Neutral Citation Number: [2022] EWHC 2112 (Ch)

Case No: BR-2022-000047

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

IN THE MATTER OF ILYA YUROV
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 9 August 2022

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PARFITT

- -

Between :

(1) EDWARD THOMAS
(2) MATTHEW CARTER
(3) ANN NILSON
(as Joint Trustees in Bankruptcy of Ilya Yurov) **Applicants**

- and –

(1) METRO BANK PLC
(2) BARCLAYS BANK PLC
(3) SANTANDER UK PLC
(4) NATIONAL WESTMINSTER BANK PLC
(5) NATALIYA YUROVA **Respondents**

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Stefan Ramel (instructed by **Steptoe & Johnson UK LLP**) for the **Applicants**
Duncan McCombe (instructed by **Gresham Legal**) for the **5th Respondent**
The 1st-4th Respondents did not appear and were not represented

Hearing date: 23 June 2022

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JUDGMENT

The date and time of handing down is deemed to be 10 am on 9 August 2022.

Deputy Insolvency and Companies Court Judge Parfitt:

1. This is an application by the 5th Respondent ("Mrs Yurova") for disclosure of privileged Russian law advice obtained by the Applicants (the "Trustees"), who are the trustees in bankruptcy of Mrs Yurova's husband, Ilya Yurov ("Mr Yurov"). I will refer to this application as the "Privilege Application".

2. The Privilege Application arises in the context of an application by the Trustees for an order under section 366 of the Insolvency Act 1986 (the "1986 Act") against the first four respondents, which are UK banks (the "Banks"). I will refer to that application as the "s. 366 Application". Mrs Yurova holds accounts with the Banks in her sole name. The Trustees want the Banks to provide them with access to bank statements in relation to those accounts.

3. Mrs Yurova was not in terms joined as a respondent to the s. 366 Application. She was, instead, named on the application notice as a "Third Party". That description does not seem to have been chosen as a particular term of art. It appears that the Trustees gave her that description to put her status "higher up" (as it was put by Mr McCombe, counsel for Mrs Yurova) than a person merely to be given notice of the application, but to reflect the fact that no substantive relief is sought against her.

4. Plainly, given that she is the account holder and the Banks' customer, it was appropriate for Mrs Yurova to be given notice of the s. 366 Application. In my judgment, it is also appropriate to treat her as a respondent to the s. 366 Application. This has been tacitly accepted by the Trustees and Mrs Yurova in these proceedings, in that Mrs Yurova was listed as the 5th Respondent (a) in an earlier directions order made on 6 April 2022 by Deputy ICC Judge Schaffer,

(b) in both counsel's skeleton arguments, and (c) in the title of the proceedings on documents relating to this hearing such as the bundle indices. Perhaps, formally, Mrs Yurova ought to have applied to be joined as a respondent, but she could equally have been made a respondent to the s. 366 Application from the outset. Although one of the Trustees' arguments is that there is no hostile litigation between the Trustees and Mrs Yurova, Mr Ramel rightly did not press this point before me. It would be bizarre if the holder of a bank account were not able to intervene in an application for disclosure of bank statements made only against the banks, and it is obvious why the applicant and the accountholder would be the substantive parties to such an application. In all the circumstances, it seems to me that any application by Mrs Yurova to be joined as a respondent would have been a mere formality. The s. 366 Application is in substance a dispute between the Trustees and Mrs Yurova. I am satisfied that Mrs Yurova should continue to be referred to as a respondent to the s. 366 Application since, in substance, that is what she already is.

The wider background

5. Before turning to the substance of the Privilege Application, I will briefly describe the wider background.

6. On 23 January 2020 Mr Justice Bryan handed down judgment in proceedings brought by National Bank Trust, a company incorporated in Russia, against (inter alia) Mr and Mrs Yurov. Mr Yurov and two other defendants were ordered to pay very substantial sums in three currencies, excluding pre-judgment interest: US$408,179,036, RUB 27,096,844,323 and EUR14,691,420. I am told

that in dollar terms the aggregate value of those sums is in the region of US$900 million.

