should be read as meaning "will not be admissible in evidence in either the financial proceedings or those concerned with the same subject matter." This is a form of words which he adopts from *Rush & Tompkins Ltd v Greater London Council and another* [1989] AC 1280 (to which I return below). They are none the worse for this,

but the source from which they are borrowed cannot of itself provide any support for his argument.

30. The difficulty with his argument is that, if this is what the words "will not be admissible in evidence" mean, the whole of the concluding part, beginning with the word "except", is otiose. Putting the same point the other way round, the inclusion of the words from "except" to the end shows, as a simple matter of construction, that the "evidence" referred to is not limited to evidence in proceedings relating to the same matter, or even evidence in other family proceedings, but extends to evidence in criminal proceedings in, for example. the Crown Court.

31. Mr Finch points out that, on this view of the meaning of PD9A, para 6.2, an unhappy litigant dissatisfied with the performance of his own counsel in the FDR, being unable to refer to anything said during the FDR, would be unable to bring a negligence claim against his counsel or make a complaint to the Bar Standards Board in relation to inappropriate of offensive remarks during submissions. Nor, indeed, would the judge. And, I might add, the same would apply if the client wished to make a complaint about the conduct of the judge conducting the FDR. All that I readily accept, but is it enough to justify a judge departing from what, in my judgment, are the plain words of PD9A, para 6.2?

32. A Practice Direction cannot bind the court if it is wrong in law. Recent examples in the family jurisdiction of the application of this principle are *S v S* [2015] EWHC 1005, [2015] 1 WLR 4592 (PD30A, para 14.1), *In re a Ward of Court (Wardship: Interview)* [2017] EWHC 1022 (Fam), [2017] Fam 369 (PD12D, para 5), and *In re NY (A Child) (Reunite International and others intervening)* [2019] UKSC 49, [2020] AC 665 (PD12D, para 1.1); for a recent very valuable discussion of the relevant principles, see Mostyn J's analysis in *CB v EB* [2020] EWFC 72, paras 58-61.

33. But, not least given its wholly statutory context, how can it be said that para 6.2 is wrong in law? It is, as it seems to me, entirely consistent with the remainder of the statutory provisions providing for and regulating the FDR. And I cannot identify any respect in which it might otherwise be said to be wrong in law. If the law regulating the FDR is thought to be unsatisfactory, then the remedy lies with the relevant lawmakers: in the case of the FPR the Family Procedure Rule Committee and, in the case of a Practice Direction, the President of the Family Division. They, after all, are in a much better position than a judge to decide if change is needed and, in particular, if it is, to decide what form that change should take. Indeed, were a judge to embark upon the latter task, the judge would no longer be acting as a judge but arrogating to himself the function of a legislator.

34. I conclude, therefore, that I am bound by PD9A, para 6.2 as it stands; that it means what it says; and that accordingly it operates as an absolute bar to any attempt by Mr V to make use of anything said or done at the FDR in support of his defence and counterclaim in the civil proceedings. I therefore dismiss his application for disclosure of the documents in classes (i) to (vi) inclusive. The consequence of this is that parts of what is said in the proposed amended defence (para 16A) and in the proposed amended counterclaim (para 24) will have to be deleted.

35. I should add that, even if I were at liberty to order the kind of disclosure being sought here by Mr V, I would not, as a matter of discretion, be prepared to do so, at least at present. This is a topic I return to below.

36. Mr Finch says that to deny Mr V recourse to the evidence of what took place at the FDR will deny him the fair trial to which he is entitled. As a matter of domestic law that is precluded against him by the decision of the House of Lords in *R v Derby Magistrates' Court ex parte B* [1996] AC 487, a very striking case where the effect of the operation of the rules in relation to legal professional privilege was to prevent a man charged with murder relying on evidence which, it was said, might assist him in his defence. If it were to be said (and this is in fact said by Mr Finch) that to deny the use of such material would involve a breach of Article 6 of the Convention, the answer is that provided by Toulson J in *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272, 295-296:

> "Article 6 gives every person a right to a fair trial, but I do not accept that it follows as a general proposition that this gives a right to interfere with another person's right to legal confidentiality. If that were generally so, the right to legal confidentiality recognised by the court would be useless, since its very purpose is to enable a person to communicate with his lawyer secure in the knowledge that such communications cannot be used without his consent to further another person's cause. In the absence of a general right under Article 6 to make use of another person's confidential communications with his lawyer, I do not see how solicitors have a particular right to do so under that Article for the purpose of defending a wasted costs application."