7. I was provided only with extracts from that judgment. It appears that one of the allegations was that Mr Yurov had transferred assets to Mrs Yurova in circumstances engaging section 423 of the 1986 Act as transactions defrauding creditors. At paragraph 1386 of his judgment, Mr Justice Bryan found that allegation proved. I am told by counsel for the Trustees that certain transactions were set aside.

8. Following the judgment, on 27 February 2020 Mr Yurov was made the subject of a worldwide freezing order in respect of assets worth up to $900 million. By the same order, Mrs Yurova was ordered not to dispose of Mr Yurov's interest in four properties and the proceeds of an investment which had been sold in August 2019.

9. Mr Yurov's application for permission to appeal was dismissed by Lord Justice Flaux on 6 January 2021.

10. Meanwhile Mr Yurov petitioned for his own bankruptcy. The Trustees were appointed as his trustees in bankruptcy on 12 May 2020.

The s. 366 Application

11. Given the dealings which resulted in the judgment against him, it is unsurprising that Mr Yurov's bankruptcy is a complex one.

12. As part of the Trustees' investigations into Mr Yurov's affairs, on 9 February 2022 the Trustees issued the s. 366 Application against the Banks. That

application is yet to be determined because on 23 February 2022 Mrs Yurova made the Privilege Application. By order of Deputy ICC Judge Schaffer dated 6 April 2022, the Privilege Application was ordered to be determined first, with directions being given for the further progress of the s. 366 Application thereafter. Accordingly, I express no views in this judgment as to the merits of the s. 366 Application, which I leave for the parties to argue in due course.

13. As described above, the s. 366 Application is made against the Banks, with Mrs Yurova named as a "Third Party". The Trustees seek an order that the Banks disclose all the bank statements in the Banks' possession and/or under their control for any current or former bank accounts held in the name of Mrs Yurova since 1 January 2016, including but not limited to seven specified accounts.

14. The s. 366 Application was supported by a witness statement of Edward Thomas, one of the Trustees, dated 8 February 2022. That witness statement sets out the basis on which the Trustees seek relief against the Banks. In broad terms (and without making any findings as to the substance of the application), the Trustees' application is made for the following reasons, as set out at paragraph 99 of Mr Thomas's witness statement:

    (a) Mr Yurov is the 50% beneficial owner of assets in Mrs Yurova's sole name, including assets which were the subject of a declaratory order made by Mr Justice Bryan. The Trustees assert that most of those assets have been sold and no proper account has been given as to the utilisation of the millions of dollars of proceeds of sale;

    (b) Mrs Yurova was using a bank account which was not disclosed by her as required under the disclosure provisions of worldwide freezing orders

made in the litigation, and there could be other undisclosed bank accounts or other undisclosed sources of funds unknown to the Trustees;

(c) Mrs Yurova had a number of other bank accounts in relation to which 50% of the balances belonged to Mr Yurov; and

(d) Mrs Yurova has steadfastly refused to disclose her bank statements so that the Trustees can conduct proper enquiries.

15. It is the evidence in relation to the third of these grounds, that 50% of the balances in Mrs Yurova's bank accounts belonged to Mr Yurov, which has led to the Privilege Application. In support of this ground of the s. 366 Application, a section of Mr Thomas's witness statement is headed "Russian Law on Matrimonial Property". Under this heading, Mr Thomas states as follows at paragraphs 66 to 72:

"RUSSIAN LAW ON MATRIMONIAL PROPERTY

66. The Trustees have received legal advice regarding the legal regime of spousal interests in the assets, acquired by the spouses during the marriage.

67. I do not waive privilege in that advice but in summary, the Trustees have been advised that the starting point under Russian law is that as a general rule, and in the absence of agreement between the parties to the contrary, the property of spouses is subject to the regime of joint property, pursuant to clause 1 of Article 33 of the Family Code of the Russian Federation No. 223-FZ of 29.12.1995 (the "Family Code").

68. Pursuant to clauses 1 and 2 of Article 34 of the Family Code and clause 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 15 of 05.11.1998 "On the application of legislation by courts when considering cases of divorce", the joint property of spouses may include the following:

- *income of each of the spouses from labour activity, entrepreneurial activity and the results of intellectual activity;*

- *pensions, benefits received by them, as well as other monetary payments that do not have a special purpose (amounts of material assistance, amounts paid in compensation for damage in connection with disability due to injury or other damage to health, etc.);*

- *movable and immovable property acquired at the expense of the spouses' general income, securities, shares and deposits in capital contributed to credit institutions or other commercial organisations; and*

- *any other property acquired by the spouses during the marriage, regardless of in which spouses' name it was acquired or registered or which of the spouses paid for it.*

69. The general rule established that is supported by Russian judicial practice, is that common property includes property owned, formalised and/or registered in the name of the spouses or one of them, so this will include bank accounts.

70. However, the regime of joint property of spouses assumes that the spouses own property received by one of them during marriage jointly with a

presumption that in case of the division of the property their shares would be considered equal (clause 1 of Article 39 of the Family Code).

71. Based on the Russian law advice as referred to above, the funds that are on a bank account in the name of one spouse during marriage, are jointly acquired property and are subject to division between the spouses in equal shares (as I am advised was established by the Moscow City Court Ruling of 2 August 2017 in a case No. 4g-7427/2017, the Ruling of the Judicial Board on Civil Cases of the Third Cassation Court of General Jurisdiction of 22 January 2020 in a case No. 8G-3767/2019[88-486/2020-(88-3185/2019)]).

72. In other words, each spouse has an equal share in the funds, regardless of in whose name the bank account is opened and regardless of the source of funds. Thus, as a general rule, funds deposited on bank accounts of one spouse during marriage are treated as joint property of the spouses."

16. Paragraphs 73 to 93 of the witness statement explain the impact of this Russian law advice on the Trustees' application.

17. Whether this ground of the s. 366 Application will ultimately be established, and whether the deployment of Russian law in this way is an appropriate way for the court to receive evidence of foreign law (as opposed to ordering expert evidence) are matters which I leave to one side in the present judgment. These issues will need to be addressed when giving directions on the s. 366 Application and, ultimately, when it is determined. Neither counsel addressed me in any great detail on these points at the hearing of the Privilege Application. Shortly after the hearing concluded, Mr McCombe helpfully provided me with a copy of the Supreme Court decision in *Brownlie v FS Cairo (Nile Plaza) LLC*

[2021] 3 WLR 1011 to which he had referred in oral submissions in answer to a question I raised about how the parties intended to prove foreign law when the s. 366 Application is eventually heard. I do not need to consider that decision or resolve these issues at this stage.

The Privilege Application

18. The s. 366 Application was issued on 9 February 2022 and served on Mrs Yurova's solicitors under cover of a letter of that date.

19. By letter dated 11 February 2022 Mrs Yurova's solicitors wrote to the Trustees' solicitors referring to the legal advice on matters of Russian law in relation to spousal interest in assets acquired during marriage referred to and relied upon in paragraphs 66-72 of the witness statement of Mr Thomas. The letter claimed that Mr Thomas had thereby waived privilege in that advice and asked for a copy of the said Russian law advice by return, failing which Mrs Yurova would make an application for disclosure and seek her costs from the Trustees.

20. The Trustees' solicitors replied in a letter dated 17 February 2022. They denied that they had waived privilege over legal advice they had received on matters of Russian law, but added that "*in the spirit of cooperation, and to avoid incurring unnecessary costs for both parties, we enclose an extract from that advice in relation to spousal interest in bank accounts that is summarised in our clients' evidence in support of their application*". The letter enclosed three and a half pages of text headed "[Extract from the Russian law advice]" which appears to have been typed or copied from another document (the "Extract").

21. It appears that paragraphs 66-72 of Mr Thomas's witness statement were based on this longer document, although there are differences. Mr Thomas's witness statement refers to advice he has received about the application of Russian law to the facts which is not in the Extract. For example, he says at paragraph 75 that "*Based on the above, I believe and am advised that £149,764.14 held on Mrs Yurova's Metro Bank Account is to be treated as belonging to Mr Yurov, and therefore falls within his bankrupt estate"*, with emphasis added. There are also passages in the Extract which are not repeated in Mr Thomas's somewhat shorter witness statement. Mr McCombe particularly drew attention to a passage in the Extract regarding the application of what Mr Thomas had described as the 'general rule', which he rightly notes provides more detail of the relevant factors than was apparent from the witness statement:

> *"Thus, as a general rule, funds deposited to the bank accounts of one of the spouses during the marriage are recognized as joint property of the spouses. To recognize the funds, deposited at the bank accounts opened in the name of one of the spouses as the personal property of one of the spouses, it is necessary to prove that there are grounds for recognizing such funds as the personal property of such a spouse, including: their receipt before marriage or during marriage as gift, under procedure of inheritance, under other gratuitous transactions or as payments that have a special designation."*

22. There is no suggestion that the Trustees have set out to mislead by selecting which parts of the Russian law material to deploy. Neither Mr Thomas's witness statement nor the Extract purport to reveal the entirety of the Russian law advice

taken by the Trustees. If the Trustees had intended to act unfairly, they would not have voluntarily disclosed the Extract.

23. Mrs Yurova issued the Privilege Application on 23 February 2022, supported by a witness statement of her solicitor Mr Kakkad.

24. The s. 366 Application and the Privilege Application came before Deputy ICC Judge Schaffer for a hearing on 6 April 2022. He gave directions, as set out above, that the Privilege Application be dealt with first; he set a timetable for evidence and he listed it in the interim applications list with a time estimate of 1.5-2 hours. He ordered that the s. 366 Application be listed for directions immediately after the Privilege Application.

25. In the event, this time estimate proved to be a substantial underestimate. It included no time for judicial pre-reading. Oral argument on the Privilege Application alone took 2.5 hours, filling the entire afternoon after a busy list in the morning. There was no time for judgment on the Privilege Application, or for argument on the appropriate directions for the s. 366 Application (let alone a decision on it). As I indicated to the parties at the end of the hearing, I will deal with the directions for the s. 366 Application when this judgment is handed down. The inadequate time estimate has, regrettably, delayed the progress of the s. 366 Application and, ultimately, the Trustees' administration of Mr Yurov's bankruptcy.

26. Mr Ramel described Mr Yurov as a sophisticated, dishonest bankrupt. He invited the court to be alert to delaying tactics and opportunistic applications. It does not seem to me that the present application is opportunistic, since (as described below) I consider it raises genuine and important points of principle.

It has undoubtedly had a delaying effect, but a substantial part of that delay is attributable to the way the parties put the application before the court.

27. In accordance with the directions given by Deputy ICC Judge Schaffer, the Trustees filed evidence from their solicitor Ms Gofman on 20 April 2022 and Mrs Yurova's solicitor filed a witness statement in reply on 4 May 2022.

The principles

28. It is unusual for there to be an application for disclosure by a respondent to a s. 366 application. The point of a s. 366 application is for the trustee in bankruptcy to obtain information or property from a person who appears to have it. The court can require such a person to provide a witness statement or to produce any documents in his possession or under his control relating to the bankrupt, or the bankrupt's dealings, affairs or property. That is recognisable as a form of disclosure, but it arises under statute rather than the Civil Procedure Rules, and operates against the respondent in favour of the trustee.

29. The Disclosure Application is in substance an application for specific disclosure under CPR 31.12. The CPR applies to insolvency proceedings pursuant to Rule 12.1 of the Insolvency (England and Wales) Rules 2016 (the "2016 Rules"), which applies the provisions of the CPR with any necessary modifications, except so far as disapplied or inconsistent with the 2016 Rules. Rule 12.27 of the 2016 Rules expressly provides that a party to insolvency proceedings in court may apply for an order (inter alia) for disclosure from any person in accordance with CPR Part 31. Thus, in contrast to multi-track proceedings under the CPR in which disclosure is to take place unless the court orders otherwise (pursuant to CPR Rule 31.5(2)), in insolvency proceedings such as the s. 366

Application there is only disclosure to the extent that the court positively orders it. Mr Ramel stressed that an application for specific disclosure in a s. 366 application was not like an application for specific disclosure arising in civil proceedings governed by the CPR. That is certainly true, and is reflected in cases such as *Highberry v Colt Telecom Group plc (No. 1)* [2003] 1 BCLC 290 in which disclosure and cross-examination of witnesses were refused on an administration application. For there to be disclosure at all, the court must order it, and must be satisfied that it is appropriate to make such an order. But the court has the power to order disclosure in an appropriate case pursuant to Rule 12.27 and CPR 31.12.