37. Given something else that was said by XYZ's solicitors in their letter of 5 November 2020, there is a further point I must address. It understandably troubles Mr V. For XYZ raises the spectre of contempt:

> "… please explain how the proposed amendments do not reflect a contempt of court in the signing of the original Statement of Truth without honest belief in the contents of the pleadings.
>
> … As required under CPR rule 22.1(1), your client verified the Defence and Counterclaim by a statement of truth.
>
> Clearly contempt is a serious matter and for the avoidance of doubt we do not accuse your client of such conduct at this stage.
>
> However your client signed a statement of truth to the first Defence, and now proposes to sign a statement of truth to version of events which have directly reversed the first. The Statement of Truth in the Defence and Counterclaim supported a counterclaim for between £1 million and £2.5 million.
>
> An explanation of how your client pleaded what he now claims to be an incorrect version of events in the current Amended Defence and Counterclaim must be provided."

38. How, asks Mr Finch, is Mr V to answer the charge, and indeed, defend himself if proceedings for contempt are launched against him, if he is not permitted the

disclosure he seeks? He correctly makes the point that, whatever the ambit of the first exception in PD9A, para 6.2, it cannot avail Mr V because the contempt, if contempt there was, although committed in relation to what had happened at the FDR, was not committed "at the appointment."

39. A somewhat similar difficulty arises in cases where the need for a solicitor or barrister to defend a claim for wasted costs mounted by the other side is hindered or stymied by the lay client's refusal to waive legal professional privilege. "I would wish nothing more than to be able to tell the court things that would exonerate me, but my lips are sealed by my client's refusal to waive privilege." The problem was addressed by the Court of Appeal in *Ridehalgh v Horsefield & Anor* [1994] Ch 205, 237, where Sir Thomas Bingham MR, giving the judgment of the court, said this:

> "So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received … Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."

40. An attempt was made to remedy the problem identified in *Ridehalgh* by inserting CPR 48.7(3), which provided in relation to applications for wasted costs orders that "the court may direct that privileged documents are to be disclosed to the court and, if the court so directs, to the other party to the application for an order." The problem re-emerged in *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272, another wasted costs case, where lay clients refused to waive privilege and argued, successfully, that CPR 48.7(3) was ultra vires. The solicitors were left to the consolation, as Toulson J put it (at 296), that:

> "the courts have been used on hearing wasted costs applications to making allowance for the lawyer's inability to disclose privileged information without the client's consent."

It is to be noted that Toulson J was clear that this inability to use such material to defend oneself did *not* involve any breach of Article 6. I have already set out the relevant passage from his judgment.

41. The effect of my decision in relation to the FDR materials is, I quite recognise, to put Mr V in a similar position. His answer to the question posed by XYZ is, as I understand it, that when he verified the original pleading he was acting honestly on the basis of his honest recollection of what had happened – giving an account based on *recollection* and without access to the documents which have since, it is said, shown his recollection to have been inaccurate. Nothing in the order I propose to make prevents him saying that; what it does is prevent him attempting to back up his position by going to the documents. In that respect, he is in precisely the same position as the lawyer hobbled in his defence to a claim for wasted costs. "I would wish nothing more than to be able to tell the court things that would exonerate me, but my lips are sealed by PD9A, para 6.2, and by the order of the family court judge."

Faced with that, the court would have to make every allowance, giving him, as Sir Thomas Bingham MR said, the benefit of any room for doubt. Moreover, given the complaint is of contempt, he will always be able to rely upon the principle that any alleged contempt has to be proved to the criminal standard.

42. I turn to the next limb of the legal analysis: the operation of the without prejudice rule.

43. In relation to the without prejudice rule the leading authority is *Rush & Tompkins Ltd v Greater London Council and another* [1989] AC 1280 in which the House of Lords allowed an appeal from the Court of Appeal. Lord Griffiths gave the only substantive speech. He stated the key principle as follows (at 1301):

> "as a general rule the "without prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party."

44. That needs to be read in the context of certain other passages in his speech. First (at 1299):

> "The "without prejudice rule" is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290, 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paper Works Ltd* (1927) 44 RPC 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence … the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation."