30. In deciding whether to order disclosure in a particular insolvency application, the court is required to have regard to all the relevant circumstances, giving effect to the overriding objective of dealing with cases justly and at proportionate cost. There will be cases where disclosure is manifestly appropriate, for example in high value adversarial litigation between an officeholder and a company's directors which may take the form of an application under the 1986 Act but which in many cases will involve the full machinery of the CPR including points of claim, disclosure, witness statements and a full trial. At the other end of the spectrum are applications of a procedural or summary nature, involving limited amounts of money, for which disclosure is likely to be inappropriate or unnecessary.

31. An application under s. 366 of the 1986 Act would typically fall into this latter category of cases. In most cases, the just resolution of the application will not require disclosure from either party during the course of the application. Any

disclosure which is to take place will be that ordered by the court at the conclusion of the application, rather than as part of the process of getting to that point, and will be from the respondent to the applicant trustee rather than the other way around.

32. However, every case will require an assessment of the relevant circumstances and consideration of the overriding objective.

The relevant circumstances in this case

33. The relevant circumstances in the present case are as follows:

(a) This is an application under s. 366 of the 1986 Act, which is normally a summary procedure to allow a trustee to obtain information relating to a bankrupt's dealings, affairs and property.

(b) Somewhat unusually, however, one basis on which the Trustees seek to obtain copies of Mrs Yurova's bank statements is that as a matter of Russian law, some proportion of the money in the bank accounts belonged to Mr Yurov. The court hearing the s. 366 Application is going to have to determine whether this principle means that Mrs Yurova's bank statements are "documents… relating to the bankrupt or the bankrupt's dealings affairs or property".

(c) The way the Trustees have proposed to address that issue is by referring to Russian law advice in the witness statement in support of the s. 366 Application. Mrs Yurova, for her part, wishes to adduce expert evidence. The Trustees have reserved their position on the question whether expert evidence is necessary until they have seen Mrs Yurova's substantive

response to the s. 366 Application. At present, though, it appears that the Trustees consider that the Russian law material in the witness statement is a sufficient basis for the s. 366 Application. Whether expert evidence will be ordered is something which will be resolved at the directions hearing following the handing down of this judgment.

(d) Mrs Yurova asserts that it is not fair for the Trustees to deploy an excerpt of the Russian law advice they have obtained. She claims that the Trustees have waived privilege in respect of the entirety of the advice relating to the issue in question, and fairness requires disclosure of the full advice. It is on that basis that Mrs Yurova makes the Privilege Application. This critical aspect is considered in more detail below. The need to deal with cases justly is firmly engaged here.

(e) The Trustees urged the court to take into account the possibility that the Privilege Application is a mere delaying tactic raised by the wife of a dishonest bankrupt seeking to prevent the Trustees from carrying out their functions. I am not in a position, on a summary application of this nature, to make any definite findings as to whether that is so. It is, of course, a possibility, and I take that into account.

(f) Further, the Trustees urged caution in before any order was made requiring them to reveal the legal advice they had been taking in relation to the many other aspects of Mr Yurov's bankruptcy. They were concerned to avoid tipping anyone off about their avenues of investigation, making it harder to get to the bottom of Mr Yurov's affairs

and realise his property for the benefit of his creditors. I have also borne this factor in mind.

(g) A further factor the Trustees wished me to take into account is that they are not ordinary litigants motivated by their own self interest. They are officeholders acting in the interests of Mr Yurov's creditors. They are also officers of the court, and the court will not permit them to act in a way which might be considered unfair contrary to the rule in *Ex p. James Re Condon* (1874) LR 9 Ch App 699. I accept the relevance of this factor up to a point. As officers of the court, it can be assumed that the Trustees have not tried to give an unfair impression of the Russian law advice they have received. But there are differences in the level of detail in Mr Thomas's witness statement and the Extract, whether deliberate or not, and it is not necessarily enough for officeholders merely to declare that they are not acting unfairly. Sometimes it will be necessary for them to demonstrate it.

(h) Mr McCombe criticised the Trustees' argument that there was a different standard applicable because these are insolvency proceedings, and they are officers of the court. He said the Trustees had never articulated what that standard was and, in any event, there was a universal standard based on fairness. I think both sides are right, to an extent: fairness is plainly a critical component of the material circumstances, and is closely related to considerations of justice as mandated by the overriding objective. But the context of the Privilege Application – coming within the s. 366 Application – is also important. That context was overlooked in the

initial correspondence, with Mrs Yurova's demands presented in unequivocal terms. There is no automatic right to disclosure in an insolvency application, and the test for whether additional disclosure of privileged material will be ordered in the present context has hurdles beyond those which apply in normal civil litigation.

(i) As to dealing with matters at proportionate cost, this is a high-value bankruptcy, with Mr Yurov being liable to pay hundreds of millions of dollars following the earlier litigation before Bryan J. By that measure, a higher incidence of costs will be proportionate than in most bankruptcies.

Waiver of privilege

34. The bulk of the argument at the hearing related to whether the Trustees had waived privilege in the Russian law advice, how far that waiver went, and what the consequences are. Clearly the court could not order the Trustees to disclose privileged advice in respect of which privilege had not been waived, so this is a threshold question. It is not, however, the only question. The court also has to consider whether, even if privilege has been waived, it is appropriate in all the circumstances to make an order for disclosure of further material. This involves considering the other factors listed above, and giving effect to the overriding objective.

35. As a preliminary point on the waiver issue, paragraph 67 of Mr Thomas's witness statement states that the Trustees "do not waive privilege" in respect of the Russian law advice summarised in the witness statement. As Mr McCombe pointed out, a party cannot avoid waiving privilege by making such a statement.

Whether there is a waiver or not is determined by looking at the material itself, not what the party says about it or the intention behind its deployment.

36. The classic statement of principle for applications of this sort, to which both sides referred me, appears in the judgment of Mustill J in *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No.2)* [1981] Com LR 138 at 139:

> *"… where a party is deploying in court material which would otherwise be privileged the opposite party and the court must have an opportunity of satisfying themselves what the party has chosen to release from that privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."*

37. I was taken by Mr Ramel to *Mohammed v Ministry of Defence* [2013] EWHC 4478 at [14], which cited the principle in . *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 and described waiver of privilege in the following terms, so far as relevant:

> *"The term 'waiver of privilege' is an imprecise one, which is capable of referring to at least five legally distinct ways in which a right to assert privilege may be lost:*
>
> *i) What might be called a 'true' waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances*

which imply consent to its use. Such a waiver may be either general or limited in scope.

ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter: see e.g. Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529. The underlying principle is one of fairness to prevent 'cherry picking': see Brennan v Sunderland City Council [2009] ICR 479, 483-4 at [16]…"

38. There are, therefore, two primary issues: has privileged material been "deployed in court", and what is the extent of the "whole of the material relevant to the issue in question".

39. As to deployment in court, the Trustees sought to argue that although Mr Thomas's witness statement referred to privileged material, this material was not being deployed in court – or at least not yet. It was argued that it will only be deployed at the hearing of the s. 366 Application itself. I disagree. It would be manifestly unjust and risk undermining the proper management of litigation if the party on the receiving end of an application supported by privileged material had to wait until the substantive hearing before being able to obtain sight of the remainder of the privileged material concerning the issue in question. To have to wait until that point would invite an application for an adjournment at the last minute, wasting court time and costs for both sides. It seems to me that the moment at which a party is taken to have deployed material in court must be earlier than that, at least if it is clear that the party will

ultimately be relying on the material. As Mr McCombe said, why put off dealing with the issue. I agree. This was the view taken by Auld LJ in the Divisional Court in *R v Secretary of State for Transport, Ex p. Factortame* [1997] EWHC Admin 445, in which he stated as follows:

> *"Much will depend, of course, on the indication given by the party waiving privilege before trial whether he intends to rely upon the privileged material at trial and, if so, for what purpose. If he does intend to put it in evidence, there is an obvious advantage in both parties knowing where they stand before trial. It enables each of them to determine whether and how to proceed with the litigation and to avoid costly adjournments for further discovery and consequential work which otherwise would occur if the point had to be determined at trial."*