45. Secondly, as Lord Griffiths went on (at 1300; citations omitted):

> "[the] authorities … all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the "without prejudice" material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement … The court will not permit the phrase to be used to exclude an act of bankruptcy … nor to suppress a threat if an offer is not accepted … In certain circumstances the "without prejudice" correspondence may be looked at to determine a question of costs after judgment has been given … *Waldridge v Kennison* (1794) 1 Esp 142 [is] an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

46. Thirdly, it is important to note that in the Court of Appeal it had been said that ([1989] AC 1280, 1287):

> "the privilege will cease if and when the negotiations "without prejudice" come to fruition in a concluded agreement."

That was expressly disapproved by Lord Griffiths (at 1300-1301).

47. Fourthly, in relation to a decision of the Court of Appeal reported only in the Times, *Stretton v Stubbs Ltd*, The Times 28 February 1905, Lord Griffiths said (at 1302):

> "I cannot … regard it as an authority of any weight for the proposition that without prejudice negotiations should in all circumstances be admissible at the suit of a third party."

48. Mr Finch submits, and I agree, that, at the end of the day, the crucial question here turns on the proper understanding of what Lord Griffiths meant when he used the words "subsequent litigation connected with the same subject matter" to set out the boundary of the without prejudice rule. This immediately suggests two questions: what is connoted by the words "the same subject matter", and what is connoted by the words "connected with"? However, in answering these questions one must, of course, resist the temptation to treat even the words of the demigods as if they were the language of a statute. It is, ultimately, a search for the principle being articulated, *not* a pedantic exercise in mere construction.

49. I am inclined to think that Mr Finch is correct when he submits that, properly understood, what Lord Griffiths said means that the without prejudice rule poses no obstacle to the relief sought by Mr V. However, there is, in the event, no need for me to come now to any concluded view on a question, on a point of no little general importance, the answer to which is not immediately obvious.

50. For, as Mr Finch recognises, this is not the end of the present inquiry. The court still has control over documents "filed or lodged in the court office" and permission pursuant to FPR 29.12(1) is therefore required to disclose them. Moreover, as he points out, that rule is supplemented by the 'implied undertaking' by parties not to use

information disclosed to them in financial remedy proceedings for any other purposes: see, amongst other authorities, *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261. He accepted in his written position statement that, insofar as the documents in issue had not been "filed or lodged in the court office", they are likely captured by the implied undertaking. He went on: "permission is therefore sought in respect of them all." He reiterated that in his oral submissions: "even so far those documents have not been lodged in court they are still subject to the court's permission because likely to be captured by the implied undertaking of the parties not to use the documents for any other purpose … I do not draw a distinction … I accept I require permission with respect to both."

51. What is the test for disclosure of such documents? By what criteria is the exercise of the court's discretion to be guided?

52. In *General Mediterranean Holdings SA v Patel and Another* [2000] 1 WLR 272, 281, Toulson J, describing the general principle, said:

> "Generally, rights of confidentiality have been held to be subject to a qualification that the confidant may be required to disclose confidential information in the course of litigation if it is necessary for the fair disposal of the case (see *D v The National Society for the Prevention of Cruelty to Children* [1978] AC 171, *Science Research Council v Nasse* [1980] AC 1028 and *British Steel Corporation v Granada Television Limited* [1981] A.C. 1096)."

He repeated the point (at 297), using the phrase "necessary for the purposes of a fair trial."

53. But in relation to the compulsory disclosure of materials from proceedings of the kind with which I am here concerned – financial remedy proceedings under the Matrimonial Causes Act 1973 – that sets the bar too low. This is because of two features of such proceedings which set them apart from ordinary civil proceedings (see in particular the judgments of Wilson J in *S v S (Inland Revenue: Tax Evasion)* [1997] 2 FLR 774, 777, and of Thorpe LJ in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, paras 99-105): first, that they are inquisitorial and, secondly (and this is a related point) because of the all-pervasive and continuing duty of full and frank disclosure which attaches to both parties throughout all stages of the litigation until the final order is made. On any view, these considerations must weigh heavily in the discretionary exercise.

54. The point was considered by Coleridge J in *HMRC v Charman and Charman* [2012] EWHC 1448 (Fam), [2012] 2 FLR 1119, to which Mr Finch drew my attention. After an extensive journey through the authorities, Coleridge J set out his conclusion as follows (para 22):

> "Paraphrasing the law is always risky but I think the effect of it can be shortly stated thus. As a general rule documents and other evidence produced in ancillary relief proceedings (now called financial remedy proceedings) are not disclosable to third parties outside the proceedings save that exceptionally and rarely and for very good reason they can be disclosed with the leave of the

> court. The fact that the evidence may be relevant or useful is not by itself a good enough reason to undermine the rule."