40. Mr Ramel took me to a passage in the earlier decision of Hobhouse J in *General Accident Corpn v Tanter* [1984] 1 WLR 100 which concerned an application for disclosure made during a trial based on use of a document which was the subject of an undetermined application under the Civil Evidence Act 1968 and which might, therefore, not be permitted to be adduced in evidence. Hobhouse J refused the application, treating it as premature in circumstances where the document was not yet in evidence. I do not accept that Hobhouse J was closing the door on the pragmatic approach subsequently taken by Auld LJ in *Factortame*. Rather, it seems he was addressing the specific application before him. If it had been clear that the document in *Tanter* was going to form part of the evidence and there had been no need for a further application under the Civil Evidence Act 1968, the outcome might have been different. In any event, the

approach in *Factortame* was broadly approved by the Court of Appeal in *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901, as referred to in a passage in *Passmore on Privilege* on timing and deployment issues which Mr McCombe took me to.

41. Applying the *Factortame* principle, I am satisfied that the Trustees have deployed the Russian law advice in court. The whole basis of the s. 366 Application is that Mrs Yurova's bank statements relate to Mr Yurov's money. As the Trustees describe it, this depends on the Russian law of matrimonial property. This is not a case where a party has accidentally waived privilege and would like to turn the clock back.

42. The Trustees made a further point on the timing of the deployment of the material, noting that the authorities on waiver of privilege referred to by the two sides in their authorities bundles were all trials, rather than interlocutory applications. This observation may have been correct, but it was a coincidence. In reply, Mr McCombe referred to passages in *Passmore* which were in his authorities bundle and which included discussion of cases such as *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm) in which deployment in interlocutory applications was held to amount to a waiver of privilege. Other interlocutory cases to the same effect were referred to in the same passage including *Re Derby & Co Ltd v Weldon (No. 10)* [1991] 1 WLR 660 and the *Dunlop Slazenger* case cited above.

43. Turning to the "whole of the material relevant to the issue in question", the reason a party relying on privileged material must disclose the whole of the material is fairness, or (putting it the other way) avoiding the risk of injustice.

A party should not be free to cherry pick, potentially giving a misleading impression of the privileged material as a whole, while being immune from any further disclosure on grounds of privilege. On the other hand, however, the importance of legal professional privilege to the due administration of justice means that a derogation from it to avoid injustice must go only as far as is necessary to prevent that injustice. That waiver of privilege is to be confined in this way can be seen from the earliest cases to which I was referred, such as *Lyell v Kennedy (No. 3)* (1884) 27 ChD 1 in which Cotton LJ (at 24) rejected a submission that a party who waived privilege at all necessarily waived privilege altogether.

44. The relevant authorities for ascertaining the "whole of the material relevant to the issue in question" were considered by Mann J in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] PNLR 23, and the process the court should follow was distilled as follows at [11]:

> *"Based on the authorities which I am about to refer to, it seems to me that the relevant process should be as follows:*
>
> *i) One should first identify the 'transaction' in respect of which the disclosure has been made.*
>
> *ii) That transaction may be identifiable simply from the nature of the disclosure made—for example, advice given by counsel on a single occasion.*
>
> *iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is*

immediately apparent. If it does, then the whole of the wider transaction must be disclosed.

iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed.

That chain is not articulated in terms in the authorities to which I am about to refer, but it seems to me that it is apparent from it."

45. The Trustees did not take issue with this approach. Mr Ramel contended that it was not possible for the court to identify what the issue in question was until Mrs Yurova has provided evidence in opposition to the application. As is clear from the chronology, the Privilege Application was Mrs Yurova's immediate response to the s. 366 Application and Mrs Yurova has not responded substantively to the s. 366 Application. Although I recognise that Mrs Yurova has not advanced a positive case in opposition to the s. 366 Application, it is reasonably clear that her response will involve grappling with the application of the Russian law of matrimonial property as it applies to her bank accounts, since that is one of the bases on which the Trustees' application is brought. It is, therefore, possible for the court to identify the issue in question even at this stage.

46. The "transaction" in respect of which the Trustees have made disclosure is the taking of advice on the Russian law of matrimonial property as it relates to monies held in bank accounts in the name of one of the spouses. That is the only Russian law issue on which the Trustees have taken advice which is relevant to the s. 366 Application. The Trustees have no doubt taken other Russian law

advice. Perhaps that advice forms part of a single document from which the Extract was taken. But that other advice has nothing to do with the s. 366 application as advanced by the Trustees. They have not waived privilege in relation to that advice, and can continue to assert privilege in relation to it. This is a situation in which, in accordance with the principle of severance described by Templeman LJ in *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529 at 536, it is possible to sever the advice over which privilege has been waived from any other advice, which remains privileged. There will be nothing "unfair or misleading" about that, in the phrase used by Templeman LJ at 538-9 to which Mr Ramel drew my attention; any other advice has nothing to do with the s. 366 Application. In this way, there is limited danger of an order for disclosure on the Privilege Application tipping anyone off in such a way as to frustrate the Trustees' conduct of the bankruptcy.

47. Mr McCombe invited me to go further and order the disclosure of at least the entirety of the advice from which the Extract was taken, and any other advice on the same subject matter on different occasions. This, in my view, is too broad-brush an approach. The power to order disclosure of privileged material only arises to prevent injustice. Any order must match the injustice, and that means it must be constrained to the advice on the point which will be in issue. Mr McCombe's approach also risks jumping too far ahead in the step-by-step process outlined in *Fulham Leisure*.

48. One of the Trustees' answers to the Disclosure Application is that they have already disclosed the entirety of the advice relevant to this issue or transaction on a voluntary basis in the Extract. I am not persuaded that that is the case. What

the Trustees have not disclosed is what instructions prompted the Extract, and whether any other parts of the Extract deal with the Russian law of matrimonial property as it relates to monies held in bank accounts in the name of one of the spouses. The Extract draws conclusions as to the application of Russian law to monies in Mrs Yurova's bank accounts. The reasoning behind those conclusions is going to be relevant on the s. 366 Application. Not only will the court wish to see such reasoning, but as a matter of basic procedural fairness Mrs Yurova should also see it so that she can challenge it if she wishes.

49. It is fair to note that the Trustees have an express fallback position in the event that disclosure is to be ordered. The Trustees invite the court to order disclosure only of those parts of the Russian law advice which relate to the legal regime of spousal interests in bank accounts of spouses. Their primary position, though, is that no disclosure should be ordered.

Disposal

50. If these were normal civil proceedings there would be no question that the Trustees would be ordered to disclose the instructions and the consequent Russian law advice relating to matrimonial interests in bank accounts. But that does not mean they must be disclosed in the context of the present application under s. 366 of the 1986 Act. As described above, the court has to consider all the circumstances of the case and apply the overriding objective.

51. In my judgment, this is an appropriate case for the Trustees to be ordered to disclose the following:

(1) Legal advice received in relation to the Russian law of matrimonial property as it relates to monies held in bank accounts in the name of one of the spouses, including in particular advice addressing the facts of the present case;

(2) Instructions which led to such advice being given, insofar as those instructions deal with these issues, with redactions to remove any other instructions; and

(3) Any communications between the advising lawyer and those giving instructions concerning the substance of the disclosable instructions or the disclosable advice, if separate from the advice or instructions themselves.

52. I reach this decision in the light of the overriding objective and having considered all the circumstances of the case as set out above. On balance, I am not persuaded that any other order would be appropriate.

53. In particular, I consider that if the Trustees are going to be making submissions about the application of Russian law, there is a risk of injustice to Mrs Yurova if the Trustees do so relying on assertions in a witness statement based on extracts from legal advice they have received. Those extracts could well be misleading, or could be misinterpreted whether by Mrs Yurova or the court. I do not consider that the Trustees would set out deliberately to create such an impression, but it seems to me to be important that the Trustees can demonstrate that they have made everything relevant available. Had the Trustees sought an order for expert evidence on Russian law, the material instructions and the report of the expert would have been provided to Mrs Yurova pursuant to CPR Part 35. Without those protections, it seems to me that the only fair way to

proceed is for the Trustees to disclose the remainder of the legal advice they have received which falls within the paragraph above.

54. I will allow the Trustees a reasonable time to comply with this requirement and I invite the parties to agree an appropriate form of order. I will determine consequential matters and give directions for the further progress of the s. 366 Application on a date to be fixed.