On one view, even that does not set the bar high enough. For Wilson J, unrivalled at the Bar and on the Bench in this field of law, had used the phrase in *S v S (Inland Revenue: Tax Evasion)* [1997] 2 FLR 774, 777, "in all but the very rare case".

55. Mr Finch points out that in *Charman* Coleridge J was concerned, as it were, with an outsider seeking to reach *in* to the proceedings, whereas here I am concerned with an insider seeking to disclose *out* from the proceedings. And he relies upon what Coleridge J said (para 27):

> "If, of course the husband himself wishes to rely upon documents/evidence he produced during the hearing in front of me he may have leave to do so but in that event all relevant material must be produced to the Tribunal not just highlights he selects which support his case."

He also submits that whereas in that case what was sought by HMRC was to use the documents as a sword, here Mr V seeks to use them simply as a shield in the civil proceedings, proceedings brought against him by another. That may be, but Mr V does not confine his application to his own documents: he seeks disclosure, for example, of all the party and party correspondence, whether emanating from those representing him or from those representing Ms W.

56. Ms W appeared, as I have said, in person and, understandably, did not delve into these legal questions. But her position was very clear and expressed to me in forthright terms: "the court keeps these matters private for a reason; I do not see why private business should now be put into a public forum … The fact that Mr V wants to now open up Pandora's box is outrageous … I have never discussed the settlement with anyone and I do not see why it should be anyone else's business."

57. I need not, at least at this stage, go any further into these important questions, for, even applying the easier test set out in the cases referred to by Toulson J, Mr Finch, in my judgment, fails to make good his argument. As matters stand today – it may be that in time matters will change; I return to this below – I am wholly unpersuaded that the disclosure of these documents is necessary for there to be a fair disposal of the civil proceedings and for Mr V to have a fair trial. I say so for the following reasons:

i) I am not persuaded that the proposed amendments to Mr V's defence and counterclaim set out any legally sustainable basis of either defence or counterclaim (see paragraphs 20-21, 23 above) or that he will be able to meet a claim to have them struck out (paragraph 24). Nor, as a separate point which goes only to the FDR materials, am I persuaded that there is any need for him (even if it were permissible) to plead what took place at the FDR (paragraph 22). Mr V can justify the disclosure sought only if it is actually needed by him to support some legally sustainable defence or counterclaim in the civil proceedings. I am not persuaded that it is.

ii) Given what is said by XYZ's solicitors in their letter of 5 November 2020, and the way in which they appear to be putting their case (paragraph 24), I am not

persuaded that there is any need for Mr V to have this disclosure in order to enable him to fend off any application to strike out the amended pleading.

iii) In short, the application for disclosure is premature. It is best considered once it has become clear whether, and to what extent, Mr V's proposed amendments survive XYZ's counter-attack.

iv) The disclosure sought is wide-ranging and indiscriminate. Mr V seeks disclosure of the totality of the post-FDR negotiation material, running to 93 ages (including attachments), without any attempt to explain why all this material is needed given the very specific way in which his case on this point is proposed to be pleaded. (The same observation applies likewise in relation to the FDR materials.) There needs, on the face of it, to be a more measured and focused approach and an explanation of why he needs to have recourse to Ms W's documents as well as his own.

58. If at least some part of his proposed amended pleading survives, then it will of course be open to Mr V to renew this part of his claim for disclosure. I shall therefore:

i) dismiss the application for disclosure of the documents in classes (i) to (vi) inclusive; and

ii) adjourn the application for disclosure of the documents in classes (vii) and (viii) with liberty (a) to Mr V to restore the application once the applications for leave to amend in the civil proceedings have been determined and (b) to Ms W to apply to dismiss the application if Mr V takes no steps to restore it.

59. Given this conclusion, there is no need for me to consider at this stage what, if any, restrictions, conditions or limitations this court should impose upon the use, whether by Mr V or by others or, indeed, by the court conducting the civil proceedings, of any documents for whose disclosure permission might hereafter be granted. That must be a matter for another day. Plainly, however, it would be imperative to ensure that there could be no even unintentional contamination of the proceedings flowing from Mr V's variation application.